Norwalk, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ORANGE COUNTY NURSERY, INC., A California Corporation, Employer, and SAN JOAQUIN VALLEY WORKERS ORGANAZING COMMITTEE LABORERS INTERNATIONAL UNION OF NORTH AMERICA (SJVWOC), AFL-CIO, Petitioner.	)	Case No. 92-RC-2-VI 19 ALRB No. 3 (March 19, 1993)

DECISION AND ORDER

On May 22, 1992, Petitioner San Joaguin Valley Workers Organizing Committee, Laborers International Union of North America, AFL-CIO, (SJVWOC) filed a petition for certification seeking to represent all the agricultural employees of Orange County Nursery, Inc. (Employer). An election was conducted on May 29, 1992, with the following results:

SJVWOC. 34

No Union. 26

Unresolved Challenged Ballots. 7

Total. 67

The Employer filed its objections to the election on June 4, 1992 alleging that non-agricultural employees had been included in the unit and that it was not at peak at the time the petition was filed. The Employer and the Regional Director participated in an evidentiary hearing on the Employer's objections to the election. Thereafter, on December 24, 1992,

Investigative Hearing Examiner (IHE) Barbara Moore issued the attached Decision, recommending therein that the Employer's objection to the Regional Director's determination that the Employer was at peak be sustained and that the election be set aside. The Employer timely filed exceptions to the IHE's recommended decision and a brief in support. Neither SJVWOC nor the Regional Director filed exceptions to the IHE's decision or a brief in response to the Employer's exceptions.

The Board has considered the record and the attached recommended decision of the IHE in light of the Employer's exceptions and brief, and has decided to affirm the IHE's conclusion that the election be set aside because the Employer was not at peak during the pre-petition payroll period.[1] We therefore adopt her recommendation that the election be set aside.

[1] The Employer requests that the Board address a large number of issues that it contends the IHE should have resolved differently. The Employer admits that these issues would not change or affect the result reached by the IHE, but contends that in the event that another petition is filed for these employees in the future, having the issues resolved by the Board would be helpful to the parties. Because several years could pass before another petition is filed, the facts or law now operative could change so materially that any resolution of them now could be a purely speculative or advisory activity by the Board. In view of the limitations on our resources, we do not believe that such an exercise is warranted in the absence of a compelling purpose,and therefore we decline to address such issues and do not express an opinion related to the IHE's findings and conclusions as excepted to by the Employer.

ORDER

It is hereby ordered that the election conducted in this matter be, and hereby is, set aside without prejudice to the filing by Petitioner or any other labor organization of a subsequent petition, if desired, when the requisite statutory conditions are met.

Dated: March 19, 1993

BRUCE J. JANIGIAN, Chairman[2]

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

[2] 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.

CASE SUMMARY

Orange County Nursery, Inc.
(San Joaquin Valley Workers Organizing Committee)

19 ALRB No. 3
Case No. 92-VI-2-RC

Background

Petitioner prevailed in tally of votes cast in election conducted among employees at its visalia, Norwalk, and Escondido nurseries. Employer's objections that some of its employees not subject to the Agricultural Labor Relations Act (ALRA) had been included in the unit, and that it did not at the time the petition was filed have half the work force that it could reasonably be expected to employ at its upcoming peak in December 1992, were set for hearing by the Board's Executive Secretary.

IHE Decision

The IHE found that the disputed employees were agricultural employees under the Act, guided by section 3(f) of the Fair Labor Standards Act. The IHE further found that the calculations made by Regional personnel to determine peak and the Regional Director's reliance on such calculations were reasonable. She found that the Regional Director reasonably projected a decrease in the Employer's prospective peak for 1992. She further found that the Employer failed to demonstrate either that the methodology used was unreasonable or that the Regional Director should have personally traveled from Visalia to Norwalk to inspect all of the Employer's current sales invoices when the Employer furnished incomplete and inconsistent information as to sales for the current year.

The IHE recommended that the election be set aside because the Regional Director's calculations were incorrect such that the Employer was not at 50 per cent of the reasonably projected 1992 peak, as reguired under section 1156.4 of the ALRA, nor within any margin of error the Board had previously found to be consistent with a valid peak determination.

Board Decision

Only the Employer filed exceptions. The Board declined to take up the several issues in the IHE's decision as to which the Employer excepted. Acknowledging that it would not presently be affected by the resolution of these issues, since the election would be set aside in the absence of any exceptions from the

Union, the Employer urged the Board to take up its exceptions both for the general guidance of the public and Board personnel in dealing with these issues in the future, and because a resolution by the Board of the other issues could potentially help the parties by settling these issues in advance.

The Board adopted the IHE's recommendation that the election be set aside. The Board declined to address the additional issues raised by the Employer. Noting that several years could pass before another election petition is filed, a decision rendered on the facts as they existed in 1992 could become completely inappropriate by the time another petition was filed, the Board concluded that its severely limited resources did not allow it to undertake what would amount to an advisory opinion whose future applicability could not be established.

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This case summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
ORANGE COUNTY NURSERY, INC., A California Corporation,	)	Case Nos. 92-RC-2-VI
Employer,	)	
and	)	
SAN JOAQUIN VALLEY WORKERS ORGANIZING COMMITTEE LABORERS INTERNATIONAL UNION (LIUNA), AFL-CIO,	)	
Petitioner.	)	

Appearances:

Stephanie Bullock
ALRB Regional Office,
Visalia, CA.
for the Regional Director

Howard A. Sagaser
Jory, Peterson & Sagaser
Fresno, CA.
for the Employer

Humberto Gomez
San Joaquin Valley Workers
Organizing Committee Laborers International
Union (LIUNA), AFL-CIO,
Los Angeles, CA.
for the Union

Before: Barbara D. Moore
Investigative Hearing Examiner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

BARBARA D. MOORE. Investigative Hearing Examiner: This case was heard by me in Visalia, California, on October 7 and 8, 1992, pursuant to an order by the Executive Secretary of the Agricultural Labor Relations Board ("ALRB" or "Board") setting two election objections filed by Orange County Nursery, Inc. ("Employer" or "OCN") for hearing. Those objections are:

1. Whether the Regional Director's determination of peak was reasonable in light of all the information available to him at the time of his decision; and

2. Whether the representation petition described an appropriate bargaining union.

An attorney from the ALRB General Counsel's office participated in the hearing representing the Visalia Regional Director; the Employer was also represented by legal counsel throughout the hearing. A nonattorney Union representative was present for most of the hearing.

