

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

CHARLES MALOVICH,	)	
	)	
Employer,	)	Case No. 77-RC-4-D
	)	
and	)	
	)	
UNITED FARM WORKERS OF	)	5 ALRB No. 33
AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	
_____	)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) , an election was conducted on April 26, 1977, among the agricultural employees of Charles Malovich (Employer). The Tally of Ballots showed the following results:

UFW . . . . .	52
No Union . . . . .	13
Challenged Ballots . . . . .	<u>4</u>
Total . . . . .	69

The Employer filed a post-election objection, asserting that the UFW's Petition for Certification was not timely filed because the Employer's payroll for the pay period immediately preceding the filing of the petition represented less than 50 percent of its peak employment payroll for that calendar year. A hearing on the objection was held on September 14 and November 22, 23, and 29, 1977, before Investigative Hearing Examiner (IHE) Carla Jo Dakin. On May 15, 1978, the IHE issued her initial

Decision, in which she recommended that the objection be dismissed and that the UFW be certified as the exclusive collective bargaining representative of all the Employer's agricultural employees.

The Board has considered the objection, the record, and the IHE's Decision in light of the exceptions and post-hearing briefs filed by the parties, and has decided to affirm the IHE's rulings, findings,<sup>1/</sup> and conclusions as augmented herein, and to adopt her recommendations to dismiss the objection and to certify the UFW.

#### Board Standard of Review in Prospective Peak Cases

The Employer contends that, because its records as to peak employment after the election show that it was not in fact at 50 percent of peak for that year at the time of the petition, this Board may not inquire into the reasonableness of the Regional Director's determination of timeliness, but must overturn the election based upon the actual peak employment figures introduced at the hearing.

This argument presents us with an issue which arises because of the requirement, in Sections 1156.3 and 1156.4 of the Act, that peak be calculated with respect to the "current calendar year." This requirement results in two kinds of election situations: (1) where peak has occurred before the election, a

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<sup>1/</sup>As a defense to the Employer's objection, the UFW attempted to prove that the Employer had manipulated peak employment for 1977 so as to defeat certification. The IHE found insufficient evidence to support such a finding. No exceptions were filed to this portion of the IHE's Decision.

past-peak election; and (2) where peak will occur after the election, a prospective-peak election. In Ranch No. 1, Inc., 2 ALRB No. 37 (1976), we drew a distinction between the kinds of evidence to be considered by Regional Directors and by the Board in determining the timeliness of election petitions. We held there that in past-peak cases determining whether the peak requirement had been met was a purely mathematical computation performed by a comparison of the two relevant payrolls. In prospective-peak cases, on the other hand, we held that crop and acreage statistics are necessary in order to estimate peak for the current calendar year.

In the instant case, our two-stage process of peak determination--initial decision by the Regional Director, followed by Board review of that decision through post-election objections-- has resulted in the actual peak figures becoming known by the time the case reached us. The Employer argues that, because the exact figures are available to use, we should adopt the Ranch No. 1 mathematical-computation approach to our review of the Regional Director's decision, despite the fact that this approach could not have been used by the Regional Director. We disagree. Our experience in the difficult area of peak since our decision in Ranch No. 1 has caused us to question whether peak determination can always be a simple mathematical computation even in past-peak cases. See Bonita Packing Co., Inc., 4 ALRB No. 96 (1978). We decline to apply the Ranch No. 1 method in our review of the decision of a Regional Director who could not have relied on that method. Therefore, for the reasons set forth below, our

review in all prospective-peak cases will be based upon whether the Regional Director's peak determination was a reasonable one in light of the information available at the time of the investigation.

The Act spells out the obligations of the parties and the Board with respect to the determination of peak. Section 1156.3(a)(1) requires that the election petition allege (i.e., be filed when) the number of employees currently employed is not less than 50 percent of peak employment for the current calendar year. Section 1156.3(a) also requires the Board to investigate this and other allegations in the petition, and to direct an election if it has "reasonable cause to believe that a bona fide question of representation exists."

The nature of the pre-election investigation into peak is controlled by Section 1156.4:

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.

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.

Our post-election review of peak determination is triggered by a post-election objection, filed within five days after an election,

which asserts that the peak allegation in the petition was incorrect.<sup>2/</sup>

We disagree with the Employer's contention that in cases like the one before us we should ignore the second paragraph of Section 1156.4, which requires us to estimate peak on the basis of crop and acreage statistics and all other relevant data. We find that such an estimate is necessary in order to carry out the broad purpose of the peak requirement, which is to "provide the fullest scope for employees' enjoyment of their rights under the Act." The rights referred to include not only the right to vote in elections, but also the right to be represented for the purpose of collective bargaining. Our review of the timeliness of election petitions must be based on a determination of whether the electorate is representative of the bargaining unit which may ultimately be certified. As is demonstrated in the instant case, in which an unusually high peak-employment figure resulted from unexpected weather conditions, the number of employees hired in a single year may not accurately reflect the size of the potential bargaining unit.<sup>3/</sup> An estimate based on crop and acreage statistics, as well as "all other relevant data", however, enables us to decide whether the electorate is representative of the

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<sup>2/</sup>The five-day time limit indicates that the review contemplated by the Act is limited to a consideration of the reasonableness of the initial peak determination as of the time of the election. We note that the information and data we are urged to find determinative in the instant case did not exist until six weeks after the election and therefore could not have formed the initial basis for the Employer's objection.

