

STATE OF CALIFORNIA
 AGRICULTURAL LABOR RELATIONS BOARD

E. DELL'ARINGA & SONS,)	
a partnership,)	
Employer)	No. 75-RC-46-S
)	
and)	3 ALRB No. 77
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Petitioner.)	
_____)	

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

On October 18, 1975, an election was held at E. Dell'Aringa & Sons. The tally of ballots showed the following results:

UFW	13
No Union	1
Challenged Ballots	3

The employer filed timely objections, of which the executive secretary dismissed 14. A hearing was held on the remaining objection, and the hearing officer issued a report in which he ruled that pursuant to Labor Code Sections 1156.3(a)(1) and 1156.4 the method of computing peak employment under the Saikhon rule ^{1/}was appropriate under the facts and circumstances of this case. Accordingly, he concluded that the petition for certification was timely filed and recommended that the election be upheld. The employer filed timely exceptions to the report. We accept the hearing officer's recommendations.

^{1/} Mario Saikhon, Inc., 2 ALRB No. 2 (1976).

The United Farm Workers of America, AFL-CIO, is certified as the bargaining representative for all agricultural employees of E. Dell'Aringa & Sons.

Dated: September 30, 1977

RICHARD JOHNSEN, JR. , Member RONALD L.

RUIZ, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

E. DELL'ARINGA AND SONS,

Employer,

Case No. 75-RC-46-S

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

David L. Grilli, Nomellini & Grilli,
for Employer.

E. Michael Heumann II, for the United
Farm Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

ARMANDO M. FLORES, Investigative Hearing Examiner: This case was heard before me on May 23, 1917, in Tracy, California.

The election objections petition, filed by E. Dell'Aringa and Sons (hereafter referred to as "employer") and served on the United Farm Workers of America, AFL-CIO, (hereafter the "UFW"), alleged, among other objections, that the number of agricultural employees employed by the employer as determined from the employer's payroll immediately preceding the filing of the (representation) petition, was less than fifty (50%) percent of the employer's peak agricultural employment for the current calendar year. Employer argues that said objection requires the Agricultural Labor Relations Board (hereafter the "Board") to set aside the election conducted

among its employees on October 18, , 1975. By order dated. February 10, 1977, the Executive Secretary of the Board partially dismissed employer's election objections petition and thereafter ordered that this hearing be conducted to take evidence on the issue of peak employment.

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. Employer presented documentary evidence consisting of payroll records and a witness to describe and explain the evidence. Both parties timely filed post-hearing briefs in support of their respective positions on the issue set for hearing.

Upon the entire record, including my observation of the witness, and after consideration of the post-hearing briefs made by the parties, I make the following findings of fact, conclusions and recommendation.

FINDINGS OF FACT

I. Jurisdiction

Neither the employer nor the UFW challenged the Board's jurisdiction in this matter. Accordingly, I find that the employer is an agricultural employer within the meaning of Labor Code Section 1140.4(c), that the UFW is a labor organization within the meaning of Labor Code Section 1140.4(f), and that a representation election was conducted pursuant to Labor Code Section 1156.3.

II. Employer's Election Objection

A. PEAK EMPLOYMENT ISSUE

The issue set for hearing was employer's allegation that the number of agricultural employees employed by the employer as determined from the employer's payroll immediately preceding the

filing of the (representation) petition, was less than fifty (50%) percent of the employer's peak agricultural employment for the current calendar year. Employer contends that the week following the date on which the petition for certification was filed by the UFW was employer's peak employment week for the year 1975 (hereafter referred to as the "petition period").

B. INTRODUCTION

On October 14, 1975, the UFW filed with the Agricultural Labor Relations Board a petition for certification at E. Dell'Aringa and Sons, of Tracy, California. A representation election was held among the employees of Dell'Aringa on October 18, 1975. (All dates mentioned hereafter are 1975 dates). The Tally of Ballots indicates that the approximate number of voters eligible to vote was 48. The results of the election were as follows: UFW - 13 votes; "no-union" - 1 vote; challenged ballots - 3. A total of 17 persons voted in the election.

