Castroville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| KUBOTA NURSERIES, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner. | Case No. 87-RC-13-SAL<br><br>15 ALRB No. 12 |

ERRATUM

Pages 7 and 8 of the Decision inadvertently refer to the Regional Director's attorney as "Regional Attorney" when in fact counsel for the Regional Director are more properly referred to as "regional counsel."

Dated: October 6, 1989

GREGORY GONOT, Acting Chairman

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

Castroville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| KUBOTA NURSERIES, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner. | Case No. 87-RC-13-SAL<br>15 ALRB No. 12 |

DECISION RND CERTIFICATION OF REPRESENTATIVE

On November 9, 1987, the United Farm Workers of America, AFL-CIO (UFW or Union) filed a Petition for Certification seeking to represent all the agricultural employees of Kubota Nurseries, Inc. (Employer). An election was conducted by the Agricultural Labor Relations Board (ALRB or Board) on November 16, 1987, with the Tally of Ballots showing the following results:

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| UFW | 22 |
| No Union | 9 |
| Challenged Ballots | 0 |
| Total | 31 |

The Employer timely filed objections to the election, two of which were set for an evidentiary hearing. The objections alleged that the Petition for Certification was not filed in accordance with Labor Code section 1156.4,[1/] which requires that the Board not consider such a petition as timely filed unless the

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

employer's payroll for the payroll period immediately preceding the filing of the petition reflects at least 50 percent of the employer's peak agricultural employment for the current calendar year. The Executive Secretary also asked the parties to brief the impact, if any, of the decision of the Court of Appeal in Adamek & Dessert, Inc. v. ALRB (1986) 178 Cal.App.3d 970
[224 Cal.Rptr. 366] on the determination of the peak issue in this case.[2/]

On July 26, 1988, Investigative Hearing Examiner (IHE) Marvin J. Brenner issued the attached Decision in which he recommended that the Employer's objections to the election be dismissed and that the UFW be certified as the exclusive representative of all the agricultural employees of the Employer in the State of California. The Employer filed exceptions to the IHE's decision with a brief in support thereof.[3/]

The Board has considered the IHE's recommended decision in light of the record and the exceptions and briefs of the Employer and has decided to affirm the IHE's rulings, findings and conclusions, and to certify the results of the election.

The Employer excepts to the IHE's finding that the Petition for Certification met the peak agricultural employment requirement of section 1156.4. For the reasons set forth below, we conclude that the exception lacks merit.

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[2/] The Board's answer to this question appears in footnote 8, post.

[3/] The Regional Director sought and was granted Intervenor status without objection by any party and thereafter filed a post-hearing brief and a brief in response to the Employer's exceptions. For reasons discussed more fully below, the Board declines to consider the Regional Director's brief in deciding the issues in this case.

In adopting the Agricultural Labor Relations Act (ALRA or Act), the California Legislature acknowledged that agriculture is a seasonal occupation for most agricultural employees and for that reason sought to ensure that both initial certification as well as decertification elections would be held only when the eligible electorate is representative of the employer's entire year-round work force. Accordingly, Labor Code section 1156.4 provides that no representation petition will be deemed timely filed unless the employer's payroll for the period immediately preceding the filing of the petition represents 50 percent of its peak agricultural employment for the current calendar year. The foregoing requirement is more specifically implemented in section 1156.3(a)(l) which provides that a valid petition for certification must allege, in part, as follows:

> That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year. (Emphasis added.)

The IHE adopted the Employer's stipulation that "no more than 64 employees" were employed during its peak employment period for the calendar year in which the petition was filed.[4/] But the Employer also contends that no more than 31 employees actually worked during the pre-petition payroll period and therefore the

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[4/] While we ordinarily would view the phrase "no more than" as being insufficient for establishing the number of employees actually employed, we accept the stipulation in this instance because it is supported by an independent finding of the IHE. (Decision of IHE (IHED) at p. 17.)

petition was not timely filed.

The dispute herein revolves around Adan Mercado, the potential 32nd employee. Mercado did not actually perform any work for the Employer during the pertinent payroll period as he was absent due to a work-related disability, and consequently his name did not appear on the Employer's applicable pre-petition payroll. The Employer contends that, in the absence of Mercado as a currently employed worker, the pre-petition peak requirement is not met. The Employer makes this contention despite the fact that it stipulated to Mercado's eligibility to vote.