All parties were given full opportunity to participate in the proceedings, and the Regional Director and the Employer filed post hearing briefs. Upon the entire record,[1] including my observation of the demeanor of witnesses, and after consideration of the arguments and briefs submitted, I hereby issue the following recommended decision.

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[1]References to the official hearing transcript will be denoted as "Volume:page." Since virtually all of the exhibits were introduced by the Employer, its exhibits will be denoted simply as "Ex.number," and the exhibits of the Regional Director will be identified as "RDX number."

BACKGROUND

On May 22, 1992, the San Joaquin Valley Workers Organizing Committee, Laborers International Union (LIUNA), AFL-CIO, ("Union") filed a petition for certification in Case No. 92-RC-2-VI seeking to represent all agricultural employees of OCN in the state of California. . The Employer's response thereto was filed on May 26, 1992, wherein the Employer asserted it was not at 50% of peak employment.[2]

The Regional Director of the Board's Visalia Regional Office determined OCN was at 50% of peak and ordered an election. The Notice and Direction of Election issued on May 27, 1992.

The election was held on May 29, 1992. The Tally of Ballots showed the following results:

Union..... 34

No Union.....26

Challenged Ballots..... 07

Total..... 67

The Employer filed its objections to the election on June 4, 1992. These were reviewed by the Executive Secretary who set the two objections described above for hearing.

COMPANY OPERATIONS

Mr. Robert Veyna of OCN testified that OCN has two operations: one in Visalia which the Company concedes is agricultural, and one in southern California (with divisions in

[2]An employer has 48 hours to file a response, but that time limit is extended to the next business day if the deadline falls on a holiday or a Sunday. The deadline fell on Sunday before Memorial day 'so it was extended two days.

Norwalk and Escondido) which is at issue here. The Visalia operation consists of deciduous trees grown in fields by OCN. Depending on the orders OCN has from customers, it decides how many trees to harvest (dig up).[3]

The harvest operation usually begins about December 1 and may continue up to 5 weeks. Following the harvest, the trees, which are in a bare root condition, are graded by size and marked with identifying labels. They are then loaded on vans and transported to Escondido/Norwalk where OCN maintains its containerized tree division. (I:48, 60-64.)

Some of the trees are apparently sold in the bare root condition very soon after they reach Norwalk/Escondido while others are planted in containers. Mr. Veyna's testimony is not completely clear whether after the trees are put into containers they are sold immediately or kept until March or April and then sold. (Compare I: 55-56, lines 27-1 with 1:56, lines 14-16.) In any event, approximately 25 % of the trees are planted in successively larger containers for resale up to 2 years later, or, occasionally, longer."[4]

These deciduous trees represent about 20% of the number

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[3] If OCN has grown more trees than it can sell, the excess trees are dug up later—in January or February—and burned. (I:64-67.)

[4] They are first planted in 5 gallon cans, then about 3 or 4 months later replanted into 15 gallon cans and from there, some 7 months later, to a 24 inch box. About 9 months after that, they will be put into a 30 inch box which is the largest size deciduous tree that OCN sells. Some trees are sold in various sizes at points along the way depending on the demand. Relatively few trees over the 30 inch size are sold. (I:55-57.)

of trees grown in containers in Norwalk/Escondido. (I:54-55.) The remaining 80% of the trees grown there are evergreen trees.[5]

All of the evergreens are purchased from outside suppliers and are received in 5 gallon containers. When OCN gets the trees, its employees replant them into 15 gallon containers. Mr. Veyna testified that "[b]asically, the 15 gallon size is used to be replanted into larger sizes, but if there' s a lack of demand in the larger sizes, we will sell some 15 gallon evergreen trees." (I:49.) Even so, it will be six months to a year before these trees will be ready to sell in the 15 gallon size. (Id.)

Like the deciduous trees, the evergreens are successively replanted in larger containers. From the 15 gallon size, the trees are planted in 24 inch boxes, and it takes another six months to a year before they will be ready for sale. Thus, the 24 inch size trees, from which OCN makes most of its money, require from one to two years' care before they are ready for sale.[6] (I:50.)

During the time the evergreen and deciduous trees are being grown, the Norwalk/Escondido employees care for them by pruning, fertilizing, staking, applying chemicals, irrigating, weeding, and, for those trees not sold, replanting them into the next size container. They also prepare them for loading when it

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[5]Evergreen trees, as the name implies, remain green year round. Deciduous trees drop their leaves in the fall and winter,

[6]OCN continues to plant evergreens in larger and larger containers—30 inch, 36 inch, 42 inch, and even 60 inches, selling some along the way as there is demand for each size. (I:50-52.)

is time for them to be transported to customers. (I:53.)

In addition to the workers who care for the trees, the status of OCN's truck drivers is at issue. During the eligibility period, OCN employed three truck drivers.[7] They drive big rig trucks which they use to transport the bare root trees from Visalia to Norwalk and also to deliver the containerized deciduous and evergreen trees to customers after they have been sold.[8] (I:59-60; II:16-17.)

THE UNIT OBJECTION

The Employer contends that none of its employees in Norwalk and Escondido are agricultural workers and insists that the election must be overturned because their ballots were commingled with those of its Visalia employees[9] so that the Board cannot determine whether a majority of workers in the appropriate unit voted for "Union" or "No Union." The facts as to the nature of the operations and the workers' duties are not in dispute. Rather, there is a legal issue as to whether the employees who care for the containerized trees and the truck drivers are subject to this Board's jurisdiction.

The distinction between agricultural employees and

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[7] A few additional drivers may be hired during the harvest season.

[8] Generally, the evergreens that OCN buys are delivered by the suppliers. (I:58.)

[9] Even though the Regional Director told Mr. Perez to challenge the drivers (see Ex. 23, only relevant portions of which were admitted, and see II: 247), for some reason they did not vote challenged ballots. (Compare Ex. 21 which is the challenge list and Ex. A to Ex. 6 which lists the names of the drivers.)

commercial or industrial employees is one with which the National Labor Relations Board ("NLRB" or "national board") has struggled for some time. In drawing the distinction, the NLRB, and this Board, use the definition of agriculture set forth in the Fair' Labor Standards Act ("FLSA").[10] (See Bud Antle Inc.,dba Bud of California, a Wholly Owned Subsidiary of Castle & Cooke, Inc. (“Antle") (1992) 18 ALSB No. 6.).

In interpreting the FLSA, the United States Supreme Court established a primary definition of "agriculture" which encompasses direct farming practices and a secondary definition which consists of work performed "by a farmer or on a farm" as incident to or in conjunction with the agricultural activities of the grower-employer. (Farmer's Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 755.)

