El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ADAMEK & DESSERT, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 82-CE-137-EC 82-CE-138-EC 11 ALRB No. 8

DECISION AND ORDER

On September 30, 1983, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, Respondent, General Counsel and the Charging Party each filed exceptions and briefs in support of their exceptions.[1/] Respondent and General Counsel also filed reply briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and

[1/] Respondent's motion to strike the UFW's exceptions to the Decision of the ALJ for failure to timely file them is denied as no prejudice to Respondent has been demonstrated. (See Nash-De-Camp Company (1982) 8 ALRB No. 5.) Contrary to Respondent's argument, the Board does treat employers and unions alike in this regard. Respondent's reference to the Board's position before the Fourth Appellate District Court of Appeal in Mario Saikhon (1982) 8 ALRB No. 88, 4 Civil 28608, that a late filing of pleadings denied the Court jurisdiction, is misplaced. That position is based on Labor Code section 1160.8 and California Rules of Court, Rule 59, which specifically impose a jurisdictional time requirement for the filing of petitions for review. (See also Nish Noroian Farms v. Agricultural Labor Relations Board (1984) 35 Cal.3d 726, footnote 7, and case cited therein.)

conclusions except as modified herein.

On December 15, 1980, Board agents conducted a representation election among Respondent's agricultural employees. The United Farm Workers of America, AFL-CIO (UFW or Union) received a majority of the valid votes cast, winning the election by a vote of 38 to 33.[2/] Respondent timely filed three post-election objections which were dismissed by the Board's Executive Secretary. The Board subsequently granted Respondent's Request for Review of the Executive Secretary's Order and set one of the objections for an investigative hearing. Following an Investigative Hearing Examiner's recommendation that that objection be dismissed, the Board certified the UFW as the exclusive bargaining representative of all of Respondent's agricultural employees on April 1, 1982.[3/] (Adamek & Dessert, Inc. (1982) 8 ALRB No. 27.)

[2/] There were also eight challenged ballots which were the subject of a Regional Director's investigation and Report on Challenged Ballots. As no party excepted to his findings that the ballots had been cast by employees ineligible to vote, the Board adopted his recommendation that the ballots be destroyed.

[3/] Respondent contends that the Board erred in dismissing its election objection concerning the peak calculation without an investigative hearing. It is difficult to understand what would have been gained by our holding an administrative hearing since the Board utilized the payroll figures submitted by Respondent in its election objections and in its request for review of the Executive Secretary's dismissal of its election objection. As the California Supreme Court noted in J. R. Norton (1979) 26 Cal.3d 1, 12-18 [160 Cal.Rptr. 710], an administrative hearing is required only when substantial and material factual issues are raised which would warrant setting aside the election. The Board, assuming the employer's payroll data to be true, found that as a matter of law the facts did not constitute grounds to set aside the election. The employer had an opportunity to argue the legal matters; no hearing was required to establish the facts the employer submitted once the Board assumed them to be true.

Thereafter, on April 29, 1982, the UFW requested Respondent to commence negotiations for a collective bargaining agreement. On July 19, 1982, Respondent informed the UFW that it would reject the Union's request to bargain in order to seek review of the Board's certification of the UFW as the representative of Respondent's employees. Upon charges being filed by the UFW, the General Counsel issued a complaint alleging Respondent's refusal to bargain and seeking makewhole relief. Respondent concedes its refusal to bargain but contends (a) that it had no duty to bargain because the Petition for Certification was not filed at a time when its employment level was at least at 50 percent of peak employment for the relevant calendar year and (b) that makewhole relief is not appropriate here because Respondent reasonably and in good faith seeks judicial review of a meritorious objection to the election which the Board has previously rejected. The parties agreed to submit this matter to the ALJ by way of stipulated facts.

When an employer refuses to bargain with a labor organization in order to gain judicial review of a Board certification, we consider the appropriateness of the makewhole remedy on a case-by-case basis. (J. R. Norton Company v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1.) We shall impose the makewhole remedy unless the employer's litigation posture was reasonable at the time of its refusal to bargain and the employer seeks judicial review of the Board's certification in good faith. (J. R. Norton Company (1980) 6 ALRB No. 26.)

In support of its refusal to bargain, Respondent repeats the argument first advanced to the Regional Director in its response to the Petition for Certification and again in its Objections Petition, that at the time the Petition for Certification was filed, Respondent's payroll did not reflect 50 percent of its peak agricultural employment for the relevant calendar year. That objection was dismissed by the Executive Secretary on the grounds that, under the principles of Luis A. Scattini & Sons (1976) 2 ALRB No. 43 (Scattini), the peak requirement was met by averaging the group of employees paid on a daily basis separately from the group of employees paid on a weekly basis. The Executive Secretary's dismissal subsequently was affirmed by the Board upon review.

Respondent contends that Scattini is inapplicable because in Scattini, the group of employees paid on a daily basis and averaged separately from the group of employees paid on a biweekly basis was hired through a labor contractor, while in the instant case, Respondent directly hires all its daily employees. We do not find this a persuasive ground upon which to distinguish Scattini. A close reading of Scattini shows that the fact that the daily workers were hired through a labor contractor was not the basis of the decision; rather it was the fact that the two groups of employees had payroll periods of widely varying lengths.[4/]

[4/] Indeed to treat employees differently merely because they were hired through a labor contractor would run afoul of Labor Code section 1140.4(c) which requires us to treat labor contractor supplied employees as employees of the employer engaging the labor contractor.

In Scattini, the employer paid its regular employees on a two-week payroll basis while it paid its contract-supplied employees on a daily basis. The Board noted that this situation raised a question as to whether the method of determining peak utilized in Mario Saikhon, Inc. (1976) 2 ALRB No. 2 and Ranch No. 1, Inc. (1976) 2 ALRB No. 37 (adding up all the employees working during each day of the respective payroll periods and dividing by the number of days therein) could be appropriately applied.

The Board suggested that several methods of computation were possible. First, proceeding according to the Saikhon and Ranch No. 1, Inc. model, the number of regular and labor contractor supplied employees working each day during the longer two-week payroll period could be added and divided by the number of days therein (hereinafter referred to as the "first" method or approach). The Board, however, expressed reservations about this first method of computation:

> This approach has the advantage of of [sic] simplicity, but may produce distorted results if the actual peak period is significantly shorter than the two-week period in which it falls. In such a situation, the sharp rise in labor contractor employees during the peak period would not give a true reflection of peak when averaged out over the lengthy, two-week period. (2 ALRB No. 43, slip opn. p. 3.)

The Board then looked at an alternative approach (hereinafter the "alternative" method or approach) to the issue:

> An alternative approach is to compute the average number of employee days worked separately for the two classes of employees. For the regular workers, that figure would be computed over the relevant two-week payroll periods, since the regular workers are paid on a

two-week basis. For the labor contractor employees, paid on a daily basis, we might proceed by analogy to Section 20355 of our regulations (8 Cal. Admin. Code, §20355), which provides that where an employer's payroll is for fewer than five working days, the relevant payroll period will be presumed to be at least five days long. Using this approach for the labor contractor employees, we would compute the average number of employee days worked over a period of five working days. The "average" figures for the two types of employees would then be added together to reach an overall figure for this period.

Under the alternative approach, during the period alleged to constitute peak, we would use statistics from the five consecutive days with the highest number of labor contractor employees. For the comparative period preceding the filing of the petition, two methods of computation are possible: (1) use the five consecutive days of highest labor contractor employment within the two-week payroll period preceding the filing of the petition, or T2~) follow the literal wording of section 20355, and use employment figures from the five working days immediately prior to the filing of the petition, regardless of whether those days fall within the two-week payroll period preceding the petition's filing. [Footnote.] Whichever period is used, the average number of employee days worked by regular employees would then be added to the average number of employee days worked by labor contractor employees. (Luis A. Scattini (1976) 2 ALRB No. 43, slip opn. pp. 3-4.) (Emphasis in original.)

Noting that the parties had not briefed this "complicated" issue, the Board in Scattini declined to choose which of the methods suggested would best effecuate the Act's purpose to afford the fullest scope for employees' enjoyment of their rights, see Labor Code section 1156.4., because whichever computation method was used, the petition was timely filed in accordance with the statute's peak requirement.[5/]

[5/] The dissent by Members Waldie and Henning erroneously contends that in Scattini, the Board rejected the first method of

(fn. 5 cont. on p. 7)

Utilizing the alternative approach suggested by the Board in Scattini, the Executive Secretary and Board in the underlying representation proceeding in this case determined that the petition was timely filed with respect to the peak requirement. We have previously adopted the National Labor Relations Board's (NLRB) doctrine prohibiting the relitigation of representation issues in subsequent related unfair labor proceedings in the absence of newly-discovered or previously unavailable evidence or extraordinary circumstances. Since Respondent has pointed to no newly discovered or previously unavailable evidence which would warrant reconsideration of our Decision in Adamek & Dessert, Inc. (1982) 8 ALRB No. 27, it remains to be determined whether there exists any extraordinary circumstances which would justify reconsidering cur earlier decision in the representation case. (Julius Goldman's Egg City (1979) 5 ALRB No. 8.)[6/]

In this regard, Respondent argues that the Board's use of Scattini's alternative method of peak computation in the

(fn. 5 cent.)

computation and concluded that it was not required to choose between the two methods suggested for computing the daily payroll figures under the alternative method of computation. A careful reading of Scattini, supra, slip opinion, pp. 4-5, including the illustrations contained in footnote 4, makes it clear that the Board, in declining to make a choice between the suggested methods, was referring to the first and alternative methods of computation.

[6/] Recently, however, in Sub-Zero Freezer Company, Inc. (1984) 271 NLRB No. 7 [116 LRRM 1281], the national board vacated an earlier certification of representative because a new majority of board members in the technical refusal to bargain proceeding agreed with the position of the dissent in the representation proceeding that conduct had occurred which resulted in the election being held in an atmosphere of fear and coercion.

underlying representation proceeding presents such extraordinary circumstances. Since we do not regard the alternative method of peak calculation itself, or its utilization in the underlying representation case, as unreasonable, we do not consider its use in finding peak as sufficient grounds to reconsider the Decision in the underlying representation case. By paying its employees on a different basis, the employer/for its own reasons has created two sets of employees with different payroll periods (weekly and daily). The Board has applied the previously established methods of computing the average daily employment figures for each set of differently paid employees: the Saikhon method for the regular workers paid on a weekly basis, .and the method enunciated in our regulation, section 20355 (now section 20352), for employees (such as those paid on a daily basis) where the payroll period is for fewer than five working days (computing the average number of employee days over a period of five working days).

However, neither do we regard as unreasonable the approach argued by Respondent in this case and suggested as the first method of peak computation by the Board in Scattini, in which the number of regular and daily workers would be added together for the relevant weekly payroll period and divided by the number of days therein. Indeed, we believe that this method is preferable in a situation like this one where, although employees are paid according to different payroll periods, it is still possible to combine the daily employees with the regular

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employees in the employer's regular weekly payroll period.[7/] The alternative approach of averaging separately for two sets of employees is more appropriate for payroll periods with different starting and ending dates which overlap, since both payroll periods are encompassed in the statutory reference to payroll periods to be used in peak determinations.[8/] (See Labor Code section 1156.4.) Henceforth we will limit the applicability of the alternative method suggested in Scattini to the latter situations.[9/]

The first method of computation is also preferable to the alternative method because it will generally require election petitions to be filed at a time when more employees are employed and thus eligible to vote, thus best effectuating the Agricultural Labor Relations Act's (ALRA or Act) purpose in affording employees with the full scope of their rights under

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[7/] Thus it will always be possible and preferable to combine the daily paid employees with the employees paid in a longer payroll period used by an employer.

[8/] The alternative approach of separately averaging will be appropriate in situations such as where an employer pays his steady workers on a weekly basis, e.g., Sunday through Saturday, but pays his seasonal or temporary employees on a different weekly-basis, e.g., Wednesday through Tuesday.

[9/] We will not, however, apply this limitation retroactively to invalidate the certification in this case, for as previously stated, no extraordinary circumstances were presented in this case and it would be unfair to the employees and their certified bargaining representative who have relied for the past years upon the Board's ruling in this case utilizing the alternative method. While we do not regard it as the most appropriate method of calculating peak, the Board's utilization of the alternative method in this case was a proper exercise of the Board's authority to compute peak and is not so unreasonable as to be an arbitrary and capricious manner of determining peak (i.e., extraordinary circumstances have not been presented).

