Tracy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRIPLE E PRODUCE CORPORATION, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 89-RC-3-VI 16 ALRB No. 14

DECISION AFFIRMING DISMISSAL OF ELECTION OBJECTION

This matter comes before the Agricultural Labor Relations Board (ALRB or Board) via the request for review of the Executive Secretary's partial dismissal of election objections filed by Triple E Produce Corporation (Employer) pursuant to the provisions of Title 8, California Code of Regulations, section 20393.[1/] A representation election was conducted by the Regional Director of the Board's Visalia Region among all the agricultural employees of the Employer in the State of California on August 4, 1989. The original tally of ballots indicated that 173 votes were cast for the United Farm Workers of America, AFL-CIO (UFW or

[1/] The Board has chosen in this instance to exercise its discretion under Title 8, California Code of Regulations, section 20393(a) to utilize the provisions of Labor Code section 1142(b), and to issue a published decision resolving the issues raised by the Employer's request for review. In so doing in this case we are not indicating a decision to change our normal practice of resolving such requests for review through Board order, rather than published decision. Where requests for review raise issues of general interest, however, we will, as in this case, consider the advisability of using the provisions of section 1142(b) as permitted by our regulations.

Union), 59 were cast for "No Union," and 268 challenged ballots were cast. The Board approved the Regional Director's disposition of 132 of the challenged ballots in Triple E Produce Corporation (1990) 16 ALRB No. 5, and directed him to issue a revised tally of ballots in accordance with its decision therein.

The Employer timely filed 43 objections to the election, the conduct of the election, and conduct affecting the results of the election on August 9, 1989. Thereafter the Executive Secretary issued his Notice of Objections Set for Hearing; Notice of Partial Dismissal of Objections; [and] Notice of Opportunity to File Request for Review on June 26, 1990, in which he set certain portions of the Employer's objections for hearing and dismissed objection nos. 2, 3, 30, 34, 35, 36, and 37. On July 6, 1990 the Employer filed its Request for Review of the Executive Secretary's Partial Dismissal of Objections. The Board granted review of the Executive Secretary's dismissal of objection number 34 in Administrative Order 90-28 (August 15, 1990.)[2/]

The Board has considered the Employer's request for review and materials submitted in support thereof in light of the

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[2/] In accordance with the provisions of Labor Code section 1142(b) and Title 8, California Code of Regulations section 20393(f), the record before the Board on review of the Executive Secretary's partial dismissal of the Employer's objections consists of (1) the election petition filed pursuant to section 1156.3(a), (2) the notice and direction of election, (3) the tally of ballots, (4) the objection petition filed pursuant to section 1156.3(c) with supporting documents, (5) the Executive Secretary's partial dismissal, and (6) the Employer's request for review with supporting documents.

other components of the record on review, and has decided to adopt the conclusions of the Executive Secretary insofar as consistent with our decision herein, and to dismiss Employer's objection number 34.[3/]

Objection number 34 alleges that the Board, through its representatives and agents, failed to properly investigate the election petition's allegation that the Employer was employing at least 50% of its peak labor complement, ignored sworn evidence that the Employer was not at 50% or more of peak, and otherwise improperly directed the election at a time when the Employer was not at 50% or more of peak employment. In support of its allegations, the Employer shows that it submitted to the Regional Director for his consideration in making his determination whether the Employer was at 50% of peak (1) the declaration of its president Nathan J. Esformes setting forth climatic, crop, and acreage changes indicating a significant increase in harvest workers necessary when peak employment was reached, (2) daily labor totals by contractor for the eligibility week preceding the filing of the election petition showing a daily average of 171 job positions, and (3) the payroll records for the week ending September 17, 1988, the period of peak agricultural employment in the preceding year.

[3/] The Union filed an untimely opposition to the Employer's petition for review which we decline to consider for that reason. We similarly decline to consider the Employer's reply to the Union's opposition consistent with our position announced in Admin. Order 90-28 and the provisions of Title 8, California Code of Regulations, section 20393(d).

We agree with the Employer that the record adequately shows that these materials were before the Regional Director in making his peak determination. We find, however, as the analysis below demonstrates, that these materials were inadequate to establish a prima facie showing that the Employer was not at 50% of peak during the payroll period immediately preceding the filing of the election petition.

This is a prospective peak case. Therefore the standard for determining the propriety of the Regional Director's peak determination is whether in light of the information then available to him or her a reasonable peak decision was made. (Charles Malovich (1979) 5 ALRB No. 33.) The record is bare of any indication that the Employer did not comply with its duty to maintain accurate and, current payroll lists of its employees' names and addresses and to make such lists available for purposes of the peak determination. (See Labor Code section 1157.3 and Title 8, California Code of Regulations, section 20310(a)(2).) In light of the fact that the Employer provided the Regional Director with similar payroll records for the peak period in the prior calendar year, 1988, we find it reasonably established that the Regional Director had before him sufficient relevant payroll records to determine whether the 50% of peak requirement was met on the basis of the actual names of the employees occurring on the respective payrolls, i.e., by employing the "body count" method. (See, e.g., Tepusquet Vineyards (1984) 10 ALRB No. 29.) Thus in the absence of proof from the Employer that the Regional Director's decision finding 50% of peak employment to be present

was erroneous, we are entitled to presume that his determination rests upon an adequate showing. (Evid. Code section 664.)

