

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

CALIFORNIA LETTUCE CO.,)	
)	
Employer,)	Case No. 78-RC-4-E
)	
and)	5 ALRB No. 24
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Petitioner.)	
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DECISION AND CERTIFICATION
OF REPRESENTATIVE

On February 20, 1978, following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), an election was conducted among the agricultural employees of the Employer. The Tally of Ballots showed the following results:

UFW	27
No Union	4

The Employer filed timely objections, two of which were set for hearing. On April 4, 1978, the Employer and the UFW submitted a stipulated record to the Investigative Hearing Examiner(IHE) Newman Strawbridge.

On May 18, 1978, the IHE issued his initial decision in this matter, recommending that the objections be dismissed and that the UFW be certified as the exclusive collective bargaining representative of the Employer's agricultural employees in the State of California. The Employer filed

timely exceptions and a supporting brief.

The case was remanded to the IHE to obtain additional information concerning the erratic patterns of days worked each week during Respondent's twelve-week season, and after a hearing on January 9, 1979, the IHE submitted explanatory documents by agreement of all parties.

In his initial Decision, the IHE found that the Regional Director had properly applied the formula set out in Mario Saikhon, Inc., 2 ALRB No. 2 (1976), for determining peak employment where there is high turnover, as in the instant case. He found that there were 114 employees in the peak payroll period of January 10-17, 1978, and 47 employees in the eligibility payroll period of February 8-14, 1978. Applying the Saikhon formula to these figures, he concluded that since the average number of employees per day during the eligibility period exceeded fifty percent of the average during the peak employment period the election petition had been timely filed, and he recommended certification of the UFW.

The Board has considered the objections and the entire record in light of the Employer's exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the IHE and to adopt his recommendations.

The parties stipulated that the peak employment period was the week of January 10-17, during which the average number of employees per work day was 61.3. The Employer's records show that during the previous week, January 3-10, there was a higher average number of employees per work day, 64.8. During the eligibility.

week, February 7-14, a total of 102 employee-days of work were recorded. Work was performed on only three days of that week. Dividing the total employee-days by three yields an average of 34 employees per day, which exceeds fifty percent of the average of either the stipulated week of peak or the actual week of highest employment. Thus, the central issue in this case, as the dissent notes, concerns the appropriateness of dividing the total of employee-days during the eligibility week by three to determine the average number of employees per work day during that week. Does the Saikhon formula, which declares that the proper measure is "the average of the number of employee days worked on all the days of the payroll period," require us to focus exclusively on the number of calendar days in the payroll period? Or is it more consistent with our statutory mandate and the intent of the unanimous holding in Saikhon if we interpret the language from Saikhon quoted above as directing attention to "all the days of the payroll period" which were representative days?

The statement of the full Board in Bonita Packing Co., Inc., 4 ALRB No. 96 (1978), at page 10, is applicable here:

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 considering the issue of representativeness in the context of an individual case we are guided by Section 1156.3(c) of the Agricultural Labor Relations Act, which concludes with the statement "Unless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." With

this language, the legislature has in effect established a presumption in favor of certification and indicated that the burd of proof rests upon the party objecting thereto.

Here we must determine whether, in view of the fluctuating work pattern during the Employer's twelve-week harvest period, a work-week of three working days was representative. The Employer's records show that the harvest period included no weeks of seven workdays, only two weeks of six workdays, one week of five workdays, one week of four workdays, three weeks of three workdays, one week of two workdays, and one week in which there was only one day of work. See Appendix A. The number of days to be worked each week was usually determined by the Employer. A declaration submitted by Bob Smith, General Manager of the Employer, states in part:

3. For every Sunday of the period beginning December 19, 1977, and ending on February 28, 1978, the Company's employees did not work because Sunday is the normal day off for the company.

4. For the days of December 23, 1977, through December 27, 1977, (excluding Sunday, the 25th) the employees of the Company refused to work because of muddy field conditions.

5. For the remaining days of where there appears no employee worked, a variety of agricultural circumstances apply: weather, bad fields, lack of market, etc.