Labor Code section 1156.4. Usually the determination of the employer's employment figures during its peak payroll period will not be affected by use of either the first or the alternative method of computation. This is so because an employer's peak payroll period usually occurs during its harvest operation, and as illustrated by the payroll data in this case, an employer will usually employ daily-paid employees throughout the peak payroll period, typically one week in duration. However, the same may not necessarily be true when the two methods are applied to a determination of the employment figures for the payroll period preceding the filing of an election petition. An election petition can be filed during a time when an employer hires daily employees for a few days to perform some preharvest work. When the number of days in which the daily-paid employees work is significantly less than the number of days in which the regular pay period employees work, use of the alternative method will result in the employment figures being higher than would be obtained by using the first method of computation. Thus, in such circumstances, use of the alternative method would make it easier to meet the statutory peak requirement than would utilization of the first method. In light of the fact that the Act already provides that a petition can be timely filed when an employer is at 50 percent of its peak employment, the first method of calculation is generally preferable in that it would give a greater number of employees the opportunity to participate

in an election.[10/]

While we understand the concern in Scattini that utilizing the first method may dilute the employment figures relative to a sharp rise in employees during a short period of time which is averaged over a significantly longer payroll period, we nonetheless observe that Labor Code section 1156.4 requires the Board to determine peak employment figures utilizing the employer's own payroll period. The Board should not focus exclusively or primarily on the "actual" peak period irrespective of a longer payroll period in which it falls. Instead, the Board should focus upon the peak employment figures as calculated by the entire relevant payroll period, if possible.[11/] This can

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[10/] The problem with the hypothetical posed by Members Waldie and Henning is, of course, that it resembles not an employer's peak payroll period but a situation concerning the prepetition payroll preceding the filing of an election petition. However, one need not resort to hypotheticals. Applying Scattini's alternative method of peak calculation to the facts of this case, the peak requirement was met. Applying Scattini's first method of peak calculation, the peak requirement would not have been met and the petition for certification would have had to have been filed when more workers worked during the payroll period preceding the filing of the petition, thus allowing more workers to be eligible to vote. Members Waldie and Henning express no concern about the rights of those workers who would otherwise be eligible to participate in an election held pursuant to a petition filed under Scattini's first method but who would not be able to do so under a petition filed pursuant to the alternative method of peak calculation.

[11/] Contrary to the assertion of Members Waldie and Henning, the Board is not overturning eight years of established precedent under Scattini. As noted previously, the Board in Scattini declined to choose between the first or the alternative method of peak calculation. While the Board did adopt the alternative method in the underlying representation proceeding in this case, we think that the first method is fairer and more preferable when the two set of employees can be combined and averaged together.

be accomplished fairly by the first method of calculation where both sets of employees can be added together and computed over the longer payroll period.

Utilizing the first method of calculation suggested by the Board in Scattini and proposed by Respondent in the underlying representation case, the peak requirement would not have been met. As we see this first method of calculation to be more appropriate than the alternative method of calculation actually used by the Board in the underlying election case to find peak, we deem this case to be a close one. Respondent's argument that the peak computation should have included the regular and daily employees together for the entire weekly payroll period raises important issues consistent with providing the fullest scope of enjoyment of employees' electoral rights (see Labor Code section 1156.4), and we therefore find Respondent's the employer's litigation posture to be a reasonable one. We thus will not impose a makewhole award for Respondent's technical refusal to bargain.

Respondent excepts to the Administrative Law Judge's (ALJ) findings and conclusions that it violated Labor Code section 1153(e) by its failure to notify and consult the union concerning its unilateral reduction in operations after the election but before the Board's certification of the UFW as the exclusive bargaining representative of Respondent's employees. In W. G. Pack (1984) 10 ALRB No. 22, we held that unilateral changes made by an employer after an election but before certification without notice to or opportunity for bargaining

by the union would not constitute a violation under Labor Code section 1153(e) if the employer has a reasonable good faith doubt about the validity of the election. In so doing, we adopted the California Supreme Court's dicta in Highland Ranch, Ltd. (1981) 29 Cal.3d 848 that the NLRB's rule, holding that unilateral changes pending certification of a union's victory of an election are made at the employer's peril, must be balanced against the proscription contained in Labor Code section 1153(f), prohibiting an employer from bargaining with an uncertified bargaining representative. As we find that Respondent has a reasonable good faith belief that the election was not conducted at a time when it was at 50% of its peak agricultural employment for the current calendar year, we hold that Respondent maintained a reasonable good faith doubt about the validity of the election and that the unilateral changes in question in this case, therefore, do not constitute a violation of section 1153(e).

ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent Adamek & Dessert, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in section 1155.2(a) of the Act, with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of Respondent's agricultural employees.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified inclusive collective bargaining representative of its 'agricultural' employees, as defined in section 1155.2(a) of the Act, and, if an understanding is reached, embody the terms thereof in a signed agreement.

(b) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(c) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent any time during the period from April 29, 1982 until the date on which said Notice is mailed.

(d) Provide a copy of the attached Notice to each agricultural employee hired by Respondent during the 12-month period following the date of issuance of this Order.

(e) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to Respondent's assembled employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following any such reading,

the Board agent shall be given an opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(f) Notify the Regional Director in writing, within 30 days after issuance of this Order, of what steps Respondent has taken to comply with this Order, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective bargaining representative of all of Respondent's agricultural employees, be extended for a period of one year from the date, following the issuance of a final order herein, on which Respondent commences to bargain in good faith with the UFW.

Dated: March 15, 1985

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

CHAIRPERSON JAMES-MASSENGALE, Concurring and Dissenting:

Two factors persuade me that the election should be set aside. First is the clear Legislative directive that the Board strive to maximize employee participation in representation elections by conducting balloting when the employer is as near peak agricultural employment for the relevant calendar year as is possible. Since fluctuating employment patterns in a seasonal industry do not always facilitate the holding of elections when employers are at peak, the Board is permitted by statute to conduct elections when the employment level is less than 100 percent of peak, but never when it falls below 50 percent of that optimum level. (Labor Code section 1156.4.) The election at issue here was held when Respondent was at no more than 40 percent of peak

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and perhaps as low as 30 percent of peak.[1/] Second, the closeness of the ballot count, where only five votes separate the Union and No Union tallies, warrants a particularly close scrutiny of the facts in light of established legal principles. Consistency in the application of such principles requires the conclusion that the Petition for Certification failed to raise a bona fide question concerning representation. (Labor Code section 1156.3(a), et seq.)

At all times material herein, Respondent's work force consisted primarily of a core of relatively steady employees who were compensated at the end of each week. That work force was augmented from time to time with employees whom Respondent hired to perform weeding and thinning tasks. Respondent explained that, due to the high turnover of the temporary workers, and for the convenience of those workers, they were paid at the conclusion of each workday.

Immediately upon receipt of the Petition, Respondent contested its timeliness with respect to the peak requirement and in support of that position provided Board agents with an analysis

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[1/] The record in this case does not permit application of the "body count method" which is based on adding and comparing the number of different employee names on the pertinent payroll rosters. (See, e.g., Donley Farms, Inc. (1978) 4. ALRB No. 66.) All computations herein utilize the alternative "averaging" method which the Board developed in Mario Saikhon (1976) 2 ALRB No. 2. Under Saikhon, the numbers of workers employed on each day of a given payroll period are totaled and the resulting figure is divided by the number of days in that payroll period. At least some employees worked on each of the seven days in both of the pertinent payroll periods. Based on a seven-day workweek, and using the averaging method, there were 106 employee days during peak week as compared to just 4-3 workdays in the prepetition week. Based on a six-day workweek, excluding Sundays when relatively fewer employees worked, and again using Saikhon, there were 122 employee workdays during peak and 48 employee workdays during the prepetition week.

of its payroll history for the peak and prepetition payroll periods Board agents confirmed the accuracy of Respondent's payroll data which revealed that 74-0 employees worked during peak week while only 302 employees worked in the prepetition week due to a normal end-of-season decline in work force requirements. That data demonstrates that (1) calendar year peak had been reached more than seven weeks prior to the filing of the Petition and (2) a minimum 50 percent of peak level a-t the time of filing was not attainable under a reasonable application of any of the peak computation methods authorized by the Board. Nevertheless, Board agents determined that the Petition was timely filed vis-a-vis the statutory peak proviso and proceeded to hold the election.

The ruling by Board agents that the peak requirement was satisfied was based on the Board's Decisions in Luis A. Scattini & Sons (1976) 2 ALRB No. 43 and Ranch No. 1 (1976) 2 ALRB No. 37. Scattini represents the Board's approach to situations in which an employer's labor force includes distinct groups of employees with payroll periods of different durations. Under Scattini, the Board may separately average such payrolls[2/] and then combine the averages in order to arrive at an overall employment level figure. In Ranch No. 1, the Board developed the concept of unrepresentative days, generally days on which few or no employees worked, which may be eliminated altogether from peak computations.

[2/] I concur in the lead opinion in the present proceeding insofar as it seeks to limit the Scattini formula to only those situations where two or more groups of employees have payroll periods which commence and/or end on different dates.

In this instance, Board agents read Scattini as authority for treating the daily workers as an independent work force solely because they were paid on a different basis; i.e., daily, rather than weekly. Furthermore, apparently in reliance on Ranch No. 1, they counted only the last three days of the prepetition workweek for the daily employees even though some of those employees also worked on two additional days in that same week, albeit in significantly smaller numbers.

In objecting to the Board about the manner in which Scattini had been applied, Respondent argued that the result was not authorized by existing precedents, but was instead an arbitrary method of inflating employee levels in order to create an artificially high average in the prepetition week. The Board's response was by means of an independent finding of peak, but on the basis of yet somewhat different theories. Initially, the Board separated the regular employees from the daily employees and then applied different computational schemes. With respect to peak week, Sunday was eliminated altogether for the regular employees because only ten of them worked that day and Sunday was, therefore, considered an unrepresentative workday. The number of employee workdays over the remaining six days (234) was divided by six to yield a workday average of 39 employees. During the same week, no daily employees worked on Sunday but between 69 and 95 of them were employed on each of the remaining six days. Ostensibly following 8 California Administrative Code section 20355 (now section 20352) which governs voter eligibility and which presumes at least a five-day workweek when employees work less than five days in the eligibility period,

the Board computed only the five consecutive days of highest employment but included therein the Sunday on which no daily employees worked, ignoring altogether Tuesday, October 7, when 86 daily employees worked and Wednesday, October 8, on which 69 of them worked.[3/] The Board could thereby divide only 340 workdays by an artificial five day workweek for an average workday of just 68 employees.

Turning to the prepetition week, the Board eliminated for the steady employees Sunday and Thanksgiving as unrepresentative workdays, but did so only with respect to the steady employees. The total of the five remaining workdays (195) was divided by five for an average of 38 employee workdays. For the daily workers, the Board eliminated Thanksgiving when no dailies worked but did not discount the Sunday on which one daily employee did work. The Board then computed the five consecutive days of November 29 through December 3, even though only four employees worked on November 29 and just one on November 30, and thereby arrived at a total of 95 workdays which, when divided by five, yielded an average workday of 19. Since the combined averages of the two groups of employee days in the prepetition week totaled 57 (38 regular workdays and 19 daily workdays), that figure is more than 50 percent of the combined averages for the two groups in the peak

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[3/] That construction of "consecutive days" prompted the ALJ to propose that the phrase has reference to consecutive working days and could not logically include days on which no one worked. While I agree with the ALJ's interpretation of the "consecutive days" language, I perceive an even broader problem in the Board's reliance, for purposes of peak week computations, on a provision which was intended to have application only to the prepetition period and only for purposes of determining voter eligibility.

week (39 regular workdays and 68 daily workdays).

Respondent's objection to the election on the peak issue was dismissed without a hearing and the Union ultimately was certified by the Board. Thereafter, in an attempt to perfect a judicial challenge to the ruling on peak, as well as on other grounds, Respondent "technically" refused to bargain with its employees' certified bargaining representative, and the matter was set for hearing before an Administrative Law Judge (ALJ) to determine whether Respondent's challenge to the certification was based on a reasonable good faith belief that the election was not conducted properly. The ALJ found that the Board agent's finding of peak as well as the Board's subsequent affirmation of the Executive Secretary's dismissal of the related objection were not well-founded. As he explained: "Although a determination had been made herein by the Regional Director and the Executive Secretary that the petition's filing was timely, the percentage of peak standards they utilized as established in prior cases were not consistently or properly applied and adequately explained...."

I proceed on the premise that the purpose of the various methods of computing peak is to permit the Board to measure as accurately as is possible true employment levels in order to maximize employee participation in elections. Indeed, if that be correct, then I submit that Scattini and Ranch No. 1, as applied here, served no purpose but to permit the Board to enter a finding

of peak when in fact peak did not exist.[4/] The Board's earlier reluctance to concede the obvious, that more weeders and thinners were needed during the alleged peak week because there was more work to be done at that time, should not now deter the Board from a reexamination of its prior ruling, in order to preserve the integrity of the election process, as well as the mandate of the Act. Certainly "public confidence in the administrative process requires a tribunal to admit its errors and not push a matter to its erroneous conclusion under the guise of procedural regularity." (American Broadcasting Company (1961) 134. NLRB No. 1458 [49 LRRM 1365].)