Roy Dell'Aringa was called to testify on behalf of the employer. He testified that E. Dell'Aringa and Sons is a partnership and that he was a partner in the business at the time of the election in 1975. The crop produced and harvested at the time of the election was tomatoes.

C. PRE-PETITION PERIOD: OCTOBER 4TH THROUGH OCTOBER 10TH.

Roy Dell'Aringa testified that in response to the UFW's petition for certification the employer estimated its peak employment figure to be 67 employees. That figure, he testified, was based upon payroll records prior to the filing of the petition. He also testified that the payroll period immediately preceding the

filing of the petition was a seven (7) day period running from October 4, 1975, through October 10, 1975 (hereinafter referred to as the pre-petition period). During this period 48 employees were on the payroll.

Mr. Dell'Aringa testified that during the 1975 tomato harvest season a labor contractor was employed to supply workers. He further testified that in addition to the labor contracted workers Dell'Aringa and Sons employed three (3) "regular employees": Fidel Fuentes, Manuel (Lalo) Rodriguez and John Mancuso. I/

The parties entered into a stipulation that during the pre-petition period each of these individuals worked the following hours: Fuentes - 49 hours; Rodriguez - 74 hours; Mancuso - 67 hours.

1. Employer's Exhibit Number 1

As its first exhibit, employer introduced the labor contractor's payroll record for the period starting October 4, 1975 and ending October 10, 1975.^{2/}

According to the testimony of Mr. Dell'Aringa this record shows all the names of the contractor-supplied workers who worked that week. The record shows employee names, social security numbers, days and hours worked, total time worked and amount earned by each employee. He testified that the mark X in the, daily hours column of some of the workers indicates that the employee did not work that day.^{3/}

^{1/} Since these three individuals were employed on a regular basis their names are not shown on the labor contractor's payroll records to be discussed later.

^{2/} The parties stipulated to the admission of each of employer's five exhibits.

^{3/} In some instances the meaning of these notations is difficult to ascertain because they appear to cover a number. Where this occurs the ambiguity can be resolved by reference to the weekly total of hours worked by that employee.

2. Employer's Exhibit Number 2

Mr. Dell'Aringa testified that this document is a record of the employees who hand-picked tomatoes on the mornings of October 6 and 7, in preparation for the afternoon machine harvest. He testified that, with the exception of Francisco Serrato, these individuals also worked in the afternoon and their names are therefore also listed on Exhibit No. 1. He further testified that Exhibit No. 2 does not indicate the hours worked by the employees because they worked on a piece-rate during the morning hours. Mr. Dell'Aringa also testified that the numbers given in the daily columns of this exhibit indicate the number of bins of tomatoes picked. He testified that it takes about 1½ to 2 hours to pick one bin and that by multiplying 1½ to 2 hours times the number of bins indicated it can be estimated how many hours were worked each morning.

The persons employed during the pre-petition period were the 3 regular employees and the persons listed on Exhibits Nos. 1 and 2. Mr. Dell'Aringa testified that no other persons worked during that period. ^{4/}

3. Chart of "Employee Days"

The number of workers employed on individual days during the pre-petition period and the total number of employee days worked

^{4/} Forty-four names are indicated on Exhibit No. 1. One name (Francisco Serrato) is listed on Exhibit No. 2 but not on Exhibit No. 1. There were 3 regular employees not on either list. The total number of employees employed during the pre-petition payroll period adds up to 48.

are illustrated by the following chart:

<u>Week of October 4-10</u>					
<u>Day</u>		<u>Exhibit #1</u>	Exhibit #2	<u>Regular Employees</u>	<u>Total</u>
October	4	37	0	3	40 ^{6/}
October	5	35	0	3	38
October	6	33	1	3	37
October	7	33	1	3	37
October	8	33	0	3	36
October	9	34	0	3	37
October	10	26 ^{5/}	0	3	29

E

Employee Days 254

D. PETITION PERIOD: OCTOBER 11TH THROUGH OCTOBER 16TH

The payroll week of October 11th through October 16th is the week that employer contends was its peak employment week for 1975.