This evidence and the record as a whole shed no light on which factors were responsible for no work being performed on specific days. Although given two opportunities to do so, the Employer did not establish that the Regional Director erred in finding that the three days on which no work was performed during the

eligibility week were unrepresentative. We therefore affirm the Regional Director's finding that the election was conducted at a time when the Employer was at not less than fifty percent of its peak employment.

The dissent's contention that to obtain an average number of employees per day during the eligibility week we should divide the total of employee-days worked by the six calendar days of the payroll period rather than by the three days on which work was actually performed seems to us overly mechanical and, in the circumstances of this case, quite unrealistic. That approach would require a petitioner to outguess the vagaries of weather and markets, and might encourage employers to manipulate payrolls and work periods to affect the timing of elections. Moreover, the approach suggested by the dissent is inconsistent with this Board's precedents. In an early case applying the Saikhon formula, this Board determined the average number of employees per day for each of the two applicable payroll periods by dividing the total of employee-days worked on Monday through Saturday by six, although some employees worked on each Sunday. The Board there stated, "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 of the other six days." Ranch No. 1, Inc., 2 ALRB No. 37 (1976), p. 2, fn. 4. Similarly, in High & Mighty Farms, 3 ALRB No. 88 (1977), the Board determined the daily average of employees for a week in which work was performed on only three days by dividing the week's total

of employee-days by three, stating, "To average these employees over a full seven-day payroll period when they only worked the last three days would give a distorted average." High & Mighty Farms, supra, at p. 4. We do not believe that the facts of the present case warrant a departure from the approach taken in these past cases.

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 California Lettuce Co. for the of collective bargaining, as defined in Labor Code Section 1155.2(a).

Dated: March 29, 1979

GERALD A. BROWN, Chairman

HERBERT A. PERRY, Member

APPENDIX A

Stipulated Peak - Week of January 10-17, 1978
 Eligibility Period - February 8-14, 1978

Week Ending	No. of Days Worked	No. of Employees Working	Average No. of Employees per each day worked
Dec. 20	1	26	26
27	2	44	28.5
Jan. 3	5	61	24.2
10	6	148	64.8
17	6	113	61.3
24	3	83	63.3
31	3	43	34.3
Feb. 7	4	43	39.3
14	3	47	34
21	5	48	36.3
28	2	47	42.5
March 7	4	(?)	42.5

"MEMBER RUIZ, Concurring in the result reached by the majority:

Despite the fact that the Employer failed to except to the IHE's finding that there were only three representative days in the eligibility period, and also failed to present evidence in support of a finding to the contrary, the dissent would have us decide this case by concluding that the entire 'week consisted of representative days. I, for one, am not prepared to make such a complex finding on this record.

On December 8, 1978, we remanded this case "for further development of the record, since the stipulated record in this case does not contain sufficient information to allow the Board to determine whether the Employer was at 50% of peak employment during the election eligibility week". We specifically sought information on "the reason or reasons, if any, why employees were or were not employed on each day of the period from December 19, 1977 to February 28, 1978". At the second hearing the Employer submitted several documents in support of its "peak" objection.

The record is still sparse and hardly suitable for deciding or defining for the first time what is or is not a representative day.

The IHE found that based on the Employer's payroll records the peak period had six representative days while the eligibility period had three representative days. This basically is that dark and foreboding formula about which the dissent repeatedly warns the majority. It is this drastic formula that will lead to "distortions", "manipulations", "anomalies" and produce "an illusion". I submit that problem is simply what is or what is not a "representative day".