As noted, OCN contends that its southern California employees are excluded from the ALRA because 80% of the product they handle (the evergreen trees) comes from entities other than OCN. OCN has misconstrued the nature of the case.

It cites various NLRB and court cases which determine the agricultural versus nonagricultural status of workers based an. the amount of product they handle which emanates from an

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[10]"Agriculture" includes farming in all its branches and among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities... the raising of livestock, bees, fur-bearing animals, or poultry, and any practices. . .performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (29 U.S.C. sec. 203(f)).

employer other than their own, and/or the regularity with which such product is handled. These cases, however, are all concerned with work which does not fit within the primary definition of agriculture (e.g. they are tasks such as packing or processing agricultural products as opposed to cultivation and harvesting), so the question is whether the work fits within the secondary definition.[11]

Here, the OCN employees (except for the truck drivers who will be discussed separately) are engaged in tasks which fall within the primary, not the secondary, definition of agriculture. This case is analogous to Light's Tree Company ("Light's") (1971) 194 NLRB 229, where the NLRB found that nursery employees who propagate, cultivate, water, transplant, trim, spray, dig and engage in other related functions necessary to insure the development and proper growth of the nursery stock are agricultural employees.[12]

These are precisely the kinds of tasks performed by OCN's workers. Thus, the Grower-Shipper line of cases is inapposite. The NLRB has itself recognized that a different rule should be applied regarding employees who spend part of their

[11]See, for example, Camsco Produce Company, Inc. ("Camsco") (1990) 297 NLRB 905 (regularity, not amount, is determinative); Employer Members of Grower-Shipper Vegetable Assn. ("Grower-Shipper" (1977) 230 NLRB 1011 (regularity and substantial amount required); DeCoster Egg Farms (1976) 223 NLRB 884 (amount, not regularity, is determinative).

[12]"In reaching its decision, the NLRB cited regulations of the Department of Labor which include planting, cultivating, watering, spraying, fertilizing, pruning, bracing and feeding a growing crop as agricultural work. (29 CFR §780.174.)

time performing primary agricultural work. (Camsco)

The Employer also cites and relies heavily on the NLRB's decision in Acruaculture Research Corp. ("ARC") (1974) 215 NLRB 1 and asserts that the facts in that case are similar to those here. Although there is a superficial similarity, the cases are different in a crucial respect.

In ARC, the employer bought clams which it either promptly prepared for sale (and then sold) or else kept and raised for sale at a later time. The NLRB found the work dedicated to raising the clams fell within the definition of primary agricultural work, whereas the tasks performed in readying the clams for sale were nonagricultural.[13]

All employees did both types of work. Because both types were intermingled and it was impractical to separate the two, and because a significant amount of the workers' time (about one-third) was spent on the nonagricultural tasks, the NLRB found the employees were not exempt agricultural workers and concluded it had jurisdiction.

This case is different, however, because unlike the employees in ARC, all of the tasks performed by OCN's workers fit within the primary definition of agriculture. They do not perform a mix of agricultural as well as nonagricultural work.[14]

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[13]This work consisted of culling, cleaning, storing and grading the clams.

[14] Even where employees are mainly engaged in primary agricultural work but also perform a small amount of nonagricultural work, the latter is inadequate to bring them

Based on the foregoing, I find OCN's southern California employees are agricultural workers. The fact that 80% of the trees they tend are obtained from an entity other than OCN is of no moment because in caring for and raising the trees, OCN is engaged in primary agricultural practices.[15]

The truck drivers present a different issue because none of their work fits within the primary definition of agriculture. Rather, the question is whether it fits within the secondary definition of agriculture.

I find it does because, whether growing trees in fields or in containers, OCN is a farmer, and its drivers transport the product to market. The FLSA specifically includes transporting to market within its definition of agriculture. Therefore, I find the drivers are agricultural workers.[16]

under the NLRB's jurisdiction. (Light's. See also, NLRB v. Kelly Brothers Nurseries, Inc. (2d Cir. 1965) 341 F.2d 433 and Camsco).

[15]In ARC, the fact that the clams that were raised or farmed by the company had been purchased did not change the fact that, as to this part of its operation, the company was engaged in primary agriculture. It was only the fact that the company was also engaged in the commercial activity of preparing clams not farmed by it for sale that caused the NLRB to assert jurisdiction.

[16]In the case of Olaa Sugar Company, Limited ("Olaa") 118 NLRB 1442, the NLRB, on remand from the court of appeals (NLRB v. Olaa Sugar Company (2d Cir. 1957) 242 F. 2d 714), found that a truck driver who spent half of his time transporting sugar cane grown by his employer, and the other half transporting cane grown by others, was agricultural as to the first and nonagricultural as to the latter. The drivers here fall in the first category.

Bayside Enterprises,. Inc. [17] ("BEI") and Campbells Fresh Inc.[18] ("Campbell's"), which OCN cites, are distinguishable from the case at bar. In BEI, drivers who worked for a feed mill drove feed that was processed at the mill to a farm where chickens owned by Bayside were raised by farmers. Bayside conceded the drivers did not work on a farm, so the question was whether the drivers' employer was a farmer within the meaning of the FLSA.

The court upheld the NLRB's finding that the farmers were independent of Bayside. Consequently, the drivers did not come within the secondary meaning of agriculture. Here, OCN is a farmer.

In Campbells, the NLRB found certain truck drivers were classified as nonagricultural employees because some of the mushrooms processed by their employer were regularly acquired from an outside source. Applying its recent ruling in Camsco, the NLRB found it was a commercial rather than an agricultural enterprise. The NLRB noted, however, that long haul drivers who transported mushrooms grown by Campbells to warehouses were still included in an agricultural unit established by this Board several years earlier. I find the drivers here are like the long haul drivers.

With regard to the drivers over whom the NLRB did assert jurisdiction, there is a crucial difference between them

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[17](1977) 429 U.S. 298.

[18](1990) 298 NLRB 432 (No. 54).

and the drivers in this case. No primary agricultural practices were performed on the acquired mushrooms which the drivers transported. They were simply processed and sold.[19] In contrast, the trees bought by OCN were subsequently grown by it for as long as two years. The facts in the two cases are materially different.[20]

Based on the foregoing, I recommend that this objection be dismissed.

THE PEAK OBJECTION

OCN's second contention is that the election should be overturned because OCN was not at 50% of peak employment when the petition was filed. As the objecting party, OCN has the burden of presenting sufficient evidence to support its claim.[21]

The peak requirement stems from sections 1156.3 and

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[19]In this respect, the case is akin to ARC.

