Healdsburg, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GALLO VINEYARDS, INC. Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 94-RC-5-SAL 21 ALRB No. 3 (July 26, 1995)

DECISION AFFIRMING DISMISSAL OF ELECTION OBJECTION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Labor Code section 1156.3,[1] the United Farm Workers of America, AFL-CIO (UFW) filed a petition for certification with the Agricultural Labor Relations Board (Board) on July 18, 1994, seeking certification as the representative of the agricultural employees of Gallo Vineyards, Inc. (Employer). Having investigated the petition and having determined that it raised a valid question concerning representation, the Acting Regional Director held an election among the Employer's agricultural employees in Sonoma County on July 27, 1994. The Tally of Ballots showed the following results:

UFW	81
No Union	21
Unresolved Challenged Ballots	5
Total Ballots Plus Unresolved Challenged Ballots	107

[1]The Agricultural Labor Relations Act (ALRA) is codified at Labor Code section 1140 et seq. All section references are to California Labor Code section 1140 et seq., unless otherwise indicated.

On August 2, 1994, the Employer filed its objection to the election in this case, contending that the number of employees on its pre-petition payroll was less than 50 percent of its peak agricultural employment for the year, as required by sections 1156.3(a)(l) and 1156.4.

On August 30, 1994, pursuant to section 20365 of the Board's Regulations[2], the Executive Secretary issued his Notice of Dismissal of Election Objection. The Executive Secretary found that the Employer failed to make a prima facie showing that the Acting Regional Director's finding that peak employment existed in the eligibility payroll period was unreasonable.

Thereafter, the Employer timely filed a request for review of the Executive Secretary's dismissal of its objection. On October 7, 1994, the Board issued its Order Granting Request for Review, Order Setting Hearing and Notice of Hearing on the Employer's Objection. The issue as framed by the Board's Order was whether the Acting Regional Director's peak determination was reasonable in light of the information available at the time of the pre-election investigation.

The hearing took place before Investigative Hearing Examiner (IHE) Douglas Gallop on November 9, 1994. The IHE issued his decision on January 12, 1995, recommending that the objection be overruled, and finding that the Acting Regional

[2]The Board's Regulations are codified at Title 8, California Code of Regulations, section 20100 et seq.

Director had properly concluded that the Employer's workforce was at or above fifty percent of its 1994 peak employment as required by sections 1156.3 (a) (1) and 1156.4. The IHE found that the Acting Regional Director properly concluded that peak was met by comparing the absolute number of employees on the Employer's pre-petition payroll with a figure for the peak employment period projected from the average number of employees that the Employer employed in the previous peak periods.

On February 10, 1995, the Employer filed its Exceptions to the Decision of the Investigative Hearing Examiner and Brief in Support of Exceptions. On February 21, 1995, the UFW filed its Opposition to the Employer's Brief in Support of Exceptions.[3]

DISCUSSION

The Employer contends that the method the Board used to determine peak in this case, comparing the absolute number of current employees with a projected average of the number who would be employed later in the season, is impermissible, and that

[3]On February 17, 1995, seven employer associations filed an amicus brief in support of the Employer's brief. No prior leave was sought to file the amicus brief. In the representation case context, where we must dispose of cases as promptly as possible, the Board must exercise strict control over the filing of amicus briefs because they may contribute to delay, and is not required to consider them when they are filed without leave. In this case, there has been no delay because the amicus brief was filed prior to the deadline for the reply to the Employer's exceptions and the UFW's Opposition addressed the amicus brief. We therefore have considered the arguments in the amicus brief, which are substantially identical to those raised by the Employer's Brief.

the Board may determine peak by comparing only the current body count with the body count at peak, or average with average. The Employer further contends that the Board is bound to follow its existing regulation, at least until it is formally amended, even though a court of appeal has, in a published decision, found the method of calculating peak reflected in the regulation to be inconsistent with the statute. Additionally, the Employer contends that the Acting Regional Director had failed to properly estimate the peak because he did not use crop and acreage statistics uniformly applied throughout the state. Finally, the Employer contends that the Acting Regional Director failed to properly estimate or adequately investigate its labor requirements for the 1994 peak.

A. Statutory Standards for Peak Determination

1. Validity of Comparison of Absolute Number with Averaged Peak Number

Labor Code section 1156.3(a)(1) prohibits the Board from conducting an election unless the number of employees on the employer's payroll for the last payroll period that ended before the filing of the petition is at least 50 percent of the peak employment for the calendar year. Where, as here, the highest payroll period in the calendar year has not yet occurred, the number must be estimated. Section 1156.4 provides that the number of employees on the preceding year's peak payroll will be the principal basis for this estimate, but states that those

figures shall not be the sole determinant, and that "the [B]oard shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon other relevant data."

The Employer contends that the method the Board has used over at least the past five years to make the comparison between the current payroll period and the peak payroll period is impermissible under both the ALRA and the Administrative Procedures Act (APA)(Government Code section 11340, et seq.). Further, the Employer asserts that the Acting Regional Director used this impermissible method in making the determination that the Employer's work force met the 50 percent of peak requirement when the petition was filed on July 18, 1994.

The methodology in use for the last five years in peak cases was stated in the Board's decision in *Triple E Produce Corp.* (1990) 16 ALRB No. 14: the absolute number of employees[4] shown on the pre-petition payroll is first compared to the absolute number of employees estimated to be employed in the peak payroll period. If the peak requirement is not satisfied, the regional director is to compare the absolute number of employees on the pre-petition payroll with the average of the number of employees who will be employed in the projected peak. This

[4]The absolute number of individuals on the payroll list is referred to both in past Board decisions and by the parties herein as the "body count."

methodology is consistent with the opinion of the court in *Adame & Dessert, Inc.* v. *Agricultural Labor Relations Board* (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366]. There, the court held that the language of section 1156.3(a)(1) prohibited the Board from applying averaging to the number of employees on the pre-petition payroll, but affirmed the finding of peak by comparing the body count from the eligibility period with the averaged number of employees on the peak employment payroll. Thus, the *Adamek & Dessert* court plainly did not see sections 1156.3(a)(1) or 1156.4 as dictating the use of what the Employer refers to as an oranges and oranges comparison.[5] The *Adamek & Dessert* court further directed that the absolute number of employees at peak should be determined in all cases before averaging is utilized, and, accordingly, *Triple E* makes this the first test to be applied before the peak payroll is averaged.

It follows from the court's rejection of the technique of averaging the number of employees in the pre-petition payroll period, that Board Regulation section 20310(a)(6)(B), which requires such averaging, is invalid. As noted above, the court did not find that averaging peak employment was inconsistent with section 1156.3 (a)(1). The Board in Triple *E, supra,* applied the court's construction of section 1156.3(a) (1). Pending the formal modification of the language of Board Regulations section

[5]*Adamek & Dessert* was a past peak case, but the principles apply equally to a prospective peak case.

