

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

FILICE ESTATE VINEYARDS,	)	
Employer,	)	Case No. 75-RC-224-M
	)	
and	)	4 ALRB No. 71
	)	
UNITED FARM WORKERS OF	)	
AMERICA, AFL-CIO,	)	
	)	
Petitioner .	)	

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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 October 27, 1975, a representation election was held on November 3, 1975, among the agricultural employees of Filice Estate Vineyards (Employer) . The tally of ballots showed the following results:

UFW. ....	39
No Union. ....	0
Challenged Ballots .....	14
Total. ....	53

The Employer filed timely objections, two of which were set for hearing. Subsequent to the hearing, Investigative Hearing Examiner (IHE) Jeffrey Fine issued his initial Decision in which he recommended that the objections be dismissed and that the UFW be certified as collective bargaining representative

of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's Decision and a brief in support of its exceptions. The UFW filed cross-exceptions and a brief in opposition to the Employer's exceptions.<sup>1/</sup>

The Board has considered the record, and the IHE's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, - and conclusions of the IHE as modified herein, and to adopt his recommendation to dismiss the objections and to certify the UFW.

The Employer excepts to the IHE's findings that the Regional Director did not abuse her discretion in invoking the second presumption <sup>2/</sup> pursuant to 8 Cal. Admin. Code Section 203-10 (e) (2) (1975) , reenacted as 3 Cal. Admin. Code Section 20310 (e)(1)(B)(1976), and that the petition for certification was timely filed as the Employer was at 50 percent of peak.

The Employer was required by 8 Cal. Admin. Code Section 20310(d)(2)(1975), reenacted as 8 Cal. Admin. Code Section 20310(a)(2)(1976), to submit to the Regional Director a complete and accurate list of full names and addresses of all the employees on its payroll for the payroll period immediately

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<sup>1/</sup> The UFW moved that testimony in the Employer's exceptions that was not provided with citations to the transcript in accordance with 8 Cal. Admin. Code Section 20370(g) be disregarded by the Board. The motion is hereby denied.

<sup>2/</sup> The regulation provides in pertinent part, "If an Employer fails to comply with the requirements of subsections (a) through (d) above, and such failure frustrates the determination of particular facts, the Regional Director may invoke any or all of the following presumptions:...(3) That the petition is timely filed with respect to the Employer's peak of season."

preceding the filing of the petition. The record reveals that the Employer relied on labor contractors' records which were wholly inadequate. As we noted in Yoder Bros., Inc., 2 ALRB No. 4 (1976), "[T]he obligation to provide a list of employees under regulation 20310(d)(2) is in no way affected by the fact that a particular employer may utilize a labor contractor."

The labor contractors' employee lists, for the payroll period immediately preceding the filing of the petition and the period which the Employer contended was its peak, suffered from various deficiencies. For example, some of the lists contain no addresses and a number of the lists contain crossed-out names. Moreover, Employer's Exhibit 5, which the Employer contends is the payroll for the period immediately preceding the filing of the petition, is in fact the payroll for a different period. The manner of its preparation was evident only through hearsay, and the IHE admitted it into evidence only for a limited purpose, in order to show the Employer's efforts to comply with the regulations. The record reveals that Employer's Exhibit 5 was never given to the Board Agents assigned to investigate the petition.

In addition to the inadequate employee lists, the Regional Director obtained from a Board Agent lists of permanent employees, evidence contrary to the Employer's contention as to peak, and production figures. The Director was not able to resolve her doubts about whether the petition was timely filed on the basis of the information before her. We are not fully convinced that the Employer's payroll for the period immediately

preceding the filing of the petition reflected 50 percent of the peak employment because there is insufficient evidence in the record to calculate peak precisely, but, for the same reason, we cannot find that the Regional Director abused her discretion in making her decision on the basis of the same record.

In order for the Employer to prevail in its objection to the Regional Director's invocation of the peak presumption, it must establish that the Regional Director's action constituted an abuse of discretion and resulted in prejudice. Yoder, supra. As we have determined that there was no abuse of discretion, it is unnecessary to address the second element, whether prejudice resulted.