<sup>3/</sup>No showing was made that the high level of employment in 1977 was likely to continue.

numbers of employees who will eventually be affected.

In addition to our interpretation of the statutory guidelines, we find strong policy and administrative reasons for adopting a standard of reasonableness in our review of prospective-peak determinations. The peak requirement and the seven-day requirement of the Act recognize that opportunities for representative elections in agriculture are limited. For this reason, our decisions in representation cases have consistently followed a policy of upholding elections unless it is clear that to do so would violate the rights of employees or a reasonable interpretation and application of the Act. The limited time in which elections may be held each year, in most cases, places a premium on speed and finality in deciding the results of elections.

Adoption of a hindsight approach could result in the setting aside of more elections and the consequent disenfranchisement of more workers, and reliance on exact post-election payroll figures could lead to the postponement of hearings on objections until the end of the calendar year in each case and consequently to an even longer delay in reaching final decisions on the question concerning representation. As a result, the beginning of collective bargaining would inevitably be delayed, for at least a year and often longer, and the bargaining relationship thus gravely weakened.

We reject the approach proposed by the Employer because it might encourage employers to file groundless objections in prospective-peak cases in order to preserve the possibility of

ultimately showing that the peak determination, although reasonable when made, was incorrect in light of subsequent events. The proposed approach might also encourage employers to manipulate the size of their workforces after elections in order to defeat certification. Furthermore, by undermining the Regional Director's authority to determine calendar-year peak in prospective-peak cases this approach might discourage employers from cooperating fully in peak investigations.

As the Employer points out, in several past decisions, notably John J. Elmore, 3 ALRB No. 63 (1977), we have examined figures for peak employment which occurred after an election in reviewing the timeliness of the petition. We note that in Elmore we specifically linked our use of such figures to the importance of avoiding a rehearing on the peak issue in a case already severely delayed by the shutdown of agency operations. More important, in all of these decisions, the hindsight figures showed that the petition had in fact been timely filed. In such a case, there is obviously little need to evaluate the pre-election situation. In no case, however, have we relied on figures arising after an election to overturn a Regional Director's reasonable determination that the peak requirement had been met and that the petition was therefore timely filed. We shall not reject evidence or testimony of post-election peak employment data offered by any party on the issue of the reasonableness of the Regional Director's initial determination concerning the peak requirement and timeliness of the petition. Except in extraordinary circumstances, we will not set aside an election or reverse a Regional Director's reasonable

determination of peak on the basis of hindsight information.

Reasonableness of the Finding of Timeliness

The Employer excepts to the IHE's finding that the Regional Director's determination of timeliness was reasonable. It argues, first, that the Board Agent who investigated the petition failed to request sufficient information from the Employer to enable the Regional Director to accurately forecast peak employment for 1977.

The IHE credited the Board Agent's testimony that, in an effort to project peak for 1977, he examined the Employer's peak payroll records for 1974, 1975, and 1976, and that he requested any 1977 crop and acreage figures which would affect a projection of peak for 1977 based on payroll data from previous years. Charles Malovich told the Board Agent that he expected peak to be "200 plus" and said he had uprooted some trees, was selling some property, and had planted new trees which would not produce for several years. He did not tell the Board Agent about unusually heavy budding of the plum trees, a matter which, the IHE found, the Employer was aware of at the time of the investigation.

The Employer argues that its contention that it was not at 50 percent of peak, and its statement that peak for 1977 would be "200 plus" placed an obligation on the Board Agent to make specific inquiries in order to determine the correctness of the contention. We disagree. Our regulations place on the Employer the burden of providing the Board with information to support its contention that it has not yet achieved 50 percent of its anticipated peak for the calendar year. 8 Cal. Admin. Code



§ 20310 (a)(6) (B) . We find it more reasonable to require the party with access to information to produce it in support of its claim than to require a Board agent to frame speculative questions about possibilities which might or might not affect employment at a particular ranch.

The Employer did not meet its burden by the statement that anticipated peak would be "200 plus". In 1976 more than 200 workers were employed, but the IHE's comparison of the Saikhon<sup>4/</sup> figures for the 1977 pre-petition payroll and the 1976 peak payroll shows that employment of "200 plus" workers would not alone preclude a finding of timeliness. The Employer did not come forward with the information that he expected increased production in 1977, and neither he nor the Board Agent could have known that a heat wave would require the employment of many more workers than was customary during the harvest.

Even if the Employer had provided the Board Agent with all the information it had about the expected increase in production, the record indicates that an increase in employment over past years would not have been predictable. Charles Malovich testified that the heavier budding of the plum trees, without the heat wave, would have resulted in a longer harvest, but he would not necessarily have hired more employees to harvest a greater number of plums. His testimony indicates that his contention at the time of the investigation that he was not yet at 50 percent of

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<sup>4/</sup>The application of the formula in Mario Saikhon, 2 ALRB No. 2 (1976), to the employment figures here is set forth fully in the IHE's Decision.

peak was based on his projection of previous years' employment figures.

