

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

DOMINGO FARMS,	)	
	)	
	)	
Employer,	)	Case No. 78-RC-7-SM
	)	
and	)	
	)	
INTERNATIONAL UNION OF	)	5 ALRB No. 35
AGRICULTURAL WORKERS,	)	
	)	
Petitioner.	)	
	)	

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DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the International Union of Agricultural Workers (IUAW) on July 27, 1978, an election was conducted among the agricultural employees of Domingo Farms (Employer) on July 31, 1978. The Tally of Ballots showed the following results:

IUAW . . . . .	8
No Union . . . . .	1
Unresolved Challenged Ballots . . . . .	<u>2</u>
Total . . . . .	11

Pursuant to Labor Code Section 1156.3 (c) and 8 Cal. Admin. Code Section 20365 (1978), the Employer filed post-election objections. The Executive Secretary dismissed all but one of the Employer's objections and set for hearing its objection that the number of employees who were eligible to vote was less than half the number employed during the Employer's peak period, contrary to the requirement set forth in Labor Code Section 1156.4.

A hearing on the said objection was held on September 26,

1978, before Investigative Hearing Examiner (IHE) Armando Marin Flores. On December 8, 1978, the IHE issued his initial Decision, in which he found that the Board's agents had reasonably concluded that the Employer was at 50 percent of peak at the time of the filing of the petition and that the Employer failed to establish at the hearing that its prospective-peak payroll in 1978 would be more than twice the number of employees at the time the petition was filed. The IHE therefore recommended that the Employer's objection to the election be dismissed and that the IUAW be certified as the exclusive collective bargaining representative of all the agricultural employees of the Employer in California.

The Board has considered the objection, the record and the IHE's Decision in light of the exceptions and briefs filed by the parties and has decided to adopt the IHE's recommendation to dismiss the objection and to certify the IUAW for the reasons set forth below.

#### 1977 Peak Period

The Employer is a small, family farming operation which grows various vegetables near Arroyo Grande. In 1977, the Employer grew bell peppers, chili peppers, tomatoes, green beans and Brussels sprouts. Peak season normally occurs during September, October and November when the Employer harvests its main crop, bell peppers. In 1977, the Employer harvested bell peppers, chili peppers, and tomatoes during that period. The Employer's payroll records indicate that its 1977 peak employment period occurred between October 1 and October 16, and that during that period 16 employees were on the payroll, 9 temporary employees and 7

permanent employees. At the hearing, the IUAW called several witnesses who testified that two additional employees worked for the Employer in October of 1977, although their names did not appear on its payroll records. The IHE found that the said two employees had worked for the Employer during the 1977 peak employment period, and therefore found that a total of 18 persons were employed at peak that year.

#### 1978 Peak Period

On July 27, 1978, the IUAW filed the representation petition in this matter, and the election was conducted on July 31, 1978. There were 11 employees on the Employer's payroll during the payroll period immediately preceding the filing of the petition for certification.

Board Agents approached Rudy Domingo, the Employer's manager, with the Petition for Certification. After reviewing his records with the Board Agents, Domingo indicated that he did not believe the Employer was at 50 percent of peak employment, as he expected the peak employment in 1978 to be greater than in 1977. The Board Agents recommended that the election take place and advised Domingo of his right to file a post-election objection with respect to their determination concerning peak.

#### The Board Agents' Determination

Under Labor Code Section 1156.3(a), the Regional Director has a duty to investigate the timeliness of the filing of a petition for certification and, if there is reasonable cause to believe that a bona fide question concerning representation exists, a representation election must be held within 7 days after the

filing of the petition. If the Employer contends that the petition was filed at a time when the number of employees constituted less than 50 percent of its peak agricultural employment for the current year, the Employer is required to provide evidence sufficient to support that contention. 8 Cal. Admin. Code § 20310 (a) (6) (1978).

We recently discussed the appropriate standard of review of a Board agent's determination in prospective-peak cases. Charles Malovich, 5 ALRB No. 33 (1979). In Malovich, the Employer's post-election objection asserted 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 which would occur later in the calendar year. We dismissed the Employer's objection and upheld the election, setting forth our standard for review in prospective-peak cases: the Regional Director's peak determination will be upheld if it was reasonable in light of the information available at the time of the investigation.

