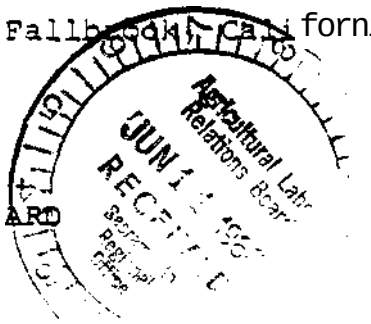
Fallbrook, California



STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	Case No. 79-RC-1-SD 6 ALRB No. 33

DECISION AND
CERTIFICATION OF REPRESENTATIVE

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), on January 3, 1979, a representation election was conducted on January 10, 1979, among the agricultural employees of Ruline Nursery (Employer). The official tally of ballots showed the following results:

UFW	14
No Union	4
Challenged Ballots	7
Total	25

The Employer timely filed 49 post-election objections, 12 of which were set for hearing. Thereafter, Investigative Hearing Examiner (IHE) Matthew Goldberg issued the attached Decision, in which he recommended that the Employer's objections be dismissed and that the UFW be certified as the collective bargaining representative of the unit employees. The Employer timely filed exceptions to the IHE's Decision and a brief in

support of its exceptions.

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel. The Board has considered the objections, the record, and the IHE's Decision in light of the Employer's exceptions and brief, and has decided to affirm the rulings, findings, and conclusion of the IHE, as modified herein, and to adopt his recommendations.

The Employer contends that the IHS should have construed the phrase "current calendar year" in Labor Code Section 1156.4 to mean the year in which the petition for certification is filed.— Section 1156.4 provides, in pertinent part, 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.

The point of the Employer's argument is that under its reading of the pertinent provision, the petition which was filed on January 3, 1979, should be dismissed since the applicable pre-petition payroll, for the period which ended on December 24, 1978, was less than 50 percent of its peak employment for calendar year 1979.

The IHE declined to rule on the statutory language since he found that the petition was timely filed whether the provision is accorded the interpretation the Employer would attach to it or

---

[1/] There is no dispute as to the meaning of a calendar year. "A 'calendar year' is the period from January 1st to December 31st next, both inclusive." Clapton v. Scharrenberg, 106 C.-A. 2d 430 (1951).

whether it means the year of the pre-petition payroll. We agree with the IHE' 3 conclusion that the petition was timely filed, but. we reach this result on the basis of our conclusion that the statute contemplates referance to the same year as that of the payroll period which predates the filing of the petition.

While there should be little doubt that the plain language of Section 1156.4 requires that the two payrolls to be utilized when measuring peak and percentage of peak are those which fall within the same calendar year, further clarification may be had by reference to other provisions which are an integral part of the same statutory scheme. Section 1156.3(a), for example, requires that the petition be supported by a majority of the currently employed employees in the bargaining unit. Moreover, under Section 1156.3(a)(1), the petition must allege:

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

We emphasize that the statutory term "currently employed" pertains to employees who were employed prior to the filing of the petition. The Act neither requires that petitions be supported by, nor that eligibility be limited to, employees who are employed on the date that the petition is filed or even on the date that the election is held. Labor Code § 1157. It logically follows that the term "currant calendar year" has reference to the same calendar year which includes the payroll period preceding the date of 'the filing of the petition.

Having concluded that "current calendar year", as that phrase is used in Section 1156.4, refers to the same calendar year as the year which includes the pre-petition payroll eligibility period, we find that the petition was timely filed in accordance with statutory requirements. Peak employment occurred during the payroll period which ended on January 22, 1978, when 51 employees were employed. The pre-petition payroll of December 11 through 24, 1978, reflects a 33-person employee complement, more than 50 percent of the highest payroll in calendar year 1978.

