

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

| | | |
|------------------------|---|---------------------|
| DONLEY FARMS, INC., |) | |
| |) | |
| Employer, |) | Case No. 77-RC-17-E |
| |) | |
| and |) | |
| |) | |
| UNITED FARM WORKERS OF |) | 4 ALRB No. 66 |
| AMERICA, AFL-CIO, |) | |
| |) | |
| Petitioner. |) | |
| _____ |) | |

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a petition for certification filed by United Farm Workers of America, AFL-CIO (UFW) on May 3, 1977, an election by secret ballot was conducted on May 9, 1977, among the agricultural employees employed by the Employer. The tally of ballots showed the following results:

| | |
|------------------------------|------------|
| UFW | 79 |
| No Union | 35 |
| Challenged Ballots | 13 |
| Void | 2 |
| Total | <u>129</u> |

The Employer timely filed objections, five of which were set for hearing. On February 2, 1978, Investigative Hearing Examiner (IHE) Jim Denvir issued his initial Decision, in which he recommended that the objections be dismissed and that the election be upheld. Thereafter, the Employer timely filed an exception to the IHE's Decision with a supporting brief.

The Board has considered the objections, the record, and

the IHE's Decision in light of the exception and brief and has decided to affirm the rulings, findings, and conclusions of the IHE and to adopt his recommendation to dismiss the objections and to uphold the election.

The only exception before this Board concerns the method used by the IHE in determining whether the Employer was at 50 percent of peak during the pre-petition period. The Employer contends that the IHE should have applied the Saikhon method ^{1/} in determining peak. This method compares the average number of employees working each day during the two relevant payroll periods. Use of the Saikhon method is unwarranted in the instant case as a conventional count of the number of employees in each of the payroll periods establishes that the Employer was at 53.3 percent ^{2/} of peak during the pre-petition period. Accordingly, 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 valid votes has 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 the agricultural employees of Donley Farms, Inc. for the purposes of collective bargaining as defined in Labor Code Section 1155.2(a) , concerning

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

^{2/}During the pre-petition period there was a total of 121 employees; during the peak period there was a total of 227 employees.

employees' wages, working hours and other terms and conditions of employment.

Dated: September 22, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

JOHN P. MCCARTHY, Member

CASE SUMMARY

Donley Farms, Inc.

4 ALRB No. 66

Case No. 77-RC-17-E

IHE DECISION

After an election won by the UFW, a hearing was held on the following objections:

1. That the Board Agent abused his discretion by failing to dismiss the Petition for Certification because the administrative investigation coupled with the Employer's evidence indicated that there was no reasonable cause to believe that a bona fide question concerning representation existed. Evidence with regard to this allegation was limited to whether the requirement of Labor Code Section 1156.3(a)(1) had been met.

2. That the Board Agent failed to properly investigate the Employer's allegation that he was not at least 50 percent of peak agricultural employment.

3. That the Board Agent improperly ordered an election when the Employer was not at least 50 percent of peak agricultural employment.

4. The Board abused its discretion by summarily appointing Jose Guzman as a union observer after the election had been in progress for two and one-half hours.

5. The Board abused its discretion by refusing to allow the Employer's observer to challenge approximately 12 prospective voters objected to on the ground that the Employer's observer did not recognize them and that they presented no identification.

With respect to objections 1 and 2, the IHE recommended that they be dismissed. The IHE found the Board Agent's request for further substantiation regarding the Employer's contention that he was not at 50 percent of peak to be appropriate given the conclusory information concerning the previous year's labor requirements and the uncertainty as to whether Donley would harvest its own citrus. The IHE concluded that having failed to receive the requested information, the Board Agent acted properly in proceeding with the election.

In determining which method was appropriate in computing peak (objection 3), the IHE rejected both the UFW's contention that the employee count method should be

applied and the Employer's argument that the Saikhon method was the only one to be used. The IHE then proceeded to find that peak requirement had been met using a method suggested by the IHE in High and Mighty, 4 ALRB No. 51 (1978), wherein the actual number of eligible voters was compared to the average number of employee days for the alleged peak.