Based on the evidence available to the Board Agents at the time the petition for certification was filed in the present matter, we find that the Regional Director's peak determination was reasonable.

Rudy Domingo, the Employer's general manager, was the only witness at the hearing who testified in support of the Employer's contention that the petition for certification was untimely. Mr. Domingo testified that he did not believe the

Employer was at 50 percent of its anticipated 1978 peak employment when the petition was filed. He based his belief on the fact that more crops would be harvested in 1978, because some crops had been planted later due to a wet spring,<sup>1/</sup> and because beans were double-cropped due to increased orders.<sup>2/</sup> At the hearing, Domingo testified that he estimated having 25 full-time employees during peak season in 1978.

The focus of our inquiry is on the reasonableness of the Board Agents' determination at the time it was made. Domingo offered almost no testimony at the hearing to support the Employer's contention that the Board Agents' determination of timeliness was unreasonable. Domingo testified that when the Board Agents first presented the petition for certification, they examined the Employer's payroll records and discussed the peak issue with him. Domingo told the agents that he did not believe the Employer was at 50 percent of peak and that, due to a "bad situation" at the end of the current year, the Employer would be "loaded down with a lot of work" and would "probably hire more [employees] than what these records would show, probably more than in any past year."

There was no evidence at the hearing that Domingo offered the Board Agents any other information to substantiate his claim

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<sup>1/</sup>In addition to bell peppers, chili peppers, and tomatoes, which were harvested during peak in 1977, the 1978 peak harvest included beans and possibly some Napa peas.

<sup>2/</sup>Domingo testified that one of the reasons beans were double-cropped was that the bell peppers would be harvested slightly later than usual, and double-cropping of the beans would "keep the workers busy" while waiting for the peppers.

that the Employer was not at 50 percent of peak employment for 1978. Moreover, there is no evidence that Domingo provided any specific facts concerning how many more acres of crops would be harvested during the 1978 peak than during the 1977 peak, or how many employees would be required to harvest the extra acres. It appears that the figure of 25 additional employees was first mentioned at the hearing,<sup>3/</sup> and neither that figure nor any factual information as to how many additional employees would be needed was communicated to the Board Agents during their discussions with Domingo.<sup>4/</sup>

Obviously, the determination of prospective-peak employment for a calendar year is often difficult, and the Act dictates that any estimate of peak must be based on "all ... relevant data". In prospective-peak cases, where an estimate of a future workforce is made, past payroll records are only one guide, and any other relevant factors must be brought to light to assure the most accurate determination.

Our regulations place on the employer the burden of providing the Board with information to support a contention that it has not yet achieved 50 percent of its anticipated peak for the calendar year. 8 Cal. Admin. Code S 20310 (a) (6) (1978). We have

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<sup>3/</sup> Even at the hearing, Domingo testified that 25 was a reasonable number, "more or less", and that he really would not know how many workers were needed until peak season actually arrived.

<sup>4/</sup> At the hearing, Rudy Domingo testified that he did not go into much detail with the Board Agents, and admitted that, when the petition for certification was presented to him, he had insufficient evidence to show that Domingo Farms was at less than 50 percent of peak employment.

rejected the argument that the burden is on the Board Agent to make specific inquiries in order to determine the correctness of an Employer's anticipated peak figure. See Malovich, supra. "We find it more reasonable to require the party with access to information to provide 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." Malovich, supra.

In the present case, the IHE found that 18 persons worked for the Employer during the fourth quarter of 1977 and that this was most likely the number used by the Board Agents in determining the Employer's peak employment figure for 1977. The Employer failed to provide the Board Agents with sufficient evidence to show that its peak employment in 1978 would be more than 18. There were 11 employees on the payroll for the applicable pre-election period and, as 11 is more than 50 percent of 18, the Board Agents reasonably determined that the petition was timely filed.

Employer's Motion to Reopen the Hearing

After the IHE issued his initial Decision, the Employer moved for a rehearing or to reopen the hearing, based on new evidence, i.e., that subsequent to the hearing, the Employer reached peak employment and that 26 employees were on its payroll during the payroll periods ending November 1, 1978, and December 1, 1978.