CERTIFICATION' OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes has been cast for the United Farm Workers of America, APL-CIO, and that, pursuant to Labor Code Section 1156, the said labor organization is the exclusive representative of all agricultural employees of Ruline Nursery in the State of California, 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: June 11, 1980

HERBERT A. PERRY, Member

JOHN P. McCarthy, Member

RALPH FAUST, Member

CASE SUMMARY

Ruline Nursery (UFW) 6 ALRB No. 33
Case No. 79-RC-1-SD

INVESTIGATIVE HEARING EXAMINER'S DECISION

On January 3, 1979, a representation election was conducted among the agricultural employees of the Employer. Following an evidentiary hearing on the Employer's objections to the election, the I HE found that there was insufficient evidence to warrant setting aside the election and recommended that the objections be dismissed and that the UFW be certified as the exclusive collective bargaining representative of all agricultural employees of the Employer.

BOARD DECISION

After considering the objections, the record, the IHE's Decision, and the Employer's exceptions and brief, the 3oard decided to affirm the IHE's rulings, findings, and conclusion and to adopt his recommendations to dismiss the objections and certify the UFW.

The Board held that the phrase "current calendar year" in Labor Code Section 1156.4 refers to the same year as that of the statutory payroll period for eligibility which immediately precedes the filing of a petition for certification; i.e., that the two payrolls to be utilized in measuring peak and percentage of peak must occur in the same calendar year. The Board also noted that a "calendar year" is the period from January 1st to December 31st next, both inclusive. On this basis, the Board concluded that although the representation petition was filed early in the year 1979, the applicable pre-petition payroll was that of December 11 through 24, 1978, and therefore the employment level during that period must be measured against the highest payroll of calendar year 1978.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	CASE NUMBER: 79-RC-1-SD

Thomas P. Campagne, Esq., for the Employer

Ned Dumphy, for the Petitioner

Before: Matthew Goldberg, Administrative Law Officer

DECISION ON OBJECTIONS TO CONDUCT OF ELECTION

I. Statement of the Case

On January 3, 1979,[1/] the United Farm Workers of America, AFL-CIO (hereinafter referred to as "Petitioner" or "Union") filed a Petition for Certification in Case Number 79-RC-l-SD, in order to obtain a representation election for a bargaining unit of all the agricultural employees of Ruline Nursery (hereafter referred to as "Employer"). Pursuant to said petition, an election was conducted among the employees on January 10. The Tally of Ballots from the election showed the following results:

Votes cast for:	
Petitioner	14
No Union	4
Number of Unresolved Challanged Ballots	7
Total Number of All Ballots	25

On January 15, the employer served its Petition Setting Forth Objections to Conduct of Election, etc., having previously

[1/] All dates refer to 1979 unless otherwise noted.

submitted on January 5, prior to the election, its Written Reply to Petition for Certification Pursuant to ALRB Regulation 2310.

On April 17, the Executive Secretary for the 3oard issued an Order of Partial Dismissal of Employer's Election Objections and Notice of Issues to Be Heard. Thereafter, on May 4, a Notice of Investigative Hearing was issued, setting forth the following matters on which evidence was to be heard:

1. Whether Board agents demonstrated bias and prejudice against the employer and favoritism towards the petitioner, by attempting to allow a voter to cast a ballot on behalf of an absent worker and whether this conduct justifies setting aside the election.

2. Whether Board agents encouraged certain persons to cast ballots even though said persons indicated that they did not wish to vote and/or were ineligible to vote and whether this conduct justifies setting aside the election.

3. Whether Board agents demonstrated bias and prejudice against the employer and favoritism towards the petitioner, by allowing voters to harass and berate employer's observer in the vicinity of the polls and whether this conduct justifies setting aside the election.

4. Whether petitioner coerced voters regarding whom they voted for and whether this conduct had an effect upon the outcome of the election. (Objection Number 15 of employer's petition.)

5. Whether Board agents permitted and condoned the presence of numerous voters in the immediate voting area during voting hours after they had cast their ballots and whether this conduct had an effect upon the election.

