STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BONITA PACKING CO., INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 75-RC-140-M 4 ALRB No. 96

DECISION AND CERTIFICATION

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), a representation election was held on October 2, 1975, among the agricultural employees of Bonita Packing Co., Inc. (Employer). The tally of ballots showed the following results:

UFW.....29

WCT.....16

No union..... 3

Challenged ballots... 9

Cross-petitioner Western Conference of Teamsters (WCT) and the employer filed timely objections to the election pursuant to Labor Code Section 1156.3 (c). On March 4, 1977, WCT requested dismissal of its objections, and disavowed any further interest

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in the proceedings.[1/] These objections are hereby dismissed pursuant to this request.

The employer's objections are now before us on the records of two separate hearings conducted on December 17, 1975, and March 21 and 22, 1977. The first of these hearings was conducted under the Board's regulations as originally enacted in August 1975. These regulations provided for hearing on objections before an administrative law officer (ALO), with the record and post-hearing briefs to be submitted directly to the Board without recommendations by the ALO. See 8 Cal. Admin. Code 20390 (1975). At this first hearing, evidence was taken on the Employer's objection that the geographical scope of the bargaining unit was improperly determined, and on its objection that the petition was not timely pursuant to Labor Code Section 1156.4. The Employer withdrew its third objection during this hearing.

On January 7, 1976, the Board issued its decision in Mario Saikhon, Inc., 2 ALRB No. 2 (1976), and the Executive Secretary granted the Employer's motion to reopen the record herein to receive further evidence on the issue concerning the timeliness of the petition in light of that decision. The second hearing, held for this purpose, was conducted pursuant to the Board's revised regulations which provide for

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[1/] Teamster Local 865 initially attempted to remain as a party despite WCT's withdrawal, by a motion requesting review of its status as a party in this and other proceedings, dated March 24, 1977. This motion was withdrawn by Local 865 on May 6, 1977.

submission of the record to the Board along with an initial decision and recommendations of an Investigative Hearing Examiner (IHE), and any exceptions thereto filed by the parties. 8 Cal. Admin. Code 20370 (1976). Thus, the unit objection is before us on the basis of the record of the December 1975 hearing and the briefs of the parties, and the objection as to the timeliness of the petition is before us on the record of the December 1975 hearing, the record of the March 1977 hearing, IHE's initial decision and recommended disposition, and the Employer's exceptions thereto.

The Board has considered the Employer's objections, the record in each hearing and the IHE's decision, in light of-the exceptions and briefs, and has decided, for the reasons set forth below, to dismiss both remaining objections and to certify the Petitioner as collective bargaining representative of the Employer's agricultural employees.

The Employer contends that the Regional Director improperly excluded packing shed workers from the bargaining unit. The Employer is a California corporation which functions as a cooperative and requires that its grower-members must also be common stockholders. It owns only the land on which its shed is located, and engages in no farming operations other than harvesting. The Employer takes the position that its packing operation is incidental to the agricultural operations of its members, and that as less than seven percent

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of its pack comes from non-members its shed workers are agricultural employees.

This Board's jurisdiction is restricted to "those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act [Section 152(3), Title 29, United States Code], and Section 3(f) of the Fair Labor Standards Act [Section 203(f), Title 29, United States Code]." Labor Code Section 1140.4 (b).

We think it is clear under applicable federal precedent that these employees fall within the jurisdiction of the National Labor Relations Board, and therefore are not agricultural employees within the meaning of Labor Code Section 1140.4(b). The NLRB is required to interpret the exclusion of agricultural laborers from its jurisdiction in accordance with Section 3(f) of the Fair Labor Standards Act, 29 USC 203 (b) et seq.[2/] Section 3(f) reads, in pertinent part, as follows:

> ...agriculture includes farming in all its branches and among other things includes ...the production, cultivation, growing and harvesting of any agricultural... commodities... and any practices... performed by *a* farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

[2/] Congress has imposed this requirement by riders to the NLRB's appropriations acts since 1946. See Bayside Enterprises, Inc., v. NLRB, 429 US 298, 94 LRRM 2199 (1977).

