

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

JACK BROTHERS & McBURNEY, INC.,)	
)	
Employer,)	Case No. 76-RC-25-E(R)
)	
and)	4 ALRB No. 97
)	
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND ORDER DISMISSING PETITION

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), an election was conducted on December 21, 1976, among the agricultural employees of Jack Brothers and McBurney, Inc. (Employer). The tally of ballots showed the following results:

UFW.	40
No Union.	30
Challenged Ballots.	4

The Employer timely filed post-election objections, all but one of which were dismissed by the Executive Secretary. Subsequently, the Employer timely filed a request for review as to one of the dismissed objections, contending that it was not at fifty percent of its peak agricultural employment when the representation petition was filed. The Board granted the request for review and both of the objections were noticed for hearing.

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Subsequent to the hearing, which was held on October 12, 1977, in Brawley, California, Investigative Hearing Examiner (IHE) Judy Weissberg issued her initial Decision in this matter, in which she recommended that both objections be dismissed and that the UFW be certified as the collective bargaining representative of the Employer's agricultural employees. The Employer timely filed exceptions to the IHE's findings and conclusions with respect to the peak employment issue.

The Employer contends that it was below 50 percent of its peak employment at the time the petition was filed. The record establishes that the petition for certification was filed within a few days after the Employer's actual peak employment period for the calendar year 1976. However, the election itself was conducted among less than 50 percent of the employees who worked during that period, by either the "employee count" or the Saikhon^{1/} approach to measurement of peak. Although this resulted from the Regional Director's interpretation of the Board's rules concerning eligibility to vote, rather than the timing of the petition, we conclude for the reasons set forth below that the election must be set aside.

The Employer's peak employment for the calendar year 1976 occurred during the week of December 2-8, 1976. During that period, it employed three crews of steady employees, consisting of nine tractor drivers, nine irrigators, and

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

approximately ten general laborers. During the same week, it also hired two lettuce-thinning crews of 40 to 45 employees each, through the El Don Company (El Don), a labor contractor. The Employer paid its steady employees on a weekly basis, while El Don paid its employees on a daily basis.

The petition for certification herein was filed on December 14, 1976. The Regional Director determined, pursuant to Section 20352(a)(1) of the Board's regulations, that: the appropriate eligibility period for the steady employees was December 2-8; and the appropriate eligibility period for the employees provided by El Don was December 8-13. The following chart indicates the number of employees working each day during the relevant periods.^{2/}

December	2	3	4	5	6	7	8	9	10	11	12	13	14
Steady employees	39	38	34	/	36	40	38	/	/	/	/	/	petition filed
El Don employees	32	84	82	/	79	82	41	0	0	0	/	0	

Thus, while the eligibility period for the steady employees included those employees 'working during the period of the Employer's peak employment, the eligibility period which the Regional Director found to be appropriate for the El Don employees was the week following the Employer's peak employment period. By that time, the Employer had dismissed one of

^{2/}The parties stipulated that Sunday, December 5, and Sunday, December 12, were not working days. The record does not show the numbers of steady employees at work on December 9-December 13, since that period is not relevant to determining peak employment or eligibility to vote for the steady employees.

the two El Don crews, and the other El Don crew worked only one day during the eligibility period which the Regional Director considered appropriate for it.

Section 20352(a)(1) of the Board's regulations provides as follows:

(a) Those persons eligible to vote shall include:

(1) Those agricultural employees of the employer who were employed at any time during the employer's last payroll period which ended prior to the filing of the petition, except that if the employer's payroll as determined above is for fewer than five working days, eligible employees shall be all those employees who were employed at any time during the five working days immediately prior to the filing of the petition.

The second portion of this regulation, which is applicable to payroll periods of less than five days duration, is obviously intended to provide a basis for determining the voting eligibility of employees whose Employer does not utilize a payroll period of five or more days for any of its employees.

However, in the instant case, where the Employer utilizes a seven-day payroll period for one group of its employees, it is unnecessary to look to the second portion of Section 20352(a)(1) to define the eligibility of its daily-paid employees, as the same eligibility period will serve both groups. Therefore, the approximately 160 daily-paid employees^{3/} who worked at any

^{3/}While 40-45 employees worked each day in each of the labor contractor crews, turnover was such that some 160 employees worked in these crews during the period of December 2-8. The figure of 160 is derived from handwritten payroll records submitted in evidence at the hearing.

time during the Employer's regular payroll period of December 2-8 should have been found eligible to vote. Instead, under the Regional Director's formula, only the 41 daily-paid employees who worked on December 8 were considered eligible to vote. We find therefore that the election was not conducted among a representative group of employees, and we conclude that the election must be set aside.

ORDER

It is hereby ordered that the election in this matter be, and it hereby is, set aside, and that the petition herein be, and it hereby is, dismissed.