The Employer also excepts to the Board Agent's analysis of the information which was provided to him. In his investigation of the timeliness of the petition, the Board Agent relied on the peak figures for the previous three years, most heavily on the figure for 1976, and on the Employer's statement that he had uprooted trees and was selling property.<sup>5/</sup> The Board Agent concluded that 50 percent of the Saikhon average for peak in 1976 was 97. He compared this figure with the actual number of employees on the pre-petition payroll, which he found was 96. Although, according to his calculations, the 1977 figure was one short of the 1976 figure, he determined that the petition was timely, in view of the other information the Employer had provide

The Board Agent made several errors in his analysis of the figures. His computation of the Saikhon figure for the 1976 peak payroll was incorrect--the parties stipulated at the hearing that the 1976 Saikhon figure was between 138 and 142. Moreover, five persons on the pre-petition payroll whom he counted as

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<sup>5/</sup>The Employer comments on the Board Agent's failure to apply the Saikhon principle to 1974 and 1975 data, i.e., to rely on the peak figures for 1974 and 1975. The Board Agent apparently relied mainly on the 1976 figures and on the Employer's statements about crops and acreage and used the previous two years' figures as background information to aid in predicting peak. We find that it was unnecessary for the Board Agent to examine the 1974 and 1975 figures in any greater detail. It is reasonable for a Board agent to assume that the peak figure closest in time to the year of the election is most relevant to an estimate of peak for that year. In *Kawano, Inc.*, 3 ALRB No. 25 (1977), we held that, in estimating prospective peak, Board agents may rely on peak figures for the year preceding the election, plus crop and acreage information for the year in which the election occurs.

eligible employees were actually supervisors. Also, the Board Agent compared the actual number of employees on the pre-petition list with his calculation of the Saikhon average for the 1976 list--a method of calculating peak which the Board has not adopted.<sup>6/</sup>

In our review of determinations of timeliness, we are not limited to a consideration of the methods actually employed by the Board Agent in his or her investigation, but will independently determine whether a finding of timeliness was reasonable based upon the information available at the time.<sup>7/</sup> Regardless of whether the Board Agent's method of analysis here was proper, we find that, based upon the information available to him, a reasonable determination was made that the petition was timely filed. The parties stipulated that the Saikhon figure for the eligibility period was 72, and that the Saikhon figure for peak in 1976 was between 138 and 142. In light of the information that the Employer was, if anything, anticipating a reduction in the number of his trees, it was reasonable to conclude that an estimate of calendar-year peak for 1977 could be based on the peak figures for 1976. Because 72 is greater than 50 percent of 142, we find that the Regional Director's determination that the petition was timely

<sup>6/</sup>Petitioner urges that we adopt this method here. Because we find that a comparison of the correct Saikhon figures for either of the periods would have supported a finding of timeliness at the time of the investigation, we do not reach the issue of the appropriateness of this method.

<sup>7/</sup>To limit our inquiry to the adequacy of the actual investigation would lead to the overturning of timely elections merely because a peak determination which ultimately proved to be reasonable may have been arrived at by inadequate methods.

filed was reasonable. Accordingly, the Employer's objection is 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 Charles Malovich, 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: May 9, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Charles Malovich (UFW)

5 ALRB No. 33  
Case No. 77-RC-4-D

IHE DECISION

In a representation election conducted among the Employer's agricultural employees on April 26, 1977, the Tally of Ballots showed 52 votes for the UFW, 13 votes for No Union, and 4 challenged ballots.

A hearing was conducted on September 14 and November 22, 23, and 29, 1977, dealing with the question, raised by the Employer's post-election objection, as to whether the UFW's Petition for Certification was timely filed.

The Investigative Hearing Examiner (IHE) found that, although the number of employees employed during the pay period immediately preceding the filing of the petition was less than 50 percent of the post-election peak-employment figure for that calendar year, on the basis of the information which the Board Agent received from the Employer during the pre-election investigation, it was reasonable for the Regional Director to conclude that the petition was timely filed.

The Board Agent determined, from the Employer's payroll records and using the Saikhon method, that the Employer was at no less than 50 percent of its prospective peak for the year during the eligibility period. The Board Agent also took into account crop and acreage statistics which were provided by the Employer. The Employer informed the Board Agent that he would be selling some property, that he had uprooted some trees, and that he had planted new trees which would not produce for several years. However, the Employer did not inform the Board Agent of increased budding for the year which would increase his crop. Moreover, a heat wave occurred during the post-election peak week, which greatly increased the number of employees needed to pick the rapidly ripening fruit. Due to these last two factors, the Employer's need for employees increased drastically, an increase which the Board Agent could not have anticipated and therefore did not include in his calculation of prospective peak.

The IHE recommended that the Employer's objection be dismissed and that the UFW be certified.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the IHE, stating that, except in extraordinary circumstances, it would not set aside an election or reverse a

Regional Director's reasonable determination of prospective peak, based on data available to him, on the basis of hindsight information, i.e., the actual peak employment figures introduced at the hearing.

The Board held that its review of the timeliness of election petitions must be based on a determination of whether the electorate is representative of the bargaining unit which may ultimately be represented in collective bargaining. The Board noted that in this case, as an unusually high post-election peak-employment figure resulted from unforeseeable weather conditions, the number of employees actually hired in the peak period may not accurately reflect the size of the normal or reasonably predictable bargaining unit at peak.

The Board found strong policy and administrative reasons for adopting a standard of reasonableness in its review of prospective-peak cases. Adoption of a hindsight approach could result in the setting aside of more elections and the consequent disenfranchisement of more workers, and reliance on exact post-election payroll figures could lead to the postponement of hearings on objections until the end of the calendar year in each case and consequently to an even longer delay in reaching final decisions on the question concerning representation.