The production, cultivation, growing and harvesting of agricultural commodities are considered to be primary agricultural activities, while activities conducted as an incident to these activities are characterized as secondary agricultural activities. Farmers Reservoir & Irrigation Co. v. McComb, 337 US 755 (1949). In interpreting the scope of secondary agricultural activities, the NLRB looks to the totality of the situation rather than to isolated factors, Jack Frost, Inc., 201 NLRB 659 (1973); L and A Investment Corporation of Arizona, 221 NLRB 1206 (1975). However, it is the policy of the NLRB to follow the interpretation of Section 3(f) adopted by the Department of Labor (DOL), "in view of that agency's responsibility and experience in administering the FLSA", L and A Investment Corporation, supra; H-M Flowers, Inc., 227 NLRB 1183 (1977).

The Employer's packing shed employees are not engaged in primary agricultural activities, and may not therefore be classified as agricultural employees unless they are employed "by a farmer or on a farm". DOL's regulations provide that employees of a farmer's cooperative association such as the Employer herein, are not employed "by a farmer":

> The phrase "by a farmer" covers practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers' cooperative association, however, are employed not by the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations whether in the corporate form or not, are

> distinct, separate entities from the farmers who own or compose them. The work performed by a farmers' cooperative association is not work performed "by a farmer" but for farmers. Therefore, employees of a farmers' cooperative association are not generally engaged in any practices performed "by a farmer" within the meaning of section 3(f). 29 CFR 780.133 (a).

Moreover, the Employer's packing-shed employees are not employed "on a farm", which is defined as "...a tract of land devoted to the actual farming activities included in the first part of Section 3(f)..." 29 CFR 780.135. See Stockbridge Vegetable Producers, Inc., 131 NLRB 1395, 48 LRRM 1289 (1961), in which the NLRB affirmed a similar analysis in its Trial Examiner's proposed decision. Accordingly, we conclude that the Employer's packing shed employees are not agricultural employees within the meaning of Labor Code Section 1140.4(b), and were properly excluded from the unit herein. The Employer's objection as to the scope of the bargaining unit is hereby dismissed.

Following the second hearing in this matter, the Investigative Hearing Examiner (IHE) issued his initial decision, in which he concluded that the Employer was at 50 percent of its peak employment at the time of the election, as required by Labor Code Section 1156.7. The Employer filed timely exceptions to the IHE's decision, objecting to the IHE's interpretation of Board precedent, to his method of calculating peak employment and to his conclusion that the petition was timely filed. We have reviewed the entire record in this matter and have determined that the objection

as to peak employment should be dismissed for the reasons set forth below.

Labor Code Section 1156.4 reads as follows:

> 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 the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.
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> In this connection, the peak agricultural employment for the prior season shall not alone 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.

Section 1156.4 poses troublesome questions of statutory interpretation, because it appears to require us to apply a clear and specific rule and to exercise discretion by making an estimate based on "all...relevant data". In policy terms, we are faced with the problem of resolving complex questions concerning the nature of a representative vote in a unit of fluctuating size and composition, within the time constraints imposed by our expedited election procedures. In past decisions, we have approached this task by the use of the Saikhon formula which incorporated the Board's concern with various "relevant data" and which can be easily applied to payroll data during the seven-day pre-election period.

Under the Saikhon formula, the estimate of peak employment is based on the average number of employees employed per day during the peak payroll period. By thus allowing for the effect of turnover, this formula estimates peak employment based on peak labor requirements rather than on total payroll. In Mario Saikhon, supra, and a series of subsequent cases,[3/] the Saikhon formula was applied to both eligibility and peak payroll periods to determine the timeliness of petitions under Section 1156.4. However, in other cases[4/] we have found petitions to be timely based simply on a comparison of total size of the payroll during peak and eligibility periods.

These two approaches to the determination of the peak question in effect represent two separate measures of the representative nature of the vote, neither of which is wholly satisfactory under all circumstances. The "body count" approach approved most recently in Donley Farms, supra, assumes that if a petition is filed when the total number of eligible voters equals 50 percent of the maximum number of employees working during a comparable payroll period during the prior peak season, the resulting election will be

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[3/] Ranch No. 1, Inc., 2 ALRB No. 37; Luis A. Scattini & Sons, 2 ALRB No. 43. See also Dell 'Aringa, 3 ALRB No. 77; High S Mighty, 3 ALRB No. 88. See also IHE ' s decision in G & S Produce, 4 ALRB No. 38 (excepted to on other grounds) .