In Malovich, the peak-employment period occurred after the election but before the hearing. Records for the peak period indicated that less than 50 percent of peak employment had been

achieved when the petition for certification was filed. Although we did not reject such evidence of post-election peak employment data in Malovich, we held that an election would not be set aside, nor a Regional Director's reasonable determination of anticipated peak reversed, solely on the basis of such hindsight information.

In the present case, peak employment was reached after the close of the hearing but before the IHE's Decision issued. As the statutory and policy reasons for adopting a standard of reasonableness at the time of the pre-election peak determination apply with equal force in the present case, we hereby dismiss Respondent's motion for a rehearing or to reopen the hearing.

We conclude that the Regional Director's determination that the petition was timely filed was reasonable in light of the information furnished to him at that time. 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 International Union of Agricultural Workers and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of Domingo Farms in the State of California, for the purpose of collective bargaining, as defined in Labor Code

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Section 1155.2 (a), concerning employees' wages, working hours and other terms and conditions of employment.

Dated: May 10, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Domingo Farms (IUAW)

5 ALRB No. 35

Case No. 78-RC-7-SM

IHE DECISION

A representation election was conducted among the agricultural employees of Domingo Farms (Employer) on July 31, 1978. The Tally of Ballots showed 8 votes for the International Union of Agricultural Workers (IUAW), 1 for No Union, and 2 challenged ballots.

The challenged ballots were insufficient in number to effect the results of the election.

The Employer filed a post-election objection, contending that the number of employees who were eligible to vote was less than half the number employed during the Employer's peak period, and that therefore the petition was not timely filed pursuant to Labor Code Section 1156.4. In his Decision, the Investigative Hearing Examiner (IHE) found that the petition was timely filed, because the Board Agents had reasonably concluded that the Employer was at 50 percent of peak at the time the petition was filed, and the Employer had failed to establish that its prospective-peak payroll for 1978 would be more than twice the number of eligible voters at the time the petition was filed. Accordingly, the IHE recommended dismissal of the Employer's objection and certification of the IUAW.

MOTION TO REOPEN HEARING

After the IHE issued his Decision in this matter, the Employer moved for a rehearing or to reopen the hearing for the receipt of new evidence, i.e., the data as to the actual peak employment period for 1978, which occurred after the hearing closed. The Board affirmed its statutory and policy reasons for adopting the standard of reasonableness at the time of the pre-election peak determination, and denied the motion,

BOARD DECISION

After considering the Employer's exceptions to the IHE's Decision, in light of the entire record, the Board concluded that the petition was timely filed. The Board found that, based on evidence available to the Board Agents at the time the petition for certification was filed, they had reasonably determined that the petition was timely filed. The Employer told the Board Agents that the Employer would be "loaded down with a lot of work" at the end of the year and would probably hire more employees than it employed during the peak period of the previous year, according to the Employer's records. However, the Employer did not provide any specific facts concerning how many more acres of crops would be harvested or how many employees would be required to harvest the extra crops. Therefore, the Employer failed to meet its burden of providing the Board with information to support its contention that it had not yet achieved 50 percent of its anticipated peak for calendar year 1978.

The Board dismissed the Employer's objection and certified the IUAW as the exclusive collective-bargaining representative of the Employer's agricultural 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.

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

DOMINGO FARMS,

Employer,

Case No. 78-RC-7-SM

and

INTERNATIONAL UNION OF  
AGRICULTURAL WORKERS,

Petitioner.

Cal B. Watkins, Jr.,  
Grower-Shipper Vegetable  
Association, for the employer.

Arturo Castro,  
for the International Union  
of Agricultural Workers.

DECISION

STATEMENT OF THE CASE

ARMANDO MARIN FLORES, Investigative Hearing Examiner:

This case was heard before me on September 26, 1978 in Santa Maria,  
California.

A Petition for Certification at Domingo Farms was  
filed on July 27, 1978, by the International Union of Agricultural Workers  
(hereafter "IUAW"). An election was held on July 31, 1978 with the  
following results:

IUAW	8
No Union	1
Unresolved Challenged Ballots	2
Total	11
No. of Names on List	11

Thereafter, Domingo Farms (hereafter "employer") timely filed a petition objecting to the election, pursuant to Labor Code §1156.3(c) and 8 Cal. Admin. Code §20365 (1978). The Executive Secretary partially dismissed the employer's objections petition and set for hearing the contention that the number of employees who qualified to vote was less than half the number employed during Domingo Farm's peak season. Thus, the issue at the hearing was whether the IUAW's petition for certification was timely filed, pursuant to Labor Code §1156.4.