Roy Dell'Aringa testified that the company did not work a full week that week and that the pay period was not a seven-day period. He testified that people worked on the 11th, 12th, 13th, 14th, 15th and 16th. Mr. Dell'Aringa also testified that the employees worked only half a day on the 16th and performed no work on the 17th. He testified that the three regular employees also worked that week. The parties stipulated to the hours worked by

5/ Employer's brief lists this figure as 27. The UFW s brief lists this figure as 26. The discrepancy arises from the ambiguous marks in the October 10 column for the names of Olivia Mendoza and Francisco Garcia. By referring to the weekly total of hours I conclude that neither person worked on the 10th and therefore 26 is the accurate number.

6/ Employer's brief lists this figure as 30. Clearly, 37 and 3 add up to 40. The figure listed by employer must therefore be a typographical error.

the regular employees that week: Fuentes - 56 hours, Rodriguez -71. hours, and Mancuso - 67 hours.

Mr. Dell'Aringa further testified that the employer hired workers through a labor contractor for that week. Those employees are listed on Employer's Exhibit No. 3.

1. Employer's Exhibit No. 3

Roy Dell'Aringa testified that this document is the labor contractor's payroll record for the period starting October 11 and ending October 16. He testified that the X marks in the daily hours columns indicated that the particular employee did not work that day.

The information contained in this payroll record is the same kind of information contained in the pre-petition payroll record.

Mr. Dell'Aringa testified that the tomato sorters were paid at a rate of \$2.75 per hour.

2. Employer's Exhibit No. 4

Mr. Dell'Aringa testified that this document represents the payroll record of a labor contractor who was engaged to supply workers in addition to those supplied by its regular agent. He testified that this payroll record gives the following information: The names and days (Oct. 13, 14, 15) that the people listed worked; social security numbers, daily hours worked; total hours worked; gross pay less F.I.C.A., and net pay.

3. Employer's Exhibit No. 5

Mr. Dell'Aringa testified that Exhibit No. 5 consists of payroll checks to four workers who were not obtained through a labor contractor and worked one day, October 14, for the company. The

checks were paid to Mateo Avila Morales, Gorardo Soto, Rafael Chavez and Francisco Serrano.

The parties stipulated that the gross amount paid to each of these workers was: Serrano - \$27.45; Chavez - \$27.45; Soto -\$23.24; Morales - \$23.24. They also stipulated that these workers were paid at the rate of \$2.75 per hour.^{7/}

4. Chart of "Employee Days"

The number of workers employed on individual days during the petition period and the total number of employee days worked are illustrated by the following chart:

<u>Week of October 11 - 16</u>						
<u>Day</u>	<u>Exhibit #3</u>	<u>Exhibit #4</u>	<u>Exhibit #5</u>	<u>Regular Employees</u>	<u>Total</u>	
October 11	36	0	0	3	39	
October 12	39 ^{8/}	0	0	3	42	
October 13	37 ^{9/}	25	0	3	65	
October 14	51 ^{10/}	32	4	3	90	
October 15	52	31	0	3	86	
October 16	51	0	0	3	<u>54</u>	
				Employee Days	376	

^{7/} The number of hours worked by each of these employees can be calculated by dividing the hourly rate of pay into the gross wages received. In total, these individuals worked approximately 37 hours.

^{8/} Employer lists this figure as 40. Apparently, the ambiguity is with the name Rosa Gomez. By referring to the total hours worked, I conclude that she did not work on October 12. Therefore, the correct number is 39.

^{9/} The UFW lists this figure as 38. By my count the correct number is 37.

^{10/} The UFW lists this figure as 52. By ray count the correct number is 51.

E. CONCLUSIONS

Based upon an examination of the payroll records submitted by employer in support of its position I make the following findings:

1. The payroll period from October 4 through October 10 contained seven days. The total number of "employee days" worked during this period equals 254.

2. The payroll period from October 11 through October 16 contained six days. The total number of "employee days" worked during this period equals 376.

ANALYSIS AND CONCLUSIONS

Section 1156.3(a)(1) of the Agricultural Labor Relations Act 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.

Furthermore, Section 1156.4 provides that:

... the Board shall not consider a representation petition . . . 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.

Neither the Act nor its administrative regulations instruct how peak employment is to be determined. The Board has grappled with this peculiar issue on several occasions. In Mario Saikhon, Inc., 2 ALRB No. 2 (1976), the Board devised a method by which level employment could be measured for purposes of determining peak employment. In Saikhon, the Board declared:

"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 is to take an average of the number of employee days worked on all the days of a given payroll period.