I would vacate the Board's Decision and Order of certification in Adamek & Dessert, Inc. (1982) 8 ALRB No. 27 and dismiss the complaint herein in its entirety.[5/]

Dated: March 15, 1985

JYRL JAMES-MASSENGALE, Chairperson

[4/] With specific reference to application of the representative days concept of Ranch No. 1, I believe that it confirms an observation expressed sometime ago in a dissenting opinion in California Lettuce (1979) 5 ALRB No. 24, wherein, on similar facts, it was said that, "The formula adopted by the majority leaves too much room for manipulation [by the Board] and as a practical matter encourages the filing of petitions when fewer employees are eligible to vote, contrary to the legislative directive to provide the fullest scope possible for employees' enjoyment of their rights to a secret ballot election...."

[5/] However, in order to facilitate a majority position of the Board so that a Decision in this matter may issue, I would find that Respondent's present litigation posture is premised on a reasonable good faith belief that the election was not conducted properly. (J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710].) Accordingly, I join Members McCarthy and Carrillo insofar as they find that the makewhole remedy is not appropriate in the circumstances of this case.

MEMBER HENNING, Dissenting:

This case is before the Agricultural Labor Relations Board (Board or ALRB) on a stipulated record to determine the merit of Adamek & Dessert's (Respondent or Employer) technical refusal to bargain, in violation of section 1153(e). The scope of our review, therefore, should be limited to the question whether Respondent's litigation posture was reasonable and in good faith. (J. R. Norton Company v. ALRB (1980) 26 Cal.3d 1.) Instead, the lead opinion chooses to create arguments that were never proffered by Respondent and the concurrence/dissent unbelievably goes even further to conclude that the election held five years ago should be overturned.

During the underlying proceeding,[1/] the Executive Secretary dismissed Respondent's peak objection concluding that

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[1/] Adamek & Dessert, Inc. (1982) 8 ALRB No. 27.

by utilizing the Scattini[2/] method, the percentage of peak requirements for the petition were met.[3/] The ALJ in the instant proceeding "found" that Respondent's argument concerning the peak issue was that the Executive Secretary improperly applied Scattini, in that he failed to reconcile Board cases which require that nonrepresentative days during the eligibility period be discounted with the Scattini requirement that the five consecutive days of highest employment be utilized. The Executive Secretary determined the average for Respondent's daily employees during the alleged peak period by calculating the total number of employee-days worked from October 2 to October 7, the five consecutive days of highest employment, without considering the fact that Sunday, October 5, was a day when little or no work was performed and was thus a nonrepresentative day.

Such an argument, had it been made, would have pointed out some ambiguities regarding how this Board interprets two lines of precedents concerning peak determinations.[4/] However, after examining the record[5/] in the underlying representation

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[2/] Luis A. Scattini & Sons (1976) 2 ALRB No. 43.

[3/] I agree with the lead opinion that Respondent's election objection pertaining to the peak calculation was properly dismissed.

[4/] I stress that the scope of review in technical refusal to bargain cases is limited to the respondent's litigation posture. This is distinguishable from the representation process where the Board's role is to assure that workers are accorded their free choice in the selection of a bargaining representative and thus we assume a broader responsibility to review all issues that may affect employee free choice.

[5/] The parties stipulated that the Board may take administrative notice of the documents of the proceeding in Case No. 80-RC-l-EC.

proceeding, Case Mo. 80-RC-l-EC, I find that this has never been Respondent's litigation posture. An examination of the Employer's Response to Election Petition, Employer's Election Objections, Employer's Request for Review, and Employer's Motion for Reconsideration reveals that Respondent never raised that argument during any phase of the underlying representation proceeding. Respondent's argument was that the Scattini method was inapplicable because of the factual distinctions between Scattini. supra, 2 ALRB No. 43, and the instant case.[6/] In addition, Respondent argued that even if Scattini was to be applied, the Board should include five days of employment in the daily payroll period, not just three. [The Executive Secretary did in fact utilize a five-day period for the employees paid on a daily basis.]

The ALJ erred in fashioning an argument for Respondent which Respondent itself has never presented. The Board's duty in a technical refusal to bargain case is merely to inquire into whether Respondent's litigation posture was reasonable, not to determine whether there was a reasonable litigation posture which Respondent might have adopted.

The lead opinion finds that Respondent "suggested" the argument it has adopted. Only a very broad reading of Respondent's arguments, as well as an improper expansion of the scope of review in technical refusal to bargain cases can lead

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[6/] I agree with the lead opinion's conclusion that Respondent's attempt to distinguish Scattini based on the presence or absence of a labor contractor is unpersuasive.

to this conclusion. Furthermore, how the lead opinion can justify its conclusion after finding that Respondent's peak objection was Properly dismissed is a mystery to me. I find the majority's approach here unwise and disagree with its conclusion that Respondent presented a reasonable litigation posture. I am thus compelled to conclude that a makewhole remedy is appropriate for Respondent's admitted refusal to bargain.

I also disagree with the majority's decision to sua sponte reconsider our Decision in Luis A. Scattini & Sons, supra, 2 ALRB No. 43. Had the majority limited its review herein to the proper scope, this sua sponte reconsideration would not have been necessitated. However, I am now compelled to respond to the majority's substantive discussion.

I dissent from the majority's decision to limit the Scattini method of calculating peak to situations where an employer has different payroll periods with different starting and ending dates which overlap. The effect of this decision is that the Scattini method would not be applied when an employer has a regular payroll (i.e., one week or two weeks) as well as a daily payroll. This, in turn, will result in the unwarranted disenfranchisement of agricultural employees.

Under the Scattini method, if an employer employs two separate groups of workers who are paid on different payroll periods, peak is determined by separately computing the average number of employee days worked for the two groups and then adding those two figures. As acknowledged by the majority, the Board in Scattini was concerned that adding the number of regular and

daily employees to determine peak would produce distorted results if the actual peak period is significantly shorter than the regular payroll period. This concern is as valid today as it was in 1976 when Scattini was decided. The majority has not shown otherwise, nor has it explained how that concern has been alleviated.

The majority recognizes that by paying its employees on a different basis, an employer creates two sets of different payroll periods (in this case, a weekly and a daily period). The majority goes on to find that section 1156.4 requires the Board to determine peak employment utilizing the employer's own payroll period. Thus the majority recognizes that in these circumstances there are in fact two separate payroll periods and that the Board must utilize the employer's own periods. Yet, despite this, the majority reaches the astonishing conclusion that these two separate payroll periods should be combined to determine peak. It concludes that it will always be possible and preferable to combine the separate payroll periods, but offers no reasoning as to why it is preferable. As to such a combination being possible, I do not question that it will always be possible, but my concern is whether such a combination is advisable and appropriate.

Neither the Act nor the Board's regulations provide guidance as to how peak is to be determined when an employer has separate payroll periods. Section 1156.4 directs us to the payroll period immediately preceding the filing of the petition. Regulation section 20352 specifies that where an employer's

payroll period is for fewer than five working days (i.e., daily), an artificial payroll period of five days will be employed. My reading of these sections does not lead me to conclude that they are mutually exclusive. To the contrary, both sections are called into play when an employer chooses to create separate payroll periods. The majority's conclusion herein is based on a faulty premise: that there is only one payroll period and the daily payroll period must be totally ignored.[7/]

While the majority concludes that we must focus upon the peak employment figures as calculated by the entire employee complement to reach a "fair" determination, the effect of this approach belies any assertion that fairness will be achieved. A random selection of a set of fictitious employment figures illustrates my point.[8/] Using this example, the majority's approach would result in a peak figure of 10 employees: two week payroll period (128) + daily payroll period (148) ÷ 14 = 20 Fifty percent of 20 = 10. Under the Scattini approach, peak is 20 workers: total in two week period (128) ÷ 14 (9) + total

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[7/] In the instant case, the Employer's Response to Petition for Certification clearly states that Respondent has two separate payroll periods, one weekly and one daily.

[8/] To illustrate my point I randomly created a two-week payroll period consisting of 10, 9, 8, 10, 10, 8, 9, 9, 10, 9, 10, 8, 8, and 10 employees and a five-day daily payroll period of 30, 25, 30, 28, and 35.

Contrary to the majority's assertion that one need not resort to hypotheticals, a hypothetical situation is clearly warranted where, as here, established precedent is being eroded in a case where neither of the parties have advocated the far-sweeping change adopted by the majority here today. Hypotheticals serve to illustrate the inadvisability of that change.

in daily period (148) ÷ 5 (30) = 39. Fifty percent of 39 = 20. Thus, under the majority's approach a petition would be considered timely filed when only 10 regular employees were working. This peak would be possible to achieve even at a time when none of the daily workers was employed. The result would be the absolute disenfranchisement[9/] of a large number of workers. A majority of the peak number, 6 workers, would vote for or against union representation while 25-35 workers would have no say whatsoever in that decision.[10/]

Section 1156.4 of the Act specifically sets forth the policy of the State of California "to provide the fullest scope for employees' enjoyment of their [electoral] rights." In spite of that clear language, the majority today chooses to disenfranchise agricultural workers based on their faulty interpretation of what constitutes an employer's payroll period.

I also express reservations about the majority's

[9/] The majority's rhetorical statement (see footnote 9) concerning my lack of concern for the "disenfranchisement" of workers who would have been needed in order for peak to be reached under the Saikhon - Ranch No. 1 formula assumes the conclusion at issue herein: that the Scattini peak formula is inappropriate. In fact, that formula has been an appropriate one until today. Because the statutory scheme requires only that an employer's payroll reflect 50 percent of its peak employment, all elections conducted when an employer is not at 100 percent of peak employment will "disenfranchise" workers. My concern is that the majority's decision will inequitably dilute the numbers of daily workers by averaging those numbers over a much longer payroll period than the period that they actually worked.

[10/] This would occur if the foregoing hypothetical figures for the previous year are utilized to determine peak and a representation petition is filed in the current calender year at a time when no daily employees are working. Under the majority's approach, peak would be reached even without the daily workers. This would not be the case utilizing Scattini.

decision to modify the Scattini decision absent any argument or briefing from the parties on this issue. Such input from the parties is invaluable especially where as here the majority is overturning eight years of established Board precedent and even the Respondent has not clearly taken the position adopted here today.

The majority's failure to accept that it is needlessly overturning established Board precedent is based on its reading of Luis A. Scattini, supra, 2 ALRB No. 43. I do not read that case as "suggesting" two approaches for determining peak and not setting forth a preference as to which approach should be utilized in situations where employers voluntarily establish separate payroll periods. In that case, the Board stated that "...several methods of computation suggest themselves" (at Slip Opn. p. 3) and went on to discredit the Saikhon[11/] and Ranch No. 1[12/] model of jointly averaging separate payroll periods. The Board concluded that a sharp rise in daily employees during the peak period would not give a true reflection of peak when averaged out over a longer payroll period. I interpret the specific conclusion, that this approach does not render an accurate reflection of peak, to be a rejection of the Saikhon - Ranch No. 1 approach. It would be incongruous indeed for the Board to conclude that a certain peak formula does not result in an adequate peak figure and yet hold this formula out as an

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[11/] Mario Saikhon, Inc. (1976) 2 ALRB No. 2

[12/] Ranch No. 1, Inc. (1976) 2 ALRB No. 37.

option that can be subsequently utilized.[13/]

After rejecting the Saikhon - Ranch No. 1 approach, the Board in Luis A. Scattini, supra, 2 ALRB No. 43, went on to fashion what has become known as the Scattini formula (i.e., separately averaging the different payroll periods and then adding the totals). In explaining this new alternate approach, the Board suggested two methods of computation of the daily payroll for the comparative period preceding the filing of the petition: (1) using five days within the longer payroll period preceding the filing of the petition, or (2) using the five days immediately prior to the filing of the petition. The Board went on to conclude that it was not required to choose which of these methods would provide the fullest scope for employees' electoral rights.

In conclusion, it is unfortunate that the majority of the Board chose to sua sponte question, and then overturn, established precedent relating to peak calculations. The facts of this case did not warrant this analysis and the parties did not brief these important issues.

Dated: March 15, 1985

PATRICK W. HENNING, Member

[13/] In fact, I can find no cases where the Saikhon - Ranch No. 1 "option" was utilized subsequent to the Board's decision in Luis A. Scattini, supra, 2 ALRB No. 43, and the majority doe; not cite any.