I agree with the dissent that our first determination of whether the peak requirement has been met should be by the employee count. That failing, I also agree that the Saikhon formula should next be used. I also emphatically agree with the dissent that those days "in which little or no work is performed due to factors external to the amount of work available such as holidays, inclement weather etc." should be excluded as unrepresentative days in using the Saikhon formula. The Employer gives four reasons for days in which no employees worked: weather, bad fields, lack of market and the refusal of employees to work in muddy fields. Aside from the muddy fields we are not told what days or how many days the weather or the bad fields or the lack of market were responsible for the employees not working. Obviously those days in which the weather was responsible would be unrepresentative days. Query: Did those days occur during the eligibility week? Query: Would days in which there were

muddy fields also be unrepresentative? There was apparently work available on those muddy days just as there would be on a holiday or on a day it rained. Are muddy fields "factors external" to the amount of work available? Are muddy fields "bad fields"? At what point does the Employer agree that muddy fields are too muddy to work? Do they then become bad fields? How long after a rain are fields muddy? What are bad fields? Is there work available on bad fields? Do "external factors" make fields bad? And what is "lack of market"? Are there crops to be picked when there is a "lack of market"? Is the "lack of market" on the East Coast an "external factor"? Is it as unpredictable as the weather? None of these questions can adequately be answered on this record.

Using Figure A the dissent infers that the Employer was at full-scale harvest from January 2 through January 20. Perhaps it was. But perhaps also it was attempting to salvage crops that were rotting as a result of the workers' refusal to work in muddy fields. In the 10 days immediately preceding this so-called "full-scale harvest" employees worked but three days. During the first five of those days there was work available but the workers refused to work. During the next three days the smallest number of daily employees during the entire 12-week harvest season worked.^{1/} (On those three days were a majority of the workers still protesting the muddy fields?) These days were followed by

^{1/} The crews on those days numbered 10, 13, 16, a significant drop from the 30 that had worked before the fields became muddy and far less than the 50 that were used on the first day of the "full-scale harvest".

two days in which no one worked. What had happened to the crops in the muddy fields that the workers had refused to pick and the crops that ripened each succeeding day over that 10-day period? Were they rotting? None of these questions can be answered on this record. Inferences can be drawn from this record. Some can-even be labeled "apparent". At best they are speculative and certainly confusing. Why, for example, is it that, unless one takes into account "unrepresentative days", during a 12-week harvest season there were only three weeks in which an election could have been held? ^{2/} It seems to me that we have come to consider the harvest season as virtually synonymous with peak. Does this mean that during the entire year an election can be held at the Employer's operation for but three weeks? The irony is that, despite their solemn warnings, the dissent is in effect doing much the same thing that they accuse the majority of doing. They are in fact making a finding that during the week of February 8 through February 14 there were no "unrepresentative days". I submit that given the state of this record that is impossible.

Section 1156.3(c) places upon the person objecting to an election the burden of raising such objections. Thereafter, if the Board finds, "on the record of such a hearing" that the objection has merit, it may refuse to certify the election. Subsection (c) concludes: "Unless the board determines that

^{2/} Under the Saikhon formula the situation is even worse. Using the "actual" peak week of January 4 through January 10, only two elections could have been held during the entire 12-week harvest.

there are sufficient grounds to refuse to do so, it shall certify the election." These words, in my opinion, establish a strong presumption in favor of certification. Despite the burden that it has, and the two distinct opportunities it had in this case to meet that burden, the Employer has come forward with little to dispel that presumption.

I would certify the election.

Dated: March 29, 1979

RONALD L. RUIZ, Member

Members HUTCHINSON and McCARTHY dissenting:

We do not agree that the Employer was at 50 percent of peak employment during the eligibility week.

Based upon the stipulated facts the Employer's payroll period runs from Wednesday through Tuesday with no work done on Sundays.

It was stipulated that the Employer reached peak employment during the week of January 11 through January 17 when 113 different employees worked the six days of that week averaging 61 1/3 employees per day. The actual peak, however, occurred the previous week when 148 different employees worked for an average of 64.8 employees per day.

During the eligibility week only 47 employees worked during three of the six work days totalling 102 employee days, and averaging 17 employees per day over the normal six day week.

Thus by a straight employee count the Employer was at 32 percent of peak, and by application of the formula adopted in

Mario Saikhon, 2 ALRB No. 2 (1976), only at 26 percent of peak, during the eligibility week.

