STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS ACT

G & S PRODUCE, EMPLOYER, and UNITED FARM WORKERS OF AMERICA AFL-CIO , Petitioner.	)	Case No. 77-RC-10-E 4 ALRB No. 38

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 Workers of America, AFL-CIO (UFW), on February 23, 1977, a secret ballot election was conducted among the agricultural employees of the Employer on March 2, 1977. The tally of ballots furnished the parties on that date showed the following results:

UFW	83
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 274	30
No Union	0
Challenged Ballots	11

The Employer timely filed two objections to the election, one of which was dismissed by the Executive Secretary. The objection set for hearing was that the Board improperly conducted

an election when the Employer was below fifty percent of peak employment. The parties submitted a joint stipulation of facts in lieu of participating in an evidentiary hearing on the issue of peak. On April 10, 1978, Investigative Hearing Examiner (IHE) Kathleen M. Meagher issued a decision, in which she recommended that the objection be dismissed and that the UFW be certified as the exclusive collective bargaining representative of the employees involved. The Employer subsequently filed timely exceptions to the IHE's decision.

The Employer's exceptions raised as an issue only its previous objection, which had been dismissed by the Executive Secretary. We uphold the Executive Secretary's dismissal of that objection as well as the subsequent denial of the Employer's Request for Review. As no exception to any portion of the IHE's decision has been filed, we adopt the recommendations of the IHE and hereby dismiss the peak objection.

CERTIFICATE OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for the 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 of the agricultural employees of G & S Produce in the State of California

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for the purpose 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: June 22, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

G & S PRODUCE, Case No. 77-RC-10-E (R)

IHE DECISION After an election won by the UFW, a hearing was held on the Employer's objection that the Board improperly conducted an election when the Employer was below 50 percerv of peak employment. The parties submitted a joint stipulation of facts in lieu of a hearing on the issue of peak.

On April 10, 1978, Kathleen Meagher, Investigative Hearing Examiner, issued her decision, found that by either of the 2 ALRB No. 2 (1976) and High and Mighty Farms , 3 ALRB No . 88 (1977), the Employer ' s payroll immediately preceding the filing of the representation petition reflected more than fifty percent of its peak agricultural employment. She therefore recommended that the Employer's objection be dismissed and that the UFW be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in California.

The Board, noting that no exception to any portion of the IHE's decision was filed, adopted the recommendations of the IHE and dismissed the peak objection. The election was upheld and certification granted.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

G & S PRODUCE, Case No. 77-RC-10-E

Employer,

and

UNITED FARM WORKERS OF AMERICA,

AFL-CIO,

Petitioner.

Scott Wilson, of Dressier, Stoll *& Jacobs,* for the employer.

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

DECISION

KATHLEEN M. MEAGHER, Investigative Hearing Examiner (IHE): This case has been submitted for decision upon a stipulation of facts entered into between the petitioner, United Farm Workers of America, AFL-CIO (UFW), and the employer, G & S Produce Co.

A petition for certification was filed on February *22,* 1977 [1/] by the UFW, and a petition for intervention was filed on February 28 by the International Brotherhood of Teamsters, Local 274 (Teamsters), with whom the company had a collective bargaining agreement in Arizona. An election was held on March 2 at an

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[1/] All dates refer to 1977 unless otherwise specified.

agricultural inspection station on Highway 8 near the California-Arizona border. The results were:

UFW	83
Teamsters	30
No Union	0
Unresolved Challenges	11
Void	0
Total	124

The employer filed a timely objections petition seeking to set aside the election on two grounds. The Executive Secretary dismissed one objection and set for hearing the objection that the Board improperly conducted an election when the employer was not at least at 50 percent of peak employment. The parties submitted a joint stipulation of facts in lieu of a hearing on the issue of peak.

Based upon the stipulation, and after consideration of the arguments made by the parties, I make the following findings of fact, conclusions, and recommendations.