CERTIFICATION OF REPRESENTATIVE

The Board dismissed the Employer's objection and certified the United Farm Workers of America, AFL-CIO, was the exclusive representative of all agricultural employees of Charles Malovich.

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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:

CHARLES MALOVICH,

Employer,

and

Case No. 77-RC-4-D

UNITED FARM WORKERS OF  
AMERICA, AFL-CIO,

Petitioner.

Michael P. Melman, A. H. Caplan and  
Associates, for the Employer.

James Rutkowski, ACLU Foundation of  
Southern California, and Jeffrey  
Sweetland, for the United Farm  
Workers of America,  
AFL-CIO.

DECISION

STATEMENT OF THE CASE

CARLA JO DAKIN, Investigative Hearing Examiner: This case was initially convened September 14, 1977 in Bakersfield, California, before Armando Flores, Investigative Hearing Examiner. The case was subsequently reconvened and heard before me on November 22, 23, and 29, 1977 in Bakersfield, California.

The United Farm Workers of America, AFL-CIO (UFW), filed a petition for certification April 20, 1977. The election was held April 26, 1977 with the resulting ballot tally:

UFW	52
No Union	13
Unresolved Challenged Ballots	4
Total Number of Ballots	69
Eligible Voters	91

The employer filed an objection to the election, asserting that the petition for certification was not timely filed according to Cal. Lab. Code §1156.3(a) because the employer's payroll immediately preceding the filing of the petition was less than 50 percent of his peak agricultural employment for the current calendar year. This question of timeliness of the petition is the sole issue in this case.

On July 6, 1977, the Executive Secretary of the Board set this issue for hearing.<sup>1/</sup> All parties were present at the hearing and were given full opportunity to participate in the proceedings. Post-hearing briefs were submitted by each party. Upon the entire record, including my observation of the demeanor of each witness and consideration of the briefs submitted by the parties, I make the following findings of fact and conclusions of law:

I  
THE EMPLOYER'S OPERATIONS

Charles Malovich owns 240 acres of land in Arvin and the Wheeler Ridge area of which he presently cultivates between 200 and 220 acres. He has 40 acres of plums, 60 to 80 acres of peaches, 40 acres of nectarines, and an unascertained number of acres of pomegranates. Malovich raises three varieties of plums: Roysans, Santa Rosas, and Red Beauts. He has been engaged in farming for over 30 years.

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1/ ALRB Exhibit 5.



## II

### PREPETITION PAYROLL

The parties stipulated at the hearing that the number of agricultural employees on the prepetition payroll list numbered 91. This payroll period ran April 11-17, 1977 (inclusive), during the thinning season. The employer contended, and I find that there were 73 average "employee days" for this period, computed according to the formula set out in a series of cases beginning with Mario Saikhon, Inc.<sup>2/</sup>

## III

### PEAK PAYROLL, 1977

The 1977 peak payroll occurred during the harvest of peaches, plums and nectarines, from Monday, May 30, through Sunday, June 5, 1977. The agricultural employees listed on the payroll numbered 375. Payroll records<sup>3/</sup> indicate that eight crews worked, six in the orchards, and two in the sheds.

Based on the evidence summarized below, I find that there were six days in the payroll period. The Board has excluded certain days from determining the average employee days worked on the basis that the excluded days were not "representative" of the average of the other days in the payroll. Ranch No. I, Inc., 2 ALRB No. 37 (1976); High & Mighty Farms, 3 ALRB No. 88 (1977). The employer's

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2/ 2 ALRB No. 2(1976). In Saikhon, the ALRB approved a method for determining peak in which one compares the average employee days in the prepetition payroll period to the average employee days in the peak payroll period to determine if 50 percent of peak employment existed when the certification petition was filed. The term "employee day" means the work done by one employee in one day. Average employee days are the number of job slots the employer needs to fill in a payroll period.

3/ Employer Exhibits 1A, 1B, 1C.

timesheets (Employer Exhibit 1A and 1C) indicate the following number of employees, working each day:

<u>Crew</u>	Mon. 5/30	Tues. 5/31	Wed. 6/1	Thurs. 6/2	Fri. 6/3	Sat. 6/4	Sun. <u>6/5</u>
Orozco	28	21	24	35	39	0	33
de la Pena	18	18	22	22	22	21	0
Tellez	17	17	18	14	16	18	0
Moreno, A.	16	19	18	36	37	35	0
Linzi	20	18	20	20	18	12	0
"Sierra Vineyard" Crew (p.6, Payroll Sheets)	27	29	28	24	29	—	0
Shedwomen	26	31	32	32	32	29	0
Total	152	153	162	183	193	115	33

The table indicates that the Sunday workers were comparatively few in relation to the numbers working on other days. The Sunday workforce is not representative of the employees working the rest of the week. For this reason, I find that the 1977 peak week was a six-day period. The parties having stipulated to the average employee days based on a six-day week, I find that, based on the Saikhon formula, the average of employee days falls between 219 and 226 for peak week 1977.

#### IV PRIOR PEAK PERIODS

Peak 1976 occurred May 24 through May 30, a seven day period. The parties disagreed as to the correct Saikhon calculation of the average employee days. I find there were 142 average employee days during this payroll period, taking the employer's figure, the one most favorable to his position.

Peak 1975 occurred June 19 through June 25, <sup>4/</sup> a seven day period. After considering the pay records and the parties' computations, I find there were 156 average employee days during the payroll period.