6. Whether the Regional Director improperly directed and conducted this election under Cal. Lab. Code Section 1156.4 and 8 Cal. Admin. Code Section 20310 (a) (6) (1978), and whether the election petition was untimely filed because the average number of employee days worked during the payroll period immediately preceding the filing of the petition is less than fifty percent of Ruline's 1973 peak payroll period.

7. Whether petitioner unlawfully coerced and threatened employees and whether this conduct had an effect upon the election. (Objection Number 21 of employer's petition.) To the extent this objection relates to showing of interest it shall not be considered.

3. Whether petitioner illegally induced employees to vote for the petitioner by threatening that reprisals would be taker, against them unless they signed authorization cards and/or voted for the petitioner and whether this conduct had an effect upon the election. To the extent this objection relates to showing of interest it shall not be considered.

9. Whether petitioner illegally induced, employees to vote for the petitioner by making threats of reprisals and promise of benefits to employees.

10. Whether petitioner, by its agents and supporters, particularly by and through Mr. Oscar Vega, intimidated and coerced employees into voting for the petitioner with threats of reprisals.

11. Whether Board agents demonstrated bias and prejudice against the employer and favoritism towards the petitioner, by the, Board agent's conversations, conduct and actions with Mr. Francisco G. Serrata (after the polls had opened and balloting began) in the vicinity of the polling area upon the employer's premises and whether this conduct justified setting aside the election.

12. Whether petitioner campaigned and electioneered by and through company supervisors and/or persons closely allied with management and whether this conduct had an effect upon the election.

II. Findings of Fact and Conclusion of Law[2/]

1. Attempt to Allow Voter to Cast Ballot for Absent Worker

The sole testimony in support of the employer's position concerning this alleged incident was provided by Rebecca Ponce, the employer's observer at the election. According to her, Board agent Tony Sanchez asked her during the lunch break on the day of the election if it would be permissible for Martha Aros Cortes to cast a ballot for her mother, a Ruline employee eligible to vote who was absent on that day.

Present at the time of this alleged conversation were Board agents Sanchez and Ellen Sward, as well as union observer Pedro Rivas. Both Sanchez and Sward denied that the conversation took place. In addition, Maria Cortes denied that she spoke with Sanchez concerning the possibility of her casting a ballot on behalf of her absent mother.

The likelihood that a Board agent would even broach such a subject or consult with an observer regarding it is highly unlikely. Sanchez was experienced in the supervision of and assistance at numerous representation elections, while the observer's acquaintance with such matters could only be termed minimal, this instant election being her only exposure to these I situations. In short, it strains the credulity to consider that such a conversation actually took place.

[2/] As will appear, the objections are not treated in their original order. The two objections which warranted extensive discussion, and which appeared to have most merit, namely the issues of peak and supervisor solicitation, are analyzed in the last two sections.

Furthermore, I found the overall credibility of Rebecca Ponce to be highly suspect[3/] Her demeanor indicated that she was not being entirely candid. While testifying on this particular subject, her discomfort was apparent, as she visibly flushed when questioned concerning it. Her accounts of other matters, as will be more fully discussed below, were not internally consistent. At times, she was somewhat evasive in her responses. Ponce openly admitted that she did not like the union, indicating an arguably biased perspective. She also lives in company housing provided by the employer as part of the benefits of her employment relationship.

In sum, I do not credit Rebecca Ponce's assertion that Board agent Sanchez consulted her regarding the casting of a ballot by proxy. Accordingly, the employer has not net its burden of proof on this issue, and objection one of its petition is dismissed.

2. Encouraging Persons to Vote

Rebecca Ponce testified that at the first voting session for the election[4/] one Lucio Corona appeared at the site and told Tim Foots, the Board agent present there, that he was not going to vote. Foote, according to Ponce, informed him that he could vote.[5/] Corona responded that he did not intend to vote "because he was neutral." Ponce stated that Foote then asked him "are you sure of what you're talking about?" Corona allegedly replied "yes." Corona himself essentially corroborated this account.