The IHE recommended that objection 4 be dismissed. The IHE's finding was based on a credibility resolution between the testimony of a Board Field Agent and that of a company employee. The IHE found the Board Agent's testimony to be more consistent with normal election procedure.

With regard to the Employer's fifth objection, the IHE recommended that it be dismissed. The IHE concluded that the Employer had failed to present evidence that the Board Agent improperly refused to allow the company to challenge voters who had no identification.

BOARD DECISION

The Board affirmed the IHE's rulings, findings and conclusions and adopted his recommendation to dismiss the objections and to uphold the election.

The Board found that the appropriate method for determining peak in the present case was the straight employee count method and that the use of the Saikhon method was unwarranted.

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

DONLEY FARMS, INC.,

Employer,

Case No. 77-RC-17-E

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Scott A. Wilson, Esq. of
Imperial Valley Vegetable
Growers Association for the
Employer.

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

STATEMENT OF THE CASE

JIM DENVIR, Investigative Hearing Examiner: This case was heard by me on December 5 and 6, 1977, in El Centre, California.

A Petition for Certification was filed on May 3, 1977 ^{1/} by the United Farm Workers of America, AFL-CIO (hereafter "UFW"). An election was held on May 9 in Winterhaven, California with the following results:

| | |
|---------------------|-----|
| United Farm Workers | 79 |
| No Union | 35 |
| Challenged | 13 |
| Void | 2 |
| Total Eligible | 127 |
| | 139 |

^{1/} All dates refer to 1977 unless otherwise specified.

The employer filed a timely petition pursuant to Labor Code §1156.3(c) seeking to set aside the election on 17 separate grounds. Fourteen of the objections were dismissed by order of the Executive Secretary, dated July 11, 1977 and three noticed for hearing. The employer filed a Request for Review, pursuant to Labor Code §1142(b), which was granted, and two more objections were noticed for hearing by order of the Board, dated August 30, 1977.

Evidence taken at the hearing was limited to the five objections set for hearing:

1. That the Board agent abused his discretion by failing to dismiss the Petition for Certification because the administrative investigation coupled with the employer's evidence indicated that there was no reasonable cause to believe that a bona fide question concerning representation existed. Evidence in regard to this allegation shall be limited to whether the requirement of Labor Code §1156.3(a)(1) was met in this instance.

2. That the Board agent failed to properly investigate the employer's allegations that he was not at least at 50% of peak agricultural employment.

3. That the Board agent improperly ordered an election when the employer was not at least at 50% of peak agricultural employment.

4. The Board abused its discretion by summarily appointing Jose Guzman as a union observer after the election had been in progress for two and one-half hours.

5. The Board abused its discretion by refusing to allow the employer's observer to challenge approximately twelve prospective voters objected to on the ground that the employer's observer did not recognize them and that they presented no identification.

The employer and the UFW were represented at the hearing and given full opportunity to participate in the proceedings. Both submitted post-hearing briefs.

Upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the arguments made by the parties, I make the following findings of fact, conclusions and recommendations.

I.

THE BOARD AGENT'S
DETERMINATION OF PEAK

A. Facts

Donley Farms, Inc. is a proprietorship, owned by Don and Sandra Donley with principal offices in Winterhaven, California. In 1977, they grew cotton, citrus, cauliflower, broccoli, dates, alfalfa and bermuda grass on acreage in California and Arizona.

The primary witness for the employer on the determination of peak issue was Sandra Donley, who is also the office manager for Donley Farms. She testified that when she became aware that the election petition was filed, she contacted her attorney, Ivan Alien. After the ALRA was explained to her, the company took the position that they were not at 50% of their peak agricultural employment period which would occur in October or November of 1977, at the time their citrus groves were to be harvested. She testified that she prepared 1) copies of the company's payroll records for the payroll period immediately preceding the filing of the Petition for Certification, 2) copies of the company's payroll records for October 1976, and 3) a handwritten graph or chart which purportedly summarized these records and set forth computations of the average daily employee count for the two periods and which indicated that the company was not at

50% of peak for the pre-petition period. She gave these documents to her representative, Ivan Alien, for the purpose of preparing the Employer's 48-hour Response.