No payroll records were introduced for 1974. Malovich employed 277 agricultural employees during peak week. From this information alone it is not possible to determine the average employee days for the peak payroll.

V  
THE 1977 HARVEST

The parties introduced a great deal of testimony concerning the unusual 1977 harvest at Charles Malovich's farm. The UFW contends the evidence shows the employer manipulated his peak employment figures to inflate the number of employees without regard to his actual employment needs in order to cause the Board to vacate the election on the basis that the workforce was less than 50 percent of peak. The employer contends the unusually high level of employment was justified by unusual crop and weather conditions.

Malovich testified without contradiction that he had no change in acreage between 1976 and 1977. In both years, the acreage of nectarines and plums did not change but crops were significantly more plentiful in 1977. <sup>5/</sup> The crops he harvested during peak week

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4/ UFW Exhibit 4.

5/ During peak week, Malovich harvested a total of 25,600 boxes of fruit, compared to 16,500 boxes during peak week in 1976. Per crop in the 1977 peak week, the employer harvested 12,000 boxes of plums, compared to 6,800 for peak week in 1976; approximately 4,000 boxes of nectarines, compared to 1,270 boxes in 1976; and 8,200 boxes of peaches, compared to 9,200 in 1976. However, the total amounts packed annually for the two harvest years are comparable; the employer harvested approximately 80,000 boxes each year. If there had been no heat wave during the 1977 harvest, the employer testified that the harvest season would have been longer and the overall 1977 production would have been larger.

were 30 acres of plums, 20 acres of nectarines and 10 acres of peaches. Harvesting was the only operation that week.

A. Thinning of Plums

Jose Orozco, testified for the UFW that the condition of the plum crop was the worst he had ever seen. There was too much fruit on the trees. Many plums were not ripe and so small that they were not marketable. Because of these problems workers found the fruit almost impossible to pick. In his opinion the condition of the trees was a result of improper thinning. As a consequence the fruit had bunched together without sufficient room to grow. Tree limbs broke off under the weight of the fruit. He testified that while it appeared that Malovich cared about harvesting this crop he did not care much about the trees themselves. He stated that workers who had been present during thinning season believed that the trees had not been thinned because of the election results.

Juan Miranda, a member of the Romero crew, corroborated that about half the plums were too small to pick. Each tree yielded only one or two buckets as opposed to the usual six or seven if the fruit had been properly sized and ripened.

Malovich testified that his Red Beaut plum trees were loaded with fruit. It was the first year they had reached maturity (seven to eight years of growth) and he had never before picked as much fruit from these trees.

Malovich testified that he had followed his usual thinning practices. He had thinned the Roysan and Santa Rosa varieties of plums as usual, and had not thinned the Red Beaut variety for several reasons. First, he did not have the money, and second, he had not yet ever thinned this variety because the trees had been immature.

The first year they had reached maturity was 1977 and therefore he would probably thin them in 1978. He testified his decision not to thin them was made after the election; but the election did not influence his decision.

Based on this testimony I find that the condition of the plum trees at harvest was highly unusual, being obvious to farm workers accustomed to harvesting the fruit. Additionally, I find that Malovich's uncontradicted explanation of the condition appears sound, that the trees were fully mature for the first time and he had never yet thinned them.

Orozco appeared to be a straightforward and credible witness. Yet he had no personal knowledge of the reasons for the thinning decisions made by Mr. Malovich. His source for the employer's thinning decision is uncorroborated hearsay. For these reasons I find that Charles Malovich could have decided not to thin the plums of the Red Beaut variety for valid agricultural reasons.

#### B. Number of Workers

The union witnesses, Jose Orozco, Estafana Pichardo, and Juan Miranda testified that Malovich had too many people working in the plums. In an average harvest an average picker would pick about 40-45 buckets per day. At Charles Malovich's they were making about 25. There were two people per tree, instead of one. Picking the fruit took extra time because it was so small. Time was lost changing crews around. Foremen told Orozco that they feared that the extra people would shorten the working time. With two or three crews in a lane (row of trees), it was difficult for the tractors to drive through and pick up the boxes of picked fruit.

Orozco told Malovich that there were so many people he did not know where to put them. The employer gave him several reasons for keeping the crews hired, including the only one Orozco could recall, that the employer wanted to avoid problems with the union by not laying people off. In Orozco's opinion, a farmer with a lot of experience would know that too many people and tractors were being used and that these extra numbers would not increase production.

The employer contended that the number of workers was the result of weather conditions. Favorable weather during the growing season (sufficient heat and chill units) produced a larger crop in 1977 than in 1976. Malovich testified without contradiction that more buds "set" on the trees than usual creating an expectation of a bountiful crop. In addition, a heat wave hit the Friday of peak week, causing significant crop losses.<sup>6/</sup>

Malovich testified further that with as many workers as he hired, he could not get all his crop picked. He had two or three days warning of the impending heat wave and consequently hired as many people as he could in order to get as much picked and packed as possible. He lost thirty or forty percent of his plum crop, left on the trees because the heat came too quickly to pick them all. Ten acres of peaches were not picked at all because there was not enough time. Malovich testified he could have used more workers. He noted that there should not have been too many people

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6/ Estefana Pichardo testified that she did not recall the temperature during peak week, but that it was hot. Jose Orozco did not recall the weather during peak. The employer testified that the temperature reached 99° Friday and he let people go home early if they wanted. It was also 99° on Sunday. As the employer's testimony is uncontradicted, I recredit his testimony concerning weather conditions.

working, if the supervisor, Orozco, had been efficient in placing them.

