STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HIGH & MIGHTY FARMS, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-10-I 3 ALRB No. 88

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

Following a petition for certification filed by United Farm porkers of America, AFL-CIO (UFW), on November 17, 1975, an election by secret ballot was conducted on November 24, 1975, among the agricultural employees employed by the Employer.

The tally of ballots furnished to the parties at that time showed that there were 36 votes for the UFW, 25 for no union and 3 unresolved challenged ballots, insufficient in number to affect the results of the election. Thereafter, the Employer filed timely objections. On March 2, 1977, the Board's Executive Secretary dismissed two of the Employer's objections and issued a notice of hearing on the remaining three objections.

At the hearing, on April 14, 1977, before Investigative Hearing Examiner Janies E. Flynn, the parties entered into a written stipulation of facts and three oral stipulations on the

record, and several documents were received into evidence, but no witnesses testified for either party. The parties also submitted a written post-hearing stipulation of facts.

On June 23, 1977, the Investigative Hearing Examiner issued an initial Decision in this matter, recommending that the objections be overruled and that the UFW be certified as the exclusive collective bargaining representative of the employees involved. The Employer filed timely exceptions to the Investigative Hearing Examiner's Decision with a supporting brief, and the UFW filed a response thereto.

The Board has considered the objections, the record, and the Investigative Hearing Examiner's Decision in light of the exceptions and briefs of the parties and hereby affirms the rulings, findings and conclusions of the Investigative Hearing Examiner as augmented herein, and adopts his recommendations.

As the Employer had one payroll period (November 5 through November 11) for his regular employees and a different payroll period (November 6 through 12) for seasonal employees hired through a labor contractor, it was reasonable for the Regional Director and the Investigative Hearing Examiner to conclude that there should be two eligibility periods for this election. The employees furnished by the labor contractor are also employees of the Employer,[1/] and therefore have the same voting eligibility as the regular employees. Moreover, the statutory requirement of Section 1157 of the Act was met by

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[1/] Section 1140. 4 (c) of the Act.

using two periods.[2/]

The fact that the eligibility list with respect to seasonal employees was based only on the three days of November 10, 11, and 12 is not a ground for setting aside the election, as the notice and direction of election stated that all employees who were employed during the period, from November 5 to 12 were eligible to vote, and there is no evidence any employee was disenfranchised as a result of using two payroll/eligibility periods for the two groups of employees.

The Employer excepted to the Investigative Hearing Examiner's finding that it was at 50 percent of its peak at the time of the filing of the petition. We reject the Employer's argument that application of the Scattini[3/] method of determining whether the peak requirement was met is inappropriate here in view of our finding that it was proper to use two different payroll/eligibility periods for the two groups of employees, regular and seasonal. The Scattini method is as applicable here where the seasonal contracted employees were paid on a different schedule as it was in Scattini where they were paid on a daily basis.

The Employer expanded its work force four-fold on November 10 when the contract employees were hired. They did not work during the first four days of their payroll/eligibility

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[2/] Section 1157 states in pertinent part: "All agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election shall be eligible to vote."

[3/] Luis A. Scattini & Sons, 2 ALRB No. 43 (1976).

period. To average these employees ever a full seven-day payroll period when they only worked the last three days would give a distorted average. As noted in Scattini, supra,

> The sharp rise in contract labor employees during the peak period would not give a true reflection of peak when averaged over a lengthy two week pay period.

We agree with the Investigative Hearing Examiner's conclusion that there were four unrepresentative days within the contracted employees' payroll period.[4/]

We agree with the Investigative Hearing Examiner's conclusion that the average number of employees during the pre-election eligibility period was 98, clearly more than 50 percent of the average number of employees during the July 2 through July 8 peak period;[5/] and we find that the petition was timely

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[4/] The stipulation in this case lists only five working days for contracted employees spread over two payroll periods. We note that in any short harvest, seasonal employees might only work for parts of two payroll periods. By averaging the numbers of seasonal employees over either full payroll period, the Employer might not appear to be at 50 percent of peak at any time during this secondary harvest period. Such a method of determining whether the peak requirement is met could defeat the right of employees to choose whether they want union representation at times when the employer is actually at 50 percent of peak.