Foote himself did not recall the conversation. Ponce modified her testimony on cross-examination by stating that she was not sure whether it was Foote or Board agent. Ellen Sward who "encouraged" Corona to vote. Sward denied that the conversation, took place.

[3/] Ms. Ponce's testimony provided the basis for the bulk of the employer's objections to the conduct of this election. As such, the statements regarding her credibility appearing above apply with equal force to the other objections about which she testified!

[4/] Balloting occurred at three separate sites and at three different times on January 10, From 6:30. to 7:00 AM, voting took place in the company lunchroom at the nursery; from 12:00 to 12:30! PM, voting took place in a parking lot located near the lunchroom;' the final session was held from 5:00 to 6:30 ?M at the Moose Lodge: in Fallbrook.

[5/] The employer contended that Corona was a supervisor. This issue will be analyzed infra.

[6/] The declaration of Jack Jester, company supervisor, in support of the employer's objections, states chat Ponce told him that it was Sward, not Foote, who had the above conversation with Corona.

Even assuming that Ponce's version of the incident was the correct one, the evidence presented on this point is insufficient, overall, to justify setting aside this election. Generally, representation elections may be invalidated where a particular act has a tendency to affect the integrity of the Board's election processes. See Athbro Precision Engineering Corp., 166 NLRB 966, 65 LRRM 1699 (1967). This Board has stated that "to constitute grounds for setting an election aside (Board agent) bias or an appearance of bias must be shown to have affected the conduct of the election itself and have impaired the balloting's validity as a measure of employee choice." Coachella Growers, 2 ALRB No. 17 (1976).

Initially, it should be emphasized that it is not contended that Foote recommended that Corona vote one way or the other, bat merely informed him that he was able to vote. In no way could this be interpreted as affecting the integrity of the election process or impairing "the balloting's" validity as a measure of employee choice." Foote's remarks, even if made, were plainly not directed at endorsing a particular position at the election, thus indicating bias. Overall, they can be viewed as fairly innocuous.

Secondly, it is extremely doubtful whether "encouraging" people to vote could be so construed as to justify the setting aside of an election. Such conduct insures, rather than impairs, "the balloting's validity as a measure of employee choice," as it seeks, to foster employee participation in the election process.

For the foregoing reasons, this objection is dismissed.

3. Allowing Voters to Harass the Employer's Observer

The employer contends, via this objection, that Board agents displayed bias towards the petitioner by permitting individuals to "harass and berate" its observer.

Ms. Ponce once again provided the only testimony on the employer's behalf upon which this objection is based. She stated that during the morning balloting session, Marta Aros approached her, grabbed at her observer's button, and said "What are you doing here?" Present at the time, according to Ponce, were agent Foote, the union observer, and another worker named "Tina" (possibly Justina Wichware). Tony Sanchez, though present, may, have been outside the polling area at that instant.

No corroboration was provided for Ponce's account. Foote and Pedro Rivas, the union observer, denied it happened. Contrary to Ponce, Sward testified that she was also present during the entire morning balloting session and saw no such confrontation take place. In addition, she stated that observers were instructed to report any irregularities to the Board agent. Ponce made no mention of this alleged incident to her. While a version of the problem appears in supervisor Jack Jester's declaration in support of the Employer's Objections Petition, dated January 14, Ponce denied talking to Jester or to the employer's

attorney about it.[7/] Interestingly, although Ponce executed two separate declarations on the day of the election, neither contained anything regarding Marta Aros.

It is elementary that the party objecting to the conduct of an election has the burden of proving that the election was unfairly and improperly conducted. (See MLRB v. O.K. Van and Storage Inc., 49 LRRM 2218 (CA 5, 1962). The employer has failed to meet this burden insofar as this objection is concerned. I am unable to credit Ponca's version in the face of her general lack of candor while testifying (as noted above), the denials by other percipient witnesses that the incident occurred, and the absence of any mention of it in declarations executed on the day the incident allegedly took place even though Ponce spoke with the company's attorney through an interpreter at the end of each voting session.

