STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

NURSERYMEN'S EXCHANGE, INC.,	)	Case No. 2010-RC-003-SAL
Employer,	)	
and	)	38 ALRB No. 1
UNITED FARM WORKERS OF AMERICA,	)	(February 28, 2012)
Petitioner.	)	

DECISION AND ORDER SETTING ASIDE ELECTION

On July 26, 2010, the United Farm Workers of America (UFW or Petitioner) filed a Petition for Certification to represent the agricultural employees of Nurserymen's Exchange, Inc. (NEI or Employer). On August 2, 2010, a representation election was held. On August 9, 2010, Employer filed nine election objections, the resolution of which was held in abeyance while ballot challenges were being resolved.

Following the filing of exceptions to the Regional Director's challenged ballot report, the issuance of a Board decision resolving the challenged ballot issues (*Nurserymen's Exchange, Inc.* (2010) 36 ALRB No. 6), and the Board's January 7, 2011 denial of Employer's motion for reconsideration of that decision (*Nurserymen's Exchange, Inc.*, Administrative Order 2011-01), the Regional Director issued a final tally of ballots on January 12, 2011, with the following results:

UFW……90

No Union……64

Unresolved Challenged Ballots……..13

The Executive Secretary issued an order on February 17, 2011 addressing Employer's August 9, 2010 election objections, and after requests for review of the Executive Secretary's order were denied on March 10, 2011 (*Nurserymen's Exchange, Inc.*, Administrative Order No. 2011-02), the Executive Secretary issued an order on April 5, 2011 calling for an investigative hearing to be held May 19, 2011, on the issue whether the timeliness requirement for peak agricultural employment in Labor Code sections[1] 1156.3(a)(1)[2] and 1156.4[3] had been met.

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[1] All statutory references are to the California Agricultural Labor Relations Act, Labor Code section 1140 *et seq.*, unless otherwise stated.

[2] Labor Code section 1156.3(a)(1), which states the requirements for an election petition, provides in relevant part:

> 1156.3(a) [T]he petition shall allege all of the following:
>
> (1) That the number of agricultural employees currently employed by the employer named in the petition, as determined from the employer's payroll immediately preceding the filing of the petition, is not less than 50 percent of the employer's peak agricultural employment for the current calendar year.

[3] Labor Code section 1156.4 provides:

> 1156.4 Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope of employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

(Footnote continued….)

On May 16, 2011, the ALRB Salinas Regional Director filed a "Dismissal of Election Petition" which attempted to dismiss the election petition based on the Regional Director's post-election determination that the 50 percent of peak employment requirement had not been reached and the election should not have been conducted. The dismissal was overruled by the Board on the grounds that any issues regarding the determination of peak needed to be addressed in the hearing on election objections and that the Regional Director had no authority to unilaterally dismiss an election petition once an election had occurred. (*Nurserymen's Exchange, Inc.* (2011) 37 ALRB No. 1.) The election objections investigative hearing proceeded from September 21 -23, 2011,[4] with Investigative Hearing Examiner Mark R. Soble presiding.

In his decision issued December 19, 2011, IHE Soble recommended that the election be overturned because the peak requirement set forth in Labor Code sections 1156.3(a)(1) and 1156.4 had not been met in this past peak case, i.e., a case in which the

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(Footnote continued)

> In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment based on acreage and crop statistics which shall be applied uniformly through the State of California and upon all other relevant data.

[4] The delay in holding an election objections investigative hearing initially stemmed from the Employer unexpectedly filing for bankruptcy and seeking a continuance in these proceedings on May 24, 2011, in order to seek approval from the bankruptcy court for its counsel to continue representing it before the Board. The UFW did not oppose the continuance, and the Board granted the continuance until June 22, 2011. Subsequent scheduling conflicts between both Employer and the UFW resulted in the Executive Secretary rescheduling the hearing for September 21, 2011, and consecutive days thereafter until completed.

Employer had experienced its peak employment prior to the election but in the same calendar year. Applying the standard of review applied to prospective peak cases as set forth in *Charles Malovich* (1979) 5 ALRB No. 33 at p. 4, the IHE reviewed the Regional Director's peak determination to see whether it was reasonable given the information available at the time of the election. (IHE Dec. at pp. 18-19). The IHE stated that logic suggested that the *Malovich* standard of review would apply to a past peak case. Applying this standard of review, the IHE held that the Regional Director's peak determination was not reasonable in light of the information available at the time of the election. The Regional Director's use of multi-year averaging of peak in a past peak case, absent any special circumstance or factor, was not appropriate. Finding no special circumstance or factor, the IHE recommended that the election be overturned. Petitioner filed exceptions on January 31, 2012.[5]

The Board has considered the record and the attached recommended decision of the IHE in light of the Petitioner's exceptions and briefs and has decided to affirm the IHE's conclusion that the election be set aside because the Employer was not at 50 percent of peak employment during the pre-petition payroll period. We therefore adopt his recommendation that the election be set aside as well as his decision to the extent it is consistent with ours below.

We write only to clarify that the appropriate standard of review to be applied to past peak cases is, as the IHE reasoned, that set forth in *Charles Malovich*,

[5] The Executive Secretary issued an order on December 21, 2011 extending the time by which exceptions to the IHE decision had to be filed.

supra, to wit: We review a Regional Director's 50 percent of peak employment determination for reasonableness in light of the information available at the time of the election.