[5/] The Employer contends that the average number (36) of its employees who worked in Arizona during peak week should be considered in the computation. This does not raise a real issue, for even according to the Employer's computation, the 93 employees employed during the pre-petition period herein would still constitute more than 50 percent of the peak-period complement of 134 employees (i.e., 98 in California plus 36 in Arizona). As hereinafter noted, the certified unit herein will exclude employees of the Employer who work exclusively outside the State of California, beyond the jurisdiction of this Board. Bruce Church, Inc., 2 ALRB No. 38, slip opinion p. 10; Textile Workers Union of America, 138 NLRB 269; Detroit & Canada Tunnel Corporation,. 83 NLRB 727, 731-73TI We "decline", however, to adopt any rule in this case with respect to the treatment of employees who work occasionally outside of California for a California employer.

filed when the peak requirement was met.

In its exceptions, the Employer contends that its employees were given inadequate notice of the times and places of the election. However/ no factual stipulation or testimony was introduced to show that the notice was ineffective to adequately inform voters of the election. As the Employer has not met its burden of proving that any voters were denied the opportunity to vote because of the notice procedure, setting aside the election on this basis is not warranted.

In view of the above findings and conclusions, and in accordance with the recommendation of the Investigative Hearing Examiner, the Employer's objections are hereby dismissed, the election is upheld and certification is granted.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the votes have been cast for United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of High & Mighty Farms, excluding its employees who work exclusively outside the State of California, and off-the-farm packing shed and vacuum plant employees, for the purposes of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, working hours and other terms and conditions of employment.

Dated: November 29, 1977

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR 'RELATIONS BOARD

In the Matter of:

HIGH & MIGHTY FARMS,

Employer, Case No. 75-RC-10-I

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

William F. Macklin, Byrd, Sturdevant, Nassif & Pinney, for the Employer.

Tom Dalzell, for the United Farm Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

JAMES E. FLYNN, Investigative Hearing Examiner: This case was heard before me on April 14, 1977 in Blythe, California. The objections petition,[1/] filed by High & Mighty Farms (hereafter also referred to as the "Employer") and served on the United Farm Workers of America, AFL-CIO, (hereafter the "UFW"), alleged five instances of misconduct which the employer argues require the Agricultural Labor Relations Board (hereafter the "Board") to set aside the election conducted among its employees on November 24, 1975.[2/] The UFW filed a response opposing the employer's objections. [3/] By order

1/ ALRB Exhibit 4.

2/ Unless otherwise specified, all dates refer to 1975.

3/ ALRB Exhibit 5.

served March 2, 1977, the Executive Secretary of the Board dismissed two objections and ordered that this hearing be conducted to take evidence on the remaining three objections.[4/]

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. Both submitted post-hearing briefs.

Upon the entire record/ and after consideration of the arguments made by the parties, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

I. Jurisdiction

Neither the Employer nor the UFW challenged the Board's jurisdiction. 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 an election was conducted pursuant to Labor Code Section 1156.3 among the Employer's employees.

II. The Alleged Misconduct

The objections set for hearing allege three instances of improper conduct of the election by the Board agent in charge. First, the employer alleges that the Board agent did not include as part of the list of eligible voters, persons employed at any time during the five working days immediately preceding the filing of the certification petition, thereby disenfranchising those employees.[5/] Second, the employer alleges that the Board agent

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4/ ALRB Exhibit 6.

5/ The Employer's objections petition misstates the nature of its objection in this matter. From the evidence it is clear that the objection relates to the alleged exclusion of eligible voters from the list and the inclusion of other ineligible voters because of the days relied on by the Board agent in compiling the eligibility list.

abused his discretion in failing to dismiss the certification petition because the number of employees employed in the. last payroll period prior to the filing of the certification petition did not reflect 50 percent of the Employer's peak agricultural employment for the current calendar year. Third, the Employer alleges that the Board agent did not give sufficient notice of the time and places of voting to a substantial number of eligible voters.

IV. Findings of Fact

At the hearing the parties entered into a written stipulation of the facts of the case.[6/] This hearing officer offered and admitted into evidence certain Board documents relevant to the case.[7/] The parties also made three oral stipulations on the record at the hearing and two post-hearing written stipulations.[8/] No testimony of witnesses was presented by either party.