MEMBER WALDIE, Dissenting:

I join fully in Member Henning's dissent. In addition, however, I reject the majority's citation to Sub-Zero Freezer Co., Inc. (1984) 271 NLRB No. 7. The instant case comes to this Board by virtue of a technical refusal to bargain, in violation of section 1153(e). In such a posture, we need only determine whether Respondent's litigation of the Scattini issues here is reasonable and then whether such litigation was in good faith. (J. R. Norton Company v. Agricultural Labor Relations Board (1980) 25 Cal.3d 1; Charles Malovich (1980) 6 ALRB No. 29.) The citation to Sub-Zero is thus an unnecessary wrinkle in the majority's Decision. Because the citation is dicta here, I will not, at this time, address the issue whether this recent renuniciation of a time-proven policy of the National Labor Relations Board (NLRB) is applicable precedent in our deliberation (Labor Code section 1148). The majority's citation to Sub-Zero will, I am certain, insure a case in the near future where the appropriateness of that NLRB decision will need

to be addressed in a less cursory fashion than the majority here seems to recognize.

Dated: March 15, 1985

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL WORKERS

A representation election was conducted by the Agricultural Labor Relations Board (Board) among our employees on December 15, 1980. The majority of the voters chose the United Farm Workers of America, AFL-CIO, (UFW) to be their union representative. The Board found that the election was proper and officially certified the UFW as the exclusive collective bargaining representative of our agricultural employees on April 1, 1982. When the UFW asked us to begin to negotiate a contract, we refused to bargain so that we could ask the court to review the election. The Board has found that we have violated the Agricultural Labor Relations Act (Act) by refusing to bargain collectively with the UFW. The Board has told us to post and publish this Notice and to take certain additional actions. We shall do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL, on request, meet with the UFW for the purpose of negotiating and bargaining in good faith about your wages, hours and working conditions.

Dated: ADAMEK & DESSERT, INC.

By:_____
(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 9224-3. The telephone number is (619) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

ADAMEK AND DESSERT, INC. 11 ALRB No. 8
UFW Case Nos. 82-CE-137/138-EC

ALJ DECISION

This technical refusal to bargain was submitted to the ALJ by way of a stipulated record. In response to Respondent's peak objection, the ALJ concluded that the formula utilized by the Executive Secretary, the Luis A. Scattini (1976) 2 ALRB No. 43 formula, did not result in the proper peak requirement at the time of the representation election. He thus concluded that Respondent's litigation posture concerning the challenge to the percentage of peak determination was reasonable. The ALJ therefore recommended that the Board not award the makewhole remedy. The ALJ went on to propose a different formula by which to reach the required peak percentage during the eligibility period.

The ALJ found that the two additional bases relied on by Respondent to challenge the union's certification were not meritorious. In addition, he concluded that Respondent had unlawfully failed to notify the union about the partial closure of its operations and had failed to afford the union an opportunity to bargain over the effects of that closure on the bargaining unit employees.

BOARD DECISION

Majority (Members Massengale, McCarthy, and Carrillo)

A majority of the Board limited the Scattini method of calculating peak (i.e., separate averaging of different payrolls) only to situations where two or more groups of employees have payroll periods which commence and/or end on different dates. This majority also found that the makewhole remedy was not appropriate in the circumstances of this case.

Lead Opinion (Members Carrillo and McCarthy)

These Board Members found that the approach for calculating peak argued by Respondent herein, in which the number of regular and daily employees are added together, for the relevant weekly basis and divided by the number of days therein, is the appropriate method to utilize in the instant case where, although employees are paid according to different payroll periods, it is possible to combine the daily employees with the regular employees in the employer's regular weekly payroll period. These members read Luis A. Scattini, supra, 2 ALRB No. 43 as suggesting two methods of calculating peak in situations where an employer established two separate payroll periods: (1) the method argued by Respondent, and (2) the method utilized by the Executive Secretary whereby the different payrolls are separately averaged

and then combined. They concluded that the approach of separately averaging the different sets of employees is more appropriate for payroll periods with different starting and ending dates. Members Carrillo and McCarthy found that Respondent had a reasonable good faith belief that the election was not conducted at a time when it was at 50 percent of its peak employment and thus makewhole is not an appropriate remedy. As such, they concluded that Respondent's failure to notify and bargain with the union about the effects of the partial closure of its operation was not violative of section 1153(e).

Dissent (Chairperson Massengale)

The dissent observed that as applied in the instant case, the methods of calculating peak established in Luis A. Scattini, supra, 2 ALRB No. 43 and Ranch No. 1 (1976) 2 ALRB No. 37, erroneously permitted the Board to conclude that Respondent was at peak when in fact peak did not exist. The dissent concluded that the Legislative directive to maximize employee participation in elections and the closeness of the ballot count in the underlying representation case herein, mandate that the union's certification be vacated.

Dissent (Member Henning)

The dissent objects to the lead opinion in that it chooses to create arguments that were never proffered by Respondent in a case where the only issue presented is whether the Respondent pursued a reasonable good faith challenge to the validity of the election. In addition, the dissent faults the lead opinion for granting sua sponte reconsideration of the separate averaging method of determining peak established in Luis A. Scattini, supra, 2 ALRB No. 43.. Member Henning further dissents from the majority's decision to limit Scattini only to situations where the separate payroll periods commence and/or end on different dates.

Dissent (Member Waldie)

Dissenting Member Waldie joined Member Henning 's dissent. In addition, he rejected the majority's citation to Sub-Zero Freezer Co., Inc. (1984) 271 NLRB No. 7 but chose not to address the issue of whether that case constitutes applicable NLRB precedent.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: ADAMEK and DESSERT, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 82-CE-137-EC 82-CE-138-EC

Appearances:

Darrell Lepkowsky, Esq.
for General Counsel

William F. Macklin, Esq.
of Ewing, Kirk and Johnson
for the Respondent

Gilbert Rodriguez
for the United Farm Workers
of America, AFL-CIO,
Charging Party [1/]

Before: Matthew Goldberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

1. Charging Party's post-hearing brief was written by Ned Dunphy, legal assistant.

I. PRELIMINARY STATEMENT

On July 14, 1982, the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union"), filed charges in case numbers 82-CE-137-EC and 82-CE-138-EC. The charges alleged that Adamek and Dessert, Inc. (hereafter referred to as "Respondent" or "the company"), had engaged in violations of sections 1153(c) and 1153(e) of the Act. Based on the aforementioned charges, on October 26, 1982, the General Counsel for the Agricultural Labor Relations Board on October 26, 1982, caused to be issued a complaint alleging that Respondent had failed and refused to meet and bargain collectively with the Union, which as of April 1, 1982, has been certified as the exclusive bargaining representative of its agricultural employees.

Copies of the charges, the complaint and notice of hearing were duly served on Respondent. Respondent timely filed an answer in which it essentially denied the commission of any unfair labor practices.

On March 30, 1983, a first amended consolidated complaint was issued. This complaint alleged that Respondent reduced the size of its operations by fifty percent without notifying the Union or bargaining with it regarding the effects of the reduction. In addition, the complaint alleged other unilateral changes ancillary to the discontinuation of 50 percent of its operations, including the "discriminatory" failure to recall certain "seniority" employees and the unilateral elimination of bus transportation which had previously been provided to certain of the permanently laid off employees.

On April 19, 1983, a "Second Amended Consolidated Complaint" was issued. The most significant difference between it and the "First Amended Consolidated Complaint" was that it emended the allegation sounding in Act section 1153(c) that the failure to recall or rehire pursuant to the curtailment of operations was discriminatorily motivated.[2/]

The parties determined that the matter should be submitted to the Administrative Law Judge by stipulation. The stipulation is reproduced below in its entirety:[3/]

> The General Counsel and Respondent, Adamek & Dessert, Inc. hereby stipulate that there is no conflict in the evidence to be considered and hereby transfer this proceeding directly to the Administrative Law Judge.
>
> The parties agree that the charges, complaints, answers and attached "Stipulation of Facts" and documents incorporated therein constitute the entire record in this case and that no oral testimony is necessary. The parties agree to waive oral arguments and testimony before the Administrative Law Judge and to submit this stipulation directly to the ALJ for findings of facts, conclusions of law, and order.
>
> STIPULATION OF FACTS
>
> The General Counsel, and the Respondent in Case No. 82-CE-137-EC, and 82-CE-138-EC, hereby stipulate as follows:
>
> 1. Respondent Adamek and Dessert, Inc. is, and at all times material herein has been, engaged in agriculture in the State of California and is and has been an agricultural employer within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act.

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2. The parties stipulation, as set out below, to the effect that the rationale behind the partail closure was economic in nature would seem to militate against a finidng of anti-union motivation for the reductions.

3. Certain minor changes in punctuation and capitalization have been made.

2. Charging Party, United Farm Workers of America, AFL-CIO (UFW), is now and at all times material herein has been a labor organization within the meaning of section 1140.4(f) of the Agricultural Labor Relations Act.

3. On December 8, 1980 the UFW filed a Petition for Certification for all agricultural employees of Respondent in the State of California.

4. On December 15, 1980 the Agricultural Labor Reltions Board (ALRB) conducted an election for Respondent's agricultural employees.

5. On or about January 1, 1982, Respondent reduced the size of its farming operation by approximately 50%. This reduction resulted in a reduction of the number of employees working for the company. Agricultural employees permanently laid-off included the following:

> A total of nine (9) irrigators were permanently laid-off; five (5) irrigators remain employed by the company.
>
> Three (3) tractor drivers were permanently laid-off; six (6) remain. Of the six, four work seasonally.
>
> The ground crew formerly headed by foreman Raymundo Gomez and commonly known as the "bus crew," was permanently laid-off. This crew consisted of ten (10) to twelve (12) permanent employees and twenty-five (25) to thirty (30) crew members during peak. Remaining employed by the company is a ground crew commonly known as the "car crew" consisting of three (3) to ten (10) employees, depending on need.
>
> Of two shop employees, none were laid off.

Also permanently laid-off were management personnel that included:

> Gus Adamek, John Adamek, Larry Adamek, Ben Adamek, Charles Dessert, and other supervisors. Gus Adamek and Ben Adamek were principals of the California Corporation known as Adamek & Dessert, Inc.

Respondent also ceased providing bus transportation to its workers as it had done in the past.

The above-stated layoffs and changes in numbers of workers employed by Respondent were made without notice to the UFW and without giving the UFW the opportunity to negotiate regarding the changes nor regarding the effects of the farming reduction on the bargaining unit.

The reduction in farming operations did not change the farming or cropping patterns of the company; the same crops are being farmed as before the decrease in operations.

The above-stated reduction in the size of the farming operation was due to the Respondent's inability to obtain continued financial backing by its lending institution. Respondent's lending institution was Production Credit Association.

6. On April 1, 1982, the ALRB certified the UFW as the exclusive representative of Respondent's agricultural employees in the State of California for the purposes of collective bargaining as defined in section 1152.2(a) of the Act.

7. On April 29, 1982, David Martinet, negotiator for the UFW, sent a letter requesting negotiations to William F. Macklin, Respondent's attorney. (A copy is attached as Exhibit A).

8. On July 19, 1982, Willian F. Macklin, Respondent's attorney sent a letter to Jesus Villegas, UFW representative in Calexico, stating that Adamek & Dessert, Inc. was choosing to test the certification of UFW by the ALRB by refusing to negotiate with the UFW. (See Exhibit B).[4/]

The parties further stipulate that the Board may take administrative notice of the records of the proceedings in Case NO. 80-RC-l-EC including, but not limited to, the following, and that documents in that case be made a part of the record in this proceeding:

a. Petition for Certification

b. Notice and Direction of Election

c. Tally of Ballots

d. Objections to Election and Petition for Hearing [under] Labor Code §1156.3(c)

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4. Exhibits A and B are attached to this Decision and incorporated by reference.

e. Order Dismissing Election Objections

f. Order Granting Extension of Time

g. Request for Review

h. Challenged Ballot Report

i. Order Granting in part and Denying in part Employer's Request for Review

j. Motion for Reconsideration

k. Order Directing Regional Director to Destroy Challenged Ballots and Issue Final Tally of Ballots

l. Final Tally of Ballots

m. Order Denying Employer's Motion for Reconsideration

n. Notice of Investigative Hearing o. Motion for Continuance

p. Order Denying Motion for Continuance and Notice of Investigative Hearing Location

q. Record Transcript of Investigative Hearing, 80-RC-l-EC

r. Employer's Post Hearing Brief s. Petitioner's Post Hearing Brief

t. Order Issuing Initial Decision of Investigative Hearing Examiner

u. Employer's Exceptions To Decision Of Investigative Hearing Examiner and Supporting Brief

v. Petitioner's Exceptions to the Decision of the Investigative Hearing [Examiner]

w. Response to Employer's Exceptions to the Decision Of The Investigative Hearing Examiner

x. Order Denying Petitioner's Request that the Board Read and Decide Petitioner's Exceptions prior to Considering Respondent's Exceptions

y. Employer's Response to Petition for Certification

z. Decision and Certification of Representative

This stipulation is made without prejudice to any objection that any party may have as to the materiality, relevance, or competency of any fact stated herein.