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

Jack Brothers & McBurney, Inc. (UFW)

Case No. 76-RC-25-E(R)
4 ALRB No. 97

IHE DECISION

Following an election in which the UFW received a majority of the votes cast, a hearing was held on two of the Employer's objections: (1) that UFW organizers violated the Board's access rule prior to the election; and (2) that the Employer was not at 50 percent of its peak employment at the time the petition was filed.

The Investigative Hearing Examiner (IHE) found that the Employer failed to meet its burden of proving that UFW violations of the access rule interfered with the employees' free choice in the election, *K. K. Ito Farms*, 2 ALRB No. 51 (1976), and recommended dismissal of the objection. The Employer filed no exceptions to the IHE's findings and conclusions as to this objection.

With respect to the other objection, the IHE found that the petition was timely filed at a time when the Employer was near its peak employment, and recommended, in accordance with the Board's decision in *Luis A. Scattini and Sons*, 2 ALRB No. 43 (1976), that this objection also be dismissed. The Employer excepted to this recommendation.

BOARD DECISION

The Board found that the petition was timely filed shortly after the time of the Employer's peak employment, but that, as a result of the Regional Director's erroneous interpretation of Section 20352(a)(1) of the Board's regulations, less than 50 percent of the employees who worked during the eligibility period were considered eligible to vote. The Board held that where an employer has a weekly payroll period for one group of employees, and pays another employee group on a daily basis, the weekly payroll period preceding the filing of the representation petition is the appropriate eligibility period for both groups of employees under the Board's regulations, Section 20352(a)(1). The Board therefore concluded that the election was not conducted in a representative group of employees. Accordingly, the Board set aside the election and dismissed the petition.

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This case summary is furnished for information purposes only, and is not an official statement of the case or of the Agricultural Labor Relations Board.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

JACK BROTHERS and McBURNEY, INC. ,

Employer,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Case No. 76-RC-25-E

Petitioner

Scott A. Wilson, Dressier, Stoll and
Jacobs, for the Employer.

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

DECISION

STATEMENT OF THE CASE

JUDY WEISSBERG, Investigative Hearing Examiner: This case was heard before me on October 12, 1977, in Brawley, California. A petition for certification was filed by the United Farm Workers of America, AFL-CIO ("UFW") on December 14, 1976. An election was subsequently conducted on December 21, 1976. Of eighty-three eligible voters, forty cast votes for the UFW, thirty voted for no union and four votes were challenged and remain unresolved.

Jack Brothers and McBurney, inc. , ("employer") filed a timely objections petition ^{1/} pursuant to Labor Code Section 1156.3 (c) ,

^{1/} ALRB Exhibit #5.

alleging eight instances of misconduct which the employer argues require the Agricultural Labor Relations Board (" board ") to set aside the election conducted among its employees. By order dated June 1, 1977, the executive secretary of the board dismissed all but one of the employer's objections. ^{2/} The remaining objection that UFW organizers violated the board's access rule prior to the election by entering the employer's fields in greater numbers than allowed, by refusing to identify themselves when requested to do so by company representatives, and by remaining in the fields in excess of the allotted time, was set for hearing.

The employer filed a request for review of one of the dismissed objections. This objection alleged that the board agent in charge held the election at a time when the employer had fewer than fifty percent of peak agricultural employment for the current calendar year. ^{3/} On August 24, 1977, the board granted the employer's request for review and set the peak issue for hearing.^{4/}

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

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

I. BACKGROUND:

A. Employer's Operations

Jack Brothers and McBurney, Inc., is a corporation involved in the farming of lettuce, sugar beets, tomatoes, alfalfa,

2/ ALRB Exhibit #6.

3/ ALRB Exhibit #7.

4/ ALRB Exhibit #8.

grain, cotton and bermuda grass. Its operations are confined to Imperial County. During December of 1976, the only month relevant to this case, the employer directly employed three crews of steady employees: nine tractor drivers, nine irrigators and approximately ten general laborers. That month the employer also hired two lettuce thinning crews of 40-45 employees each, through the El Don labor contracting company. Only one of the labor contractor crews was eligible to vote in the election.

B. UFW Organizing Campaign

The UFW conducted an organizing campaign at Jack Brothers and McBurney during the weeks preceding the election. A notice of intent to take access was filed by the union on approximately December 1. Arturo Mendoza was assigned to coordinate the effort; organizers were assigned to the labor contractor employees as well as to the steady employees.

II. TESTIMONY CONCERNING ALLEGED VIOLATIONS OF THE ACCESS REGULATION:

A. Alleged Violations Involving the Thinning Crews

1. December 1, 1976 Incident

Employer partner Neal Jack was the only witness testifying to access violations on this date. Jack testified that the violations occurred at the employer's lettuce field known as Trifolium 2, Gate **32**, northeast of Westmorland in Imperial County.