Mrs. Donley also testified that Ivan Alien's office prepared two- declarations for her signature. In the first, ALRB Exhibit #10, she objects to the method by which the ALRB determines peak and reserves her objections to it and also asserts that the ALRB lacks jurisdiction over Donley Farms employees on the grounds that the employees are domiciled in the State of Arizona and were hired in Arizona and that the Arizona laws should apply.^{2/} In the second declaration, ^{3/} Employer's Exhibit #1, she sets forth the company's position that it was not at 50% of peak agricultural employment in the pre-petition period. It states that additional employees will be employed in the anticipated peak to harvest citrus and dates, "[i]n addition to the employees identified on the payroll records attached to the Employer's Response...". It is not clear from the declaration exactly what records were referred to.

In taking the position that the company was not at 50% of peak agricultural employment, the employer was relying on the above described documents. But it is not clear exactly what documents were actually submitted to the El Centro ALRB office and what was considered by the Board agents in making the decision to proceed with the election, Mrs. Donley testified that she turned all of the documents over to her

2/ These contentions were apparently dropped prior to the company's filing of its objections petition and no evidence was offered at the hearing concerning them.

3/ While the declaration is dated April 5, 1977, Mrs. Donley testified that this date was a typographical error and that the declaration was actually signed on May 5, 1977, and I so find.

representative, Ivan Alien, to be submitted to the ALRB, either as part of the Employer's 48-hour Response or for a meeting Alien was to have with the ALRB ^{4/}prior to the pre-election conference. Mrs. Donley further testified that she went to the ALRB offices with Alien, who went into a back office while she waited in the reception area. Mrs. Donley does not have personal knowledge that Alien submitted all the documents, but is sure that he had all the documents in his office prior to going to the ALRB office and that when she and Alien left the ALRB, he did not have any of the documents. On this basis she believes that he submitted all the documents to the Board.

Mr. Alien did not testify.^{5/}

Michael AuClair-Valdez testified as a Board witness on this issue.^{6/} Mr. AuClair-Valdez was the election supervisor for El Centro subregional office at the time of the election. He testified that he was certain that the Employer's 48-hour Response was filed, along with the employer's payroll records for the pre-petition period and the two

4/ The exact time at which the documents were submitted is not necessary to a decision in this case, because the person responsible for making the decision as to peak, Michael AuClair-Valdez, indicated that he accepted further documentation after the technical deadline of 48 hours, and the testimony is consistent that whatever documents were submitted, were submitted prior to the pre-election conference.

5/ Mr. Alien's absence at the hearing was the ground for a motion for continuance based on his unavailability at the beginning of the hearing. The motion was denied because the employer had failed to subpoena Mr. Alien, who no longer is employed by the Imperial Valley Vegetable Grower's Association. On the second day of the hearing, when it became clear that Mr. Alien had potentially valuable testimony, I informed employer's counsel that I would entertain a renewal of the motion based upon an offer of proof as to his testimony. Counsel declined to renew the motion.

6/ Current Board policy is that when the conduct of Board employees is at issue, to insure a complete record, the employee will be called as a Board witness. In this situation, the parties agreed that Mr. AuClair-Valdez and Mr. Jose Carlos, another Board witness, would be taken on direct examination by the UFW's counsel.

declarations. He also testified to having a meeting with Ivan Alien on the day of the pre-election conference, at which Mr. Alien presented the handwritten chart. The chart was never actually filed. Mr. AuClair-Valdez specifically recalled the meeting and that he informed Mr. Alien that he would need further substantiation of the employer's position on peak. He was sure that at no time did Mr. Alien ever show him, nor did he ever see, payroll records for October 1976. He further testified that earlier, after the Petition for Certification was filed, he had telephone and personal conversations with Mr. Don Donley to explain to him his obligation to file a response and to generally explain the response. While he was not sure of the dates of the conversations, he believes they were prior to the response, and I so find. In these conversations Mr. Donley was hostile, indicating at various times that he would not cooperate with the ALRB at all, that Donley Farms citrus would be harvested by a packing shed in the upcoming year, that melons would be harvested by Senini, that if the UFW won he would not negotiate and that there would be no lettuce harvested or planted at all, and that Valdez, Cesar Chavez and the ALRB were communists.