II. ANALYSIS AND CONCLUSIONS OF LAW

A. Appropriateness of the Make-Whole Remedy

1. General Legal Principles

The central issue presented by this case is that which devolves in all "technical refusal to bargain"[5/] cases: whether, given the particular circumstances of the case, it is appropriate to award the "make-whole" remedy referred to in Labor Code Section 1160.3 for such refusal. In J.R. Norton (1979) 26 Cal.3d 1, the state Supreme Court recognized the tension which existed between the "need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization by employees" and the "interest in fostering judicial review as a check on arbitrary administrative action in cases in which the employer has raised a meritorious objection to an election and the

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5. As specifically noted in each such case, under Labor Code section 1160.8, the certification issued by the Board of a labor organization as the exclusive bargaining representative for a given group of employees is not considered a "final order" of the Board. Hence, only by refusing to bargain with the organization certified may a respondent obtain judicial review of that certification. (Nishikawa v. Mahoney (1977) 66 Cal.App.3d 731.) A refusal to bargain for these purposes is deemed a "technical" one.

objection has been rejected by the Board." (26 Cal.3d at p. 30.) As such, it held that the blanket imposition of the make-whole remedy by the Board was not warranted in every case where an employer, following the issuance of a certification of representative, refused to bargain with that representative in order to test the legal sufficiency of that certification.

The Court specifically directed that:

> . . . the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining, or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted . . . . [The automatic imposition of make-whole where the Board's finding of a failure to present a prima facie case is upheld by the courts] would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice . . . . [J]udicial review in this context is fundamental in providing for checks on administrative . . . arbitrary exercises of discretion. On the other hand, our holding does not mean that the Board is deprived of its make-whole power by every colorable claim of a violation of the laboratory conditions of a representation election: it must appear that the employer reasonably and in good faith believed the violations would have affected the outcome of the election. (26 Cal.3d 39.)

With the aforementioned Supreme Court language as a guide, on remand, the Board, in J.R. Norton (1980) 6 ALRB No. 26, enunciated the specific standards under which a respondent's "technical" refusal to bargain would be adjudged in determining whether or not to impose the make-whole remedy. The Board stated that the remedy would be appropriate where the employer's litigation posture, at the time of the refusal to bargain, was "not reasonable," or the employer, generally, was not acting in good faith in contesting the certification. In other words, an inquiry

in each such case was to be made to determine "whether the employer litigated in a reasonable good faith belief that the election was conducted in a manner which did not fully protect employees' rights, or that misconduct occurred which affected the outcome of the election." (6 ALRB No. 26 at p. 2.)

The continued vitality of the aforementioned principles is evident from the recent decision in Thomas S. Castle Farms (1983) 9 ALRB No. 14. That case, in reiterating those standards, further explicated the concept of a "good faith" litigation posture in terms of whether the test of the certification presented "novel" legal theories or issues, "close cases," or "meritorious challenges." Attempts to overturn or rebut "well-established [legal] precedent" were, as they have been previously, viewed as "unreasonable" by the Board.[6/]

Other cases examining whether a litigation posture was reasonable, have, in addition to noting that objections to an election "clashed with an established labor law principle," focussed on the sufficiency of the respondent's proof in support of its objection(s). Where there was a lack of supporting evidence, or where factual issues were resolved against a respondent based on credibility determinations not presenting a "close case," the particular respondent was found not to have acted in good faith in

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6. For example, in Ranch No. 1 (1980) 6 ALRB No. 37, an election was challenged on the basis that the union availed itself of "excess access." The Board held that respondent's litigation posture was not in good faith, as there had been four prior decisions regarding the impact of such access on representation elections, and that the applicable legal standards were "well-established."

challenging the certification. (See George Arakelian (1980) 6 ALRB No. 28 and (1982) 8 ALRB No. 36; ASP Christopher (1982) 8 ALRB No. 84; Ron Nunn Farms (1980) 6 ALRB No. 37.)

Most recently, in Robert J. Lindeleaf (1983) 9 ALRB No. 35, the Board has reemphasized, in a technical refusal to bargain case, the lack of "reasonableness" inherent in a respondent's rehashing election objections based on factual contentions determined adversely to it in prior representation proceedings. The Board noted there that the previous dismissals of objections by it, an Investigative Hearing Examiner, and the Executive Secretary were based on "a clear statement of reasons, with supporting legal authorities," and did not present a close case raising "novel" or "difficult" legal issues.

Conversely, the Board has declined to award the make-whole remedy where there has not existed any previously-established guide lines regarding the specific legal principles applicable to the particular case. For example, in D'Arrigo Brothers (1980) 6 ALRB No. 27, the Board held that respondent's litigation posture was reasonable where it relied upon the well-established "laboratory conditions" standard to test the conduct of representation elections as per General Shoe (1948) 77 NLRB 124, and the provisions of ALRA section 1148 to follow "applicable" National Labor Relations Board precedent. The Board's standard, though different, was, for the first time, announced in the prior D'Arrigo representation case, (1979) 3 ALRB No. 37. Thus, a "close case" raising "important issues" was presented by respondent. Since it was determined that the legal contentions urged by respondent were "reasonable" and

undertaken in good faith, the imposition of the make-whole remedy was not warranted.[7/]

Significantly, a number of cases involving a certification challenge based on the issue of the timeliness of an election petition in reference to "peak employment" have held that a respondent's litigation posture was reasonable, since the "percentage of peak" concept is unique to the Agricultural Labor Relations Act. Hence, there could be no "applicable" National Labor Board precedent. In addition, there exist no judicial decisions to date interpreting the particular statutory provisions (Labor Code sections 1156.3 and 1156.4) setting out the Act's requirements in this regard.[8/] (See, e.g., Charles Malovich (1980) 6 ALRB No. 29; High and Mighty Farms (1980) 6 ALRB No. 31; Holtville Farms (1981) 7 ALRB No. 15.)[9/] As noted in Bonita Packing (1978) 4 ALRB No 96, p. 7, "[s]ection 1156.4 poses troublesome questions of statutory interpretation, because it appears to require us to apply a clear and specific rule and to exercise discretion by making an

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7. Compare the Board's holding in Waller Flowerseed (1980) 6 ALRB Mo. 51, where an employer's reliance on a particular legal principle was deemed "reasonable" until that principle was determined contrary to its position in an appellate court. In that case, make-whole was awarded from the date of the appellate court decision forward. (of. F & P Growers Assn. (1983) 9 ALRB No. 22.)

8. These sections essentially state that an election petition will be considered timely filed only if the number of employees in the payroll period immediately preceding the filing of the petition was at least fifty percent of the employer's "peak" agricultural employment for that current calendar year.

9. Despite a finding regarding the reasonableness of respondent's litigation position, make-whole relief was found warranted in Holtville Farms because of evidence of respondent's general bad faith, which included the commission of numerous unfair labor practices.

estimate based on 'all . . . relevant data.'" Thus, the Board has recognized that where an issue is raised in the area of peak and percentage of peak determinations, sufficient uncertainty exists in the state of the law as to permit a respondent, in a variety of situations, to adopt a good faith litigation posture in regard to questioning the timeliness of an election petition.[10/]

A final consideration pertains to cases of this nature. The Board has adopted the National Board's proscription against relitigating, in the refusal to bargain case, the issues presented during the representation phase, in the absence of "extraordinary circumstances," newly-discovered or previously unavailable evidence.

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10. This is not meant to imply that in all cases where the timeliness of a petition or a peak issue is raised that the Board will automatically find such a litigation posture to be "reasonable". Consonant with the principles noted above, the Board will award make-whole where a respondent does not present a "close case" raising "important issues," where the legal principles applicable to the situation are well-settled, or where the employer is found not to have acted in good faith, generally, in challenging the certification. In A & D Christopher, supra, respondent failed to meet its burden of proof at the representation hearing regarding its assertion and assessment of a "prospective" peak (i.e., that the petition was filed before the employer had attained peak employment that year). Using either of two well-established methods, the Board determined that the peak and pre-petition payroll calculations therein were accurate and clearly demonstrated that the petition had been timely filed. Thus, the timeliness issue was not "close" and did not present a reasonable basis for that respondent's refusal to bargain.

In Ruline Nursery (1982) 8 ALRB No. 105, the employer's overall conduct, including a series of unfair labor practices, was found indicative of a general lack of good faith in challenging the certification. While the respondent there argued an issue concerning peak, its contention was found to be based on an overly legalistic and facile interpretation of unambiguous statutory language. Reliance on such an assertion in its test of the legal sufficiency of the certification provided additional evidence that the challenge was not bona fide. Make-whole was therefore warranted.

(Perry Farms (1978) 4 ALRB No. 25; D'Arrigo Brothers of California (1978) 4 ALRB No. 45; see also, e.g. Charles Malovich, supra; A & D Christopher, supra; Robert Lindeleaf, supra. Thus, lacking such elements, prior determinations on the representation issues will remain undisturbed.

2. The Percentage of Peak Issue

It is this issue which evinces the "reasonableness" of respondent's litigation posture, and which satisfies the first prong of the Norton test so as to insulate respondent from the application of the make-whole remedy during the period of its challenge to the certification issued herein.[11/] As will be shown below, a variety of methods could have been employed in determining percentage of peak. Interestingly, while some result in a finding that the petition was not timely filed, others reach the opposite conclusion. Although a determination had been made herein by the Regional Director and the Executive Secretary that the petition's filing was timely, the percentage of peak standards they utilized as established in prior cases were not consistently or properly applied and adequately explained as respondent pursued its legal challenge

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11. The only evidence in the record regarding respondent's general lack of good faith (the second prong of the Norton test) centered on the delay between the Union's initial request that collective bargaining begin and the company's reply thereto. The request was dated April 29, 1982, while the response was not sent until July 19 of that year. Although a number of cases have held that such delays are indicative of bad faith (see, e.g., Masaji Eto (1980) 6 ALRB No. 20; Holtville Farms, supra), without more extensive evidence on this point, a finding of respondent's overall bad faith cannot be supported by a preponderance of the evidence. Owing to the lack of proof, it is to be assumed for the remainder of this decision that once it is established that respondent maintained a reasonable litigation posture in challenging the certification, the make-whole remedy will not be imposed.

on various levels. Thus, it is determined that the contentions raised by the respondent in its test of the Board's certification, at least insofar as this aspect of the case is concerned, present a "close case" raising "novel" issues.

During the relevant payroll periods the employer utilized two distinct groups of employees, those that were paid on a weekly basis ("regular" employees) and those that were paid on a daily basis ("daily" employees). Regarding the latter group, Respondent maintained that a high turnover in the weeding and thinning crews necessitated that it pay such employees on a daily basis.[12/]

In support of its objections based on the size of the work force during the pre-petition payroll period, respondent submitted the following figures. The numbers and the designation of the peak week noted below, which had also been submitted to the Regional Office as attachments to the Employer's Response to the Petition for Certification, were not disputed by either the General Counsel or the petitioning Union.

Peak Week

(Thursday, October 2, 1980 - Wednesday, October 8, 1980)

Employees	10/2	10/3	10/4	10/5	10/6	10/7	10/8	Total
Daily	79	95	86	0	81	86	69	496
Regular	42	39	40	10	34	41	38	244
								740

12. This assertion was contained in respondent's Request for Review of certain election objections. Although the statement cannot substitute for actual proof via admissible evidence, neither the Union nor the General Counsel argued to the contrary.

	Week Prior to Petition							
Employees	11/27	11/28	11/29	11/30	12/1	12/2	12/3	Total
Daily	0	0	4	1	27	29	34	95
Regular	3	42	40	14	31	38	39	207
								302

In Bonita Packing, supra, the Board declared that it would consider election petitions to be timely filed if the percentage of peak requirements were met under either of two formulae: the "body count" method, or the "Saikhon averaging method," per Mario Saikhon, (1976) 2 ALR3 No. 2. Normally, when the period of highest employment has already been reached in a given year by the time the petition is filed, the initial step in determining percentage of peak is to use the "body count" method: i.e., the names on the payroll for the eligibility period are counted and compared with the number of names on the payroll for the peak period. (Kamimoto Farms (1981) 7 ALRB No. 45, p.3; Donley Farms (1978) 4 ALRB No. 66; A & D Christopher (1981) 7 ALRB No. 31.) With the data supplied here, it is impossible to utilize the "body count" method: there is no indication whether the number of employees per day noted involved the same or different employees.[13/] Further, given the assertion regarding the high turnover rate during the relevant payroll periods, it is doubtful whether the "body count" method would be appropriate.

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13. If peak were determined by reference to the total number of employee-days, the statutory ore-petition requirements would obviously not be met: 302 is not 50 percent of 740.

