Fresno, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HARRY TUTUNJIAN & SONS, PACKING, Employer, and FRESH FRUIT AND VEGETABLE WORKERS, LOCAL P-78-A, Affiliated with the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Intervenor.	)	Case No. 84-RC-2-F 12 ALRB No. 22

DECISION AND ORDER SETTING ASIDE ELECTION

Following a Petition for Certification filed by the Fresh Fruit and Vegetable Workers, Local P-78-A, (FFVW or Union), a representation election was held on September 11, 1984, among the packing shed employees of Harry Tutunjian & Sons (Employer).[1/] The Tally of Ballots showed the following results:

FFVW	44
No Union	7
Unresolved Challenged Ballots	10
Total	61

[1/]The Employer is comprised of two entities: one, a partnership, Harry Tutunjian & Sons (H.T. & Sons), consisting of

[fn. cont. on p. 2]

Pursuant to Labor Code section 1156.3(c),[2/] the Employer and United Farm Workers of America, AFL-CIO (UFW) timely filed objections to the election. An investigative hearing was conducted on March 4, 5, and 6, 1985, before Investigative Hearing Examiner (IHE) Stella C. Levy on three election objections set for hearing: (1) whether the unit of packing shed employees (excluding the field workers) constituted the appropriate unit; (2) whether an outcome determinative number of eligible voters were disenfranchised due to inadequate notice of the election; and (3) whether late notice of the election prevented the UFW from intervening in the election. In her Decision, the IHE found that the packing shed was located off-the-farm, and that, on the basis of legislative intent, the packing shed could be considered noncontiguous to the field parcels, pursuant to section 1156.2. The IHE determined that the shed employees did not share a community of interest with the Employer's field workers and that therefore the shed employees constituted an appropriate separate bargaining unit. The IHE further concluded that the election's notice provisions were adequate and that the UFW was not deprived of the opportunity to intervene in the election. Accordingly, the IHE recommended that the election results be certified. The Employer excepts to the IHE's ruling (1) that the appropriate

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[fn. 1 cont.]

Tutunjian and his two sons, Robert and Karnie; the second, consisting of the sole proprietorship of Harry Tutunjian (H.T.). The Employer contended at the hearing that for labor law purposes there was no legal distinction between H.T. & Sons and H.T.

[2/]All section references herein are to the California Labor Code unless otherwise specified.

unit consists only of packing shed employees and (2) that adequate notice of the election was given to employees.

The Board has considered the objections, the record, and the IHE's Decision and recommended Order of Certification in light of the exceptions and brief filed by the Employer, and has decided to affirm the IHE's rulings, findings, and conclusions only to the extent consistent herewith, and to dismiss the Petition for Certification.

The Employer farms 11 parcels of land in Fresno and Madera Counties, growing tree fruits (plums, nectarines, and peaches), almonds, grapes (table, raisin, and wine), tomatoes and melons. With the exception of almonds, raisins and wine grapes, all of the produce grown by the Employer (H.T. & Sons and H.T.) is packed into its packing shed located on an 80 acre parcel owned by the Employer. The shed is surrounded on three sides by almond orchards (which comprise most of the 80 acres) and fronts on a public street. Next to the shed is the Employer's business office, while 100 feet away is the Employer's shop.

Our analysis begins with section 1156.2, which states the clear intent of the Legislature that unless the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, all of the employees are to be included in a single bargaining unit. If the Board finds that the employees are employed in two or more noncontiguous geographical areas, it is then vested with discretion to determine the appropriate unit or units of employees.

In this case, the Employer's packing shed is located on

a parcel of land where the Employer's almonds are grown. Although the Employer's almonds are not packed in this shed, the packing operation is clearly on, as well as adjacent to, land owned and farmed by the Employer.

The IHE found specific legislative history exempting employees in certain packing sheds from the section 1156.2 requirement that the bargaining unit be comprised of all the agricultural employees of the employer. On May 21, 1975, at a legislative hearing before the Senate Industrial Relations Committee, an agreement between the FFVW, UFW and the Governor's representative was presented to the Legislature. That Statement of Intent reads as follows:

> It is the intent of AB 1535 and SB 813 that the board, in exercising its discretion to determine bargaining units in non-contiguous geographic areas, may consider processing, packing, and cooling operations which are not conducted on a farm as constituting employment in a separate or non-contiguous geographic area for the purpose of Section 1156.2. (Emphasis added.)

The Statement of Intent was a response to the FFVW's concern about protecting its interest in organizing "processing, packing and cooling operations which are not conducted on a farm." Thus, the language instructs the Board to use an "on or off a farm" analysis with respect to determining whether a packing shed is contiguous to the field operations.[3/]

We reject the IHE's interpretation of legislative intent

[3/] When a petition for certification is filed in relation to an employer who employs workers in processing, packing or cooling operations, as well as in field operations, the Regional Director

[fn. 3 cont. on p. 5]

to the effect that in order .for a packing shed operation to be considered "on-a-farm," the produce grown on the adjacent land must be packed by that shed. The choice of words in the Statement of Intent in reference to " . . . packing operations ... not conducted on a farm" indicates that the concern was only with the site of the shed in relation to the rest of the employer's farming operations, not with the types of crops grown adjacent to the shed or whether the crops are packed into that shed. This reading of the Statement of Intent is consistent with the Legislature's overall intent contained in section 1156.2, to the effect that all of an employer's agricultural workers employed in a single geographical area be included in one unit without regard to the types of work involved or the kinds of crops grown.[4/]

In only the second case to ever come before the Board, Interharvest, Inc. (1975) 1 ALRB No. 2, a unanimous Board

[fn. 3 cont.]

should include in his or her investigation of the appropriate bargaining unit an inquiry as to whether the processing, packing, or cooling operations are conducted on a farm. If such operations are conducted on a farm, the appropriate unit will consist of both field workers and workers employed in the processing, packing, or cooling operations.

[4/]The dissenting opinion pays little heed to the fact that the ALRA mandates one bargaining unit for all of the agricultural employees of an employer unless certain circumstances are found to exist i.e., those employees are employed in two or more noncontiguous geographical areas. Even then the Board has discretion to find that a single bargaining unit is nonetheless appropriate. The Statement of Intent is merely intended to make it clear that the Board could find a packing shed which is not on a farm to be in a separate, noncontiguous geographical area. Any exception from the basic legislative preference for one bargaining unit should be strictly construed. (Cf. Barnes v. Chamberlain (1983) 147 Cal.App.3d 762 [195 Cal.Rptr. 417].) Our dissenting

[fn. 4 cont. on p. 6]

interpreted the Act and the Statement of Intent as we have here. In that case, the UFW sought a bargaining unit which would exclude employees at a packing shed located at the intersection of two streets in Salinas. As the Board then stated:

> The two packing sheds in question are located off the employer's farm and the legislative history of which this Board takes official notice supports the position the Board may regard such off-the-farm packing sheds as constituting a separate and noncontiguous geographical area. See Statement of Intent published in Senate Journal, Third Extraordinary Session May 26, 1975.

Thus the Board determined that the Statement of Intent affected the creation of bargaining units,[5/] and that the Legislature intended for packing sheds that are physically off a farm to be

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[fn. 4 cont.]

colleague does just the opposite, elevating a narrowly defined nonstatutory proviso to a position of greater importance than the explicit statutory presumption favoring *a* single bargaining unit.

Even if we focus on the Statement of Intent alone, its language therein does not support the interpretation given to it by Member Carrillo. The Statement compels only a determination of whether the packing operation is on a farm or not on a farm. Looking at the definition of the word "on" one finds that it comprehends a wide range of locations of one thing with respect to another. "On" generally means that one thing is in physical contact with another. The packing shed here in question is in physical contact with a farm; it is not away from or off of a farm.

[5/]We disagree with our concurring colleague's conclusion that the Statement of Intent was simply a response to FFVW's concern with losing existing contracts. The FFVW was also concerned with future organizing, as evidenced by the newsletter (Exhibit 44) that issued to their membership immediately after passage of the Act ("IV. How The Act Benefits Our Union: Opportunities To Organize".) The FFVW had been organizing agricultural packing shed workers for years prior to the passage of the Act and was unlikely to lose interest just when the workers had acquired organizing rights under the Act. We also note that this case arose because the FFVW is using the processes of the Act to organize agricultural workers. Moreover, the Statement of

[fn. 5 cont. on p. 7]

considered for status as separate bargaining units.[6/]

In R.C. Walter & Sons (1976) 2 ALRB No. 14, where we again considered the Statement of Intent and the question of whether or not a shed was on a farm, there is further support for our conclusion herein. In that case, a shed was found to be "on-a-farm" because it was located adjacent to one of four vineyards belonging to the employer. The Board stated the following:

> The statutory language supports the conclusion that agricultural workers working in packing sheds that are on farms must be included in bargaining units of other agricultural workers. Since the packing shed involved in this case is located on land adjacent to other farmland owned by the employer, it is 'contiguous[1] for the purpose of the statute. Failure to include all employees was an error.[7/]
>
> (R.C. Walter & Sons (1976) 2 ALRB No. 14, at pp. 3-4.)

The Board's opinion in Walter focuses on whether the adjacent land is part of the employer's farm, not on whether the produce grown on such farmland is packed into the shed.

As the 80 acre parcel of almond trees in the instant case is clearly part of the Employer's farm and such farmland is located adjacent to the packing shed, the packing shed is

[fn. 5 cont.]

Intent clearly states that it is a clarification of section 1156.2 - a section which deals with bargaining unit determinations and organizing campaigns. Had the intent of the Legislature been simply to protect existing contracts the Legislature would have so stated.

[6/]Our concurring colleague would apparently overrule Interharvest and give the Statement of Intent no weight. Our dissenting colleague would appear to accept the Interharvest result but change the analysis. Neither approach comports with a logical reading of legislative intent.

[7/]It should also be noted that we disagree with the dissent's interpretation of the Walter case. Unlike our dissenting colleague we find no ambiguity in the quoted language.

contiguous for purposes of the statute and the Board has no discretion to establish more than one bargaining unit. The appropriate bargaining unit would thus consist of both packing shed and field employees. We therefore dismiss the Petition for Certification as it would provide representation for only the packing shed employees.[8/]

ORDER

By authority of Labor Code section 1156.3, the Agricultural Labor Relations Board hereby orders that the election heretofore conducted in this matter be/ and it hereby is set aside and the Petition for Certification be, and it hereby is, dismissed,

Dated: November 13, 1986

JYRL JAMES-MASSENGALE, Chairperson[9/]

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

[8/] In light of our conclusion, we need not determine whether the shed and field parcels are all located within a single definable agricultural production area. Additionally we need not reach the Employer's remaining exception as to inadequate notice of the election.

[9/] The signatures of Board Members in all Board decisions appear with the signature of the Chairperson first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

MEMBER HENNING, Dissenting and Concurring, in part:

The facts describing the Employer's operation in the case before us are not in dispute. Also undisputed are several legal conclusions which can be drawn from a review of those facts: (1) the Tutunjian partnership and sole proprietorship operation consisting of the packing shed and eleven parcels of land constitute a single employer (see Radio Union v. Broadcast Service of Mobile, Inc. (1965) 380 U.S. 255 [58 LRRM 2545]); (2) the shed is agricultural in nature and thus its employees fall within the jurisdiction of the Agricultural Labor Relations Act (ALRA or Act) (see Sequoia Orange Co., et al. (1985) 11 ALRB No. 21 and cases cited therein); and (3) the shed and field parcels are "contiguous" for purposes of section 1156.2 in that they are all located within one single definable agricultural production area. (Eqqer & Ghio Co., Inc. (1975) 1 ALRB No. 17.)

Based on these factors, the Agricultural Labor Relations Board (ALRB or Board) would ordinarily certify a bargaining unit

consisting of all the agricultural employees of the employer. (Lab. Code sec. 1156.2.) However, in this case we are asked to consider whether a unit consisting of only the packing shed employees is appropriate in light of legislative history pertaining to bargaining unit determinations for packing sheds. The petitioning union, Fresh Fruit and Vegetable Workers, Local P-78-A (FFVW or Union) argues that section 1156.2 of the Act as modified or clarified by the "Statement of Intent"[1/] published in the Senate Journal on May 26, 1975, authorizes the Board, in its discretion, to approve a separate bargaining unit of employees involved in "processing, packing and cooling operations which are not conducted on a farm" -- even if those operations are otherwise contiguous under the Act as written or construed.

The Investigative Hearing Examiner (IHE) examined the legislative history and the Statement of Intent.[2/] Focusing on the definition of the phrase "on the farm" found in that Statement, and the correlative definition of what constitutes "off the farm," the IHE concluded that the Tutunjian shed was not located on the farm since there is no functional relationship between it and the surrounding property. She therefore concluded that the packing shed employees may be certified as a unit

[1/]STATEMENT OF INTENT - It is the intent of AB 1535 and SB 813, that the board, in exercising its discretion to determine bargaining units in non-contiguous geographic areas, may consider processing, packing, and cooling operations which are not conducted on a farm as constituting employment in a separate or non-contiguous geographic area for the purpose of Section 1156.2.

[2/]The IHE's recitation of the facts relating to the legislative history of the Statement of Intent is found on pages 13 through 21 of her Decision.

separate from the field employees. She went on to examine the community of interests between the shed employees and the field employees to determine whether the shed employees should in fact comprise a separate unit.

For the reasons that follow, I disagree with the IHE's analysis and conclusions on this issue, as well as with those of my colleagues. I do concur with the majority in dismissing the Petition for Certification as it seeks an inappropriate unit.

I do not believe the Statement of Intent rises to the level of modifying in any relevant respect section 1156.2 of the Act. That section states:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

The Statement of Intent is not an amendment to the ALRA and cannot be accorded statutory significance. While the Statement was read into the Senate Journal, it was not adopted by the Legislature: neither the Senate nor the Assembly ever voted on it. As such, the Statement is only evidence of legislative intent. We must look to the specific language of section 1156.2 to determine the proper bargaining unit in this, as well as in all other, unit determination cases.

In the instant case, the shed and field employees employed by Tutunjian are all agricultural. Furthermore, since those operations are located within a single definable agricultural production area, they are contiguous for purposes of

section 1156.2 and should constitute a single bargaining unit.

My colleagues have elevated the Statement of Intent to a level akin to statutory language. I believe attributing this significance to the Statement is inappropriate. I also disagree with my colleagues' conclusions that the legislative history surrounding the Statement of Intent evidences the Legislature's intent to create a special situation where employees engaged in packing, cooling and processing operations of agricultural commodities may be certified as a separate unit, notwithstanding the clear language of section 1156.2. As noted by the dissent, then-Secretary of the Agriculture and Services Agency, Rose Bird testified[3/] that the Statement of Intent was merely a clarification of the Act in that the Act all along allowed the Board discretion to consider what constitutes the appropriate unit or units where packing sheds, as well as farms, are noncontiguous. Assemblyman Howard Berman, co-author of the Act, similarly testified at the Labor Relations Committee Hearing held on May 12, 1975. (See Exhibit 42.) Secretary Bird's testimony does not, in my view, support the conclusion that the concept of contiguity found in section 1156.2 has a different meaning when applied to packing sheds.