ORDER

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

DATED: February 28, 2012

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

STATE OF CALIFORNIA

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Employer,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	
Petitioner.	)	

Appearances:

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For the Employer
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For the United Farm Workers
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For an Interested Party
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Camarillo, CA 93010-6082

DECISION OF THE INVESTIGATIVE HEARING EXAMINER

This matter was heard by Mark R. Soble, Investigative Hearing Examiner (IHE), Agricultural Labor Relations Board (ALRB), at the Best Western San Mateo/Los Prados Inn, 2940 S. Norfolk Street, San Mateo, CA 94403-2018, on September 21-23, 2011.

ISSUE

Whether the representation petition filed on July 26, 2010 by the United Farm Workers with respect to the agricultural workers at Nurserymen's Exchange was timely filed with respect to peak, as required by California Labor Code section 1156.4?

FINDINGS OF FACT

A. Jurisdiction, Procedural History and Background

1. Juridiction

During all relevant times, Nurserymen's Exchange has been an agricultural employer within the meaning of California Labor Code section 1140.4, subdivision (c). During all pertinent times, the UFW was a labor organization as defined by California Labor Code section 1140.4, subdivision (f).

2. Petition, Response and Election

On July 26, 2010, the UFW filed a petition for certification pursuant to California Labor Code section 1156.3. In so doing, the UFW sought to be the bargaining representative for the agricultural workers at Nurserymen's Exchange. Two days later, on July 28, 2010, the Employer filed a response to the petition for certification contending that the petition was untimely because it was filed during a non-peak employment time period. On July 30, 2010, the Salinas ALRB Regional Office issued a notice of election and an election was held on August 2, 2010.

3. Initial Vote Tally and Challenged Ballots

The initial vote tally was three votes for the UFW, fifty-eight votes for "No Union", and 107 unresolved challenged ballots. Ninety-four of the challenged ballots involved workers who had received layoff notices but who were still on the payroll. These ballots were challenged by the Employer. Another thirteen ballots were initially challenged by the UFW as having been cast by non-agricultural workers, but the UFW later withdrew their challenge to those thirteen workers.

On August 9, 2010, the Employer filed nine election objections. On October 7, 2010, the Salinas ALRB Regional Director issued his report on challenged ballots. On October 13, 2010, the ALRB Executive Secretary granted the Employer an extension of time to file exceptions to that Regional Director's report from October 18, 2010 to November 17, 2010. On November 16, 2010, the Employer timely filed exceptions to the Regional Director's report. On December 17, 2010, the Agricultural Labor Relations Board (Board) issued its decision finding that the ninety-four workers who had received layoff notices but who were still on the payroll were eligible voters. (Nurserymen's Exchange, Inc. (2010) 36 ALRB No. 6, at page 6.) On December 27, 2010, the Employer filed a motion for reconsideration on that same issue, which the Board denied on January 7, 2011.

4. Final Vote Tally and Setting of Election Objections for Hearing

On January 12, 2011, the Regional Director issued a final vote tally of ninety votes for the UFW, sixty-four votes for "No Union", and thirteen unresolved

challenged ballots. With the voter eligibility issues having been resolved, on February 7, 2011, the ALRB Executive Secretary then issued an order addressing the Employer's August 9, 2010 election objections. On February 17, 2011, both the Employer and the UFW filed requests for review of the Executive Secretary's February 7, 2011 order. On March 10, 2010, the Board issued an administrative order denying both of the requests for review. (Nurserymen's Exchange, Inc., Administrative Order No. 2011-02, at page 4.) On April 5, 2011, the Executive Secretary issued an order calling for an investigative hearing on the peak issue to be held on May 19, 2011, and specifying the issue to be decided.

5. Prehearing Conference Calls and the Regional Director's Attempt to Dismiss the Election Petition Over Nine Months Following the Election

On April 28, 2011, an Order issued setting a Prehearing Conference Call for May 11, 2011. The parties then jointly requested that the Prehearing Conference Call be rescheduled to May 16, 2011. On May 16, 2011, the ALRB Salinas Regional Director issued a document entitled "Dismissal of Election Petition" which purported to retroactively dismiss the election petition filed back on July 26, 2010.

On May 16, 2011, the Prehearing Conference was held, wherein attorney Marvin Brenner advised that the Salinas Regional Director had reviewed the methodology that he had used to calculate peak in this matter and concluded that his prior determination was erroneous. Attorney Brenner indicated that the Salinas Regional

Director now concludes that peak was not met and that the election should not have been held.

At the prehearing conference, the IHE noted that "there is the issue of whether the Regional Office rather than solely the Board has the jurisdiction or authority to dismiss an election petition at this late juncture." (Prehearing Conference Order, dated May 17, 2011, at page 2.) The IHE noted that this issue "would be correctly raised before the Board" and also urged the parties "to independently meet and confer to see if a stipulated factual record relating to peak could be achieved in this matter." (Id.)