"The next method for measuring levels of employment in determining peak is to compare the average number of employees working each day during the two relevant payroll periods. Or, to explain this method in another manner, we count the number of employees listed on the payroll list for each day of the particular pay period and add them together to arrive at a total number of employee days. This total is then divided by the number of days in the pay period in order to obtain the average number of employees who worked each day of that period. (Kamimoto, supra, pp. 3 & 4; Mario Saikhon, supra.) As noted by Member Waldie in his dissent in Kamimoto at p. 9, the Saikhon averaging method in essence creates "a stable work force out of a potentially unstable one," as "turnover and fluctuation in employment needs are typical in agriculture, therefore making the `employee count' method unreliable."

In the instant case, applying the Saikhon method strictly, fifty percent of the peak figure is not attained in the eligibility period. Given a seven-day payroll period, the average number of employees for each day during the peak period is 740/7 or about 106 employees per day. In the eligibility period, there is an average of 302/7 or 43 employees per day. Therefore, under this method, the petition would be regarded as untimely, since 43 is not fifty percent of 106.

However, since the Board's decision in Ranch No. 1 (1976) 2 ALRB Mo. 37, when employing the Saikhon method, non-representative days (i.e., days when little or no work was performed) are generally not included in determining the average number of employees working each day. (See, e.g., California Lettuce Co. (1979) 5 ALRB No. 24;

High & Mighty Farms (1972) 3 ALRB No. 88; A & D Christopher, supra.)

Therefore, eliminating Sunday (10/5) from the peak week, the average number of employees working per day is 730[14/] divided by six, or 122. In the payroll period prior to the filing of the petition, two days might be deemed "unrepresentative": 11/27, which was the Thanksgiving holiday, and 11/30, a Sunday. Thus, the average would be computed as 234/5, or 57 employees/day. This figure is still less than fifty percent of peak.[15/]

A third method of determining peak and eligibility week employment figures has been utilized where "the employer has two separate groups of employees . . . who appear to be paid on different payroll bases." This method, known as the Scattini method, after the case in which it was originally formulated, Luis H. Scattini (1976) 2 ALRB No. 43, dictates that "the average number of employee days [is computed] separately for the two classes of employees." The two figures are then added to arrive at a total average. It is in the utilization of this particular method and the ambiguities connected with it that the percentage of peak

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14. While some "regular" employees worked that day, that group constituted only about one-fourth of the normal complement, and thus might be deemed "unrepresentative."

15. In Bonita Packing, supra, fifty-eight individuals were employed during the eligibility period as opposed to a total of 119 for the peak period. The Board held that the margin of error, or 2.5 percent, was insignificant, and the results of that election were certified. By contrast, in Wine World, d/b/a/ Beringer Vineyards (1979) 5 ALRB No. 41, there were sixty eligible employees compared with a peak complement of 129. There, the margin of error in the percentage of peak calculation, or 7%, was determined to be unreasonable, and the election was set aside. In the instant situation, the margin of error in calculating peak under the method outlined above would be 6.5%, approaching "unacceptable" levels.

determination in this situation evolved into a "close case/" raising "important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice." (J.R. Norton v. A.L.R.B, op cit.)

Below is set forth, in its entirety, the rationale of the Executive Secretary in concluding that, utilizing the Scattini method, percentage of peak requirements for the petition had been met:

> Objection No. 1, that the Petition for Certification filed by the United Farm Workers of America, AFL-CJO (UFW) was not timely because it was filed when the Employer was not at fifty percent of its peak agricultural employment, is DISMISSED because, based on the employment figures submitted by the Employer with its objection petition as Exhibit B, and applying the method set forth by the Board in its decision in Luis A. Scattini & Sons (March 3, 1976) 2 ALRB No. 43, the Petition for Certification was filed at a time when the Employer was at fifty percent of its peak agricultural employment.
>
> If an employer employs two separate groups of workers who are paid on a different payroll basis, the Scattini formula is applied and peak is determined by computing separately the average number of employee days worked for the two classes of employees.
>
> Exhibit B attached to the Employer's election objections petition indicates that the Employer employes (sic) two groups of workers, "regular" employees and "daily" employees. In order to determine the Employer's employment figures for both the period the Employer claims to be its peak employment period (October 2 to 8, 1980) and the payroll period immediately preceding the filing of the Petition for Certification (November 27 to December 3, 1980), employment figures for the regular employees and the daily employees must be computed separately for each period.
>
> Using the figures submitted by the Employer in its Exhibit B, an application of the Scattini formula results in the following computations:
>
> Alleged peak payroll period
>
> Regular employees - The employment figure for the regular employees is determined by dividing 234

(the total for six days, not counting October 4, which was a Sunday, Ranch No. 1, Inc. (February 23, 1976) 2 ALRB No. 37; High & Mighty Farms (November 29, 1977) 3 ALRB No. 88) by six days which yields..... 39

Daily employees - The employment figure for the daily employees is determined by dividing 340 (the total employee-days worked from October 2 to October 6, the five consecutive days of highest employment in the relevant payroll period for the regular employees, Luis A. Scattino & Sons, supra 2 ALRB No. 43) by five days, which yields..... 68

Total employment figures for the alleged

peak payroll period is 39 plus 68, or..... 107

Payroll period immediately preceding filing of Petition

Regular employees - The employment figure for the regular employees is determined by dividing 193 (the total for five days, not counting December 1, 1980, which was a Sunday, or November 27, which was Thanksgiving, California Lettuce Co. (March 29, 1979) 5 ALRB No. 24) by five days, which yields..... 38

Daily employees - The employment figures for the daily employees is determined by dividing 95 (the sum of employee-days worked from November 29 to December 3, the five consecutive days of highest employment in the relevant payroll period for the regular employees) by five days, which yields..... 19

Total employment figure for the payroll period immeidately preceding the filing of the Petition is 38 plus 19, or 57

Since 57 is more than 50 percent of 107, the Petition for Certification was timely filed pursuant to Labor Code section 1156.4.

The Executive Secretary, in applying the Scattini formula, placed a particular interpretation on the language in that case which failed to reconcile the reference therein to "five consecutive days of highest employment" with the fact that the Sunday herein (10/6), a day when little or no work was performed during the peak

week, was not a representative work day. By stressing the word "consecutive" in the formula, the Executive Secretary included in his peak computation a day when no workers were employed, and eliminated a total of 156 employee-days from the peak calculation. The citation in Scattini to Ranch No. 1, supra, makes clear that non-representative work days are not to be counted and that the phrase "five consecutive days with the highest number of . . . employees" means five consecutive working days, not just any five consecutive days in the period.

Other specific language in the opinion lends further support to this interpretation.

> Under this . . . approach, . . . we would use statistics from the five consecutive days with the highest number of . . . employees. For the comparative period preceding the filing of the petition, two methods of computation are possible. (1) Use the five consecutive days of highest labor contractor employment within the two-week period preceeding the filing of the petition, or (2) . . . use employment figures from the five working days immediately prior to the filing of the petition regardless of whether those days fall within the two-week payroll period preceding the petition's filing. (Scattini, op. cit.; emphasis in original.)

The use of the terms "consecutive days of highest . . . employment" and "five working days" makes clear that non-work days are not to be included in determining the average number of employees per day.

Any additional doubt concerning the meaning of this phrases should be dispelled by the recitation in footnote 2 on page 4 of the Scattini opinion: "[T]he five working days immediately prior to the petition appear to have been September 4, 5, 6, 8, and 9." The conspicuous omission of September 7, a Sunday, demonstrates clearly that the Board meant not to utilize non-representative days in calculating peak and/or percentage of peak.

Applying these principles to the instant case, the appropriate percentage is still not attained. The "five consecutive days of highest . . . employment" during the peak period would yield an average of 85 employees per day (427/5). Add this to the 39 regular employees per day average and 124 is the result. During the eligibility week, an average of 19 daily employees and 38 regular employees worked for a total average of fifty-seven employees per day (Sunday and Thanksgiving not being included in the calculations).[16/]

Nevertheless, there is an ample basis for concluding that the correct percentage of peak was reached during the eligibility period, and the petition was timely filed. This particular method of calculating peak percentage is well-supported by Board precedent. The issue raised by these circumstances was framed in California Lettuce Co., supra, as follows:

> Does the Saikhon formula, which declares the proper measure is the "average number of calendar days in the payroll period,' require us to focus exclusively on the number of calendar days in the payroll period? Or is it more

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16. In Scattini, the Board stated that "where an employer's payroll is for fewer than five working days [i.e., daily] the relevant payroll period will be presumed to be at least five days long. It arrived at this number by analogy to Regulation section 20355 (currently section 20352, as amended) which provides in essence that where an employer's payroll period is fewer than five working days, any employee working during the five days preceding the filing of the petition shall be eligible to vote. In Jack Brothers and McBurney (1978) 4 ALRB No. 17, the Board stated that "where the Employer utilizes a seven-day payroll period for one group of its employees, it is unnecessary to look to the second portion of section 29352(a)(l) [setting out the five-day period] to define the eligibility of its daily paid employees, as the same eligibility period will serve both groups." Similar to Scattini, an analogy might be drawn in determining the peak figure here by utilizing the number of days in the weekly payroll period for averaging the daily employees.

consistent with our statutory mandate and the intent and unanimous holding in Saikhon if we interpret the language from Saikhon quoted above as directing attention to 'all the days of the payroll period[1] which were representative days?

The Board answered this question by holding that the Saikhon average should be obtained by dividing the number of employee-days by the number of days on which work was actually performed, rather than by the number of calendar days in the nay period. It stated that the utilization of calendar, rather than representative work days, was an "overly mechanical . . . unrealistic . . . approach [which] would require a petitioner to outguess the vagaries of weather and market, and night encourage employers to manipulate payrolls and work periods to effect the timing of elections." Further, the Board noted, the method utilized in the California Lettuce Company case was consistent with precedent, most notably Ranch No. 1, Inc., supra, and High & Mighty Farms, supra.

In the instant case, only three days during the eligibility week, vis-a-vis the "daily" employees, could be deemed "representative." Those days were December 1, 2 and 3. The average number of daily employees in that span was thirty. Add this to the average number of regular employees employed on representative days (thirty-eight)[17/] and the total average number of employees working during the eligibility period was sixty-eight. This figure is

17. As previously noted, under Scattini, where different payroll periods are used for different groups of employees, daily employee averages are determined separately.

greater than fifty percent of the peak average, or 122.[18/]

High and Mighty Farms, supra, is even more directly on point and supportive of the position set forth above. There, the Scattini formula was utilized. An average was determined for contract employees which did not include the first four days of the payroll/eligibility period, as these employees did not work during those days. Similar to calculations made above for the instant case, the Scattini average was determined using only the three representative days during the payroll period during which the contracted employees were employed,[19/] as opposed to the "five consecutive days" referred to in Scattini.

In its "Objections to Election and Petition for Hearing," respondent stated that a Board agent informed its attorney that the petition was timely filed, indicating that "for the payroll period immediately preceding the filing of the Petition he only analyzed the daily employees for the last three days of their employment . . . . that that method was supported by the . . . Board in the Scattini case." Respondent then argued that such was "an incorrect

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18. This peak average was determined by using all of the representative days (six) during the peak week, rather than just the "five consecutive days" approach.

19. The situation in High and Mighty demonstrates the ultimate cogency of the position adopted therein. Contracted employees worked a total of five days spread over two payroll periods, three in one period and two in the other. Thus, "[b]y averaging the numbers of seasonal employees over either full payroll period the Employer might not appear to be at 50 percent of peak at any time during this . . . harvest period. Such a method of determining whether the peak requirement is met could defeat the right of employees to choose whether they want union representation at times when the employer is actually at 50 percent of peak."

analysis,"[20] that "the computation method would be to use the 5 consecutive days of highest labor contractor employment . . . ."[21]

Thus, respondent alluded to the ambiguity present in determining peak under the Scattini formula, especially in light of the cases cited by it, which included Ranch No. 1, supra, and High and Mighty Farms, supra. The explanation by the Executive Secretary set forth above for the percentage of peak determination did not clarify these ambiguities, nor did it rely on the principles clearly established in Scattini, Ranch No. 1, High and Mighty Farms, or California Lettuce Company. For these reasons it is determined that respondent's litigation posture in regard to the challenge of the percentage of peak determination was a reasonable one. Accordingly, the make-whole remedy is not warranted for the period when respondent contested the certification and refused to bargain on that basis.[22]

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20. It is determined here that the Board agent in charge of investigating the petition was indeed correct in his analysis.

21. The fact that respondent does not use a labor contractor is not, as respondent maintains, a significant enough factor as to distinguish Scattini from the case at bar.