The second issue set for hearing was whether the Employer was, in fact, at peak. As we are unable to make such a determination on the record before us, the objection is dismissed. On the basis of the above findings and conclusions, and the record as a whole, and in accordance with the recommendations of the IHE, 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 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 the agricultural employees of Filice Estate Vineyards 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: October 13, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Filice Estate Vineyards

4 ALRB No. 71

75-RC-224-M

IHE Decision

After an election won by the UFW, a hearing was held on two of the Employer's objections: 1) whether the petition was filed when the Employer was at 50 percent of peak employment, and 2) whether the Regional Director abused her discretion in invoking the second presumption pursuant to 8 Gal. Admin. Code Section 20310 concerning the timeliness of the petition with respect to the Employer's peak of season. The Employer contended that peak occurred not during the period when the petition was filed but instead had occurred earlier in the year. The IHE found on the basis of production figures and testimony and considering the presumption favoring certification that the petition was timely filed. The IHE also found that the Regional Director did not abuse her discretion in invoking the presumption because the information supplied by the Employer was difficult to interpret and of dubious reliability; The Employer had been given numerous opportunities to supply information, and the Regional Director was obligated to hold the election within 7 days.

Board Decision

The Board dismissed the Employer's objection as to invocation of the presumption, on the grounds that the Regional Director had not received sufficient reliable data to determine peak of season, notwithstanding her requests to the Employer for such information.

As the Board was unable to determine from the record whether the Employer was actually at peak, the objection as to that matter was also dismissed.

Objections dismissed. Election upheld. Certification granted.

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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:

FILICE ESTATE VINEYARDS,

Employer,

Case No. 75-RC-224-M

and

UNITED FARM WORKERS OF AMERICA,  
AFL-CIO,

Petitioner.

Frederic J. Domino, Miller, Perrin, Domino,  
Giacalone & Ackerman, for Employer.

Deborah Peyton, for United Farm Workers  
of America, AFL-CIO.

DECISION

On October 27, 1975 the United Farm Workers of America filed a petition for certification of representative at Filice Estate Vineyards in Gilroy, California. An election was held on November 3, 1975 and the results were: UFW 3.9; No Union 0; challenged ballots 14. The petition estimates there were 75 eligible employees.

The Executive Secretary set two objections for hearing:

1. whether the acting regional director abused her discretion in invoking the presumption of 8 Cal. Admin. Code §20310 (e) (1975) concerning peak, and 2.
- whether the petition was timely filed because the number of employees was less than fifty percent of peak.

A hearing was held on May 12, May 17, and May 18, 1975 in Gilroy, California. Evidence was taken on the two issues set for hearing. All parties were given full opportunity to participate in the hearing. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of all available evidence as well as post hearing briefs submitted by both parties, I make the following findings of fact, conclusions and recommendations.

#### JURISDICTION

The employer does not contest that it is an agricultural employer within the meaning of the Agricultural Labor Relations Act (Act) and based on the record as a whole I find that Filice Estate Vineyards (FEV) is an agricultural employer within the meaning of Labor Code §1140.4(c). I further find that the United Farm Workers of America, AFL-CIO, (UFW) is a labor organization within the meaning of Labor Code §1140.4(f).

#### STATEMENT OF THE CASE

Filice Estate Vineyards is principally in the business of growing and harvesting cherries and grapes. FEV also operates a packing shed for cherries. This shed is located on the boundary between FEV and property owned by partners of FEV in a different entity. While the shed sometimes packs cherries for other growers, the uncontradicted evidence shows that only FEV cherries were packed in this shed in 1975.

The cherry harvest occurs in June. For 1975 it lasted from June 12 through June 24. The employer contends that June 15 through June 21 constituted the peak employment period for 1975. This period corresponds to their Sunday through Saturday payroll period. The evidence supports the conclusion that the bulk of cherries were



picked during this week. (Employer's Exhibit 10). The grape harvest begins in late September or early October and lasts four to six weeks. The election took place during the grape harvest. The employer contends that the work force employed for the brief but intense cherry harvest was greater than fifty percent of the work force employed for the grape harvest.

The employer has a small permanent work force and also hires directly for the packing shed. However, the harvest crews, (most of FEV's employees) are hired through labor contractors. In the 1975 cherry harvest two labor contractors, Jose Sandoval and Salvador Cazares, were used. In the 1975 grape harvest only Cazares was used. The issues in this case stem from the employer's dependence on labor contractor's records. Neither the contractors nor the employer have accurate employee lists with regard to the employees hired by the contractors as required by the regulations, for either the cherry or grape harvest. On the basis of the lists that are available as well as production figures, the employer argues that FEV has substantially complied with the regulations requiring information from the employer. Additionally, FEV maintains that employment during peak and the immediately preceding payroll period can be inferred or at least the conclusion that the employer was not at fifty percent of peak during the immediately preceding payroll period can be inferred. What information the employer had, was made available to the Board. However, that information, in the form presented, does not allow for a precise peak calculation.