My colleagues proceed to analyze the issues posed herein by attempting to define the phrase "on the farm" contained in the Statement of Intent. Analysis of that issue is dependent on a discussion of the concern which led to the Statement of Intent. I

[3/]Public Hearing of Senate Industrial Relations Committee, May 21, 1975, State Capitol, Room 4203, Sacramento, California.

disagree with my colleagues that the Statement was meant to protect the FFVW's ability to organize packing shed employees.

My reading of the legislative history and the record in this case leads me to conclude that the FFVW's major concern during the period prior to passage of the ALRA was with the prospect of losing its existing contracts.[4/] The FFVW was concerned that the new law (the ALRA) required the inclusion of all of the employer's agricultural employees in a single unit. This would include packing shed workers where the shed was deemed agricultural. The Union had had contracts with sheds dating back to the 1930's, some of them under the National Labor Relations Board's (NLRB) jurisdiction. It was concerned that the new law would "destroy and nullify anywhere from 50 to 60 percent of [its] contracts..." (see testimony of Keith Jones, RT III:55-56, 59, 76; Exhibit 44).

The agreement of the parties referred to by Senator Dunlap during the Senate Industrial Relations Committee hearing relates to the concern that the United Farm Workers of America, AFL-CIO (UFW) could not file a petition for an election to include agricultural employees engaged in packing, processing and cooling operations where the FFVW had an existing contract. (See RT III:78.)

[4/] This is, of course not to say that the FFVW was not also concerned with its ability to organize employees at other operations where it did not have existing contracts. I take it for granted that a union's continued vitality is dependent on continuing organizing activities. However, it was the Union's concern with its existing contracts which prompted its involvement with the Legislature prior to the enactment of the ALRA.

In my view, the legislative history of the Statement of Intent does not support the conclusion that it was meant to protect the FFVWs ability to organize. To the contrary, I believe the Board would be remiss in its obligations to oversee election matters under the Act if it were to favor and protect one union's organizational abilities over those of another union. All agricultural unions (see section 1140.4(f)) are equally entitled to utilize the procedures and mechanisms established by the Act and the Board's regulations in their efforts to organize agricultural workers.

Focusing on the meaning of the phrase "operations not conducted on a farm" found in the Statement of Intent, I cannot ascribe the meaning attached to it by the dissent. From my reading, nowhere in the legislative history is there any support for the dissent's conclusion that "on the farm" means that a packing shed must be on the farm which produces the commodities that are packed in the shed. This is a strained reading of that phrase and can only be supported if one begins with the assumption that the purpose of the Statement of Intent was to protect the FFVW's organizational abilities. I do not suscribe to that assumption. As discussed by the majority, in the only prior case where the Board analyzed the "on the farm" language, it did not set a functional relationship requirement as advanced by the dissent. (See R. & C. Walter & Sons (1976) 2 ALRB No. 14.)[5/]

[5/]Unlike the majority, I do not believe the Board's Decision in Interharvest, Inc. (1975) 1 ALRB No. 2, is dispositive of this

[fn. 5 cont. on p. 7]

FFVW's own understanding of what constitutes on the farm or off the farm also sheds light on this issue. In a 1975 Executive Report, the Union attributes a very literal meaning to that phrase: agricultural employees employed "off the farm" means those working in such places as packing sheds or vacuum coolers. (Exhibit 44.) This seems to imply that any worker not actually working in agricultural fields is working off the farm.[6/]

Since passage of the Act in 1975, this Board has developed an extensive body of interpretive case law relating to what constitutes the appropriate employee unit for purposes of collective bargaining. That body of law is of necessity consistent with the clear intent of section 1156.2 of the Act that all the agricultural employees of an employer be included in a

[fn. 5 cont.]

issue. I do not profess to have greater insight into the purpose behind the Statement of Intent than did the Board Members who decided Interharvest, supra, but it is clear to me that those Board Members were not faced with the issues confronting us in the instant case. In that case, the Board approved of the Regional Director's exclusion of certain packing shed employees from the bargaining unit based on an agreement from the parties to that effect and on the Regional Director's determination that the agreement was not contrary to the purposes of the Act. The Board parenthetically took official notice of the Statement of Intent and, without any analysis or discussion, concluded that it could regard off-the-farm packing sheds as constituting a separate noncontiguous geographical area. However, the Board went on to specifically limit the exclusion of the packing shed employees from the unit to the limited circumstances of that case. (Interharvest, supra, 1 ALRB No. 2, at p. 7.)

[6/] The dissent cites this document in support of its functional relationship requirement (see footnote 6). I note, however, that the Statement of Intent quoted by the FFVW in that document is an earlier version and is not what was ultimately read into the Senate Journal. As such, it adds little to the discussion herein. If anything, a good argument can be made that the Legislature considered the language contained in the earlier version of the Statement of Intent and specifically rejected it.

single bargaining unit. (See Vista Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307, 323-324 for a discussion of the legislative intent favoring a grower-wide "wall to wall" unit.) While that section of the Act gives us some discretion to establish more than one bargaining unit when the employees work in noncontiguous geographical areas, I do not believe the Statement of Intent modifies or overrides section 1156.2 or requires that we create a separate analysis for representational cases involving packing sheds or coolers. In my opinion, the concepts, definitions, and analysis contained in our current body of law are sufficient and appropriate for situations such as the instant case. I for one am not prepared to cloud our analytical models based on a speculative interpretation of the Statement of Intent and its legislative history.

For the foregoing reasons, I agree with the majority that the Petition for Certification should be dismissed as the petitioning union seeks to represent only the packing shed employees.

Dated: November 13, 1986

PATRICK W. HENNING, Member

MEMBER CARRILLO, Dissenting:

I dissent from the majority's conclusions that the packing shed does not constitute a separate and appropriate unit and that the election be set aside on that basis. In my view, the Investigative Hearing Examiner (IHE) in her Decision correctly evaluated and applied the legislative history and intent to find the shed to be an appropriate unit.

In this case, the Board must determine whether the Tutunjian packing shed can be certified as a bargaining unit separate from the Employer's field operations. Labor Code section 1156.2 allows the Board discretion to certify separate units only when employees are employed in "noncontiguous geographical areas." However, aside from the words used, the statute does not define the term.[1/] The Board must therefore apply well-established

[1/] Thus, in non-packing shed situations, the Board has developed the Single Definable Agricultural Production Area (SDAPA) standard for determining whether two or more parcels of land are in "noncontiguous geographical areas." See Egger & Ghio Co., Inc. (1975) 1 ALRB No. 17.

principles of statutory construction in order to ascertain the Legislature's intent with respect to the Board's ability to certify packing sheds as "noncontiguous geographical areas." As the California Supreme Court stated in Highland Ranch v. ALRB (1981) 29 Cal.3d 848, 858, " . . . the object of all construction of statutes is to ascertain and give effect to the intention of the legislature . . . . In the analysis of statutes for the purpose of finding legislative intent, regard is to be had not so much as to the exact phraseology in which the intent has been expressed as to the general tenor and scope of the entire scheme embodied in the enactments.... [T]he obvious design of the law should not be sacrificed to a literal interpretation of such language." [Citations omitted.].[2/]

[2/]In R. Bernard Dickey v. Rasian Proration Zone No. 1 (1944) 24 C.2d 796, 802, the California Supreme Court also stated:

> In attacking the problem of statutory interpretation here presented it is essential to remember the basic principle unqualifiedly declared by this court on numerous occasions and well stated in 23 Cal.Jur. section 107, page 725, as follows: "It is a cardinal rule that statutes are construed according to the intention, or at least according to the apparent or evident intention or purpose, of the lawmakers. Such intention controls, if it can be reasonably ascertained from the language used. Indeed, it has been said that the legislative intent in enacting a law is the law itself. Accordingly the primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained if possible, and, when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute. In other words, as is declared by the code, 'in the construction of a statute the intention of the legislature . . . is to be pursued if possible.' [Code Civ. Proc., sec. 1859.] Certainly the language of a statute should never be so construed as to nullify the will of the legislature, or to cause

[fn. cont. on p. 3]

In this case, there exists legislative intent with respect to the Board's ability to certify packing sheds as separate bargaining units which is contained in an explicit Statement of Intent agreed to by the parties, adopted by the Senate Industrial Relations Committee in its hearings on the Agricultural Labor Relations Act (ALRA or Act), and published in the Assembly and Senate Journals as part of the official legislative history of the Act. The IHE's decision contains a full and excellent recitation of the facts underlying the adoption of the Statement of Intent. In May 1975, shortly before passage of the ALRA, the Fresh Fruit and Vegetable Workers Union (FFVW) expressed to the Legislature its concern that the proposed statutory language requiring all agricultural employees of an employer be included in one bargaining unit would preclude FFVW from retaining or organizing its traditional base of support, namely employees involved in the packing, cooling and processing operations of agricultural commodities. Drafters of the law expressed surprise upon learning about the very existence of FFVW or its traditional organizational base. In specific response to FFVW's concerns, the Statement of Intent was drafted to protect FFVW's organizational rights by providing the Board with discretion to certify packing sheds as separate noncontiguous geographical units where the " . . . packing

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[fn. 2 cont.]

> the law to conflict with the apparent purpose had in view by the lawmakers." (In re Haines, 195 Cal. 605, 612 [234 P. 883]; County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639 [122 P.2d 526].)

(See also Galleher v. Campodonico (1931 S.F. Sup. Ct.) 5 P.2d 486, 488-489.)

. . . operations are not conducted on a farm . . ."[3/]

The majority concludes that because the Tutunjian shed is physically located next to the Employer's almond orchard, it is "contiguous" for purposes of Labor Code section 1156.2, and hence the Board lacks any discretion to certify the shed as a separate unit. This conclusion, the majority and concurring opinion state, is consistent with the Legislature's intent behind Labor Code section 1156.2 favoring the inclusion of all agricultural employees in a single bargaining unit. I disagree.[4/] As the IHE noted:

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[3/]Nothing in the legislative history suggests that the Legislature intended to restrict, rather than protect, the ability of FFVW to organize new employees under the ALRA. Indeed, Labor Code section 1156.7 specifically provides that a collective bargaining agreement executed prior to the effective date of the Act would not bar a petition for a new election. Thus, in those cases where it had pre-Act contracts, FFVW would eventually have to file a petition for an election in order to be able to continue to represent employees it had represented prior to enactment of the ALRA. In order for FFVW to continue to represent shed employees separately, FFVW would have to have the ability to have any election in an appropriate unit consisting of only packing, cooling and processing employees.

In its Executive Report, reviewed by FFVW official Jerry Breshear prior to issuance to its membership, FFVW described how the ALRA provides future opportunities for the FFVW to organize unrepresented packing shed employees. See Exhibit 44, section 4.

[4/]Although then-Secretary of Agriculture Rose Bird testified that the Statement of Intent was merely a "clarification" of the Board's discretion to certify separate units where sheds, as opposed to farms, are noncontiguous, it is clear that the Statement of Intent was intended to define "noncontiguous," in cases involving sheds, in terms of whether the shed is "on-or-off-a-farm."

> The Statement of Intent creates a separate analysis for bargaining units involving packing sheds by shifting the focus from the distinction between "contiguous" and "noncontiguous" geographical areas to the distinction between "on the farm" and "off the farm." It would have been superfluous to issue the statement that a packing shed located off the farm constitutes a separate noncontiguous geographical areas if "off the farm" only meant "noncontiguous geographical area." (IHED, p. 22.)

Thus, the majority errs by focusing primarily on the physical relationship of the packing shed to the almond orchard as satisfying the "noncontiguous" language of Labor Code section 1156.2, rather than focusing on whether the shed is "on-or-off-a-farm" as required by the Statement of Intent.[5]/ Furthermore, regardless of the existence of legislative intent behind Labor Code section 1156.2 to include all agricultural employees in one bargaining unit, see Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.3d 307, 323-324, the fact remains that the legislative intent as evidenced through the Statement of Intent makes it clear that the Board could certify sheds as separate units despite the already existing proposed language of Labor Code section 1156.2. Thus, the specific legislative intent to protect FFVW's organizational abilities must take precedence over the otherwise general legislative intent favoring single bargaining units.

[5]/Contrary to the majority and concurring opinions, I am not elevating ". . .a narrowly defined nonstatutory proviso to a position of greater importance than the explicit statutory presumption favoring a single bargaining unit." As stated earlier, I am merely construing the statutory language in Labor Code section 1156.2 in light of the legislative intent as expressed in the Statement of Intent. See Highland Ranch v. ALRB, supra.

The Statement of Intent did not define what is meant by "on a farm." However, it is clear that the term should be construed liberally, consistent with the legislative intent in protecting the FFVW's ability to organize packing shed employees into separate bargaining units. The legislative intent was to expand the Board's discretion in this regard. The Board frustrates that overall intent by adopting a literal and narrow reading of the words "on-a-farm" in order to restrict, rather than expand, the ability of the Board to certify sheds as separate units.

The wording in the Statement of Intent, namely that " . . . packing . . . operations . . . not conducted on a farm . . . ", evidences an intent that there be some functional relationship between the packing being conducted and the farm being operated. In light of the clear legislative intent to protect the rights of packing shed employees to organize under the FFVW, the language of the Statement of Intent should be construed to allow sheds to be separate units unless the shed operation is inseparably part of the farming operation. Only if the packing operation is conducted on the premises (i.e. farm) where the crops are being grown is there such a functional relationship between the shed and the farm.[6/] Construing "on-a-farm" as meaning that

[6/]Despite Member Henning's assertion that no basis exists for my interpretation of "off-a-farm," FFVW's 1975 Executive Report, section II (Exhibit 44) explicitly makes reference to its understanding that the Statement of Intent would require that packing sheds located on land where the produce is not grown would be considered "off-a-farm." There is no evidence that FFVW's understanding was erroneous or was rejected by the Legislature in its deliberations over the Statement of Intent.

the shed must be on the farm which produces the very commodities to be packed into the shed is a logical construction, consistent with the clear legislative intent to protect the FFVW's organizational abilities.[7/]

In R.C. Walter & Sons (1976) 2 ALRB No. 14, the facts are distinguishable. There, unlike the present case, the shed which was found to be "on-a-farm" was adjacent to one of four vineyards whose produce was packed into the shed. However, the Board did state the following:

> The statutory language supports the conclusion that agricultural workers working in packing sheds that are on farms must be included in bargaining units of other agricultural workers. Since the packing shed involved in this case is located on land adjacent to other farmland owned by the employer, it is contiguous for purposes of the statute. Failure to include all employees was an error . . . . .
> (R.C. Walter & Sons (1976) 2 ALRB No. 14, at pp. 3-4, emphasis added.)

[7/]Developing a functional criteria in the "on-or-off-a-farm" analysis is not unprecedented. The Board developed such functional criteria in its approach to determining whether two separately located parcels of land are nevertheless in one contiguous geographical area when it formulated the Single Definable Agricultural Production Area standard in Egger & Ghio Co., Inc., supra, 1 ALRB No. 17.

The Employer's arguments that the IHE analysis could be defeated by the planting of a single fruit tree whose produce is packed into the shed is without merit. The Board would have the discretion to determine whether the planting of a single fruit tree, or even several trees would be substantial or minor enough to have an impact in the analysis or result. Similarly, the Employer's argument that the IHE's approach would lead to a race horse result is unpersuasive. As long as the Board's approach is clear and consistent, the same analysis and result as to the appropriate unit should ensue regardless of which union happens to petition for an election first.

