

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD

)	
MARIO SAIKHON, INC.)	
)	
Employer)	No. 75-RC-9-I and
)	No. 75-RC-14-I
and)	
)	2 ALRB No. 2
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO)	
)	
Petitioner)	
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On November 17, 1975, the United Farm Workers of America ("UFW") filed a Petition for Certification for the Mario Saikhon Ranch in the Imperial Valley, alleging that the employer currently employed 120 people. On November 20, 1975, the director of the El Centro subregional office dismissed the petition on the ground that the employer's peak agricultural employment for the current calendar year was in excess of 360 employees, and therefore the petition did not meet the requirements of Labor Code sections 1156.3 (a) and 1156.4 that a petition for certification must reflect 50 percent of the peak agricultural employment for the current calendar year.^{1/} On November 24, 1975, the UFW filed a second Petition for Certification alleging that on

^{1/} Labor Code section 1156.3(a)(1) requires that a petition for certification must state

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.

that date 165 persons were employed. On November 26, 1975, the Director again dismissed the petition on the same ground.

The UFW then filed with this Board two "Requests for Review of Dismissal of Petition for Certification" on November 23, 1975, and December 1, 1975, alleging in each case that the El Centro Director used an incorrect method of determining peak employment and thus improperly dismissed the two petitions for failure to allege an employee complement of at least 50 percent of peak. As this is the first case to arise on the issue of measurement of peak, the Board directed the Director in El Centro to submit a detailed report on how he arrived at his peak agricultural employment determination. This report was served on all parties.

The Board is informed by its Executive Secretary that the Petitioner has filed a third representation petition covering the employees of this employer and that a representation election has been scheduled. Although this development in some respects moots the issue raised by the petitioner's objection to dismissal of its prior petitions, we will proceed to resolve the underlying issue because it is one of general import and requires guidelines for the determination of peak employment in other cases.

fn. 1 cont.

^{1/}Labor Code section 1156.4 provides that a representation petition is not 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.

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The Director's approach used in determining the payroll period having the highest level of employment during the calendar year and in further determining what the level of employment was during that payroll period, was to count the number of employees whose names appear on the payroll during that payroll period. Where there is no turnover among employees in any given payroll period the number of employees on the payroll would equal the number of employees on any given day during that payroll period, assuming the employer used the same number of employees each day. However, where there is daily turnover of employees, the number of employees during, for example, a five-day payroll period could equal as many as five times the number of employees employed on any one day.^{2/} Thus, if the computation of employees complement is based upon number of employees whose names appear on the payroll, the measure of peak employment may fluctuate greatly depending upon the rate of employee turnover. Indeed, rapid turnover could create the appearance of a peak employment period despite the fact that the number of persons employed each day during that period is much less than the number employed at another time.^{3/}

^{2/} An example illustrates the effect of using this "employee count" method. In the case of an employer who employs exactly the same 100 employees each day for the five-day period, the employee complement for purposes of determining peak would be 100 employees. On the other hand, where an employer has complete turnover and employs 100 different employees each day for five days, the employee complement for purposes of determining peak would be 500 employees because each of the 500 employees names would be on the payroll during that five-day payroll period.

^{3/} For example, a five-day period during which 50 different employees were employed each day would have an employee complement

(fn. cont. on page 4)

In order to avoid the arbitrary effect of measuring employee complement for purposes of determining peak by the "employee count" method, a tool of measurement is required which does not fluctuate with turnover and thus can be used to reliably and meaningfully compare periods without regard to the amount of turnover. We conclude that the proper method for measuring level of employment for purposes of determining peak employment is to take an average of the number of employee days worked on all the days of a given payroll period. Thus, where an employer employs the same 100 individuals each day for the five-day period, there would be 100 employee days worked each day and the average number of employee days worked would be 100. Where an employee has total turnover and employs 100 different employees each day, there would be also 100 employee days worked each day and the average number of employee days worked on all the days of the payroll period would be 100. Thus, the approach we adopt of taking the average of the number of employee days worked on all the days of the payroll period avoids the pitfalls of the "employee count" method by yielding a consistent measure despite employee turnover.^{4/} We conclude that this method is the appropriate measure of employee complement for purposes of determining peak.

fn.3 cont.

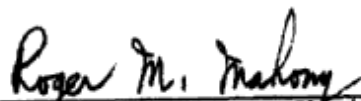
^{3/} of 250 for the purpose of determining peak if the "employee count" method is used, while a five-day period during which the same 100 individual employees were employed each day would have a count of only 100. Thus, peak would be falsely measured by a period during which there were only half the number of employees employed each day as there were during another period.

^{4/} The statute confers voting eligibility upon "all agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition." Labor Code section 1157. Current regulations provide, with respect to employers who employ agricultural employees on a payroll of less than five working days duration, that all

(fn. cont. on page 5)

We do not overrule the Regional Director's dismissal of the two petitions at issue here, despite our finding that they were improperly dismissed, because it will not effectuate the purposes of the Act to reactivate the prior petitions where there is a more recent timely and valid petition filed by the same union in the same unit.

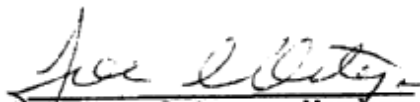
Dated: January 7, 1976



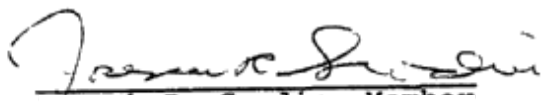
Roger M. Mahony, Chairman



LeRoy Chatfield, Member



Joe C. Ortega, Member



Joseph R. Grodin, Member



Richard Johnsen, Jr., Member

fn. 4 cont.

employees who were employed at any time during the five working days immediately prior to the filing of the petition shall be eligible to vote. Section 20355. Thus, the number of employees eligible to vote under current regulations may well exceed the average number of employees used to compute seasonal peak. This distinction is in accord with the different functions served by the eligibility and seasonal peak determinations.

The method of computing showing of interest under Section 1156.3 (a) is a separate issue. That section requires that the petition be signed by, or accompanied by authorization cards signed by "a majority of the currently employed employees in the bargaining unit". The Board is informed that the regional offices have generally required a showing of interest based upon the total number of eligible employees. We do not intend to alter that practice at this time. We reserve judgment, however, pending study of the effect of that formula in situations with rapid employee turnover, as to whether a different method of computing showing of interest may be appropriate in such situations.