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

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments of the parties, I make the following findings of fact, conclusions of law and recommendation.

#### FINDINGS OF FACT

Domingo Farms is a small, family farming operation in the business of growing various vegetables near Arroyo Grande.

#### 1977 Peak Period

In 1977 the employer grew bell peppers, tomatoes, brussels sprouts and green beans.

Mr. Rudy Domingo, general manager of Domingo Farms and son of its owner, testified that peak season for Domingo Farms normally occurred from September through November. This

is the period when the employer's main crop, bell peppers, would be harvested. Last year, bell peppers and tomatoes were harvested during this period.

Employer introduced into the record its payroll records for 1977.<sup>1/</sup> These records indicate that a total of eighteen different agricultural employees worked for Domingo Farms during the fourth quarter of 1977.<sup>2/</sup>

At the hearing the parties entered into the following stipulation: "Employer's Exhibit #1a (Temporary Employees) shows that for the payroll period ending 10-17-77 nine people were paid. Employer's Exhibit #1b (Permanent Employees) shows that for the payroll period ending 11-1-77 eight people were paid." This number apparently included Rudy Domingo, the company manager, who should have been excluded. The correct number would then be seven, not eight.

These records indicate that employer's peak employment period occurred between October 1 and October 16, and that during this period 16 persons were on the payroll-- 9 temporaries plus 7 permanents.

The employer's payroll records were not the only evidence of how many employees worked for Domingo Farms during October 1977. The IUAW called several witnesses to testify that Joel Navarro and Alvaro Navarro also worked for Domingo Farms

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1/ These are marked as Employer's Exhibits #1a and #1b. Exhibit #1a is a record of temporary employees and Exhibit #1b is a record of permanent employees.

2/ This number excludes Rudy Domingo, whose Record of Employment and Earnings is also among the group of permanent employees.

in October of 1977, even though they do not appear on the employer's payroll records. Based upon the uncontradicted testimony of Joel Navarro, Alvaro Navarro and Rafael Rios, I find that Joel and Alvaro also worked for Domingo Farms during employer's peak employment period between October 1 and October 16 of 1977, even though Joel and Alvaro do not appear on employer's payroll records for that period. Therefore, I find that during employer's peak employment period in October of 1977, 18 persons were employed-- the 16 workers appearing on the payroll records plus the two workers who do not.

#### Pre-Petition Period

On July 27, 1978, the IUAW filed with the Board of Petition for Certification at Domingo Farms. The election took place on July 31, 1978 and all 11 eligible voters cast ballots. The voter eligibility payroll period was July 1, 1978 to July 16, 1978.

Employer's payroll records for 1978 were admitted into evidence.<sup>3/</sup> These records indicate that there were 11 people on the employer's payroll during the payroll period immediately preceding the filing of the Petition for Certification.

#### Prospective Peak for 1978

It is employer's contention that its peak employment period is yet to come, and that peak employment would be greater this year than last. The only evidence proffered in support of

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<sup>3/</sup> Employer's Exhibit # 2.

this contention was the testimony of Rudy Domingo. He testified that this year the employer grew bell peppers, tomatoes, brussels sprouts, green beans, chili peppers, napa and fresh peas. He further testified that employer increased its acreage this year because it "doubled cropped" or doubled the acreage of its bean crop from 25 to 50 acres over last year. Beans were doubled this year because, due to a late start in planting, more acres were open for planting after the summer months and because more beans had been ordered this year. The delay in planting was caused by a heavy amount of rainfall earlier in the year.

Mr. Domingo testified that employer's peak season for employment this year would occur in the middle of October. At that time workers would be harvesting bell peppers, chili peppers, tomatoes, napa and beans.