[20]Also, in Campbells, the drivers were responsible for sales and developing a relationship with customers was an important part of their job. There is no similar evidence in this case. Moreover, I find the primary/secondary features of agriculture are the more significant considerations.

[21]Clearly, it is the employer that has the information necessary to support its claim and, especially given the very short time within which elections are to be held, the Regional Director and his or her staff should not have to ferret out information which the employer fails to provide. There are, however, circumstances where the Regional Director should make inquiries. (Perry Farms, Inc. (1978) 86 C.A. 3d 448). Thus, for example, where there was a very large discrepancy between her peak calculation and the employer's, the Board held that the Regional Director "should investigate all (emphasis in original) relevant data..., including information not provided by or accessible to an employer, if reasonably apparent or accessible to the Board agents." Tepusquet Vineyards ("Tepusqiaet") (1984) 10 ALRB No. 29, at p.7.

1156.4 of the Act[22] and is designed to ensure that the number of eligible voters is representative of the workforce which will be bound by the election results. The body count is the favored method of determining peak[23] and was the method used here.

OCN contends that at the time the petition was filed it had not yet reached peak employment for 1992 and would not do so until December 1992 during its harvest season. Thus, this is a prospective peak case.

The standard to be applied in evaluating the Regional

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[22]"Section 1156.3 of the Act provides in pertinent part that a petition for certification 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 50 percent of his peak agricultural employment for the current calendar year.

Section 1156.4 provides in pertinent part that:

> the board shall not consider a representation petition...as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition. (emphasis added in both sections.)

[23]"Ace Tomato Co., Inc., (1992) 18 ALRB No. 9; Triple E Produce Corporation ("Triple E") (1990) 16 ALRB No. 14. Only if this method does not result in an employer being at 50% of peak does the Board resort to the Saikhon averaging method to estimate prospective peak. Averaging is not used to ascertain the number of eligible voters. (Id.)

Director's peak determination is whether it was reasonable[24] in light of the information available to him at the time he made it (Triple E). In reviewing the decision, however, the Board does not confine itself to a consideration of the methods actually used by the Regional Director but will independently decide whether a finding of timeliness (of the petition) was reasonable based on the information available at the time the Regional Director made the decision. (Tepusquet; Charles Malovich ("Malovich") (1979) 5 ALR3 No. 33.)

OCN argues the determination was not reasonable because:

(1) the Board Agent in charge of the election, Mr. Ed Perez, incorrectly counted the number of - employees both in the eligibility week and in the peak periods in preceding years and also incorrectly determined that peak employment in 1992 would be 15% less than the 1991 peak;

(2) the Regional Director, Mr. Lawrence Alderete, improperly relied on Mr. Perez's calculations and his recommendation that 1991 peak figures be reduced by 15% rather that personally ascertaining or verifying that information for himself;

(3) the Regional Director acted unreasonably in not examining underlying sales invoices when he determined that the summary of sales orders supplied by the Employer's attorney did

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[24]As the Executive Secretary noted in his Order Denying Request To Reframe Peak Objection Set For Hearing (dated September 11, 1992), the standard is not the "correctness" of the Regional Director's determination.

not: support the Employer's contention that it had as many or more orders in 1992 than in. 1991; and

(4) the Regional Director's conclusion that OCN would harvest the same number of acres in 1992 as 1991 but with 15% fewer workers was incorrect, and he was unreasonable in not verifying his conclusion by checking it with OCN, its attorney and/or other employers in the same business as OCN.

a. The Board Agent's Recommendations.

Mr. Alderete testified he relied on Mr. Perez' calculations as to the number of workers employed during the eligibility week and during the 1989, 1990 and 1991 peak employment periods at OCN. He also relied on Perez' representation that OCN had experienced an average 15% drop in employment during those years and Perez' recommendation that the 19'91 peak employment figure should be reduced by 15% to estimate what the 1992 peak would be.

He did not independently examine underlying payroll records nor make calculations such as those made by Perez.[23] He did personally review the material regarding sales orders (see

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[25]While in this case the number of payroll records is guite small, and they are maintained in an orderly condition, it should be kept in mind that in the experience of this Board, payroll records are often so voluminous that the only way to review them is for Board agents to physically go the employers' premises. Further, "[p]ayroll records in the agricultural setting can range from entries on adding machine tapes, or labor contractor's notebooks, or penciled ledgers, to computer printouts." (Wine World, Inc. dba Beringer Vineyards (Wine World") (1979) 5 ALRB No. 41.) All of which is to say that in establishing a standard for the level of the Regional Director's personal involvement, it should be kept in mind that what may be practical in one case will not be in others.

discussion below) because Mr. Perez was on the road attending to other election related matters, and he weighed all the information he had to decide if the election should proceed.

As noted above, OCN contends Mr. Alderete was remiss in not independently verifying the information Mr. Perez provided. Although he made some errors, Mr. Perez is an experienced agent. I find it was not unreasonable for Mr. Alderete to rely on his calculations and recommendations without personally verifying them. Alderete made his own analysis and determination as to the peak issue which is set forth in Ex.24.

I also reject the contention, made by OCN's legal counsel at hearing, that Mr. Alderete decided to order the election without regard to whether the peak requirement was met. Counsel charged that Mr. Alderete falsified dates on documents to cover up a precipitous decision to hold the election. (11:107-108, 240-243, 246-247.) These are serious charges, and I do not find any evidence to support them.

Mr. Alderete and Mr. Perez both credibly testified that because of the short time between the filing of a petition and the election itself, many things must be set in motion while the ultimate decision whether to proceed is still being made. This is especially true where, as here, Board agents must travel some distance. Thus, for example, Mr. Alderete signed copies of the Notice and Direction of Election so Perez could take them with him when he left for Southern California on May 27, 1992, even though he had not yet decided whether OCN was at 50% of peak.

b. The Peak Calculations

OCN contends Mr. Perez made several types of errors in his peak calculations, to wit, that he counted people he should not have, that he miscounted, and that sometimes he was inconsistent in his methodology. At hearing, Mr. Perez was questioned extensively as to how he arrived at the numbers he provided to Mr. Alderete that are reflected in the latter' s analysis of peak (Ex.24).

Mr. Perez was a very cooperative witness and readily acknowledged while reviewing his calculations at hearing that he sometimes included workers in one calculation but not in another and made some other errors as well. Some were the kinds of errors that almost inevitably happen in reviewing numerous documents and making calculations (not unlike typographical errors in a document that has been edited several times), some he could not explain because with the passage of time he could not reconstruct what he had done, and others seemed to stem from some uncertainty about how to count workers in certain situations.