The Board's language in R.C. Walter focused upon whether the shed was located on land adjacent to other farmland owned by the employer. It is impossible to say that the Board intended its reference to "other farmland" to encompass broadly any and all farmland producing any of the employer's crops regardless of whether the crops are packed into the shed. That precise question was not before it in R.C. Walter & Sons, as the other farmland involved in that case was yielding crops packed into the shed.

Applying the functional relationship analysis, I would find that the Tutunjian packing operation is being conducted off-a-farm since the almond orchard adjacent to the shed does not produce crops being packed into the shed. Accordingly, I would affirm the IHE's findings of fact and conclusions of law, and would find that the Tutunjian packing shed is noncontiguous for purposes of Labor Code section 1156.2.

Having concluded that the Tutunjian shed is noncontiguous, I would also adopt the IHE's recommendation that the Board determine whether the shed should nonetheless be included in a single bargaining unit with the Employer's remaining field workers. When two or more operations of an employer are in noncontiguous geographical areas, the Board still considers certifying one unit in light of the factors listed in Bruce Church, Inc. (1976) 2 ALRB No. 38.

Applying the Bruce Church factors to this case:

(1) Physical or geographical location; The shed is located within close proximity of all the parcels. The farthest

parcel is 16 to 17 miles away, with most parcels located within 1 to 4 miles of the shed.

(2) Centralized administration, labor relations: As noted by the IHE, top management and labor relations are centralized in Harry Tutunjian and his two sons, Robert and Karnie. Harry oversees the entire operation, Robert oversees most of the field parcel operations, and Karnie oversees the shed operation and the field parcels located in Madera County. The three men meet every morning to discuss the entire field and shed operations. They collectively decide on wages prior to hiring employees. The same central office exists for both the shed and field parcels. To the extent Harry Tutunjian & Sons owns some field parcels as well as the shed, the same checking account is used for those parcels and the shed.

(3) Common supervision; As to the shed operation, Karnie sets up the general guidelines as to supervision, but it is up to floorlady Bea Gonzalez and her assistants to implement the guidelines. Field employees are generally provided by labor contractors although there was evidence that Robert Tutunjian hired employees and supervised them. Karnie supervises the parcels located in Madera County.

(4) Interchange of employees; The evidence shows that interchange was sometimes frequent but the extent of it was not large. As noted by the IHE, workers were generally hired to work in the respective field or shed operations. The Employer-draws from its field employees when it is short of labor in the shed, and vice versa. The number of times this occurred in 1984 and how

many employees interchanged was largely disputed. Harry and Robert testified it occurred frequently, sometimes daily. Robert recalled three occasions when he brought up to 25 employees to pack but conceded that these were emergencies and highly unusual. Beyond that, Robert could only recall individual instances involving one or a few employees interchanging, mostly fork lift operators, truck drivers or irrigators who would stack or repair boxes, clean the shed and other such duties. One employee, Esther Salazar, recalled only five times when field employees were brought to the shed, although she believed that the packers supplied by the labor contractor also worked in the field in the morning prior to working in the shed. Harry estimated that the percentage of interchange was only 10 percent of the employees and that the same percentage applied in terms of shed employees who worked in the field both before and after the shed season.

(5) Similarity in skills, nature of work; The work at the shed is different than the regular field work. The shed employs primarily packers (comprising sixty percent of shed workers), while the rest are boxers and checkers, fork lift drivers, mechanics, and maintenance personnel. Field employees are engaged in thinning, pruning and harvesting. Mechanics, welders, fork lift drivers and truck drivers work in both the field and shed.

(6) Similarity in wages, hours and working conditions; Substantial differences exist between the hours, wages and working conditions of shed employees and field workers. These differences include: By whom they are hired; by whom they are supervised; who

handles their labor relations; the amount they are paid and their wage rates (hourly versus piece rate); classifications and the nature of their work; what time of day their work commences; how long their work season is; how frequently they are paid; from whom they receive their paychecks; where they receive their paycheck; on whose payroll they are carried; whether they punch into a time clock; and whether they eat in a lunchroom.[8/]

(7) Bargaining history: There is no history of prior bargaining.

In this case, although there exists centralized labor relations, there is not enough of a strong community of interest

[8/]Specifically, field and shed employees are each hired separately. Field workers can be hired by Robert Tutunjian but are mostly hired through labor contractors. With the exception of 20 to 30 workers provided by labor contractor Jose Ruiz (who also provides field workers)/ shed employees are hired by Karnie Tutunjian and floor lady Bea Gonzalez. Supervision and labor relations for field workers are generally handled by Robert while supervision and labor relations for shed employees are handled by Karnie or Bea Gonzalez. Field workers are not broken into strict categories; they do typical field work: pruning, thinning, harvesting, etc. Shed employees are classified as packers, box boys, checkers, fork lift operators and maintenance men. Field workers are primarily men; 60 to 65 percent of the shed workers are women employed as packers. Field employees are paid hourly wages; shed packers are paid piece rate while the rest (box boys, checkers, etc.) are paid hourly. The shed employees' hourly wages are different from the hourly field workers. Field workers are paid weekly and receive their checks in the field; shed employees are paid every two weeks and collect their checks from the Employer's business office. Field workers collect their checks from the labor contractors; shed workers are carried directly on Harry Tutunjian & Sons payrolls and receive Harry Tutunjian & Sons paychecks. Shed workers punch into a time clock; with the exception of some truck drivers, field workers do not. Shed workers eat lunch in a lunchroom; field workers do not. Field workers start work at 6:00 a.m.; shed workers start at 10:00 a.m. (after a certain volume of produce as been generated for packing). The shed workers season is generally June through September or October; field work season is longer (it is unclear on the record how much longer). However, neither shed nor field employees are provided medical or pension benefits.

to warrant one single unit/ given the Legislature's intent to protect the FFVW's organizational ability. Wages, hours and general working conditions of shed employees are different from those of field workers as are the skills inherent in their respective work. Interchange while frequent does not occur on a large scale and to the extent it does, workers remain on their respective field or shed payroll. Employees are for all practical purposes separately supervised. Even though the shed operation is integrated with the Employer's field operations, in the sense that the shed packs the produce grown in the field, this will almost always be the case when the Board is dealing with agricultural packing sheds. The Legislature presumably was aware of this but nonetheless gave the Board authority to consider sheds as separate bargaining units. Given the legislative intent to protect the ability of packing shed employees to be organized into a bargaining unit separate from field workers, I find the shed to be an appropriate separate bargaining unit.

ADEQUATE NOTICE OF ELECTION

I also find the Employer's exception that inadequate notice of the election was given to employees to be without merit. The facts show that the petition upon which the election was held was filed on Tuesday, September 11, 1984. After investigating the Employer's contention that the appropriate unit consisted of both field and shed workers, the Regional Director concluded that the unit of shed workers was inappropriate. He dismissed the election petition on Friday, September 14, notifying the Employer of his dismissal at about 5:00 p.m. A request for review filed by the

FFVW over the weekend was granted by the Board on Monday, September 17, and an election was ordered to be held as soon as possible which would allow for maximum voter participation. A pre-election conference was held at 2:30. p.m. on September 17.

At the pre-election conference, the Employer's counsel, Thomas Campagne, complained about holding the election on that same day because of the fact that the shed had closed on September 12 and no one was working. According to Campagne, Joseph Sahagun, the Board agent in charge of the election, responded that he had learned that the packing shed employees would be picking up their checks beginning at 4:30 p.m. that day. Sahagun asked the parties to cooperate in the distribution of notices for the election. The union representative agreed to cooperate but Campagne refused to do so, stating he did not believe the election should be taking place. Sahagun sent two Board agents to the Employer's packing shed at 4:00 p.m. to distribute notices regarding the election to workers coming in to pick up their checks.[9/]

Robert Tutunjian testified that shed workers normally get paid on a two-week basis; however, since the last day of work for the shed employees was September 12, the Employer decided to make

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[9/] Sahagun testified that he did not know if the two Board agents did in fact distribute the notices. However a declaration by Campagne admitted into evidence concedes this fact. Also, the testimony of assistant floorlady Esther Salazar shows that Board agents did distribute papers to workers as they walked into the Employer's premises to pick up their checks. Employee Marina Macias testified she saw many workers read a poster posted by Board agents on the fence at the entry to the Employer's property regarding the time and place of the election before they left without voting.

paychecks available as soon as possible. Thus, on the last day of work, the Employer wrote on a chalkboard that checks would be available on Monday evening. Robert testified that this announcement was written so everyone could see it. He further stated that not everyone came on the 17th to pick up their checks; he saw some employees come into the office to pick up their paychecks Tuesday through Friday. According to Robert, workers can come in and pick up their checks anytime they feel like it. He did not specify how many workers came on Monday to pick up their checks nor how many came on the following days.

There was substantial testimony that more people received notice of the election than the number who actually voted. Esther Salazar, an assistant floorlady, testified that on the day of the election, she saw about 100 packing shed workers gathered just before the polls opened. She saw Board agents handing out pieces of papers to workers as they entered the Employer's premises between 4:00 and 4:30 p.m. She also saw the Tutunjians, Bea Gonzalez and assistant floorlady Minnie Caballero in the Employer's office. According to Ms. Salazar, shortly before 4:30 p.m. while the workers were gathered, Minnie Caballero came out of the office and spoke to a group of workers waiting to vote. Minnie told them to go home because the border patrol was going to come and they were going to call the police.[10/]

Ms. Salazar testified that quite a few people left; she did not

[10/]The IHE overruled a hearsay objection as to what Minnie said to the workers on the basis that such testimony went to the question of whether workers had notice of the election.

know how many -- it was more than 10 but she did not know if it was more than 20. Ms. Salazar testified that she tried to stop them by telling them it was a lie and that the border patrol would not show up but people left anyway, saying they were afraid to vote because the border patrol would show up. Ms. Salazar told Xavier Sandoval, the FFVW representative, who also tried to stop people from leaving. According to Ms. Salazar, what Minnie had said was quickly repeated and spread among the workers.

Esther Salazar's testimony concerning Minnie's threat was corroborated by employee Marina Macias in full and by employee Maria Hernandez in part.[11/] Macias testified that a lot of illegals were in the group and that about 45-50 people left,[12/] while Hernandez put the number of people leaving at 40. Macias also testified that she saw some workers read the ALRB poster posted on the Employer's fence regarding the time and place of the election but they left without voting.

Diane Sanchez, another shed employee, testified she saw about 80 to 90 people close to the voting site. Sanchez did not testify about the threat to call the border patrol or the police. Sanchez, however, claimed that everyone knew the election would be coming up. She testified that prior to the layoff, Marina Macias told her and about 30 others during lunch that the election would

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[11/] Hernandez testified that when she saw a lot of people leaving she asked Minnie what was going on. Minnie answered that the workers were leaving because they were going to call the border patrol -- they had already called the police.

[12/] Macias first testified she saw 80 shed workers come to get their checks but later testified that the actual number was 97.

be held on Monday at 4:00 p.m.[13/]

Sixty-one persons voted, with 10 of them voting challenged ballots. The election was held over a two-day period, with the polls opened from 4:30 p.m. to 7:30 p.m. on both Monday and Tuesday, September 17 and 18. Board agent Sahagun testified that not more than 10 people voted on Tuesday, September 18.

Sahagun testified that in addition to distributing notices from 4:00-4:30 p.m. on Monday to workers who were picking up pay checks, he arranged for notices to be broadcast in Spanish on three local Spanish-speaking radio stations on Tuesday at half-hour intervals, from 10:30 a.m. to 7:00 p.m. Sahagun further testified that had the Regional Director not dismissed the election petition on Friday, he would have proceeded with his plan on Saturday for himself and other Board agents to go door-to-door and give workers notice, as well as to have aired radio spots over the weekend. However, because of the dismissal of the petition on Friday, he did not do so. He testified that generally once a petition is filed, workers know when an election will be held before notice is given out but he conceded he did not know if workers in this case knew a petition had been filed or if they knew the election would be held on the sixth day after the filing of the petition.

The Employer's eligibility list contained 303 names although the Tally of Ballots designated the number of voters at 283. This conflict is not resolvable because the Employer's

[13/]This testimony was not contradicted; however, neither was it corroborated by Macias when the latter testified.

payroll records were not introduced into evidence and the employee eligibility list was not qualified as a business record.[14/] Robert Tutunjian testified that at peak, they employ 220 to 280 workers in the shed daily, not counting truck drivers or mechanics. However, he conceded that he normally experiences daily turnover of 30 to 50 workers.[15/] Employee workers testified that the number of daily workers was less. Esther Salazar, an assistant floorlady, testified that as part of her duties, she walks around the shed and has the opportunity to have contact with all the shed workers. Before the election, she counted employees at least once a week, and excluding truck drivers, found about 140 workers working on any given day. Marina Macias, an employee who initiated the union organization at the shed and who served as a union observer during the election, stated that she collected union authorization cards among the workers in August. She counted the number of packers and box boys on three different

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[14/]The employee eligibility list, Exhibit 10, was a document compiled by the Employer's staff after the Union's election petition was filed. Administrative notice was taken that it was submitted to the Regional Director as part of the Employer's obligation to respond to the election petition. The Employer did not establish the necessary elements to qualify it as a business record.

[15/]If the Employer experiences daily turnover of 30 to 50 people, then over a two-week payroll period, a lot of different individuals would be eligible to vote during the relevant pre-petition payroll period. However, if Robert's testimony that there are regularly 220 to 280 daily jobs at peak is correct, then the eligibility list of 283 to 303 names would suggest very little turnover.

occasions.[16] and each time counted 137 to 140 employees.

ANALYSIS

It is clear that low voter turnout, standing alone, is not sufficient grounds to set aside an election. (Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99; S.W. Evans and Son (1948) 75 NLRB 811 [21 LRRM 1081].) The Board has held that an election will be deemed representative where there is sufficient notice to eligible employees, voters are given an adequate opportunity to vote, and there is no evidence of interference with the electoral process. (Leo Gagosian Farms, Inc., supra; Lu-Ette Farms (1976) 2 ALRB No. 49; Verde Produce Co., Inc. (1980) 6 ALRB No. 24. See also Versail Manufacturing, Inc. (1974) 212 NLRB 592 [86 LRRM 1603]; S.W. Evans and Son, supra.)

Over the years, the Board has consistently stressed that Board agents face peculiar difficulties in providing notice to agricultural employees because of the seven-day election requirement and because of the inherent high turnover in the work force. The Board has stated that responsibility lies first with
Board agents to provide adequate notice but that all parties are equally on notice of the short time limits and must make reasonable accommodations for holding elections within that time period, including participating themselves in efforts to notify

[16]She excluded from her count truck drivers and fork lift drivers, Robert Tutunjian testified that at peak they have up to 8 fork lift drivers, 8 truck drivers, and 2 to 3 yard men. They also employ up to 20 people repairing bins and boxes, although the average number is 5 to 8 people.

employees. (Lu-Ette Farms, supra/ 2 ALRB No. 49; Yamano Bros. Farms, Inc. (1975) 1 ALRB No. 9; Sun World Packing Corporation (1978) 4 ALRB No. 23; Leo Gagosian Farms, Inc., supra, 8 ALRB No. 99.) Thus the Board has held that Regional Directors must provide as much notice as is reasonably possible under the circumstances of each case. (Leo Gagosian Farms, Inc., supra; Verde Produce Co., Inc., supra, 6 ALRB No. 24.) The NLRB similarly requires that reasonable measures be taken to notify employees of an impending election. (Jowa Security Services, Inc. (1984) 269 NLRB 297 [115 LRRM 1212].)