On May 17, 2011, the Executive Secretary continued the hearing until May 31, 2011, giving the parties added time to evaluate the Regional Office's position and if desired, to file a request for review with the Board. On May 24, 2011, a second Prehearing Conference Call was held to address some of Employer's subpoenas for Regional Office staff to testify at the investigative hearing. On the same day, the Employer also indicated that it filed for Chapter 11 bankruptcy on May 23, 2011. On May 25, 2011, the Board issued a decision finding that the Regional Director did not have the authority to dismiss an election petition after an election was held. (Nurserymen's Exchange, 37 ALRB No. 1, at page 2.) However, the Board granted an additional continuance due to Nurserymen's Exchange bankruptcy filing. (Id. at pages 4-5.) To that end, on June 6, 2011, the Executive Secretary then issued an Order continuing the date of the investigative hearing from May 31, 2011 to June 22, 2011.

6. Additional Motions and Continuances

On June 1, 2011, the Employer and Regional Office filed requests for reconsideration with the Board. On June 7, 2011, the Board denied those requests. (Nurserymen's Exchange, Administrative Order, 2011-12, at pages 2-4.) Also on June 7, 2011, the Executive Secretary advised the parties that the UFW, Regional staff and IHE all had another hearing scheduled for overlapping dates and the Nurserymen's hearing would thus need to be rescheduled. On July 1, 2011, the Executive Secretary rescheduled the hearing to begin on September 21, 2011. On September 9, 2011, the Employer filed a motion to dismiss the petition for certification or, in the alternative to further continue the date of the investigative hearing. On September 14, 2011, the Board denied the Employer's request. (Nurserymen's Exchange, Administrative Order, 2011-19, at pages 1-2.) On September 16, 2011, the Board denied Employer's request for reconsideration of the same matter. (Nurserymen's Exchange, Administrative Order, 2011-20, at pages 1-2.) On September 19, 2011, the entity which purchased Nurserymen's assets in bankruptcy requested to intervene in the matter as an interested party and the IHE granted that request.

The ALRB received post-hearing briefs from the Employer and UFW on November 17, 2011 and November 21, 2011, respectively. Neither the General Counsel nor the Interested Party filed post-hearing briefs.

B. Stipulated Facts

The parties entered into a three page joint stipulation which is identified as hearing Exhibit J-A. The gravamen of this stipulation is that the Salinas ALRB Regional

Office had in its possession the 1355 pages comprising hearing Exhibits J-1 through J-18 prior to when the Regional Director issued the Notice and Direction of Election on July 30, 2010. See Exhibit J-A, at page 2, lines 13-16.

C. Witness Testimony and Documents

Three witnesses testified at the hearing. The witnesses were Jesse Melendrez, Octavio Galarza and Freddie Capuyan.

1. Human Resources Director Jesse Melendrez

Jesse Melendrez is Employer's Vice President of Human Resources. Nurserymen's Exchange is a nursery and specializes in potted plants. (Court Reporter's Transcript, volume three, at page 358, lines 15-17, hereafter abbreviated as 3 RT 358:15-17.) Melendrez indicated that the company brings in extra labor contractor workers during the time period in May slightly before Mother's Day for general nursery work such as harvesting and packing plants in decorative pots.[1] (3 RT 359:2-16)

Melendrez himself started working for the company in 2001. (3 RT 338:25-339:1) Melendrez noted that in 2010, the company issued layoff notices to 114

[1] This testimony is consistent with Employer's July 28, 2010 written submission to the Regional Director, which alleges that the business of Nurserymen's Exchange is producing potted floral plants and that the company's business is driven by four major holiday's Valentine's Day, Easter, Mother's Day and Christmas. (Joint Exhibit J-4, at record 000039.) There is no potential hearsay issue here because the IHE does not need to consider record 000039 as to the truth of the memorandum's content, but rather uses the document in the context of the parties' stipulation that this document from the Employer was in the possession of the Regional Director at the time that he made his decision regarding peak.

direct-hire employees but that the company did not significantly reduce the number of labor contractor employees that the company used. (3 RT 353:19 – 354:4)

2. Field Examiner Octavio Galarza

a. Octavio Galarza's background

Octavio Galarza is a field examiner (also sometimes referred to as an "agent") with the Salinas ALRB Regional Office. (1 RT 29:7-8) During his career, Galarza estimates that he has handled approximately forty different election petitions. (1 RT 30:2-7) In approximately five or six of those elections, peak was an issue. (3 RT 272:19-22) With respect to the instant election petition, Galarza served as the agent in charge. (1 RT 33:9-10) Galarza indicated that he was the most knowledgeable agent regarding peak calculations in the Salinas Regional Office. (1 RT 33:15-23)

b. Materials Received and Reviewed By Galarza

When the Regional Office and Galarza received the UFW's election petition, he contacted the Employer to obtain a response. (1 RT 36:1-7) On July 28, 2010, Galarza received a response from the Employer stating that the election petition was not timely filed. (1 RT 36:20-37:2; 1 RT 70:23-71:23) The Employer response included a position statement that peak was not met, summaries of in-house payroll records, and summaries of labor contractor payroll records.[2] (1 RT 37:14-42:13) Galarza