Disarmingly simple on its face, calculating peak employment has generated quite a few Board decisions with rules evolving as different factual situations presented themselves. This case demonstrates there is still some confusion as to certain fundamental questions.

The testimony of Mr. Perez and Mr. Alderete shows there is uncertainty as to how to interpret the statutory language and the Board's regulations; specifically, in this case, how to treat workers whose names were noted on the payroll as being on

workers' compensation leave or on vacation.[26] (See, for example, II: 57-59, 139-142, 150, 175-178, 230-233.)

In Kubota Nurseries, Inc. ("Kubota") (1989) 15 ALRB No. 12, the Board determined that, generally, eligible voters will be counted for purposes of peak and vice versa. The Board determined that a worker who was on workers' compensation leave, and whose name did not appear on the employer's pre-petition payroll, nonetheless should have been counted because the employer had not shown that the employment relationship had ceased.[27] The Board decided it was not necessary for a worker to be physically present on the job in order to be counted.

As to workers who are on vacation during the eligibility period or the relevant peak employment periods, the Board, using language similar to that in Kubota, has found they should be counted if they would have worked but for the fact that they were on vacation. (Compare Hiji, p.13, with Kubota, p.5.)

c. The Eligibility Period

Ex. A to Ex. 2 contains the payroll records for the eligibility week (May 11 through May 17, 1992), and Ex. 28 is the eligibility list with a cover sheet on which are two sets of calculations performed by Mr. Perez. He could not independently

[26]There is no issue as to workers marked "laid off" since they were not counted which is in accord with Board precedent. (Comite 83, Sindicato de Trabajadores Campesinos Libres (Hiji Brothers) (hereafter "Hiji") (1987) 13 ALRB No. 16.)

[27]The Board's ruling comports with NLRB precedent. (Atlanta Dairies Cooperative, Inc. (1987) 283 NLRB 327; Red Arrow Freight Lines (1986) 278 NLRB 965; Otarion Listener Corp. (1959) 124 NLRB 880.)

recall which of the two totals he gave to Mr. Alderete but, based on Ex. 24 where Alderete used the number 68, Perez concluded that would have to have been the number he provided.

Applying applicable legal precedent, I find, as Mr. Perez did, that the number of individuals "currently employed" during the eligibility week was indeed 63. I reject OCN's assertion that it should have been 64. OCN obtains this number by deleting the three truck drivers and Everado Magallon who is noted on Ex.A to Ex.2 (under the heading "Edison") as being on workers' compensation leave.)

OCN had the burden of providing the Regional Director with evidence showing that Mr. Magallon should not have been counted, which it did not do (Kubota). As discussed above, truck drivers may be agricultural or nonagricultural workers depending on the circumstances. Absent sufficient evidence to the contrary submitted by OCN, it was not unreasonable for Mr. Perez to count them as agricultural.[28] Further, I have found that they are, in fact, agricultural employees and therefore are properly included in the unit and should have been counted.

d. Calculations of Peak in Prior Years

OCN also contends that various errors in calculating peak employment in prior years (1989, 1990 and 1991) result in 68 workers not being sufficient to put OCN at 50% of peak. Ex. 25, 26 and 27 consist of payroll records for the respective years,

[28]The fact that he counted them when calculating the number of people employed during the eligibility week and in calculating peak employment in 1989, but failed to include them for 1990 and 1991, means only that he made a mistake.

and each has a cover sheet with various calculations performed by Mr. Perez.[29] As with Ex. 28, Mr. Perez was questioned extensively about his methodology. I will discuss each year separately, beginning with 1991.

1. 1991 Peak

Ex.25 consists of payroll records for the week of December 16-23, 1991, the undisputed payroll period during which OCN was at peak for that year. Based on Ex.24, Mr. Perez inferred that he gave Mr. Alderete the number 163.

Perez did not count supervisors, guards,[30] one worker who was noted as laid off, one worker noted as on vacation, one confidential employee and, despite having counted drivers during the eligibility week, four truck drivers. (II:144-163.) OCN did not establish any reason to doubt the numbers listed for the Visalia employees and labor contractors, 70 and 54, respectively.

The number for Escondido (p.6 of the exhibit) should have been 4 not 3 because Jesus Avila should have been counted since he was on vacation.[31] The four truck drivers at Norwalk should have been counted (p.7 of the exhibit). Eleven workers at Norwalk (p.8 of the exhibit) were properly counted since there is no evidence the two individuals whose names Mr. Perez lined

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[29]Some notations on the original documents did not show up clearly on the photocopies introduced as a second set of exhibits. In those instances, I inserted the information on the copies and signed my initals.

[30]No one contends the guards were not properly excluded.

[31]He did not count Francisco Perez since he had noted "foreman" next to Perez' name. (II:150.)

through should have been counted. Similarly, there is no evidence his count of four employees at Norwalk (p.9) with the heading "Chevron" was not proper.

The evidence as to the proper count of Norwalk workers listed under the heading "Franciosi" (p.10) is unclear. Mr. Perez lined through the name of Jose Milian which was the way he indicated a person should not be counted. Perez could not recall at hearing his basis for doing so and was asked only to identify the circled number in the top left hand corner of that page. He responded it "appeared to be six." (II:157.) If so, it would mean he counted Milian. The number is either a 5 superimposed on a 6 or vice versa, and there is no way to tell, even from the original document, which it is.

Perez' testimony on this point is very brief, and he did not give any reason why he would have counted a name which had been lined out when he had not done so in any other instance. I note also that using the number 5 results in getting a total of 36 workers at Norwalk which is the number indicated in the set of calculations which total 163. I find that he did not count Milian which would mean 5 not 6 workers at "Edison" and "Franciosi" which are part of Norwalk.

Finally, Perez testified he did not count two workers at "Base," another part of Norwalk, (listed on page 11) because they were supervisors. Thus, 16 workers from that page were included in the count.

Adding the foregoing numbers (70 (Visalia), 54 (Visalia labor contractors), 4 (Escondido), and 40 (Norwalk--4 (drivers),

11 (at p. 8 of exhibit), 4 (Chevron), 5 (Edison and Franciosi) and 16 (Base), the total 1991 peak was 168.

2. 1990 Beak

The General Counsel claims the correct peak is 203; the Employer claims it is 206. Based on Ex.24, Mr. Perez inferred he gave the number 135 to Mr. Alderete.

Mr. Perez testified he could not replicate the number 83 for Visalia indicated on the front page of Ex.26 except by excluding the 6 supervisors (on page 1 of the Visalia records) twice. He concluded he must have made such a mistake, and I conclude the same. (II:165-168.) Thus, the number should have been 89 workers.[32] There is no issue regarding the 44 labor contractors.