Under the Saikhon decision the method for determining peak is to add up all the employees working each day of the respective payroll periods and divide by the number of days therein.^{11/}

II. Computations

In this case the computations and comparison are to be made with respect to the payroll weeks of October 4 through October 10 and October 11 through October 16.

Week of October 4 through October 10: This payroll week contained seven working days. The total number of employee days worked was 254. By dividing 254 by 7 the average of the number of employee days worked that week equals 36.

Week of October 11 through October 16; This payroll week contained six working days. The total number of employee days worked was 376. By dividing 376 by 6 the average of the number of employee days worked that week equals 62.

Employer contends that the pay period during which it reached peak employment for the calendar year of 1975 occurred subsequent to the filing of the petition for certification. The evidence supports that contention. However, the evidence also shows that, under the Saikhon method of computation, the petition

11/ In subsequent cases the Board refined the Saikhon method of computation to take into account variations in the number of workdays within the payroll periods, RANCH NO. 1, INC., 2 ALRB No. 37 (1976), and variations in the length of payroll periods for different groups of employees, LUIS A. SCATTINI & SONS, 2 ALRB No. 43 (1976).

was timely filed since the average of the number of employee days worked during the payroll period immediately preceding the filing of the petition (36) was more than 50 percent of the average of the number of employee days worked during the peak payroll period (62) .

III. Employer's Arguments

In its post-hearing brief Employer argues strenuously against the application of the Mario Saikhon method of computing peak employment. Employer contends that the most appropriate method of determining peak employment is to compare the total number of employees who are employed during the pre-petition period to the total number of those employed during the peak period. Employer is essentially advocating that the Board disregard its approach and rationale in Saikhon and return to the standard "employee count" method of determining peak-employment. By utilizing the employee count method one would have to conclude that 50 percent of Employer's peak employment had not been reached when the petition for certification was filed since during the pre-petition period 48 persons were employed as compared to 113 during Employer's peak employment period. However, the shortcomings of such an approach where there is a turnover of employees, as in this **case**, were recognized by the Board in Saikhon when it concluded

that:

. . . 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.

Thus, the underlying rationale of Mario Saikhon dictates that Employer's argument be rejected.

Employer makes a policy argument against using the Saikhon method of determining peak employment. Employer contends that by using the Saikhon method, elections will be permitted when the total number of eligible voters is much less than would be eligible under the "employee count" method. "The Saikhon approach," says Employer, "allows the smaller stable work force to control what may in actuality be a much larger number of workers and eligible voters who are employed during the employer's peak season when turnover is more prevalent." ^{12/} That may well be the case in a given situation, but it is not a problem which the Board failed to recognize in Saikhon. Indeed, the Board specifically noted that the number of employees eligible to vote under the current regulations may well exceed the average number of employees used to compute seasonal peak. "This distinction," said the Board, "is in accord with the different functions served by the eligibility and seasonal peak determinations."^{13/}

^{12/} See Employer's post-hearing brief, page 9.

^{13/} Mario Saikhon, Inc., 2 ALRB No. 2 (1976), footnote number 4.

IV. Conclusion

Employer raises several cogent arguments for using the "employee count" method of determining peak. These arguments, however, fail to undermine the fundamental reason for the Saikhon approach - the need for a consistent measure of employee complement despite employee turnover.

At some time in the future the Board may, in the light of experience, modify or even abandon the Saikhon method of determining peak employment. For the purposes of determining peak in this case, however, the Saikhon method is the appropriate tool.

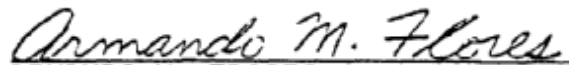
I conclude that by the rule set forth in Mario Saikhon the UFW's petition for certification was timely filed, as required by Labor Code Section 1156.4.

RECOMMENDATION

Based on the findings of fact, analysis, and conclusions I recommend that the Employer's peak objection be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the employer in the State of California.

DATED: July 5, 1977

Respectfully submitted,



ARMANDO M. FLORES

Investigative Hearing Examiner