I found Mr. AuClair-Valdez' testimony convincing. He obviously was the person best placed to know what documents were considered in making the peak determination. His memory of the events, though somewhat hazy as to specific dates, was internally consistent and, with the exception of whether the October 1976 records were filed and/or considered, consistent with other testimony presented. He was candid in testifying that while he found some of Mr. Donley's statements to be offensive, they were not so unusual nor so offensive as to interfere with his objectivity in performing his job.

While I also found Mrs. Donley to be a credible witness, she was not in a position to have personal knowledge of what documents were considered or submitted.

Therefore, I find that in making the determination as to whether the employer was at 50% of peak at the time of the filing of the petition, that Michael AuClair-Valdez considered the allegations of the UFW in their Petition for Certification, his conversations with Don Donley, the Employer's Response, the two declarations (ALRB Exhibit #10 and Employer's Exhibit #1), the payroll records for the pre-petition period, the handwritten graph or chart and the verbal representations of the counsel of Donley Farms. I further find that he requested substantiation of the employer's claim that it was not at 50% of peak and that, either because this substantiation was not supplied or was lost by the ALRB office, it was not considered.

B. Analysis and Conclusions

While it would be impossible to reconstruct the exact process by which Mr. AuClair-Valdez reached the conclusion that reasonable cause ^{7/}existed to believe that the employer was at 50% of peak agricultural employment, certain inferences can be made from the timing and content of the information he had available to him.

The first information available to the Board agent was the sworn allegations of the Petition for Certification. Neither the Board's regulations nor its decisions indicate what weight should be

^{7/}This standard is derived from 8 Cal. Admin. Code §20300(i)(1) which reads:

(i) Dismissal of petition

(1) The petition for certification shall be dismissed by the regional director whenever the contents of the petition or the administrative investigation of the petition disclose the absence of reasonable cause to believe that a bona fide question concerning representation exists, or the unit petitioned for is not appropriate, or there is not an adequate showing of employee support pursuant to §20300(j).

given these, although §20305(b) states that the petition shall be liberally construed to avoid dismissal. The next information available to Mr. AuClair-Valdez was the spontaneous, albeit emotional statements of Mr. Donley, to the effect that Donley Farms would have its citrus harvested by a packing shed in the upcoming year, and the melons would be harvested by Senini. While these statements were not controlling and the investigation continued, they may reasonably have cast a shadow on the company's later position while, in effect, supporting the allegations in the UFW¹s petition. Next, though the timing is not clear, the Board agent had the employer's response, the two declarations and the handwritten graph (though it doesn't appear the graphs were actually filed). The employer's response contains the sworn allegation that the employer is not at 50% of peak. One of the declarations (ALRB Exhibit #10) indicated that the employer objected to the Board's jurisdiction over the employer and objected to the Board's method of determining peak. The second declaration (Employer's Exhibit #1) takes the position that the company will harvest citrus, and additionally dates, and that the labor requirements will therefore be higher than the previous year. The graph or chart purportedly summarized the previous year's employment records and, based upon them, came to the conclusion that the employer was not at 50% of peak.

Given the contradictory information regarding whether Donley Farms would harvest their own citrus and the conclusory information concerning the previous year's labor requirements, it was appropriate for the Board agent to request further support for the employer's contentions prior to depriving the workers, more than 50% of whom had indicated a desire for an election, of an opportunity

to choose or reject a bargaining representative. When he did not receive such further substantiation, either because of the negligence of the company's representative or an administrative mishap, it was appropriate for him to find that the employer had failed to support his contention, as required under 8 Cal. Admin. Code §20310(a)(6)(B), and to proceed with the election.^{8/} Objections 1 and 2 should be dismissed.

II.