Malovich hired people to work two Sundays, before and after peak week, attempting to save as much fruit as possible, although he usually did not have his crews work Sundays. He gave his regular crews Sunday off and hired people from other ranches. He had done this in other harvests but he did it more in 1977 because of the unusual weather. Jose Orozco corroborated this testimony. The length of the harvest was shorter in 1977 than in 1976, lasting from May 13 to about July 15. The period was shorter because fruit ripened so quickly in the heat. The testimony regarding Sunday work and a shorter harvest season supports the employer's testimony that he had to hurry to save as much of a large crop as possible. I find that Malovich presented valid agricultural reasons for hiring more workers in 1977 than before in his attempts to save a large crop from a disastrous heat wave.

#### C. Bonuses

Orozco testified that while other ranches paid a bonus of seven cents per bucket in addition to the hourly rate, Malovich did not. Pichardo corroborated this testimony. Orozco said that a bonus provided incentive to work. He said that the workers asked him why there was no bonus. Neither witness testified whether Malovich's policy towards paying a bonus in 1977 was different from his policy in prior years. Malovich did not pay a bonus in 1977 although he testified he had done so in 1976, 1975, and 1974 in about a third of his crops. He did not pay a bonus consistently in all crops because the bonus increased the cost of the harvest. Pickers would tend to pick unacceptable fruit in order to fill their buckets quickly when a bonus was paid. As a result, a higher

percentage of fruit would be rejected by the packers. There is no evidence that Malovich deviated from prior years' pay practices as a result of an election or as an excuse to hire more workers. I find that his testimony regarding increased harvest costs and larger quantities of unacceptable fruit picked when paying a bonus to be adequate explanation for his decision.

D. Conclusion

Based on the testimony and documentary evidence presented at the hearing, there is insufficient evidence to support a finding that the employer manipulated his peak employment for 1977 to increase the number of workers. I find that the number of workers Malovich employed was required by unusual weather conditions coupled with an unusually bountiful crop.

VI  
TESTIMONY OF BOARD AGENT

In April 1977, before the election, Board agent Lawrence Alderete visited the employer at his office for about an hour and a half, and asked him for documents or any other information relating to the peak question. He learned that employment for the past three years was as follows:

1974	246 employees
1975	277 employees
1976	216 employees

The agent testified he averaged the number of employees working in 1976 in accordance with the Saikhon decision and calculated 194 average employee days. He did not explain how he arrived at that high figure. (See discussion, infra, p.19). Malovich gave him the April 11-17 payroll, the records used for



determining peak and eligibility. The agent did not realize that the list included five foremen ineligible to vote among the 96 names.

The Board agent did not compute the average number of employees who worked in 1974 or 1975. <sup>7/</sup>

In addition to payroll records, he learned from Malovich that he was selling some property, that he had uprooted some trees, and that he had planted new trees which would not produce for several years. Malovich did not say how many acres or whether they were bearing or nonbearing. He also said his 1977 peak workforce would be "200 plus." It was not clear if Malovich referred to total employment or average employment. The Board agent said he realized that the numbers were very close, looking at his calculations of 96 employees for the prepetition period and 194 for peak 1976.

The Board agent testified he did not average the employees on the prepetition payroll, but took the actual number of employees he believed to be eligible to vote and compared that number to the average peak agricultural employment of 1976.

He further testified that according to his calculations he figured prepetition employment was one employee short of 50 percent of peak, but that he determined to hold the election anyway, based on the other information Charles Malovich had provided him.

He did not interpret the statement that peak would be "200 plus" employees to indicate an expected increase in employment. Malovich testified he did not recall any discussion with the agent about change in crops or acreage. He testified that the agent was

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<sup>7/</sup> The agent testified that he did not average these earlier years, because it was his practice to make his determination only on the prior year.

mostly interested in payroll records. I credit the agent's testimony with regard to what he asked the employer. His testimony was internally consistent and straightforward.

VII  
EMPLOYER'S AND UNION'S  
CONTENTIONS

The employer contends that both the Act and Board decisions indicate that when employment figures for both prepetition payroll and peak of season for the current year are available, they should be the sole basis of determining timeliness of the petition, without regard to when the election was conducted. Emphasizing the Act's repeated mention of "current calendar year," the employer contends that when peak has occurred by the time of the hearing, the only relevant records admissible as evidence are those for the "current calendar year," the year in which the peak determination was made-- in this case, 1977. All other records or data are irrelevant to the issue.

The employer and the union stipulated that during peak of season in 1977 there were between 219 and 226 employee days. Comparing the average employee days during the prepetition payroll period with the average employee days during the 1977 peak payroll period, the employer asserts that since 73 is less than 50 percent of either 219 or 226 the petition was not timely filed.

The union argues that this case presents a "future peak" situation in which peak occurred after the election. Thus, the Board should not limit its review to the 1977 employment figures but should examine all the information available to the Regional Director and Board agent since it is relevant to the reasonableness

of their determination, pursuant to Cal. Lab. Code §1156.4. Ranch No. I, Inc., 2 ALRB No. 37 (1977).