22. Additional support for the ultimate finding that the petition was timely filed may be discerned from the proscription against relitigating representation issues (see analysis above), thus leaving the prior determination on the peak issue undisturbed. Further, as noted in the California Lettuce Co. case, supra, under section 1156.3(c) of the Act, there exists "a presumption in favor of certification . . . and the burden of proof rests upon the party objecting thereto." Thus, while respondent framed the issue, essentially, as a legal one hinging on an interpretation of Scattini, it might have presented a factual argument, as set out in California Lettuce and commensurate with its burden of proof, that the three days utilized by the Board agent in his peak analysis were not "representative." Its objections, etc., do not contain any reference to this issue, and it therefore must be presumed that these three days were, in fact, "representative" of "a fluctuating work pattern." (See California Lettuce Co., supra, at p. 4.)

3. Respondent's Remaining Objections

By contrast, the litigation posture assumed by the respondent in regard to the two other objections to the election it raised cannot be deemed "reasonable" under controlling authority. The objections were grounded on respondent's assessment of a particular set of facts. Those factual issues, and the legal principles applicable thereto, were resolved in the representation case contrary to respondent's position, either by Investigative Hearing Examiner with the affirmance of the Board, or by the Executive Secretary. As reconsideration, at this stage, of these objections involves nothing more than rehashing the facts which were previously analyzed and recounted, no "novel" legal theories or "close cases" are presented. (See, e.g., George Arakelian, supra; A & D Christopher, supra.) Challenges to the election grounded upon such objections are therefore not considered to be undertaken in good faith. (Robert J. Lindeleaf, supra.)

a. Dismissal by Executive Secretary of objection based on Board Agent's alleged failure to properly police the polling area.

The thrust of this particular objection was that individuals were observed drinking beer within the quarantine area. Additionally, one individual, who, according to respondent, "clearly indicated characteristics of being under the influence of some debilitating substance," loitered in the polling area. At one point while the polls were open, he shouted, in the presence of others, that the employers were "son of a bitches, . . . that the company was not worth a shit."

The Executive Secretary, in dismissing this objection

without setting it for hearing, noted that respondent failed to submit declarations demonstrating that any improper electioneering or campaigning took place, that the voting was actually disrupted, that voters were threatened or coerced or that the outcome of the election was improperly influenced. Respondent relied on Perez Packing Company (1976) 2 ALRB No. 13, in support of its legal position with regard to this particular objection. The fact that no evidence was presented of electioneering or disruption of the polling distinguishes Perez Packing from the instant situation. There, groups of beer drinking individuals in close proximity to the polling site continually yelled and chanted union slogans while the election was in progress. Here the declarations in support of the employer's objections merely show that two groups of employees, some of whom were drinking beer, congregated within sight of the polling area. Further, there was no indication that the one-time utterance of the anti-company phrases disturbed the orderly progression of the polling.

In addition to the factual deficiencies inherent in respondent's contentions, this objection is legally insufficient to be utilized as a basis for setting aside an election. This Boarl, as noted above, does not apply the NLRB "laboratory conditions" standard in assessing election conduct. Rather, the Board will examine the circumstances of the election to determine whether, in fact, the employees were able to vote freely and without cocerion. (See, e.g.,D'Arrigo Brothers (1977) 3 ALRB No. 37). The sum total of respondent's proof did not reasonably support this conclusion.

This Board has declined to adopt the so-called Milchem rule

(as per Milchem, Inc. (1968) 170 NLRB 362), regarding prolonged conversations between parties and persons in the polling area waiting to vote.[23] (Superior Fanning (1977) 3 ALRB No. 35; Ruline Nursery (1980) 6 ALRB No. 33; S.A. Gerrard (1980) 6 ALRB No. 49.) In contrast to a per se approach regarding such conversations, the Board has stated that an inquiry should be made to determine whether the conversation(s) directly affected the outcome of the election. A vocal disturbance lasting but a few seconds, in and of itself, is insufficient to establish this point. (Ruline Nursery, op. cit.; D'Arrigo Brothers; Dairy Fresh Products (1978) 3 ALRB No. 2.) Hence, in the instant case, evidence pursuant to an objection concerning an inebriated employee loitering and uttering two short anti-company phrases, without more, would be inadequate, from a purely legal stand point, to overturn the election results. The fact that the offending individual was not a party nor an agent of a party further lessens the impact of his actions. (Matsui Nursery (1983) 9 ALRB No. 42; Ruline Nursery, op. cit.; Takara International, Inc. (1977) 3 ALRB Mo. 24; S.A. Gerrard Farming Corp., supra.)[24]

Notably, the state Supreme Court in J.R. Norton v. A.L.R.B., op. cit., discussed the Executive Secretary's dismissal of a similar objection:

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23. The "Milchem rule" essentially holds that such conversations, standing alone, are a sufficient basis to set an election aside.

24. Respondent has the burden of establishing an agency relationship, if any, and failed to do so herein. (S.A. Gerrard Co., supra.)

> Norton's next polling area objection is that the election site could not properly be supervised, a circumstance which impaired the integrity of the election because disruption occurred . . . . Norton's declarations merely disclose . . . (2) two drunks at one point during the five and one-half hours [the polls were open] tried to vote . . . . With respect to the two intoxicated persons, it is not shown that they requested to vote while any eligible voters were present, that they prevented any workers from voting, or that their presence in any way affected the outcome of the voting. It is thus clear that the declarations do not establish a prima facie case in support of Norton's claim that the election was disrupted. (J.R. Norton v. A.L.R.B., op. cit., pp. 24-25.)

Likewise, in the case at bar, no evidence was presented that any worker was prevented from voting by the allegedly drunken employee[25/] or that his presence "in any way affected the outcome of the voting."

Furthermore, as was the case in S.A. Gerrard Farming Company, supra,[26/] there was no showing that the complained-of conduct interfered with the free choice of the voters. The Executive Secretary was thus on firm legal ground in dismissing this objection. Questioning the dismissal cannot therefore be utilized as a good faith basis to challenge the certification herein, as no

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25. Respondent's declarations allege that the inebriated person in question made his objectionable statements when six other voters were present.

26. In that situation an individual (not an employee) was alleged, while the voting was taking place, to have shouted pro-union slogans, and to have made vulgar statements to a Board Agent defying his authority.

"novel" legal issues have been raised.[27/]

b. Dismissal, after hearing, of objection based on assemblage of large numbers at employees' homes.

In 8 ALRB No. 27, the Board affirmed I.H.E. Ismael Castro's decision on the following issue:

> Whether the UFW engaged in coercive and intimidating conduct during its election campaign by assembling large numbers of people during the early morning hours at the residences of prospective voters, and, if so, whether such conduct affected the outcome of the election.

The Board found that there was "no involvement of the UFW in that incident," and hence dismissed the objection without reaching the issue of the affect of the conduct on the outcome of the election.

In its brief, respondent merely re-analyzes the facts underlying its objection which were determined contrary to its litigation posture. As noted above, this Board applies the N'LRB rule against "relitigating" representation issues. By urging its own particular interpretation of the circumstances, respondent is attempting to re-try the representation case despite its statements,

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27. Respondent places great reliance on EDS-IDAB, Inc. v. N.L.R.B. (1982) 109 LRRM 2653 in support of its contention that a hearing should have been granted to litigate this issue. In that case, the Fifth Circuit found that the employer presented specific evidence of threats and violence. Additionally, an employee who was alleged to have been linked to an assault on a fellow worker sat close to the Union observer for ten minutes to one-half hour during the voting, by different estimates. Throughout the period the employee who wore a Union insignia engaged in continual conversation with voters and observers. Although the contents of these conversations were undisclosed, the Court noted that the employee's conduct at the polls was to be "considered cumulatively with the allegations of threats and violence." When so viewed, those facts raised substantial and material issues as to whether the proper election atmosphere was destroyed. Here, there was no evidence of threats or violence prior to the election, and the employee in question did not engage in any "conversation" with individuals at the polling site.

in effect, to the contrary. Consequently, it has not adopted a "reasonable" litigation posture with regard to this issue. (See, e.g., Robert J. Lindeleaf, supra.)

Respondent's argument on this point essentially ignores the findings of the Board and the IHE. It assumes that the incident to which it objected took place pursuant to the Union's "home vistation" policy, and was directed, organized, and encouraged by the Union. The evidence received .at the hearing, as found by the IHE and affirmed by the Board, established that while the Union nay have encouraged "home visitations" by groups of two or three individuals, it was not responsible for the assemblage of the group of twelve to fourteen individuals who were in the vicinity of the complaining employee's home.[28/] As noted in Matsui Nursery, supra, at p. 4, "actions of union supporters are not ipso facto attributable to the union absent a showing of some union involvement in or union instigation of the actions of the supporters.

Nonetheless, and continuing in this vein, respondent argues the applicability to the instant case of United Farm Workers of America, AFL-CIO (Marcel Jojola), (1980) 6 ALRB No 53. That case, as noted by IHE Castro, is patently distinguishable from the one at bar. There, during a strike, massed picketers (some fifty in number) surrounded a non-striker's residence, carrying signs,

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28. Respondent seeks to convey the impression that the group en masse approached or surrounded the house. The proof adduced at the hearing demonstated that only two or three individuals actually accosted and spoke to the employee, while the remainder were "gathered on the street . . . approximately 60 to 80 feet from the front of his residence." (8 ALRB No. 27; IHE Decision, p. 25)

chanting slogans, and shouting epithets at the occupants. In this case, there was a complete paucity of any such conduct: there was no "demonstration," nor were the actions of those who cane to the worker's home shown to be anything but peaceable and orderly.

In urging that the "home visitation" policy contributed to an atmosphere of "intimidation and fear" prior to the election, respondent also ignored a long-standing and fundamental tenet arising under the Act concerning the rights of individuals discussing Union organization to visit people at their homes, and the right of people to receive such visits. "We have determined that communication at the homes of employees is not only legitimate, but crucial to the proper functioning of the Act." (Silver Creek Packing Co. (1977) 3 ALRB No. 3; see also Sam Andrews' Sons (1982) 8 ALRB No. 87, and cases cited therein.)

Therefore, respondent's litigation posture with regard to this objection cannot be deemed "reasonable." It is grounded upon its own particularized view of the facts presented to the Investigative Hearing Examiner, a view which that Examiner found not to be supported by the evidence as a whole. The objection was additionally based on a position which conflicts with a well-established policy arising under the Act, that is, one of encouraging visits to workers' homes to discuss the merits of union organization.[29/]

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29. Respondent presented evidence that Oscar Mondragon, who was in charge of the organizational campaign involving its employees, had been convicted of arson some five years previous to the election. It attempted to draw an inference from these facts

(Footnote continued----)

B. Respondent's Reduction in Operations

General Counsel further alleged that respondent terminated 50% of it operations without notifying or bargaining with the UFW over the effects such a termination would have on the bargaining unit. Respondent was also alleged to have unilaterally discontinued bus transportation which it previously provided for its workers.[30/]

As indicated above in the stipulation of the parties, a total of nine irigators, three tractor drivers and a ground crew varying in size from ten to thirty employees were permanently laid off. Various management personnel were also laid off pursuant to the reduction. Respondent continues to have the same basic operation as it did before the scope of its enterprise was curtailed. Lastly, the parties stipulated that the reduction was "due to respondent's inability to obtain continued financial backing." Simply stated, the cut-backs were economically motivated.

(Footnote 29 continued----)

that the Union in appointing Mondragon to the position, contributed to the creation of "an atmosphere of intimidation and coercion." The Board noted in 8 ALRB No. 27, p. 2, footnote 1, that "the pre-petition activity of Mondragon was too remote in time to have affected the employees' free choice in this election and that no testimony was presented by employer's witnesses connecting that activity with the 1980 election." Accordingly, it affirmed the I.H.E.'s findings. Respondent cannot now reargue such facts and urge a different conclusion consonant with a "reasonable" litigation posture.

30. Although not absolutely clear, it appears that the workers for whom the bus transportation had been provided were those employees who lost their jobs due to the reduction in Respondent's workforce. General Counsel's brief states, "[a] further direct result of the particular closure was the cessation of bus transportation which had been provided to the land-off crew."

The chronology of the partial closure and the subsequent certification is noteworthy. Again, as reflected in the stipulation, the Union prevailed in a representation election held on December 15, 1980. The reduction in size of Respondent's operations took place "on or about January 1, 1982." The Union was not certified by the Board until April 1, 1982, and the Union did not request that negotiations commence until April 29, 1982.

Initially, it should be assumed that if an obligation to bargain exists at all, that obligation applies to bargaining over the effects of a partial cessation of an employer's business. (Pik D'Rite, Inc., et al. (1983) 9 ALRB No. 39; Cardinal Distributing Co., Inc. (1983) 9 ALRB No. 36, First National Maintenance Corporation v. N.L.R.B. (1981) 452 U.S. 666; Highland Ranch v. A.L.R.B. (1981) 29 Cal. 3d 843, 857, and cases cited therein.)[31/] Thus, if it is found that respondent had a duty to bargain with the Union after the Union's apparent election victory but before the Union's certification was actually issued, then respondent was obliged to bargain with the Union regarding the effects of its Fifty percent reduction in operations.