The number of "currently employed" workers is composed of workers "as determined from [the employer's] payroll immediately preceding the filing of the petition. . ." (section 1156.3(a)(1)), while the number of eligible voters is composed of those agricultural employees "whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition. . ." (Section 1157.) The Employer's contention can have meaning only if "as determined from [the employer's] payroll immediately preceding the filing of the petition" can mean something different from "whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition." Since both of those limiting clauses are keyed to the same payroll period, we find no circumstances under which the framers of our Act would have wanted the two linguistic formulations to have produced antithetical results. In other words, since we are concerned with achieving a representative vote through a representative electorate, there is no reason for

finding an eligible voter not countable for purposes of peak, or finding someone who is countable for peak not eligible to vote. Consequently, aside from a few technical distinctions not relevant here, we consider the two clauses to be synonymous, and we will construe precedent under the one formulation as being applicable to the other as well.[5/]

Labor Code section 1156.3(c) establishes a statutory presumption favoring certification of the results of an election. (Ruline Nursery Co. v. Agricultural Labor Relations Board (1985) 169 Cal.App.3d 247 [216 Cal.Rptr. 162].) Thus, the Employer, as the objecting party, bears the burden of overcoming the Regional Director's finding that the petition herein was timely filed with respect to the peak requirement. In that connection, the Employer also bears the burden of demonstrating why Mercado should not be counted for the purpose of computing peak. We find that adequate grounds for exclusion of Mercado have not been demonstrated.

As a general rule, an employee deemed to be "currently employed" within the meaning of section 1156.3(a)(l) is one who normally would have worked because there was work available for him or her, as distinguished from an employee who had been laid off, or not yet recalled, because there was no work to be performed by that employee. (Rod McLellan Co. (1977) 3 ALRB

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[5/] In finding the two clauses to be synonymous, we do not, however, find the concepts of "currently employed" for purposes of the peak determination and "eligible to vote" for participation in Board conducted elections to be interchangeable. (See exceptions set forth in the Act at section 1157 as it relates to economic strikers, and in the Board's regulations at Cal. Code Regs., tit. 8, sections 20352 and 20355(a ) (1)-(8), pertaining to eligibility and election objections.)

No. 6, at p. 4.) When considering whether an individual is currently employed, the Board may examine "such factors as the employee's history of employment, continued payments into insurance funds, contributions to pension or other benefit programs, and any other relevant evidence which bears upon the question of whether or not there was a current job or position actually held by them during the relevant payroll period." (Ibid.)

In this instance, however, the Employer has failed to meet its burden of establishing that Mercado would not have worked but for his leave. Specifically, the Employer has not shown that Mercado had voluntarily severed his employment, or been discharged. Nor has the Employer shown that no job was being held open for him. (Red Arrow Freight Lines (1986) 278 NLRB 965 [121 LRRM 1257].) Accordingly, we conclude that Mercado continued to enjoy employee status, that he would have worked during the pertinent eligibility period but for his absence due to his work-related disability,[6/] and thus he was "currently employed" as that term is used in section 1156.3(a ) (1).[7/]

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[6/] While our finding in that regard is premised on the Employer's failure to establish otherwise, our finding is bolstered by the fact that the Employer stipulated that Mercado was eligible to vote, indicating that it continued to grant Mercado employee status. We find additional support for our finding in the fact that while Mercado worked for the Employer as an irrigator, the pre-petition employee roster reveals no other employee in that particular job classification, thus raising an inference that Mercado had not been replaced.

[7/] Thus, the absence of Mercado's name from the pre-petition payroll is not controlling if he is otherwise "currently employed." The payroll is not to be identified with any particular piece of paper. (Rod McLellan Co. (1977) 3 ALRB No. 6 at pp. 3-4.)

As we have found that Mercado was currently employed during the qualifying period, we conclude that 32 out of 64 potentially eligible voters were currently employed in the relevant time period. Therefore, the Act's peak requirement was met, and the instant Petition for Certification was timely filed under sections 1156.3(a)(l) and 1156.4.[8/] On that basis, we affirm the IHE's recommendation that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in the State of California.

Regional Director's Intervention

The Board is concerned about the advocacy position taken by the Region's counsel during the briefing in this case. We consider inappropriate the request for sanctions against the Employer for having pursued objections which had already been set for hearing by the Executive Secretary, but which the Regional Attorney, following the presentation of the Employer's case, considered frivolous, in bad faith, and intended solely for purposes of delay. The request for sanctions is a clear indication that the Regional Attorney exceeded the legitimate bounds of protecting the Regional Director's interest, on behalf of the Board, in developing a full and complete record and substantiating the integrity of the Board's election processes.

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[8/] Since peak in this case is obtainable by the straight "body count" method (see Donley Farms, Inc. (1978) 4 ALRB NO. 66), the "Saikhon averaging method" as discussed in Adamek & Dessert, Inc. v. ALRB (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366] has no application here. (See IHE's related discussion at IHED at p. 11.)