20310 (a) (6) (B), the Board directed that only the absolute number of employees on the pre-petition payroll list be compared with the projected peak numbers, first with the projected absolute number, and then with the projected average number of peak employees, before dismissing the petition for lack of peak.

In contrast to the language of section 1156.3(a)(1) related to current employees, which the court in *Adamek & Dessert* correctly held to be so specific as to allow only the absolute number of names on the pre-petition payroll to be used, section 1156.3(a)'s "peak agricultural employment" is not defined in that section. We believe this was a deliberate omission by the Legislature, in recognition of the reality that the peak figure is an estimate or a hypothetical number.[6] The contrasting wording chosen by the Legislature in section 1156.3(a), specifying exactly the meaning of the pre-petition payroll number and providing no language describing peak, means that the Board was to have some flexibility in designing its methods to estimate the peak figure.

Most importantly, the only definition of peak employment the Act provides appears in section 1156.4. Section 1156.4 instructs the Board not to look simply to the employer's payroll from the prior year to compute peak, and requires the Board to estimate peak, allowing the use of data from other

[6]Section 1156.4 states that in all cases "the [B]oard shall estimate peak."

sources to make the computation. Since this admonition prevents the Board from limiting itself to mechanically comparing the absolute number of employees from the prior year, it would be inconsistent with this clearly expressed policy to allow calculation of peak to be subject to the deviations and fluctuations that so often distort the body count from a single employer's work force in a single week of a peak season. Section 1156.4 therefore requires that a method of arriving at a more representative figure be adopted. Averaging is the most practical way of leveling out such fluctuations to arrive at a realistic estimate of the true size of the employer's peak work force. Deviation from the normal work requirements are present in this case not only on Sunday, September 5, 1993, but also on Monday, September 6, when only a minority of the work force was present. We believe that the appropriateness of the application of averaging is demonstrated by the facts of this case. We therefore reject the Employer's principal contention, that the only basis from which peak can be computed is "body count" projected from the prior year's peak.

2. Alleged Noncompliance with the Administrative Procedures Act

Before the petition giving rise to this case was filed, the Board formally announced its intent to modify the language of Board Regulations section 20310 (a) (6) (B) to conform to the court's decision in *Adamek & Dessert* and to the Board's decision

in *Triple E* as part of an extensive regulation package dealing with potential changes in substantive law. Board Regulations section 20310(a)(6)(B) directed the Regional offices to determine peak by first comparing the body count of the eligibility period with the body count for the peak payroll period, and, if that did not result in a finding of peak, to compare the average for the eligibility payroll period with the average for the peak payroll period before dismissing the petition. *Triple E* and the Board's proposed amended Regulation section 20310(a)(6)(B) provide that the eligibility payroll period body count first be compared with peak payroll period body count, and if no finding of peak results, to compare eligibility period body count with the average for the peak payroll period before dismissing the petition.

The Employer contends that the Board is bound by the language of Board Regulations section 20310(a)(6)(B) until that language has been formally withdrawn in rulemaking proceedings under the APA. The Employer relies on section 1156.3(a)'s provision that representation "petition[s]. . .may be filed in accordance with such rules and regulations as may be prescribed by the [B]oard. . ., and on section 1144, which confers rulemaking power on the Board. The section 1156.3 language cited by the Employer empowers the Board to adopt procedural rules for the filing of petitions, but does not compel the Board to adhere to a regulation that has been found to be invalid, nor does

section 1144 make rulemaking the exclusive procedure for statutory interpretation.[7]

The Board's authority to proceed by adjudication rather than only by formal rulemaking procedures under the APA has long been asserted by the Board and recognized by the courts. *(Agricultural Labor Relations Board* v. *Superior Court* (1977) 16 Cal.3d 392, 413 [128 Cal.Rptr. 183]; California Coastal *Farms, Inc.* v. *Agricultural Labor* delations Board (1984) 111 Cal.App.3d 734 [168 Cal.Rptr. 838].) The National Labor Relations Board, on which the California Legislature closely modeled the Board, historically has and continues to articulate its generally applicable rules on a case by case basis.

The Employer further contends that the *Adamek & Dessert* court could not invalidate the language of Board Regulations section 20310(a) (6) (B) because that language was the Board's reasonable interpretation of the statute, binding on the court as the expert agency's reasonable interpretation of its own statute. Contrary to the Employer's position, *Adamek & Dessert* held that the Board's application of the averaging language of Board Regulations section 20310(a) (6) (B) to the eligibility period was

[7]The Employer also contends that the Regional Director substituted the Election Manual for the language of Regulations section 20310 (a) (6) (B). The Election Manual was used in this case, as in all others, simply as a guide to assist field personnel in locating and following applicable case law. In this case, the applicable law was to be found in *Adamek & Dessert* and Triple *E* and the Acting Regional Director's methodology was consistent with those authorities.

not a reasonable interpretation of the ALRA because it was in conflict with the statute and impermissible under the specific language of section 1156.3(a) (1), which states that the "number of agricultural employees currently employed", not the "averaged number" of such employees, shall be compared to the employment in the peak period. The Board, in *Triple E,* agreed and announced that the *Adamek & Dessert* approach was to be followed. The Board has continued to adhere to that rule.[8]

Triple E was not a sudden "volte face" rejection of a theretofore valid and unquestioned regulation but the Board's recognition that the prior regulation reflected an impermissible interpretation of the ALRA, as the court in *Adamek & Dessert* had held. The *Triple E* rule embodies the Board's reasonable and expert judgment as to the meaning of the statute, and is now controlling.

We therefore reject the Employer's contentions that *Adamek & Dessert* was an impermissible interference with the Board's reasonable interpretation of the statute, and that the Board is bound by the unrevised language of Board Regulations section 20310 (a) (6) (B) until the last formality of striking it from the Board's'Regulations has been concluded.

[8]The reasons for the soundness of the *Triple E* rule are discussed more fully below.

B. The Substantive Basis for Board's Interpretation of ALRA Section 1156.4

The thrust of the Employer's argument as to *Adeunek & Dessert's* invalidity is that there is somehow a denial of employee rights to minimum standards of democracy that results from comparing eligibility body count with peak average. The Employer therefore argues that body count can be compared only to body count or average only with average. The Employer asserts that the *Adamek & Dessert-Triple E* approach "disenfranchises" the number of employees by which the peak period body count exceeds the eligibility period body count, and that sections 1156.3(a)(1) and 1156.4 seek to protect the majority from this disenfranchisement.[9] Aside from the likelihood that many of the voters on the eligibility list may not be working at peak, and that their replacements are in this fictitious sense "disenfranchised", this argument cannot be supported by the statute.