[4/] Valdora Produce, 3 ALRB No. 8; Kawano Farms, Inc., 3 ALRB No. 25, Donley Farms , 4 ALRB No. 66.

representative. We note that this approach in effect designates the total number of employees who were working at peak for the prior season as a first estimate of peak employment for the current calendar year.

The Saikhon approach takes these same data and, by discounting for daily turnover during the relevant periods, arrives at an estimate of the number of jobs filled by the Employer during each period. Application of the Saikhon approach thus assesses the timeliness of petitions based on seasonal fluctuations in an Employer's labor requirements rather than on seasonal fluctuations in numbers of employees. While this approach to determining the timeliness of petitions promises more stable and consistent results with respect to the seasonal cycle of employment needs experienced by a particular employer, we are not satisfied that it is appropriate in all cases to measure the representative character of an election by counting numbers of jobs rather than numbers of voters.

We think it is incumbent on this Board, pursuant to the language of Labor Code Section 1156.4, to develop standards for estimating peak employment and determining the timeliness of petitions which reflect such factors as crop and acreage data applicable on a statewide basis. The purpose of this process is to establish standards which will enable employees and their prospective representatives to know with reasonable certainty when they may call for an election at a particular employer's operation.

We cannot, however, deny employees access to the collective bargaining rights conferred upon them by the legislature, pending our accumulation of more information and experience with the varied and complex seasonal patterns of agricultural employment in California. Both the "body count" and Saikhon approaches are reasonable measures of the timeliness of petitions under this statute, and we shall therefore continue to find petitions which meet either of these formulas to be timely.

In this particular case, 58 employees were eligible to vote in the election. Prior to the election herein, the Employer selected the week of March 8, 1975, as representative of its peak employment, and stipulated at the first hearing in this matter that 117 employees worked during that period. At the second hearing, it designated the week of March 16-23 as representative of its peak employment, and introduced payroll records which show that 119 employees worked during that period. The record in this case does not reveal why the Employer initially selected the earlier week in March as representative of its peak employment. It appears, however, that the Employer experienced its peak employment for 1975 over a period of time which was longer than one payroll period. In this context, the total number of individuals working during a single one of those periods must be taken as an approximate measure of peak employment. On this record, the fact that the total number of eligible voters fell short of being over 50 percent of 119 by a margin of two employees,

does not indicate that this election was unrepresentative and is not adequate reason to refuse to certify its results. We conclude that the petition herein was timely filed pursuant to Labor Code Section 1156.4. 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 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 agricultural employees of Bonita Packing, Inc., 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: December 1, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

HERBERT A. PERRY, Member

RONALD L. RUIZ, Member

CASE SUMMARY

Bonita Packing Co., Inc. (UFW) Case No. 75-RC-140-M
4 ALRB No. 96

IHE DECISION

After an election in which the UFW received a majority of the 57 votes cast, two hearings were conducted, on December 17, 1975, and March 21 and 22, 1977, concerning the Employer's objections that: (1) its packing-shed employees were improperly excluded from the bargaining unit; and (2) that the petition was not timely filed pursuant to Labor Code Section 1156.4. In his decision, the Investigative Hearing Examiner (IHE) found that the petition was timely filed, based on his analysis of Section 1156.4 and applicable ALRB precedent, but made no finding or recommendation as to the exclusion of packing-shed employees from the unit. Thereafter, the Employer filed timely exceptions to the IHE's findings concerning the timeliness of the petition.

BOARD DECISION

The Board found that the Employer's packing-shed employees were not agricultural employees as defined in Labor Code Section 1140.4(b), and that they were properly excluded from the unit. The Board relied upon the interpretive guidelines to Section 3(f) of the Fair Labor Standards Act contained in 29 CFR 780.133(a), which state that employees of a farmer's cooperative [such as the Employer herein] are deemed to be employed by the cooperative and not by its grower-members.