ACTUAL PEAK

A. Facts

The company introduced documentary evidence showing its actual employment for all relevant time periods. In its argument at the hearing and in its post-hearing brief, the company took the position that in making the computations necessary to determine whether Donley Farms was actually at 50% of peak agricultural employment during the pay period prior to filing the Petition for Certification the following should be excluded: all persons identified

^{8/} The Company submitted its employment records for the previous year at the hearing (Employer's Exhibit 15 through #9 and #19). An analysis of those records according to the proper standard (see analysis page 11) shows that even had the Board agent had the October 1976 records the result would have been the same. The 121 employees from the pre-petition period are more than 50% of the 178 average employee days in the October 1976 period. If the contradictory evidence available to the agent concerning increased harvest labor needs in dates and citrus had been resolved in favor of the employer, and the figures from Mrs. Donley's declaration, Employer's Exhibit #2, used, an additional 60 to 80 employees would be considered. This would change the comparison to 121 employees for the pre-petition period and 238 to 258 average employee days for the peak agricultural employment period. The Board agent's decision would still have been to continue with the election since the current payroll reflected more than 50% of peak agricultural employment. In fact, Mrs. Donley's estimate of additional employees proved to be incorrect.

as foremen, clericals or carpenters and all hours worked by any employee in the State of Arizona. The UFW, in its post-hearing brief, did not challenge any of these exclusions. As the record is incomplete as to the propriety of the exclusions and a finding concerning them is not necessary to a decision in this case, I will proceed consistent with the position, or lack thereof, of the parties and also exclude these employees referred to as standard exclusions from my calculations.

1. Pre-Petition Period

Employer's Exhibit #18, a summary of the company's employment records for the pre-petition period, April 21 through April 28, 1977, indicates the following:

| | Thur. | Fri. | Sat. | Sun. | Mon. | Tues. | Wed. | Thur. | Total |
|----------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-------|
| Date | <u>21</u> | <u>22</u> | <u>23</u> | <u>24</u> | <u>25</u> | <u>26</u> | <u>27</u> | <u>28</u> | |
| Regular Farming Crew | -- | 30 | 26 | 17 | 25 | 28 | 31 | 28 | 185 |
| Lettuce Crew | 37 | 37 | 40 | 43 | 47 | 57 | 67 | -- | 328 |
| Total | 37 | 67 | 66 | 60 | 72 | 85 | 98 | 28 | 513 |

Employer's Exhibit #2, copies of time cards for the regular farming crew for the pre-petition period, indicates that there were 40 different employees who worked in California at some time within the pre-petition period. In addition to the standard exclusions discussed above, this excludes five employees who worked the total pay period in Arizona. Employer's Exhibit #3, copies of time cards for the lettuce thinning crew for the pre-petition period, indicates that 81 different employees and one foreman worked in California at some time within the payroll period. Therefore, I find that for purposes of determining whether the employer was at 50% of peak agricultural employment, Donley Farms employed 121 different workers during the pre-petition period.

2. Peak Period

Employer's Exhibit #17, a summary of the company's employment records for the peak period, November 10 through November 19, 1977, indicates the following:

| | Thur. | Fri. | Sat. | Sun. | Mon. | Tue. | Wed. | Thur. | Fri. | Sat. | Total |
|------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-------|
| Date | <u>10</u> | <u>11</u> | <u>12</u> | <u>13</u> | <u>14</u> | <u>15</u> | <u>16</u> | <u>17</u> | <u>18</u> | <u>19</u> | |
| Regular Farming | -- | 60 | 55 | 35 | 60 | 62 | 61 | 59 | -- | -- | 392 |
| Citrus Crews <u>9/</u> | -- | -- | -- | -- | 83 | 86 | 85 | 81 | 90 | 95 | 520 |
| Lettuce Crew | 41 | -- | -- | -- | 33 | 38 | 42 | -- | -- | -- | 154 |
| Total | 41 | 60 | 55 | 35 | 176 | 186 | 188 | 140 | 90 | 95 | 1066 |