Board Exhibit #10, a diagram of the property, indicates that the lettuce field was planted in rows running north and south with turn rows at the north and south ends of the field. Bordering the north turn row was a private field road owned by the employer. On the other side of the field road was another

field not owned by Jack Brothers. Twenty feet from the south edge of the field a cement ditch four feet in width bordered the field; forty feet beyond the ditch a county road ran parallel to the field. A thirty-foot wide canal with banks on each side bordered the field to the east, and a forty-foot wide drainage ditch with banks on each side ran along the west side of the field. On the far sides of the canal and the drainage ditch were county roads. Neal Jack testified that the employer owned the property underlying the canal and the drainage ditch; its boundary lines ran out to the near edges of the three county roads bordering the field to the east, south and west.

Jack testified that he first observed UFW organizers at the field at 8 a.m. on December 1, 1976. He did not know who the persons were when he first saw them but was told by a foreman present that they were organizers for the UFW. Jack testified that he did not see identifying insignia on the persons but that he later saw people whom he knew to be UFW organizers on his property and recognized them as the persons he had seen on December 1. At the hearing Jack identified only one organizer by name: Phyllis Hasbrouck.

According to Jack's testimony, the employees were at work when the organizers were present. He was unsure whether one or two labor contractor lettuce thinning crews were in the field at the time. He remembered only one crew bus present; each thinning crew of approximately 40-45 workers travelled in a separate bus. Jack stated that the thinning crews work down the rows to the turn rows where they stop briefly to rest and to get water

where the bus is parked. On this occasion, the bus was parked on the employer's cement ditch bank at the south end of the field. Jack testified that he saw UFW organizers standing on the ditch bank near the bus talking to the employees who stopped at the end of the rows. Jack did not state how many organizers were present nor how long they remained at the field. The evidence does not show that he or any employer representative confronted the organizers

Jack testified during the hearing that the two labor contractor thinning crews usually began work at 6:30 a.m. or 7 a.m., depending on the time when the night ice melted off the lettuce. The crews customarily took a one-half hour lunch break at approximately 11:30 a.m.

2. December 3, 1976 Incident

Neal Jacks' son, Steve Jack, a supervisor at Jack Brothers and McBurney, Inc., testified to two access incidents on December 3. At 7 a.m., Steve Jack drove by the Trifoliuir. 2, Gate 32 lettuce field and saw three persons whom he identified as UFW organizers: Arturo Mendoza, Phyllis Hasbrouck and John Brown. Steve Jack had seen Mendoza the day before in the company's office filing a notice of intent to take access, and he learned the names of the other two organizers when he confronted them on the employer's property at 11 a.m. on December 3.

At 7 a.m. when Steve Jack saw the organizers they were standing at the west side of the lettuce field about thirty feet from the thinning employees who were working northward in the rows. Jack was unsure whether one or two crews were at work; he thought there must have been two crews since he saw workers at 11 a.m. in

the field much farther away than the crew he saw at 7 a.m. could have worked in that amount of time. He continued to drive by without stopping or speaking to the organizers.

Steve Jack stated at the hearing that he returned to the field at 11 a.m. that day and saw the same three organizers and a fourth person whom he claimed was a UFW organizer but whom he did not identify by name at the hearing. At this time the workers were making a turn at the north end of the field. Jack testified that the organizers' car was parked on the employer's field road at the north end of the field, next to the crew bus. The organizers were standing on the field road edge of the turn row near the employees who were stopping to drink water and to rest at the end of the row. Jack stated that he did not see the organizers talking to the employees at this time.

Steve Jack testified that he stopped on this occasion and asked the organizers to identify themselves, which they did. He then told them they were on Jack Brothers property and must leave. A conversation of approximately twenty minutes in length, which Jack described as "congenial," ensued. According to his testimony, the organizers were unaware that the field road they were on was the employer's property and expressed willingness to stay where they were allowed by law. Jack stated that he radioed his father to ask about the ownership of the field road and that at 11:45 a.m. he told the organizers that Neal Jack had confirmed that, he owned the road. The organizers promptly drove off the employer's premises and waited until the crews stopped for their

lunch break before returning to talk to the employees. Steve Jack stated that the crew members nearest the conversation were approximately one hundred feet away and that the crew was moving along the rows away from the organizers during the conversation.

Arturo Mendoza, one of the UFW organizers present on this occasion, testified that the organizers were waiting at the edge of the field for the lunch break which usually came at 11:30 a.m. or 12 p.m. and that they did not engage in any organizing activities while they waited. He believed they were not on Jack Brothers property.