A. General Background

High & Mighty Farms is a California corporation involved in the growing and harvesting of lettuce and other row crops in Arizona and California. In conducting its operation, the Employer employs regular employees and seasonal employees who are hired either directly by the Employer or contracted for through a labor contractor. The UFW filed a petition for certification as bargaining representative of these employees on November 17. The tally of

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6/ Employer-UFW Exhibit 1.

7/ ALRB Exhibits 1 through 6.

8/ Post-hearing stipulations are contained in a letter dated April 20, 1977 to this hearing officer from Tom Dalzell, attorney for the UFW, with a copy to William Macklin, Employer's representative.

ballots for the election showed *the* following results:[9/]

UFW	-	36
No Union	-	25
Challenged Ballots	-	3
Total	-	64

The Employer then filed its timely objections to the election.

B. Eligibility to Vote

The Employer had two different payroll periods which ended prior to the filing of the petition. The payroll period for regular employees was November 5 through November 11,[10/] while the payroll period for seasonal employees was November 6 through November 12.[11/] There were some regular employees working every day of their payroll period, but seasonal employees worked only on the three days of November 10, 11, and 12 in their payroll period.

The Employer provided the Board agent with a list of eligible voters within 48 hours of the filing of the certification petition which showed 119 eligible voters. The list was based on the three days of November 10, 11, and 12. [12/] By using these three days the names of four eligible voters who worked from November 5

9/ ALRB Exhibit 3.

10/ The payroll period for regular employees was on a weekly basis, running from Wednesday through Tuesday.

11/ Seasonal employees, hired through Tom. R. Garcia, a labor contractor in the Blythe area, worked harvesting lettuce. They were also on a weekly payroll which ran from Thursday to Wednesday.

12/ The Employer argues that the list was prepared at the direction of the Board agent, although this fact was not entered into evidence. As discussed below, even assuming the list was faulty, the election should not be set aside on this ground.

through November 9, but not on November 10 or 11, were excluded.[13/]

The Employer also argued that this method of compiling the eligibility list included three seasonal employees who worked on November 12, but not on any day from November 5 through November 11, which the Employer contends was the relevant payroll period for eligibility purposes. [14/] For the reasons discussed below, I find that these three employees were properly included as eligible voters.

The Direction and Notice of Election described those eligible to vote as all employees in the unit "who were employed during the payroll period from November 5,to November 12, 1975.[15/] This description encompassed persons who worked in either the regular or contracted payroll periods.

C. Peak Agricultural Employment

The petition for certification alleged that the Employer was at 50 percent of its peak agricultural employment. Sometime prior to the pre-election conference on November 24, the Employer informed the Board agent in charge that it was not at peak; nevertheless, to the best knowledge of both parties, the Board agent determined on November 22 that the peak requirement was satisfied.

13/ The following five workers worked between November 5 and November 9, but not on November 10 or November 11: Ramon Hernandez, A. J. Suena, John Lucio, Jesus Cisneros, and Carlos Alvarez. Since the name of Ramon Hernandez appears on the eligibility list, the possible number of voters disenfranchised by exclusion of their names from the list is four, not five.

14/ These three employees are: Santos Marquez, Juan Sanchez, and Antonio Mancillaz.

15/ ALRB Exhibits 2a, 2b, and 2c.

The Employer's peak employment occurred prior to the election in the week of July 2 through July 8. In that payroll period the Employer hired all workers directly and used no- contracted labor crews. The number of employees working on each day in the period were as follows:

DAY	7/2	7/3	7/4	7/5	7/6	7/7	7/8
Melon & Farm	109	108	71	116	70	106	105

There was a fairly high turnover in workforce as evidenced by the fact that 199 different persons worked in this period.

During this peak week the Employer also employed the following number of workers each day harvesting honeydew melons in fields located in Arizona, 25 to 30 miles from the California border:

DAY	7/2	7/3	7/4	7/5	7/6	7/7	7/8
Dew Pickers	39	39	35	37	-0-	45	57

Approximately, 65 different persons were employed as dew pickers in this period. These employees also worked in the Employer's melon harvest in California at times outside the peak payroll period. They were paid by the Employer through its Blythe, California office on the same basis as harvest employees working in California.[16/] No Arizona state deductions were withheld from wages, but deductions were made for California State Disability. Honeydew pickers commuted to work in Arizona in their own vehicles. They were managed and supervised by the same persons who supervise the Employer's California melon harvest: which takes place during this same period. For the reason discussed below, I find that these employees are not within the Board's jurisdiction, and, therefore, not properly included in the computation of peak employment.