Although the Saikhon, supra, decision declared that the proper measure was "the average of the number of employee days worked on all the days of the payroll period," (emphasis added), the IHE concluded that the three work days during the eligibility week in which no one worked were "unrepresentative" and therefore divided the total employee days worked (102) by three instead of six producing a number greater than 50 percent of 61 1/3. The error, in our view, is the conclusion that three of the six work days in the eligibility week were unrepresentative simply because no one worked. The only evidence available to us regarding the lack of work is the statement of the company manager quoted in the majority opinion. "Weather, bad fields, lack of market etc," seems, to us, to describe the normal conditions experienced in harvesting operations. That no one worked during three of the days in the eligibility week considered in the light of the manager's statement and the overall work pattern at the ranch, is representative of the fact that there was little or no work to do which, in turn, is representative of the fact that the Employer was no longer at peak.

The problem with the IHE's approach is that it actually produces the kinds of distortions that the Saikhon formula was designed to prevent. Several illustrations of the anomalies that can occur are provided by the facts of this case. Figure A represents a summary of the exhibits which shows the total number of employees working on each day of the harvest season.

For example, there were a total of 121 employee days logged by 61 employees during the week of December 28 to January 3; 14 employees and 19 employee days more than during the eligibility week. Yet the IHE's formula results in a finding that the 50 percent of peak requirement would not be met for the week of December 28 while it would for the week commencing February 8.

Consider also that during the week of January 18 to 24 there were 30 fewer employees working a total of 178 fewer employee days than during the previous week. But the formula adopted by the majority produces a result which indicates that the employment level during the week ending January 24 was actually higher than the previous week.

Any rule fashioned in this case would be applicable in other cases as well, including rival union and decertification petitions. The formula adopted by the majority leaves too much room for manipulation and as a practical matter encourages the filing of petitions when fewer employees are eligible to vote, contrary to the legislative directive to provide the fullest scope possible for employees' enjoyment of their rights to a secret ballot election. Labor Code Section 1156.4. This can be illustrated by a hypothetical example applied to the facts of this case. If we assume that a crew of 33 employees had worked only one day of any week during the applicable calendar year, then the peak requirement would be satisfied under the IHE's formula.

In our view the first determination should be whether or not the peak requirement is satisfied by the employee count method. Donley Farms, ALRB No. 66 (1978). If that method produces a finding

that the peak requirement is not satisfied, then the Saikhon formula should be used, excluding as "unrepresentative" only days in which little or no work is performed due to factors external to the amount of work available such as holidays, inclement weather, etc. Even in such cases care must be taken to avoid a result which excludes a substantial majority of the affected employees from the process. It is quite possible, for example, that inclement weather may cause a loss of several days of a given week thereby reducing the number of employees actually working that week to a totally unrepresentative number. It is clear that in some cases the Board will have to go beyond application of mathematical formulas to decide whether or not a sufficiently representative vote has been obtained.

The present case comes to us on a stipulated record which leaves many unanswered questions. However, there are other facts in the record which contribute to our conclusion that the petition was not timely filed.

A total of 2,191.5 hours were worked by all employees during the "peak" week. Only 612 hours were recorded during the eligibility week representing 28 percent of the total worked during the "peak" week.

It is apparent from the records that the Employer was at full scale harvest operations from January 2 through January 20. It is reasonably inferable from the record that the size and number of crews substantially decreased after the 20th. The highest day of employment occurred on January 10 when 87 persons worked. On only two occasions subsequent to the 20th, were 50 percent of that"

number employed. Neither of those days occurred during the eligibility week. Given the degree of employee turnover, it is reasonably inferable that close to 200 people worked during the harvest. Only 31 people voted in the election; only 15 to 20 percent of the people affected by the election participated in the process.

An analysis of all of these factors leads us to conclude that either the straight employee count or Saikhon method are true indicators that the Employer was not at 50 percent of peak employment during the eligibility week. The formula adopted by the majority produces only an illusion that the peak requirement has been satisfied. We believe the purposes of the Act are best served by dismissing the present petition as untimely.