#### WAS THE PETITION TIMELY FILED

The 50 percent of peak requirement of the ALRA is designed to assure that a representative number of employees are eligible to vote. The prejudice suffered when the peak presumption is invoked

is that an election is held and the number of employees eligible to vote is not representative of the total work force. If in fact Filice Estate Vineyards was at least at 50 percent of peak, no prejudice would accrue to any party if the regional director abused her discretion in involving the peak presumption. Therefore, a finding that the employer was in fact at 50 percent of peak when the petition was filed estimates the significance of the abuse of discretion issue.

With regard to peak employment and employment during the relevant payroll period, documentary and testimonial evidence was introduced. Below is a brief description of that evidence.

#### GRAPES

##### Sue Robeson

Ms. Robeson is the bookkeeper for FEV and was acting in this capacity in 1975. She recorded the tonnage picked. The pay period for FEV goes from Sunday through Saturday and the workers are paid on Wednesday. The petition was filed on October 27, 1975. Therefore, the applicable payroll period was October 19 through 25. Since Mr. Cazares did not testify, no evidence was submitted as to whether he had the same or a different payroll period.<sup>1/</sup> The employer introduced production figures and sums paid for wages for the October 21 through October 27 period. The employer claims that a comparison of these figures with the June 15 through June 21 figures demonstrates that FEV was not at 50 percent of peak.

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<sup>1/</sup> He apparently was not available in spite of the employer's effort to have him testify.

For the October 19 through October 25 period, FEV employed 7 permanent employees. (See Employer's Exhibit 8, p. 1; Employer's Exhibit 12). Ms. Robeson testified that there were about 60 people employed by Cazares around this time.

Michael Filice

Michael Filice, a principle shareholder and actively engaged in FEV, testified that he hired Cazares for the grape season in 1975. He told Cazares to start with 30 to 40 workers. He estimated that Cazares had around 75 but indicated that there were 20 or 30 others from another labor contractor or permanent employees. Ms. Robeson testified that she did not think another labor contractor was used at this time.

Eddie Hernandez

Mr. Hernandez, the UFW's witness, testified that he worked for FEV from 1972 to 1976. During the 1975 grape harvest he worked as a tractor driver. In the middle of the season he was transferred and no longer drove the tractor pulling the gondolas. Even though Hernandez was not directly involved in the grape harvest after mid-October, as part of his organizational efforts on behalf of the union he met with grape workers 2 to 3 times per week; he spoke to approximately 70 to 75 workers; was not able to speak to approximately 20 to 30. In sum, Hernandez indicated that there were about 100 grape employees. Hernandez also said that he supplied information to the union. The petition indicates approximately 75 employees. Hernandez explained the difference between his estimate of 100 and the 75 indicated in the petition, by saying that he did not draw up the petition, that he counted on 75 to support the union, and that after October 15 he did not know exactly how many were employed in grapes.

Rudy Neja

Mr. Neja testified for the employer as an expert witness. Not only was he able to testify knowledgeably as to grape production in the Santa Clara Valley but he testified that he examined FEV vines from 4 to 15 times per year since 1968. He indicated that he was at FEV more than once in 1975.

Mr. Neja testified that there are many factors which account for yield and ease of picking. Cluster size is a crucial factor and he noted that 1975 was a year of exceptionally large cluster size. In addition, other factors related to vigor of vines training, topography. Running through the varieties at FEV (Employer's 14) and based on his personal knowledge of FEV, Mr. Neja made the following comments:

Malvasia Bianca; Gentle topography. Some vines are young and well trained, grown in relatively shallow soil and hence are not as vigorous as they would be if grown in deeper soil. An average picker could pick from 1-1/4 to 1-1/2 tons a day.

Muscata Canelli; Large cluster, less vigor, ideal training, an average picker could pick 1-1/2 to 2 tons per day.

Semillion: Less vigor, bigger cluster. Some fields have younger vines which are easier to pick but yield less tonnage. The younger vines are planted on a hill. Neja provided a range of less than 1 ton to 1-1/2 tons.

Grenache; Neja indicated that he didn't know the topography but knew grenache was not extensively planted. He noted the grape is temperature sensitive and there is wide cluster variation. He estimated an average picker about 1 ton per day plus or minus 3/10th of a ton.

Louis Filice

Louis Filice acted as a supervisor for FEV in 1975. He indicated that Cazares used 50 to 60 workers during the latter part of October.

Al Linden

Mr. Linden worked for FEV in 1973, 1974 and 1976 as a foreman. He testified that he was responsible for seeing that the grapes were harvested. As part of his duties he kept a record of tonnage coming off different blocks (rows of vines) since there were old and new vineyards and different styles of pruning. Mr. Linden also indicated that he would check the cards of some employees to get a sense of how many buckets they picked that day. Each bucket was approximately 25-26 pounds and employees averaged 75-80 buckets per day.