In Silva Harvesting, Inc. (1985) 11 ALRB No. 12, the Board without comment upheld the IHE's unchallenged determination that the above interests of the region warranted full party status for the region in election-related hearings. (Id. at IHED p. 20.) Likewise in George A. Lucas & Sons (1982) 8 ALRB No. 61, the Board did not address the IHE's permitting the Regional Director, over the objection of the employer, to intervene and litigate the case as a full party. In William Buak Fruit Company, Inc. (1987) 13 ALRB No. 2, the Board in dicta approved intervention as of right by the Regional Director (whose participation would not be limited to matters concerning the issuance of subpoenas under Cal. Code Regs., tit. 8, section 20250(g)) when the integrity of the Board's processes was placed in issue. None of these cases, however, properly stands for the proposition that the limited intervention permitted a Regional Director allows partisan advocacy by a Regional Attorney. Rather, the purpose for such limited participation is to ensure that the evidentiary record is fully developed and that the basis for the Board's action is fully substantiated. To the extent that these cases attribute "full party" status to a Regional Director's participation, they are hereby disapproved and overruled.

Unfortunately, the Regional Attorney became an active and partisan participant in this proceeding. In order to prevent such conduct in the future in hearings where the Board's handling of representation matters is called into question, the Regional Director's participation therein shall be scrupulously limited to protecting the legitimate interests of the Regional Director as

outlined above.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Kubota Nurseries, Inc. in the State of California for purposes of collective bargaining as defined in Labor Code section 1155.2(a), concerning wages, working hours, and other terms and conditions of employment.

DATE: August 18, 1989

GREGORY L. GONOT, Acting Chairman[9/]

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

[9/] The signatures of Board Members in all Board decisions appear with the signature of the Chairman first (if participating), followed by the signatures of the participating Board Members in order of their seniority. There are currently two vacancies on the Board.

# CASE SUMMARY

Kubota Nurseries, Inc. (UFW)

15 ALFB No. 12
Case No. 87-RC-13-SAL

## IHE Decision

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW or Union) on November 9, 1987, an election was conducted by the Agricultural Labor Relations Board (ALRB or Board) on November 16, 1987, to determine whether the Union would become the certified collective bargaining representative of all the agricultural employees of Kubota Nurseries, Inc. (Employer). The election results were as follows: 22 votes for the UFW, 9 votes for no union, and 0 challenged ballots for a total of 31 votes cast. The Employer timely filed objections to the conduct of the election, of which the Executive Secretary of the Board set two for hearing, and also asked the parties to brief the impact, if any, of the decision of the Court of Appeal in Adamek & Dessert, Inc. v. ALRB (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366] on the issues presented by the Employer's objections. The Employer contended that it was not at peak for purposes of the requirements of Labor Code sections 1156.3(a)(l) and 1156.4 due to the absence of the name of employee Adan Mercado from the pre-petition payroll. Mercado was on unpaid disability leave during the relevant period. The Investigative Hearing Examiner (IHE) recommended that the Employer's objections be dismissed, and that the Union be certified as the collective bargaining agent of the Employer's employees.

## Board Decision

The Board affirmed the IHE's recommended decision. Noting that the Employer had stipulated to Mercado's status as an eligible voter, and that the Employer had failed to bear its burden of demonstrating that Mercado would not have worked during the relevant payroll period, the Board agreed that Mercado should have been included in the peak determination despite the absence of his name from the Employer's payroll for the relevant period. The Board observed that the proper standard for determining whether an employee was "currently employed" for purposes of Labor Code sections 1156.3(a)(l) and 1156.4 was the same as that for determining whether an employee was an eligible voter under section 1157, viz., whether the employee would normally have worked during the relevant period because work was available for the employee, as distinguished from an employee who had been laid off, or not yet recalled, because there was no work to be performed by that employee. (Rod McLellan Company (1977) 3 ALRB No. 6.) The Board also disapproved of the Regional Attorney's conduct in filing a brief requesting sanctions against the Employer for advancing an argument considered by the Regional Attorney to be frivolous, in bad faith, and advanced for purposes of delay. The Board found the Regional Attorney's conduct to have exceeded the limited intervention allowed Regional Directors in election

proceedings in order to develop a full and complete record and to protect the integrity of the Board's election processes. The Board disapproved and overruled language in earlier cases which allowed Regional Directors "full party" status, and might have seemed to justify the Regional Attorney's partisan stance.