Concerning the Employer's objection that the petition was untimely filed, the Board found that 58 employees were employed during the payroll period immediately preceding the filing of the petition, and were therefore eligible to vote. Prior to the election, the Employer selected the week of March 8, 1975, as representative of its peak employment and stipulated at the first hearing in this matter, 2-1/2 months after the election, that 117 employees worked during that period. Fifteen months later, at the second hearing, the Employer designated the week of March 16-23, when 119 employees worked, as representative of its peak employment. The Board held that as the number of employees who worked during either of those periods was an approximate measure of peak employment, and as there were 58 employees when the petition was filed, the election was conducted in a representative group and the petition was timely filed. Accordingly, the Board dismissed the Employer's objections and certified the Union as exclusive collective bargaining representative of the Employer's agricultural employees.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

BONITA PACKING,

Employer, Case No. 75-RC-140-M

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner.

Cal Watkins, Jr., Dressier, Stoll & Jacobs for Employer.

Bob Thompson, for the United Farm Workers, AFL-CIO.

DECISION

JEFFREY FINE, Investigative Hearing Officer: This case was heard before me in Santa Maria, California on March 21 and 22, 1977. The sole issue was whether or not the petition filed September 26, 1975[1/] was timely filed pursuant to Labor Code Section 1156.4.

This case was initially heard in Santa Maria on December 15, 1975 by Louis Zigman. Evidence was taken on the issue of peak as well as other objections to the election. After the hearing had closed, the Board issued Mario Saikhon, 2 ALRB No. 2

1/ The Tally of Ballots for the election held on October 2, 1975 shows: UFW - 29; Teamsters - 16; No Union - 3; Challenges - 9.

(1976) which described a method for calculating peak by determining the average number of employee days worked in any given period. Both the Teamsters and the employer moved to re-open the hearing to introduce additional evidence with regard to peak employment in light of the Saikhon decision. The Board granted these motions on September 30, 1976 and ordered the parties to submit additional evidence. The evidence submitted however was conclusory and confusing when considered with other evidence possessed by the Board. Therefore, a hearing was held in order to resolve the peak question.[2/]

Two other objections to the election were heard by Louis Zigman on December 15, 1975. One was withdrawn at the hearing. The other objected to the regional director's decision to exclude packing shed workers from the unit. Zigman heard evidence on this objection. Therefore, the peak issue is the single issue remaining for which evidence need be gathered.

All parties were given full opportunity to participate in the hearing and after the close thereof, the UFW and the employer filed briefs in support of their position. Upon the entire record, including my observations of the demeanor in this case of the single witness and after careful consideration of the briefs, I make the following findings.

Statement of Facts

I. Bonita Packing

Bonita Packing is a cooperative located in Santa Barbara County, California. Bonita operates a packing shed and is engaged

2/ Although the Board granted the motions of the employer and the Teamsters, it should be noted that the Teamsters never objected to lack of peak prior to making their motion.

in the harvesting of various crops. Bonita Packing employs several harvesting crews to harvest some crops of its various members. Specific crews generally harvest for particular members of the cooperative and members of each crew usually do not switch crews. The crop is marketed by Bonita which has packing and freezer facilities.

II. Jurisdiction

The employer does not contest that it is an agricultural employer within the meaning of the Act and based on the record as a whole I find that the employer is an agricultural employer within the meaning of Labor Code Section 1140.4 (c).

III. Peak Period Employment - Payroll Period Employment

The employer alleges and no evidence contradicts its allegation that peak employment in 1975 for Bonita Packing occurred in the period beginning March 16 and ending March 23. At that time Bonita had five crews working. The payroll for the Camacho crew began Monday and ended Sunday. (March 17 - March 23.) The payroll period for the other four crews began Sunday and ended Saturday. (March 16 - March 22.) The employer and the UFW after having reviewed the employer's records pursuant to a subpoena duces tecum stipulated to the following with regard to the period of peak employment.