Employer's Exhibit #16, a copy of a 4-page check register for the regular farming crew for the peak period, indicates that 73 different employees worked for Donley Farms on this crew for the payroll period ending November 17, 1977. Employer's Exhibit #14, a copy of the check register for the lettuce thinning crew, indicates that 50 different employees were employed during the payroll period ending November 16, 1977. Employer's Exhibit #13, a copy of a computer-generated check register for the three citrus harvesting crews, shows 44 different employees in Crew #1, 34 different employees in Crew #2 and 26 different employees in Crew #3, for a total of 104. Therefore, I find that 227 different employees worked for Donley Farms during the peak period. B. Analysis and Conclusion

This objection turns upon what method is used to determine

9/ The Employer's exhibit broke down the three citrus crews individually. Since they are all on the same pay period, I find no reason to make this distinction.

whether or not " . . . 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." Labor Code §1156.4.

1. The UFW argues that present Board decisions mandate a two-step process. First, an employee count method should be used. Under this method, used by the Board in Kawano Farms, Inc., 2 ALRB No. 25 (1976) and Valdora Produce Co., 3 ALRB No. 8 (1977), the number of employees eligible to vote should be compared to the number of employees working for the employer during the alleged peak period. If the employee count method shows that the eligible voters are more than 50% of the employees at peak, the union argues the inquiry should cease. If this method shows that eligible voters are less than 50% of peak, a Saikhon method of comparing average employee days within each period should be utilized, recognizing the danger that the straight employee count method is potentially an inaccurate measure in situatio with high employee turnover.

Applied to the facts of this case, the UFW argues that the first step resolves the objection. Under this method, since the 121 different employees shown for the pre-petition period is more than 50% of the 227 employees during the peak period, the election was timely held.

2. The employer takes the position that the only method which should be used in this case is that set forth in a series of cases beginning with Mario Saikhon, Inc., 2 ALRB No. 2 (1976). These cases indicate that an average of the number of employee days should be arrived at and compared for each relevant period. Applying this approach to the facts of this case, my calculations indicate that for the pre-petition period there is an average of 73 employee days, and

for the peak period, an average of 181 employee days. ^{10/} Since the pre-petition period does not reflect 50% of peak agricultural employment, under this method the election was not held timely.

3. My reading of the statute leads me to an alternative method suggested by the decision of the Investigative Hearing Examiner in the case of High & Mighty Farms, 3 ALRB No. 88 (1977), at page 19. There the actual number of eligible voters is compared to average employee days for the alleged peak period.

The ultimate question before me is whether "the employer's payroll reflects 50 percent of peak agricultural employment." Labor Code §1156.4. In defining the terms "employer's payroll" and "peak agricultural employment," the plain meaning of the words within the context of the Act suggests the following analysis. "Employer's payroll" connotes a concrete, verifiable number. Labor Code §1156.3(1) provides 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..." (emphasis supplied). This language refers to a simple number to be determined from a count of employees shown on the employer's last payroll before the election. Nothing in the language of the Act suggests that this simple, concrete number should be averaged and the purposes of the requirement suggest the opposite.

10/ The computations are:

| Pre-Petition Period | | Peak Period | |
|----------------------|--------------|-----------------|--------------|
| Regular Farming Crew | 185/7 = 26.4 | Regular Farming | 392/7 = 56 |
| Lettuce Crew | 328/7 = 46.9 | Citrus Crews | 520/6 = 86.6 |
| | 73.3 | Lettuce Crew | 154/4 = 38.3 |
| | | | 180.9 |

The legislature was attempting to insure that the actual voters in the election were of a sufficient number to be representative of all the workers in expressing their desire to have an election, regardless of outcome. Since every agricultural worker who was employed during the pre-petition period is given the right to vote, I find no support within the Act for a proposition by which the value of a worker's interest in the election is dependent upon the number of days he or she works. This is the inevitable result of averaging the employees in the pre-petition period. The assumption is that if 6 different workers hold the same job position for a 7 day pay period because of high turnover in that position, they each are less representative of the wishes of the whole workforce during that time than one worker who holds a job position for an entire 7 days. I find this result incompatible with the Act's stated purpose of "guaranteeing justice for all agricultural workers," ^{11/}and the legislative scheme under which each is given an equal vote, regardless of number of days worked.