In spite of the fact that some vineyards were old, some new and some first coming into production, Linden testified that year to year production averaged out. This I take it means that FEV output was within a general range from year to year and thus Linden's testimony as to 1974 is probative as to 1975.

John Filice

John Filice testified that he asked Cazares to compile a list of employees currently picking grapes. (Employer's 5). This list was admitted for the limited purpose of showing what information Paula Paley had before she invoked the 50 percent of peak presumption. The list indicates that it is for the period October 27 to November 1, 1975 and contains 47 names. The petition was filed on October 27, 1975 and therefore, this list is not especially relevant as to the number of employees in the immediately preceding payroll period. Employer's 8, another list prepared by Cazares, (40 names) does not

indicate what time periods are involved and contains no addresses. Filice testified, however, that these lists were partially available to McDermott and fully available to Celia Trujillo, another Board agent.

John Filice testified that he asked Cazares to make these lists but beyond this there was no testimony with regard to how these lists were compiled. Therefore the utility of such lists in determining how many employees actually worked is questionable.

Tina Navarette

Ms. Navarette testified that she was employed by Alfonso Salazar, a labor contractor, and worked as a checker in both grapes and cherries in 1974. She testified that the average grape picker could pick more than 75 buckets per day.

Grape production during October 21-27 was 303.25 tons (Employer's 13) or 606,500 pounds. During that period Cazares was paid a total of \$8,700 (employer's 13 and 18). Permanent employees were paid a total of \$1,040.95 during this period. (Employer's 12). The employer asserts that the resulting total of \$9,740.95 is less than 15% of the payroll paid to the cherry pickers during the peak June period. This fact is of little consequence since no evidence was introduced as to the pay rates of grape pickers.

Applying Mr. Linden's figures of 75 buckets per day and dividing it into 606,500 pounds of grapes, 24,260 buckets were picked during the week of October 21-27. Ms. Robeson indicated that grapes were picked only 4 days of this week. Using a four day work week, 6,065 buckets per day were picked and this figure divided by the average number of buckets per day indicates that approximately 80 workers were required each day of the four day period.

The employer gets a lower figure by employing the following

method.

Rudy Neja testified that based upon the variety shown on Employer's Exhibit 14, the following average production per day per worker could be expected:

Malvasia Bianca - One and a half (1-1/2) tons;

Muscato Canelli - One and a half (1-1/2) - two (2) tons;

Semillion - One and a half ..(1-1/2) tons;

Grenache - One (1) ton.

Neja actually testified that an average picker picked within a range.

Malvasia Bianca - 1-1/4 - 1-1/2 tons

Muscato Canelli - 1-1/2 - 2 tons

Semillion - less than 1 - 1-1/2 tons

Grenache - .7 - 1.3 tons

Any conclusions, therefore, as to how many employees were needed must also reflect a range.

As shown by the figures in Employer's Exhibit 14, the following is a percentage of total grape production of each variety during the relevant week:

Malvasia Bianca - 5.65%

Muscato Canelli - 54.94%

Semillion - 16.5%

Grenache - 21.6%

The ratio of percentage of the varieties picked as to the entire tonnage and the number of tons per worker per eight (8) hour day indicates that the average picker would pick approximately 1.45 tons per day of the total tonnage picked or 2,900 pounds per day. Applying 2,900 pounds per day to the total amount of tonnage picked indicates that on October 21, 103,710 pounds were picked requiring

thirty-five (35) workers, on October 23, 211,800 pounds were picked requiring seventy-three (73) workers, on October 24, 173,295 pounds were picked requiring sixty (60) workers, and on October 27, 57,700 pounds were picked requiring approximately twenty (20) workers for a grand total of 188 workers employed during the four (4) day period or an average of 47 workers per day. To the aforementioned figure would be added the seven (7) permanent employees who were paid on the basis of a seven (7) day payroll.

One difficulty in assessing Mr. Neja's testimony is that there was no testimony regarding the factors that might go into a decision about how many workers an employer would want to employ. Another difficulty is the assumption made by the employer of an eight hour work day. The testimony in fact suggests that little regard was given to the length of the work day since Cazares was told to pick a certain block and to hire the people necessary to pick that block. No testimony indicated that Cazares was told he had to make his employment calculations on the basis of an 8 hour day. Finally, Mr. Neja testified as to a range of average production. For example, Semillion would be less than one ton to 1-1/2 tons. The employer in its brief uses 1-1/2 tons. I do not accept the employer's conclusion that the average employee complement for the applicable payroll period was 54. I give more credence to the direct testimony than the conclusions the employer draws from the expert testimony based on the assumption the employer makes.