Dated: March 29, 1979

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

FIGURE A.

WEEK	WED	THUR	FRI	SAT	SUN	MON	TUE	ACTUAL NO. OF EMPLOYEES	TOTAL EMPLOYEE DAYS	AVERAGE OVER 6 DAYS	AVERAGE PER THE FORMULA
12/21-12/27	31	30	0	0	0	0	0	44	61	10	30.5
12/28-1/3	10	13	16	0	0	50	32	61	121	20.2	24.2
1/4-1/10	51	64	51	67	0	69	87	148	389	64.8	64.8
1/11-1/17	71	65	59	49	0	60	64	113	368	61.3	61.3
1/18-1/24	60	65	65	0	0	0	0	83	190	31.7	63.3
1/25-1/31	0	37	35	0	0	0	31	43	103	12	36
2/1-2/7	40	40	40	0	0	0	37	43	157	26.2	39.3
2/8-2/14	38	43	0	21	0	0	0	47	102	17	34
2/15-2/21	39	36	37	0	0	33	42	48	187	31.2	37.4
2/22-2/28	0	0	0	0	0	43	44	47	87	14.5	43.5
3/1-3/7	42	43	45	40	0	0	0	Unk	170	28.3	42.5

CASE SUMMARY

California Lettuce Co,

Case No. 78-RC-4-E 5

ALRB No. 24

IHE DECISION

On February 20, 1978, a representation election was conducted among the employees of the Employer, California Lettuce Co. The official Tally of Ballots showed the following results: UFW 27; No Union 4. The Employer filed timely post-election objections, two of which were set for hearing. The case was submitted to an Investigative Hearing Examiner (IHE) on the basis of an all-party stipulation of facts.

Both objections concerned the requirement in Labor Code Section 1156.4 that the petition be filed at a time when the number of employees is not less than 50 percent of the Employer's peak employment for the current calendar year.

The Employer objected that the Board Agent abused his discretion by determining that the election was timely under the Saikhon formula, and argued that he should have used a straight "employee count" approach; and that, under an employee-count approach, the petition was not timely filed pursuant to Section 1156.4.

In applying the Saikhon formula, the IHE found that there were three representative days during the eligibility payroll period and six representative days during the comparable peak payroll period. He further found that the Saikhon method of computing peak employment was applicable Board precedent at the time of the filing of the petition herein, that the Board Agent did not abuse his discretion by applying it, and that • under the Saikhon approach the petition was timely filed under Labor Code Section 1156.4. Accordingly, he recommended dismissing the petition and certifying the UFW.

BOARD DECISION AND CERTIFICATION OF REPRESENTATIVE

The Board remanded the case to the IHE for additional evidence concerning the basis for his findings as to representative days in the relevant payroll periods. In the majority opinion, Chairman Brown and Member Perry held that in applying the Saikhon formula, the Board should not look to the number of calendar days in the relevant payroll periods, but should consider which days in each period were representative. Noting that the statute places the burden of proof on the objecting party, the majority concluded that despite two opportunities to do so, the Employer in this case failed to establish that the data used by the Regional Director in applying the Saikhon formula were inappropriate in this case.

Member Ruiz, concurring in the result and in the majority's conclusion that the Employer failed to sustain its burden of proof, noted that the factors recited by the Employer, in

explanation of the low number of days worked during the eligibility period, leave unanswered significant questions concerning the definition of an unrepresentative day and permit at best speculative and confusing inferences.

Members Hutchinson and McCarthy, dissenting, would define an unrepresentative day as a day in which little or no work is performed due to factors external to the amount of work available, e.g., holidays, inclement weather, etc. They would find that the Employer's statement that work was not performed due to Weather, bad fields, lack of market, etc." establishes that there were six representative days during the eligibility period, and that the petition was therefore untimely by either an employee-count or the Saikhon formula. They would also find that the petition was untimely based on other factors, such as hours worked, turnover, and the number of employees participating in the election, which indicate that the election was conducted among an unrepresentative group of employees.