He excluded the truck drivers just as he had done for 1991. In this instance, there are 5 drivers (listed on the next to the last page of the exhibit).

The most likely explanation of the number 57 shown for Norwalk on the cover of Ex.26 is that he mistakenly used the encircled numbers from the first two pages of Norwalk "Base" employees which means he failed to exclude supervisor Lorenzo Gutierrez and the terminated employee, Giro Marin Noyola.

[32]The employer posits that Mr. Perez should have counted Carmen Mendoza (last page of the Visalia weekly payroll records). Mr. Perez could not recall whether he excluded her based on information from Sarah Wolfe, the attorney representing OCN at that time. OCN as the objecting party has the burden of proof, and it introduced no evidence to show that Mr. Perez acted unreasonably in not counting Ms. Mendoza.

The count should be 55 since they should not have been included.[33]

As with the truck drivers, Mr. Perez did not count people on vacation in calculating either 1991 or 1990 peak. (II:175-177.) Thus, the two workers listed on the Escondido payroll records who were noted as being on vacation should have been counted which would change that total from 8 to 10.

Based on Mr. Perez' testimony, it appears he should have counted 89 Visalia workers, 44 Visalia labor contractor employees, 10 Escondido workers, 5 truck drivers, and 55 Norwalk employees for a total of 203 individuals employed during the peak week of December 10-16, 1990, rather than the 185 number he gave to the Regional Director.

3. 1989 Peak

Based on Ex.27, which has only one peak calculation, and Ex.24, Mr. Perez testified he told Mr. Alderete there were 216 workers during the 1989 peak payroll period of December 4-10, 1989. In this instance, he included the drivers and counted workers on vacation so no adjustments for them need be made.

The only change to his calculation is that the number

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[33]The Employer posits 59 is the correct number (Employer's brief, p. 18), but I do not see how it arrives at that figure. There should be 41 for Norwalk "Base." "Chevron" accounts for 7 (excluding supervisor Enrigue Benitez), plus 5 for "Edison" (excluding foreman Raul Sandoval), plus 2 at "Franciosi." Totaling these figure yields 55. I note that some employees were counted one year but not another (e.g. Raul Sandoval excluded in 1990 but counted in 1991), Mr. Perez explained that in some instances the supervisory status of workers changed. (II:234.)

of workers at Norwalk base[34] should be reduced from 28 to 26. (Mr. Perez inadvertently counted one worker (Abel Rodriquez) twice[35] and miscounted the remaining number of workers. The total number he should have given to the Regional Director was 214.

Although the peak employment figures of prior years, especially the immediately preceding year, are very important evidence as to what the likely peak will be in the election year, the Regional Director must also be aware of any changes which would warrant adjusting these figures to estimate prospective peak, and he must be able to rely on the information provided by the employer. ("Tepusguet"). As discussed below, both Mr. Perez and Mr. Alderete determined that peak employment in 1992 would be substantially lower than in prior years.

4. The 15% Reduction Factor

Based on information from OCN that the company was in dire economic straits and expected to operate on a smaller scale for the next 3 to 5 years,[36] Mr. Perez recommended to Mr. Alderete that the 1991 peak employment figure be reduced by 15 percent in order to estimate peak employment for 1992. He obtained this figure by averaging the reduction in employment from 1989 to 1990 and from 1990 to 1991. Actually, using his

[34]The two pages showing this payroll are located within the pages listing labor contractor workers just after the FAX sheet, and the first worker's name is "Gabriel Mendoza."

[35]Mr. Rodriguez worked at both Base and Norwalk/Chevron that same week and is counted under Chevron.

[36]See RDX 1.

figures, the average decline was 13.12, not 15, percent.[37]

Mr. Alderete concurred in the 15% figure and ascertained that the number of eligible voters was one less than 50% of anticipated peak. (See Ex.24) Citing this Board's decision in Bonita Packing Co., Inc., (1977) 4 ALRB No. 96, he determined the peak requirement was satisfied and decided the election should be held.[38] He also considered inconsistencies (discussed below) in the information provided by OCN which, he testified, in view of the fact that only one more person would make the difference, caused him to determine that OCN had not substantiated its contention that the 50% requirement had not been met.

The question here is whether the Regional Director's finding that the peak requirement was met was reasonable in light of the information available to him. Clearly, the first step in this process is to use the new peak figures set forth above.

Using those figures, I find that employment declined

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[37]A drop of 14.35% from 1989 to 1990 (216 minus 185=31, and 31 divided by 216=14.35) added to a drop of 11.89% from 1990 to 1991 (185 minus 163=22, and 22 divided by 185=11.89) equals 26.24, and dividing that by 2 yields an average of 13.12.

[38]In Bonita, the Board determined that where the number of eligible voters was two short of meeting the 50% requirement (58 out of 119) the election should proceed since the peak figures it had were approximations . The Employer contends Bonita is no longer relevant precedent in view of the more recent case of Triple E, applying Adamek & Dessert, Inc. v.- ALRB (1986) 178 Cal.App. 3d 970.) I do not agree. If the Board had meant to overrule Bonita, I presume it would have so stated. Rather, Bonita reflects that a narrow difference where peak figures are only an approximation will not necessarily defeat finding the peak requirement has been met. In prospective peak cases, the estimate of future peak will always be an approximation.

5.14% from 1989 to 1990 and that the decline from 1990 to 1991 was 17.24 percent.[39] Adding these two amounts together and dividing by two yields an average decline of 11.19 percent. If one reduces the 1991 peak of 168 employees by this amount, OCN was not at 50% of peak during the eligibility week.[40] The inquiry does not end here, however, because in view of the information provided by OCN, I do not believe it was reasonable for Mr. Perez to simply average the two numbers and ignore the fact that employment dropped more than three times as much from 1990 to 1991 as it did from 1989 to 1990.

Mr. Perez based his recommendation that the 1991 peak figure should be reduced in part because of information obtained during his investigation of an unfair labor practice case involving two layoffs of OCN workers in January 1991.[41] Ms.Wolfe, who originally represented OCN in the instant case, was

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[39]A drop of 11 workers from 1989 to 1990 divided by 214 yields 5.14 percent, and a drop of 35 workers from 1990 to 1991 divided by 203 yields 17.24 percent.

[40]Multiplying 168 by 11.19% yields 18.80. Hounding up to 19 and subtracting 19 from 168 yields 149. Dividing 149 by 2 yields 74.5, so 75 workers would have to have been "currently employed" during the eligibility week for OCN to have been at 50% of peak. The 68 eligible voters represent only 45.64% of 168, i.e. 4.36% short. In Bonita, a margin of 2.5% was close enough, but in Tepusguet 4.4% was not.