I. Jurisdiction

Neither the employer nor the UFW challenged the Board's jurisdiction. I therefore find that the employer is an agricultural employer within the meaning of Cal. Lab. Code §1140.4(c), that the UFW is a labor organization within the meaning of Cal. Lab. Code §1140.4(f}, and that an election was conducted pursuant to Cal. Lab. Code §1156.3 among the employer's employees.

II. Background

G & S Produce is an Arizona corporation with corporate offices in Somerton, Arizona. The company grows and harvests cauliflower in Arizona and lettuce in California and Arizona.

The UFW's petition for certification sought *a* unit of all G & S agricultural employees in California. The Notice and Direction of Election described the eligible voters as all employees in the state of California who were on the company payroll as of February 17.

III. Employment Figures

A. Peak Period

The employer contends that its period of peak employment in California was during the seven-day payroll period which ended January 6. The parties stipulated to the following employment figures for that period:

January 3, 1977	
Harvesting cauliflower - Arizona	20 employees
Harvesting lettuce - California	136 employees
Thinning lettuce - Arizona	58 employees
Irrigaters - Arizona	4 employees
Tractor drivers - Arizona	3 employees
January 4, 1977	
Harvesting cauliflower - Arizona	20 employees
Harvesting lettuce – California	92 employees
Thinning lettuce - Arizona	68 employees
California	37 employees
Irrigators - Arizona	6 employees
Tractor drivers - Arizona	9 employees

January 5, 1977

Harvesting cauliflower –	Arizona	18 employees
Harvesting lettuce	- Arizona	102 employees
Thinning lettuce	- California	166 employees
Irrigators -	Arizona	7 employees
Tractor drivers -	California	3 employees
	Arizona	9 employees

These were the only days worked in either state during this payroll period.

Of the 136 harvest employees in California on January 3, 96 also worked on January 4. The 37 employees who worked thinning lettuce in California on January 4 were among the 166 who were in-the thinning crew in California on January 5. Although the parties did not offer a direct stipulation about the number of employees in California during this peak period, the figures suggest that there were 305s 136 harvest employees on January 3, 92 of whom also worked on January 4; 166 thinning employees on January *5, 37 .of* whom also . worked on January 4; and 3 tractor drivers on January 5.

B. Eligibility Period

During the seven-day payroll period which ended on February 17 the following numbers of persons were employee :

February 11, 1977

No cauliflower harvest		
Lettuce harvest -	Arizona	150 employees
Thinning & weeding -	California	2 employees
	Arizona	43 employees

Irrigators – Arizona	19 employees
Tractor drivers – Arizona	15 employees

February 14, 1977

Cauliflower harvest – Arizona	20 employees
Lettuce harvest – Arizona	144 employees
Thinning & weeding – Arizona	46 employees
Irrigators – Arizona	20 employees
Tractor drivers – Arizona	14 employees

February 15, 1977

Cauliflower harvest – Arizona	20 employees
Lettuce harvest - Arizona	158 employees
Thinning & weeding - Arizona	83 employees
Irrigators - Arizona	79 employees
Tractor drivers – Arizona	14 employees

February 16, 1977

Cauliflower harvest - Arizona	20 employees
Lettuce harvest – California	150 employees
Thinning & weeding - Arizona	48 employees
Irrigators – Arizona	19 employees
Tractor drivers – Arizona	16 employees

No other days were worked in either state during this payroll period.

The figures above show that 152 workers were employed in California during the eligibility period. The eligibility list submitted by the employer to Board agents, however, contained 160 names. The employer is not able to account for this discrepancy.

The stipulation does not indicate whether the eight employees whose names appeared on the eligibility list but who were not shown as in the employment records as working in California were challenged as ineligible at the election.