3. December 4, 1976 Incident

Both Neal and Steve Jack testified to an access incident which occurred at the Trifolium 2, Gate 32 lettuce field on the morning of December 4. When Steve Jack arrived at the field at 6:30 a.m. the two thinning crew buses were parked on the field road at the north end of the field. Jack saw eight persons whom he believed were UFW organizers; two were at one bus in which one thinning crew was waiting for work to begin, and six were at the second bus around which the other crew was standing in small groups. Jack asked one of the UFW representatives, Lupe Murgia, how many organizers were present, and Murgia said he thought there were eight. According to Jack, there were two crews of approximately 40-45 employees each present. Steve Jack had each of the organizers sign a list he was keeping of all organizational activities on the farm.

Jack testified that he waited at the field until the ice on the lettuce melted at 7 a.m. and then instructed the crews to

start work. As the workers entered the field he saw two of the organizers, Phyllis Hasbrouck and Ken Fujimoto, walk out into the rows, still talking to the workers.

Neal Jack arrived at 7 a.m. just as two of the organizers, Lupe Murgia and Miguel Ceballos, passed him on their way off the premises; the other six remained. Jack testified that he then engaged organizing coordinator Arturo Mendoza in a discussion that lasted from twenty to forty minutes; he told Mendoza that the crew had started work and that the organizers must leave. The conversation became an argument. Mendoza stated that work had not yet begun, and Jack asserted that work had started and that there were too many organizers present. According to Neal and Steve Jack, one crew had entered the field during the conversation, and about ten or twenty workers had begun to work. Approximately fifteen to twenty members of the other crew stood twenty to thirty feet away, listening to the conversation. The testimony revealed that the crew that entered the field was the crew that was eligible to vote in the election; the crew that listened to the conversation was ineligible to participate in the election. Organizers Fujimoto and Hasbrouck joined the conversation as it was ending at about 7:45 a.m. and all the organizers then left the property. All the employees were at work by 7:50 a.m.

UFW organizer Arturo Mendoza testified that on the occasion in question, Lupe Murgia and Miguel Ceballos were not present at the Trifolium 2 field to organize the labor contractor thinning crews. They had come to make a regular report to coordinator Mendoza concerning their organizing activities for

that day. Mendoza stated that neither organizer spoke to employees at the field; they left at 7 a.m. to resume their duties organizing the employer's steady employees. Mendoza could not recall the conversation with Neal Jack.

B. Alleged Violations Involving the Steady Workers

1. December 8 and 9, 1976 Incidents

Neal Jack testified to the following access incident which occurred at the employer's enclosed shop yard on Highway 86 in Brawley. The yard contained an office building and a shop building where farming equipment was maintained. The employer's three crews of steady workers gathered in the yard each day before work began. According to Jack, the nine irrigators arrived by 5:30 a.m. at which time their work day started. The ten hand laborers and the nine or ten tractor drivers arrived by 6 a.m. when they began work. According to Jack, each crew had its own foreman and gathered in a different part of the yard: the irrigators met in front of the office on the south side of the yard where their foreman gave each irrigator his instructions for the day; the tractor drivers gathered inside the shop building on the north side of the yard; and the hand laborers' crew bus parked in the middle of the yard approximately thirty feet north of the office.

Neal Jack testified that he arrived at the shop yard between 5:30 a.m. and 6 a.m. on December 8 and found UFW organizers Lupe Murgia and Arturo Mendoza attempting to talk to the irrigators while their foreman was delivering his instructions. Jack confronted the organizers and told them that the irrigators were working.

He stated that an argument ensued but that he did not tell the organizers to leave. The organizers stayed until 6 a.m. when the three crews left for the fields.

Jack testified that substantially the same incident occurred the next morning when he arrived at the yard between 5:30 a.m. and 5:40 a.m. On this occasion Jack and the two organizers engaged in a loud argument. The employer tried to make the organizers leave the area, asserting that the irrigators were on company time as of 5:30 a.m.; the organizers' position was that the employees in the yard were not yet working. On this day the employer called the sheriff at 6 a.m. to have the organizers removed. When the deputies arrived at 6:15 a.m., the UFW organizers were leaving the premises. No action was taken against the organizers.

Arturo Mendoza testified that these conversations with Neal Jack occurred on as many as five occasions. Each time, Jack insisted that the organizers leave because it was after 5:30 a.m. and the irrigators had begun work. The organizers insisted that they were talking to employees who had not yet started their work day. According to Mendoza, there were always workers nearby when the conversations occurred, but no more than seven, or eight. The conversations lasted about five minutes.

Mendoza testified that the organizers spent most of their time in the yard with the general laborers but that, as the organizing campaign progressed, members of the three different crews mingled together in the yard, and therefore the organizers inevitably talked with some employees, including irrigators, who

were not general laborers. Mendoza stated without contradiction that the organizers arrived at 5 a.m. and stayed only until 6 a.m. when the general laborers left for the fields.

III. ACCESS: ANALYSIS AND CONCLUSIONS

Alleged violations of the ALRB's access regulations by a labor organization require a three-step analysis: 1) Did the alleged conduct in fact occur? 2) If so, did the conduct violate the provisions of the board's access regulation?^{5/} 3) And, if so, does such "excess access" constitute misconduct warranting the setting aside of the election?

