

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
LUIS A. SCATTINI & SONS,)	No. 75-RC-55-M
)	
Employer,)	
)	2 ALRB No. 43
and)	
)	
WESTERN CONFERENCE OF)	
TEAMSTERS, AGRICULTURAL)	
DIVISION, I. B. T. , AND)	
AFFILIATED LOCALS,)	
)	
Petitioner,)	
)	
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Intervenor.)	

The major issue in this case is whether the election was timely held in view of the requirement in Labor Code Section 1156.4 that elections under the Agricultural Labor Relations Act be conducted only when the employer is at 50 percent of its peak agricultural employment for the calendar year.

This election was held on September 17, 1975, on a petition for certification filed by the Western Conference of Teamsters ("Teamsters") on September 10, 1975. The United Farm Workers of America, AFL-CIO ("UFW") intervened.^{1/} Thereafter, the UFW filed objections to the election alleging that the election was not held at peak and that the UFW was not given timely notice of the pre-election conference.

^{1/} The tally was Teamsters 17; UFW 9; no union 2.

This case was originally consolidated for hearing with six other Salinas Valley elections because of the common issue of peak raised in all seven cases. At the hearing, the parties entered into a stipulation that (1) the number of eligible employees shown on the eligibility list submitted by Scattini was 32, and (2) on August 6, 1975, there were 83 agricultural employees working for Scattini, including 30 regular employees and 53 employees of a labor contractor. See Labor Code, §1140.4(c) Additionally, the parties stipulated to sever this case from the other six matters for further hearing.

Thereafter, pursuant to a subpoena duces tecum, the UFW inspected the employer's employment and production records. By stipulation, extracts of those documents, listing the number of employees who worked during different relevant periods, were made part of this record. In accordance with our decision in Mario Saikhon, Inc., 2 ALRB No. 2 (1976), we have reviewed these materials to determine the average number of employee days worked during the payroll period immediately preceding the filing of the petition (see Labor Code, §§1156.3(a)(1), 1156.4) and to compare that number with the analogous figure from the period in early August claimed to constitute peak.

This review indicated that this case raises a problem not confronted in Saikhon. Here the employer has two separate groups of employees, regular employees and workers hired through a labor contractor, who appear to be paid on different payroll bases. The record shows that the steady Scattini employees are paid every two weeks, while the labor contractor employees appear to be paid on a daily basis. This raises the question whether

the method of determining peak which was utilized in Saikhon and Ranch No. 1, Inc., 2 ALRB No. 37 (1976) -- adding up all the employees working during each day of the respective payroll periods and dividing by the number of days therein -- can be appropriately applied here, where there are different payroll periods varying widely in length for the two sets of employees.

Several methods of computation suggest themselves. First, we might proceed according to the Saikhon and Ranch No. 1, Inc., model and simply add the total number of regular and labor contractor employees working each day during the two relevant two-week payroll periods and divide by the number of days therein. This approach has the advantage of of simplicity, but may produce distorted results if the actual peak period is significantly shorter than the two-week payroll period in which it falls. In such a situation, the sharp rise in labor contractor employees during the peak period would not give a true reflection of peak when averaged out over the lengthy, two-week payroll period.

An alternative approach is to compute the average number of employee days worked separately for the two classes of employees. For the regular workers, that figure would be computed over the relevant two-week payroll periods, since the regular workers are paid on a two-week basis. For the labor contractor employees, paid on a daily basis, we might proceed by analogy to Section 20355 of our regulations (8 Cal. Admin. Code, §20355), which provides that where an employer's payroll is for fewer than five working days, the relevant payroll period will be presumed to be at least five days long. Using this approach for the labor contractor employees, we would compute the

average number of employee days worked over a period of five working days. The "average" figures for the two types of employees would then be added together to reach an overall figure for this period.

Under this alternative approach, during the period alleged to constitute peak, we would use statistics from the five consecutive days with the highest number of labor contractor employees. For the comparative period preceding the filing of the petition, two methods of computation are possible: (1) use the five consecutive days of highest labor contractor employment within the two-week payroll period preceding the filing of the petition, or (2) follow the literal wording of section 20355, and use employment figures from the five working days immediately prior to the filing of the petition, regardless of whether those days fall within the two-week payroll period preceding the petition's filing.^{2/} Whichever period is used, the average number of employee days worked by regular employees would then be added to the average number of employee days worked by labor contractor employees.

We are not required at this time to choose which of these methods would best effectuate the Act's purpose "to provide the fullest scope for employees' enjoyment of [electoral] rights."

^{2/}In many situations, these two approaches would produce identical results because the five working days immediately prior to the filing of the petition would fall within the longer payroll period for regular employees. That is not the case here, however. The petition for certification was filed on September 10. The two-week payroll period immediately preceding the filing of the petition appears to have run from August 16 through August 30, although the record is somewhat hazy as to the precise starting and ending dates. The five working days immediately prior to the filing of the petition appear to have been September 4, 5, 6, 8, and 9. Labor contractor employees worked only on September 5 and 6.