[41]ln its brief, OCN refers to an April 2, 1992, letter containing information about acreage upon which Mr. Perez relied. This is a mistake since the only letter of that date is RDX1 which contains no such information. Apparently, the letter counsel meant to refer to is Ex.A to Ex.6, which is dated May 27, 1992, which was not considered by Mr. Perez since he had left midday on that date to drive to Norwalk and did not see the letter until he returned after the election. Mr. Alderete did have the letter before him when he made his peak determination. (See discussion below.)

also its attorney in the unfair labor practice case and in that capacity sent a letter dated April 2, 1992. (II:209.)

In that letter (KDX1) and in various conversations with Mr. Perez, Ms. Wolfe indicated that the layoffs were instituted because of serious ongoing financial difficulties at OCN and stated there was no likelihood the workers would be rehired.[42] She described the layoffs as "unprecedented in [OCN's] recent history, and she represented that even more layoffs were anticipated since OCN was fighting for economic survival and labor was its most expensive item. (See RDX1, p.l.)

Also in KDX1, she noted that 1991-1992 sales were lower than expected and that, in some cases, OCN's market was off 30 to 40 percent. She stated that OCN's financial position was further threatened because its traditional source of credit was refusing to extend further monies. From the contest of this statement, it appears this occurred after the layoffs.

She further explained that OCN's efforts to cut labor costs and production in 1991 "did not result in a substantial

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[42]Mr. Perez testified that at some point Ms. Wolfe told him the workers had been "permanently terminated," and that is certainly the thrust of her letter. OCN argues that the post harvest layoffs are unrelated to the number of employees who will be hired during the peak harvest season. It never raised this issue at the time the Regional Director was making his decision on peak even though Ms. Wolfe knew Mr. Perez and Mr. Alderete. were relying on the information in RDX1 in determining peak. I find it was OCN's responsibility to provide any information supporting this contention and not the Regional Director' s responsibility to ask such speculative questions. Further, the evidence addressed at hearing was general rather than specific, i.e. OCN needed to complete the harvest quickly to beat the competition. Since the amount of trees harvested depended on the number of sales orders OCN had received, it is not clear why it would have to hurry to market to beat its competitors.

improvement in the Company's economic situation." (RDX1, at. p.2} Moreover, she continued, "...the 1991-1992 market has been as bad as it was in 1990-1991." (Id.)

Ms. Wolfe projected that "...the Company will most likely operate on a smaller scale throughout the next three to five years simply to avoid any further economic problems, i.e. the loss of the business." (Id.) Finally, she stated that "for several months" the workers had been warned that layoffs "might well be coming in the future..." (Id.)

It is clear from the foregoing that the decline in employment from 1990 to 1991 was far more relevant than that of the preceding year in trying to determine what peak employment would be in 1992. Thus, I conclude that averaging the two years was not a reasonable approach.[43]

I also conclude that since OCN's efforts to economize in 1991 had not been successful enough, and the continued viability of the company was at stake,[44] that it was reasonable to reduce the 1991 peak figures to arrive at an estimate of peak employment for 1992. The question becomes what is a reasonable reduction.

However, 15% used by Mr. Perez and adopted by Mr. Alderete was based on erroneous peak calculations. A

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[43]OCN did not introduce any evidence that in the short time between when RDX 1 was written on April 2, 1992, and the determination of 1992 peak was made at the end of the following month, the situation had changed.

[44]I refer to the assertion in RDX 1 that OCN would operate on a smaller scale in order to avoid "the loss of the business."

reasonable reduction must be ascertained from the decline from 1990 to 1991 and the other information available to the Regional Director at the time he made his decision.

e. Other Factors Affecting Peak

There were two other types of information provided by OCN in response to requests from the Regional Director and his staff, to wit, the acreage to be harvested in 1992 as contrasted to 1990 and 1991, and the number of sales orders in 1991 compared to those received in 1992 as of the time the peak determination was made. In a letter (Ex.A to Ex.6), Ms. Wolfe provided the acreage information.

At hearing, she testified that she orally gave to Mr. Alderete corrections as to certain dates in the letter. She informed him that the reference to "December of 1990" in subparagraph "a" on page 2, should read "1991," the reference to "December 1991" in the last line on the same page should read "1990," and, finally, on page 3, subparagraph "b," the reference to "88 acres" should read "80 acres." (I:24-25.)

As corrected, the letter indicated OCN harvested approximately 102 acres of 120 acres available for harvest in 1990. [45] In 1991, it harvested 80 of 120 acres. For 1992, OCN initially projected it would harvest 88 of 101 acres, but Ms. Wolfe later changed that to 80 acres.

Thus, in 1992, OCN had 16% less acreage that it potentially could harvest than it had the prior two years (101

[45]According to Ex.A to Ex.6, in 1990 OCN harvested about 15% of its 120 harvestable acres. Fifteen percent of 120 is 102.

acres divided by 120 acres) , but believed it would actually harvest the same amount because its sales orders were about the same as they had been in 1991.[46] There is no evidence how many sales orders OCN had in 1990.

Mr. Alderete testified he did not compute a percentage reduction in acreage and specifically factor it with the 15% reduction recommended by Mr. Perez to estimate 1992 peak. Rather, he simply noted the acreage decreases were consistent with the other information that OCN was scaling back its operations. He considered those facts in light of his belief that OCN had inflated the number of sales orders it received in 1992 and concluded that, since prospective peak could only be estimated, and OCN was only one person short of 50% peak, it had not met its burden of showing the peak requirement was not met.

OCN contends it was unreasonable for Mr. Alderete to conclude that it would harvest approximately the same number of acres in 1992 as it did in 1991 with 15% fewer people, and that, especially since neither he or Mr. Perez had personal experience in the bare root nursery business, Alderete should have verified his hypothesis.

In the first place, if indeed there were something special about its business, this is the type of information that falls into the category of material OCN should have provided the

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[46]Mr. Venya credibly testified he was trying to more closely match the number of harvestable acres with the number of acres actually harvested to reduce waste. In 1992, the harvestable acres were less than in 1991 but still 25% higher than the actual acreage harvested.

regional staff. To find that Alderete should have inquired would be to require the type of speculative questions which this Board has held are not within the regional director's responsibilities (Tepusquet).

Consequently, I find the information provided by Mr. Veyna and the two bare root nursery operators who testified on behalf of OCN on this point irrelevant since it was not provided to the Regional Director at the time he made his decision on peak. It does not require much foresight to anticipate that a reduction in acreage at least raises the issue as to whether fewer people would not be hired for harvest when a company is trying to cut labor costs.