* * *

This Case Summary is furnished for information only and is not the official statement of the case or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| In the Matter of: | ) | |
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| KUBOTA NURSERIES, INC., | ) | Case No. 87-RC-13-SAL |
| | ) | |
| Employer, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| UNITED FARM WORKERS OF AMERICA, AFL-CIO, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AGRICULTURAL LABOR RELATIONS BOARD, SALINAS REGIONAL OFFICE, | ) | |
| | ) | |
| Intervenor. | ) | |

Appearances:

Thomas M. Giovacchini
The Law Firm of Thomas E. Campagne
5108 East Clinton Way, Suite 122
Fresno, California
for the Employer

Jose Morales
P. 0. Box 30
Keene, CA
for the Petitioner

Clifford R. Meneken
112 Boronda Road
Salinas, California
for the Intervenor

Before: Marvin J. Brenner
Investigative Hearing Examiner

DECISION OF INVESTIGATIVE HEARING EXAMINER

On Monday, November 16, 1987, the Agricultural Labor Relations Board (hereinafter "ALRB" or "Board") conducted a representation election among all the employees of Kubota Nurseries, Inc. (referred to hereinafter as "Employer") pursuant to a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (referred to hereinafter as "UFW" or "Union"). The Tally of Ballots showed that there were 32 employee names certified as being on the eligibility list (to which number there was no objection), that 31 persons voted, and that of that number, 22 voted in favor of the UFW with 9 against. There were no challenged ballots. (Jt.9 and 4.)[1]

On November 23, 1987 the Employer filed a Petition Setting Forth Objections to Conduct of Election (Jt.6 and 10) with nine objections listed. Of these, the Executive Secretary of the ALRB dismissed seven and set the following two for hearing:

1. Whether the Regional Director improperly determined that the representation petition in the above-captioned matter was timely filed pursuant to Labor Code section 1156.4 and relevant Board precedent (objection nos. 8 and 9); and

2. What impact, if any, the Court of Appeal's decision in Adamek & Dessert, Inc. v. Agricultural Labor Relations Board

[1]Hereinafter the joint exhibits will be identified as "Jt.__". References to the Reporter's Transcript will be noted as "(Roman Numeral: p.___.)"

(1986) 178 Cal.App.3d 970, 224 Cal.Rptr. 366, has on the peak question in this case.

The hearing proceeded on these objections on April 6, 1988. The Employer and Union were present throughout the entire hearing, as was the Salinas Regional Office of the ALRB which intervened in the case without opposition. (1:1.) All the parties were given the opportunity to participate fully in the proceedings. The parties elected not to present any testimonial evidence but to jointly stipulate in all record evidence. The Employer and the Salinas Regional Office filed post-hearing briefs .

Upon this record and after careful consideration of the arguments and briefs of the parties, I make the following:

## FINDINGS OF FACT

### I. Jurisdiction

I find that Kubota Nurseries, Inc., is an agricultural employer within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereafter "ALRA" or "Act") and that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act.

### II. The Dispute

#### The Filing of the Petition for Certification and the Events Thereafter

On November 9, 1987 the UFW filed a Petition for Certification. (Jt.l). (1:2.)

Pursuant to the ALRB Regulations,[2] the Employer, on November 12, 1987, filed a Written Response to the Petition (Jt.2) in which it took the position that said Petition was untimely based upon the claim that the Employer's work force was not at peak, i.e., during the eligibility payroll period,

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[2]ALRB Regulation Sections 20310(a), (a)(6) and (a)(6)(A) provide as follows:

"Section 20310 - Employer Obligations

(a) Employer's written response to the petition. Upon service and filing of a petition, as set forth above, the employer so served shall provide to the regional director or his or her designated agent, within the time limits set forth in subsection (d), the following information accompanied by a declaration, signed under penalty of perjury, that the information provided is true and correct:

(6) A statement of the peak employment (payroll period dates and number of employees) for the calendar year in the unit sought by the petition. If the employer contends that the petition was filed at a time when the number of employees employed constituted less than 50 percent of its peak agricultural employment for the current calendar year, the employer shall provide evidence sufficient to support that contention.

(A) If the employer contends that the payroll period of peak employment for the calendar year has already passed, he shall provide the regional director with payroll records which show the number of employees employed each day and the number of hours each employee worked during the peak payroll period."

^Attached to its Written Response were the following documents: 1) an eligibility list (Jt.2A) (attached as "Exhibit A"); 2) the eligibility week, October 27, 1987 - November 2, 1987 (Jt.2B) (attached as "Exhibit B"); 3) the eligibility list for the peak period April 7 - April 13, 1987 (Jt.2C) (attached as "Exhibit C"); 4) time cards, 31 in number, for the eligibility period (Jt.2D) (attached as "Exhibit B-l"); and 5) time cards, 62 in number, for the peak period (Jt.2E) (attached as "Exhibit C-l") (1:5-6).

Tuesday, October 27 through November 2, 1987, the Employer's employee complement constituted less than fifty percent (50%) of its peak agricultural employment for the current calendar year.[4] In this initial response to the Petition, which was verified by the Employer's President, Ted K. Kubota, the Employer represented that it employed 32 workers during the payroll period immediately preceding the filing of the Petition. (Jt.2, pp. 4-5.) The Employer also represented that 66 workers were employed during the peak payroll period, April 7, 1987 through April 13, 1987.[5] (Jt.2, p. 5.)