IV. Analysis and Conclusions

A. Employment in Arizona

The ALRB has no jurisdiction over operations outside the borders of California, and a certified bargaining unit will exclude employees who work exclusively outside the state. Bruce Church, Inc., 2 ALRB No. 38 (1976); High & Mighty Farms, 3 ALPS No. ?V (1977). In the instant case, in which it appears that some of the employees may have worked in both states, this rule would logically be applied to extend the Board's jurisdiction over employees and employers to the extent that the employees work in California. The rule would limit eligibility, as was done in the instant case, to employees who performed some work in California during the eligibility period. [2/] Similarly, the peak employment figure, to which the eligibility figure is compared to determine the representative character of the vote, should be calculated on the basis of employment in California alone. I have therefore used only the California employment figures contained in the stipulation in determining

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[2/] Another way of stating this rule is to say "that," as far as the Board is concerned, days worked in another state will be treated as days not worked at all. Thus, an employee who works one day of the eligibility period in California and the rest of the days of the period in Arizona will be eligible to vote, as would an employee whose total work during the period was one day in California.

whether the employer was at 50 percent of peak employment in its California operation.

3. Methods of Calculating Peak

The Board has employed several methods of calculating whether an employer is at least at 50 percent of peak employment at the time of an election. In its efforts to carry out the Act's intention that elections be conducted only at a time when the size of the electorate would fairly represent the entire work force,[3/] the Board has recognized that peak must be calculated in each case so as to be responsive to employment patterns which may vary with crops, employers and labor pool. Thus, in order to account for high turnover, the Board, in Mario Saikhon, 2 ALRB No. 2 (1976), used the "averaging" method of dividing the number of employees on the payroll by the number of days in the payroll period. In two later cases, Valdora Produce Co., 3 ALRB No. 8 (1977), and Kawano Farms, Inc. 3 ALRB No. 25 (1977), the Board found it appropriate simply to compare the number of employees during peak with the number of employees during the eligibility period. In other cases, turnover plus the added complications of different payroll periods for different groups

[3/] Cal. Lab. Code §1156.4 provides:

> 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 peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

of employees (Luis A. Scattini & Sons, 2 ALRB No. 33 (1976)) or days of low employment in the payroll period which were not representative of the employer's employment requirements (Ranch No. 1, 2 ALRB No. 37 (1976)) have required the adoption of refinements to the Saikhon formula.

Another method, suggested in the Investigative Hearing Examiner's decision in High & Mighty Farms, Inc., 3 ALRB No. 88, at 19 (1977), would take account of the purpose of the peak requirement and the difference in significance between the numbers used to determine peak and the numbers of employees eligible to vote. The number of employees on the eligibility period payroll represents the actual number of employees who will vote in the election, and it is therefore this number which this alternative method would compare to peak to determine if these voters can fairly be expected to represent the wishes of all the workers. Unlike this concrete and certain number of eligible voters, however, the actual number of employees on the payroll during the period of highest employment may not always accurately represent the employer's true labor needs. Saikhon recognizes that high turnover, for example, may cause peak employment figures to be so inflated as not to reflect the employer's actual peak employment requirements. In cases of prospective peak, it is necessarily estimates of labor needs which must be compared to the number of eligible employees. There is no basis in the language of the Act for attaching a different meaning to the concept of "peak agricultural employment"

when past peak is involved. [4/] This alternative method, therefore, compares the number of employees on the eligibility period payroll with the average number of employees per day (or per day worked, see below) during the peak payroll period.

1. The Employee Count Method

Use of the simple employee count method employed in Kawano Farms, Inc., 3 ALRB No. 25 (1977) , and Valdora Produce Co., 3 ALRB No. 8 (1977), is complicated in this case by uncertainty about, the number of eligible employees. Three hundred five employees worked in California during the peak payroll period. The eligibility list submitted by the employer before the election contained 160 names—more than 50 percent of the- number of peak employees. The parties' stipulation, however, shows that 152 people were employed in California during the eligibility period—one fewer than 50 percent of peak. The record does not show whether the eight workers listed on the payroll who apparently did not work during the eligibility period voted, or whether their votes- were challenged.

Because of the inadequacy and inconsistency of the record on this matter, and because of the availability of other methods of

[4/] As noted above, Saikhon and its progeny implicity recognized that peak employment is not a matter of simple numbers, but must be "calculated so as to reflect the employer's actual labor needs. With this in mind, the Board may wish to reconsider its decision in Ranch No. 1, 2 ALRB No. 37, at 3, n.6 (1976), to ignore crop and acreage statistics in arriving at a peak employment figure in cases of past peak. Such information, in addition to actual employment figures, might well aid the regional director in arriving at the kind of estimate the Saikhon method suggests.

calculating peak, I make no finding as to whether the actual number of employees during the eligibility period was at least 50 percent of the number of employees during peak of season.