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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.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

CALIFORNIA LETTUCE CO.,

Employer,

Case No. 78-RC-4-E

and

UNITED FARM WORKERS OF
AMERICA AFL-CIO,

Petitioner.

Richard B. Andrade, of Dressier,
Stoll and Jacobs, for the Employer.

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

DECISION

Statement of the Case

Newman Strawbridge, Investigative Hearing Examiner: The case was submitted for decision upon a stipulated record agreed to by the petitioner, United Farm Workers of America, AFL-CIO (hereinafter the "UFW"), and the employer, California Lettuce Co. ^{1/}

^{1/} On March 13, 1978, the Executive Secretary scheduled an investigative Hearing pursuant to 8 Cal. Admin. Code §20365 (g) for April 5, 1978 at Holtville City Hall, Civic Center, 121 West 5th Street, Holtville, California.

On April 4, 1978, representatives of California Lettuce Co. and the United Farm Workers, AFL-CIO, met and stipulated to the admissibility of three documents: 1) Payroll record of California Lettuce Co. for the week ending January 17, 1978. 2) Payroll record of California Lettuce Co. for the week ending February 14, 1978. 3) A document reporting the total number of employees per day employed by California Lettuce Co. from December 19, 1977 to February 28, 1978.

The representatives also agreed that post-hearing briefs supporting the contentions of each party would be filed with the Executive Secretary by April 17, 1978. These briefs and documents, marked as Exhibits 1, 2, and 3, provide the basis for the recommendation herein submitted to the Board.

A petition for certification was filed on February 15, 1978, by the UFW. An election was held on February 20, 1978. The results were:

United Farm Workers	27
No Union	4

The employer filed a timely objections petition seeking to set aside the election on four grounds. The Executive Secretary dismissed two objections, and set for hearing the remaining two objections, which allege: 1) that the Board improperly conducted an election when the employer was not at least at 50 percent of peak employment, as required by §1156.4 of the Act, and 2) that the regional director abused his or her discretion in calling the election.

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

I.

FINDINGS OF FACT

A. Peak Period of Employment

The employer contends that its period of peak employment was during the seven-day payroll period which ended January 17, 1978.^{2/} The documents submitted show the actual employment figures for all

^{2/} The employer has only one payroll period for all workers. The period begins on Wednesday, ends the following Tuesday, and excludes Sunday. There are, therefore, no complications as to different time periods.

relevant periods, including the pay period ending January 17, 1978, as follows:

January 11.	71 workers
January 12.	65 workers
January 13.	59 workers
January 14.	49 workers
January 15.	- - - - -
January 16.	60 workers
January 17.	64 workers

An analysis of this period indicates a considerable turnover. One hundred and fourteen different individuals worked for California Lettuce Co., during the peak week. More than half worked three days or less. Of the 71 workers who worked the first day of the payroll period (Wednesday, January 11), only 37 workers or 52 percent were still working on the last day of the payroll period (Tuesday, January 17). The precise breakdown of the days worked per worker is as follows:

18 workers worked all 6 days	(16% of work force)
17 workers worked for 5 days	(15% of work force)
18 workers worked for 4 days	(16% of work force)
11 workers worked for 3 days	(9% of work force)
17 workers worked for 2 days	(17% of work force)
32 workers worked only 1 day	(29% of work force)

B. Eligibility Period

The stipulated record shows the following employment figures for the seven-day payroll period immediately preceding the filing of the petition for certification:

February 8	38 workers
February 9	43 workers
February 10	- - - - -
February 11	21 workers
February 12	- - - - -
February 13	- - - - -
February 14	- - - - -

The turnover was considerable less during the eligibility period than during the peak period.

A total of 47 different workers labored during the eligibility period. Sixteen employees worked all three days, 23 employees worked two days, and 7 employees worked only one day.