At some point thereafter, the Employer's counsel, Thomas M. Giovacchini, telephoned Board agent Harry Martin.[6] During

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[4]The Agricultural Labor Relations Act at Section 1156.3(a)(l) provides that a petition for a union election must allege:

> "That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than fifty percent of his peak agricultural employment for the current calendar year."

[5]However, only 65 workers' names actually appeared on the peak list the Employer presented to the Board agent assigned to the case, Harry Martin (Jt.2C). And in fact, it later turned out that one of the names on the list was there in error. Rafael Leon Rodriguez did not work during the peak week. (I:14-15.) In addition, the Employer only presented 62 time cards (Jt.2E) (I:6). In fact, it was 64 employees that worked, not 62. No time card was presented for Adan Mercado; he was a salaried employee. And Yukiko Chaid's time card was not presented until the day of the hearing. (I:15-16.)

[6]is not entirely clear when this telephone conversation (or conversations) occurred. However, the contents of this (and other) conversations were reduced to writing when Giovacchini wrote a letter to Martin on November 13 and served same upon him

that conversation Martin told Giovacchini that he had come to the conclusion that the Employer's payroll period immediately preceding the filing of the election petition was at least 50 percent or more of peak for the current calendar year. Martin had determined this using a head count[7] comparison of the peak payroll with the payroll immediately preceding the filing of the Petition. In particular, Martin stated that although the peak head count attached to the Employer's Written Response the Petition for Certification showed 66 employees, he believed that 34 employees worked during the payroll period preceding the Petition. Martin had arrived at a head count of 34 because in addition to the 31 names shown on Exhibit "B",[8](Jt.2B) he located 2 time cards in Exhibit "B-l" (Jt.2D) in the names of Arturo Alfaro and Miguel Barrientos, whose names did not appear on Exhibit "B"; and he found that Exhibit "A" (the "Excelsior list") showed the name of Adan D. Mercado (an irrigator) which

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(Footnote 6 Continued)

on that same day (Jt.ll). The parties have stipulated that many of the representations contained in that correspondence were truthful. (1:22). The factual conclusions herein which relate to discussions about peak between Giovacchini and Martin derive from this Stipulation.

[7]Hereinafter the phrases "head count/body count" or "head count method/body count method" will be used interchangeably.

[8]The letters "B", "B-l" etc. which later appeared in the correspondence to Martin (Jt.ll) refer to exhibits which were attached to the Employer's Written Response to the Petition for Certification filed on November 12, 1987. (See footnote 3, supra)

was not listed on Exhibit "B" either and for whom there was no time card in Exhibit "B-l". It was Martin's belief that these 3 names when added to the 31 names on Exhibit "B-l" raised the total head count for the payroll period preceding the election to 34, which was more than 50 percent of the 66 names appearing on the peak payroll at Exhibits "C" (Jt.2C) and "C-l" (Jt.2E). (See also Jt.ll, p. 1) (1:22-23.)

In a subsequent conversation, Giovacchini told Martin that Exhibit "B" to the Employer's Response listed all persons (31) who performed work during the period immediately preceding the filing of the election Petition and that "B-l" listed the time cards for those individuals. Counsel further told Martin that Arturo Alfaro was the same person as Jose A. Alfaro and that Miguel Barrientos was the same person as Miguel Flores.[9] He explained that the 31 names listed on Exhibit "B" were the same individuals listed on 31 time cards as Exhibit "B-l" (Jt.ll, p. 2) (I:23).

As regards Adan D. Mercado, Giovacchini represented to Martin that he was not eligible to vote as he had not worked during the period preceding the filing of the election petition in that he was on a disability leave:

> "I further explained to you that the individual, Adan D. Mercado, listed on Exhibit 'A' did not work during the payroll period preceding the filing of the Election

[9]This was correct information as stipulated to by the parties (I :16-17.)

> Petition. Rather Adan Mercado was injured and on disability from October 23, 1987 to the present. The only reason Adan Mercado[1]s Name ended up on the Excelsior list was because Kubota Nurseries' Office, when sending the names and addresses over the phone to our secretary (while Ted Kubota was driving the time cards from his Castroville office to our Fresno office) wasn't sure whether to include or exclude Adan Mercado as an eligible voter while on disability leave. As a result, Adan Mercado's name ended up on the Excelsior list even though he did not work and therefore had no time card for the period preceding the filing of the Petition. This is why his name does not appear on Exhibit 'B[1] showing hours worked for the period preceding the Petition; and this is why he has no time card in Exhibit 'B-l' for the period preceding the filing of the Petition." (Jt.ll, pp. 2-3) (I:22-23.)