[2] Among the documents that the Regional Office received from the Employer is the one identified at the hearing as record # 000060. (1 RT 56:16-61:2) On its face, this document purports to show the number of workers during each week between January 7, 2007 and July 4, 2010. (Joint Exhibit J-4, at record 00060.)

also requested additional information from the Employer, all of which the Employer timely provided to the Regional Office. (1 RT 52:7-56:7) The extra materials requested included a second week of payroll records for certain time periods. (1 RT 52:12-53:20) Galarza reviewed all of the submissions involving 2008 through 2010, but did not look at the materials covering 2007. (1 RT 35:13-18; also 1 RT 79:25-80:5)

c. Galarza's calculations and findings

i. Body count comparison

Galarza determined that there were 195 employees on the pre-petition payroll. (1 RT 81:7-82:18)[3] Galarza then compared this number to the Employer's response of 640 as to the alleged body count for the week ending May 2, 2010.[4] (3 RT 298:15-300:12) Galarza correctly found that 195 is less than fifty percent of 640. (3 RT 303:19-23)

[3] Galarza reached this figure by including the workers who had received layoff notices but who were still on the payroll. (3 RT 291:15-24; 3 RT 331:20-24) In its materials, the Employer argued that these workers did not count for purposes of calculating peak. (3 RT 323:17-21) However, the same reasoning that the Board applied in December 2010 within its decision at 36 ALRB No. 6 to find these workers were eligible to vote would also require that such workers be counted toward assessing whether or not peak is met. Thus, Galarza correctly included these workers in his tallies.

[4] Note that while Record 000060 uses the number 640, Employer's accompanying memo instead stated the number 616. Since 195 is less than 50% of either 640 or 616, this distinction would not have impacted Field Examiner Galarza's methodology.

ii. Averaging methodology using 2010 figures

Since the body count method showed that peak was not met, Galarza then proceeded to calculate using an averaging methodology that he understood to be called the Saikhon[5] method. (1 RT 80:10-19) The averaging methodology takes into account turnover within a single payroll period. (3 RT 300:15-301:15) In making such calculations, Galarza eliminated certain days when few or no employees were working.[6] Galarza took into account differences in the length of the payroll period for direct-hire workers and labor contractor employees.[7] Using the averaging method, Galarza found that for the payroll period ending May 2, 2010 the Employer had 424 workers. (2 RT 144:9-10; Employer's Exhibit No. 1, at page 9.) Fifty percent of 424 equals 212. (2 RT 144:9-13) The number of workers on the pre-petition payroll, 195, is less than 212. (2 RT 144:16-145:5)

iii. Averaging methodology using three years of figures (2008-2010)

Galarza next used the averaging method for calendar years 2009 and 2008. (1 RT 81:7-13) Using the averaging method, Galarza found that the Employer had 368

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[5] The "Saikhon" method is derived from Mario Saikhon (1976), 2 ALRB No. 2.

[6] This is the process called for in Ranch No. 1, Inc. (1976) 2 ALRB No. 37. This process is also explained in the ALRB Election Manual. (2 RT 152:12-24; Employer's Exhibit Seven at page 4-40 ("If the peak payroll period contains unrepresentative days on which no or very few employees worked, those days should not be included in the averaging computation. (Ranch No. 1 (1976) 2 ALRB No. 37.)")

[7] 2 RT 188:22-189:11.

workers in 2009 and 378 workers in 2008. (See Employer's Exhibits 2 and 3.[8]) Galarza than added the numbers for each of the three years, to-wit 424 plus 368 plus 378, which equals 1170, and then divided that sub-total by three, which totals 390. (See Employer's Exhibits One, Two and Three.) The number of agricultural workers in the pre-petition payroll period is 195, and that figure equals exactly fifty percent of 390. As a consequence, Galarza found that peak was met. (1 RT 81:7-82-3; 3 RT 316:17-25)

iv. Galarza testified that he was unaware that different methodologies might apply with respect to past and prospective peak cases

Galarza testified that he was unaware that different peak calculation methodologies may apply for past and prospective peak cases. (3 RT 327:1-10) Galarza knew that the Employer asserted that the peak occurred back near the 2010 Mother's Day holiday. (3 RT 282:19-23) Galarza also knew that the Employer considered the matter to be a past peak case. (3 RT 328:5-7) Nonetheless, Galarza did not slot the case as either a prospective or future peak case for purposes of conducting his analysis. (3 RT 275:16-19)

The only factor that Galarza cites for using a three-year averaging methodology is that under the other formulas the pre-petition payroll did not meet fifty

[8] Specifically, Employer's Exhibit One shows Galarza adding 185 for the first week and 239 for the second week, to total 424. (See also 2 RT 143:22-144:9) Employer's Exhibit Two shows Galarza adding 177 for the first week and 191 for the second week, to total 368. Employer's Exhibit Three shows Galarza adding 179 for the first week and 199 for the second week, to total 378.

percent of the figure occurring around Mother's Day 2010.[9] (3 RT 303:19-304:4) Galarza did not examine any trends as to past year's peaks before deciding to proceed with the three-year averaging methodology. (3 RT 305:14-21; 3 RT 310:21-311:4) This means that Galarza did not take into account that the time period where peak could be met was of a rather short duration. Nor had Galarza previously read any materials suggesting that past years should be incorporated into the analysis in instances of inflated peak numbers. (3 RT 319:4-9) Finally, in July 2010, the UFW had not made any allegations that the Employer had artificially inflated or manipulated peak numbers to make them suspect.[10] (3 RT 330:22-24)

