Hanford., California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WARMERDAM PACKING COMPANY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 94-RC-3-VI 20 ALRB No. 12 (August 4, 1994)

DECISION AFFIRMING DISMISSAL OF ELECTION OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

On June 9, 1994,[1] Petitioner United Farm Workers of America, AFL-CIO (UFW or Union) filed a petition for certification seeking to represent all agricultural employees of Warmerdam Packing Company (Employer) in the State of California. An election was conducted on June 16. The tally of ballots showed 220 votes for the UFW, 43 votes for No Union, and 9 Challenged Ballots.

The Employer timely filed six election objections making the following contentions:

1. That the petition was filed when the Employer was at less than 50 percent of its peak agricultural employment;

2 . That the bargaining unit sought by the petition improperly included non-agricultural employees not subject to the

[1]All dates refer to 1994 unless otherwise stated.

jurisdiction of the Agricultural Labor Relations Board (ALRB or Board);

3. That the regional director improperly refused to consider documentation submitted in support of the Employer's peak argument; and

4. That the UFW engaged in misconduct (taking excess access) which affected the outcome of the election.

On July 1, the Executive Secretary dismissed all of the Employer's objections for failure to set forth adequate grounds for finding the election petition untimely and failure to make a prima facie showing of misconduct that would warrant setting aside the election. He dismissed the objection relating to jurisdiction because there was no showing that any employees not subject to the Board's jurisdiction were in fact included in the bargaining unit covered by the election. The Employer requests review only of the dismissal of its objections relating to access violations and peak.

Access

In its election objections, the Employer alleged that the UFW had exceeded the amount of workplace access permitted under the Board's regulations. Section 20900 of the regulations provides that union representatives may take access for organizational purposes for one hour before and after work and for up to one hour during the employees' lunch break. (Cal. Code Regs., tit. 8, §20900.) The Employer alleged that the UFW exceeded the permitted access by visiting several crews during

their morning breaks and during their lunch breaks on the same day, and, on one occasion, refusing to leave the field at the end of a crew's lunch break. The Employer argues that the taking of excess access would "automatically" have some significance, and that the UFW must have interfered with employee free choice simply because of the frequency of the access violations.

The Board has declined to adopt a per se rule regarding the setting aside of elections on grounds of access violations. The California Supreme Court has deferred to the Board's administrative judgment that access violations should be reviewed in each instance on their own facts. *(Lindeleaf* v. *ALRB* (1986) 41 Cal.3d 861.) Further, the Court has upheld the Board's dismissal of objections where the supporting declarations failed to show that access by union organizers was of such an intimidating character as to affect the outcome of the election. (J". *R. Norton Co.* V. *ALRB* (1979) 26 Cal.3d 1.)

As the Executive Secretary found, the Employer made no claim that any threats, disruption or other misconduct occurred during the taking of access in this case. Moreover, there was no showing that the amount of access taken would have tended to intimidate or coerce employees. We find that the Employer failed to establish a prima facie case of misconduct tending to interfere with voter free choice, and we therefore affirm the Executive Secretary's dismissal of this objection.

Peak

Board case law holds that in determining peak, the regional director is required first to make a "body count" comparison of the number of employees on the prepetition eligibility payroll and the peak period payroll. If peak is not obtainable by that method, then other methods of calculating peak, including averaging of peak period figures, may be used. (Triple *E Produce Corporation* (1990) 16 ALRB No. 14.) However, in all cases the body count method must be used to calculate the prepetition payroll figure. *(Adamek & Dessert, Inc.* v. *Agricultural Labor Relations Bd.* (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366] .)

In this case, the Regional Director appropriately employed the body count method in determining that 288 employees worked during the prepetition payroll period. He also determined that 303 *regular* employees worked during the peak period. Due to high turnover among labor contractor employees during the peak period, the Regional Director used the single highest daily figure from that period, which was 247.[2] Since 288 is more than half of the sum of 303 and 247 (550), the Regional Director concluded that the election petition was timely filed.

[2]As the Executive Secretary noted, this actually produced a higher figure than would have resulted from simply averaging the daily numbers of labor contractor crew members (229.6). If the 229.6 figure had been used, peak would have been established by an even larger margin (303 + 229.6 = 532.6; 532.6 •*• 2 = 266.3, compared to 288 during eligibility period)

In its election objections petition, the Employer argued that a comparison of the actual number of employees working during the prepetition period with the number of employees working during the peak period demonstrated that the Employer was not at 50 percent of peak at the time of the election. Moreover, the Employer argued, peak could not be established by comparing the average number of employees during the prepetition period to the average number of employees during peak, or by comparing the actual hours worked during both periods. The Employer further claimed that it was prejudiced when the Regional Director prematurely cut off its time for submitting information in support of its position.

The Employer makes the same arguments in its petition for review. It asserts that the body count method is more appropriate in this case than averaging, and reiterates its contention that peak cannot be established here by any of the methods the Employer has described. Further, it continues to claim that it was prejudiced by the Regional Director's cutoff of information.

We find that the Executive Secretary properly rejected the Employer's assertion that the body count method should have been used to calculate the number of labor contractor employees working during the peak period. Since there was a great deal of turnover during the peak period (329 different employees worked during the period, while daily totals ranged from 198 to 247), using the body count method would have resulted in a highly

distorted view of the Employer's labor requirements during peak.[3] The Regional Director's method of calculating peak was reasonable and consistent with the Board's practice of using alternate methods where the body count method would not provide an accurate calculation. *(Triple E Produce Corporation, supra,* 16 ALRB No. 14.)