The board has held that the failure of a winning labor organization to abide by the requirements of the access regulation will not per se constitute grounds for overturning an election absent evidence that the misconduct affected the outcome of the election.^{6/} Allegations of excess access are assessed on a case by case basis to determine in each instance whether such misconduct occurred.^{7/} Minimal and insubstantial encroachments on an employer's premises beyond the scope of the rule which do not interfere with the workers' ability to freely choose a collective bargaining representative are considered de minimis conduct insufficient to overturn an election.^{8/} The conduct must have an intimidating or coercive impact on the employees or must in some other way interfere with their choice in the election.^{9/}

5/ Regulations Section 20900, et seq.

6/ Dessert Seed Co., Inc., 2 ALRB No. 53 (1976)

7/ K.K. Ito Farms, 2 ALRB No. 51 (1976)

8/ Toste Farms, Inc., 1 ALRB No. 16 (1975); John V. Borchard Farms, 2 ALRB No. 16 (1976)

9/ K.K. Ito Farms, 2 ALRB No. 51 (1976); Hiji Brothers, Inc., 3 ALRB No. 1 (1977)

Even if the labor organization's conduct does not violate the provisions of the access regulation, the board may still find that the conduct restrains the workers in the exercise of their rights under the Act and thereby warrants setting the election aside.^{10/}

A. December 1, 1976

Neal Jack gave uncontradicted testimony that he saw four individuals on the employer's property at the Trifolium 2 lettuce field at 8 a.m. after work had begun. Jack was unsure whether one or two crews of thinners were at work; up to 82 employees could have been present if two crews were at work, thereby permitting six union organizers under Regulations Section 20900(e)(4)(A). The record is absent any evidence that the four individuals were confronted and asked to leave by employer agents.

It is not clear from the evidence that all four of the individuals seen by Neal Jack were UFW organizers, but it is established that the four were present on the employer's property during the thinning crews' working hours in violation of the time limitations of Regulations Section 20900(e)(3)(A) and (B). However, even assuming that all four individuals were UFW representatives, the employer introduced no evidence showing that the organizer or the other three individuals interfered in any way with the thinning crews' work. Nor was there any evidence that their conduct intimidated the employees or was in any way coercive. The mere presence of union organizers for an undetermined period of time

^{10/} Toste Farms, Inc., 1 ALRB No. 16 (1975); K.K. Ito Farms, 2 ALRB No. 51 (1976)

during working hours without a showing of some type of interference with the workers' free choice in the election is de minimis conduct insufficient to overturn an election. See discussion above.

B. December 3, 1976

Steve Jack testified without contradiction that three persons whom he identified from personal knowledge as UFW organizers were on the employer's property at the Trifolium 2 lettuce field at 7 a.m., after work had begun. He testified that two crews - approximately 82 employees - were present; six union organizers were therefore proper under Section 20900 (e) (4) (A). Nothing in Jack's testimony indicates that the organizers were talking to the workers; nor was it shown that any employer representative informed the organizers that they were improperly on the premises or asked them to leave.

The testimony of Steve Jack and Arturo Mendoza indicates that the organizers believed they were not on the employer's property and that they did not want to be on the property at times not allowed by the access rule. When it was verified they were in fact on Jack Brothers land, the organizers promptly left until the lunch break when their presence on the property was proper under the access rule.

The only violation of the access regulation on this date was the physical presence of three UFW organizers on the employer's property for an undetermined period of time outside the regulation's limitations; the organizers otherwise complied with the rule.

The employer failed to present any evidence that the mere presence of the organizers interfered with the crews' work or in some way coerced the workers' participation in the election. Absent

such a showing this conduct is de minimis and insufficient to set this election aside. See discussion above.

C. December 4, 1976

According to the testimony of Neal and Steve Jack and Arturo Mendoza, eight UFW organizers were at the Trifolium 2 lettuce field at 6:30 a.m., before the start of work. They all identified themselves to Steve Jack, on request, in compliance with Section 20900 (e) (4) (B). Two crews of approximately 40-45 workers were present; therefore six organizers were proper under Section 20900 (e) (4) (A). Two of the organizers left at 7 a.m., and two of the remaining six organizers continued to talk to workers in the field for a short time after work began at 7 a.m. The conversation between Neal Jack and Arturo Mendoza was witnessed by at most twenty workers.

The mere presence on the employer's property of two organizers in excess of the access rule's limitations and the violation by two other organizers of the rule's time limits with regard to organizing workers is conduct insufficient to set aside an election absent some showing that the employees were thereby adversely affected in their choice of a collective bargaining representative.