Moreover, even if it had been timely provided, I do not find it very helpful. The witnesses testified only that a reduction in acreage does not necessarily reduce peak employment and that there are various factors (e.g. weather) which affect how quickly a grower wants to complete harvesting. The testimony does not mean that where a company such as OCN is especially concerned with cutting labor costs that it will not reduce employment when it has fewer acres to be harvested.

Turning to the question of the sales orders. Alderete believed OCN was inflating them because on May 27, 1992, Ms. Wolfe had FAXed him information that, to date, OCN had orders for 318,000 deciduous trees compared to 332,000 as of June 5, 1991, and the very next day she informed him the number had increased from 318,000 to 336,134 but gave no explanation for the change. (Compare Ex.B to Ex.6 with Ex.D to Ex.6). Alderete was skeptical

that orders had increased by that much, so he added the number of orders received on May 27 and May 28, and determined they amounted to only 2,200.

OCN contends Alderete was unreasonable in not examining some 400 pages of sales orders when he concluded the summary of those orders did not support OCN's attorney's representation of the number of sales orders received by OCN to date in 1992. (II:200, 207-208.) In Kamimoto Farms ("Kamimoto") (1981) 7 ALRB No. 45, the Board found the Regional Director should have investigated a discrepancy in the information provided by the employer where the Board believed the employer had "obviously" mistakenly cited the wrong number of employees. In a later case, Tepusquet, the Board found the Regional Director was remiss in not seeking further information to resolve the large discrepancy between her peak figures and those of the preceding year where the data was reasonably apparent or accessible to the Board agents.

When Ms. Wolfe spoke to Mr. Perez by telephone about examining the underlying documentation for the sales orders on the morning of May 28, he had already left the Norwalk office and was on his way to Escondido. He told her she should talk to Mr. Alderete about how to handle the issue, and when he spoke to Alderete a few minutes later, they agreed Alderete would deal with it. (II:228-230, 237-239.)

Ms. Wolfe testified that she FAXed Ex.D to Ex.6 to Alderete about 2:35 p.m. on May 28. (I:27.) It was only then that the increased sales figures became an issue because Alderete

determined the documentation did not support a sharp increase in orders in 24 hours.

I find it was not unreasonable for Perez and Alderete to make the initial decision they did rather than have Perez and Board agent Paala turn back for Norwalk. Although pursuant to Kamimoto and Tepusguet Mr. Alderete perhaps should have contacted Ms. Wolfe to try to resolve the discrepency, I find that by the time the issue arose as to the increased orders, it was not feasible for Perez or Paala (who were in one car) to drive the one and a half to two hours back to Norwalk and examine over 400 documents when they had to meet with the Union in Escondido at 5:30 p.m. to explain election procedures (this Union had not participated in an ALR3 election before) and when they had to get up and set up the election site so the election could proceed at 6:30 the next morning. (I:235, 242; Ex.3.)

Thus, in spite of the fact that OCN was cooperative and willing to make the documentation available, I find the information was not "reasonably accessible." (Tepusqriet) OCN was aware the number of orders cited had increased but did not offer any explanation for the changes. The reason proffered at hearing by Ms. Wolfe is perfectly plausible, but the time to provide it was when the material was given to the Regional Director.

OCN argues the election could have been postponed to give the staff time to verify the sales orders. The 318,000 figure was 95% of the 1991 sales orders. This discrepancy is not so large that the election should have been delayed. Although the lack of verification was a factor in Alderete's decision, it

was by no means determinative. His testimony shows the overall economies OCN was effecting was the primary consideration.

CONCLUSIONS

For the reasons set forth above, I find it was reasonable for the Regional Director to conclude that the 1992 peak employment at OCN would be reduced from 1991. Using the proper peak calculation for 1991 of 168 employees, the 15% reduction applied by the Regional Director would put OCN at 47.6% of peak which is within the margin found acceptable in Bonita[47]

Since the 15% figure was obtained based on erroneous calculations, however, I find no particular reason to use it.

Applying a 17.24% reduction (the amount 1991 peak employment was below that for 1990) brings OCN to 48.9% of peak which is, of course, within an even smaller margin. However, although I am not convinced there is any reason OCN could not[48] stretch out the harvest by using substantially fewer workers, thereby curbing its most expensive cost item, it does seem reasonable to compare the decline in acres harvested from 1990 to 1991 with the decline in peak employment in the same years.

There was a 21.57% decline in actual acres harvested and a 17.24% decline in the number of workers who harvested those

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[47] Multiplying 168 by 15% yields 25.2. Subtracting 25 from 168 yields 143. Dividing the 68 eligible voters by 143 yields 47.6% or 2.4% below 50%. In Bonita, a margin of 2.5% was held to be close enough.

[48] since the trees are dormant, there is certainly much greater leeway for manipulating the span of the harvest than is often the case when harvesting agricultural products.

acres.[49] The number of workers declined less than the number of acres harvested. Since the number of acres to be harvested in 1992 is about the same as in 1991, a 17.24% drop in employment seems high. One must apply at least a 13% reduction to come close to an acceptable margin (3.5%) which also seems high.

Consequently, I find that using the body count method, OCN was not at 50% of peak, nor within an acceptable margin thereof. Pursuant to Triple E, the inquiry turns now to whether using the Saikhon averaging technique results in the peak requirement being met. It does not.

The average number of employees in the peak periods for 1989, 1990 and 1991 are 204, 195 and 158, respectively.[50] The decline from 1989 to 1990 is 4.41% (195 divided by 204), and the decline from 1990 to 1991 is 18.98% (158 divided by 195).

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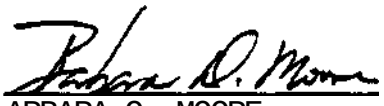
[49] Dividing 80 acres by 102 acres yields 78.43% and subtracting that number from 100% yields 21.57 percent.

[50] I used Ex. 7, 9 and 10 to obtain the daily numbers of Visalia labor contractor workers since there was no dispute as to their accuracy. I did not use those exhibits to calculate the number of other workers but instead used Ex. 25, 26 and 27 applying the criterion set out in the section above concerning peak to determine which workers to count. Since there was not much turnover, I counted workers who were ill, on leaves of absence or otherwise absent for part of a week since there is no evidence there was not work available for them on those days.

Although the decline in peak employment is slightly higher using this method, the same considerations which cause me to believe a 17.24% reduction is too high also apply here. Based on the foregoing, I recommend that the peak objection be upheld and the election be overturned.

Dated:



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