About five days before the election Rudy Domingo was contacted by an agent of the ALRB, The peak issue was raised in his discussions with the Board agent. Mr. Domingo testified that he told the Board agent that he didn't think the company was at peak. He testified that:

"...he (the Board agent) looked over some of our records. And then I mentioned our situation this year, and he suggested that if we feel confident that we could win a non-union vote, if we win the election, no union, then the peak issue wouldn't matter. And if we lost, then I could raise an objection afterwards, after the election."

Mr. Domingo further testified that he told the Board agent that the company would "probably" hire more than the records showed-- more than in any past year. He expected to have more people working this year during the peak period because "...we have more to harvest." When asked for his estimation of how many people he would have

working during the peak payroll period this year, Mr. Domingo responded, "I could see times when we could have 25 people out there, and they'd still be working full time." <sup>4/</sup> When asked to characterize the estimated number of 25 as high or low Mr. Domingo stated:

"Well judging from our last year's employment and our situation this year, its a reasonable figure, more or less. We could have more, but we wouldn't know until our peak season come around, and then we'd see how many workers we would need."<sup>5/</sup>

Mr. Domingo based his opinion that approximately 25 workers would be working during this year's peak payroll period on two factors. (1) Employer doubled-cropped its bean acreage this year. (2) Employer would be harvesting four crops at the same time this year, whereas last year only two were harvested. He testified that beans and napa would be harvested at about the same time as bell peppers and tomatoes because all four crops, due to the unusually wet planting year, were planted late and at the same time.

#### ANALYSIS AND CONCLUSIONS

Section 1156.3(a)(1) of the Agricultural Labor Relations Act requires that a petition for certification must state:

That the number of agricultural employees currently employed by the employer named in the petition, as determined from his payroll immediately preceding the filing of the petition, is not less than 50 percent of his peak agricultural employment for the current calendar year.

<sup>4/</sup> Transcripts of hearing, at page 29.

<sup>5/</sup> Transcripts of hearing, at page 30.

Furthermore, Section 1156.4 provides that:

...the Board shall not consider a representation petition...as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

Employer contends that at the time the IUAW filed the petition for certification at Domingo Farms, the employer was not at 50 percent of its peak agricultural employment for the current year because the prospective peak number for 1978 (25) would be greater than the number achieved in 1977 (18).

It is undisputed that employer's peak employment period occurs in October and November of each year. The employment figure for the peak payroll period of October 1 through October 16, 1977, was 18. At the time of this election, July 31, 1978, 11 workers were employed during the voter eligibility payroll period of July 1 through July 16, 1978. However, employer contends that this year, during its upcoming peak season in October and November, it will employ 25 workers. Thus, the objection concerns predicting prospective peak.

Under Labor Code §1156.3(a) the Regional Director, generally through his/her Board agents, has a duty to investigate the timeliness of the filing of a Petition for Certification. If there is reasonable cause to believe that a bona fide question of representation exists, a representation election must be held within seven days of the filing of the petition. Labor Code §1156.3(a)(4).

If the employer contends that the petition was filed at a time when the number of employees employed constituted less than 50 percent of its peak agricultural employment for the current calendar year, the employer is required to provide evidence sufficient to support that contention. 8 Cal. Admin. Code §20310(a)(6)(1978). Furthermore, 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 that is more than twice the average number of employee days worked during the payroll period immediately preceding the filing of the petition, he is required to provide the Board with information to support that contention. 8 Cal. Admin. Code §20310(a)(6)(B)(1978). If the Board agent investigating the petition is to make a reasonable determination about what an employer contends will be a higher than normal future peak employment number, then the employer must supply sufficient information.

Since employer's peak season had yet to arrive at the time of the hearing in this case the hearing officer is put in the same position as the Board agent in determining whether the Petition for Certification was timely filed. This process will necessarily involve a review of the decision of the Board agent, based upon the information provided to him at the time of the filing of the petition, to see whether there was reasonable cause to believe that a bona fide question of representation existed. If the Board agent's peak determination and decision to hold the election, based upon the information provided at the time of the filing of the petition, were an abuse of discretion under Labor Code §1156(a)(4), then the election should be overturned.