The Executive Secretary also properly rejected the Employer's contention that a comparison of the average number of "man days" during the eligibility week should be compared to the average number of "man days" during the peak week. The use of such a method would have violated the judicial mandate that employment during the eligibility period cannot be averaged. *(Adamek & Dessert, Inc.* v. Agricultural *Labor Relations Bd., supra,* 178 Cal.App.3d 970.) For the same reason, the Executive Secretary acted correctly in rejecting the Employer's proposal to compare the total hours worked during eligibility week to the total hours worked during peak.

We also affirm the Executive Secretary's conclusion that the Employer was not prejudiced by the Regional Director's failure to consider the Employer's last-minute submission of information on the peak question. The submitted information consisted of minor clarifications and reiteration of arguments already considered by the Regional Director. The Executive Secretary reviewed the submitted information and correctly found that it did

[3]There is no indication in the record that there was similar turnover during the eligibility period.

not affect the reasonableness of the Regional Director's peak calculation.[4]

For the above-stated reasons, we affirm the Executive Secretary's dismissal of the election objections relating to peak and the Regional Director's conduct in calculating peak.

CERTIFICATION

We affirm the Executive Secretary's dismissal of the Employer's Election Objections Petition in its entirety. We therefore order that the results of the election conducted on June 16, 1994, be upheld and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive collective bargaining representative of all of Warmerdam Packing Company's agricultural employees in the State of California.

DATED: August 4, 1994

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

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[4]The Employer's June 16 motion to censure the Regional Director is hereby denied. The Employer argued that the Regional Director asked the Employer to respond to written questions by 5:00 p.m. on June 13, but then failed to wait for the Employer's response, which was being prepared for transmission by FAX at 4:59 p.m. The Regional Director, apparently presuming by 4:59 p.m. that the Employer would not respond to his request by 5:00 p.m., declined to delay his decision on peak any longer. We fail to see how such conduct could warrant censure. In any event, the Employer suffered no prejudice. As the Executive Secretary concluded, the later-submitted information would not have affected the reasonableness of the Regional Director's peak calculations, since it contained no significant new data or any arguments not already considered by the Regional Director.

CASE SUMMARY

WARMERDAM PACKING COMPANY
(United Farm Workers of America, AFL-CIO)

20 ALRB No. 12
Case No. 94-RC-3-VI

Background

On June 16, 1994, an election was conducted among all the agricultural employees employed in California by Warmerdam Packing Co. (Employer) . The tally of ballots showed 220 votes for the United Farm Workers of America, AFL-CIO (UFW), 43 votes for No Union, and 9 Challenged Ballots. The Employer filed six election objections contending that the election petition was filed at a time when the Employer was at less than 50% of its peak agricultural employment; that the petitioned-for bargaining unit included non-agricultural employees; that the Regional Director had failed to consider information submitted in support of the Employer's peak argument; and that the UFW had engaged in misconduct by taking excess access. On July 1, 1994, the Executive Secretary dismissed the objections for failure to establish a prima facie case for setting aside the election. On July 11, 1994, the Employer filed a request for review of the dismissal of its objections relating to access and peak with the Agricultural Labor Relations Board (Board).

Board Decision

The Board affirmed the Executive Secretary's dismissal of the Employer's objections. The Board concluded that the Executive Secretary had properly found that the Regional Director correctly determined peak by comparing the actual number of employees working during the prepetition eligibility period to an average of employees working during the peak employment period, when there was high turnover. The Board also concluded that the Executive Secretary had properly dismissed the objection relating to access violations, since the Employer had made no showing that the amount of access taken would have tended to affect free choice in the election. The Board also denied the Employer's motion to censure the Regional Director for failure to consider the Employer's last-minute submission of information on the peak question.

Having concluded that the Executive Secretary had properly dismissed all of the Employer's election objections, the Board certified the results of the June 16, 1994 election.

State of California
AGRICULTURAL LABOR RELATIONS BOARD

Estado de California

CONSEJO OE RELACIONES DE TRABAJADORES GRICOLAS

Warmerdam Packing Co.,
Employer,

and
United Farm Workers of America,AFL-CIO,

Petitioner.

94-R03-IV
Case No. AFL-CIO

Caso Num.

CERTIFICATION OF REPRESENTATIVE
CERT1FICACION DEL REPRESENTANTE

An election having been conducted in the above matter under the supervision of the Agricultural Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no petition filed pursuant to Section 1156.3(c) remaining outstanding;

Habiendose conducido una eleccion en el asunto arriba citado bajo la supervision del Conse/o de Relaciones de Trabajadores Agricolas de acuerdo con las Reg/as y Ragulaciones del Consejo; y apareciendo por la Cuenta de Votos que se ha seleccionado un representante de negociacion colectiva; y que no se ha registrado (archivado) una peticion de acuerdo con la Seccion 11S6.3(c) que queda pendiente;

Pursuant to the authority vested in the undersigned by the Agricultural Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for

De acuerdo con la autoridad establedda en el suscribiente por el Consejo da Relaciones de Trabajadores Agricolas, por LA PRESENTE SE CSRT1FICA que la mayoria de fas balotas va'tidas han sido depositadas an favor de

United Farm Workers of America, AFL-CIO

and that, pursuant to Section 1156 of the Agricultural Labor Relations Act, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

y que, de acuerdo con la Seccion 1156 del Acto de Relaciones de Trabajadores Agricolas, dicha organizacion de traoa/adores es a/ representante exclusive de todos los traoa/adores en fa unidad aqufimglicada, y se ha determinado que es apropiada con el fin de llevar a cabo negociacion colectiva con respecto at salario, las horas de trabajo, y otras condiciones de empleo.

UNIT:_ All agricultural employees of the Employer in the State of California UNIT:
UNIDAD:

Signed at Sa ramento, California On behalf of