#### VIII ANALYSIS

The Regional Director and Board agent in charge of the election have the task of investigating a petition within seven days of its filing, and among other duties they must determine whether the current workforce is at 50 percent of peak employment. The seven-day time constraint, necessary to the functioning of the Act, requires full cooperation of all parties with the Board. The regional office staff relies largely on information which the employer must provide within 48 hours of the filing of the petition. If the employer contends that he expects that a payroll period later in the calendar year will reflect an average number of employee days worked more than twice the average number of employee days worked during the payroll period immediately preceding the filing of the petition, he must provide information to support this contention. 8 Cal. Admin. Code §20310(a)(6)(B). Failure to provide this information may give rise to a presumption that the petition is timely filed with respect to the employer's peak of season. 8 Cal. Admin. Code §20310 (e) (1).

The Regional Director and Board agent in charge of the election must apply methods and standards which properly assess, under the particular facts of the case, whether a representative vote is possible at the time the petition is filed. Agriculture in general is characterized by a transient workforce. Employment patterns vary from crop to crop, and within the same crop employment

needs often vary from year to year. The method for making the peak determination must be flexible enough to permit the Board to resolve the overriding issue of a representative vote without being constrained by mathematical formulas which may not be applicable to all factual situations.

The Board has distinguished past peak situations from future peak situations in applying Cal. Lab. Code §1156.4. If a case arose in which the peak would occur after the election, the Board would be required to take into account crop and acreage statistics, because in such circumstances reliance on employment records for the prior season might be inadequate to project peak for the current year. Ranch No. I, Inc., 2 ALRB No. 37 (1976) n.6.

This case clearly presents such a future peak situation. Between the 1976 and 1977 harvests there was an election in which the UFW polled a majority of the votes. The election took place April 26, 1977. Peak occurred later, between May 30 and June 5, 1977. The ALRB hearing on this issue first convened September 14, 1977. The employer's total bearing acreage did not change from 1976. Crops remained the same. Yet at peak 1977 the employer employed 375 people compared to 216 people in 1976. In 1975 there were 246; in 1974 there were 277. Over the four year period, 1977 was by far the highest in employment.

The enormous increase in peak employment during 1977 over the prior three years requires explanation. The two 1977 payrolls while relevant, do not adequately document the employer's contention that the petition was not timely filed. Because the 1977 season was highly unusual compared to the three prior years, other records and information are also relevant in reviewing

the Board agent's determination of peak. The crop and acreage information which the employer made available at the time of the election was sketchy and incomplete. Most significantly, there was no prediction of a significant increase in crop yield. At the time the petition was filed, the data available to the Board agent indicated that the 1977 peak of season would be similar to prior harvests. Therefore, I conclude that payrolls of prior years and other crop and acreage data are also relevant to a determination of peak.

The language of the ALRA supports the proposition that the validity of the Board agent's determination of the peak issue in prospective peak cases should not depend on a later review of that decision made after the projected peak employment has occurred. Cal. Lab. Code §1156.4 requires the Board to "estimate" peak agricultural employment for the current calendar year based not only upon the prior season peak agricultural employment but also upon crop and acreage statistics and upon all other relevant data.

An "estimation" is a rough or approximate calculation involving the weighing of data and the use of judgment, a process which does not lend itself to rigid dependence on tidy mathematical formulas. Additionally, §1156.4 requires that the employer's payroll "reflect" 50 percent peak agricultural employment. This language also denotes an estimate, a figure which reasonably approximates the coming peak level of employment. Furthermore, the Act provides that upon receipt of a petition, the Board shall immediately investigate it, and if the Board has "reasonable cause" to believe that a question of representation exists, the Board shall direct

an election. Cal. Lab. Code §1156.3(a).<sup>8/</sup> These three provisions all indicate that the determination of prospective peak must be a reasonable one, and support the proposition that peak is an estimate, a rough calculation.

However, concluding that peak is an estimate does not mean ignoring the requirement that petitions be filed when the employer's workforce is at least 50 percent of peak. If the information provided the Board agent upon review fails to show that the agent's determination of estimated peak employment for the current calendar year was reasonable, then the election should be vacated.

On the other hand, if everything the employer provided the Board agent indicates that the agent's determination was reasonable, the election should be upheld, even if subsequent to the election, there are unexpected and unusual employment demands which increase the peak season workforce. The Act would be misconstrued if an appraisal of the current year's peak of season, correct as to information available at the time of the election, could lead to the overturning of an election in a situation such as this, where peak did not approximate what had been anticipated.

The Board has not reached the issue presented here, of whether the decision that a petition is timely filed in a future peak

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8/ The conclusion that a question of representation exists involves a determination of the validity of the petition with regard to (1) the issue of peak; (2) that no election has been conducted among agricultural employees of the employer within 12 months before the petitions filing; (3) that no labor organization is currently certified as the exclusive collective bargaining representative of the agricultural employees of the employer named in the petition; and (4) that the petition is not banned by an existing collective bargaining agreement. Cal. Lab. Code §1156.3(a).

situation can be overridden by the actual figures of peak employment. John J. Elmore, 3 ALRB No. 63 (1977) relied on by the employer, is distinguishable. The Board did not adopt a hindsight approach although it considered such a perspective appropriate in that one case. The election had been held prior to the shut down of the agency's operations and the Board sought to avoid further delay in certification.