Thus, Giovacchini's position as expressed to Martin was that there were no more than 31 employees who worked in the eligibility period of October 27 - November 2, 1987:

> "In summary, only 31 individuals worked during the payroll period immediately preceding the filing of the Election Petition. These 31 names and time cards are set forth at Exhibit 'B[1] and 'B-l[1] to the Employer's Written Response. Jose A. Alfaro and Miguel Flores, on Exhibit 'B' are the same persons as Arturo Alfaro and Miguel Barrientos on Exhibit 'B-l'. Adan Mercado on Exhibit 'A' (the Excelsior list) did not work during the payroll period preceding the filing of the Election Petition because he was and still is on disability." (Jt.ll, p. 3) (1:23. )

On November 13, 1987, the Employer filed a First Amendment to Employer's Written Response[10] (Jt.3, Jt.3A and Jt.3B). The October 27 - November 2, 1987 eligibility list had

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[10]The Amendment came the same day the Salinas Regional Director determined that an election should be held (Jt.9). The General Counsel argues that the Amendment was untimely under ALRB Regulations 20310(d) and (e).

been reduced by one worker from 32 to 31 (Jt.3A). Adan Mercado had been removed from the list. According to the Employer, the total head count was now at 31 (Jt.3B). (Compare Jt.2A with Jt.3A). Joint Exhibit 2C, the eligibility list for the peak period, April 7 - April 13, 1987, was not amended (I:8-9).

At the hearing the parties stipulated to the following: that 31 employees actually performed work during the eligibility week of October 27 - November 2, 1987, that the 32nd employee, Mercado, did not work during the said eligibility week because he was on a disability leave due to a work-related injury, that the Employer (and the Union) raised no objection to Mercado[1]s voting in the election, and that in fact, he did cast a ballot unchallenged. (I:14.) The parties further stipulated that Mercado had previously performed work during the peak week of April 7 - April 13, 1987. (I:16.) It was also stipulated that the Employer did not contend that more than 64 persons worked during the said peak week. (I:17.)

## ANALYSIS AND CONCLUSIONS OF LAW

### III. The Peak Requirement and the Burden of Proof

The key to resolving peak issues is whether the number of eligible voters is representative of an employer's work force; the eligible electorate is representative so long as the number of eligible voters is within a narrow margin of 50 percent of the employer's peak employment. Ruline Nursery Co. v. Agricultural Labor Relations Board (1985) 169 Cal.App.3d 247, 216 Cal.Rptr.

162. The peak requirement insures that the total of employees eligible to vote is representative of the potential size of the work force which will be bound by the results of the election. At the same time, however, section 1156.3(c) states that "[u]nless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election". Tepusquet Vineyards (1984) 10 ALRB No. 29. The Board has said that by this section the Legislature has established a presumption in favor of certifying the results of an election and that the burden of proof rests upon the party objecting to the election. Ibid. See also California Lettuce Co. (1979) 5 ALRB No. 24. As pointed out in Charles Malovich (1979) 5 ALRB No. 33,

> "because opportunities for representation elections in agriculture are limited, Board decisions have consistently followed a policy of upholding the elections unless it is clear that to do so would violate the rights of employees or a reasonable interpretation or application of the Act."

Thus, if the employer contends that the petition is filed at a time when the number of employees is less than 50 percent of peak, the employer is required to provide evidence sufficient to support that contention. Tepusquet Vineyards, supra (1984) 10 ALRB No. 29. The burden is not on the Board agent to make specific inquiries in order to determine the correctness of an employer's anticipated peak figure.[11] Charles Malovich, supra

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[11]Even in past peak cases, estimating peak, given the setting in which this computation must generally be made, can be no more than just that - an estimate. Wine World, Inc. d/b/a Beringer Vineyards (1979) 5 ALRB No. 41.

(1979) 5 ALRB No. 33; Domingo Farms (1979) 5 ALRB No. 35. Normally/ Board agents must be able to rely on the accuracy of statements or payroll records submitted to them by an employer during a peak investigation. It is the employer's burden to keep accurate payroll records, and Board agents are entitled to rely on the accuracy of the payroll information submitted by the employer. Tepusquet Vineyards, supra (1984) 10 ALRB No. 29. See also A & D Christopher Ranch (1981) 7 ALRB No. 31, fn. 1.

IV. The Body Count Method

Under the body count method, the number of employees working for the employer during the peak period is compared with the number of workers employed during the pre-petition period. Donley Farms, Inc. (1978) 4 ALRB No. 66.

The body count is the favored method to determine peak. Adamek & Dessert, Inc. v. Agricultural Labor Relations Board (1986) 178 Cal.App.3d 970. The use of the "averaging" method adopted in Mario Saikhon, Inc. (1976) 2 ALRB No. 2 is unwarranted whenever a conventional count of the number of employees in each of the payroll periods establishes that the employer was at peak during the pre-petition period. Therefore, the first determination should be whether the peak requirement is satisfied by the body count method. Only if that method fails to produce a finding of peak, should the Saikhon averaging method be applied. A & D Christopher Ranch, supra (1981) 7 ALRB No. 31; Donley Farms, Inc., supra (1978) 4 ALRB No. 66; Tepusquet Vineyards, supra (1984) 10 ALRB No. 29.