The Employer, however, furnishes us with no proof sufficient to controvert the Regional Director's finding of 50% of peak under the "body count" methodology. It includes among its supporting documents on review neither its pre-petition payroll list nor the payroll from its prior peak. Instead the Employer includes the total number of employees who worked in the pre-petition eligibility period (1026) and the average employee-days for that same period (171). The employer then argues that since the pre-petition average employee-days figure of 171 is less than 50% of its projected peak average of 610, the petition was untimely filed under Title 8, California Code of Regulations, section 20310(a)(6)(B).[4/]

We find the Employer's contention without merit under the decision of the Fourth District Court of Appeal in Adamek & Dessert, Inc. v. ALRB (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366]. There the court, in a past peak case, decided that the Board's practice of averaging the pre-petition payroll employment figures violated the express wording of the statute:

[4/] Title 8, California Code of Regulations, section 20310(a)(6)(B) provides: "If the employer contends that he expects that a payroll period later in the calendar year will reflect an average number of employee days that is more than twice the average number of employee days worked during the payroll period immediately preceding the filing of the petition, he shall provide the Board with information to support this contention."

> Section 1156.3, subdivision (a)(l) does not say if an average of the number of current employees is not less than 50 percent of the average number who worked during the period of peak employment. Section 1156.3, subdivision (a)(l) says if the "number ... currently employed ... as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent" of those employed during peak. The statute does not expressly permit averaging and averaging unnecessarily complicates a simple process.

(Id. at p. 978.) We have serious reservations as to whether the process of determining whether the Act's peak requirement has been met is always the "simple process" the court seems to have envisioned. Nevertheless, in this our first opportunity to construe the impact of the Adamek decision on our regulations, we must find that as a result of that decision section 20310(a)(6)(B) cannot stand.[5/]

The Employer's showing of average eligibility period employment and average peak employment is therefore barred by Adamek. In the absence of actual employment figures for the pre-petition eligibility period we have no basis upon which to find that peak was not met under Saikhon-Adamek. Neither do we have a basis to find a "body count" peak determination erroneous,

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[5/] We see nothing in the court's ruling concerning averaging that would call for a different result in a prospective peak case such as this. We similarly see no need to decide here whether we must choose between the "body count" methodology and the simple averaging of peak employment figures as originally adopted in Mario Saikhon, Inc. (1976) 2 ALRB No. 2. Rather, until we resolve the matter in rulemaking, we will continue to require first the "body count" comparison of actual employees on the eligibility and peak period payrolls and then, if a finding of peak is not obtainable by that method, the Saikhon approach approved in Adamek, or other appropriate methodologies, in both past and prospective peak cases as the nature of the circumstances warrants.

since the Employer has likewise failed to include in the record before us on review his prior peak employment payroll for 1988. We will, therefore, in agreement with the Executive Secretary's determination, dismiss Employer's objection number 34.

DATED: October 10, 1990

BRUCE J. JANIGIAN, Chairman[6/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JOSEPH C. SHELL, Member

[6/] 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. Member Ellis did not participate in this decision.

CASE SUMMARY

Triple E Produce Corporation (UFW)

16 ALRB No. 14
Case No. 89-RC-3-VI

Background

A representation election was held among the agricultural employees of Triple E Produce Corporation (Employer) on August 4, 1989. The original tally of ballots indicated that 173 votes were cast for the United Farm Workers of America, AFL-CIO (UFW or Union), 59 were cast for "No Union," and 268 challenged ballot were cast. The Agricultural Labor Relations Board (ALRB or Board) approved the Regional Director's disposition of 132 of the challenged ballots in Triple E Produce Corporation (1990) 16 ALRB No. 5, and directed him to issue a revised tally of ballots in accordance with its decision therein. The Employer timely filed 43 objections to the election, conduct of the election, and conduct affecting the results of the election on August 9, 1989. Thereafter, the Executive Secretary issued his Notice of Objections Set for Hearing; Notice of Partial Dismissal of Objections; [and] Notice of Opportunity to File Request for Review on June 26, 1990. The Executive Secretary set certain portions of the terms objections for hearing and dismissed objection numbers 2, 3, 30, 34, 35, 36, and 37. On July 6, 1990, the Employer filed its Request for Review of the Executive Secretary's Partial Dismissal of Objections, and thereafter the Board granted review of the Executive Secretary's dismissal of objection number 34 in Administrative Order 90-28 (August 15, 1990).

Board Decision

The Board agreed with the Employer that the materials alleged by the Employer to have been before the Regional Director at the time of his peak decision were indeed before the Regional Director as reflected in the record before the Board. The Board determined that even were those records before the Regional Director, however, the Employer had not presented evidence sufficient to demonstrate that the Regional Director's peak determination was incorrect. In the first instance the Employer did not present evidence sufficient to indicate that the Regional Director could not have determined that peak was met under the Board's traditional "body count" approach. Moreover, the Employer's reliance on the Board's regulations at Title 8, California Code of Regulations, section 20310(a)(6)(B) was unavailing since that section was effectively invalidated by the decision of the Fourth District Court of Appeal in Adamek & Dessert, Inc. v. ALRB (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366]. In Adamek the court disapproved the Board's practice of averaging eligibility period employment. Insofar as Title 8, California Code of Regulations, section 20310(a)(6)(B) contemplates such a procedure it cannot stand after Adamek. The Board therefore affirmed the Executive Secretary's dismissal of the Employer's peak objection (no. 34),

and restated an employer's obligation to demonstrate that peak has not been met both under a traditional "body count" methodology and under the comparison of actual eligibility period employment with average peak employment enunciated by the Board in Mario Saikhon, Inc. (1976) 2 ALRB No. 2 and approved by the court in Adamek, supra. The Board also noted that it was utilizing the discretion granted under Title 8, California Code of Regulations, section 20393(a) to use the provisions of Labor Code section 1142(b) in publishing its decision herein on a topic of general interest.

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