3. Regional Director Freddie Capuyan

Freddie Capuyan is the Salinas ALRB Regional Director. (3 RT 228:18-22) Capuyan has served as Regional Director since 1996. (3 RT 228:20-24) Capuyan supervises examiner Galarza. (3 RT 229:14-17) After completing the peak calculations, Galarza orally communicated his findings to Regional Director Capuyan. (2 RT 188:4-16) Capuyan indicated that the region evaluated peak by first comparing the pre-petition

[9] Using Galarza's reasoning, the three-year averaging should always be calculated next if peak is not met under the body count or one-year averaging methodologies.

[10] Galarza did not alter or factor into his methodology that during the pre-petition payroll period, the Employer had almost one hundred percent as many *direct-hire* employees as did the company did during the previous peak period. (3 RT 331:20-333:23)

employee number to the past peak number for calendar year 2010.[11] (3 RT 236:4-8) After finding that peak was not met using that approach, the Regional Director then evaluated peak by comparing the pre-petition payroll to a combined average for years 2008 through 2010. (3 RT 236:9-15) Using the three-year averaging of the May peak, the Regional Director found that peak was met. (3 RT 265:24-266:1)

4. Excluded Evidence Regarding Regional Office Determinations Made Nine Months Following the Election

The Regional Director's decision involving the election occurred back in July 2010. In May 2011, at the direction of counsel, and in anticipation of this litigation, Regional Office counsel had examiner Galarza prepare a memorandum regarding the peak calculations made nine months earlier. The Employer sought discovery and introduction of this memorandum at hearing. The Regional Director took the position that the memorandum was protected by the work product privilege. (2 RT 199:18-200:4)

The undersigned ruled that the document is attorney work product drafted in anticipation of this litigation. Moreover, the content of the memorandum would be irrelevant to a resolution of this matter. In its previous decision, the Board concluded that

[11] Capuyan recalled that the region had calculated the number of employees on the pre-petition payroll as 195. (3 RT 268:19-25) This figure included all of the employees who had recently received layoff notices. (3 RT 269:5-10) Capuyan testified as to his understanding that first the region evaluated peak using the body count method as to 2010. The region found that peak was not met under that approach. Then the region applied the Saikhon or averaging methodology as to 2010. Again, the region found that peak was not met. Only at that juncture did the region compute a three-year average of the May peak. (3 RT 265:4-23)

the Regional Director's authority over this matter is relinquished following the election. (Nurserymen's Exchange, 37 ALRB No. 1, at page 2.) There is nothing wrong with the Regional Director reviewing possible past mistakes with his attorneys and other staff. But nine months after the election, it is the Board and not the Regional Director that makes the call of whether a proper peak calculation methodology was used or not. So the document is both privileged and irrelevant. (See 2 RT 199:3-205:12)

The undersigned did admit two documents wherein the Regional Director unambiguously indicated his belief that his past determination in this matter was erroneous. (Employer's Exhibits No. 8 and 9; 3 RT 257:10-260:14) Employer's Exhibits No. 8 and 9 were not admitted as a basis to determine whether or not the Regional Director reasonably calculated peak, but rather are admitted solely to show the chronological progression of the matter.

D. Specific Factual Findings

1. The number of employees during the pre-petition payroll period was 195.

2. Using the Saikhon averaging method for the single year of 2010, Galarza found a peak employment figure of 424.

3. Using the Saikhon averaging method for the three years of 2008 to 2010, Galarza found a peak employment figure of 390.

4. Galarza appropriately excluded certain days where there were few or zero employees consistent with the Ranch No. 1 case.

5. The Regional Director based his conclusion that the petition was filed during peak by relying upon Galarza's calculations that included calendar years 2008 to 2010.

6. Aside from the methodology, there was no persuasive evidence at the hearing that examiner Galarza's team made mathematical errors.

7. In its responding papers back in July 2010, the Employer was very clear that it alleged that the peak had occurred during the week ending May 2, 2010. [12]

8. There was no persuasive evidence at the hearing to suggest that Galarza altered his methodology due to some special or unique circumstances in this case such as the shortness of the peak period or the large number of layoffs that were in process.

9. There was no testimony at this hearing that either Capuyan or Galarza tailored their methodologies due to any sort of bias either for or against the Petitioner or the Employer.

10. Given findings seven through nine, the IHE concludes that, in July 2010, when making the peak calculations, it did not occur to examiner Galarza that a different methodology might be used to calculate peak in a past peak case as opposed to the methodology used in a prospective peak case.

[12] See Joint Exhibit J-4, at record 000042.

ANALYSIS AND CONCLUSIONS OF LAW

A. Elections to Select or Decertify Labor Organizations May Only Be Sought During Time Periods When Sufficient Numbers of Workers Are Employed

Agricultural workforce needs vary more than the staffing needs of most industries or professions. For some crops, the variance in the size of the workforce is highly tied to the seasons of the year and the corresponding weather that those seasons typically bring. Other variables such as the price of commodities may impact the number of workers at any given time. To that end, the Agricultural Labor Relational Act has specific language designed to ensure that elections to select or decertify a labor organization occur during time periods when there is a sufficiently representative workforce to represent the interests of all of the agricultural workers. (ALRB v. Superior Court (Gallo Vineyards) (1996) 48 Cal.App.4th 1489, 1497.)