Sections 1156.3(a)(1) and 1156.4 by their terms accept the "disenfranchisement" of half of the peak employees by allowing elections when the workforce is at 50 percent of peak. Therefore, the Legislature provided that 25 percent plus one of the estimated peak employment number could and should determine

[9]As an illustrative example, the Employer states that 175 employees would be disenfranchised where the peak body is 275, the average is 200, and the pre-petition body count (i.e., the number eligible to vote) is 100.

the outcome of a representation election.[10] The only way to prevent "disenfranchisement" of any peak employees would be to permit election petitions to be filed only during the peak payroll week, as suggested by the Employer in its brief. This illustrates what, in our view, is most persuasive against the Employer's position. The strict interpretation of sections 1156.3(a)(1) and 1156.4 urged by the Employer would greatly limit opportunities to choose or reject a collective bargaining representative by greatly restricting when an election petition would be considered.

Indeed, the use of body count as the only measure of "peak employment" could, as a practical matter, restrict the filing of election petitions to the single payroll period of highest employment, or shortly before or after.[11] This cannot be squared with the standard of representativeness adopted by the Legislature, i.e., that elections are appropriate whenever the current number of employees is 50 percent of peak.

The primary objective of the peak requirement in

[10]The figure would of course be less then 25 percent if there were less than 100 percent turnout in the election.

[11]As the courts have recognized *(Scheid Vineyards and Management Company* v. *Agricultural Labor Relations Board* (1994) 22 Cal.App.4th 139 [27 Cal.Rptr.2d 36], enforcing 19 ALRB No. 1), the number of employees in the unit is inherently subject to manipulation. The employees' statutory rights may become dependent not only on manipulation of the peak, but on how long an employer who has become aware of an interest in unionization among its employees could hold off hiring additional employees.

sections 1156.3(a)(1) and 1156.4 is to ensure the representativeness of the eligible voters, not to prevent "disenfranchisement". Strictly speaking, an employee can only be "disenfranchised" if he or she is otherwise eligible to vote but is denied the opportunity because of a defect in the election procedure. Persons who are not presently employed, i.e., employees not on the pre-petition payroll, cannot be "disenfranchised" because by definition they have no right to vote under the ALRA.

Since representativeness is the purpose of sections 1156.3(a)(1} and 1156.4, then comparing the number of eligible voters (the number of employees on the payroll for the period immediately preceding the filing of the petition) with the real size of the bargaining unit is the most appropriate test. Averaging is the best means of achieving the most accurate measure of the real size of the bargaining unit because it reduces the effect of bulges and shifts in the work force on the unit due to turnover, unusual weather and other unpredictable factors. Averaging is therefore the most reasonable way to determine representativeness.

Because the election process, under the ALRA, is the only way to establish or remove a union as exclusive collective bargaining representative, the effect of restricting the availability of elections is even more serious under the ALRA than it would be under the National Labor Relations Act (NLRA) (29 U.S.C.

sec. 140 et seq.), where unions can obtain and employers withdraw recognition without an election." The right to vote and the right to use, or reject, the machinery of exclusive collective bargaining representation has long been recognized as the most important provision of both the NLRA and ALRA.[13]

We therefore conclude that the view we expressed in Triple *E* and in our proposed amendment to Board Regulations section 20310 (a) (6) (B) is not only reasonable, but necessary to effectuate the most essential employee rights granted by the Act.

[12]The ALRA's many other departures from the NLRA's representation procedures show a pervasive policy of expanding and expediting the availability of the election process to agricultural employees. In Mann *Packing* (1990) 16 ALRB No. 15, we stated: "The chief means by which the. . . ALRA. . . meets its stated goals of assuring peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations is by the provision of secret ballot elections. . ." Section 1156.3's provision of 48 hour elections in strike circumstances is perhaps the most direct use of the Act's election provisions to effectuate the Act's purposes of peace and stability. Other statutory provisions that reflect a policy of making the election process more rather than less available include section 1156.3's provision for elections within one week, without a preelection hearing, section 1157's single eligibility period, and section 1156.7(c)'s assurance of a full one year open period for petitions during the term of any collective bargaining agreement. To adopt a restrictive standard for -when elections could be conducted would make this important statutory procedure unavailable perhaps for all but the peak week, or a short period before or afterwards. As noted above, such a result would be inconsistent with policy embodied in the statutory requirement that 50 percent of peak is sufficient for the holding of an election.

[13]The restriction of the time that election petitions can be filed would defeat the filing of decertification and rival union petitions as much as it would restrict the filing of petitions by non-incumbent unions seeking initial representation.

We decline to adopt the more restrictive policy urged by the Employer.

C. The Application of the Standard

The Acting Regional Director testified, and it is not disputed, that he applied the analysis inherent in the standards we have reaffirmed above. Therefore, the only remaining issues relate to whether the Acting Regional Director properly applied these standards. The issues presented include whether crop and acreage statistics uniformly applied throughout the state had to be considered for the peak determination to be valid, and what effect, if any, did the increased acreage and production projected by the Employer have on its labor needs.

1. Use of Employer Payrolls and Statistics Applied Uniformly throughout the State to Estimate Peak

The Employer asserts that the Acting Regional Director erred by not considering crop and acreage statistics applied uniformly throughout the state in making his peak determination. The Employer cites two cases in which the Board purportedly expressed the view that the language in section 1156.4 placed it under a duty to create such a method for estimating peak.

Specifically, the Employer cites expressions in *Bonita Packing Co., Inc.* (1978) 4 ALRB No. 96 and *Tepusquet Vineyards* (1984) 10 ALRB No. 29, that it was "incumbent upon the Board to develop standards for projecting peak based on crop and acreage data applicable on a statewide basis." (*Bonita*, *supra,* p. 9.)

However, an examination of the context of this statement by the Board reveals that it cannot be read to stand for the proposition that the Board must create such statistics or that they must be employed in every case.

Most revealing is the fact that in both Bonita and *Tepusquet* the Board approved of the method utilized by the regional director to estimate peak employment, even though the regional director did not use crop and acreage statistics applied uniformly throughout the state. The quotation cited above merely reflected the Board's expectation that such statistics would eventually become available. More importantly, the Board stated in Bonita that it could not "deny employees access to the collective bargaining rights conferred upon them by the Legislature, pending our accumulation of more information and experience with the varied and complex seasonal patterns of agricultural employment in California." *{Bonita, supra,* p. 10.) Five years later, the Board stated in *Tepusquet,* after noting that statistics applicable on a statewide basis had not materialized, that it must nonetheless proceed to estimate peak using the tools then available. *(Tepusquet, supra,* p. 8.)[14]

[14]We have no disagreement with our concurring colleague's comment that public institutions should follow through with any promises made, whether legally required or not. However, we must note that there is no reason to believe that the availability of uniform statistics would have affected the procedural history of any cases that have come before the Board. In particular, the history of the cases cited by our concurring colleague, while

(continued...)

While the Board stands ready to utilize such statistic in appropriate cases, experience thus far has not resulted in any useful methods of utilizing crop and acreage statistics on a uniform statewide basis. Nor has any party in this case brought any such statistics to our attention or explained how they might properly be utilized. Additionally, as far as we have been able to determine, in no adjudicatory or rulemaking proceeding before the Board have any interested parties brought to our attention any existing statistics or proposals for creating such statistics for purposes of estimating peak employment.