The employer presented no evidence that the four organizers involved in violations of the access rule coerced or intimidated the crews. No employees testified to being adversely affected in their freedom of choice in the election by the two organizers who continued to talk with workers after work began, and Murgia and Ceballos spoke only to Mendoza, not to either of the crews. The animated conversation between Neal Jack and the

organizers was witnessed only by the crew that was ineligible to participate in the election. See discussion above.

The evidence presented by the employer establishes no more than de minimis conduct by the UFW organizers and does not warrant setting aside this election.

D. December 8 and 9, 1976

The employer's two steady crews of tractor drivers and general hand laborers gathered in the Brawley shop yard between 5 a.m. and 6 a.m. at which time their workday began. During that hour, the access regulation permitted the UFW to have four organizers present to talk to the two crews. It was also proper for the UFW to have two organizers present between 4:30 a.m. and 5:30 a.m. to speak to the crew of irrigators. On December 8 and 9 only two UFW organizers, Arturo Mendoza and Lupe Murgia, organized at the shop yard. On these two occasions they stayed on the premises until 6 a.m., leaving promptly when the three crews departed the yard for the fields.

The only violation of the access regulation on these dates potentially occurred when the two UFW organizers talked with irrigator employees between 5:30 a.m. and 6 a.m. The evidence indicates that on December 8, the organizers were put on notice by the employer that the irrigators were on company time as of 5:30 a.m., even though they did not leave for the fields until 6 a.m. If employees on company time but not yet at their work places in the fields are considered to be "at work" within the meaning of the access regulation, then UFW organizing among the irrigators after 5:30 a.m. constituted a violation of Section 20900(e)(3)(A).

Arturo Mendoza testified without contradiction that, as the organizing drive progressed, the irrigators began mingling with the general laborers in the yard between 5:30 a.m. and 6 a.m. and that they joined conversations between the organizers and the hand laborers who were the UFW's main organizing targets. Thus, the irrigators were not in a clearly-defined group singled out by Mendoza and Murgia for organizing after 5:30 a.m.

This violation by the two UFW organizers of the access regulations time limits on organizing was no more than de minimis conduct insufficient to justify setting this election aside. The extent of the violation was that two organizers talked to an undetermined number of workers in the nine-man irrigator crew during 30 minutes on each of at most five occasions. Seventy-four persons voted in the election, and the employer presented no evidence that the nine irrigators, much less the other sixty-five voters, were adversely affected in their choice of a collective bargaining agent by this conduct of the two UFW organizers.

For the reasons discussed above, I find that the UFW violations of the access regulation on the occasions in question had no substantial impact on the outcome of the Jack Brothers and McBurney, Inc. election. I find that the employer has failed to meet its burden of proving that the UFW organizers' conduct intimidated, coerced or otherwise interfered with the employees' free choice in the election. ^{11/} The employer presented no evidence whatsoever on this crucial issue. I therefore recommend dismissing the employer's excess access objection.

11/ K.K. Ito Farms, 2 ALRB No. 51 (1976)

IV. EVIDENCE CONCERNING ALLEGATION THAT THE PETITION FOR CERTIFICATION WAS NOT TIMELY FILED:

At the hearing, the employer and the UFW stipulated to the following facts concerning the employer's allegation that it was not at fifty percent of peak employment ^{12/} when the union filed its petition for certification :

1. During the month of December, 1976, Jack Brothers and McBurney, Inc., employed steady employees who were paid on a weekly basis.. (Joint Exhibits #1 and #2)
2. During December, the employer hired workers through a labor contractor, the "El Don Company," which paid its employees on a daily basis. (Joint Exhibits #1 and #2)
3. The peak agricultural employment of steady employees by Jack Brothers for calendar year 1976 occurred during the period December 2-8, and the peak employment of labor contractor employees occurred during December 2-7. (Joint Exhibit #1)
4. The steady employees eligible to vote in the election were those on the payroll during the period December 2-8; the eligible labor contractor employees were those employed during December 8-13. (Joint Exhibit #1)
5. Sunday, December 5 and Sunday, December 12 were not work days at Jack Brothers. (Joint Exhibit #1)
6. The petition for certification was filed by the UFW on Tuesday, December 14. (Board Exhibit #1)
7. The five working days at Jack Brothers immediately preceding the filing of the petition for certification were: December 8, 9, 10, 11 and 13. (Joint Exhibit #1)
8. The payroll period for the employer's steady employees immediately preceding the filing of the petition for certification was December 2-8. (Joint Exhibit #1)
9. The number of steady employees working on each day of the period December 2-8 was as follows:

<u>Day</u>	<u>12/2</u>	<u>12/3</u>	<u>12/4</u>	<u>12/5</u>	<u>12/6</u>	<u>12/7</u>	<u>12/8</u>
<u>Steady Employees</u>	39	38	34	0	36	40	38

(Joint Exhibit #1)

12/ Section 1156.4 of the Labor Code states: "[T]he board shall not consider a representation petition...as timely filed unless the employer's payroll reflects fifty 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."