### Conclusions

I find there were 7 permanent employees of FEV in the applicable payroll period during the 1975 grape harvest. Testimony in general indicates 75-100 pickers employed by Cazares. No records substantiate that other contractors worked in grapes. I conclude



that Cazares was the only contractor in grapes.

CHERRIES

Sue Robeson

As bookkeeper in 1975, Ms. Robeson compiled the daily production record, weighed the incoming product, prepared the receipt tags and made out checks to the labor contractors based on the total weight as indicated by the weight receipts. Through personal observation she noted that Cazares started with 30-50 workers.

She testified that in 1975 only FEV cherries were processed and sorted in the packing shed. The packing shed employed an average of 49 employees per day (Employer's Exhibit 11, column 1) for the period June 15-21. The shed workers were paid a total of \$6,228.02 during this period.

The average number of permanent employees was 10.4 (Employer's Exhibit 11, column 3) during the June 15 - June 21 period. They were paid \$2,096.62.

During the harvesting period 950,643 pounds of cherries were picked and packed; 646,340 pounds were picked during the June 15 - June 21 period. The total amount of money due to Cazares and Sandoval was \$88,897.16 (Employer's Exhibit 6). The amount paid for cherries picked during the June 15 June 21 period was \$56,653.52. Employer's Exhibits 4 and 16 show the checks made out by Ms. Robeson to Sandoval for work performed during the harvest period.

Michael Filice

Mr. Filice testified that he recommended that Cazares be hired. After Cazares was taken around in order to estimate crew needs it was decided that he would start with 40 pickers and be authorized to go to 60-70 as the season wore on, Michael Filice testified that more pickers were needed at the end of the season. Cazares' crew was placed in different orchards than Sandoval's.

Mr. Filice indicated that using an average of 20 buckets per picker per day, Cazares used about 60-70 pickers but he didn't actually count.

Louis Filice

Louis Filice was a supervisor in 1975 for FEV. He testified that he did not tell Cazares to hire a specific number but would tell him how much to pick. He estimated Cazares used 75-80 workers.

Refugio Sandoval

Mr. Refugio Sandoval is the son of the labor contractor employed by FEV in 1975 to provide workers in the cherry harvest. However, he, not his father, was in charge. Mr. Sandoval testified that there were approximately 200 or more workers employed by him in the cherry harvest.

Mr. Sandoval laid the foundation for the introduction of Employer's Exhibit 3. As a labor contractor Mr. Sandoval, by law, is required to submit a list of employees employed by him and their earnings to the Department of Benefit Payments four times a year. John Filice asked Mr. Sandoval to provide him a list of FEV cherry harvest workers so that he could comply with §20310 of the regulations. Using the DBF quarterly list, check stubs, and daily time cards for the June 15 - June 21 period a new list was developed. In form, this new list consists of the DBF list with names of those who did not work in the cherry harvest crossed off.

The cherry harvest employee list (Employer's Exhibit 3) contains 176 names; 149 names on checks correspond to names on Employer's Exhibit 3. Mr Sandoval testified that he was present when the list for John Filice (Employer's Exhibit 3) was compiled.

Mr. Sandoval testified that it was possible for him to

compile the list because the cherry harvest in Gilroy was the only Sandoval operation involving cherries and the only Sandoval operation in Santa Clara County. For the most part, Sandoval supplied labor to farms in Tulare County. Therefore, by noting which checks were cashed in Gilroy, one could assume that the person to whom the check was made out worked in the cherry harvest. In addition, he testified that he kept a separate check binder for cherries. (Board's 2). Sandoval indicates that the list (Employer's 3) may include some people who picked oranges on another farm. He also indicated that some workers with crossed out names actually worked in the FEV cherry harvest.

The documents which were the basis of employer's 3 were subpoenaed by the IHE during the harvest. Only the check and check stubs were produced. Mr. Sandoval testified that he searched for the time cards but was unable to find them. His testimony indicated that the time cards were crucial in compiling the list.

Sandoval also testified that the average picker picked 25-33 buckets per day, that each bucket weighed approximately 22 pounds and that he paid his workers either \$1.35 per bucket or \$1.50 per bucket depending on the difficulty of picking.

Sandoval testified that although there is a weekly payroll period, people were in fact paid at other times during the week. Some people were paid weekly, sometimes money was held back to be paid at the end of the season. There is no way to conclude from the checks or check stubs when people worked. The 228 checks submitted are dated from June 14 to June 25. The date of the check bears little relation to the actual day worked.