The Board and national board's standard of requiring reasonable efforts to notify employees of an election does not include an obligation to provide actual notice to employees. This is particularly true of employees who are on layoff status or are away from work for personal, non-work related reasons where individual notification would be too great a burden on Board agents who have many responsibilities in the brief period between the filing of the election petition and the election. (Sun World Packing Corp., supra, 4 ALRB No. 23; Lu-Ette Farms, supra, 2 ALRB No. 49; Leo Gagosian Farms, Inc., supra, 8 ALRB No. 99.) In Leo Gagosian, the Board stated:

> We have implemented the duties imposed by the statute and our regulation by requiring the [Regional Director] to give as much notice as is reasonably possible under the circumstances of each case. Recognizing the exigencies of our election procedure and numerous responsibilities placed on Board agents upon the filing of a petition, we do not require that election notices be given individually to each potential voter, even in situations where the eligible voters are no longer working at the petitioned employer. "Thus even where some eligible employees fail to hear of an election

> because of notice difficulties, we shall nonetheless certify the results if the Regional Director provided as much notice as reasonably possible under the circumstances." Verde Produce Co., Inc. (1980) 6 ALRB No. 24. See also Sun World Packing Corp. (1978) 4 ALRB No. 23; Lu-Ette Farms (1976) 2 ALRB No. 49.

In Jowa Security Services, Inc., supra, 269 NLRB at 298 [115 LRRM 1212], the national board stated:

> The Board has never required that employees receive actual notice of an impending election. Rather, the standard has always been that reasonable measures must be taken to assure that unit employees are aware of their right to exercise freely their franchise in a Board-conducted election. This is traditionally accomplished through the posting of the official notice of the election in conspicuous places prior to the election. There is no requirement, for example, that eligible employees who are off duty during the posting period be individually notified of the election. See Rohr Aircraft Corp. 136 NLRB 958 (1962). It is sufficient to show that reasonable steps were taken to apprise employees of their election rights. (Emphasis in original, footnote omitted.)

What constitutes reasonable measures to provide notice is largely a question of fact, dependent upon the circumstances of each case. Nonetheless, *a.* party attempting to set aside an election bears a heavy burden of proof. (See Jowa Security Services, Inc., supra, 269 NLRB 297 [115 LRRM 1212]; California Lettuce Co. (1979) 5 ALRB No. 24.) There must be affirmative evidence in the record showing that workers, sufficient in number to have affected the results of the election, were disenfranchised as a result of the conduct of a party or the Board in not providing as much notice as was reasonably possible or in the scheduling of the election. (Leo Gagosian Farms, Inc., (1984) 10 ALRB No. 39; Jack or Marion Radovich (1976) 2 ALRB No. 12; Lu-Ette Farms, supra, 2 ALRB No. 49. See also Jowa Security

Services, Inc., supra.) In reviewing allegations that employees did not receive sufficient notice of the election, the Board must balance the strong need to assure that all eligible employees have been given an opportunity to vote against the competing policy considerations favoring prompt completion of election proceedings. (Versail Mfg., Inc., supra, 212 NLRB 592 [86 LRRM 1603]; NLRB v. Berryfast, Inc. (1984) 741 P.2d 1161 [117 LRRM 2151].)

A review of some cases is illuminating. In Lu-Ette Farms, supra, 2 ALRB No. 49, the Board certified the results of an election where only 56 of 112 eligible employees voted. Notices of the election were not handed out until the day of the election; over 50 percent of the eligible voters were not working that day and presumably did not receive notice. The Board noted that 40 of the 56 who did not vote last worked for the employer before the election petition was filed such that even if the notice of election had been disseminated the day the petition was filed, these employees might not have received it. The Board observed that the employer furnished a late and incomplete list of employees' names and addresses thus making any other means of notification (such as contacting workers at their addresses) largely a matter of guesswork. The Board went on the say that even if the employer had timely supplied a complete list, the Board would have declined to make individual notification a requirement as it is too great a burden for Board agents. However, the Board noted that addresses might be helpful in devising other means of notice such as the posting of notices in labor camps or community areas or the use of radio announcements

in appropriate areas. The Board reaffirmed the discretion of Board agents to devise the means of notice which are appropriate under the circumstances.

In Leo Gaqosian Farms, Inc. (1982) 8 ALRB No. 99, only 164 of 627 eligible employees voted (26 percent turnout). At the time the petition was filed, only 40 to 50 employees were working. Board agents visited every home for which there was an address on the eligibility list. The addresses were in 8 different towns as well as motels and labor camps. Board agents left official notices concerning the election and also posted notices in laundromats. Thirty-five announcements were aired on local radio stations. The union and employer similarly attempted individual notification and aired radio spots, and the employer attached a campaign flyer to 300 checks it distributed to employees. The Board again stressed that such efforts to give individual notification of the election were not mandatory and that Board agents exceeded their obligations in providing as much notice as reasonably possible under the circumstances. The Board certified the election despite the low turnout vote.

In Jowa Security Service, Inc., only 64 out of 314 eligible employees voted. Official Notices were posted in several locations at the employer's facilities where employees report to receive their paychecks. The election was conducted on payday. The union had mailed copies of the notice of election to all employees on the Excelsior list two days before the election (although the national board does not rely on this fact in its analysis). The Regional Director concluded that employees

received inadequate notice of the election and inferred that this was the cause of the low voter turnout. He based his conclusion upon the fact that employees performed their work at different job sites, and only went to the employer's office to pick up their checks paid on a biweekly basis; thus they were not likely to see the posted notices until the day of the election. The Regional Director reasoned that it would be "pure speculation to assume that all or a great majority of employees who did come into the employer's facility before the polls closed to pick up their checks actually saw the Notice of Election." The national board overruled the Regional Director's recommendation that the election be set aside, noting that no evidence was presented that in fact any employee did not see the notice of the election. The national board rejected the Regional Director's reasoning, finding that it would be equally speculative to conclude that employees did not see the posted notice. After noting that there is no requirement that actual notice be given to voters, only that reasonable steps be taken to apprise employees of their election rights, the national board went on:

> There is no evidence of any irregularity in the posting of election notices in this case. Accordingly, other than the naked assertion that the low turnout was a fortiori attributable to inadequate notice, there is no basis for drawing an inference that the lack of notice was the reason for the low voter turnout. Where employees fail to vote because of hospitalization, vacation, apathy, or any other normal conditions of life, we see no useful purpose in speculating *as* to the state of mind of employees who do not vote. In the absence of evidence that any employee eligible to vote was denied the right to cast a ballot, the reasons for an employee's failure to vote are irrelevant. Stiefel Construction Corp. 65 NLRB 925 (1946). Rather we prefer to rely on the untainted results of the well-established election machinery as the best evidence of employee sentiment. (269 NLRB at 298.)

In Verde Produce Farms, Inc., supra, 6 ALRB No. 24, however, the Board set aside an election where a 48-hour strike petition was filed, no employees worked the two days after the filing but 81 employees worked on the day the election was held. Board agents attempted to notify employees of the election by placement of radio announcements in local Spanish-speaking stations and by distribution of leaflets at the Calexico-Mexicali border. The union also distributed leaflets and the employer made some efforts to notify employees through its foremen. Of 222 eligible voters, only 66 (29.7 percent) voted. No strikers voted. only employees who worked on that day voted. The Board found significant evidence existed to conclude that employees who did not vote were disenfranchised due to lack of notice and that the election was scheduled so promptly that employees did not receive adequate notice. The Board however reaffirmed its previous holding that where the Regional Director has provided as much notice as is reasonably possible, the Board will certify the results of the election.

The question in this case is whether the Board agents took reasonable measures to assure that eligible employees received notice of the election. I conclude the Board agents did take such reasonable measures. At the time of the pre-election conference, the Board agents were aware that no workers were working since the previous Wednesday but that the employer had advised employees that they could pick up their paychecks on Monday afternoon. Thus Board agents had every reason to believe that scheduling the election at such time and place where

employees would pick up their paychecks would provide effective notice of the election to most of the Employer's workers. In accordance with such belief, the Board agents posted a Notice of Direction of Election at the entrance to the Employer's property where employees passed through to go to the office and collect their checks. Between 4:00 and 4:30 p.m., Board agents handed out Notices to those workers who arrived. In addition to these efforts, Board agents also scheduled the polls to be open from 4:30 to 7:30 p.m. on Tuesday so as to provide further opportunity to vote for any workers collecting their checks on Tuesday. In order to further notify any workers not planning to pick up their checks on Monday or Tuesday, Board agents aired announcements in Spanish on local Spanish-speaking stations every half-hour on Tuesday beginning at 10:30 a.m. until 7:00 p.m.

There was evidence that such efforts to provide notice were successful even though some employees did not vote after getting notice. Esther Salazar testified that workers stopped to read the notice posted at the entrance to the Employer's gate but left anyway without voting. FFVW witnesses estimated that between 90 to 100 eligible employees were gathered outside the Employer's office just prior to the opening of the polls, although 40 to 50 workers left after hearing Minnie Caballero's statement that the border patrol and police would be called. Board agent Sahagun testified that some workers voted on Tuesday, albeit less than 10 persons.

Compared to the affirmative record evidence that Board agents reasonably tried to provide notice and that a significant number of workers received notice, the Employer here has presented

no direct evidence that workers failed to receive notice or were denied the opportunity to vote. In the face of evidence that workers were advised they could pick up their checks on Monday and that many workers did so, the Employer produced no evidence as to how many workers did or did not pick up their checks on Monday or Tuesday. Robert Tutunjian did testify that he saw some workers pick up their checks Tuesday through Friday, but he did not specify how many. Of course, any workers picking up checks on Tuesday would have received notice and an opportunity to vote, and some workers apparently did vote on Tuesday. Despite the fact that the checks were distributed from its office, no payroll or office personnel was called by the Employer to testify as to how many checks were not distributed on Monday, Tuesday or any other day such that some estimation could be made as to how many workers did not receive notice.[17/] Similar to Jowa Security Services, Inc., it would be pure speculation under these circumstances to infer that the low voter turnout in this case was because of inadequate notice. Indeed there is affirmative evidence in the record that a substantial number of workers -- at least 40 to 50 -- left without voting for reasons other than failure to receive notice. In light of these facts the Employer has failed to show affirmatively that workers were disenfranchised as a result of inadequate notice procedures, the Employer has failed to meet its burden.

[17/]The Board can draw a negative inference from the Employer's failure to produce evidence of the number of checks not distributed during those two days.

The Employer contends that the Board agents failed to provide the kind of notice that was provided in Leo Gaqosian Farms, Inc., supra, 8 ALRB No. 99. However, the Board stressed in that case that such efforts by Board agents to provide individual notification were not mandatory even though only 40 to 50 were working, out of 627 eligible workers. The Board held that the Board agents exceeded their obligation to provide as much notice as was reasonably possible under the circumstances. Individual notification was also rejected in Lu-Ette Farms, supra, 2 ALRB No. 49, where 50 percent of the work force was not working on the day of the election. In the present case, Board agents had planned to give such individual notification over the weekend prior to the election but canceled those plans when the election petition was dismissed on Friday. Even after the Board reversed the dismissal on Monday and ordered the election to go forward, Board agents were still under no obligation to provide the laid-off employees with individual notification at their homes. All the Board agents were required to do was to take reasonable measures to provide notice to employees. In light of the known fact that employees were picking up their checks on Monday, the Board agents' decision to schedule the election on Monday and Tuesday without making efforts at individual notification appears to be imminently reasonable. As it was, the Board agents did make use of radio announcements, as was suggested in Lu-Ette Farms and utilized in Gaqosian, to provide workers with additional notice.

This case is different from Verde Produce Co. In Verde, the Board found that workers were disenfranchised due to lack of

notice where the only eligible employees who voted were ones who worked on the day of the election and none of the eligible employees on strike voted. In this case, without a showing as to how many employees did not pick up their checks on Monday or Tuesday, we cannot infer that in fact workers did not so pick up their checks and were denied the right to vote. Furthermore, the election in this case was not scheduled so promptly that it deprived workers of the opportunity to vote, as was the case in Verde Produce. The scheduling of the election on Monday maximized voter participation by allowing voters who were picking up checks to receive notice and to vote. The Tuesday polling hours coincided with the 7th day limit for holding elections after the filing of the petition and the notice procedures were otherwise regular. In light of the fact that Board agents are not required to give individual notification when workers are laid off, there appears little the Board agents could have done to provide employees any more notice and opportunity to vote. Those laid off workers who did not pick up their checks on Monday and Tuesday, and who may not have received notice through word-of-mouth or by virtue of the radio announcements were beyond the reach of the Board agents' reasonable measures to provide notice, a sometimes unavoidable fact of life recognized inherently by the statute's 7-day election requirements.

The Employer excepts to the IHE's crediting of the testimony by Diane Sanchez that Marina Macias told workers on the last day of work that an election would be held on Monday. The IHE found Sanchez' testimony credible in light of the fact that

Macias, the employee who brought the union into the shed and solicited authorization cards, would be familiar with the seven-day time limit for holding elections and would so inform the employees. The problem with the IHE's ruling is that Sanchez testified that Macias told workers the election would be held at 4:00 p.m. on Monday. This testimony is inherently unbelievable since first, neither Sanchez nor Macias would have had any way of knowing what time the election would be held and secondly, seven days from the filing of the petition is arguably the following Tuesday, not Monday. Furthermore neither Macias who testified at the hearing nor any other worker corroborated this evidence. I would not rely on this part of the IHE's ruling to support the conclusion that in fact workers knew that an election would be held on Monday.

The IHE found that the Employer's refusal to cooperate with the distribution of the notices hindered the election process. The Board need not rely upon this lack of cooperation since the only thing the Employer in this case could have done was to hand out notices of the election with its paychecks. The Board agents handed out notices of the election to workers going into the office to pick up their checks so that there was, in effect, no harm by the Employer's refusal to cooperate. However, the fact that the Employer did not suggest to the Board agents alternative means of notifying laid off workers of the election suggests that there existed no reasonable means of notifying the workers other than those employed by the Board agents. (Yamano Brothers Farms, Inc. (1975) 1 ALRB No. 9.)

One last issue remains to be discussed. The IHE found that Minnie Caballero's statement to workers gathered near the polling site (to the effect that if they did not leave, the border patrol or police would be called) was not fully litigated. The IHE admitted the testimony only for the limited purpose of showing that more workers than the 61 who voted actually received notice of the election. Nor was any such possible misconduct set for hearing as an election objection. Thus, the IHE observed that the question of whether Caballero, an assistant floorlady, was a supervisor or an agent of the Employer[18/] was not litigated and could be important in evaluating the effect of her misconduct. The question of her agency status could affect whether the Employer can object to the election based upon its own misconduct. (See Regulation section 20365(c)(5); Sun World Packing Corp., supra, 4 ALRB No. 23; Pacific Farms (1977) 3 ALRB No. 75; but see Perry Farms Inc. v. ALRB (1978) 86 Cal.App.3d 448 [150 Cal.Rptr. 495].) Furthermore, the issue of whether the workers were in fact undocumented workers was not litigated (even though there was evidence to that effect) although it would be necessary to show that some workers in the workforce were undocumented before it could be said that Caballero's statement would reasonably tend to coerce employees. Since the possible misconduct was neither alleged as an objection nor set for hearing, was not fully litigated, and no party excepted to the

[18/]Caballero had just come out of the Employer offices where Harry Tutunjian and supervisor Bea Gonzalez were present.

