STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN J. ELMORE, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	No. 75-RC-6-I 3 ALRB NO. 63

This decision has been delegated to a three-member panel. Labor Code Section 1146.

A representation election was held at John Elmore Company on November 21, 1975, with the following results:

UFW	49
No Union	28
Challenged Ballots	6

The employer filed timely objections to the election pursuant to Labor Code Section 1156. 3 (c) and 8 Cal. Admin. Code Section 20365 (1975).

On April 27, 1977, this case was submitted for decision to Investigative Hearing Examiner, Vincent A. Harrington, Jr., on the basis of a stipulated record. Having reviewed the entire record, we accept the report of the investigative hearing examiner to the extent consistent with this opinion.

Whether the employer was at 50% of peak employment during the payroll period immediately preceding the filing of the petition for certification as required by Section 1156.4 of the Act is the sole issue to be resolved in the instant case.

The company contends that since it had not yet reached its peak employment level during the 1975 calendar year at the time the petition for certification was filed, the past year's (1974) peak employment figures should be used to determine if the petition was timely filed. The hearing examiner reasoned, however, that at the time of the administrative proceeding in April 1977, the employer was aware of whether its projected peak for 1975 had, in fact, occurred. Hence, it was incumbent upon the employer to offer evidence consisting of the actual peak employment figures for 1975. The employer's failure to document its contention prompted the hearing examiner's recommendations of dismissal of the employer's objections and certification of the UFW as bargaining agent for the company's agricultural employees in the Imperial Valley.

This hindsight approach to peak determination is appropriate in this case in which the election was held prior to the shutdown of operations and subsequent reorganization of this agency. To further delay certification of the results of an election held nearly two years ago and to require rehearing on the issue of peak employment would be, in our view, unproductive. We are constrained to regard the company's failure to substantiate its contention in reference to future peak as demonstrative of its inability to do so.

Therefore, we hold that the petition for certification at issue in this case was timely filed pursuant to Labor Code Section 1156.4. We hereby certify the United Farm Workers of America, AFL-CIO, as the bargaining representative for all

agricultural employees of John Elmore Company in the Imperial Valley.

Dated: August 5, 1977

RICHARD JOHNSEN, JR., Member

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

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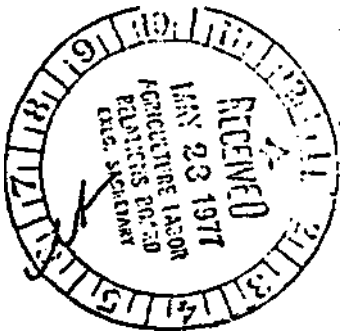

JOHN J. ELMORE, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	No. 75-RC-6-I

Thomas A. Nassif, of
Byrd, Sturdevant, Nassif & Pinney
for the Employer;

Tom Dalzell and Lydia Villarreal,
for the petitioner, the United
Farm Workers of America, AFL-CIO

DECISION

VINCENT A. HARRINGTON, JR., Investigative Hearing Examiner: This case was heard by me in Brawley, California on April 21, 1977. The hearing was held pursuant to a Notice of Investigative Hearing dated March 14, 1977 in which the executive secretary specified the issues to be heard as follows:

(1) Whether employer was at 50 percent of peak employment during the payroll period immediately preceding the filing of the petition.

(2) Whether those employees challenged at the pre-election conference were properly included in the bargaining unit as agricultural employees of the employer for the purposes of determining peak.

All parties were represented by counsel and were given a full opportunity to participate in the hearing. Following a brief adjournment, the case was submitted for decision on the

basis of stipulated facts and exhibits. The parties agreed that issue number 2, supra., should be answered in the negative, and that those employees were not reflected in the exhibit containing the employment figures for the pay periods immediately preceding the filing of the petition for certification. (Jt. X2) .

Both parties filed briefs regarding the resolution of the remaining issue in view of the stipulated record.

Upon my consideration of the stipulated record and the briefs of both parties, it is my recommendation that the employer's peak objection be dismissed.

Throughout this proceeding the employer has claimed that its peak employment occurred in the period November 3 though November 16, 1974. However, as the UFW points out in its brief, Section 1156.4 of the Act speaks in terms of peak employment in the calendar year in which the certification petition is filed. In Ranch No. 1, Inc., 2 ALRB No. 37, n. 6 (1976), the Board stated that statistics regarding employment in the prior season become relevant only where it is claimed that the employer is not yet at peak in the calendar year in which the petition is filed.[1/] Although the employer claims in

[1/]Although the regulation governing the employer's statement of peak employment in effect at the time of the filing of the petition herein was less clear than it might have been [compare 8 Cal. Admin. Code § 20310(d)(3)(1975) with 8 Cal. Admin. Code § 20310(a)(6) et seg. (1976)], the specific statutory reference to "current calendar year" controlled any ambiguity which may have existed on the face of the regulation.

its brief that this is a case of future peak, my review of the Board exhibits does not disclose that the employer has expressly made this claim in any document previously filed with the Board. The UFW urges that since there has never been affirmative evidence of a future peak claim, the 1974 figures are inadmissible or irrelevant to a 1975 election. While I am inclined to agree that the union is correct in this claim, it is nonetheless true that the 1974 figures survived a preliminary hearing before former Board Member Grodin and a further screening at the time the case was set for hearing. I feel compelled therefore to leave open the possibility that at the time of the hearing the record could be read to include a claim of future peak. Whatever the merits of that position, however, it is clear that when the hearing began in April, 1977, the 1974 figures had become irrelevant. At that time the employer could show by its own records that the peak which it was predicting would occur at some time after the filing of the petition in November, 1975, did in fact occur.

It is the employer's failure to introduce any such evidence which leads to my recommendation.[2/]

[2/]On May 13, 1977, the employer filed with the Board a document entitled "Employer's Supplement to Post-Hearing Brief" in which it claims that the record reflects that the union stipulated that the November, 1974 figures were the figures to be utilized in determining whether the employer was at peak in 1975; that the record reflects that the employer has claimed an issue of future peak which in any event makes the 1974 figures relevant; that the UFW, having so stipulated, is barred from raising the question of relevance.

(Footnote 2 continued on p. 4}

RECOMMENDATION:

I recommend that the employer's peak objection be dismissed and that the United Farm Workers of America, AFL-CIO be certified as the collective bargaining representative of all of the agricultural employees of the employer in Imperial County.

Dated: May 23, 1977

Sacramento, California

VINCENT A. HARRINGTON, JR

(Footnote 2 continued)

The short response to the document is that as there was no agreement that reply briefs would be permitted, it is not properly before me. More fundamentally, however, the employer misperceives the function of the stipulation made herein. This stipulation was simply an agreement that if examined, the company records for the specified period in November 1974 would show the figures contained in joint exhibit I (Jt. X 1}. The legal significance or relevance of the facts were not the subject of the stipulation, nor, in my view, did the fact of a stipulation operate to relieve the employer from making its case in support of the objection. It had the obligation to put into the record facts sufficient to establish a prima facie case to set aside the election. This it failed to do here.