The limited legislative history suggests that the language of section 1156.4 referring to uniform statewide crop and acreage statistics was not intended to require the Board to utilize such statistics, regardless of circumstances. The May 27, 1974 colloquy between Assemblymen Berman and Warren indicates that Warren initially supposed that peak would be determined from the individual employer's payroll records, which in practice it

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[14] (. . .continued)
involving a dispute over peak at some point in the proceedings, would not have been affected in any way by the availability of such statistics. In *Triple E Produce* and Ace *Tomato,* the dispute was over the use of averaging in estimating peak employment. Once the Board made it clear that averaging was permissible, the peak issue was pursued no further. The protracted nature of those proceedings was due to the litigation of other issues. In *Scheid Vineyards,* there was no dispute as to the estimate of prospective peak, as the regional director simply accepted the estimate offered by the employer. Instead, the peak issues in dispute in that case involved the resolution of a discrepancy in the employer's response as to the number of employees on the pre-petition payroll and the proffering of post-election data.

has been. (Hrg. Before the Assembly Ways and Means Comm. on the ALRA, May 27, 1974, pp. 23-24.) Assemblyman Warren contemplated the proposed statewide standard as a supplemental guide to assist unions and employees in knowing when to file petitions, not as a vehicle to override the individual employer payroll data that must finally determine this issue.

The May 12, 1974 testimony of Rose Bird shows that such data would become important in the case of an employer who has had no prior payroll at all from which to project a peak, or whose past employment patterns were based on only a small part of the projected production. (Labor Relations Comm. Hrg., May 12, 1974.) In such cases, the Board must accept data from other operations or be bound solely by the self-interested projections of the parties. We have accepted estimates from other growers and governmental officials in the same area who are familiar with similar operations. *(Gregory Beccio* dba *Riverside Farms* (1993) 19 ALRB No. 6.) However, we find no indication in the legislative history that statistics applied uniformly were to be determinative where employer records are adequate from which to estimate peak.

As noted, section 1156.4's reference to the prior year's payroll "not alone" being the basis for estimating peak employment implies that this factor, along with adjustments based on any changes in the operation, appropriately is the dominant consideration, as we noted in *Wine World, Inc.* (1979) 5 ALRB No.

41, at p. 6. (See also *Tepusquet, supra,* p. 8; *Charles Malovicl* (1979) 5 ALRB No. 33.) The reason for this dominance is apparent in that uniform statistics, or even figures for a region as small as a county, have limited predictive value given the drastic influence on growing seasons and harvest dates that such factors as varieties of plants, elevation, weather conditions and markets[15] can have on an individual operation. This is true for figures based on operations which are a few miles away, or even adjacent, let alone for figures based on county or statewide averages. Indeed, adjustments for individual variance in operations and circumstances, which growers would surely demand, would in most cases render the uniform statistics meaningless.

In sum, the Board has neither discovered nor been made aware of any relevant or useful method of utilizing available crop and acreage statistics applied uniformly throughout the state. Such standards would be less reliable than information based on the history of the individual employer's operation. At most, they would be useful as a basis of comparison in evaluating an individual grower's data which varies widely from the "norm" or, as noted in the legislative history, where the grower has no

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[15]The influence of market demand is seen in this case, when the 1994 harvest of zinfandel was delayed because of a surge in demand resulting from favorable publicity over the health effects of red wine.

prior history from which to estimate peak employment.[16] Nevertheless, should they become available, the Board will utilize them in appropriate cases.

While the estimation of peak employment should be based on all relevant information reasonably apparent or available to the regional director, neither case law nor statute imposes a duty upon the Board to create crop and acreage statistics to be uniformly applied throughout the state. Moreover, such statistics are presently unavailable and, in any event, would in most cases be of questionable predictive value. Consequently, the Acting Regional Director could not have erred in making his estimate of peak employment by failing to consider what to our knowledge are statistics which do not presently exist.

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[16]Our review of data collected by the California Department of Employment Development (EDD), which for practical reasons far exceeds our ability to collect data, shows its limited use for the purpose of projecting peak. EDD data is collected for the week that includes the twelfth calendar day of the month. The smallest unit for which such data is published is for single generic crops in a single county. The figures for the Sonoma County wine grape producing area include 280 "establishments" but do not distinguish what varieties are grown, indicate to what extent the employees engage in work other than operation of wine vineyards, or identify other critical factors that may create radically different peak dates, such as elevation and exposure. (Employment Development Department Labor Market Information Division, S2-1, Employment and Payroll Data-Sonoma County.) In addition to the fact that peak labor needs on any particular farm could be far different due to differences in elevation, crop varieties, weather and market, existing EDD data is collected only one pay period every month. Therefore, assuming a weekly payroll period, in three out of four cases the only data systematically collected would not cover the week that is being used to estimate peak.

2. The Acting Regional Director's Estimate of Peak in the Case

The parties agree that 109 agricultural employees were employed during the pre-petition payroll period. The estimated prospective peak, based on the average of representative days (Tuesday through Saturday) during the previous year's peak period, was 210. Therefore, absent a reasonable basis for concluding that increased labor needs would raise the average above 218, the 50 percent of peak requirement was met and the petition was timely filed.

The Acting Regional Director concluded that the Employer had failed to show that there would be an increase in the number of employees required for the 1994 harvest. The Employer itself in its July 22 letter professed that it was unable to predict accurately the full extent and date of its pea, labor requirements because of the influence of the weather on the sugar content of the Employer's grapes. Not until it filed a declaration from personnel manager Patrick Deatrick after the election did the Employer provide any estimate of the increased labor requirements.

The Employer later offered the actual number of employees used in the 1994 peak harvest week, which occurred after the election. The actual 1994 peak figures cannot be considered in reviewing a peak determination because they were not before the Acting Regional Director prior to the election,

and, in any event, such figures are inherently subject to manipulation. *(Scheid Vineyards and Management, supra,* 27 Cal.Rptr.2d at p. 40.) Rather, the established standard is whether the regional director's peak determination was reasonable in light of the information available at the time of the preelection investigation.

The Employer also contends that its personnel manager, Robert Deatrick, informed the Acting Regional Director before the election that it had 174 acres that would be harvested for the first time, and 205 acres that would be harvested for the second time in 1994. While Deatrick[1]s post-election declaration, filed in support of the Objection, states that peak labor requirements would increase by at least 10 percent in 1994 over 1993, there is no evidence that the estimate of a 10 percent workforce increase or any other estimate of increased labor requirements, was communicated to the region before the election. More importantly, neither Deatrick nor any other Employer source explained how an increase in acreage of the magnitude communicated to the Acting Regional Director would necessarily result in an increase in crew sizes when the harvest crews in 1993 worked only just over 30 hours per week. Therefore, the Employer did not present information to the Regional Director that would require that the petition be dismissed or further investigation be conducted.