C. Findings

Based upon an examination of the payroll records submitted by the employer and stipulated by the UFW, I make these findings of fact:

1. That the payroll period from January 10-17, 1978 contained six representative days and that the eligibility period contained three representative days.
2. That the total number of employee days during the peak period was 368 and 102 during the eligibility period.
3. The average employee days, computed per Saikhon, during the peak period was 61.3 employees per day and for the eligibility period, 34 employees per day.

II.

LEGAL ANALYSIS

The question presented is whether, in these circumstances, the Board agent abused his or her discretion in following Saikhon's averaging methods as opposed to Valdora's employee count.

Under our Act, when a petition for an election is filed, the regional director must make a factual investigation to determine

if a "bona fide question of representation exist."^{3/} The regional director must determine several issues, one of which is whether it may reasonably be determined that the peak requirement was met.^{4/} In doing this the regional director must follow the guidelines set down by the Board. At the time of this election the method for determining peak in circumstances involving turnover was that set out in Mario Saikhon^{5/} and if applicable the Ranch 1^{6/} and Scattini^{7/}

^{3/} Cal. Lab. Code §1156.3; 8 Cal. Admin. Code §20300 (i) of the Board's Regulations authorize the regional director to dismiss a petition for certification "whenever the contents of the petition or the administrative investigation of the petition disclose the absence of reasonable cause to believe that a bona fide question concerning representation exists, or the unit petitioned for is not appropriate, or there is not an adequate showing of employee support pursuant to 8 Cal. Admin. Code §20300 (i)."

^{4/} Cal. Lab. Code §1156.3 which reads (in part): "Upon filing of such a signed petition, the Board shall immediately investigate such petition, and if it has reasonable cause to believe that a bona fide question of representation exists, it shall direct a representation election. . ."

^{5/} Mario Saikhon, 2 ALRB No. 2 (1976) at 4. "In order to avoid the arbitrary effect of measuring employee complement for purposes of determining peak by the 'employee count' method, a tool of measurement is required which does not fluctuate with turnover and thus can be used to reliably and meaningfully compare periods without regard to the amount of turnover.' We conclude that the proper method for measuring level of employment for purposes of determining peak employment is to take an average of the number of employee days worked on all the days of a given payroll period. . . Thus, the approach we adopt of taking the average of the number of employee days worked on all the days of the payroll period avoids the pitfalls of the 'employee count' method by yielding a consistent measure despite employee turnover. We conclude that this method is the appropriate measure of employee complement for purposes of determining peak."(Emphasis added.)

^{6/} Ranch 1, Inc., 2 ALRB No. 37 (1976) at 2.

^{7/} Luis A. Scattini, 2 ALRB No. 43 (1976).

modifications. The last Board statements to which the regional director could look for guidelines was High and Mighty^{8/} and E. Dell' Aringa^{9/} both of which upheld "Saikhonization."

The employer argues the Board agent should have used the employee count method, citing Kawano Farms^{10/} and Valdora Produce Co.^{11/} The employer argues that since Saikhon, in some circumstances, functions to disenfranchise some migratory workers in favor of "steadies," the method should be rejected.

Valdora and Kawano are not cases where the Board devoted significant attention to peak. The issue in Kawano was what documents could be utilized in the application of appropriate methods. Kawano holds that records from previous years could be used in the determination of peak. Kawano does not shed light on what method of determination should be used and therefore produces little support for the employer's proposition that peak was not met. It could not have been the basis for a Board agent choice against following Saikhon in carrying out his or her duties under 8 Cal. Admin. Code §20300 (i) in this case in which high turnover was involved. In the event the Board agent had disregarded the instructions in Saikhon a clear case of abuse would have been made. The same principle applies to the employer's assertion that the Board agent should have seen in

^{8/} High and Mighty, 3 ALRB No. 88 (1977).

^{9/} E. Dell'Aringa and Sons, 3 ALRB No, 77 (1977).

^{10/} 3 ALRB No. 25 (1977).

^{11/} 3 ALRB No. 8 (1977).