Ponca also claimed that at the third voting session, about fifteen workers were laughing as they lined up to vote,[8/] saying that she, Ponce, "was on the boss's side." She later added on cross-examination that they also said she was nervous. Her testimony was not corroborated.[9/] Sward and Pedro Rivas denied that this incident took place.

The employer contends that Board agent bias was demonstrated by their condonation of abusive behavior directed towards the employer observer. Implicit in this position is that Board agents observed the behavior in question and consciously determined to do nothing about it. Nothing in this record could arguably support such a finding.

I am not convinced that these incidents as alleged in fact occurred. Even assuming they did, however, the employer has failed to demonstrate by virtue of them how they could "have impaired the balloting's validity as a measure of choice." Only

---

[7/] She did recall meeting with these individuals after each of the voting sessions, however.

[8/] Her statement that the workers “were laughing at me because I was a representative" was stricken.

[9/] Ponce's testimony in this regard was colored by her inconsistent testimony on cross-examination concerning it. Ponce related that the workers were about 30 or 40 feet away from her as they came inside to vote, laughing, and from that distance she could hear the comments they were making. Despite her professed ability to hear these remarks, all she could recall was the workers said she was nervous because she “was representing the boss." She then modified her statement by saying that the workers were 10 or 15 feet away "when they were coming to vote." and the doorway to the polling site was 25 to 30 feet from where she was seated. Further, she stated that about 15 people voted at the third site, five or six at the first, and two at noontime. Yet she recalled that a total of 16 people voted all together.

one other worker was present when Arcs allegedly pulled the observer's button; no evidence was presented to demonstrate that an account. of the incident was communicated to other workers. The possible impact of this conduct, if it occurred, was therefore de_ minimus. Although Ponce attempted to testify that the laughter of the afternoon voters was directed at her, none of the surrounding circumstances which she supplied would substantiate this conclusion. The remarks which Ponce attributed to individuals at the third site were not of such character to affect the free choice of these voters (see Kawano Farms, 3 ALRB No. 25 (1977)).

The employer has failed to demonstrate, by a preponderance of the evidence, that voters “harass [ed] and berate [d]" the employer's observer; that Board agents allegedly demonstrated their bias by permitting such behavior; or how these incidents affected the integrity of the election process, thus justifying the setting aside of the election. This objection is therefore dismissed.

4. Board Agents Permitting Voters to Congregate

Ponce and Jack Jester testified that outside the Moose Lodge, where the third balloting session was held, a group had assembled in the parking lot. While the voting was actually taking place, this group was heard laughing and creating a general commotion by persons inside the building. Ponce had only a vague recollection of any remarks made by the group, stating that she heard some individuals say that they were "going to win." As noted earlier, Ponce also testified that as voters entered in the Lodge to cast their ballots, they were in an exuberant, boisterous mood, saying that about fifteen voters had come in as a group at that time. Board agent Sanchez, however, stated that voters came in to the third site in twos and threes, not en masse, and he could not recall those voters laughing, chanting or shouting at that time.

Sanchez corroborated the statements regarding the commotion outside the Moose Lodge. He testified, however, that after he perceived the disturbance, he went outside the Lodge, told the people to come inside to vote, if they had not already done so, and to leave the area if they had. Following Sanchez's request, the disturbance was abated. The noise, according to Sahchez, lasted a total of about one minute.

Significantly, no evidence was presented as to whether any of the commotion discussed herein contained elements of electioneering or campaigning. The record merely indicates that individuals were expressing their good moods at the end of a work day, or perhaps their anticipation of a favorable outcome of the election, as they perceived it. While the election itself may have provided the occasion for their assemblage, the gathering and the effects it produced were largely innocuous in character.