MARCH

	Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
Crew	16	17	18	19	20	21	22	23
Camacho	*	28	30	32	33	36	29	0
Avelino	9	9	11	10	8	9	9	*
Gonzales	15	15	15	15	15	0	14	*
Uvalle	11	24	11	11	21	22	11	*
Kanda	25	25	25	25	25	25	25	*
Total	60	101	92	93	102	92	88	0

At the time of the payroll period immediately preceding the filing of the petition Bonita had three crews working. Again, Camacho crew had a Monday to Sunday payroll period and the other two crews had a Sunday to Saturday payroll period. The UFW and the employer stipulated to the following figures:

September

	Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
Crew	14	15	16	17	18	19	20	21
Camacho	*	37	5	39	39	35	7	0
Uvalle	0	9	9	9	0	0	0	*
Morin	0	8	6	0	0	9	9	*
Total	0	54	20	48	39	44	16	0

*Not in pay period

**Figures do not include labor contractors who because of their authority to hire and fire must be considered as supervisors and hence ineligible to vote. Prohoroff Poultry Farms, 2 ALRB No. 56 (1976).

THE EMPLOYER'S ARGUMENT

The employer argues that the petition was not timely filed. Applying the formula described in Mario Saikhon, 2 ALRB No. 2 (1976) the average number of employee days worked on each day is 8 9'. 71. (628 employee days divided by seven days.) Sunday, March 23 is excluded because no one from Camacho's crew worked that day and it was not within the payroll period for the other crews. This method however includes Sunday, March 16 which is not within Camacho's payroll period.

Using the same formula for the payroll period in September the average number of employee days worked on each day is 36.83. (221 employee days divided by six days.) Sunday, September 14 is excluded from the computation because no one from Uvalle's or Morin's crew worked that day and September 14 was not within Camacho's payroll period. Sunday, September 21 is excluded because no one from Camacho's crew worked that day and September 21 was not in Uvalle's or Morin's pay period.[3/]

The employer also calculates the result according to the method described in Luis A. Scattini & Sons, 2 ALRB No. 43 (1976). In that case the Board was faced with determining the average number of employee days worked when crews had widely different payroll periods.[4/] The regular employees of Scattini were paid

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3/ In Ranch No. IT Inc., 2 ALRB No. 37 (1976) the Board excluded Sunday in both the peak period and the payroll period immediately preceding the filing of the petition because "only a few employees worked on each Sunday so that the addition of Sunday and division by seven would yield an average number of employee days which was not representative of the average of the other six days." Supra, at 2, footnote 4. Here the employer does not exclude Sunday for the peak period but does exclude Sunday for the payroll period.

4/ Here the payroll periods are not widely different and it is arguable that Scattini is not appropriate or necessary.

every two weeks but the employees of Scattini hired through a labor contractor were paid daily. The Board offered a number of solutions to resolve the problem of widely differing payroll periods but did not endorse any particular solution. The Board essentially calculated according to the Saikhon method the average number of employees per day for each crew separately and then added them together.

During the March 17 to 23 payroll period Camacho's crew averaged 31.33 employee days. (188 employee days divided by six days.) Sunday, March 23 is excluded because no one from Camacho's crew worked that day and thus to include Sunday and divide by seven would yield an average number of employee days which is not representative of the other six days. See Ranch No. 1, Inc., 2 ALRB No. 37 (1976). The average of the remaining four crews is 62.86. (440 employee days divided by seven.) The resultant total is 94.1-9.

Similar calculations for the payroll period show that the Camacho crew averaged 27 employee days and the other crews average 9.83 employee days. The total is 36.83 which is less than 50 percent of 94.19.

THE UFW'S ARGUMENT

The UFW seizes upon the notion of "unrepresentative days" mentioned in Ranch No. 1, Inc., supra. By so doing the UFW raises the larger question of representativeness, which is the conceptual underpinning for the legislative requirement that a petition can be timely filed only when employment in the immediately preceding payroll period reflects peak agricultural employment. The legislature has determined that in an industry characterized by turnover and seasonal labor, an election will be deemed representative if the

eligible voters "reflect" 50 percent of peak employment. By arguing that "unrepresentative days" should be excluded, the UFW seems to be saying that the Saikhon formula must be sufficiently flexible so as not to be obscure or distort the relationship between the peak period and the payroll period. The UFW proposes that "a reasonable method for determining which days should be included or excluded is to use the median. If the number of workers on the questionable day is less than 50 percent of the median it should be excluded. If the number is more than 50 percent of the median, then the day should be included." (UFW post-hearing brief, pp 4-5). All days from March 16 through March 22 would' be included. Sunday, March 23 would not be included. The average number of employee days would be 89.71.