B. The Number of Workers Employed During the Pre-Petition Payroll Period Must be Sufficiently Representative For an Election to Occur

Labor Code section 1156.4 makes clear that a representation petition may only be filed during a time period when the number of workers on the employer's payroll

is at least fifty percent of the maximum or "peak" number for that calendar year.[13] Specifically, the number of workers on the payroll period immediately preceding the petition is then measured against the maximum number of employees on the payroll during the year. (Harry Carian Sales (1980) 6 ALRB No. 55, at page 6.) If the number of employees during the pre-petition payroll period is at least fifty percent of the peak number, then the workforce is deemed sufficiently representative to allow an election.

C. Past Peak Versus Prospective (Future) Peak

The peak or maximum employment is to be calculated for the January-December calendar year within which the election petition is filed. (Ruline Nursery Co. (1982) 8 ALRB No. 5 aff'd *Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247.) If the peak employment within the calendar year occurred before the filing of the petition, it is commonly referred to as a "past peak"; if it has yet to occur it is called a "prospective" peak. (ALRB v. Superior Court (Gallo Vineyards) (1996) 48 Cal.App.4th 1489, 1497.)

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[13] California Labor Code section 1156.4 states as follows:

> 1156.4 Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.
>
> In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data.

D. The ALRA Requires the Employer to Provide the Regional Director With Pertinent Payroll Records and Evidence

ALRB Regulation section 20310, subdivision (a)(6) sets forth the Employer's obligation to provide to the Regional Director with its written position regarding when peak occurred and to further provide payroll records and other evidence to support that position.[14] If the Employer alleges that it is a past peak case, it must submit records for the current calendar year. If the Employer is contending that the peak will occur later in the year, then it is required to provide records for previous years.

E. Standard of Review

For a prospective or future peak case, the Board has determined that the standard of review is whether the Regional Director's peak determination was a

[14] ALRB Regulation section 20310, subdivision (a)(6) sets forth the contents of the Employer's statement of peak employment as follows:

> (6) A statement of the peak employment (payroll period dates and number of employees) for the current calendar year in the unit sought by the petition. If the employer contends that the petition was filed at a time when the number of employees employed constituted less than 50% of its peak agricultural employment for the current calendar year, the employer shall provide sufficient evidence to support that contention. If it is contended that the peak employment period has already passed, such evidence shall include payroll records which show both the names and actual number of (agricultural) employees employed each day and the number of hours each employee worked during the peak payroll period. If it is contended that the peak payroll period will occur later in the year, such evidence shall include payroll records which show both the names and actual number of (agricultural) employees employed each day and the number of hours each employee worked during the peak payroll period from the previous year(s), as well as any other information in the employer's possession which would be relevant to the determination of peak employment requirements.

reasonable one given the information available at the time of the election. (Charles Malovich (1979) 5 ALRB No. 5, at 4.) Logic suggests that the same standard also applies to a past peak case. Indeed, it is possible that some cases may require the Regional Director to determine whether the case is a past or prospective peak matter. Moreover, since the election is held within seven days of the filing of the petition, the Regional Director may only have two or three days to make a decision after receiving the Employer's response. (California Labor Code section 1156.3, subdivision (a)(4).) The party objecting to the Regional Director's determination bears the burden of showing that the Regional Director acted unreasonably. (See Kubota Nurseries, Inc. (1989) 15 ALRB No. 12.)

F. The Body Count Method of Comparing the Pre-Petition Payroll to the Maximum Number of Workers Employed During the Calendar Year

The body-count method simply involves counting the number of names of non-supervisory agricultural employees during the payroll period in question. Thus, a comparison can be made between the number of names on the pre-petition payroll and the number of names on the payroll with the maximum number of employees. The Court of Appeal has found that the body-count formula is the correct methodology to count the number of employees in the pre-petition payroll period. (*Adamek & Dessert, Inc. v. ALRB* (1986) 178 Cal.App.3d 970, 978; see also Triple E Produce Corporation (1990) 16 ALRB No. 14.)

G. Single-Year Averaging

In its decision in *Mario Saikhon* (1976) 2 ALRB No. 2, the Board determined that an averaging methodology would help take into account the existence of employee turnover during the peak period. (Mario Saikhon (1976), 2 ALRB No. 2, at pages 3-4.) Suppose that a hypothetical payroll period was comprised of ten working days. If one hundred different employees were hired on each day, the body count for that period would be one thousand workers. But using the averaging methodology, the figure of one thousand would be divided by ten, to equal only one hundred. As another hypothetical, if there was no turnover during the peak period, and the same one hundred employees worked on all of the days, then the body-count and averaging methodologies would yield the same tally of one hundred workers.