Even where electioneering has occurred at or near the polls, this Board has declined to apply a per se approach, as in

Milchem, Inc. (170 NLRB No. 46, 67 LRRM 1395 (1968)), to the effect that conversations between parties and voters in the polling area will be deemed prejudicial. (See Superior Farming, 3 ALRB Mo. 35 (1977)). In such cases, an inquiry must be made into whether the conduct affected the election's outcome (Ibid) The mere presence of numerous voters in the voting area, coupled with a vocal disturbance, has been held insufficient to justify the setting aside of an election. See D'Arrigo Brothers of California, 3 ALRB Mo. 37 (1977); Dairy Fresh Products, 4 ALRB No. 2 (1978).

In Hecla Mining Company, 218 NLRB No. 61, 89 LRRM 1886 (1975), the NLRB held that no interference with the election process occurred, even though voters congregated in the polling area and engaged in conversations wherein pro and anti-union sentiments were voiced, since: the balloting was fast and orderly; the conversation was not overly loud or disruptive; "mass [or]... rampant electioneering, mass confusion, chaos or a noisy uproar" did not occur; Board agents did not act improperly, in the absence; of complaints, in not directing that conversation cease.

The facts presented by the instant situation are lacking in a number of elements appearing in the above-cited cases, yet even in those cases the elections were not set aside. The conduct complained of within the ambit of this particular objection did not involve conversations with parties, nor did the substance of the conversations contain any pro or anti-union references. Mo evidence was presented by the objecting party that; this conduct actually disrupted the balloting, or was a source of confusion or consternation. Furthermore, unlike Hecla Mining, Board agent Sanchez, acting on his own initiative acted effectively to quell, the disturbance, which by his estimate, went unchecked for "less than a minute."

Accordingly, it is concluded that the circumstances which are the subject of this objection are legally insufficient to justify the setting aside of the election.

5. Union Coercion Via Threats of Reprisals and Promises of Benefits (Objections Numbers 7, 8, 9 and 10)

The basis for these objections centers around three separate incidents which, the employer contends, illegally coerced or induced employees to vote for the union. Each of these incidents involves conduct alleged to have been perpetrated by Oscar Vega. The sum and substance of these objections is that according to employee Sandelio Castenada, Oscar Vega told him that if he, Castenada, did not sign an authorization card, he could be reported to immigration authorities[10/]; Vega allegedly informed Lucio Corona that "union representative was coming, and your work could be performed by' an irrigating company. Think it over"; and that on December 30, 1978, the rear window of Castenada's automobile was

---

[10/] Castenada admitted that he was not present in this country legally.

smashed by two men whom Rebecca Ponce claimed were Vega and employee Mario Duran.[11/]

Vega denied complicity in any of the foregoing.[12/] Castenada's credibility and his ability to recollect was called into question by conflicts between his testimony and his declaration under penalty of perjury. In the declaration, Castenada stated that Vega visited him one evening, that Vega made the remarks concerning immigration at that time, and that he and Ponce, his common-law wife, both signed authorization cards then. However, he testified that Vega spoke with him on the morning of the day Castenada returned to work and at that time mentioned the immigration "threat"; that Castenada signed a card at about noon the same day, as the two spoke outside of Castenada's residence; and that Ponce did not sign her card then but did so after work on that day. Further, Castenada's testimony was substantially I colored by his arguable bias in favor of the employer: he had been recently promoted to foreman, replacing former supervisor Raul Vega, and lives in company supplied housing.

Although Corona noted that Socorro Sandoval, who worked for Ruline, was present when Vega allegedly made the above remarks to him, Sandoval, when called as a witness for the employer, was not asked to corroborate Corona's testimony. The import of Vega's alleged remarks to Corona is also somewhat ambiguous. It is difficult to determine whether the alleged threat of job loss was designed to encourage voting for or against the union, despite Vega's admission that he told nearly every worker that he was for the union.