September 16 (Mexican Independence Day - 20 employees), September 20 (Saturday - 16 employees) and September 21 (Sunday - no one from Camacho's crew worked and it is not in Uvalle's or Morin's payroll period) would be excluded. By excluding these two days the resulting average is 46.25.[5/] This is more than 50 percent of 89.71.

When calculated according to the method outlined in Scattini and excluding "unrepresentative" days the result also shows there was peak. The average number of employees in Camacho's crew in the peak period is 31.33. (188 days divided by 6 days.) The remaining crews averaged 62.86 employees per day. The total

5/ The median for the September period is 41.5, the average of the two middle numbers 44 and 39. Thus, September 16 and 20 are excluded. Sunday is also excluded. The figure 46.25 is reached by adding the number of employees in the remaining four days (185) and dividing by four.

is 94.19. Sunday, March 23 is excluded because no one from Camacho's crew worked and it was not within the payroll period of the other crews.

In September, for the Camacho crew the UFW excludes Tuesday, September 16, Saturday, September 20, and Sunday, September 21 because only 5, 7, and 0 employees respectively worked on those days. The UFW points out that the work records for Camacho's crew during the entire month of September shows that Saturday and Sunday were not normal working days. (UFW post-hearing brief, p. 7.) Tuesday, September 16 is excluded because it was Mexican Independence day and very few people from Camacho's crew worked that day.[6/] The average employment for the Camacho crew for the week of September 15 through September 21 was 37.5. (150 employee days divided by 4 days.)

For the remaining crews the UFW argues that the days to be considered should be Monday, September 15; Tuesday, September 16; Wednesday, September 17; Friday, September 19; and Saturday, September 20. Since no one from these crews worked Sunday, September 14 or Thursday, September 18 these days should not be included. The resulting average is 11.8 employees per day. (59 employee days divided by 5 days.) Thus the total average employment for the September period is 49.3 (11.8 plus 37.5) and this is more than 50 percent of 94.19.

6/ I take administrative notice that Tuesday, September 16, 1975 was Mexican Independence Day. While it is reasonable to conclude that few people in Camacho's crew worked that day because it was Mexican Independence Day, the UFW presented no evidence that Mexican Independence Day was considered a holiday by Camacho's crew and for that reason they did not work. Uvalle's and Morin's crews like that of Camacho is composed mainly of Spanish surnamed individuals and they apparently did not celebrate this holiday.

ANALYSIS OF THE UFW' S SAIKHON-SCATTINI VARIATION

In Ranch No. 1, Inc., the Board noted that "Sunday was not added in for either period because only a few employees worked on each Sunday *so* that the addition of Sunday and division by seven would yield an average number of employee days which is not representative of the average number of the other six days." Ranch No. 1, Inc., at 2 footnote 4. (emphasis added) The median approach advocated by the UFW has no expressed support with the above standard articulated by the Board which seems to require comparing averages. Moreover, in Ranch No. 1, Inc., the determination of unrepresentativeness seems to be based, also, on the fact that because few people worked on Sundays in any of the payroll periods under consideration that day is properly excluded from any calculations. In the instant case the UFW seeks to include Sunday for the peak period, yet exclude Sunday for the payroll period.

The difficulty in applying the above language from Ranch No. 1, Inc., is that the Board has not suggested a ratio by which one could conclude what is unrepresentative. While 20 people is arguably a "few" compared to 1000 it is not a "few" compared to 30. Thus, on the basis of Board precedent, it" is impossible to determine with precision the meaning of "unrepresentative day" in any given context.[7/]

7/ Some guidance in defining "representative" can be gleaned from NLRB decisions regarding an election in an expanding unit. In General Cable Corp., 173 NLRB 42, 69 LRRM 1318 (1968) the NLRB found that 30 percent of the contemplated work force employed in 50 percent of the job classifications constitutes substantial and representative segment of employees to be employed in the immediate future. See also Gerlach Meat Co., 192 NLRB 86, 77 LRRM 1832 (1971).