If the employer, who is much more familiar with its

operational requirements than anyone else, is unable to project " peak that would preclude an election, then the regional director should not dismiss the petition unless he or she can find some substantial basis to believe that peak will more likely than not exceed the standard stated in sections 1156.3(a)(1) and 1156.4. The showing of any degree of uncertainty as to exactly when peak will occur and how large it will be is no basis for dismissal, because the necessary result of such a standard would be the dismissal of virtually all petitions except those filed in the single payroll period of highest employment. This is because the uncertainty of labor requirements because of weather and other considerations always exists in agricultural operations. Indeed, it must be remembered that the determination of prospective peak is by nature no more than an estimate.

In *Triple E* we stated that ". . .in the absence of any proof from the Employer that the Regional Director's finding of 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.)" As stated by the court in *Scheid Vineyards, supra, 22 Cal.App.4th at 148,* the burden falls on the employer to show that the regional director's analysis was not a "reasonable one in light of the information available at the time of the investigation."

As the Board stated in *Triple E,* once the regional director has made a prima facie determination that statutory peak

requirements are satisfied, the burden falls on the party urging the absence of peak to support its position with evidence of some degree of reliability. The Employer contends that its increased acreage and the expected yield meant that its labor requirements at harvest would be much greater than in the preceding year. The Acting Regional Director in effect concluded that an increase in future labor requirements had not been demonstrated by the employer with the certainty required in Triple *E.*

It is important to understand that the regional director's investigation is limited by the time constraints of section 1156.3(a)(4), which require an election within 7 days of the filing of the petition. The effect of these constraints is that the regional director, after getting the employer's response 48 hours after the petition's filing, must make a final decision by the fourth or fifth day after the petition. Thus, any further investigation triggered by the Employer's response must be completed within 48 to 72 hours after the employer's response is received.

The Employer contends that, while it informed the Acting Regional Director that it was unable to estimate that its peak labor requirements, the information provided was at a minimum sufficient to put the Acting Regional Director under a duty to investigate further. The Regional Director did undertake such further investigation. In addition to continuing to seek further information from the Employer, which was not forthcoming,

the Acting Regional Director considered the field examiner's interview of an employee who said that the additional acres getting their initial harvesting or second harvesting that year would not require adding additional employees. The Employer objects vigorously to the Acting Regional Director's consideration of this testimony because it was based only on the witness's general knowledge as an employee, not on specific information about acreage and crops. We do not believe that the regional director should rely on a single employee's bare prediction of future labor requirements, and should only attach weight to such employee prediction if the declaration states facts that reasonably support the prediction and establishes a sufficient foundation for the employee's knowledge of those facts. However, the employee in this case merely provided information consistent with other information known to the Acting Regional Director, including the Employer's payroll records. The employee's testimony does not appear to have been decisive in any way, and was undertaken as part of the duty to investigate the peak issue that the Employer strongly asserts fell upon the Region in view of the Employer's submission.

More importantly, the Acting Regional Director's conclusion was supported by the Employer's own records, which showed that during the 1993 peak harvest, the employees in the harvesting crews had worked only 30 hours per week. In the absence of any explanation showing why these hours could not be

increased to meet any additional peak labor requirements that could be anticipated from the increased acreage and production in some of the Employer's vineyards, or why the harvest could not be spread more evenly among payroll periods surrounding peak, it was not unreasonable to conclude, as the Acting Regional Director did, that the Employer had failed to show that its labor requirements would increase to such an extent as to bar a petition. In the absence of any showing as to how much, if any, the number of employees would grow because of the increased acreage and tonnage claimed by the Employer, the Acting Regional Director properly concluded that the Employer had failed to show that the expected peak would exceed twice the number of employees on the pre-petition payroll.

We therefore conclude that the Employer has failed to meet its burden of showing that the Acting Regional Director's determination that its current labor force was at 50 percent of its prospective peak was unreasonable.

CERTIFICATION OF REPRESENTATIVE

For the reasons stated above, the Board hereby affirms the IHE's Decision dismissing the Employer's election objection. We therefore order that the results of the election conducted on July 27, 1994 be upheld and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive collective

bargaining representative of all agricultural employees of Gallo Vineyards, Inc., in Sonoma County, California.

DATED: July 26, 1995

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CHAIRMAN STOKER, Concurring with reservations:

In *Bonita Packing Co., Inc.* (1978) 4 ALRB No. *96,* the Board assumed this obligation:

> We think it is incumbent upon this Board, pursuant to the language of Labor Code section 1156.4, to develop standards for estimating peak employment and determining the timeliness of petitions which reflect such factors as crop and acreage data applicable on a statewide basis. The purpose of its process is to establish standards which will enable employees and their prospective representatives to know with reasonable certainty when they may call for an election at a particular employer's operation.
>
> We cannot, however, deny employees access to the 'collective bargaining rights conferred upon them by the legislature, pending our accumulation of more information and experience with the varied and complex seasonal patterns of agricultural employment in California. . . . *(Bonita,* pp. 9-10).

In *Tepusquet Vineyards* (1984) 10 ALRB No. 29, the Board reaffirmed its earlier commitment:

> How exactly to determine what an employer's prospective peak will be has been problematic. In *Bonita Packing Co., Inc.* (1978) 4 ALRB No. 96, we stated that it was incumbent upon the Board to develop standards for estimating peak employment which reflect such factors as crop and acreage data applicable on a statewide basis, so that employees and prospective representatives would know with some certainty when they may call for an election at an employer's ranch. Pending the accumulation of more information, we stated we would continue to use the body count and *Saikhon* formulas as reasonable measures of timeliness of petitions even though neither one was wholly satisfactory in all circumstances. . . . *(Tepusquet,* pp. 7-8.)

The commitment promised in *Bonita* and *Tepusquet* is significant as the issue of "peak" continues to be a major, if not the sole, issue regarding certification in a number of election cases. (Triple *E Produce, Inc.* (1991) 16 ALRB No. 14; *Ace Tomato Co., Inc.* (1991) 18 ALRB No. 9; *Scheid Vineyards and Management, inc.* (1992) 19 ALRB No. 1; and the case now before the Board). The cases cited include some of the largest bargaining units and the most protracted representation proceedings in the Board's recent experience. Significantly, had the commitment expressed in *Bonita* and *Tepusquet* been pursued and uniform standards for crop and acreage data been adopted, the procedural history leading to election certification in the above cases may have been much different. However, these will never be known because prior Boards did not make the effort required to establish the promised standards.

The desire by employers to establish these standards

envisioned in *Boaita* and *Tepusquet* is obvious by the arguments advanced by Gallo. The potential advantage to employees and labor organizations from uniform standards are discussed by Assemblyman Warren in the debate leading to adoption of the statute. (Hrg. Before the Assembly Ways and Means Comm. on the ALRA, May 27, 1974, pp. 23-24.)