IHE's finding in this regard, I would not reverse the IHE or her rulings on this point.

I therefore would overrule the Employer's and UFWs objections and certify the results of this election. Dated: November 13, 1986

JORGE CARRILLO, Member

CASE SUMMARY

Harry Tutunjian & Sons Packing (PFVW)

12 ALRB No. 22
Case No. 84-RC-2-F

IHE DECISION

The Investigative Hearing Examiner (IHE) held a hearing on three election objections: (1) whether the unit of packing shed employees, which excluded field workers of the Employer, constituted an appropriate unit; (2) whether an outcome determinative number of eligible voters were disenfranchised due to inadequate notice of the election; and (3) whether late notice of the election prevented the UPW from intervening in the election. In her Decision, the IHE determined that the packing shed was located off-the-farm because it was not located adjacent to any parcel of land where the produce grown was packed into the shed. She then found, on the basis of legislative intent, that the packing shed should be considered noncontiguous to the field parcels, pursuant to Labor Code section 1156.2. The IHE determined that the shed employees did not share a community of interest with the Employer's field workers and that therefore the shed employees constituted an appropriate separate bargaining unit. The IHE further concluded that the election's notice provisions were adequate and that the UFW was not deprived of the opportunity to intervene in the election. Accordingly, the IHE recommended that the election results be certified.

BOARD DECISION

The Board found specific legislative history to the effect that the Legislature gave it the discretion to exempt certain packing sheds from the requirement of section 1156.2 of the Act that the bargaining unit be comprised of all the agricultural employees of the employer. The Board' determined that the clear language of a Statement of Intent by the Legislature granted such discretion only for packing operations which are physically not conducted on a farm. The Board stated that any such exception from the basic legislative preference for one bargaining unit should be strictly construed and pointed out that the only two prior Board cases, on this issue, interpreted the Statement of Intent similary. The Board then concluded that because the packing shed was located on the Employer's farmland the Board had no discretion to establish a separate bargaining unit for packing shed workers, as was requested by the Union, and dismissed the Petition for Certification.

CONCURRENCE/DISSENT

Member Henning concurred with the majority's decision to dismiss the petition for certification as it sought an inappropriate bargaining unit. However, he disagreed with both the majority and dissent on the issue of what weight to attribute to the legislative Statement of Intent in determining whether packing shed employees are part of the bargaining unit. Member Henning

believes that section 1153.2 of the Act which defines what constitutes the appropriate bargaining unit of agricultural employees is determinative of the issue presented. He does not believe the legislative history of the Statement of Intent supports his colleagues' conclusion that the Statement requires an analysis distinct from a section 1156.2 analysis where packing shed operations are involved. In addition to the clear language of section 1156.2, Member Henning believes the extensive body of case law the Board has developed over the years on unit determination questions is sufficient to accomodate an analysis of unit questions involving packing sheds. Finally, Member Henning disagreed with the the dissent's position that in interpreting the Statement of Intent's reference to agricultural operations not conducted "on a farm," a functional relationship is required. He believes this position is not supported by the legislative history of the Statement or by the Board's precedent.

DISSENT

Member Carrillo agreed with the majority opinion insofar as it finds that the Statement of Intent intended to protect the Fresh Fruit and Vegetable Workers Union's ability to organize packing shed employees into separate bargaining units and that the Board should utilize an "on-a-farm" analysis in determining whether a packing shed is in a noncontiguous geographical area. Member Carrillo dissented from the Board's conclusion that the Tutunjian packing shed was contiguous to the Employer's field operations because it was located next to the Employer's almond orchards, which almonds are not packed into the shed. He would require that the "on-a-farm" standard be liberally construed since the legislative intent was to expand, nor restrict, the ability of the Board to certify sheds as separate units. In order for a shed to be deemed "on-a-farm," the shed must be located on the land which produces the crops being packed into the shed. Member Carrillo would also reject the Employer's second objection concerning inadequate notice of the election and would certify the results of the election.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

HARRY TUTUNJIAN & SONS,

Employer,

and

FRESH FRUIT AND VEGETABLE WORKERS, LOCAL P-78-A, Affiliated with the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioner,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Intervenor.

Case No. 84—RC-2-F

Thomas E. Campagne, Esq. and James M. Schiavenza, Esq.
Campagne & Schiavenza, a Professional Corporation for the Employer

Thomas Tosdal, Esq.
Georgiou & Tosdal
for the Petitioner

Marcos Camacho for
the Intervenor

Derek Ledda, Esq.
for the Agricultural Labor Relations Board

DECISION

STELLA CONNELL LEVY, Investigative Hearing Examiner: This case was heard by me in Fresno, California on March 4 through 6, 1985.

STATEMENT OF THE CASE

On September 11, 1984[1/] a petition for certification was filed with the Agricultural Labor Relations Board (ALRB or Board) by Fresh Fruit and Vegetable Workers, Local P-78-A (Union or FFVW) seeking to represent the packing house workers at Harry Tutunjian & Sons (Tutunjian). In its response to the petition the Employer objected to the unit designation, contending that an appropriate unit would consist of all of its agricultural employees and not just the shed workers. On September 14, Delano Regional Director Lawrence Alderete dismissed the petition stating that the unit sought was inappropriate. Petitioner appealed the Regional Director's decision to the Board, which ordered the Regional Director to hold the election as soon as possible and to conduct an investigation followed by a written report concerning the unit question.[2/]

On September 17, an election was held among the packing house employees of Tutunjian with the following results:

FFVW	44
No Union	7
Challenges	10
Total	61

Objections to the election were timely filed by the Employer and by the United Farm Workers of America, AFL-CIO

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1. All dates herein refer to 1984 unless otherwise specified.

2. In October 1984 the Regional Director issued his investigative report which concludes that "the appropriate unit would include all the agricultural employees that work in the packing house and in the fields located in Fresno and Madera counties."

(UFW),[3/] the following of which were set for hearing:

1. Whether the election should be set aside because it was conducted among an inappropriate bargaining unit (Employer's Objection No. I and Intervenor's Objection No. 1);

2. Whether an outcome determinative number of eligible voters were disenfranchised because they did not receive adequate notice of the election (Employer's Objection No. 3); and

3. Whether the late notice of the election prevented the United Farm Workers of America, AFL-CIO from intervening in the election and, if so whether this affected the outcome of the election (Intervenor's Objection No. 3).

The Employer, the Petitioner and the Intervenor were represented at the hearing and were given a full opportunity to participate in the proceeding. ALRB attorney Derek Ledda was also present on behalf of the Regional Director. Upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law.

JURISDICTION

None of the parties to the proceeding has challenged the Board's jurisdiction. Accordingly, I find that Harry Tutunjian & Sons, a California partnership, is an agricultural employer within the meaning of Labor Code section 1140.4(c). I further find

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3. The UFW intervened after the election by filing post-election objections pursuant to 8 Cal. Admin. Code section 20365(a). The regulations allow "any person" to file election objections. I find that the UFW is a "person" within the meaning of Labor Code section 1140.4.(d) because it is a legal entity "having an interest in the outcome of a proceeding." The UFW did not intervene in the election itself for reasons discussed below under objection no. 3.

that the FFVW and the UFW are each labor organizations within the meaning of Labor Code section 1140.4(f).

BACKGROUND

Harry Tutunjian & Sons, a California general partnership, and Harry Tutunjian, a sole proprietor, farm tree fruits, grapes, almonds, melons, tomatoes and pomegranates on 850 acres located in Fresno and Madera counties. The partners are Harry Tutunjian and his sons Robert and Karnie. The property consists of eleven geographically non-adjacent and legally distinct parcels. The partnership owns five of the parcels (Ranch Nos. 4, 6, 8, 9 and 10) and leases two parcels (Ranch Nos. 7 and 11); and Harry Tutunjian, a sole proprietor, owns the remaining four parcels (Ranch Nos. 1, 2, 3 and 5). In addition to its farming operations, the partnership owns and operates a packing shed which is located on Ranch No. 1, the property of the sole proprietorship, at 2699 E. Manning Avenue, Fresno.

The Fresh Fruit and Vegetable Workers union has represented packing house and vacuum cooler workers since the 1930s. It has negotiated contracts under both NLRB and ALRB certifications. The FFVW is currently affiliated with United Food and Commercial Workers International. Local P-78-A and Local P-78-B were originally joined under administration of the International, but were later separated by geographic area. Local P-78-B has jurisdiction in the Imperial Valley of southern California and in Arizona. Petitioner, Local P-78-A, has jurisdiction in northern California, with its main office in Salinas. (Reporter's Transcript, Volume II at pages 34-36 or

RT 11:34-36.)[4/]

WHETHER THE ELECTION SHOULD BE SET ASIDE BECAUSE IT WAS CONDUCTED AMONG AN INAPPROPRIATE BARGAINING UNIT

Findings of Fact

The election was held among a unit consisting of the employees of the Harry Tutunjian and Sons packing house. The shed is located on Ranch No. 1 and faces Manning Avenue, a major thoroughfare. On the other three sides, it is surrounded by 80 acres of almond trees owned by Harry Tutunjian, the sole proprietor. The Employer's office is located on one side of the packing house and has its own separate entrance. (RT I:95) The machine shop is also located on Ranch No. 1 in a building within about 100 feet of the packing house. (RT I:106) The parcel of land closest to the packing house is Ranch No. 3, which is located approximately 1 mile away. The parcel of land farthest from the packing house is Ranch No. 11 which is located approximately 17 miles away. (See Attachment A which charts the geographical relationship between the farm properties and the packing house.)

The shed packs only produce grown by the Employer, but it does not pack all of the Employer's produce. Specifically, raisins, wine grapes and almonds are packed elsewhere. Almonds, the only crop harvested on Ranch No. 1, are sent to the Almond Association for packing. (RT I:83)

Administration of the Tutunjian family enterprise is centralized in the office on Manning Avenue. Top level management

4. Hereafter citations to the Reporter's Transcript will be abbreviated. The Roman numeral indicates the volume; the Arabic numeral indicates the page.

is carried out by Harry Tutunjian and his sons Robert and Karnie. (RT I:94) The three men meet every morning to discuss the day's activities. (RT II:61) Robert manages the Fresno ranches, Karnie manages the Madera ranches and the packing house, and Harry "does what he wants to". (RT II:106) Harry does not get involved in the area of labor relations. (RT II:85) His two sons set the overall policies, but the on-line supervisors actually implement the policies and handle all employment matters. In the packing house, floorlady Bea Gonzalez is the supervisor of the packers. The testimony of packing house employees indicates that packers are typically hired, fired, supervised and disciplined exclusively by Bea Gonzalez.

Approximately sixty percent of the packing house employees work as packers. (RT I:74.) Almost all of the packers are women and are paid on a piece rate basis. (RT I:88 and Ex. 10) About 30 percent of the employees are box boys. These are all men and are paid by the hour. The other 10 percent of the employees work as forklift drivers, maintenance men and clericals. (RT I:88, et seq.) They too are paid an hourly wage. All of the packing house employees are carried on the Employer's payroll with the exception of one crew which is provided by labor contractor Jose Ruiz. (Exhibit 10) All of the employees who work in the fields on the eleven parcels of land are hired through labor contractors. These workers are paid on an hourly basis.[5/]

Working conditions for packing house employees are

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5. Exhibit 10, the Employer's payroll records, indicates that those who harvested wine grapes were paid on a piece rate by the labor contractor.

understandably quite different from those of field workers, partially due to the differences in the nature of the work. The two groups work different hours and receive different rates of pay. (RT I:85-86,109) Wages for packing house employees are issued on Harry Tutunjian & Sons checks every two weeks. Field workers are paid weekly by labor contractors.[6/] Packing house employees punch a time clock whereas field workers do not. (RT I:90) A specially designated lunchroom is available for use by packing house employees which is never used by field workers. (RT I:89) The packing house opens with the first harvest in June, and closes after the grape harvest in September.[7/] The season for field workers begins earlier and lasts later than that at the packing house. (RT I:69,86) The Employer does not offer medical or pension benefits to either group of its employees. (RT I:88)

Within the packing house job categories are strictly delineated and employees work at the particular job they were hired to perform. Packers and box boys do not operate or maintain heavy equipment and machinery. These jobs are performed by forklift drivers, truck drivers, mechanics and welders. (RT I:105) Although this latter group of employees is headquartered at Manning Avenue, they perform their job functions at the most convenient locations. Trucks are kept parked outside the packing house. The drivers haul produce from the field to the packing house and from there to the cold storage facility. (RT I:71;

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6. The checks to the labor contractors, however, are drawn on the account of the legal entity which owns the particular parcel worked.

7. The shed opens briefly in October again to pack pomegranates.

RT III:30) Mechanics and welders work out of the machine shop located within 100 feet of the packing house. However, if farm equipment breaks down in the fields it may be repaired at that location. Packing house workers do not do field work, e.g. cultivation or harvest, during the packing season. (RT III:30; RT I:75)

Field workers are not separated from each other by job categories and all crews work all parcels of land. (RT I:64.) These employees do not work in the packing house as part of their job function. However, there were occasions during the 1984. season when field workers were brought to the packing house due to unforseen labor shortages. (RT III:6-7) Robert Tutunjian testified that on three occasions a whole crew was brought to the packing house when large numbers of new hires did not show up for work. (RT III:6)[8/]

Assistant floorlady Esther Salazar credibly testified that field workers have come into the shed, but this is not a typical or usual occurrence. (RT III:106) Her husband is one of the only employees who works at both locations. He is a yard man who is headquartered at the loading yard in the fields. He takes care of the pallets in the yard. About once a week he works around the packing house. On these occasions he does whatever job is

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8. Robert Tutunjian was a very guarded witness, particularly when testifying about crucial facts regarding the election objections. He appeared to have been well coached in his attorney's legal theory of the case and attempted to answer accordingly. Inevitably this approach caused him to contradict himself and appear untruthful. At times he was completely evasive saying that he did not have information that his father had testified was Robert's area of responsibility or that he should have known. See for example his testimony at RT III:16-18.

assigned to him. At times he stacks boxes of fruit; at other times he washes Robert's and Karnie's cars. (RT III:143) When field employees work at the packing house they continue to be paid by their labor contractor boss at the same rate of pay. (RT III:27) They are not put on the Tutunjian payroll and no records are kept which document their work at the packing house. (RT I:103) Analysis and Conclusions of Law

Overview

Analysis of any bargaining unit issue necessarily begins with the statute. Labor Code section 1156.2 provides:

> The bargaining unit shall be all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.