The NLRB has also articulated standards regarding the viability of a contract bar if a contract is executed before any employees have been hired or prior to substantial increases in personnel. At least 30 percent of employee complement have to be employed at the time the contract was executed and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed. General Extrusion Co., Inc., 121 NLRB 147. 42 LRRM 1508 (1958).

When Scattini is applied, the situation becomes more complicated. The UFW claims that because only 5 people worked on Camacho's crew on September 16, that day is not representative. Additionally, because only 7 people worked on Saturday, September 20, and-Camacho generally did not employ a full crew on Saturdays, this day should also be excluded. Nine and six people worked on Uvalle's and Morin's crew respectively on September 16, that day is representative for those crews. The September work pattern shows that Uvalle's crew never worked Saturday and Morin's crew worked three out of four Saturdays in September. The UFW, however, argues that Saturday, September 20 should be included as a representative day for these two crews even though no one from Uvalle's crew worked that day and customarily did not work Saturdays.

If the employment of each crew is averaged separately, and days when no one or few from that crew worked are excluded as unrepresentative, a very high employment figure is reached. For example, this method would result in an average of 54.5 employees in Bonita for the week of September 15 through September 21. During the high day of employment in this week only 54 people worked. The "average" is thus higher than any single day worked - a very strange average indeed. This absurd result lends support to the employer's contention that because the payroll period which immediately preceded the filing of the petition is a period of low employment the exclusion of the lowest employment days because they are "unrepresentative" distorts this fact. From the employer's point of view, days of high employment would be "unrepresentative."

The UFW's position perverts the notion of an average, which is the mean between the highest and lowest numbers. While

the inclusion of days in which' no one worked or very few people worked creates the potential of distortion, it is also true that excluding days destroys the notion of an average. Even if excluding days was desirable the Board has not articulated standards so that a line can be drawn between "representative" and "unrepresentative." The exclusion of days willy-nilly creates the potential for inconsistent application.

LEGAL ANALYSIS

Mario Saikhon, Ranch No. 1, Inc., Luis A. Scattini, Valdora Produce, and Kawano Farms, Inc., represent the Board's continually evolving efforts to create a sound body of law regarding the interpretation and application of the 50 percent of peak requirement.[8/] Saikhon and Scattini compare averages to other averages, while Valdora and Kawano compare the number of eligible voters with the employer's statement of peak. To determine whether a petition is timely filed under any of the methods so far advanced two periods of employment are compared to each other, and if one period "reflects" 50 percent of the other, the requirement of Labor Code Section 1156.4 is met. The method is one of comparison but it is not clear exactly what is being compared.

Labor Code Section 1156.3 (a) (1) states that a petition for representation must allege that "the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year." The legislature specifi-

8/ Mario Saikhon, 2 ALRB No. 2 (1976); Ranch No. 1, Inc., 2 ALRB No. 37 (1976); Luis Scattini, 2 ALRB No. 43 (1976); Valdora Produce, 3 ALRB No. 8 (1977); Kawano Farms, Inc., 3 ALRB No. 25 (1977).

cally referred to "agricultural employees currently employed." Superficially, at least, it appears the legislature contemplated the actual number of employees (body count) be compared with peak employment. This view is reinforced when Section 1156.3 (a) (1) is compared with Labor Code Section 1157 which defines eligible voters as "all agricultural employees of the employer whose names appear on the payroll applicable to the payroll period immediately preceding the filing of the petition of such an election ..." In order to be found eligible, it must be determined that an employee is on the payroll during the applicable payroll period. If an employee is on the applicable payroll and hence eligible that employee is currently employed under Section 1156.3(a)(1). If both provisions of the Labor Code were not consistent with one another and not read together then it would be possible to conclude that an eligible employee was not currently employed or vice-versa. Labor Code Section 1156.4 states that:

> 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 as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.
>
> 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.