Labor Code, §1156.4. The parties have not briefed this complicated issue,^{3/} and whichever computation method is used in this case, the petition for certification was timely filed because employment during the period immediately preceding the filing of the petition was far greater than 50 percent of the employer's peak agricultural employment for the calendar year.^{4/}

^{3/}The parties' failure to brief this issue appears to have stemmed, at least in part, from their assumption that the petition was not timely filed because the employer's payroll list did not reflect at least 50 percent of peak, an assumption reflected in their original stipulation. However, it appears that the stipulation was based on a faulty premise. The 32 employees listed on the eligibility list supplied by the employer constituted only the regular workers for Scattini & Sons; apparently none of the workers employed through a labor contractor was listed. Consequently, considerably more workers were employed during the relevant payroll period than appeared on the eligibility list. The UFW did not raise this defect in its objections petition.

^{4/}

Saikhon Approach

Using the Saikhon method, we find that there were 28 regular field workers and 4 tractor drivers as steady employees during the payroll period between August 1 and August 15, alleged to constitute peak, for a total of 32 regular employees. Assuming that each worked 12 days during this two week period, we find that the regular employees worked a total of 384 employee days. In that same period, a total of 268 employee days were worked by employees hired through a labor contractor. Adding those two figures, we conclude that the regular and labor contractor employees together worked a total of 652 employee days. Dividing that figure by the 12 work days in the payroll period, we determine that the average number of employee days worked during this period, under the Saikhon method, was 54.

During the payroll period immediately preceding the filing of the petition (August 16 through August 30), there were 33 regular employees. During the 12 work days of that period, these regular employees worked a total of 396 employee days. Labor contractor employees worked a total of 127 employee days. Adding these two figures, we find a total of 523 employee days worked by both classes of employees. Dividing by the 12 work days, we find that the average number of employee days worked during this payroll period, under the Saikhon method, is approximately 43. Since 43 is more than 50 percent of 54, the petition was timely filed under the Saikhon approach.

(fn. 4 cont. on p. 6)

As to the claim that the UFW did not receive timely notice of the pre-election conference, Bob Thompson, a UFW legal worker assigned to handle the Scattini election for that union, testified that he was leaving the Salinas regional office of the ALRB at approximately 8:00 a.m. on Monday, September 15, after a pre-election conference involving another employer, when a Board agent informed him that the pre-election conference in Scattini was scheduled to begin in a few minutes. The UFW had not been notified earlier of the conference because it had

(fn. 4 cont.)

Five-Day Approach

Using the alternative method of computation, it appears that an average of 32 regular employees worked on each day of the peak payroll period. The total number of employee days worked by labor contractor employees during the five peak employment days of this period was 165; divided by 5, the average number of employee days worked by labor contractor employees was 33. Adding 32 and 33, we find that the average number of employee days worked by both types of employees during the peak payroll period totals 65.

During the two-week payroll period immediately preceding the filing of the petition, the average number of employee days worked by regular employees was 33. Turning to the labor contractor employees, if we use the first proposed approach, based on the five consecutive days of highest labor contractor employment within this two-week payroll period, we determine that labor contractor employees worked a total of 105 employee days during this time. When that figure is divided by 5, it appears that the average number of employee days worked by labor contractor employees was 21. Adding 33 and 21 produces a total average number of employee days worked of 54. If we use the other approach, based on the five working days immediately prior to the filing of the petition, we find that labor contractor employees worked 83 employee days; divided by 5, the average number of employee days worked by labor contractor employees was 17. Adding 33 and 17 produces an average of employee days worked by both types of employees of 50. Since 54 (the average figure derived from the first method of computation) and 50 (the average figure derived from the second method of computation) are each more than 50 percent of 65 (the average figure for the peak payroll period), the petition was timely filed under either of these approaches.

intervened late the previous Friday afternoon after the Board agent had left the office. Thompson, attempted to reach the UFW organizers in charge of organizing at Scattini in order to notify them of the imminent pre-election conference, but was unable to contact them. He protested the lack of advance notice to the Board agent, tried to convince her to move the meeting to the next day, and when she refused, declined to participate in the conference. Thus, the pre-election conference was conducted without UFW participation.

The UFW urges that the Board agent erred in not continuing the pre-election conference until the following day (the sixth day after the filing of the petition) to accommodate the UFW and the Scattini workers whom the UFW wished to attend the conference. While every reasonable effort should be made to schedule meetings at a time when all parties and interested employees can participate, we cannot say as a matter of law that the Board agent abused her discretion here. Thompson was listed on the UFW's intervention petition as the UFW representative to contact in relation to the Scattini election. Although notice of the pre-election conference was given to him late, he was notified, but declined to participate. In the absence of any showing of prejudice from the late notice,^{5/} we decline to set aside the election on this ground.

^{5/} The UFW received a copy of the employee eligibility list later on September 15. This would appear to have been in sufficient time so that it could have detected the employer's failure to list the workers employed through a labor contractor. However, the UFW did not protest that error, either before the election or in post-election objections.

The Western Conference of Teamsters is certified as the exclusive bargaining representative of all agricultural employees of the employer in the Salinas Valley.

Certification issued.

Dated: March 3, 1976

Roger M. Mahony

Richard Johnson