Under the statute the threshold inquiry is into the fact of contiguity. Where an employer's agricultural enterprise is contained within a "contiguous geographical area", the statute mandates one and only one bargaining unit for all of the employer's agricultural employees. Where an employer's operations are noncontiguous, the Board has discretion to determine the appropriate unit or units. However, although the Board has discretion to determine the geographical boundaries or scope of the unit, it has little discretion in determining the composition of the unit. John Elmore Farms (1977) 3 ALRB No. 16.[9/]

9. John Elmore is not, strictly speaking, correct in saying that the Board has no discretion in this matter. The Board has not interpreted Labor Code section 1156.2 as requiring that the unit include all the agricultural employees of the employer. Board

(footnote 9 continued on next page)

In excercising its discretion to define the scope of the unit, the Board follows NLRB 'precedent regarding multi-location unit determinations. Bruce Church, Inc. (1976) 2 ALRB No. 38. Although many of the factors considered by the NLRB are not relevant to the agricultural setting, the basic principles are "identical". John Elmore Farms, supra.

> The exception to employer-wide units, couched in terms of "non-contiguous geographical areas", reflects the Legislature's concerns with the bargaining unit when different employment patterns and work conditions are present in separated operations of an employer. Ibid, at p. 4.

The Board's discretion in determining the bargaining unit is limited only by the principle that the designated unit "have a direct relevancy to the circumstances within which collective bargaining is to take place." Kalamazoo-Paper Box Corp. (1962) 136 NLRB 134, 137. Where geographical areas are noncontiguous there is no statutory preference for the employer-wide unit nor for a multiplicity of units. The Board, however, has indicated that it prefers the employer-wide unit and it has adopted a legal presumption favoring one comprehensive unit over a multiplicity of units. Prohoroff Poultry (1983) 9 ALRB No. 68.[10/] Thus, where

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footnote 9 continued:

regulations at 8 Cal. Admin. Code sections 20352 and 20355 provide for the exclusion of supervisors and other classes of individuals from the bargaining unit. Before adoption of the regulations such exclusions were considered to be "debatable." See Grodin, "California Agricultural Labor Act: Early Experience" Industrial Relations, Vol. 15, No. 8, Oct. 1976.

10. Prohoroff refers to "a legislative preference for comprehensive bargaining units" but gives no citation in support of application of this presumption to noncontiguous geographical areas. The "comprehensive" or "wall-to-wall" bargaining unit

(footnote 10 continued on next page)

the unit issue is litigated in a representation hearing, the burden falls on the party advocating multiple units to overcome the administratively created presumption favoring a single unit.[11/]

To the extent that it is possible to extract a cohesive analysis from Board precedent, the following analytical pattern emerges from examination of the cases:

1. Are the parcels of land physically contiguous? If so, the Board will certify one and only one unit.[12/]

2. Are the parcels of land located within a single definable agricultural production area (SDAPA)? If so, the Board will certify one and only one unit.[13/] Eggers &• Ghio Co. , Inc. (1975) *I* A.LRB No. 17.

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footnote 10 continued:

concept refers to the inclusion of all agricultural employees of an employer within a single unit. This contrasts with the NLRB practice of separating employees at one location into multiple units bases on craft or job function. See Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307. The issue of the geographic scope of the bargaining unit is an entirely different matter. The legislature expressly permitted separate certification of employees working at geographically separate locations. However, once the geographic scope of the unit is determined, the Board is obligated to certify all of the agricultural employees of the employer within the designated geographic area.

11. Normally the party objecting to an election carries the burden of showing that the election should be set aside. However, where an election objection raises the issue of the scope of the unit, the Board has implied that the burden of proof rests with the proponent of multiple units even if it is not the objecting party. Prohoroff Poultry (1983) 9 ALRB No. 68; Cream of the Crop (1984.) 10 ALRB No. 43.

12. This result is mandated by the statute.

13. It is debatable whether or not this result is mandated by the statute. If "SDAPA" is synonomous with "contiguous geographical area" then the single unit certification is statutorily required. Joseph Grodin favored this interpretation because "the term 'geographical area' seems to connote something more substantial than a parcel of land." See "California Agricultural Labor Act: Early Experience", 15 Ind. Rel. No. 8, October 1976. However, it

(footnote 13 continued on next page)

3. If the parcels of land are neither contiguous nor within a SDAPA, do the employees who work at separate locations share a community 'of interest? This issue is resolved by consideration of the factors outlined by the Board in Bruce Church, Inc. (1976) 2 ALRB No. 38 in the light of the administratively created preference for an employer-wide unit.[14/]

Bargaining Unit Determinations and Packing Sheds

The legislative history of the Act indicates that the analytical pattern described above is not applicable to bargaining unit determinations for packing sheds. Rather, the legislative history manifests a clear intent to favor separate certification of a packing house when it is off the farm.

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footnote 13 continued:

is also possible to interpret the statute as mandating inclusion in one unit only those parcels of land which are physically touching. Under this interpretation, "SDAPA" is a broader concept than "contiguous geographical area". This latter interpretation is urged by a writer who argues that the Grodin approach constitutes an unnecessary self-imposed limitation on the Board's area of discretion in determining bargaining units. "Bargaining Unit Determination Under the Agricultural labor Relations Act", UCD Law Rev. 1978.

14.. Unfortunately, it is impossible to know how the Board will weigh the community of interest factors in any particular case. Compare for example Exeter Packers, Inc. (1983) 9 ALRB No. 76 with Cream of the Crop (1984.) 10 ALRB No. 4-3. In Exeter a union petitioned for a statewide unit. The workers were employed at two locations in Fresno and Monterey Counties, about 100 miles apart. Only one crop — tomatoes - was grown at both locations. One labor contractor hired workers of similar skills and under the same terms and conditions for both locations. There was little employee interchange but the company had no policy against it. The Board did not certify the statewide unit but decided on a unit of only the Monterey County employees. By contrast, in Cream of the Crop (1984.) 10 ALRB No. 4-3 the two parcels were located in Monterey and Imperial Counties, about 500 miles apart. A union petitioned for a unit of the Monterey County workers. Brocolli and carrots were grown on the Monterey property whereas only carrots were grown in the south. There was no common supervision with the exception of one supervisor in the carrots and there was little if any employee interchange. The skills and working conditions were similar for carrots at both locations but different for brocolli. Although the facts gave strong support to multiple units, the Board designated one statewide unit.

One of the only Board decisions to discuss the application of Labor Code section 1156.2 to packing shed workers is R.C. Walter & Sons (1976) 2 ALRB No. 14. In Walter, the employer's agricultural employees worked in four geographically separate vineyards and in a packing shed located adjacent to one of the vineyards. The shed packed only grapes grown on the parcel adjacent to it and on the other three parcels. A union petitioned for a unit which included all the field workers but excluded the packing house employees. The Board held that it could not certify the petitioned-for unit because the packing house was on the farm.

In reaching its decision in Walter, the Board considered the possible impact of the following "Statement of Intent" which was published in the Senate Journal, Third Extraordinary Session, May 26, 1975:

> It is the intent of AB 1533 and SB 813, that the Board, in excercising its discretion to determine bargaining units in noncontiguous geographic areas, may consider processing, packing and cooling operations which are not conducted on a farm as constituting employment in a separate or noncontiguous geographic area for the purpose of section 1156.2.[15]

The Board found that "[s]ince...the packing operations are clearly conducted on a farm, the Legislature did not intend the Board to have discretion to exclude the packing shed workers from the bargaining unit."

Legislative History

The testimony of petitioner's witness, Keith Jones, provides a context for evaluating the Statement of Intent cited

15. Assembly Bill 1533 and Senate Bill 813 resulted in the Agricultural Labor Relations Act (ALRA).

in Walter. Based upon his utterly candid, straightforward demeanor and based upon the clarity and consistency of his testimony, I find Mr. Jones to be a credible witness.

Keith Jones is a cantaloupe packer who has held elective office in the FFVW for over 20 years. In 1983 he was elected to the office he now holds as recording secretary and member of the Executive Board. The following narrative is a summary of Mr. Jones' testimony regarding the genesis of the statement of legislative intent quoted in Walter.

From 1965 until his death in a plane crash in September of 1981, Jerry Breshears was executive secretary and chief administrative office of FFVW Local P-78-B. He was also co-chair of the vacuum cooler negotiations held jointly with petitioner, Local P-78-A, and advised both locals on a variety of matters. Mr. Jones first met Mr. Breshears in 1959. Over the ensuing years a close working relationship developed between the two men.

On May 7, 1975, Mr. Jones and Mr. Breshears were driving from El Centro to Blythe when they first heard the news over the radio that the agriculture bill then pending before the legislature would mandate a single bargaining unit for all agricultural employees of a single agricultural employer. Later, on May 12th the two travelled to Sacramento where their first stop was the office of then Secretary of Agriculture Rose Bird. They explained to Secretary Bird their fear that the proposed legislation would nullify 50-60% of their existing contracts and curtail their ability to organize agricultural workers in the future.[16/] In

16. The FFVW also has contracts under NLRB certifications

response, Ms. Bird stated "that the bill in the present state was a so-called 'fragile coalition' unquote, and that . . . there was no way that . . . we could get an amendment to the bill."(RT III:57) Ms. Bird suggested that the allowance for separate certification of non-contiguous areas and/or a pact with the UFW would adequately protect the interests of the FFVW, but Mr. Breshears disagreed. The meeting recessed, during which time Mr. Breshears telephoned Daryl Arnold. Mr. Arnold was the director of Western Growers Association, a member of the "fragile coalition" referred to by Ms. Bird. It was widely assumed that the ALRA could not be passed without the support of Western Growers Association. Mr. Breshears told Mr. Arnold that if he did not intervene on behalf of the FFVW the union would strike all of the cantaloupe sheds in the western San Joaquin Valley.

When Mr. Breshears and Mr. Jones returned to Ms. Bird's office she told them that Mr. Arnold had called Governor Jerry Brown and that Governor Brown in turn had called her. She sent them to speak to some of the key legislators in order to "work something out."

Immediately upon leaving Ms. Bird, they went to the office of Senator John Dunlap, one of the bills co-authors. Again they explained their position. Senator Dunlap was sympathetic and stated that neither he nor his co-author, Assemblyman Howard Berman, had known about the existence of the FFVW. Senator Dunlap said that it would not be possible to amend the bill but that he would try to resolve the problem in some other way.

Later that day, Mr. Breshears testified before the Assembly Labor Relations Committee. Exhibit 42, contains a

detailed description of the position of the FFVW vis a vis the proposed ALRA in general and the unit issue specifically. It also contains Assemblyman Herman's response to Mr. Breshears which states in pertinent part as follows:

> ...[O]ur bill does provide one key area of discretion for the Board with respect to determining bargaining units and that is in the area where the site is noncontiguous. So that if that shed is not contiguous to that field, then the Board can determine a separate unit.

Mr. Breshears and Mr. Jones returned to El Centro the next day. On the following Monday Mr. Breshears returned to Sacramento alone. On May 21, 1975 the unit issue was raised again in a public hearing before the Senate Industrial Relations Committee. Relevant excerpts from that hearing follow:

> SENATOR STULL: Go over that again, Senator, relative to having this on file in both Houses. Is this related to what?
>
> SENATOR DUNLAP: A statement of intent. I don't have a copy of it. Maybe I do here. Rose, do you have a copy? Hold on a minute. I'd be glad to read it to you, Senator Stull. It's a statement of intent signed by both Assemblyman Herman and myself, and "it is the intent of AB 1535 and SB 813 to wit: that the board, in exercising its discretion to determine bargaining units in non-contiguous geographic areas, may consider processing, packing, and cooling operations which are not conducted on a farm as constituting employment in a separate and non-contiguous geographic area for the purpose of Section 1156.2".

SENATOR STULL: Why wasn't that, rather than to do it in this manner, why wasn't it included in the bill itself?

SENATOR DUNLAP: This was the agreement which satisfied the interests involved at the time, and that's just the way it was done. In other words, there's no problem; the parties were involved and made this agreement and were satisfied that this solved the problem, Senator Stull. And they so testified before Senate Finance. Mr. Jerry Brashears appeared at that time.

SENATOR ZENOVICH: Is Mr. Jerry Brashears here in the audience today? I guess not. Go ahead, Senator Stull.

SENATOR STULL: Strange deal . . .

SENATOR ZENOVICH: Well, let me say for the record that this whole hearing is being recorded as you can see. And that's for a purpose, so that there will be a record of what has transpired. We recorded the last hearing, so that if and when this bill becomes the law, people can look at the record to make some determination with respect to the legislative intent.

Now, Senator Stull, this agreement was evidently worked out among those present Monday in the Governor's office, and so this letter, as such, will be a letter of intent that will be printed in the Journal at the time that the bill is passed out of the Senate, if that be the case, as giving the public at large that information with

respect to what the intention was in connection with the packing shed people in connection with 1156.2 which is the section of the code that relates to the bargaining unit.

SENATOR ZENOVICH: So that everyone knows, I'm going to read it again for the record.

STATEMENT OF INTENT

It is the intent of AB 1535 and SB 813, that the board, in exercising its discretion to determine bargaining units in non-contiguous geographic areas, may consider processing, packing, and cooling operations which are not conducted on a farm as constituting employment in a separate or non-contiguous geographic area for the purpose of Section 1156.2.

SENATOR ZENOVICH: it's got two lines, unsigned. One says: "Member of the Senate", and the other line, unsigned, says: "Member of the Assembly". This will be inserted into the record, and on this statement of intent there are some signatures. And I guess one of them is: "REB", that's Mr. Breshears, is that right? ROSE BIRD: No, that's my initial.

SENATOR ZENOVICH: Oh, is that your initial?

ROSE BIRD: Yes, "Rose Bird".

SENATOR ZENOVICH: "Rose E. Bird". - Who's J.P.? Jerry Breshears? Spelled with a P?

SENATOR DUNLAP: B.

SENATOR ZENOVICH: And who's this one? Is that you,

Mr. Harming? Breshears is the one to the left. This one, well, that looks like a "JP" to me.

SENATOR DUNLAP: Jerry Cohen, Rose Bird, and Breshears.

SENATOR ZENOVICH: Yes, Ms. Bird.

ROSE BIRD: The reason why the letter of intent was placed in is that this is an agreement made by Mr. Breshears and Mr. Cohen as a clarification of the Act. In our reading of the Act, the Act all along allowed this discretion in the board in non-contiguous areas to consider packing sheds as well as farms that are non-contiguous. Mr. Breshears wanted that clarified. He was willing to accept *a* letter of intent and the good faith offer on our part and on the part of the UFW and on his part, and that's why the letter of intent is going in. That's why it was in a letter of intent and clarification only and not an amendment. SENATOR ZENOVICH: Mr. Henning, did you want to be heard on this?

JACK HENNING: Mr. Chairman, both of the unions are affiliates of ours. Both the affiliates discussed this letter of intent with us. It's a matter of great importance to remove any doubt that you may have on this because under the constitution of the AFL-CIO, the United Farmworkers would not be allowed to go on the ballot in any area or in any farm operation where the packing house workers have a contract with an agricultural packing house as distinct from a commercial house. This is a

matter of great importance. Both of our affiliates agreed to that letter of intent, but we don't want to have the slightest bit of doubt as to its validity because it affects the very future of the farmworker's union.

SENATOR ZENOVICH: All right. Any other questions from any members of the Committee relating to this subject matter? Senator Russell.