Insofar as the automobile damage was concerned, Ponce's identification of the two who allegedly caused it was highly suspect. She testified that on December 30, at about 8:00 PM, she heard a noise outside her and Castenada's house, looked outside, saw the rear window of Castenada's car smashed in, and two men walking, not running, away from the scene. Ponce admitted that she) did not see the faces of these men that night, but based her identification on their body shapes, as seen from the back, and their voices. However, she could not recall any of their remarks, and openly stated that they were speaking in "very soft voices." Not asked on direct examination what these individuals were wearing, on cross she could not recall how they were dressed. However, on examination by this hearing officer, she related that one of the men was wearing a yellow and red cap; on re-direct, she stated that she had seen Vega wearing such a cap. Vega himself denied owning or wearing this item at any time.

Furthermore, Ponce stated that she did not call out or say anything to the two men immediately after the window had been

---

[11/] The employer contends that Duran was a supervisor. As will the more fully discussed below, I have determined that he is to be considered an employee.

[12/] Duran likewise denied responsibility for the damage to the automobile in question.

broken, despite the fact that they were allegely in front of her house right after she heard the window being broken. and that she was acquainted with the two. She also testified that she did not report the incident to the police, which, in light of her ability to identify the individuals who were responsible for such an obvious act of vandalism, renders that identification questionable.

In sum, I am unable to lend any credence to Ponce's identification of the two individuals who allegedly smashed the rear window of Castenada's automobile, and find that there is insufficient reliable evidence to positively attach responsibility for this act to Vega and Mario Duran.

Notwithstanding the above factual dissection of the employer's presentation of these three incidents, and the concommitant lack of credence which I can attach to the employer's evidence j concerning them, these objections must be dismissed on what is essentially a legal ground. The gravamen of each objection is that the petitioner (or union) was somehow responsible or could be held accountable for the complained of acts. As such, an agency relationship must be established between the union and the perpetrator of the acts in question. The burden of proof in establishing this relationship rests squarely with the party (in this case the employer) asserting its existence. San Diego Nursery, 5 ALRB No. 44 (1979); International Longshoremen's and Warehousemen's Union Local 6 (Sunset Line & Twine Company), 79 NLRB 1487, 23 LRRM 1001 (1948). The employer has clearly failed to meet its burden in this regard.

As will be more fully discussed below, Oscar Vega abetted the organizing efforts of the union. He solicited authorisation cards, distributed leaflets inviting employees to union meetings, attended these meetings, and made it no secret that he was in favor of the union. Scott Washburn, however, an organizer for and official representative of the union, was responsible for the campaign at Ruline, speaking at union meetings, conferring with workers, collecting authorization cards, and signing the election petition. This Board has repeatedly held that the actions of employees who are union adherents cannot automatically be attributed to the union. Takara International, Inc., dba Niedens Hillside Floral, 3 ALRB No. 24 (1977); D'Arrigo Bros. of California, 3 ALRB No. 37 (1979); Sam Andrews Sons, 4 ALRB No. 59 (1978); C. Mondavi & Sons, 3 ALRB No. 65 (1977). Merely j soliciting authorization cards and distributing union leaflets does not give rise to the creation of an agency relationship between the person so engaged and the union. Select Nursery, 4 ALRB No. 61 (1978); Tepusquet Vineyards, 4 ALRB No. 102 (1978), San Diego Nursery, 5 ALRB No. 43 (1979).

While the facts of the San Diego Nursery (ibid) are distinguishable from the instant case[13/] its analysis of the agency

---

[13/] There, unlike here, contacts by union officials were exceedingly minimal. Organization of that nursery was due primarily to the initiative of its own employees via an in-plant organizing committee.

concept as it pertains to agricultural labor relations is particularly instructive and applies with undiminished strength to this situation. The Board therein noted that

> [T]he existence of an agency relationship under both the NLRA and our Act must be determined in light of common law principles of agency (citing ALRA 1165.4, the equivalent to NLRA §2(13), which states "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.") Under the common law, the apparent authority of an agent arises from manifestations made by the principal to the third party.
>
> ...[N]o union official or organizer made any statements or engaged in any conduct which would indicate to the employer's employees that members of the organizing committee were acting as agents of the union...[t]he San Diego Nursery committee members were not acting as the union's contact with the rest of the workers. The nursery workers knew the committee members not as UPW organizers but as fellow employees.... There was no manifestation by the UFW to the other employees that the UFW had authorized the committee to act as agents. (5 ALRB No. 43, pp. 5-7.).