10. The number of labor contractor employees working on each day of the period December 2-7 were as follows:

<u>Day</u>	<u>12/2</u>	<u>12/3</u>	<u>12/4</u>	<u>12/5</u>	<u>12/6</u>	<u>12/7</u>
L.K.						
<u>Employees</u>	82	84	82	0	79	82

(Joint Exhibit #1)

11. The number of labor contractor employees working on each of the five working days immediately preceding the filing of the petition for certification were as follows:

<u>Day</u>	<u>12/8</u>	<u>12/9</u>	<u>12/10</u>	<u>12/11</u>	<u>12/13</u>
L.K.					
<u>Employees</u>	41	0	0	0	0

(Joint Exhibit #1)

V. PEAK: ANALYSIS AND CONCLUSIONS

Section 1156.4 of the Agricultural Labor Relations Act states that a petition for certification is not timely filed unless the employer's payroll in the period immediately prior to the filing of the petition reflects fifty percent of its peak agricultural employment for the current calendar year. The same section explains that the purpose of this requirement is to provide for the fullest possible election participation by agricultural employees in light of the seasonal character of employment in the industry.

The implementation of this board policy of maximizing voter participation is initially the responsibility of the board agent who investigates a petition for certification and determines whether it was timely filed. The board agent's determination is subject to review by the board which must ultimately decide whether the method used by the agent for calculating peak employment was proper.

The board's decisions have recognized that there is no single proper method for determining peak employment. Employment variables such as payroll periods and turnover differ in each farm setting. The board agent who determines peak must use a method which produces a representative vote in light of the employment pattern at the ranch in question.

The board has provided guidelines for determining peak in several of its decisions. In Mario Saikhon, 2 ALRB No. 2 (1976), the board held that where the measure of peak employment fluctuates greatly due to rapid employee turnover, the proper method for determining employment levels is to take an average of the number of employee days worked on all the days of a given payroll period. The average number of employee days during the payroll period immediately prior to the filing of the petition for certification is then compared to the number of employee days during the alleged peak payroll period to determine whether it is at least fifty percent of the peak figure.

The board developed a different approach to computing peak employment in Luis A. Scattini and Sons, 2 ALRB No. 43 (1976) where the employment pattern differed from that in the Saikhon case. In Scattini, the employer hired two separate groups of employees: steady workers and workers hired through a labor contractor. The two groups were paid on different payroll bases.

The board set forth two different methods of peak computation in Scattini. The board agent might use the Saikhon model and simply determine the total number of employee days worked by both steady and labor contractor employees during the two relevant payroll periods. But the board pointed out that that

method might produce distorted results if the actual peak period is significantly shorter than the payroll period in which it falls. The board therefore established an alternative method (the "Five-Day Approach") of peak computation designed to accommodate the situation where two different classifications of employees have different payroll periods.

Under the Five-Day Approach, the board agent computes the average number of employee days in the relevant payroll periods separately for each class of employees. The average number of employee days for each class is added together to determine the employment level in each relevant payroll period. The peak period for labor contractor employees who are paid on a daily basis consists of the five consecutive days of highest labor contractor employment during the period alleged to constitute peak. The comparative payroll period which precedes the filing of the petition for certification may be either of two possible periods. It may be the five consecutive days of highest labor contractor employment within the steady employees' payroll period prior to the filing of the petition. Or, it may be the five working days immediately prior to the filing of the petition.

In Scattini, the board was not obliged to choose which approach was preferable because in that case the union's petition was timely filed under each of the alternative methods of computation. In the present case, the UFW petition for certification was not timely filed under one of the approaches but was timely filed under the other approaches. The various methods for

determining peak discussed above, as applied to the present case, produce the following results:

1. Saikhon Method

a. Alleged Peak Period :

<u>Day</u>	<u>12/2</u>	<u>12/3</u>	<u>12/4</u>	<u>12/6</u>	<u>12/7</u>	<u>12/8</u>	<u>Total</u>
	82	84	82	79	82	41	<u>Employee Days</u>

Labor

Contractor

Employees

Steady

Employees

<u>39</u>	<u>38</u>	<u>34</u>	<u>36</u>	<u>40</u>	<u>38</u>
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<u>Total</u>	121	122	116	115	122	79	<u>675</u>
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Peak Average Employee Days: 112.5

b. Payroll Period Preceding Filing of Petition:

In the present case, this is the same payroll period as that alleged by the employer to constitute the peak period. The average number of employee days for this period is therefore 112.5, which is at least fifty percent of the peak average employee days. Under this method, the UFW's petition was timely filed.