SENATOR RUSSELL: Inquiry. Is there any way, so that Mr. Henning's point and anybody else's point, so as to be no doubt, that that letter of ihtent can go along in the jacket with the bill and become part of the official ...

SENATOR DUNLAP: No, it wouldn't be part of the bill, Senator ...

SENATOR RUSSELL: I know it wouldn't be part of the bill but go along with it as each committee ...

SENATOR DUNLAP: You have my word that I'll present it to each committee, and you have my word, signed by Mr. Herman and I, that it will be published in both the Assembly and Senate Journal.

SENATOR RUSSELL: Well, I'm not concerned about it, but Mr. Henning is and others are, and I just was seeking some way which, if there are any fears out there, that they could be allayed.

SENATOR ZENOVICH: Do you have any comment on that, Mr. Henning?

JACK HENNING: I'm willing to accept the legal judgment of the Committee on this, but since questions of doubt were raised and since they affect the very existence of the Farmworker's union, I don't want to have any unfinished business on this question.

. . .

It is clear from Mr. Jones' testimony and the legislative transcripts that the legislature intended to protect the ability of the FFVW to organize packing shed workers except where the packing facilities are located on the farm. I find that the legislative history supports the Union's contention that the legislature created a presumption favoring the separate certification of an off-the-farm packing shed where a union seeks to represent the less inclusive unit. See Vista Verde Farms v. ALRB (1981) 29 Cal. 3d 307, 323-324- for a similar reliance on legislative hearings in analyzing legislative intent.

On and Off the Farm

The instant case is analogous to Walter in that the packing house here is also physically contiguous to the employer's agricultural property. Petitioner, however, finds a crucial difference between the two cases in the fact that the Tutunjian shed, unlike that in Walter, does not pack any produce grown on the property to which it is adjacent. Attachment B illustrates the distinction between this case and Walter. I find merit in the Petitioner's position. The issue here concerns the interpretation of "on a farm." Under the analysis adopted by the Regional Director in his written report, "on a farm" means "on any farm

property owned by the Employer." Under the petitioner's interpretation, the phrase means "on the farm whose commodities are packed in the shed."

The Statement of Intent creates a separate analysis for bargaining unit determinations involving packing sheds by shifting the focus from the distinction between "contiguous" and "noncontiguous" geographical areas to the distinction between "on the farm" and "off the farm." It would have been superfluous to issue the statement that a packing shed located off the farm constitutes a separate noncontiguous geographical area if "off the farm" only meant "noncontiguous geographical area."

A packing house which is physically adjacent to the farm cannot be separately certified just as two adjacent farm parcels cannot be separately certified. However, by virtue of the Statement of Intent, a packing house which is not adjacent to the farm is deemed to be located in a noncontiguous geographical area despite the fact that the two parcels are within a SDAPA.[17/] By contrast, two non-adjacent farm parcels located within a SDAPA are deemed to be located in a contiguous geographical area.

In Walter, the shed packed grapes grown on land adjacent to it. Thus, the shed and the farm were contiguous within the meaning of the statute. Here, the shed packs commodities grown on non-adjacent parcels of land. Thus, the shed and the farm are non-contiguous and may be separately certified. The fact that the

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17. It is likely that an agricultural packing shed will in fact be located within the same agricultural production area as the farm. Due to the perishable nature of agricultural commodities, there is a clear benefit in locating the packing house as close to the farm as possible.

shed is adjacent to the Employer's almond orchard has no more legal significance than if it were located adjacent to the Employer's greenhouses, or the employer's dairy. The operative factor is the relationship between the shed and the farm which grows the commodities that flow into the shed. Here, there is no functional relationship between the packing house and the surrounding property. I find that the Tutunjian packing house is located off the farm; therefore the employees may be certified as a separate unit.[18/]

Although the Tutunjian packing house employees may be certified as a separate unit, such certification should not issue if the packing house workers and the field workers share a community of interest strong enough to overcome the legislative presumption favoring separate certification. The factors relied upon by the Board in determining whether employees share a community of interest include the following:

1. the physical or geographical location of the parcels in relation to each other;

2. the extent to which administration is centralized, particularly with respect to labor relations;

3. the extent to which employees at different locations share common supervisors ;

4. the extent of interchange among employees from location to location;

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18. I note that there are a variety of cases where packing houses have been certified as a unit separate from the same employer's fields. Some of the ALRB cases include Veg-Pak (1976) 2 ALRB No. 50, Bud Antle, Inc., Case No. 76-RC-ll-E(R) and Masarani Melons, Case No. 78-RC-ll-EC. Where a packing house processes commodities of outside growers as well as its own, it is given separate NLRB certification even if the shed is on the farm. See Associated Produce Distributors (1976) 2 ALRB No. 47 and The Garin Co., 14-8 NLRB 138.

5. the nature of the work performed and the skills involved;

6. the terms and conditions of employment;

7. the pattern of bargaining history among employees.
Bruce Church, Inc. (1976) 2 ALRB No. 38.

The facts here indicate a very weak connection between packing house employees and field workers. Although administration and top level management is centralized, there is no common supervision of employees. Further, there was no evidence that employees themselves have any access to top level management. Petitioner's employee witnesses testified that supervisor Bea Gonzalez was their sole contact with management. (RT III:113) Harry Tutunjian testified that he does not get at all involved in the area of employee relations. (RT II:85) The Employer produced no employee witnesses to testify otherwise.

The job skills of packing house workers are inherently different than that of field workers. There is no evidence showing any similarity in the nature of the work performed by the two groups.

The evidence adduced at hearing indicates that there is no true employee interchange between the field and the packing house. Packing house workers do not get called to work in the fields. The fact that welders, mechanics and drivers work in both locations reflects the mobility inherent in their job functions and not an interchange of employees. The only interchange occurs when field workers are called upon to help out at the packing house on an emergency basis. It is clear from the testimony of the Employer's witnesses that this interchange is not part of the normal functioning of the packing shed. Robert Tutunjian described

those occurances as "unusual" and "out of the ordinary." (RT III:6,32) As soon as the emergency subsides the workers return to the fields. (RT II:106) There is no pay differential for packing done by field workers who continue to receive the same hourly rate for those hours spent at the packing house. (RT III:27)

Harry Tutunjian testified that there are no records which reflect time spent by field workers in the packing house. (RT I:101) The payroll records submitted by the employer contain one sheet labeled "Field Workers" which purports to show hours spent by field workers in the shed during the eligibility period. These records were admitted into evidence [Ex. 10] for the purpose of showing which materials had been submitted to the regional office in support of its claim that the unit was improper. These records were also used by the Regional Director to compile the eligibility list. However, the payroll records do not constitute credible evidence of interchange between the packing house and the field. Rather, I credit the testimony of Harry Tutunjian that field workers are not put on the Tutunjian payroll but continue to be paid by the labor contractor at the same rate of pay.

Although clearly there is no bargaining history between the Employer and the FFVW, some weight must be given to the fact that the Union has organized the less inclusive unit. The legislative history supports the conclusion that the extent of union organizing is an important factor in determining whether packing house employees should be deemed to be in a unit separate from field employees of the same employer. I further note that

although the ALRA is modeled after the NLRA, it does not contain the proscription found at NLRA section 9(c)(5) that "[i]n determining whether a unit is appropriate... the extent to which the employees have organized shall not be controlling." The absence of an equivalent to this section in the ALRA suggests that the legislature expected the ALRB to give some weight to this factor whenever it exercised its discretion to determine the geographical scope of the bargaining unit.

In summary, I find the following analysis to be appropriate when making bargaining unit determinations for packing sheds:

1. Does the shed pack a significant amount of produce from outside growers? If so, the shed is commercial and under the jurisdiction of the NLRB. If not, the shed is agricultural and under the jurisdiction of the ALRB.

2. Is the shed physically contiguous to the farm which produces the commodities packed by the shed? If so, the shed is on the farm and the Board will certify one and only one unit.

3. If the shed is off the farm, do employees working at the noncontiguous locations share a community of interest? This issue is to be analyzed in light of the legislatively created presumption favoring certification of an off the farm shed where the union has petitioned for a separate unit.

Following this analysis, I find that the Tutunjian packing house is located off the farm and that the packing house workers do not share a community of interest with the field workers. Therefore I conclude that the petitioned for unit is appropriate and T recommend dismissal of Objection No. 1 in its entirety.

WHETHER AN OUTCOME DETERMINATIVE NUMBER OF ELIGIBLE VOTERS WERE DISENFRANCHISED BECAUSE THEY DID NOT RECEIVE ADEQUATE NOTICE OF THE ELECTION

Findings of Fact

On Tuesday September 11, 1984- FFVW Local P-78-A filed its petition for certification. The Employer, in its September 12 written response to the petition, contended that the unit petitioned for was inappropriate. On Friday, the Regional Director issued his dismissal of the petition, from which the Union appealed. On Monday, September 17, the Board granted the appeal and ordered the Regional Director to conduct the election "as soon as possible" and "at a specific time and place which allows for maximum voter participation." (Exhibit 5) The election was subsequently scheduled for that same day from 4-: 30 to 7:30 p.m. and on the following day at about the same time. A total of 61 people voted in the election.

Wednesday, September 12 was the last day of packing at the shed. (RT II:88) On that day the Employer posted a notice on the blackboard stating that employees could pick up their paychecks the following Monday. (RT II:2) Diane Sanchez packed grapes during the 1984- season. She credibly testified, without contradiction, that on the last day of work Marina Macias told her and about 30 others at lunch that the election would take place the following Monday. Ms. Macias was the worker responsible for bringing union organizers into the Tutunjian shed. Previously, Xavier Sandoval had given each worker a flyer stating that there would be an upcoming election under the NLRB (Exhibit 40).[19/]

Joe Sahagun, the Board agent in charge of the election, testified regarding the Delano region's notice procedures. The

19. The Union had filed a petition with the NLRB before it realized that the shed was agricultural and not commercial.

Regional Director knew that most of the packing shed workers would be coming in to pick up their checks on Monday. Since the shed was already closed for the season, Monday was the only day within or near the seven day period when workers would have a reason to be back at the packing house. Mr. Sahagun and the Board agents assisting him discussed going to workers' homes over the weekend to notify them of the election as they had in Gagosian.[20/] However, since the Regional Director cancelled the election on Friday, this plan was never implemented. (RT III:196,216) On Monday at around 11:30 a.m., Mr. Sahagun called in to the Delano office from a location just south of Bakersfield. He was told that the Board had overturned the Regional Director's dismissal of the petition and that the election would be held that day.[21/] He immediately drove north to Delano where he picked up his election kit. From there he drove on to Fresno, arriving at about 2:00 p.m. (RT 111:203) The pre-election conference was held in Fresno from 2:30-3:30 p.m. with all the parties, except the UFW, participating.[22/]

Mr. Sahagun testified that normally both parties assist with the distribution of notices. In accordance with Board practice, he asked the Employer and the Petitioner to assist in

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20. Mr. Sahagun was one of the board agents who worked on the election in Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99 where there were notice problems similar to those in the instant case.

21. The testimony of Mr. Campagne and Mr. Gomez indicate that the Employer and the UFW were also informed that the election was to go forward at around 11:30 a.m.

22. The UFWs failure to participate is discussed in this decision at pp. 31 et seq.

the distribution of notices. Xavier Sandoval agreed, on behalf of Local P-78-A, to distribute notices. Mr. Campagne , however, on behalf of the Employer, refused to participate in the process. (RT III:197,208) Following the pre-election conference, the participants went to the polling site which was at the Tutunjian packing house. Notices were distributed to workers as they arrived to pick up their checks. On the following day, notice of the election was aired every half hour on three local Spanish language radio stations. The polls were open again but very few people voted the second day.

Esther Salazar has worked in the Employer's packing house for seven years. She and Minnie Caballero are the assistant floor ladies. These are non-supervisory positions helping supervisor Bea Gonzalez.[23/] Ms. Salazar testified[24/] that she arrived at the polls early on Monday to pick up her check before voting. She saw all of the Tutunjians, Bea Gonzalez, and Minnie Caballero in the office where the paychecks were being distributed. Outside the office, over 100 packing house workers were standing around waiting for the polls to open. Ms. Salazar observed Ms. Caballero walk out of the office and over to a group of prospective voters. Ms. Caballero told the group that everyone should leave because the Employer was going to call the Border Patrol. The word soon spread among the waiting voters. Ms. Salazar thought that

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23. Both assistant floor ladies were eligible to vote in the election. However, Ms. Caballero did not vote because "her religion doesn't permit her . . . and that women were not supposed to vote." (RT III:101)

24. Esther Salazar's testimony is contained at RT 111:96 et seq.

Ms. Caballero was lying. She so informed Xavier Sandoval and the two of them tried to stop people from leaving. Ms. Salazar testified that many of the workers were undocumented and she was unable to convince them to stay and vote. She further testified that about 4-0 to 50 eligible voters left the area in response to Ms. Caballero's threat.

I found Esther Salazar to be a credible witness. She answered questions from both union and employer attorneys in a candid, open manner. There was no sense of premeditation in her answers or of hostility in her voice. I credit her testimony regarding the above described incident because of her demeanor, because her testimony was uncontradicted, and because her testimony was corroborated by two other credible witnesses, Marina Macias and Maria Hernandez.

Analysis and Conclusions of Law

The burden of proof in a hearing on election objections rests with the party claiming that the election should be set aside. California Lettuce Co. (1978) 5 ALRB No. 24. Where the objecting party alleges that inadequate notice procedures resulted in a non-representative vote, the threshold determination is that of voter turnout. In cases where a high percentage of employees have cast ballots in an election, the Board will presume that notice was adequate. For example, in Yamano Brothers Farms, Inc. (1976) 1 ALRB No. 9, the Board handily disposed of the objection by noting "the simple fact that an extremely high percentage of workers, at least 103 out of 108, did in fact vote in the election." Similarly, in Admiral Packing Co. (1976) 1 ALRB No. 20,

where 117 out of 128 eligible employees participated in the electoral process, the Board found that the numbers alone refuted any claim of inadequate notice. On the other hand, where voter turnout is "relatively low", the Board will review notice procedures as well as the representative character of the vote. Lu-Ette Farms (1976) 2 ALRB No. 49. It appears from past Board decisions that the lower the turnout of voters is, the more strictly the Board will scrutinize the election.

The Employer submitted an eligibility list containing 303 names. According to the tally of ballots, however, only 283 people were potentially eligible voters. Sixty-one people voted in the election. Of these, 10 ballots were challenged. These figures indicate voter participation at about 25 percent, but this figure is misleading because it does not account for the high employee turnover during the payroll period. The averaging method adopted by the Board for calculation of peak and showing of interest is equally applicable to the determination of the representative character of the vote where there is high employee turnover. In Leo Gagosian Farms, Inc. (1982) 8 ALRB No. 99, the Board upheld an election with about the same percentage of voter turnout as here. Because of the turnover factor, the IHE calculated the average number of employee days and compared that to the number of names on the list. See also Leo Gagosian Farms, Inc. (1984-) 10 ALRB No. 39 at footnote 5. Application of the averaging method here yields a figure of approximately 120 average employee days.[25/] Comparing this figure to the number of voters

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25. This figure comports with the testimony of Petitioner's witnesses as to the daily average number of workers at the packing

(footnote 25 continued on next page)

yields a voter turnout figure of about 51 percent.[26/]

Having determined the percentage of voter turnout, the analysis moves to the question of whether an outcome determinative number of voters failed to vote because they were uniformed as to the time and place of the election.