16/ The Employer does not maintain an Arizona office.

For purposes of determining the Employer's current payroll, the number of employees working in the two overlapping payroll periods ending prior to the filing of the petition are as follows:

DAY	11/5	11/6	11/7	11/8	11/9	11/10	11/11
Regular Workers	15	15	12	11	5	13	12
Contracted		-0-	-0-	-0-	-0-	69	95

There was some turnover in this period, but it is not possible to determine the exact extent of it for each class of employees.[17/]

D. Notice of the Election

The Board agent issued a Direction and Notice of Election at the pre-election conference which was held in Blythe at 6:00 a.m. on the morning of the election. The notice provided for voting from 1:00 to 3:00 p.m. in Blythe and from 6:00 to 8:00 p.m. near Winterhaven.[18/] No factual stipulation or testimony was introduced to show how the notice of the times and places of the election was disseminated to eligible voters.

17/ Stipulated facts show that 110 different persons worked through a labor contractor on the days of November 10, 11, and 12. The total number of persons who worked from November 5 through November 11 was 112. Evidence showed that 87 and 84 contracted employees worked on the days of November 13 and 14, which fell within their next payroll period.

18/ There are three different notices of election. ALRB Exhibit 2a is in English and shows neither the times nor places of the election. ALRB Exhibit 2b is in Spanish and shows the times for voting, but an incomplete description of the voting location. ALRB Exhibit 2c is in English and contains a complete description of both the times and places of voting. No factual stipulation or testimony was introduced to indicate which of these notices, if any, was used to notify eligible voters.

ANALYSIS AND CONCLUSIONS

I. Incorrect Eligibility List

The voter eligibility list used in the election was drawn from the Employer's payroll for the days November 10, 11, and 12. The Employer argues that the working days of November 5 through November 9 were improperly excluded in compiling the list, that November 12 was improperly included, and that this resulted in the possible enfranchisement of three ineligible voters and the disenfranchisement of four eligible voters.[19/]

Regulations in effect at the time of the election provided that voters eligible to vote consisted of eligible economic strikers and those agricultural employees of the employer who were employed at any time during the last payroll period which ended prior to the filing of the certification petition, except that *if* the employer's payroll was for fewer than five working days/ eligible employees were to be all employees who were employed at any time during the five working days immediately prior to the filing of the petition. [20/] In this case the Employer had two payroll periods which ended prior to the filing of the petition. The payroll period ending November 12 covered contracted employees, therefore, the three workers who worked November 12, but no other day in the payroll period were eligible voters and properly included by the Board agent as part of the eligibility list.

19/ This argument is based on Employer's mistaken belief that the only relevant payroll period was November 5 through November 11 for regular employees. Based on this assumption, the Employer argued that eligible voters are regular employees and those contracted employees who worked days in their own payroll period which fell within the payroll period for regular employees.

20/ 8 Cal. Admin. Code Section 20355 (1S75) ; re-enacted as 8 Cal. Admin. Code Section 20352 (1976).

The question remains whether four employees who were eligible to vote, but who were not included on the voter eligibility list because they did not work on the days of November 10, 11, or 12, were disenfranchised.[21/] The Direction and Notice of Election issued by the Board agent stated that eligible voters were "those employees in the unit who were employed during the payroll period from November 5 to November 12." This notice correctly described a period which encompassed the payroll periods of both regular or contracted employees. If the four employees allegedly disenfranchised had received this notice, they would have known they were eligible voters because they worked at some time in the period described. No evidence was introduced to show that these four employees attempted to vote, but were prevented from doing so because their names did not appear on the eligibility list.[22/] The Employer's objection is premised on speculation as to possible scenarios, rather than on factual evidence of disenfranchisement, and should be dismissed.[23/]

21/ As noted above, the Employer argued that five eligible voters were not included on the eligibility list, however, evidence showed that one employee who did not work on the days used to compile the eligibility list was nevertheless included, "inclusion of these four employees raises the number of eligible voters to 123.

22/ If these four employees had attempted to vote, the Board agent might have allowed them to do so, if they presented evidence of having worked in the eligibility period, even though their names did not appear on the eligibility list.