General Counsel contends that under both federal and ALRB authority, the duty to "notify a union about its decision to close and bargain with it over the effects of such a decision exists during the pendency of objections to elections which eventually results in certification of the union." (See Mike 0'Connor Chevrolet (1974) 209 NLRB 701; Celotex Corp. (1982) 259 NLRB No.

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31. Respondent did not dispute this point in its brief.

159; N.L.R.B. v. Carbonex Coal Co. (10th Cir. 1982) 679 F.2d 200; Thomas S. Castle Farms, supra.)

In D'Arrigo Brothers (1982) 8 ALRB No. 45, fn. 4, a distinction was drawn between the unilateral changes that are made after an election but before a certification is issued, and those changes that are made following the certification, but before an ultimate judicial resolution, during the peri9d when an employer challenges it via a technical refusal to bargain. The California Supreme Court in Highland Ranch v. A.L.R.B., supra, discussed this issue in light of that employer's contention that under Act section 1153(f),[32/] absent a certification, it was prohibited from bargaining with the Union, and thus could not be held liable for unilateral changes occurring prior to certification. The Court noted that under a line of federal authority, once a decision was made to "terminate bargaining unit employees' jobs . . . . 'the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision.[1] [Citing N.L.R.B. v. Transmarine Navigation Corp. (9th Cir. 1967) 380 F.2d 933, 939, and other cases.]" (Id., p. 857.) The Court determined that the purpose of section 1153(f) was "prohibiting an employer from entering into a 'sweetheart' arrangement with one or more competing unions, and to make it clear that under the ALRA, unlike the NLRA," (Id., p. 859), secret ballot elections, rather than voluntary

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32. ALRA section 1153(f) makes it an unfair labor practice to bargain with an uncertified union.

recognition, was the means by which an exclusive bargaining representative was chosen. The Court then acknowledged that because an election might not represent:

> [A] valid expression of the desires of the affected workers . . . , when employees or an employer level objections at an election that are sufficiently serious to cast doubt upon whether a union's initial victory will be sustained, section 1153, subdivision (f), may bear upon the situation. When the employer can establish that it entertained a good faith, reasonable doubt as to the representative status of a union that has not yet been formally certified by the ALRB, the proscriptions of section 1153, subdivision (f), may preclude a ruling that the employer acted 'at its peril' in refusing to bargain with a presumptively victorious union during the period of an election challenge. (Id., p. 861, emphasis supplied.)

Thus the Court left open for the Board to decide the issue of whether an employer acts "at its peril" when making post-election, pre-certification unilateral changes, intimating that the issue might hinge upon the good faith of the employer in challenging the election results.

The Board in Ruline Nursery (1983) 8 ALRB No. 105, resolved this question by holding that:

> [T]he good faith (or, as here, the lack thereof) motivating an employer's challenge to certification is . . . an issue bearing on the appropriateness of the makewhole remedy, but is not germane to the question of whether the employer violated section 1153(e) by making unilateral changes in terms and conditions of employment. We concur in the ALO's conclusion that Respondent's challenge to the UFW's certification does not justify or excuse Respondent's failure and refusal to bargain over changes in employees' terms and conditions of employment.
>
> Respondent's second defense is that it had no obligation to negotiate with the UFW regarding these changes because the changes took place after the election but before the certification of the UFW . . . was issued by this Board. The ALO correctly rejected this defense by pointing out that . . .'absent compelling economic considerations for doing so, an employer acts at its peril in making changes in existing terms and conditions of employment while the certification issue is pending before the Board.'"

While "compelling economic considerations" might well have motivated respondent's curtailment by half of its operations, no evidence was presented that these considerations had any impact on its refusal to notify and consult with the Union over the effects of these changes.

Recently, the Board reaffirmed the above-stated principle in Thomas S. Castle Farms, supra, by stating that it had adopted the NLRB rule that "an employer must maintain the status quo between the election and the Board's resolution of the certification issue where it appears a union might be certified." (Id., p. 9)

While the preservation, during the pendency of the election objections, of the "status quo" as it related to the scope of respondent's operations might have been impractical or impossible owing to economic exigencies, in these circumstances such language is construed to mean that an employer must maintain the status quo regarding its employees' representational rights vis-a-vis collective bargaining, and do nothing in derogation of those rights. Thus, despite a finding herein that Respondent maintained a "reasonable litigation posture" with regard to the Board's certification determination, it was nonetheless under a duty to notify and bargain with the Union in matters relating to the effects on bargaining unit employees of its post-election, pre-certification reduction in operations. Accordingly, by failing to do do, it is determined that Respondent violated sections 1153(a) and (e) of the Act.

RECOMMENDED ORDER

By authority of section 1160.3 of the Agricultural Labor Relations Act, Respondent Adamek & Dessert, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of respondent's agricultural employees.

(b) Specifically, failing to give the United Farm Workers of America, AFL-CIO (UFW) an opportunity to bargain with it about the effects on its employees of the decision of January 1, 1982, to discontinue a part of its business.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees regarding a collective bargaining agreement and, if an understanding is reached, embody such understanding in a signed agreement.

(b) In particular, upon request, bargain collectively with the UFW with respect to the effects upon its former employees of its partial termination of operations, and reduce to writing any

agreement reached as a result of such bargaining.

(c) Pay to those employees on its payroll set forth below, employed prior to January 1, 1982, their average daily wage for a period commencing ten days after issuance of this Order and continuing until: (1) the date it reaches an agreement with the UFW about the impact and effects on its former employees of its decision to discontinue its business; or (2) the date it and the UFW reach a bona fide impasse in such collective bargaining; or (3) the failure of the UFW either to request bargaining within ten days after the date of the issuance of this Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to bargain; or (4) the subsequent failure of the UFW to meet and bargain collectively in good faith with Respondent. In no event shall the back pay award for any employee exceed the lesser of either: (a) payment for the period necessary for the employee to obtain alternate equivalent employment; or (b) the amount the employee received in wages from Respondent in the season immediately preceding January 1, 1982, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. The Regional Director shall identify and determine the duration of the aforesaid season.[33/] The following employee classifications, laid off as of January 1, 1982, are to be

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33. Not enough data exists in this record to determine the appropriate period to limit respondent's back pay liability. Recently, in Pioneer Nursery (1983) 9 ALRB No. 44, the Board left to the compliance phase the issue of respondent's past practice re: work patterns to determine who would have been employed absent unlawful discrimination and thus who would share in the remedy. A similar situation is presented here.

included in the remedy: (1) nine irrigators; (2) three tractor drivers; and (3) members of the "bus crew" formerly under the supervision of foreman Raymundo Gomez.

(c) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the makewhole and backpay amounts, and interest, due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent any time during the period from July 1, 1981 to January 1, 1982.

(f) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with this Order, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

(g) Provide a copy of the attached Notice to each agricultural employee hired during the 12 month period following the resumption of its agricultural operations.

(h) Arrange for a representative of Respondent or a

Board agent to distribute and read the attached Notice, in all appropriate languages to Respondent's assembled employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following any such reading, the Board agent shall be given an opportunity, outside the presence of supervisors and management, to answer any questions the employees nay have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days after resuming agricultural operations, of what steps Respondent has taken to comply with this Order, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

IT IS FURTHER recommended that the certification of the (JFW, as the exclusive collective bargaining representative of all of Respondent's agricultural employees, be extended for a period of one year from the date, following the issuance of a final order herein, on which Respondent commences to bargain in good faith with the UFW.

DATED: September 30, 1983

MATTHEW GOLDBERG
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office of the Agricultural Labor Relations Board (ALRB or Board) by the United Farm Workers of America, AFL-CIO (UFN), the certified bargaining representative of our employees, the General Counsel of the ALRB issued a complaint which alleged that we, Adamek and Dessert, Inc., had violated the law. After all parties had an opportunity to present evidence, the Board found that we violated the law by not bargaining in good faith with the UFW and especially by not bargaining with the UFW over the effects to the workers of our reducing the size of our farming operations.

The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, and help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to held and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing any of the things listed above.

Especially:

WE WILL meet and bargain in good faith with the UFN for the purpose of negotiating a contract covering your wages, hours and working conditions.

WE WILL particularly meet and bargain in good faith with the UFW about the effects on former employees of our decision to discontinue part of our business operations.

WE WILL pay to each of the employees permanently laid off on January 7, 1982, a sum to reimburse them for our failure to bargain about

the effects to close part of our business.

ADAMEK AND DESSERT, INC.

_____

(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (619) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE

UNITED FARM WORKERS of AMERICA AFL-CIO
P.O. Box 1940, Calexico, CA. 92231
(714) 357-6270

William F. Macklin
Ewing, Kirk, & Johnson
636 State Street;
El Centro, Ca. 92243

April 29, 1982

Re: Adamek and Dessert, Inc. Negotiations

Dear Sir:

Pursuant to & union representation, election conducted among your employees on December 15, 1980, and a subsequent certification of our union as exclusive bargaining agent by the California Agricultural Labor- Relations Board Certification No. 80-RC-l-EC, we are requesting a negotiaions meeting with your company.

It is our hope that negotiations proceed smoothly and expeditiously. It is important that we receive and have the opportunity to review the information requested in the enclosures within the next two weeks. We additionally request that you lee us know what land you operated on by acres and by location each year for the years 1979, 1980, 1981, and 1932, and what the Company's projections are for 1983. Also please inform us what leases you have or had by acres and with whom for the years 1978, 1979, 1980, 1981, and 1982 and the disposition of any leases you no longer have and who now leases or in some other manner operates on that land. Production of this information is to our mutual benefit and basic to the union's ability to advance reasonable and substantive negotiation proposals

Enclosed you will find our first collective bargaining proposal. Additional proposals, including wages, will be advanced pending receipt of information from you and bargaining between the parties.

Please advise me of dates acceptable for our first negotiations 1 can be reached at the address and phone number on the letterhead above or at 805-822-5571. If you have any questions, please do not hesitate todcall or write.

Respectfully,

David M Martinez

David M. Martinez

EXHIBIT A

LAW OFFICES
EWING, KIRK & JOHNSON
A PROFESSIONAL LAW CORPORATION
826 STATE STREET
EL CENTRO, CALIFORNIA 92243

WILLIAM J. EWING
RUSSELL J. KIRK
CHARLES G. JOHNSON
JON P. LIEBERG
WILLIAM F. MACKLIN
RICHARD V. DAY
JOANNE L. YEAGER

July 19, 1982

OUR FILE NO
8-4555

Mr. Jesus Villegas
United Farm, Workers' Representative
P.0.Box 1940
Calexico, California 92230

Re: Adamek & Dessert, Inc.,

Case No. 82-CE-137-EC

Dear Mr. Villages:

I have just received a copy of the above stated charge. I have carefully reviewed the facts surrounding the election which was conducted at Adamek & Dessert, Inc. If you will remember, that was referred to as Case No. 80-RC-I-EC. The company diligently filed Exceptions to the election process. Those Exceptions were based essentially on the claim that, (1) the election was not held during the peak employment period end therefore was untimely, (2) conduct surrounding the election polling place would not allow for & free and unfettered selection of collective bargaining representative, and (3) the Union's policy which was originated and implemented by Mr. Oscar Mondragon of home visitations was intimidating and coercive and affected the results of the election.

Initially the ALRB dismissed all the Exceptions and denied the employer the opportunity to have a hearing. Upon a request for review, the ALRB conducted a hearing on the third issue i.e. the home visitation policy as coordinated by Mr. Mondragon. The Company is of the belief that the totality of the circumstances surrounding the election negated the employees of Adamek & Dessert, Inc. from freely choosing whether or not they wanted to be represented by your Union. Please note, that the election results were very close. Therefore, Adamek & Dessert, Inc. cheeses to test the certification of your Union by the Agricultural Labor Relations Board.

The only means allowed by law for testing certification is for the Company to refuse to bargain with your Union. At

EXHIBIT B

such time as the ALRB rules that such a refusal has taken place, the employer is then entitled to have the California Court of Appeals review the issue. Therefore, please accept this communication as the Company's expression of its desire to "technically refuse to bargain" in order to test the certification in the California Court of Appeals.

The Company would like to have this matter resolved as soon as possible, as I am sure the employees would too. In the furtherance of that desire, we are more than willing to immediately stipulate the relevent facts and have this matter heard as soon as possible before an Administrative Law Judge. The sooner that this matter is resolved, the sooner the Company and the employees will have some sense of “certainity” emanate from the process.

If you nave any questions or if I can be of any further assistance to you, please do not hesitate to contact me at your convenience .

Sincerely,

William F. Macklin
EWING, KIRK & JOHNSON
A Professional Law corporation

WFM:sg
CC: Adamek & Dessert
UFW – Keene, CA Office