H. For Averaging Purposes, the Regional Director Must Disregard Days Where Few or Zero Agricultural Workers Were Employed

In its decision in *Ranch No. 1, Inc.* (1976) 2 ALRB No. 37, the Board excluded from its averaging calculations those days were very few or zero agricultural workers were employed. (Ranch No. 1, Inc. (1976) 2 ALRB No. 37, at page 2, footnote number 4.) As discussed *infra*, there is not a statutory or case law basis to exclude from the calculations those days with unusually large numbers of workers.

I. Multi-Year Averaging Is Not Appropriate For Past Peak Cases

1. Case Law States That Past Peak Cases Are Evaluated Solely By Comparing the Pre-Petition Payroll Period and the Peak Period From Earlier That Same Calendar Year.

In its consideration of a past peak case, Ranch No. 1 (1976), 2 ALRB No. 37, at pages 3-4, footnote no. 6, the Board noted that:

> [W]here, as here, it is contended that peak employment has already occurred within the current calendar year, a comparison between employment figures in the two relevant payrolls will fully reveal whether the petition for certification was timely filed. No supplemental data concerning crop or acreage statistics is required to make the purely mathematical computation of whether the payroll for the period immediately preceding the filing of the petition was 50 percent of the payroll in the earlier period claimed to constitute peak.

Later, in *Adamek & Dessert, Inc. v. ALRB* (1986) 178 Cal.App.3d 970, 982, the Court of Appeal cited the Ranch No. 1 case as authority for the proposition that "When section 1156.4 and 1156.3 are read together, it seems clear that the estimate referred to in section 1156.4 was applicable to potential future peaks which may occur within the applicable calendar year."

2. Regulatory Language Also Suggests That Prior Years' Data Is Irrelevant For Assessing a Past Peak Petition's Timeliness

ALRB Regulation section 20310, subdivision (a)(6) provides for the Employer to provide payroll records from past years when the Employer is contending that the peak payroll will occur later in the year. But the same regulation states that if the Employer contends that the peak employed period for current calendar year has already

passed, the Employer shall only include payroll for that single peak period.[15] This would suggest that for past peak calculations, data from past calendar years are not used in the calculations. [16]

Accordingly, in the absence of any special circumstance or factor, I find that a three-year averaging calculation is an unreasonable methodology when the Employer is contending that the peak already occurred during the current calendar year. For a prospective peak calculation, using three years of data may be a highly appropriate way to estimate a future outcome. But the past peak calculation does not involve a prognostication of an event that has yet to occur. Instead, the past peak calculation involves an event that has already taken place. Thus, typically, it would be appropriate for Regional staff to first compare the pre-petition payroll, using a body-count

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[15] ALRB Regulation section 20310, subdivisions (a)(2) and (a)(3) provide for the Employer to also provide payroll records covering the pre-petition payroll period.

[16] The Board has held that the ALRB Election Manual is not legal authority as to the ALRA, but instead is merely a guide designed to reflect existing law. (Nurserymen's Exchange, Inc. (2010) 36 ALRB No. 6, at page 5.) This being said, the manual does set forth language that is consistent with my analysis of the case law and Regulation section 20310. Section 2-4420 of the ALRB Election Manual describes calculating past peak as simply a comparison of the pre-petition payroll period to the period within the calendar year in which the Employer contends that the past peak occurred. (Employer's Exhibit No. 7, ALRB Election Manual, June 1991, at page 4-38.) In contrast, for future or prospective peak cases, section 2-4430 of the ALRB Election Manual directs staff to obtain the Employer's payroll records for its peak seasons in the last three years. (Employer's Exhibit No. 7, ALRB Election Manual, June 1991, at page 4-46.) However, the IHE's ultimate conclusion in this matter is based solely upon the case law, statutory language and regulatory language, not the election manual.

calculation, to the past peak payroll period, again using a body-count calculation. If the number for the pre-petition payroll period is fifty percent or greater than the sum for the peak period, the analysis is done and that prerequisite for an election is met. If the fifty percent threshold is not met using that methodology, then the Regional Director would next compare the pre-petition body count to the single-year averaging of the peak period. If the number for the pre-petition payroll period is fifty percent or greater than the count via averaging for the peak period, then the threshold is met. Otherwise, if the pre-petition number again falls short of fifty percent, in the absence of a special circumstance or factor, then the Labor Code section 1156.4 standard for holding an election is not met.

J. There Was No Evidence Presented at This Hearing of Special Factors That Requires Using a Different Methodology In Order to Calculate Whether a Representative Workforce Exists

The Petitioner suggests two possible special factors as bases why the Regional staff might have undertook the three-year averaging methodology in a past peak cases. Prior to a discussion of those two factors, however, it should be emphasized that there was no persuasive evidence that examiner Galarza or Regional Director Capuyan considered any such factors in making their peak determination.

1. The Regional Director Did Not Rely Upon Special Factors As His Basis to Use a Three-Year Averaging Methodology

At the outset, the IHE reiterates that neither Field Examiner Galarza nor Regional Director Capuyan testified that any special factors caused them to utilize a different methodology. Instead, Field Examiner Galarza testified that after the fifty

percent threshold was not met under the other methodologies, he simply moved on, as an automatic progression, to trying to meet the standard using the three-year averaging. Nonetheless, the IHE addresses below the possible special factors due to the possibility that the Board might otherwise consider them.