Additionally, under the facts of this case, I do not find the sort of turnover of employees which called for averaging in the Saikhon line of cases. On Wednesday, April 27, 1977, Donley Farms employed 98 workers and 121 different workers were employed at some time within the pre-petition payroll. This does not indicate such a turnover which is likely to skew the representativeness of the vote.

What the legislature meant by "peak agricultural employment" appears to be another matter. The words themselves provide no internal indication of what sort of measurement they refer to, except insofar as an implication can be made from the fact that the words do not parallel the language "employer's payroll," - that is, do not connote as concrete a figure. But the second paragraph of Labor Code §1156.4

1/ Section 1 of the Act.

does suggest that "peak agricultural employment" is some type of estimate,^{12/} or rough figure. This interpretation supports an analysis which would arrive at an average employee day figure. Moreover, this interpretation better suits the functioning and purposes of the Act because average employee days will reflect the number of job positions necessary to perform the work regardless of high or low turnover and is therefore more stable and predictable. Because of the wide variety of ways in which labor is obtained for California agriculture, a method which reflects employee days worked or to be worked is a more easily estimated figure using crop and acreage statistics. An employee count method, while perhaps easier for those with the advantage of hindsight, requires a Board agent not only to have to determine the number of job positions which will be necessary at peak, but also to try to guess what amount of turnover an employer will have, even though turnover will depend on the method the employer uses to obtain labor and the available labor pool. Moreover, it subjects a grower, whose sole motivation is to obtain the necessary labor in the most economical and efficient way, to charges of manipulation of his or her employment figures in an attempt to change peak employment. Finally, the employee count method of determining peak provides those growers who do wish to interfere with the rights of workers to elect or reject a bargaining representative with a simple and effective delaying objection to every election in which prospective peak is an issue, and an incentive to manipulate their figures.

^{12/}The entire second paragraph reads,

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

Therefore, I conclude that because the 121 employees eligible to vote were more than the peak agricultural employment of Donley Farms in 1977 of 181, I find the petition timely filed and the election timely held. ^{13/}

Recommendation

This objection should be dismissed.

III.

APPOINTMENT OF
JOSE GUZMAN AS OBSERVER

The testimony in support of this objection was that of Manuel M. Olmos, an employee of Donley Farms. He testified that on the day of the election he was an observer for the employer. As such, his job was to ask for identification from voters and to make sure he knew them and then to compare their identification with the list of eligible voters. He first learned that he was an observer when he arrived to vote in the morning after getting off the bus. When voting began, the union had three observers and the company two. He testified that after the voting had been under way for a few hours, a Board agent told him that because a man named Jose Guzman had been in the voting area for some time and wouldn't leave, that the Board agent was going to put a badge on him and make him a union observer.

No testimony was offered by the company as to how this action, taken as true, had any effect upon the election or that Jose

13/ While my reasoning depends on principle not yet enunciated by the Board, I believe the result would be the same under the somewhat muddled state of the law at present. The Saikhon method, regardless of its merits, depends upon a large employee turnover for its justification. Here, there is no such turnover and I would find the Valdora/Kawano method more appropriate to the facts of the case. If used, it would show that the election was timely held, as is shown in the discussion above of the UFW's contentions.

Guzman did anything subsequent to appointment which affected the outcome. This would seem to mandate dismissal of the objection. But since the Board set this allegation on Request for Review, I will take the Board's action as an instruction to make a finding on the alleged misconduct.

Jose Carlos testified as a Board witness concerning this objection. Mr. Carlos testified that he is a field examiner with the ALRB and was Board agent in charge of the election at Donley Farms. Acting upon an agreement made at the pre-election conference, the company and the union designated their observers and alternate observers on the morning of the election prior to the beginning of voting. All the names were written on the same piece of paper. Jose Guzman was designated as an observer at that time, and no objection was made by the employer. At the time, there were observers designated by both parties who had not arrived at the election site. Mr. Carlos informed the parties that the observers should report to him when they arrived. He believes that Guzman arrived at the site at approximately 8:15 a.m., and that he then appointed him as observer pursuant to the parties' agreement. He denied ever stating to Olmos that Guzman was being appointed an observer because he would not leave the voting area, though there may have been some discussion of Guzman when it became clear that Guzman was at the site to be an observer.