Eleven check stub's indicate they were for loans, others have no indication (deductions, etc.) that they were actually pay-checks. The 205 checks represent 174 names. Thirty-one people received more

than one check. Many checks (92) were not cashed in Gilroy.

Using 30 buckets per day, the median testified to by Sandoval, and using \$1.50 per bucket and comparing these amounts to the checks written, it is clear that numerous employees worked for less than the full week of June 15 through June 21. Thus, a reasonable inference can be drawn from the evidence submitted by the employer that there was considerable turnover. Sandoval testified there was turnover at the beginning of the harvest but that it tended to decrease as the harvest progressed. Alfonso Salazar, who was the labor contractor in 1974, indicated there was substantial turnover in 1974. Thus the 176 names that Sandoval came up with may more truly represent the actual number of employees rather than the "peak" average in Saikhon.

Analyzing production figures also suggests that the 176 names submitted by FEV may in fact be the total number of employees who worked over the peak week, and not the average number of employee days. The median of the range of pounds per bucket testified to by Sandoval is 22. Salazar testified to 25 lbs./bucket. Dividing these into the daily total of pounds shows how many buckets were picked. Dividing the number of buckets an average picker could pick (30) reveals how many pickers worked that day.

	<u>25 pounds/bucket</u>	<u>22 pounds/bucket</u>
June 15	121.21	137.74
June 16	99.11	112.62
June 17	100.04	113.68
June 18	146.90	166.93
June 19	129.08	146.63
June 20	128.02	145.48
<u>June 21</u>	<u>137.04</u>	<u>156.15</u>
Average	123.11	139.89

The same method using Salazar's testimony that the average picker could pick 40 buckets per day and a bucket holds 25 pounds, yields

an average of 92 workers.<sup>2/</sup> Tina Navarette testified that the average pickers could pick 75 buckets a day. This would yield a correspondingly smaller figure.

Another approach is to multiply 22 pounds-by the average 30 buckets per day which shows that an average picker picked 660 pounds per day. If this figure is divided into the total number of pounds that each labor contractor's employees picked, Mr. Sandoval employed 92 workers and Mr. Cazares employed 37 workers for a total of 129.

Sandoval testified that he employed "over 200" in the cherry harvest. The list (Employer's 3) shows 176 names. I find this testimony less believable than the figures arrived at using production figures. This is because Sandoval's testimony as to how the list was compiled, the numerous problems with the checks and check stubs, the missing time cards, and the fact that there is no indication on Employer's 3 of turnover make the list less than reliable in my estimation.

Calculations based on the production figures, by their nature, resolve, to some extent, the turnover problem. Sandoval, himself, testified to some turnover. Salazar indicated that in his experience there was quite a bit of turnover.

In addition, the average daily employment of shed workers was 49.14. The average daily employment of ranch workers, defined

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<sup>2/</sup> I credit the testimony of Sandoval and Salazar with regard to the number of buckets an average picker could pick because the testimony showed they were in a better position to make such estimates and they are more consistent with each other than with Navarette.

as non-pickers engaged in other types of farm work and generally more permanent was 10.42. Depending on which set of production estimates are used, the total work force was between 152 and 200.

As for grapes, testimony as well as production figures indicates a range of 75-100 workers for each of the four days grapes were picked.

### Conclusion

Based on the evidence available, I conclude that during the week the employer alleges is peak, FEV employed approximately 152 to 200 people. During the period of the election, FEV employed 75 to 100 people.

The language of §1156.3 of the ALRA is viewed by the Board as creating a presumption in favor of certifying an election. "The Board is obligated to certify elections unless there are sufficient grounds to refuse to do so." Carl Joseph Maggio, Inc., 2 ALRB No. 9 (1976). The employer is only able to produce records from which employment figures can be inferred. The information supplied and available does not allow for a simple mathematical determination based on precise employment figures. On the basis of the information supplied, I find substantial evidence to infer that the petition was timely filed. In view of the presumption favoring certification and in view of the evidence I find the petition was timely filed.

### DID THE REGIONAL DIRECTOR ABUSE HER DISCRETION IN INVOLVING THE PEAK PRESUMPTION

Paula Paley, the acting regional director of the Salinas region, invoked the presumption concerning peak on November 1, 1975. She communicated her decision to FEV by telegram.<sup>3/</sup> The reasons

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<sup>3/</sup> I take administrative notice of the confirmation copy of this telegram which is in the official master file.

for invoking the presumption was that FEV had failed to supply a complete and accurate list of the full names and addresses of all employees in the bargaining unit sought by the petitioner for the payroll period immediately preceding the filing of the petition. In addition, FEV failed to furnish complete evidence with respect to recent or peak employee complement.