V. Where the Board Agent Incorrectly Analyzes the Body Count

Where a Board agent incorrectly analyzes the information provided to him—even if errors are made in his calculation of the figures—this fact is not relevant to the question of whether peak is in fact present. In Charles Malovich, supra (1979) 5 ALRB No. 33 the Board pointed out that it would not limit itself to a consideration of the methods actually employed by the Board agent in his investigation but would independently determine whether a finding of timeliness was reasonable based upon the information available at the time. As stated by the Board:

> "To limit our inquiry to the adequacy of the actual investigation would lead to the overturning of timely elections merely because a peak determination which ultimately proved to be reasonable may have been arrived at by inadequate methods." 5 ALRB No. 33, p. 11, fn. 7

This principle was approved by the Court of Appeal in Ruline Nursery Co. v. Agricultural Labor Relations Board, supra (1985) 169 Cal.App.3d 247, 216 Cal.Rptr. 162 where the Court, referring to Charles Malovich, supra, said:

> "By this rationale, the Board clearly spelled out the reasons why a delayed and "hindsight[1] approach to determining representation elections should be avoided. (See also Domingo Farms, supra, 5 ALRB No 35, at pp. 7-8)" 169 Cal.App.3d at 2583.

In A & D Christopher Ranch, supra (1981) 7 ALRB No. 31, IHED, p. 31, the employer had argued that the Regional Director could not have accurately determined peak with the data available. The Board, affirming the Investigative Hearing Examiner, gave recognition to the fact that Labor Code section 1156.3(c)

specified that the objection must be that the employer was not actually at peak; whether peak was correctly arrived at -- whether the Board agent was correct in each calculation -- was irrelevant so long as peak in fact existed. See also Valdora Produce Co. (1977) 3 ALRB No. 8; Kawano Farms, Inc. (1977) 3 ALRB No. 25.

VI. Should Adam D. Mercado Have Been Counted as Having Been on the Payroll for the Period Immediately Preceding the Filing of the Petition for Certification?

Despite the fact that the Employer admits that Mercado "was on disability leave during the eligibility week due to a work related injury" and "was eligible to vote." (Jt.10, attached Exhibit 6, p. 2), the Employer's position is that Mercado is not to be considered as having been on the payroll immediately preceding the filing of the Election Petition for the sole reason that, being on a disability leave, he did not actually work during the eligibility period. In its Petition Setting Forth Objections to Conduct of Election (Jt.6), the Employer states the following on pages 1-2 of its Memorandum of Points and Authorities:

> "Exhibit 'A' (Jt.2A herein) to said Written Response constitutes the eligibility list and sets forth the names, job classifications, addresses and social security numbers of all employees eligible to vote in the election. It consists of 32 names. (Parenthesis added)
>
> Exhibit 'B' (Jt.2B herein) to said Written Response lists all persons on payroll together with their hours worked for the October 27 through November 2, 1987 payroll period immediately preceding the filing of the Election Petition. (Parenthesis added) That Exhibit lists only 31 names. The reason Exhibit 'A' has 32 names and Exhibit 'B' has only 31 names is because Adan D. Mercado (who is listed on Exhibit "A", the Eligibility List) did not work during the eligibility

week (of Exhibit 'B'). Mr. Mercado was on disability leave during the eligibility week due to a work related injury. Thus, while he was eligible to vote (and therefore listed on Exhibit 'A'), he did not work during the eligibility week (and therefore is not listed on Exhibit 'B')."

Counsel for the Employer explained that the only reason Mercado[1]s name ended up on the eligibility list was because he "believed" Mercado "was eligible to work even though he was not actually on payroll due to his disability." (Jt.10, attached Exhibit 7, p. 3)

Respondent's argument that Mercado was an eligible employee for voting purposes but not for purposes of determining peak is clearly erroneous as it runs contrary to Board policy as set forth in prior case law to broadly interpret the meaning of the word "payroll" or "payroll period immediately preceding the filing of the petition." In Valdora Produce Co. (1977) 3 ALRB No. 8, it was held that employees were to be considered eligible to cast ballots if it appeared that they would have performed work for the employer but for their absences due to illness or vacation. And in Rod McLellan Co. (1977) 3 ALRB No. 6 the Board held that employees on paid vacation or paid sick leave during the applicable payroll period were eligible to vote. The Board found that "the term "payroll" did not describe a particular piece of paper." 3 ALRB No. 6 at pp.3-4; see also Comite 8, Sindicato de Trabajadores Campesinos Libres (Hiji Bros.) (1987) 13 ALRB No. 16.