The Board considered this issue in Gagosian, supra. In Gagosian, as here, the election was held after the season had ended making it difficult for Board agents to contact workers. The Board expressed its approach to analyzing the election objection as follows:

> Low voter turnout, standing alone, is not a basis upon which this Board will set aside an election. An election is deemed to be representative where there is sufficient notice, the voters are given an adequate opportunity to vote, and there is no evidence of interference with the electrol process. Ibid. p. 3.[27/]

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footnote 25 continued:

house. RT III:108-109. By contrast, Robert Tutunjian testified that about 280 people worked in the packing house everyday. I do not credit his testimony which is belied by a simple averaging of the employee list.

26. The calculation cannot be completely accurate because it is based on the Employer's payroll records which were never authenticated. Although, the tally of ballots indicates only 283 eligible voters, I based my calculation on the full number of names submitted by the Employer minus the sheet labeled "field workers". For a full discussion of the reasons for eliminating this group see page 25. However, even with inclusion of the "field workers", the voter turnout would be 4-2 percent.

27. I have carefully considered whether Minnie Caballero's threat to prospective voters constitutes "interference with the electoral process" and conclude that it does. However, I cannot justify setting the election aside on this basis despite the fact that an outcome-determinative number of voters responded by leaving the polls. An objection, not set for hearing, cannot be a basis to set aside an election unless the matter has been fully litigated. In this case the facts were interjected into the hearing by the

(footnote 27 continued on next page)

The Board looked to an earlier case, Verde Produce Company, Inc. (1980) 6 ALRB No. 24 for a definition of "sufficient notice"

> Thus, even where some eligible employees fail to hear of an election because of the notice difficulties, we shall nonetheless certify the results if the Regional Director provided as much notice as reasonably possible under the circumstances. (emphasis added)

Here, the Employer did not attempt to show that notice was insufficient in the Verde Produce sense. There was no evidence that even one voter was disenfranchised for lack of notice. As a matter of fact, during the hearing Mr. Campagne insisted that Mr. Sahagun had done as much as he possibly could to get notice to the workers.[28/]

The Employer's case is based entirely upon the proposition, disavowed by the Board in Gagosian, that low voter turnout alone will nullify an otherwise valid election. However, Board precedent is clear that the integrity of the electoral process is not compromised because voters fail to exercise their franchise. Verde Produce Company, Inc. (1980) 6 ALRB No. 24. In Gagosian, the Board pointed out that employees may abstain from voting "for a myriad of reasons other than notice, such as

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footnote 27 continued:

union to rebut the charge of inadequate notice by showing that there were more voters present than indicated by the tally of ballots. The parties did not litigate the matter as an election objection. Thus, for example, the Question of whether Ms. Caballero was an agent of the Employer was not litigated because it was irrelevant to the notice issue. Yet the agency question might be critical to the determination of the interference issue.

28. See, for instance, RT III:211 where Mr. Campagne states "...neither I nor the Employer is in any way accusing Joe, under the circumstances, of not trying his best to give notice".

indifference or other personal factors beyond the control of the Board or any party."

In Verde Produce Company, Inc. (1980) 6 ALRB No. 24, the Board set aside an election due to inadequate notice procedures which resulted in a 29.7 percent voter turnout. There, the Regional Director encountered notice difficulties after scheduling a 48-hour election due to strike circumstances.[29/] The Board found that an outcome determinative number of eligible employees did not vote in the election because they were not notified of the time and place of the election. Further, the Board found that the election could have been scheduled more than 48-hours after the filing of the petition to allow for adequate notice.

The instant case differs from Verde in several significant respects. Here the evidence indicates that notice was adequate but that other factors were responsible for the voter turnout. According to the testimony of three credible witnesses, more than 100 eligible voters were at the polling place at the time of the election. Forty to fifty of them left without voting because of Minnie Caballero's threat, but they all had notice of the election. The Board has held that notice that an election petition has been filed is tantamount to notice that an election will be held within a week of the filing date. Labor Code section 1156.3(a) (4); Carl Joseph Maggio, Inc. (1976) 2 ALRB No. 9.

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29. Labor Code section 1156.3(a) (4.) provides inter alia that elections shall be held within a maximum of seven days of the filing of the petition. However, if a majority of the employees are on strike when the petition is filed "the Board shall, with all due diligence, attempt to hold a secret ballot election within 4-8 hours of the filing of such petition."

Joe Sahagun, an experienced Board agent, testified that workers usually know when an election is going to be held, even before they receive the official notice. Further, there was credible testimony that the packing house employees were generally aware, through Marina Macias, that an election would be held on Monday.[30/] Furthermore, unlike Gagosian, here there was no evidence that voters had left the area. Thus, it is reasonable to infer that those few voters who did not hear of the election through word of mouth, or who may not have picked up their checks on Monday, would have heard about the election through the radio broadcasts. I conclude from this that eligible voters knew or should have known about the election and that any voter who failed to exercise the ballot did so as a matter of choice.

Here, unlike Verde, rescheduling of the election would not have increased voter participation. Monday was by far the best day to hold the election because the workers were returning to the packing house that day to pick up their checks. Otherwise, there was no other time during peak that employees would be gathered at the worksite. By adding a second day for voting on Tuesday, the Regional Director insured that all eligible employees had the opportunity to vote.

The Employer was completely non-cooperative with respect

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30. The election here was held on Monday, September 17, the seventh day following the filing of the petition. That Monday was also the logical choice for the election because the paychecks were distributed that day. Thus, it is entirely reasonable that the union would have told employees to expect the election on Monday even before the Regional Director distributed an official notice of the election date.

to notice.[31/] Regulation 20350(c) requires all parties, when requested, to "cooperate fully" in giving potential voters notice of an election. In Gagosian, the parties cooperated fully in notifying eligible employees of the time and place of the election. The employer attached a campaign flyer to each of the paychecks it distributed in the preelection period. Here, only the Union agreed to cooperate with the Board. The Employer could have handed out notices with the paychecks it distributed before the election but the Employer refused Mr. Sahagun's request for help. See also Sequoia Orange Co., et al. (1985) 11 ALRB No. 21.

In conclusion I find that the vote was representative and that the Regional Director gave as much notice as was reasonably possible under the circumstances. I further find that the Employer hindered the electoral process by refusing to cooperate with the distribution of notice. I therefore recommend that Objection No. 2 be dismissed in its entirety.

WHETHER THE LATE NOTICE OF THE ELECTION PREVENTED THE UFW FROM INTERVENING IN THE ELECTION AND, IF SO, WHETHER THIS AFFECTED THE OUTCOME OF THE ELECTION

Findings of Fact

Humberto Gomez manages the UFWs grape and fruit tree division in Madera, Fresno and Soledad counties. Gomez testified that approximately the last week in August he spoke to UFW

31. On the day the representation petition was filed, the Regional Director mailed Tutunjian ALRB Form 18 (Ex. 1) asking the Employer's assistance in notifying employees "that a petition for an election has been filed." Copies of an official notice to employees were enclosed with the request that the Employer "cooperate by posting such notices in conspicuous places." There was no testimony at hearing regarding whether the Employer cooperated in posting the notices.

organizer Roberto Escutio who reported that the Tutunjian shed workers wished to be organized by a union. Gomez told Escutio to investigate as to whether the shed was commercial or agricultural. (RT II:26)[32/] When some of the workers stated that they packed fruit from outside ranches, Gomez concluded that the shed was probably commercial. (RT II:39) However, he passed the information on to FFVW organizer Xavier Sandoval so that union could organize the workers. (RT II:27) Gomez expected Sandoval to call him back if he found out that the packing house was agricultural. (RT II:29) As Sandoval never called him back, he assumed the packing house was indeed commercial. (RT II:30)

The UFW was not aware that the workers at the Tutunjian packing house were agricultural employees until the morning of September 13 when Board agent Ricardo Ornelas called Humberto Gomez and informed him that the instant petition had been filed. Ornelas further stated that the Employer was contesting the unit and that the petition might be rejected for seeking an inappropriate unit. (RT II:4.) Gomez testified that, although he told Ornelas that the UFW intended to intervene, the UFW did not attempt to organize the workers because they expected the petition to be dismissed. (RT. II:37,38)

Gomez did not receive official notice that the petition had been dismissed until Regional Director Lawrence Alderete phoned him on the morning of September 17. (RT II:8} However, on that same day a Board agent called Gomez to inform him that the Board

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32. The UFW limits its organizational efforts to farmworkers under the jurisdiction of the ALRB.

had overturned the Regional Director's decision and that the election would be held that day and the day following. (RT II:12,30) The Board agent further informed the UFW as to where and when the pre-election conference would take place. Gomez expressed his intention to attend the pre-election conference but he was unable to drive to Fresno because of a scheduling conflict.

Analysis and Conclusions of Law

In one of its earliest cases, the Board addressed the question of whether an election should be set aside where inadequate notice prevented a union from intervening. V. V. Zaninovich (1975) 1 ALRB No. 24. The Board set aside the election in Zaninovich based on its finding that

> Board agents abused their discretion by scheduling the election and pre-election conference at such time as to prevent intervention by a party which had notified the agent of its intent to intervene, which used due diligence and reasonable efforts to intervene and which could have in fact intervened but for the overly hasty scheduling of the election by Board agents. Ibid, at p. 8.[33/]

The facts of this case, while bearing a superficial resemblance to those in Zaninovich, differ from that case in several critical respects. Here, the UFW notified the Board that it intended to intervene, but did not make any attempt to obtain

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33. V.V. Zaninovich incorrectly cites Sampsel Time Control, Inc. (1948) 80 NLRB 188 for the proposition that the workers' right to choose a collective bargaining representative compels allowing intervention in an election by a union which failed to exercise due diligence to get its name on the ballot. In Sampsel the issue arose in the context of a pre-election hearing at which the employer objected to intervention by *a* union which already represented a segment of its workforce and which had garnered the requisite showing of interest. The NLRB did not agree with the employer's argument that the union failed to exercise due diligence but rather found that the intervenor had a "right", to participate in the election.

the needed showing of interest. The testimony of Humberto Gomez is clear in explaining why the UFW did not collect the signature cards it knew would be necessary in order to intervene. Initially, the UFW was not interested in organizing the Tutunjian packing house because of its mistaken belief that the shed was commercial. The UFW relied on FFVW organizer Xavier Sandoval to refer the packing house workers back to the UFW if it turned out that the packing house was agricultural rather than commercial. However, for reasons unexplained by the testimony, that reliance was misplaced. The Union went ahead with its efforts to represent the packing house even after it learned that the shed did not pack for third parties and was, therefore, agricultural.

On the morning of September 13, Humberto Gomez was informed by Board agent Ricardo Ornelas that Local P-78-A had filed a representation petition at Tutunjian but that the unit was problematic. On the gamble that the petition would ultimately be dismissed for seeking an inappropriate unit, the UFW did not attempt to gather the 20 per cent showing of interest it needed in order to intervene in the election.

Unlike Zaninovich, there was no abuse of discretion by Board agents in scheduling the election. On the contrary, Board agents acted professionally by keeping the UFW apprised of the status of the Tutunjian petition throughout the pre-election period. The hasty rescheduling of the election was a necessary consequence of the Board's action overturning the Regional Director's dismissal of the petition in conjunction with the seven-day election rule. Labor Code section 1156.3(a)(4). In

Zaninovich the election was conducted in a negligent manner which prevented a union from intervening. Here, the UFW made a calculated decision not to collect signature cards, for which Board agents bear no responsibility. In Zaninovich the intervenor had collected the requisite showing of interest before the pre-election conference and could have participated in the pre-election conference as a party had it been permitted to do so. Here, the Intervenor could not have participated in the pre-election conference even if it had attended. Humberto Gomez, an experienced union organizer, knew that the UFW could play no role in the pre-election conference and that may have been a factor influencing his decision not to attend. (RT II:32)

In R.T. Englund Co. (1976) 2 ALRB No. 26 the employer objected to an election because the Teamsters were not included on the ballot although that union had made no attempt to intervene. The Board found that the Teamsters knew of their right to intervene, had time to intervene, but chose not to do so. Therefore, the board dismissed the objection. The facts here are similar in that the UFW knew of its right to intervene, had time to intervene, but chose not to do so.

I conclude that late notice did not prevent the UFW from intervening in the election. I therefore recommend that Objection No. 3 be dismissed in its entirety.

SUMMARY AND CONCLUSIONS

The evidence establishes that the Tutunjian packing house is located off the farm and that the election was held among an appropriate unit.

The evidence establishes that the vote was representative. The evidence does not establish that any eligible voter was disenfranchised due to inadequate notice procedures.

The evidence does not establish that late notice prevented the UFW from intervening in the election.

RECOMMENDATION

Based on the foregoing findings of fact, analysis, and conclusions of law I recommend that the Petitioner, Fresh Fruit and Vegetable Workers, Local P-78-A, be certified as the exclusive bargaining representative of the packing house employees of Harry Tutunjian & Sons, the Employer.

DATED: November 25, 1985

Respectfully submitted,

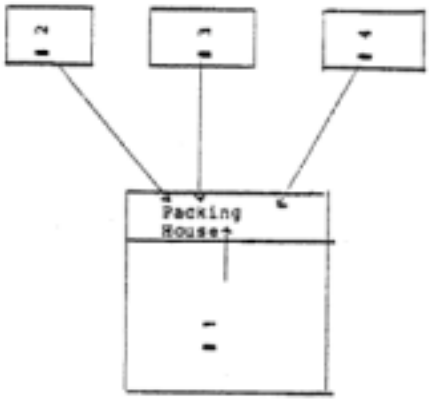
Stella Connell Levy

STELLA CONNELL LEVY
Investigative Hearing Examiner

TIITUNJIAN PROPERTY

Parcel Number	Owner	Number Of Acres	Crop Grown	Distance For Shed In Miles	Location
1	Harry Tutunjian	80	almonds	shed located here	2699 E. Manning Avenue Fresno
2	Harry Tutunjian	80	grapes/plums	1.5	7614 Chestnut Fresno
3	Harry Tutunjian	40	grapes	1	1499 So. Orange Avenue Fresno
4	Harry Tutunjian & Sons	40	grapes	2	8599 So. East Avenue Fresno
5	Harry Tutunjian	30	grapes	2.5	6184 So. Orange Avenue Fresno
6	Harry Tutunjian & Sons	40	trees/vines	4.5	4495 Orange Avenue Fresno
7	Lease by Harry Tutunjian & Sons	240	vines	4	West Avenue Fresno
8	Harry Tutunjian £ Sons	60	melons/trees	12	Avenues 7 and 34 Madera
9	Harry Tutunjian C Sons	30	trees/tomatoes	12	Avenues 7 and 33 Madera
10	Harry Tutunjian & Sons	45	trees/tomatoes	12	Avenues 8 and 32 Madera
11	Lease by Harry Tutunjlruii *t. Sons*	155	trees/vines	17	12666 Road 23 Mtidera
Packing Shed	Harry Tutunjian & Sons	n/a	n/a	n/a	2699 E. Manning Avenue Fresno

R. C. Walter



Harry Tutenjian & Sons