2. Five-Day Approach:

a. Alleged Peak Period:

1) Steady Employees

<u>Day</u>	<u>12/2</u>	<u>12/3</u>	<u>12/4</u>	<u>12/6</u>	<u>12/7</u>	<u>12/8</u>	<u>Total</u>
<u>Employees</u>	39	38	34	36	40	38	<u>Employee Days</u>
							<u>225</u>
<u>Peak Average Employee Days:</u>							<u>37 . 5</u>

2) Labor Contractor Employees

<u>Day</u>	<u>12/2</u>	<u>12/3</u>	<u>12/4</u>	<u>12/6</u>	<u>12/7</u>	<u>Total</u>
<u>Employees</u>	82	84	82	79	82	<u>Employee Days</u>
						<u>409</u>
<u>Peak Average Employee Days:</u>						<u>81.8</u>
<u>Total Peak Average Employee Days:</u>						<u>119.3</u>

b. Payroll Period Preceding Filing of Petition;

1) Steady Employees

In this case, this is the same payroll period as that alleged to constitute the peak period. The average number of employee days for this period is therefore 37.5.

2) Labor Contractor Employees

a) Method #1: [Use the five consecutive days of highest labor contractor employment during the relevant comparative payroll period of the steady employees.]

<u>Day</u>	<u>12/2</u>	<u>12/3</u>	<u>12/4</u>	<u>12/6</u>	<u>12/7</u>	<u>Total Employee Days</u>
<u>Employees</u>	82	84	82	79	82	<u>409</u>

Average Employee Days: 81.8

Total Average Employee Days: 119.3, which is at least fifty percent of the peak average employee days. Under this method, the UFW's petition was timely filed.

b) Method #2: [Use the five working days immediately prior to the filing of the petition.]

<u>Day</u>	<u>12/8</u>	<u>12/9</u>	<u>12/10</u>	<u>12/11</u>	<u>12/13</u>	<u>Total Employee Days</u>
<u>Employees</u>	41	0	0	0	0	<u>41</u>

Average Employee Days: 8.2

Total Average Employee Days: 45.7, which is less than fifty percent of the peak average employee days. Under this method, the UFW's petition was not timely filed.

The employer argues that Method #2 under the "Five-Day Approach" is the proper method for computing peak employment in

this case. Its basis for this position is that Method \$2 is the best way to gauge the number of employees who will actually participate in an election. By this method, argues the employer, one can determine if there has been a significant drop-off in employment by the time the election takes place. If such a decrease has occurred, the consequence of holding an election would be to allow a smaller group of employees to select a bargaining agent for a significantly larger group of employees who were not allowed to vote.

The Scattini decision directs the board agent who is responsible for determining the timeliness of the filing of a petition to choose that method which, regardless of the employment circumstances, best effectuates the Act's purpose "to provide the fullest scope for employees' [electoral] rights."^{13/} Where a board agent can reasonably determine, by any of several methods approved by the board, that fifty percent of the number of workers employed at the peak period of employment were at work when the petition for certification was filed, it is not an abuse of discretion for the board agent to find that the petition was timely filed.

In the present case, the method of peak computation which results in a finding that the UFW's petition was not timely filed involves the average number of labor contractor employee days in the five working days prior to the filing of the petition. In those five days at the Jack Brothers ranch, one labor contractor crew worked on only one day. Yet, the alternative peak computation method in this case uses the period of the preceding week, at which time an average of over eighty labor contractor employees worked

^{13/} Labor Code Section 1156.4

each day. It would frustrate the purpose of the Act to overturn an election as untimely because the board agent, in determining peak, refused to use a period in which an unrepresentatively small number of employees were at work and chose instead a period in which over fifty percent of peak labor was employed.

The employer's contention that the decrease in labor contractor employment near the election risks the selection of a collective bargaining agent by an unrepresentatively small number of employees is rebutted by the fact that 74 of 83 eligible employees voted in this election. Jack Brothers employed 119 workers at its peak during the election year. Regardless of which period between December 2 and December 13, 1976, is used as the comparative payroll period, the combined number of steady and labor contractor employees on any one day in which both classes of employees were working at Jack Brothers was never less than 79 workers, well over fifty percent of peak. To average the number of labor contractor employees in the last five days before the filing of the petition when an unrepresentatively small number were working gives an unrealistic picture of employment at the Jack Brothers ranch during this period.

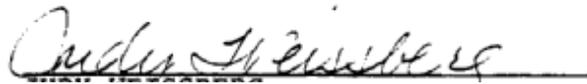
For the reasons discussed above, I find that Jack Brothers and McBurney, Inc., was at fifty percent of its peak employment when the UFW filed its petition for certification. I therefore recommend that the employer's peak objection be dismissed.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions herein, I recommend that the employer's objections be dismissed and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive bargaining representative of all the agricultural employees of the employer in the State of California, excluding the Cal-Tom packing shed employees.

DATED: November 7, 1977

Respectfully submitted,

A handwritten signature in cursive script, reading "Judy Weissberg", written over a horizontal line.

JUDY WEISSBERG

Investigative Hearing Examiner