The hindsight approach to peak determinations is not appropriate to prospective peak cases for several reasons. Under the Act, the Board agent's decision concerning peak must be a reasonable estimate of what the employer's employment needs will be at peak of season for the current year. The employer has a duty to provide sufficient information to the agent in order that the estimate will be as accurate as possible. If the Board were to adopt wholesale a hindsight approach in prospective peak cases, it would remove the burden of substantiating peak contentions from the employer, who has the information, to the Board agent, who necessarily must rely on data the employer provides him. If the agent's determination is not only reasonable but correct as to the information available, the Board should not throw out an election simply because unforeseeable events led to a different employment level than could have been anticipated. In this case, the employer knew at the time the petition was filed he would have an unusually large crop based on the setting of the buds and that his employment needs would likely be correspondingly greater than prior years. Even though he may not have known the exact increase to be expected and acted in good faith, he should have provided the Board agent with the information he had. Failure to substantiate

a contention that his current payroll was less than 50 percent of his anticipated peak, when he knew more than he revealed, should not provide the employer with a basis for objecting to an election once it has occurred and the result may be known.

The unusual facts in this future peak case caution against overturning the Board agent's decision. A review based on unforeseeable events would second guess the agent's determination and undercut the responsibility of the employer to come forward and document fully his contentions at the time the petition is filed. Such second guessing might encourage employers to withhold information and would be counterproductive to the functioning of the Act.

In addition, the hindsight approach does not help regional staff reach a decision about peak, or help ensure that an election will be held when the workforce for the calendar year is representative. The only result accomplished by application of a hindsight test would be the dismissal of petitions and delaying elections for a season, usually an entire year.

Use of hindsight is not necessary to ensure representativeness of elections. The representative character of employees on the prepetition payroll is not necessarily destroyed by subsequent events in a future peak situation. An unexpected fluctuation in employment, whether high or low, which is outside the expected range of employment should not be sufficient to transform the general character of the workforce. Furthermore, in this case there is no indication that the increase is permanent or even likely to be repeated.



A statutory presumption exists favoring certification.<sup>9/</sup>

Elections should be upheld unless employees have been unable to cast their votes freely and without coercion. Chula Vista Farms, Inc., 1 ALRB No. 23 (1975)(Member Grodin concurring); Superior Farming Co., 3 ALRB No. 55 (1977). The basis for applying this presumption in a peak context is a determination that the complement of agricultural employees satisfies the underlying policy of ensuring a representative election. In a case where a valid method for determining peak indicates at the time of the election that the representativeness requirement is met, the election should be upheld and the results certified.

I conclude that it would be inappropriate under the ALRA to adopt an approach to prospective peak determinations which permits hindsight to overrule a Board agent's decision which is both reasonable and valid at the time it was made.

#### IX CALCULATING PEAK

Board agent Lawrence Alderete testified he computed 194 average employee days for peak 1976. The agent testified that according to his calculations he figured prepetition employment was one employee short of 50 percent of peak, but that he determined to hold the election anyway based on the other information Charles Malovich had told him.

This figure appears excessively high since the employer calculated 142 average employee days, and the UFW figured 138 using the same records. My own calculations indicate 137 average

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<sup>9/</sup> "Unless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." Cal. Lab. Code §1156.3(c).

employee days. The Board agent's figure is clearly out of line with these three other calculations. This apparent miscalculation is understandable, given the complex nature of the employer's payroll records,<sup>10/</sup> and the fact that the agent spent a total of an hour and a half going over the records and talking with the employer.

The miscalculation of the agent merely made his decision regarding peak a closer one than it actually is. But more important than the difficulties in determining peak in this case is the fact that the information available to the agent at the time of the election indicates that the petition was timely filed and that the decision to conduct the election was a correct one.

The methods of calculating peak do not all lead to the same conclusion in this case. Thus, if one used the "employee count" method, Valdora Produce Co., 3 ALRB No. 8 (1977), the result is that the petition was not timely.

However, if one uses the established Saikhon method, averaging both payroll periods, with information available at the time the petition was filed, the result is that the petition was timely.<sup>11/</sup>

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10/ In UFW Exhibit 3--the 1976 payroll records--different employees are listed on three different types of records: timesheets, check registers, and packing sheets. Some employees are listed on more than one record. Determining daily hours worked is impossible to do with complete accuracy from the check register which tells only weekly hours worked. In addition, the identity of the supervisors is not clear from the records; these names would not be counted in determining "peak agricultural employment" because supervisors are not agricultural employees under the Act. 8 Cal. Admin. Code §20353(b) (1) (1976). Prohoroff Poultry Farms, 2 ALRB No. 56 (1976). Records for 1975 and 1977 were prepared in the same manner as the 1976 records.

11/ The method referred to is set forth in Mario Saikhon, Inc., 2 ALRB No. 2 (1976).


The employer computed an average of 73 employee days for the 1977 prepetition period, and 142 average employee days for the 1976 peak. Since 73 is more than 50 percent of 142, the petition was timely filed according to the Saikhon formula.

CONCLUSION

The Board agent's decision to conduct an election was a correct one in this case. The payroll and agricultural data provided by the employer at the time of the filing of the petition, when properly analyzed, support the agent's determination of peak. I therefore recommend a decision that the petition was timely filed and that the Board dismiss the employer's objection.

DATED: May 15, 1978

Respectfully submitted,

A handwritten signature in cursive script that reads "Carla J. Dakin". The signature is written in dark ink and is positioned above a solid horizontal line.

CARLA JO DAKIN  
Investigative Hearing Examiner