Valdora the basis for overriding the instructions of Saikhon. One paragraph of the entire Valdora decision pertains to the issue and this paragraph is ambiguous. It is difficult to tell exactly what the numbers refer to. Additionally, there is no indication whatsoever that Valdora involved any turnover and was therefore applicable to the circumstances presented the regional director by the petition in this case. Finally, I note that the Board failed in High and Mighty ^{12/} to uphold the Investigative Hearing Examiner's conclusion that peak was met via employee count methods while expressly upholding the Investigative Hearing Examiner's finding that peak was met through "Saikhonization."

The employer further argues that the disenfranchisement effected upon the migrant workers by the Saikhon method should have alerted the regional director to the use of some other method.

First, there was no authority, at the time of the election nor does any exist now, in support of any other method of computation in cases of high turnover. There existed (as now) express authority to compute peak as it was done. Secondly, in developing the Saikhon method the Board was not unmindful that some disenfranchisement resulted, but held in effect, that when balanced against the policies of the Act, it was necessary.

^{12/} 3 ALRB No. 88 (1977).

III.

CONCLUSIONS

A Board agent cannot be held to have abused his or her discretion by following applicable Board precedent. Stated otherwise—it is not unreasonable to follow the instructions of the Board.

It is undisputed that according to Saikhon peak was met.

IV.

RECOMMENDATION

I recommend the Board find that the Board agent in this case did not abuse his or her discretion in finding that the petition was timely filed with respect to peak where appropriate methods indicate that the employer's current payroll reflects 50 percent of peak and there is no showing that (s)he made a clear error in judgment in his or her conclusion upon a weighing of relevant factors. The election should be certified.

DATED: May 18, 1978

Respectfully submitted,



NEWMAN STRAWBRIDGE
Investigative Hearing Examiner

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

CALIFORNIA LETTUCE CO.,

Employer,

and

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

Case No. 78-RC-4-E

INVESTIGATIVE HEARING
EXAMINER'S REPORT ON
REMAND FROM THE BOARD

Mr. Ron Barsamias for the
Employer.

Ms. Anita Morgan and Ms. Alice
Thompson for the United Farm Workers
of America, AFL-CIO.

This case was submitted for decision upon a stipulated record agreed to by the Petitioner, United Farm Workers of America, AFL-CIO, and the Employer, California Lettuce Co. After review of the record submitted, I recommended on May 18, 1977 that the election be certified, i.e., that the peak requirement had been met and that there was no abuse of discretion on the Board agent's part in making the peak determination.

The Board remanded the recommendation and ordered me to seek, either through stipulation or hearing, the following information, which the Board found necessary to determine whether the Employer was at peak.

1. The number of employees who worked each payroll period from December 19, 1977 through February 28, 1978 and;

2. The reason or reasons, if any, why employees were or were not employed on each day of the period from December 19, 1977 to February 28, 1978.

The Employer refused to stipulate to the figures and a hearing was held on January 9, 1978 in El Centro.

The following documents were offered and accepted into evidence. The United Farm Workers of America, AFL-CIO, stipulated to the veracity of the submitted documents.

1. Employer's Exhibit No. 1: A calendar beginning December 19, 1977 and ending March 7, 1978. The number of workers that worked each day is indicated in each box representing the date in question.

2. Employer's Exhibit No. 2: A declaration of Bob Smith the operations manager, providing the reasons workers did not work on particular days.

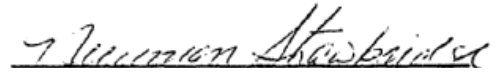
3. Employer's Exhibit No. 3: A summary of the actual number of employees that worked during each payroll period in question.

4. Employer's Exhibit No. 4: Copies of the Payroll Journals, prepared in the normal course of business, which indicates the date and time each worker worked.

I hereby forward these documents to the Board for
consideration.

DATED: January 22, 1979

Respectfully submitted,

A handwritten signature in cursive script, reading "Newman Strawbridge", is written over a horizontal line.

NEWMAN STRAWBRIDGE
Investigative Hearing Examiner