2. The Saikhon (plus) Method

a.The Problem of "Unrepresentative" Days

The method of calculating peak described in Mario Saikhon, Inc., 2 ALRB No. 2 (1976), is to add together the numbers of employees on each day of a payroll period and to divide by the number of days in the payroll period. The resulting figure was described in the case as "an average of the number of employee days worked on all days of a given payroll period." 2 ALRB No. 2, at 4.

A problem which soon arose was the application of this language to a situation in which not "all days of a given payroll period" were days on which employees worked. The facts here present the problem clearly during peak week, employees worked in California for three days of the seven-day payroll period, during eligibility week for two. When the numbers of employee days worked in each period are added together the issue becomes whether to divide those sums by the number of days in the period, or only by the number of days actually worked, in order to arrive at the "average of employee days worked" described in Saikhon.

In Ranch No. 1, 2 ALRB No. 37 (1976), the Board adopted a notion of "unrepresentative days" to deal with a seven-day payroll period in which very few employees worked on Sunday. Finding that addition of the Sunday employees and division by seven "would yield an average number of employee days which is not representative of the average of the other six days....," 2 ALRB No. 37, at 2, n.4,

the Board totaled the six days and divided by six.

The decision does not make clear whether a day is to be excluded as "unrepresentative" solely on the basis of comparison of the average taken including the questioned day with the average taken excluding it, or whether a day must be shown to be unlike the other days of the normal work week before the comparison will be made. A single day on which no one works because it is a holiday or day of rest may be "unrepresentative," but it cannot be argued that a series of days on which no one works because (presumably) there is no work to do, or because work is being done in another state, is "unrepresentative" in-the same sense.

The Board partially solved this problem in High & Mighty Farms, Inc., 3 ALRB No. 88 (1977), when it discounted as unrepresentative the first four days of a seven-day pay period because the workers had not begun to work until the last three days. It did so because, these seasonal employees' concentrated five-day period of employment was spread over two payroll periods. To impose an artificial seven-day framework on a period of high employment with which it did not coincide, the Board stated, would distort the true employment pattern.

The facts stipulated in the instant case do not, unfortunately, indicate the employment figures for the payroll periods before and after the peak and eligibility periods. The eligibility week figures, however, consisting of one day with two workers in California, two days of work only in Arizona, and one day with 150 workers in California, followed by no further work in either state that week, suggest that this is not a case of "split

peak," as in High & Mighty, but rather a checkerboard pattern of days worked and days not worked, presumably because of the employer's perceived managerial or agricultural requirements.

The employer argues that Luis A. Scattini & Sons, 2 ALRB No .43 (1976), and 8 Cal. Admin. Code §20352(a)(1976), require that in any case in which the Saikhon method is applied the divisor be no less than five, and further argues that peak and eligibility figures must always be divided by the same divisor to avoid distortion. High & Mighty disposes of both arguments. There,, the Board approved the IHE's calculation of the peak Saikhon figure using a divisor of seven and of the Saikhon figure for seasonal workers during the eligibility period using a divisor of four.

Even apart from Board precedent, however, the employer's reliance on Scattini and §20352(a) is misplaced. The regulation does not refer to peak calculation at all, but to determination of the eligibility of workers paid on a daily basis. In such a situation, the regulation prescribes that the payroll will be presumed to be five days long, in order to calculate which employees were employed during the payroll period ending before the filing of the petition. In effect, an artificial payroll period is created because an actual one does not exist. Scattini applied this regulation by_ analogy to the determination of peak for workers paid on a daily basis. Again the situation was one in which no actual number of days in the payroll period existed. Where actual payroll figures, or numbers of days worked, do exist, as in the instant case, it is certainly preferable, and more in keeping with the intent of the peak requirement, to use them rather than to impose an arbitrary number which has no

connection to the actual employment situation.