While uniform standards provide potential advantages, we must also acknowledge that the project of establishing a generalized system of statistics and standards presents major data collection problems and conceptual difficulties regarding the identification of relevant crop and acreage information. The difficulties identified by the majority in applying a uniform statewide measure are real. However, in my view, the difficulty in establishing these standards does not exonerate the past Boards' neglect. The significance of this failure is magnified when we consider that the commitment was made in published, precedential decisions. The obligation undertaken by any public agency, particularly in decisions that have been recognized to have the force and effect of binding precedent, in my view must be redeemed either by fulfilling any promises made or accounting fully for the decision not to do so.

What data is to be collected and analytical methods to be applied to it raise questions extending far beyond the Board's expertise in agricultural labor relations to questions of data design and collection. The creation of a system truly complying

with the intent expressed in the second paragraph of section 1156.4 will require the Board to consult and employ experts in agronomy (the application of the various soil and plant sciences to soil management and raising crops) and social sciences, and may require the Board to seek additional resources, financial and non-financial, to complete.

The *Bonita* and *Tepusquet* Boards that promised the development of such standards were clearly in the best position to initiate the process. The financial resources available to the Boards that promised the standards were clearly much greater than the resources available to the current Board. This can be illustrated by comparing the budgetary resources available to the *Bonita* and *Tepusquet* Boards and the present Board. In 1978-79 (Bonita), the budget for the Board's administration, excluding General Counsel, was $4,113,492. Allowing for inflation, this amount exceeds the Board's present budget ($1,884,000) by a factor of approximately five to one. By the time *Tepusquet* was issued, the Board's budget was $3,596,000. Beginning two years after the issuance of *Tepusquet,* the Board's budget experienced systematic reductions that understandably had the effect of precluding the current Board from committing to a plan to fulfill past Boards' promises regarding uniform standards.

The members of the majority have consistently been confronted with dwindling financial resources, which understandably made a current commitment to developing the

uniform standards nearly impossible.

Notwithstanding the budget and resource restraints, the *Bonita* and *Tepusguet* Boards created an institutional obligation. While this obligation may not be legally binding, at a minimum, it is a moral obligation the performance of which becomes a gauge to judge the credibility of the entire Agency. When a public institution commits to performing a task, the task must be completed or the integrity of the public institution is at stake.

With the foregoing in mind, I have struggled with my legal obligation to uphold the majority based on clear legal guidelines. This is countered by my personal feelings regarding the moral and ethical obligation discussed above. Ultimately, the law must prevail over my personal feelings which is why I have concurred with this decision. However, I believe the Board must commit in future rulemaking to pursuing uniform standards or make it clear that uniform standards will not be considered. In the event the latter option is chosen, it is incumbent upon this Board to explain why the direction the Sonata and Tepusguet Boards committed to was not followed. To do otherwise only invites legal challenges based on novel legal theories. In this spirit, I would hope that this issue would be resolved during the Board's next rulemaking proceeding. In the interim, interested parties should clearly understand that the failure to adopt the standards articulated by the *Bonita* and Tepusguet Boards will not

be used as grounds for legal relief from the legal obligation imposed on the parties by a Board certification.

DATED: July *26,* 1995

MICHAEL B. STOKER, Chairman

CASE SUMMARY

Gallo Vineyards, Inc.
(UFW)

21 ALRB No. 3
Case No. 94-RC-5-SAL

Background

An election was conducted among the Employer's employees on July 27, 1994, in which the UFW received the majority of votes cast. The Employer filed an objection to the election, contending that the election petition was untimely under section 1153.6(a)(1) because its work force was less than half the number it would employ during its peak payroll period for 1994. The Board reversed the Executive Secretary's dismissal of the objection, setting it for hearing.

IHE Decision

The IHE found that the methodology applied by the Acting Regional Director to estimate peak employment was valid. The Acting Regional Director found that the requirement of section 1156.3(a)(1) was met by comparing the absolute number of employees on the payroll preceding the filing of the petition with the averaged number of employees working during the peak, payroll period. The IHE rejected the Employer's contention that the Board could not apply this methodology because it had not been adopted in a rulemaking proceeding. The IHE finally concluded that the Acting Regional Director had properly found that the increases in acreage and yields anticipated by the Employer for the current year did not compel the inference that the Employer's labor requirements would be increased to an extent requiring dismissal of the petition for failure to meet the 50 percent of peak requirement. He therefore dismissed the objection.

Board Decision

The Board affirmed the IHE's decision. The Board rejected the Employer's contention that it could not compare the absolute number of employees on the pre-election payroll with the averaged nuirber for[1] the anticipated current year peak payroll period. The Board considered itself bound by *Adamek & Dessert* v. ALRB (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366], which held that the Board's former methodology, which required averaging of the current payroll period before comparing it with the average for the peak payroll period, was contrary to section 1156.3(a)(1) of the ALRA. The Board rejected the Employer's argument that *Adamek & Dessert* was an invalid judicial rejection of the Board's own reasonable interpretation of the statute. The Board held that it had properly adopted in *Triple E Produce Corp.* (1990) 16 ALRB No. 14 the methodology followed by the Acting Regional Director in the present case.

The Board held that it was not required to create a uniform system of standards based on crop and acreage statistics to determine whether the requirements of section 1156.3(a)(1) were met. The definition of peak employment set out in section 1156.4 recognizes that the prior year's payroll is properly the dominant basis for determining peak, and no party had shown that any other standards were either existent or relevant. The Board discussed the problems presented by creating such standards, and found that it was not required by statute or case law to have them in place before it could certify an election.

The Board found that the Employer's information concerning increased acreage and yields provided by the Employer before the election did not require that the petition be dismissed. The Acting Regional Director properly found that the Employer's payroll for the prior peak showed that the harvest crews worked such limited hours the prior year that it was unreasonable to conclude that they could not handle an increase in acreage and yield much greater than the Employer projected. The Employer had not provided any explanation for why the crews, which had only worked approximately 30 hours per week the prior week, would not absorb the increased labor requirements with more than a minimal change in the number of hours they worked. Moreover, prior to the election the Employer offered no estimate of any increase in labor needs that might result from the increased acreage or yield.

CONCURRENCE

Chairman Stoker would undertake to carry out the promise the Board that issued *Bonita Packing* Co., *Inc.* (1978) 4 ALRB No. 96, made to issue uniform standards based on crop and acreage statistics, in the Board's next rulemaking proceeding.