23/ See Superior Farming Company, 3 ALRB No. 35 (1977), in which the Board notes that to "begin overturning elections on possibilities would certainly be a complete abdication of that obligation charged to us by statute to assure farm workers secret ballot elections."

II. Board Agent's Abuse of Discretion in Finding Certification Petition Timely Filed

A petition for certification must allege that the number of agricultural employees currently employed by the employer, 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.[24/] The Board may not consider a petition as timely filed unless the employer's payroll reflects 50 percent or peak.[25/] In determining whether a peak allegation is correct and the petition timely filed, the Board may not make peak agricultural employment for the prior season alone *a* basis for its finding, but must also estimate peak employment on the basis of acreage and crop statistics applied uniformly throughout California, and upon all other relevant data.[26/] An objection that an employer's current payroll did not reflect 50 percent of peak must be made within five days after an election.[27/]

The 50 percent of peak provision in the Act recognizes that agriculture is a seasonal occupation for a majority of agricultural employees.[28/] In order to provide the fullest scope for employees' enjoyment of their right to select a bargaining representative in a secret ballot election, the 50 percent of peak requirement requires that the Board conduct elections at a time when a representative number of employees are on an employer's payroll and eligible to

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24/ Labor Code Section 1156.3(a).

25/ Labor Code Section 1156.4; see also Nishikawa Farms v. Mahoney, 66 Cal. App. 3d 781 (1977).

26/ Labor Code Section 1156.4.

27/ Labor Code Section 1156.3(c); Harden Farms of California, Inc. , 2 ALRB No. 30 (1976).

28/ Labor Code Section 1156.4.

vote.[29/] In this regard, the rapid turnover in workforce characteristic of much of California agriculture combines with the requirement that elections be conducted only when an employer's payroll reflects 50 percent of peak to create peculiar difficulties in determining that a petition for certification is timely filed with respect to peak.[30/] As is the case with many provisions of the Act, the burden of confronting these difficulties falls in the first instance on the regional director and Board agent in charge of the election, but parties are expected to provide necessary information. For example, a person or union petitioning for an election must allege that the employer is at 50 percent of peak and provide the approximate number of employees currently employed in the unit and the Employer's agricultural commodities.[31/] Within 48 hours of the filing of a petition, an employer must provide the Board with certain information, including a statement based on evidence available to the employer of the highest single week employment during the preceding year and a statement of the acreage devoted to each crop during the current calendar year.[32/] Failure to provide this information may give rise to a presumption that the petition is timely

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29/ See Labor Code Section 1156.4.

30/ See Lu-Ette Farms, 2 ALRB No. 49 (1976) in which the Board observed how the turnover factor affected notice requirements and the responsibilities of the regional director and Board agents under the Act.

31/ Labor Code Section 1156.3(a); 8 Cal. Admin. Code Section 20305(a)(1975); re-enacted as 8 Cal. Admin. Code Section 20305(a) (1976).

32/ 8 Cal. Admin. Code Section 20310(d)(1975); re-enacted as 8 Cal. Admin. Code Section 20310(a)(1976).

filed with respect to the employer's peak of season.[33/] An employer against whom the presumptions are invoked may not later raise his own misconduct as a ground for setting aside the election for lack of 50 percent of peak.[34/]

It is clear from these requirements that the Act and regulations contemplate the exercise of reasonable discretion by the regional director and Board agents in determining whether a petition is timely filed with respect to peak. An inquiry into matters related to peak is part of the larger administrative investigation conducted by the regional director and Board agent in charge upon the filing of a petition, to determine whether there is reasonable cause to believe that a bona fide question of representation exists so that an election should be directed.[35/] The requirement that an employer's payroll reflect 50 percent of peak furthers this overriding consideration by making a determination that the petition was filed at a time when a representative

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33/ 8 Cal. Admin. Code Section 20310(e) (1975) ; re-enacted as 3 Cal. Admin. Code Section 20310 (e) (1) (1976).

34/ 8 Cal. Admin. Code Section 20355(b) (1975); re-enacted as 8 Cal. Admin. Code Section 20365(d)(1976).

35/ See Labor Code Section 1156.3(a); 8 Cal. Admin. Code Section 20300(b) (1975) ; re-enacted as 8 Cal. Admin. Code Section 20300(a) (j)(1976). In particular, Section 20300(j}(2) of the current regulations makes it clear that the regional director's determination as to the average employee days worked in the current payroll period which relates co peak is also part of the administrative investigation into showing of interest.

number of an employer's employees are working and eligible to vote an element of the determination that a bona fide question of representation exists.