2. The Employer Initiated Layoffs Shortly Before the Pre-Petition Payroll Period

The first special circumstance alleged by the Petitioner are the massive layoffs that were initiated shortly prior to the petition being filed. The IHE concludes that these layoffs are not a special factor requiring use of a different methodology to calculate peak. This is because the Regional Director correctly included these workers in the pre-petition tally. Thus, the Petitioner had the full benefit of those workers counting toward the fifty percent threshold. Thus, this circumstance does not comprise a special factor which would justify using a different methodology to calculate peak.

3. The Employer Hired Extra Farm Labor Contractor Workers During Certain Time Periods

The second circumstance alleged by the Petitioner is "isolated" spikes in the hiring of farm labor contractor (FLC) workers. A review of Exhibit J-4, at record 00060, shows a similar pattern of FLC workers during 2010 as occurred during the previous two years. The maximum number of FLC employees occurred during the period ending May 2, 2010. The IHE will take official notice that Mother's Day took place on May 9, 2010. The Petitioner did not present any persuasive evidence at hearing that the Employer sought to deliberately alter or manipulate peak employment at that

juncture for anything other than business reasons.[17] Nor did the Regional Director have any such evidence in front of him at the time of his determination.

4. There is no Basis to Exclude FLC Workers From the Tallies

It is worthy of note that the body-count of the direct-hire employees during the pre-petition payroll period was 195. This equals the body-count of the direct-hire employees during the past peak payroll period. The reason that the fifty percent threshold is missed is because of inclusion of the FLC workers. However, there is no basis for excluding the FLC workers from the tally. Indeed, courts have emphasized the fifty percent of peak formula is designed to protect the representational rights of seasonal workers from being determined for them by a year-around minority. (*ALRB v. Superior Court (Gallo Vineyards)* (1996) 48 Cal.App.4th 1489, 1497; *Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 256.)

ORDER

Presented with Employer documentation and memoranda suggesting that this was a past peak matter, and in the absence of any special circumstances requiring a unique methodology, I find that it was unreasonable for the Regional Director to utilize a three-year averaging method to find that the pre-petition payroll met fifty percent of the peak tally. Using a one-year averaging methodology, the pre-petition body count of 195 equals only 45.99% of

[17] For this reason, the IHE does not have the issue before him of whether a variance in methodology is appropriate where there is tangible evidence of a deliberate employer scheme to disenfranchise workers' right to organize. An extreme example of this would be if an employer deliberately hired several hundred workers to work for a single hour during the peak period.

the 424 tally that Field Examiner Galarza computed for the peak period. For that reason, I recommend that the Employer's peak objection be upheld and that the election be overturned.

Dated: December 19, 2011.

Mark R. Soble
Investigative Hearing Examiner, ALRB

CASE SUMMARY

NURSERYMEN'S EXCHANGE, INC. Case No. 2010-RC-003-SAL
(United Farmer Workers of America) 38 ALRB No. 1

On July 26, 2010, the United Farm Workers of America (UFW) filed a Petition for Certification to represent the agricultural employees of Nurserymen's Exchange, Inc. (NEI). On August 2, 2010, a representation election was held. On August 9, 2010, Employer filed nine election objections, the resolution of which was held in abeyance while ballot challenges were resolved. Following a resolution of the ballot challenges, the Regional Director issued a final tally of ballots on January 12, 2011, with the following results: "UFW," 90; "No Union," 64; "Unresolved Challenged Ballots," 13. The Executive Secretary issued an order on February 17, 2011 addressing Employer's August 9, 2010 election objections, and after requests for review of the Executive Secretary's order were denied on March 10, 2011 (*Nurserymen's Exchange, Inc.*, Administrative Order No. 2011-02), the Executive Secretary issued an order on April 5, 2011 calling for an investigative hearing on the issue whether the timeliness requirement for peak agricultural employment in Labor Code sections 1156.3(a)(1) and 1156.4 had been met.

In his decision issued December 19, 2011, Investigative Hearing Examiner (IHE) Mark R. Soble recommended that the election be overturned because the peak requirements set forth in Labor Code sections 1156.3(a)(1) and 1156.4 had not been met in this past peak case, i.e., a case in which peak employment for the calendar year occurred prior to the election. Applying the standard of review applied to prospective peak cases as set forth in *Charles Malovich* (1979) 5 ALRB No. 33 at p. 4, the IHE reviewed the Regional Director's peak determination to see whether it was reasonable or given the information available at the time of the election. (IHE Decision at pp. 18-19). The IHE held that the Regional Director's peak determination was not reasonable in light of the information available at the time the decision was made. The Regional Director's use of multi-year averaging of peak in a past peak case, absent any special circumstance or factor, was not appropriate. Finding no special circumstance or factor, the IHE recommended that the election be overturned. Petitioner filed exceptions on January 31, 2012.

The Board considered the record and the recommended decision of the IHE in light of the Petitioner's exceptions and briefs and decided to affirm the IHE's conclusion that the election be set aside. The Board wrote separately to clarify that the appropriate standard of review to be applied to past peak cases is, as the IHE reasoned, that set forth in *Charles Malovich*, to wit: A Regional Director's determination whether the 50 percent of peak was met is reviewed to determine whether it was reasonable or not given the information available at the time of the election.

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