I credit Mr. Carlos' description of the incident. While both witnesses appeared to me from their demeanor to be sincere, the character of Mr. Carlos' testimony seemed to reflect a better understanding of the election process and a better perception of the election at issue. Mr. Olmos, on the other hand, who only knew he was to be an observer upon arriving at the election site, seemed confused about the election and his role in it. He was concerned because the

UFW observers outnumbered the employer's. Moreover, Mr. Carlos' rendition of the election seems consistent with normal procedures, while Mr. Olmos¹ appears to be improbable. I can conceive of no reason why Mr. Carlos would unilaterally recruit an additional observer for either party, as another observer would only mean one more person whose conduct he had to supervise within the voting area. Finally, his testimony that the observers were designated prior to the voting is unchallenged and seems to be so easily contradicted as to make it unlikely that it is a fabrication. Therefore I find that Jose Guzman was designated as a UFW observer prior to the voting, was not present at the voting site until approximately 8:15 a.m., and was appointed as an observer when it became clear who he was, pursuant to the agreement of the parties.

Therefore, I recommend that the objection be dismissed.

IV.

VOTERS WITHOUT IDENTIFICATION

The employer's fifth objection is that its observer was not allowed to challenge approximately 12 voters who were not recognized by the observer and who showed no identification. The company again supported this objection with the testimony of Manuel Olmos. Mr. Olmos testified that approximately 12 or 13 persons appeared to vote and had no identification, and that an observer from the union said she believed she recognized them as employees. Mr. Olmos told the Board agent, Mr. Carlos, that he had been told that if voters did not have identification, they could not vote. The Board agent told Mr. Olmos that this wasn't true, that they would put writing on the back of an envelope with no identification. On cross-examination, Mr. Olmos indicated that these individuals were given envelopes and went into the voting booth and then would deposit their envelopes in the ballot

box like other voters. He also indicated on cross-examination that to his knowledge there were no challenged votes.

Mr. Carlos testified as a Board witness. He testified that the procedure used at the election was that when an observer wanted to make a challenge, he would ask the reasons for the challenge at the eligibility table. If the challenge was for appropriate reasons he would take the voter to the challenge table, where the person's name would be written down on a list, a declaration filled out and a ballot and envelope given to the voter. Only those who were challenged used envelopes. He was not sure exactly what instructions he gave the observers, but is sure that he explained the challenge procedure to Mr. Olmos a number of times because Mr. Olmos kept referring to a list he had in his pocket, which the Board agent felt was improper. He was not sure of the number of voters who did not have identification but stated that it was possible that he let some vote upon personal recognition by an observer. He further stated that his primary concern with Mr. Olmos was the list, though he could have made other objections. Finally, he testified that Mr. Olmos seemed very confused about the election procedures.

The UFW submitted UFW Exhibit #1, a copy of the challenge list prepared at the election by Mr. Carlos. It indicates that 13 voters were challenged: three by the company for no identification, six by the UFW as not agricultural workers (i.e., foremen or confidential employees) and four by the Board as not being on the eligibility list.

After considering the evidence presented, I find that I cannot give credence to Mr. Olmos' perceptions of events. At the election he was apparently proceeding on the incorrect assumption that persons who were challenged were not to be allowed to vote at all.

Moreover, he was incorrect in his testimony that no voters were challenged, and that all voters used envelopes. I cannot give his testimony great weight in light of these apparent negative reflections on his ability to perceive and understand the events of the election.


Therefore, I find that the employer has failed to present evidence that the Board agent improperly refused to allow the company to challenge voters who did not have identification and recommend that this objection be dismissed.

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.

DATED:

Respectfully submitted,



JIM DENVIR
Investigative Hearing Examiner