In the present case employer submitted to the Board agent his 1977 payroll records which indicated that 18 different persons worked for Domingo Farms during the fourth quarter of 1977. This is the same number which I independently find constituted employer's peak employment figure for 1977.<sup>6/</sup> Eighteen is also the number the Board agent most likely used in determining employer's peak employment figure for 1977. At the time of the election there were 11 employees on the payroll for the payroll period immediately preceding the filing of the Petition for Certification.<sup>7/</sup> Clearly, the number 11 is more than 50 percent of employer's 1977 peak of 18.

Mr. Rudy Domingo testified that he told the Board agent investigating the petition that he (Domingo) did not think the company was at peak. When the Board agent reviewed employer's payroll records Domingo mentioned the harvesting situation this year and said the company would "probably" hire more than its records showed were hired last year during the peak period. The Board agent suggested that the election be held and informed Mr. Domingo of his post-election objection rights.

There is no evidence that any information was supplied to the Board agent to substantiate employer's contention that 25 workers would be employed during this year's prospective peak period. In fact there was no evidence presented at the hearing

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<sup>6/</sup> Since employer did not retain the daily and hourly worksheets maintained by the employees themselves, it is impossible to use the averaging method of determining peak as set forth in Mario Saikhon Inc., 2 ALRB No. 2 (1976). However, the lack of any evidence of employee turnover would mean, in my judgment, that the Saikhon approach is not applicable to this case anyway.

<sup>7/</sup> All 11 were eligible to vote.

that employer informed the Board agent that it expected a peak employment figure of 25 this year. It appears that this estimate first came to light at the hearing. And this number itself seems to have been the result of only guesswork. Clearly, the employer did not come forward, prior to the election, with sufficient concrete information to substantiate its contention that this year's peak figure would be significantly greater than last year's. Thus, the employer did not meet its obligations under the Board's administrative regulations.<sup>8/</sup> This failure to provide information at the proper time defeats the purpose of the Act and Regulations which require a peak determination within seven days of the filing of the petition. In light of the information provided by the employer the Board agent's determination that employer was at 50 percent of peak at the time of the filing of the petition was reasonable. The decision to go ahead with the election was therefore not an abuse of discretion under Labor Code §1156.3(a)(4).

The evidence presented at the hearing was also insufficient to support employer's contention. Employer's general manager testified that more acreage was planted this year and that more crops would be ready for harvesting at peak of season in November. Assuming this to be true, it still was not shown that at least 25 workers would be employed during the 1978 peak payroll period as the employer contended. The only evidence offered to support this contention was the general testimony of the company manger. The most substantive testimony he offered

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<sup>8/</sup> Specifically, 8 Cal. Admin. Code Sections 20310 (a) (6) and 20310(a)(6)(B)(1978).

on this crucial point was as follows: "I could see times when we could have 25 people out there, and they'd still be working full time," He characterized this number as a "reasonable figure, more or less." Nothing further was offered in support of the contention that 25 workers would be employed during the upcoming peak payroll period. Based upon this record, I cannot conclude that employer would achieve a prospective peak payroll figure of 25. It may turn out that while this matter is under consideration the employer may hire 25 workers during its peak payroll period. However, that factor should not overrule the present determination because of the ease with which an employer could deliberately manipulate its employment decisions in order to circumvent the present review. In my judgment, the employer did not, prior to the election or at the post-election hearing, substantiate its contention that a payroll period later in the calendar year would reflect an average number of employee days worked that would be more than twice the average of employee days worked during the payroll period immediately preceding the filing of the petition. 8 Cal. Admin. Code §20310(a)(6)(B)(1978). In other words, employer failed to establish that during its prospective peak payroll period it would employ more than 22 workers--22 being twice the pre-election payroll number of 11.

#### CONCLUSION AND RECOMMENDATION

I conclude that there was no abuse of discretion in the Board agent's determination that employer was at 50 percent

of peak at the time of the filing of the petition and in the decision to hold an election at Domingo Farms. I further conclude that employer failed to substantiate, at the hearing, the contention that its prospective peak payroll number this year would be 25, or a number greater than 22. I therefore recommend that the employer's peak objection to the election be dismissed and that the IUAW be certified as the exclusive bargaining representative of all the agricultural employees of Domingo Farms in the State of California.

DATED: December 8, 1978

Respectfully submitted,

*Armando Marin Flores*

ARMANDO MARIN FLORES  
Investigative Hearing Examiner