* * *

State of California
AGRICULTURAL LABOR RELATIONS BOARD

Estado de California

CONSEJO DE RSLACIONESDE TRABAJADORES AGRICOLAS

In the Matter of:

GALLO VINEYARDS, INC.,

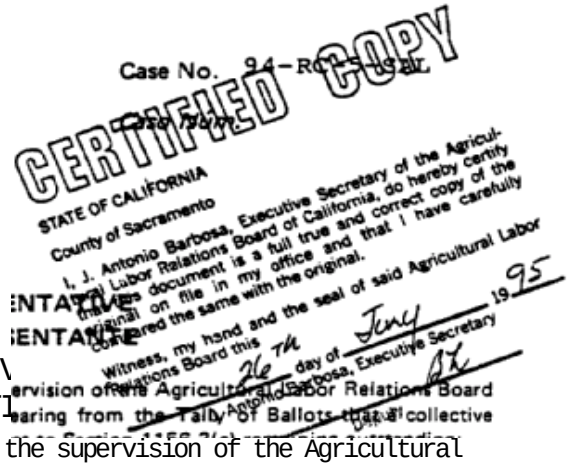
Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Case No. 94-RC-5-SAL



CERTIFICATION OF REPRESENTATIV
CERTIFICACION DEL REPRESENTATI

An election having been conducted in the above matter under the supervision of the Agricultural labour Relation Board in accordance with the Rules and Regulations of the Board; and it appearing from the tally of Ballots that collective bargaining representative has been selected; and no petition filed pursuant to Section1156.3© remaining outstanding.

Habiendose conducido una election en el asunto arriba citado bajo la supervision del Consejo de Relaciones de Trabajadores Agricolas de acuerdo con las Reglas y Regulaciones del Consejo; y apareciendo por la Cuenta de Votos que se ha seleccionado un representante de negotiation colectiva; y que no se ha ngistrado (archivado) una petition de acuerdo con la Secdon 1156.3(c) que queda pendieme;

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 estabietida en el suscribiente por el Consejo de Relaciones de Trabajadores Agricolas, por LA PRESENTS SE CERTIFICA que la mayoria de las balotas validas han sido depositadas en 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 Section 1156 del Acto de Relaciones de Trabajadores Agricolas, dicha organization de trabajadores es el representante exclusive de todos los trabajadores en la unidad aqunmplicada. y se ha determinado que es apropiada con el fin de llevar a cabo negotiation colectiva con respecto al salario, las haras de trabajo, y otras condiciones de empleo.

UNIT: All the agricultural employees of the employer Gallo Vineyards, Inc,
UNIDAD: in Sonoma County, California.

Signed at Sacramento, California

On the 26th day of July 19 95

Firmado en _____

En el ___ dia de _____ 19 ____

On behalf of
AGRICULTURAL LABOR RELATIONS BOARD

De pane del
CONSEJO DE RELACIONES DE TRABAJADORES AGRICOLAS

J. Antonio Barbosa

J. ANTONIO BARBOSA

ALRB 49

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case No.94 -RC- 5 -SAL
GALLO VINEYARDS, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	

Appearances :

Jordan L. Bloom
Spencer H. Hipp
LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
San Francisco, California
For the Employer

Marv Mecartnev
MARCOS CAMACHO A LAW CORP.
Keene, California
For the Petitioner

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

DOUGLAS GALLOP: This case was heard by me on November 9, 1994, in Salinas, California. It is based on an objection to the conduct of election[1] filed by Gallo Vineyards, Inc. ("Employer"), alleging Chat it was not at 50% of its peak agricultural employment, as required by section 1156.3 (a) (1) of the Agricultural Labor Relations Act ("ALRA" or "Act"),[2] when the United Farm Workers of America ("UFW" or "Union") filed a petition for certification on July 18, 1994, seeking to represent the Employer's agricultural workers in Sonoma County.

The Regional Director of the Salinas regional office of the Agricultural Labor Relations Board ("Board" or "ALRB") determined that the peak requirement was met, and an election was j held on July 26, 1994. The Tally of Ballots was:

UFW	81
No Union	21
Challenges	5
Total:	107

The Board's Executive Secretary set the objection for

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[1]The objection is contained in Employer Exhibit 1, under the tab marked Exhibit 5. References to Employer exhibits will be denoted by "EX" followed by the number and, where applicable, a dash and the number of the tabbed portion of the exhibit. References to Union exhibits will be denoted by "UX" followed by the number. References to page numbers in the single volume of the official transcript will be denoted "TR page. "

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

hearing, and also directed chat evidence be taken on:[3]

1. The methodology utilized in counting the daily number of bargaining unit employees employed by the Employer for the payroll period ending September 11, 1993. The record shall include evidence as to any adjustments to the daily or total number of employees listed on the payroll reports submitted by the Employer before the election and the basis for such, adjustments. Specifically, what, if any, reconsideration was given to the fact that while a representative number of hourly employees worked, no piece rate employees worked on Monday, September *6,* 1993.

2. What determination the region made of the projected increase in the Employer's labor requirements for the 1994 harvest, based on the information available before the election, and the reasonableness of that determination.

STATEMENT OF FACTS

The parties agree that using the "body count" method, 109 agricultural employees were employed during the pre-petition week ending July 17, 1994 (TR 5), that the peak employment week in 1993 was the week ending September 12, 1993, and that if one uses the body count method, the Employer was not at peak when the election petition was filed.

According to the Employer,[4] the employment numbers for the week of peak employment in 1993 were:

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[3]In an Order issued on October 7, 1994, the Board denied, a request by the Employer to present evidence consisting of payroll records for dates after the election, to show the actual number of employees eventually working in the 1994 harvest.

[4]The Union's numbers differ slightly. It contends the numbers are, respectively, 73, 207, 213, 236, 204, 192 and 2, for a total of 1127. It is not necessary to resolve the discrepancies because when the non-representative days are discounted, the minor differences do not change whether or not the Employer was 50% of peak.

Monday	September 6	70
Tuesday	September 7	206
Wednesday	September 8	212
Thursday	September 9	235
Friday	September 10	204
Saturday	September 11	191
Sunday	September 12	2
Total:		1120

Monday was Labor Day and a paid holiday. If it had not been a holiday, there would have been a normal complement of workers. (TR 106, 129) Consequently, the number of employees who actually worked was unusually low.[5] The Regional Director did not discount this day, but did discount Sunday, which clearly was not representative.[6] Discounting these two days, the total work force was 1048 using the employer's numbers and 1052 using the Union's. Dividing these by five days yields 210 (209.6 to be precise) and 197, respectively. In both cases, the 109 employees who worked during the pre-petition week constituted more than 50%

[5]No harvesters worked that day. Those who did work primarily performed repair, maintenance and possibly, some irrigation duties. (TR 107, 132)

[6]The Union argues that Thursday was also unrepresentative, because the Employer, due to a forecast of rain, hired a number of new employees to work only on that day. It makes no difference, however, whether Thursday is included or not, since the peak requirement is met under the averaging method, and not met under the "body count" method in either case.

of the 1993 peak week.[7]

Board Agent Octavio Galarza investigated the peak issue, and the Regional Director relied on the investigation and resulting calculations in deciding whether the peak requirement was met, so as to permit conducting the election. The Employer, through its attorney, provided payroll records for the pre-petition week and the 1993 peak week (EX1) and further advised the Board agent it expected its 1994 peak to be greater than 1993. Galarza requested a declaration from the Employer as to the number of acres, the number of additional workers anticipated and any other information the Employer wanted to provide in support of its contention.[8]

In a letter dated July 22, 1994, the attorney stated that the Employer would be harvesting an additional 150 acres in 1994 and, also, it would conduct a second harvest on a 250-acre parcel. Second harvests are more productive, and the Employer estimated a yield of four to five tons per acre in 1994 versus the one to two tons per acre in 1993.[9] The letter contended

[7]The Regional Director arrived at the higher total of 1050 workers for the six days, for an average of 175 per day. The parties agree this figure is inaccurate, and the reason for the calculation was not explored at the hearing, since the peak requirement was still met, using averaging, with these numbers.