To determine whether the regional director abused her discretion it is necessary to examine what information was available when she made her decision.

Pat McDermott

Board agent Pat McDermott was assigned to investigate the petition filed at FEV. Up to this point he had investigated 40 to 45 petitions. However, he had never investigated a petition where peak was an issue.

McDermott phoned FEV on October 27 or 28 and informed Mike Filice that a petition had been filed. He indicated the nature of the employer's obligation and that he would come out to FEV to look at records. Later that day John Filice called back. McDermott again indicated the information he needed. He directed John Filice's attention to the attachment on the petition which speaks of employee lists. John Filice told McDermott how to get FEV, and a meeting was arranged.

When McDermott arrived he was ushered into a room. John Filice and several other people were present. Immediately McDermott got into a discussion of peak. He saw a quarterly listing of the Department of Benefit Payments, which had a number of names on it, and purported to be from a labor contractor. This list contained more than twice the number of names than the current number of employees. A copy of this list and possibly another was put in

McDermott's file. These lists either were the same as or were similar to Employer's Exhibit \$1 and 2. At that time McDermott did not examine documents relating to the relevant payroll period. He did, however, make a rough count of names. He asked for a statement from the employer that FEV was not at fifty percent of peak. McDermott testified that he must have discussed how many people were presently employed, and thought that he was told about 45. McDermott did not recall seeing any production records. At this point McDermott felt he had sufficient information. He told John Filice that he would be able to make his recommendation to the regional director.

McDermott discussed the results of his investigation with Pete Beltran, his immediate superior. At that time Beltran did not indicate there was a need for further investigation. Subsequent to this conversation, McDermott spoke to John Filice and indicated he would recommend dismissal of the petition. McDermott left Salinas that day, after preparing his recommendation and a form letter of dismissal for Paula Paley's signature. On Saturday, McDermott learned that another investigation had taken place and an election was scheduled for November 3. He talked on the phone with Paula Paley and learned that she was concerned because there was no list of employees in the immediately preceding payroll period. Paley wanted to know if McDermott asked for such lists. McDermott testified that he did not ask for a specific list, and FEV did not offer such a list.

#### John Filice

Filice's testimony generally corroborates McDermott's in those areas of overlap. Filice stressed that he made all the



information available to McDermott. This is consistent with McDermott's testimony that John Filice did not deny him any material he had. Filice told McDermott that he thought peak was June 15-21. He showed McDermott the list prepared by the labor contractors, (Employer's 1 and 2). They did not talk about the present number of employees. McDermott was told he could copy whatever information he wanted. On October 29 at about 3 p.m., McDermott called and said he thought the petition would be dismissed. At about 5 p.m. that day Pete Beltran called and said more information was needed.

A meeting was arranged for the next day but never occurred. Instead John Filice learned that an election was scheduled for the next day. Filice was outraged and called Paula Paley. She told him that FEV had failed to file a list of employees with the Board. Filice argues that he "made available" all the information and thus met his obligation to furnish information. Paley said that she would send a more experienced Board agent.

On October 29, Board agents John Thompson and Celia Trujillo came to FEV. Trujillo wanted the cherry records and didn't request other information. She took lists from the peak period of shed workers and permanent employees, drew up a list of employees based on weight tags, took the employer's summary of cherry tonnage (Employer's 6), and took the employer's summary which included tag numbers and net pounds. This information is also contained in the letter prepared by John Filice and dated October 21. The Board agents left at approximately 5 p.m., staying about 1-1/2 hours.

The next day Filice spoke to Beltran who said he needed to see Sandoval's list with a statement under penalty of perjury

as to the number of employees working at peak. Beltran also wanted Cazares' list by 3 p.m. the next day. Filice said it was impossible to get Cazares' list, but indicated it would be possible to get Sandoval's list by the next day. The next morning, John Filice flew to Woodlake, and met with the Sandovals. They figured out as best they could who worked during the peak period and returned with a list, (Employer's 3). Check stubs, checks, and time cards were used to compile the list. This information was given to Beltran at the Salinas airport. John Filice received a telegram invoking the presumption on Monday morning. It was sent the previous Saturday about 6-7 p.m.

#### Paula Paley

Paula Paley had been employed by the ALRB since it began operation in August 1975. From September to November 1975 she was acting regional director in Salinas. Paley testified that the presumptions were invoked on Saturday, November 1, 1975, in middle or late afternoon. She had been informed by the Board agents that they did not have a complete list of names and addresses of employees in the preceding payroll period or during peak. She instructed the agents to ask for this information several times. She remembered three occasions when she spoke to Beltran about it. Celia Trujillo reported that she was unable to get such a list.