In carrying out their responsibilities with respect to the 50 percent of peak requirement, the regional director and Board agent in charge must apply methods and standards which will properly assess, under the particular facts of the case, whether a representative vote is possible at the time the petition is filed. Because employment patterns vary from crop to crop and from employer to employer, the regional director and Board agent in charge must use methods for making this determination which are flexible enough to permit them to resolve the overriding question of the possibility of a representative vote without being constrained by mathematical formulas which may not be applicable to continually evolving factual situations. Board decisions have recognized the necessity for a variety of methods for determining peak. In Mario Saikhon, Inc.,[36/] the Board held that, where an employer's peak employment fluctuated greatly because of a high rate of employee turnover, the proper method for determining peak employment was to take an average of the number of employee days worked on all days of a given payroll period. In later cases, the Board found that this method had to be modified where there were different payroll periods for different groups of employees,[37/] or where a given payroll period

36/ Mario Saikhon, Inc., 2 ALRB No. 2 (1976).

37/ Luis A. Scattini & Sons, 2 ALRB No. 43 (1976).

contained Sundays or other days which were not representative of the employee complement on other days in the period.[38/] In still later cases, the Board has indicated that the proper method for determining whether an employer's payroll reflected 50 percent of peak would compare the number of eligible voters to peak agricultural employment.[39/] Thus, in Kawano Farms, Inc.,[40/] the Board held that the regional director was free to rely on the two relevant payrolls supplied by the employer and that, the 649 employees in the current payroll easily reflected 50 percent of the 930 employees employed later that year at peak season and of the 796 employees during the employer's peak the preceding year.

In this case, the Employer informed the Board agent in charge that it was not at 50 percent of peak sometime prior to the pre-election conference. Two days before the election, on November 22, the Board agent determined that the Employer's payroll reflected 50 percent of peak, and directed that an election be conducted. The record does not indicate what evidence was supplied by the Employer in support of its contention that it was not at peak, nor does it show what method the Board agent in charge used in reaching his decision. Based on the facts in evidence, the Board agent in charge could reasonably have determined that the petition was timely filed with respect to peak.

38/ Ranch No. 1, Inc., 2 ALRB No. 37 (1976).

39/ Valdora Produce Company, 3 ALRB No. 3 (1977); Kawano Farms, Inc., 3 ALRB No. 25(1977). In Valdora, the Board made it clear that the current payroll was not limited to persons on a piece of paper/ but would include the persons such as employees absent due to illness or vacation, who would be eligible to vote.

40/ Kawano Farms, Inc., supra, note 39.

Both parties agree and the facts show that the Employer's period of peak agricultural employment was July 2 through July 8 and that during that period there was a fairly large turnover in the workforce. [41] The Employer also argues that those employees working in its melon harvest in Arizona during this period should be counted as part of its peak agricultural employment. Unlike the National Labor Relations Board, the ALRB has no jurisdiction over operations outside the State of California, and consequently cannot include an employer's Arizona operations within the bargaining unit.[42/] Similarly, such operations may not be considered for purposes of computing peak agricultural employment. Labor Code Section 1156.4 states that crop and acreage statistics are to be applied uniformly throughout the State of California; it does not provide for application in Arizona or any other state.

Excluding Arizona employees, the Saikhon method, which the Employer contends is appropriate, produces an average number of employee days worked in the peak period of 98, 103, or 109, depending on whether Sunday, July 6, or a holiday, July 4, or both, are excluded because inclusion of employees working on those two days, while significant, would result in an average number of employee days which is not representative of the average of the

41/ Approximately 199 different persons worked, but no more than 116 persons were employed on any day daring this period.