The term "peak agricultural employment" is not specifically defined. However, that portion of the statute which directs the Board to estimate peak on the basis of crop and acreage statistics strongly suggests that peak is a reflection of an employer's labor

demands within a given period of time and is not merely a body count. Because agriculture is characterized by high turnover an employer who may have 100 job slots to fill will likely in any given period of time actually hire more than 100 individuals. In the case of prospective peak it is patently impossible to estimate the number of people who might be hired, but the Board could estimate the number of jobs necessary to harvest or prepare a particular crop. Therefore, the legislature could not have intended to require the Board to determine the actual number of people an employer may hire.

In past peak cases on the other hand, the total number of employees does not necessarily reflect an employer's actual job needs. Those aspects of Saikhon and Scattini which deal with determining peak agricultural employment recognize this. In those cases the Board calculated peak by adding all the individuals employed at a particular farm during the peak period and dividing by the number of days in the period. By doing this Saikhon converts an employment pattern characterized by high turnover into one that is equivalent to a stable work force. Thus, an employer who employs 100 different people on each of five days has the same number of job slots available as the employer who employs the same 100 people on each of five days. The payroll or labor costs are the same for both. When an employer with a stable work force says that he employs 100 people he is also saying that he has 100 job slots. There is a total correspondence between people employed and job slots. By the same token Saikhon-Scattini are really talking about the number of job slots and not employees. The difficulty is that Saikhon proposes to average the immediately preceding payroll period thus comparing job slots to job slots and this is not consistent with Labor Code Section 1156.3 (a) (1)

and Labor Code Section 1157.

The Board's latest decisions on peak, Valdora Produce, 3 ALRB No. 8 (1977) and Kawano Farms, Inc., 3 ALRB No. 25 (1977) do not employ the formula set out in Saikhon and Scattini. In those cases the Board compared the number of workers the employer said it employed at peak with the eligibility list provided by the employer. In Valdora the employer supplied the Board with information that at peak it employed 329 and during the immediately preceding payroll period it employed 153. When 13 challenges, which the Board determined should be overruled were added to 153, the total of 166 was more than 50 percent of peak. Accordingly, the objection was dismissed.

In Kawano Farms, Inc., the Board relied on testimony adduced at hearing that the 1975 peak would be approximately 930. Since 649 employees appeared on the payroll in the period immediately preceding the filing of the petition the Board concluded that the 50 percent of peak requirement was met. Neither Valdora nor Kawano expressly reject Saikhon but they approve the method that the actual number of employees is compared to the peak figure. This contradicts the position set forth in Saikhon and Scattini.

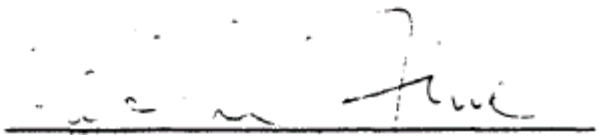
There is uncertainty regarding the appropriate standard to apply in determining whether a petition has been timely filed. With regard to defining peak, Saikhon is consistent with the Act which implies that peak is more than a mere body count. Valdora and Kawano are consistent with the Act in determining the number to be compared with peak. Therefore, I conclude that when the number of actual voters or employees eligible to vote reflect 50 percent of peak agricultural employment, (and peak is defined as job slots or labor needs) a petition has been timely filed.

CONCLUSION AND RECOMMENDATION

The employer's records show that 58 individuals worked during the week immediately preceding the filing of the petition.[9/] The tally of ballots show that 57 individuals voted although 9 were challenged. No party contested the fact that at least 48 individuals were eligible to vote. Using the figure most favorable to the employer, peak agricultural employment was 94.19. Where at least 48 people are undeniably eligible to vote and the peak agricultural employment is no greater than 95, the petition has been timely filed. Such a conclusion furthers the express policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation or representatives of their own choosing ..." Labor Code Section 1140.2. Therefore, the United Farm Workers of America, AFL-CIO should be certified as the exclusive bargaining representative of the employees of Bonita Packing Company, Inc.

DATED: July 14, 1977

Respectfully submitted,



JEFFREY FINE
Investigative Hearing Examiner

9/ This total excludes labor contractors, i.e. those who were admittedly in charge of the crews and hired crew members.