There is a more serious objection to calculating Saikhon figures on the basis of only the days actually worked—here, three for peak week, and two for eligibility week. [5/] The objection is that excluding days not worked (other than Sundays or holidays) leads to an inaccurate picture of the amount of work available and therefore of the employer's labor needs. Describing the only day in a payroll period on which work was done as "representative" of the work week is an unusual and, arguably, misleading use of the term.

On the other hand, Saikhon suggests that the Board's attempt, in peak calculations, is to arrive at an approximation of the employment patterns of a steady work force. Viewed in this light, counting employment on days worked and-dividing by the number of those days yields a figure which approximates the number of steady employees the employer would have hired to do the work it-had -to do in the length of time it had determined to do it. -In a. steady work force, there would be no difference in terms of representativeness between a week in which 150 workers worked only one day and a week in which they worked six. High & Mighty, also, suggests that it is the concentration of labor and not the number of days workers are employed which is significant in determining peak.

[5/] February 11, on which only two employees worked in California, might also be excluded as "unrepresentative." As discussed below, the use of one, rather than two, days worked to calculate the eligibility week figure would not affect the result.

It appears, therefore, that in the instant case counting and dividing by the number of days actually worked is a more appropriate extension of the Board's policy in Saikhon than dividing by the number *of* days in the payroll period. The former gives the number of steady workers the employer would have hired to do the work available; the latter is an "average" figure which, in a week in which few days were worked, bears no relation to the reality of the employment pattern.[6/]

b. Conclusion

Applying the foregoing analysis of Saikhon to the instant facts, I find that the average number of emoloyees per day worked in the peak period was 144,[7/] and that the average number of emoloyees per day worked during eligibility week was 150.[8/] Because 150 is more than 50 percent of 144, I conclude that, according to the Saikhon method of calculation, the petition was timely filed.

[6/] In the employer's peak week here,-for example the days worked" average would be 144 (136 + 129 + 169 divided by 3) . The seven-day average would be 62. It is difficult to see how the latter figure is of any assistance in analyzing the representativeness of the vote in this case.

[7/] 136 (January 3) plus 92 and 37 (January 4) plus 166 and 3 January 5) equals 434. Dividing this total by three days worked yields a Saikhon figure of 144 employees per day worked.

[8/] I have not counted the employment of two workers on February 11, Because I find it to be unrepresentative of the employer's labor requirements in California that week. The Saikhon figure is therefore 150 divided by one, or 150. If employment on February 11 were accounted for in the calculation, the Saikhon figure would be 76—152 divided by two days worked—which is more than 50 percent of 144.

3. The High & Mighty Alternative

According to the method suggested by the IHE in High & Mighty Earns, which was described above, the employer was at least at 50 percent of peak at the time of the election. The number of employees working in California during the eligibility period was 152, which is more that 50 percent of 144—the average number of employees per work day during peak.

4. The UFW's Scattini Extension

In its brief, the UFW suggests an application of Scattini which would average each group of workers—lettuce cutters, thinners, and drivers—separately, and then add the averages together for each period, leaving days not worked by each group out of the calculation. This results in the startling "averages" of 219 workers per day worked during peak week, and 152 workers per day worked during eligibility week.

This is another misapplication of Scattini, which averaged groups of employees separately because of their widely differing payroll periods. There is no such, difference here, and no reason to divide the employees along craft lines for peak, purposes. A method which results in an "average" higher than any of the figures it purports to be an average of merely casts further darkness on the already murky issue of peak.

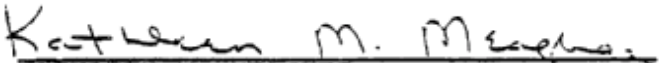
V. Conclusion and Recommendation

I find that by either of two methods of calculation, the employer's payroll immediately preceding the filing of the representation petition reflected more than 50 percent of its

peak agricultural employment. I therefore conclude that the petition was timely filed. I recommend that the employer's objection be DISMISSED and the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the employer in California.

DATED: April 10, 1978

Respectfully submitted,



KATHLEEN M. MEAGHER
Investigative Hearing Examiner, ALRB