42/ Bruce Church, Inc., 2 ALRB No. 38 (1976).

other days in the period.[43/]

The problem of unrepresentative days is compounded in the current payroll period. The Employer argues that 'any unrepresentative day excluded in the peak period should also be excluded in the current payroll period, but in this respect the periods are in no way comparable because of the change in the employment pattern. The Employer also argues that only the payroll period for regular employees is relevant and that contracted employees are pare of the computation only to the extent they worked on days which fall within the payroll period of regular employees. On such days they are added to the number of regular employees. This produces an average number of employees working each day in the period of 35 or 40, depending on whether or not an unrepresentative Sunday is excluded.[44/] However, facts show that there were two current payroll periods, one for regular employees and one for contracted employees. The UFW argues that average employee days worked should be computed separately for the two periods and then added together to find the total average

43/ Adding 109, 108, 71, 116, 70, 106, and 105 produces a total or 685 employee days worked in the period. Dividing by seven days in the period produces average employee days worked of 93. If the 70 employees who worked on Sunday, July 6, are excluded the total is 615, which divided by six days, produces 103 average employee days worked of 103. If the 71 employees who worked on the holiday, July 4, are also excluded, the total becomes 544 and the average employee days worked is 109.

44/ Adding 15, 15, 12, 11, 5, 32, and 107 for the period of November 5 through 11 produces a total of 242 employee days worked in the period. Dividing by seven days produces average employee days worked of 35. If the five regular employees who worked on Sunday, November 9, are excluded, the total becomes 242, which divided by 6, produces 40 average employee days worked.

employee days worked in the current payroll. In doing this, the UPW would exclude an unrepresentative Sunday within the payroll period of regular employees, and four unrepresentative days within the payroll period of contracted employees on which no contracted employee worked. This produces an average employee days worked of 99.

I find that a proper application of the Saikhon method in this case produces a peak employment of 98. Neither the holiday, July 4, nor the Sunday, July 6, should be excluded in computing this figure, since a significant number of employees, 71 and 70 respectively, worked on those days. To determine average employee days worked in the current payroll, the two payroll periods should 45 be computed separately and then totaled. In Luis A. Scattini & Sons,[45/] the Board indicated that, where an employer has both regular employees and workers hired through a labor contractor who are paid in different payroll periods, the Saikhon method must be modified to compute average employee days worked for each group of employees.[46/] If such a method is used here, it produces a figure of 12 for regular employees and a figure of 86 for contracted

45/ Luis A. Scattini & Sons, supra, note 37.

46/ Although Scattini concerned payroll periods which differed, greatly in length, the rationale behind doing separate computations applies here where the payroll periods were the same length. In this case, combining the two payroll periods would produce a figure which does not accurately reflect the Employer's current payroll, because days worked by contracted employees are concentrated at the end of one payroll period and the beginning of another, while days worked by regular employees are spread across all days of their payroll period.

employees.[47/] When added together, average employee days worked in the current payroll is 98. Since 98 reflects more than 50 percent of the 98 in the peak payroll period, the petition was timely filed.

The facts of this case illustrate some of the problems created by any requirement that one Saikhon formula be rigidly-applied in all situations. First, the Employer had only one payroll in the peak period,- but two in the current payroll period. Second, working days for contracted employees in the current payroll period spanned two different payroll periods. Third, there is no clear understanding of what constitutes an unrepresentative day; furthermore, it may not be possible to exclude the same number of unrepresentative days in the two comparative payroll periods because of differences in employment patterns and operations in the comparison periods. If unrepresentative days are excluded, a question arises as to what kind of average number is being produced. Fourth, no matter what variation of the Saikhon method is used, the figure which is intended to represent the employer's current payroll will be less than the actual number of employees currently employed and eligible to vote in an election. For example, in this case the Employer's computation produces a figure which is 83 fewer than the number of eligible voters, while the UFW computation is 25 fewer. Finally, any method for computing whether an employer's payroll reflects 50 percent of peak is valid only as long as it is an effective tool which can be used by the

47/ Adding 15, 15, 12, 11, 5, 13, and 12 produces a total of 83 regular employee days worked, which divided by seven days, gives an average regular employee days worked of 12. Adding 69, 95, and 95 produces a total of 259 contracted employee days worked, which divided by three days worked in the seven-day payroll period, gives an average contracted employee days worked of 86. Adding 12 and 86 produces average employee days worked for all employees in the current payroll of 98.

regional director or Board agent in charge to determine that a petition is timely filed because a representative vote, consistent with statutory standards, is possible at the time a petition is filed. This finding is not susceptible to strictly mathematical computation, but rather requires a weighing of relevant factors and an exercise of judgment based on available data.