But most important for our purposes here is the case of Wine World, Inc. (1979) 5 ALRB No. 41 where four employees were

challenged during the voting on the grounds that their names did not appear on the list of employees who worked during the relevant payroll period. Company records indicated that three of the four employees had been injured in work-related accidents prior to the election and that their injuries prevented them from returning to normal work until after the week used to determine voter eligibility (IHED, pp. 5-6). The Board, after finding these employees eligible to vote despite the fact that their names did not appear on the relevant payroll records,[12] also found that their names should be added to the list of employees who actually worked during the eligibility week for purposes of computing peak. In so holding, the Board specifically found:

> "Labor Code Section 1156.4 prohibits us from considering any petition for certification as timely unless it is filed when the Employer is at no less than 50 percent of its peak agricultural employment for the current calendar year. Initially, we reject the Employer's contention that we should consider only those employees who actually performed work during the eligibility week in determining whether this requirement has been met. The purpose of the peak requirement is to insure that the number of employees eligible to vote is representative of the overall labor force which will be affected and bound by the results of the election. Therefore, in order to determine whether the peak requirement has been met, it is necessary in this case to compare the number of employees eligible to vote with the number of employees at the peak of employment for

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[12] In this the Board was merely following NLRB precedent. Federal courts have approved NLRB decisions which have held that employees on disability leave are still considered employees entitled to vote in an election. (See e.g., N.L.R.B. v. Atkinson Dredging Company (4th Cir. 1964) 329 F.2d 158, cert, denied (1964) 377 U.S. 965,84 S.Ct. 1647.

the calendar year."[13] 5 ALRB No. 41 at p. 2.

VII. It Was Proper to Conduct the Election

Though Board agent Martin was in error that Arturo Alfaro was a different person from Jose A. Alfaro and that Miguel Barrientos was a different person from Miguel Flores, he was still correct in having concluded, based upon what was presented to him at the time, that peak had been reached and that the election ought to go forward. This was because in the Employer's initial response to the Petition, it had represented to the Board, through the verified signature of its president, that 32 workers were employed during the pavroll period immediately preceding the filing of the Petition. (Jt.2, pp. 4-5). Though it claimed that 66 workers were employed during the past peak period, it listed only 65 such persons and presented the time cards of only 62. An employer ought not to be allowed to rely on its own failure to provide a proper list as grounds to overturn the results of an election.[14] Muranaka Farms (1983) 9 ALRB No. 20. Even after the

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[13]It should be noted that the Agricultural Labor Relations Act makes no distinction between the use of the word "payroll" or "payroll immediately preceding the petition" as found in the election eligibility provision (section 1157) and the use of those same words in the peak provision (section 1156.3(a)(1).

[14]It was not until the hearing that the time card for Yukiko Chaid was presented. The Employer explains in its Brief that Chaid's card "was inadvertently omitted." (Employer's Post-Hearing Brief, p. 3, fn. 4). In the case of Mercado, the Employer merely states that he was a "salaried employee." (Employer's Post-Hearing Brief, p. 3, fn . 4 . )

Employer filed its Amendment (assuming arguendo it was timely) claiming that only 31 employees worked during the payroll period preceding the election, Martin was reasonable in determining peak since he had included as the 32nd employee, Adan D. Mercado. It was proper to include Mercado for purposes of the body count as he was an employee who surely would have worked during the week preceding the election filing but for his work-related injury.15 See Wine World, Inc., supra (1979) 5 ALRB No. 41. Thus the body count revealed peak because 32 is more than 50 percent of 62.

In point of fact the Employer admits that no more than 64 persons actually worked during the peak week of April, 1987. (I: 17.) The Employer also admits to 31 employees having worked during the eligibility period. The key question then simply revolves around employee No. 32, Mercado, the injured worker who was allowed to vote unchallenged in the election. As it has been shown that he should have been included in the body count, peak is once again reached, i.e., 32/64=50 percent.

VIII. The Request for Sanctions

The General Counsel requests sanctions against the Employer on the grounds that given the legal precedent and stipulated facts, the Employer's continued litigation of the peak

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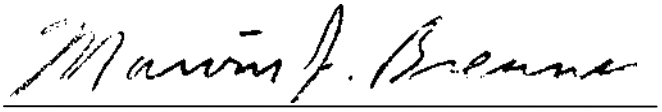
[15]There is no evidence that Mercado[1]s position had been taken over by any other employee.

issue must be deemed "frivolous, in bad faith, and solely intended for delay." (Intervenor's Brief In Opposition to Employer's Objection to the Election, p. 10.)

This request is denied. The Employer did no more than to stipulate to evidence relevant to the issues set forth for this hearing by the Executive Secretary. Presumably, had the Employer presented frivolous or bad faith objections for review, the Executive Secretary would not have set them for hearing.

I recommend that the results of the election be certified,

DATED: July 26, 1988



MARVIN J. BRENNER
Investigative Hearing Examiner