Paley testified that she had information that contradicted the employer's position. Juanita Sanchez, another Board agent, indicated to her that one contractor furnished 30 to 40 employees. In an October 31 conversation by phone, Sanchez indicated that the other contractor employed only 20 people in the month of June. In addition Paley had before her, the UFW's letter, (UFW 4) , which questions, by use of EDD statistics, the employment figures of

the employer.

Paley saw the quarterly report of Sandoval. It has no addresses. She knew of the other quarterly reports supplied by the employer. On the basis of all this information she could not tell if employment was currently at less than 50 percent of peak.

On October 29, she spoke to John Filice and told him the lists were incomplete. Paley felt she made it clear that she needed documents which showed the daily employment.

Paley was subject to probing cross examination. What came out was that Paley had before her the quarterly list, production figures, and information which contradicted the employer's assertions. She indicated that she believed she took Beltran's report on his meeting with Filice on Saturday into consideration. She articulated her belief that the employer has a positive obligation to furnish information, not merely make it available. As a result of her investigation she was unable to resolve doubts about whether the petition was or was not timely filed. When she made her decision to invoke the presumptions she did not think she could get more information which would resolve the dispute. Under a 7 day deadline she invoked the presumptions. She felt the information submitted by the employer was incomplete.

#### LEGAL ANALYSIS

In Yoder Brothers, Inc., 2 ALRB No. 4 (1976) the Board discussed the nature and function of the presumptions invoked in that case.

"Invocation of a particular presumption is appropriate only where the employer's failure to submit timely and complete information has frustrated the determination of facts which relate to the presumption which is being invoked. For example, where no list is timely filed, it may be appropriate to immediately invoke the first two presumptions in order to provide due notice of the election

as required by Labor Code Section 1156.2 (a), rather than delaying the determination that an election will be held until the end of the seven-day limit.

. . .

"In cases where it appears to the regional director, in the exercise of his or her discretion, that the list is incomplete, inflated, or inaccurate to such an extent that it cannot be relied upon as a basis for determining seasonal peak, showing of interest, or eligibility, any or all of the relevant presumptions may be invoked. In such cases an employer objection to the action of the regional director must prove that the invocation presumptions constituted an abuse of discretion and resulted in prejudice."

"Abuse of Discretion" is defined in Black's Law

Dictionary (4th ed. rev.) as follows;

"'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and a legal discretion. (citations.) ... And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgement—one that is clearly against logic and effect of such facts as are present in the support of the application..." (Id. at 25.)

Section 1157.3 of the Act specifically states that "employers shall maintain accurate and current payroll lists containing the names and addresses of all their employees, and shall make such lists available to the Board upon request." Under Section 1140.4(c) of the Act, farm labor contractors are not considered employers. Therefore, the duty to maintain accurate lists fall squarely on Filice Estate Vineyards.

Paula Paley testified as to the information she had prior to making her decision whether to invoke the peak presumption. She concluded that the lists provided by FEV could not be relied upon. There is justification for this conclusion. The issue is not whether FEV cooperated with the regional office and was forthcoming with all the information it had. The record supports finding that

FEV did indeed supply a great deal of information and was cooperative. However, as discussed, that information was difficult to decipher and of questionable reliability. On the basis of the information available to Paula Paley, and Ms. Paley's exhaustive investigation which gave the employer numerous opportunities to supply information, and considering the clear mandate of the Act to hold elections within 7 days , she did not abuse her discretion in invoking the peak presumption.

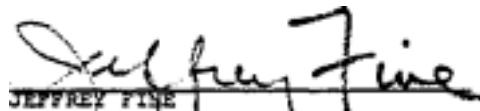
The information was sufficiently unclear that reasonable people could differ as to the propriety of invoking the presumption. "The fact that reasonable minds may differ will fortify the conclusion that there was no abuse of discretion. " Lake v. Civil Service Commission, 47 C.A. 3d. 224, 228; 120 Cal. Rptr. 452, 455 (1975).

Recommendation

Yoder indicates that the party objecting to the invocation of presumptions must show an abuse of discretion and resulting prejudice. Even if Paula Paley abused her discretion, which I do not find, there is no prejudice because the petition was timely filed. Therefore, I recommend that the United Farm Workers of America, AFL-CIO, be certified as the collective bargaining representative of the workers of Filice Estate Vineyards.

DATED: November 4, 1977

Respectfully submitted,



JEFFREY FINE

Investigative Hearing Examiner