Because of these considerations, another method of determining whether a petition is timely filed might be to compare the employer's current payroll, which also represents the eligible voters, to the employer's peak agricultural employment. In Valdora Produce Company,[48/] the Board added the names of thirteen workers improperly excluded from the eligibility list to employees on the list and then compared this figure to the employer's peak agricultural employment. In this case, such a comparison would produce 123 eligible voters which when compared -co a peak agricultural employment of 98 shows that the petition was timely filed.[49/] If eligible voters are compared to peak agricultural employment, measured by actual persons working in the peak payroll, the comparison is 123 to 199 which again reflects more than 50 percent of peak. The Board agent in this case did not abuse his discretion in finding that the petition was timely filed with respect to peak where appropriate methods indicate that the Employer's current pay-

48/ Valdora Produce Company, supra, note 39.

49/ While this comparison at first glance may not seem appropriate, It becomes so when one considers that peak agricultural employment is not identical to number of employees. Peak agricultural employment is an estimate of the number of employees required to perform specific agricultural labor on a given acreage of a particular crop. On the other hand, current payroll represents a real number of employees eligible to vote in the election. The sole concern is whether these employees reflect 50 percent of peak agricultural employment so that a vote by them can be considered representative of the wishes of the employer's workforce.

roll reflected 50 percent of peak and there is no showing chat he made a clear error in judgment in his conclusion upon a weighing of relevant factors.[50/] This objection should be dismissed.

III. Inadequate Notice to Employees of Tines and Places of the Election

Board agents have discretion to give as adequate notice as possible of the exact tine and place of an election,[51/] and to devise means of doing so which are appropriate under the circumstances.[52/] In this regard, the Board has noted that the requirement of the Act that an election be held within seven days of the filing of a petition combines with rapid turnover in the workforce characteristic of much of California agriculture to create peculiar difficulties in providing such notice. Recognizing these difficulties, the Board has upheld an election in which notice of an election set for 8:00 a.m. was not available until midnight of the preceding day.[53/] While that election involved a high voter turnout and a margin of victory that could not be overturned had every eligible voter voted, the standard remains that, for an election to be overturned because of inadequate notice, there must be evidence that some employees did not vote because they did not receive notice of the election.[54/] In the absence of evidence that any voter or voters were denied the opportunity to vote by the notice procedures used, the mere fact that a minority of eligible voters participated in an election would not in itself constitute grounds for setting

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50/ See McBee v. Bomar, 296 F.2d 235, 237 (6th Cir. 1961) in which abuse of discretion is defined as "s. clear error of judgment in the conclusion...reached upon a weighing of the relevant factors."

51/ R.T. Englund Company, 2 ALRB No. 23 (1976).

52/ Lu-Stte Farms, supra, note 30.

53/ Harden Farms of_ California, Inc. , supra, note 27.

54/ Jack or Marion Radovich, 2 ALRS No. 12 (1976).

aside an election.[55/]

In this case, the official Direction and Notice of Election was not prepared and ready for distribution until approximately seven hours before the first balloting was scheduled to begin at the Blythe site, and 12 hours before balloting began at the Winterhaven site.[56/] The Employer argues that the high turnover in contracted employees, when coupled with the short time provided for notifying employees, did not allow for sufficient notice to employees, as evidenced by the fact that only 64 employees, of 123 eligible, cast ballots in the election. While a 57 percent turnout is not an extremely high turnout, and those not voting could have affected the outcome to the election had they voted, no evidence was presented to show that any of those not voting did not have an opportunity to do so because of the notice procedures used. Absent such evidence, it would require sheer speculation to conclude that the low voter turnout was due to inadequate notice. The objection should be dismissed.

55/ Lu-Ette Farms, supra, note 30.

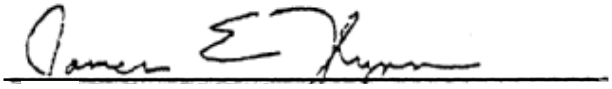
56/ As stated previously, the factual stipulations do not indicate which of three notices was actually distributed to employees. No employees testified, therefore it is impossible to- determine whether even had they received a notice, they would have had adequate information on the exact times and places of the election.

RECOMMENDATION

Based on the findings of fact, analysis, and conclusions, *I* recommend that the Employer's objections 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, excluding off-the-farm packing shed and vacuum cooler plant employees.

DATED: June 23, 1977

Respectfully submitted,



JAMES E. FLYNN
Investigative Hearing Officer