[8]The parties stipulated that if called as a witness, the Employer's attorney would testify that upon his request, Galarza stated it would be acceptable to submit a letter, instead of a declaration.

[9]EX9 consists of maps showing the ranches, blocks and acreage. These were not available to the Regional Director at the time of the investigation and are not considered now. Rather, the relevant information is that provided to him in the July 22 letter.

that additional harvesting employees would be needed, but also stated, ". . .at this time it is not possible to estimate" the number. The reason given for this inability was that such variables as the weather and sugar content of the grapes would greatly influence the number of workers needed. The Employer provided no further information in response to Galarza's request.

At the direction of the Regional Director, Galarza also attempted to obtain information from employees familiar with the Employer's operations, on the issue of the need for additional workers for the upcoming harvest. He obtained a sworn declaration from an employee, referred by the Union, who had worked for the Employer since December 1989. He had performed a variety of job functions during his employment, including harvesting.

The employee had worked at all of the ranches, and agreed that the 1994 harvest would include more acres. Although the employee was familiar with all the ranches, he acknowledged he did not know specifically how many acres were involved. Based on his knowledge that the crews had not worked full-time in the 1993 harvest, he anticipated the same number of workers could complete the 1994 harvest by working more hours. Regarding those ranches where the vines would be harvested for the second time in 1994, the employee agreed production would be greater, but not to the extent contended by the Employer. He also believed the same number of crews used in 1993 could harvest the 1994 crop.

The Regional Director and Galarza utilized the

averaging method to determine that 50% of peak employment had been reached, once the "body count" method failed to reach such a result, because they felt that both the Agency, as set forth in the Representation Manual, and the Board, as set forth in its decision in Triple E Produce Corporation (1990) 19 ALRB No.14, require such a determination. In the absence of specific information from the Employer supporting a reasonable estimate of the alleged increase in prospective peak employment, and given the employee's sworn declaration to the contrary, the Regional Director determined the Employer had not met its burden of showing it was not at 50% of peak. Accordingly, he ordered the election to proceed.

ANALYSIS AND CONCLUSIONS OF LAW

In a prospective peak case, the standard for determining the propriety of the Regional Director's peak determination is whether it was reasonable in light of the information then available. (Scheid Vineyards and Management Company v. ALRB (1994) 22 Cal.App.4th 139 [27 Cal.Rptr.2d 26]; Charles Malovich (1979) 5 ALRB No. 33. Further, if an employer fails to provide sufficient information as required, the Regional Director may invoke a presumption that the petition is timely filed with respect to the employer's peak of season. (Title 8, CCR, section 20310(e)(1)(B).

The Employer contends the determination was not reasonable on several grounds. It argues that the Regional Director was only permitted to compare the body count in the pre-

petition week with the body count in the 1993 peak week, to determine peak employment. Even if averaging is permitted, Title 3, California Code of Regulations, section 20310 (a) (6) (B) only permits comparing the average number of employees in the pre-petition week with the average number of employees in the 1993 peak week.[10]

In connection with the latter argument, the Employer argues that the court in Adamek & Dessert. Inc. v. ALRB (1986) 178 Cal.App.3d 970 [224 Cal.Rptr. 366] held only that the Board should use the body count method for both periods, and did not authorize the use of averaging. It then argues that the Adamek court, to the extent it implied situations where averaging might be permitted, did not have the authority to, in effect, write regulations for the Board. Therefore, until the Board drafts r regulations on the subject, it can only follow existing regulations in deciding post-Adamek cases.

In Adamek, the Court of Appeal held that the pre-petition averaging provisions of section 20310 (a) (6) (B) exceeded the Board's authority under section 1156.3 of the Act. Adamek wag not a prospective peak case; rather, the Employer had already reached its peak for the year. Under those facts, the Court held that the Board was only permitted to consider the body count for

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[10]This section 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 worked 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."

the pre-petition payroll period, but affirmed the averaging method for the peak period.

In Triple E Produce Corporation (1990) 16 ALRB No. 14, the Board had its first opportunity to apply Adamek. It determined that until it went through the lengthy and cumbersome process of changing its rules, it would first require a body count comparison of actual employees during the eligibility week and the peak period payrolls and then, if a finding of peak was not obtainable by that method, it would apply the averaging approach approved in Ademek.[11] "or other appropriate methodologies as the nature of the circumstances warrants." This approach would be used in both past and prospective peak cases.

The Employer's contention, that Adamek requires the Board to use only the body count methodology is clearly wrong, since the Adamek court itself affirmed the use of averaging for past peak periods. Similarly, there is no merit to the argument that, until the Board enacts a new regulation, it is required to apply the invalidated averaging regulation, rather than determining peak issues through the litigation process. To the contrary, the Board is bound to comply with the decision of the appellate court, and may resolve peak issues through litigation. In furtherance of that obligation, the Board certainly can issue decisions applying the court's requirements to varying fact patterns, consistent with the Act. This is precisely what the

[11]This technique is referred to as "Saikhon" averaging, because it was first used in the case of Mario Saikhon. Inc. (1976) 2 ALRB No. 2.

Board did in Triple E.

Irrespective of the differences the Employer has with the Board concerning the use of averaging, the Regional Director's obligation was to follow the Board's position on that subject, which is what he did. The Regional Director here followed the same methodology utilized by the court in Adamek, by using the body count method for the pre-petition period and the averaging method for the 1993 peak week, once the 1993 body count did not result in 50% of peak employment.

It is concluded that the Regional Director also acted reasonably on the issue of the alleged increase in prospective peak employment, based on the information provided to him at the time. He provided the Employer with two opportunities to substantiate its assertion of the increase, and the Employer w unable to give even an estimate. The Regional Director was in no position, and under no obligation to try to guess how many workers the employer might have at some point in the future. The Employer's failure to meet its burden, in itself, justified rejection of the contention. Given the uncertainty raised by the Employer's information, it was also not unreasonable for the Regional Director to attach some weight to the sworn declaration of the employee, that additional workers would not be needed.

Accordingly, since the Employer did not meet its burden of showing it was not at 50% of peak employment at the time the petition was filed, it is recommended that the Board dismiss the Employer's objection and certify the election results.

ORDER

Based on the foregoing findings of fact and conclusions of law, and the record as a whole, the Employer's objection to conduct of the election is dismissed and a certification of representative shall issue.

Dated: January 12, 1995.

Douglas Gallop
Investigative Hearing Examiner