Likewise, in this case, no evidence was presented regarding expressions by anyone from the union which would indicate that either Oscar Vega or Mario Duran "were acting as agents of the union." Clearly, union contact with this employer's workers was not solely through in-plant organizers: Washburn made himself a visible union representative, actively engaged in the organizing campaign. The record herein contains nothing which would indicate that Vega or Duran "were the representatives of the union in the eyes of the other employees and that the union authorized them to occupy that position." (5 ALRB No. 43, p. 4.) Accordingly, j having failed to establish that Vega or Duran was an agent of the j union, the employer's objections based on their alleged conduct which it sought to attribute to the union are dismissed.[14/]

[14/] Parenthetically, it should also be noted that conduct of a non-party is accorded less weight than that of a party in determining the impact of such conduct on the free choice of workers in representation proceedings. Takara International, supra; Kawano Farms, 3 ALRB No. 25 (1977); San Diego Nursery Co., Inc., supra. In the Takara, Select Nursery and Kawano cases, alleged threats by union adherents to report certain individuals to immigration authorities were held insufficient to form the basis for setting aside a representation election.

6. Board Agent Bias Via Conduct Involving Employee Francisco Serrata

Jack Jester, a supervisor for the employer, testified that employee Francisco Serrata, who had recently been laid off but was eligible to vote, was in attendance when Jester, Board agent Sward, employer attorney Campagne, union representative Washburn, and union observer Pedro Rivas, among others, discussed setting up the morning balloting session, which was to be held in he employer's lunchroom.[15/] During the course of that discussion, Sward set up a "quarantine area" encompassing the lunchroom and the road from the top of the hill, where the entrance to the nursery is located, to the time clock area at the bottom of the hill.[16/] Jester testified Campagne noted at that time chat as Serrato was no longer employed by the nursery, he should leave the company premises as soon as he had cast his ballot. Serrato was seen wearing a red UFW button on that morning.

At approximately 7:00 AM, when the morning balloting session was supposed to be concluded, Jester and Campagne walked back down the road towards the lunchroom. Jester testified -hat he saw Serrato and 3aord agent Sanchez standing at the door of the lunchroom. Sanchez, upon seeing Jester and Campagne, told them to return to the company offices, as the voting had not yet finished. Jester and Campagne did so.

After waiting about ten minutes at the office, they starred back down the hill again, this time accompanied by Scott Washburn. Sanchez again caught them before they reached the polling area, told them they were still not finished with the balloting, and requested that they return to the office. Jester noted Serrato was still standing by the entrance to the lunchroom, and that Serrato was conversing with employees and Sanchez.[17/] Campagne questioned Serrato's continued presence. Sanchez, according to Jester, said that he would send Serrato back up the hill momentarily and Serrato eventually did leave the polling area.

Prior to the noon balloting session, Serrato was once again observed near the polling area, which had been designated as the lot adjacent to the greenhouse where the lunchroom was located.

[15/] Serrato wished to be chosen as the union's observer. However, Rivas was so designated by Washburn.

[16/] The lunchroom is located about mid-way down the hill on this road.

[17/] Jester testified inconsistently regarding Serrato's interchange with employees. He initially stated that Serrato was "talking to employees as they entered..." Almost immediately thereafter, however, he stated that he did not see Serrato speaking with employees as they went in to the lunchroom, but only "acknowledging" at least one employee as he left the voting area.

Campagne re-iterated to Sward that Serrato had no right to be present if he had already voted in the morning. Serrato then, according to Jester, "kind of wandered off and went down into the greenhouses," and was seen standing right outside the time clock area, talking with Mario Duran.[18/] Sward again designated a quarantine area, which Jester said he saw Serrato leave shortly after Jester himself had.

Jester again saw Serrato before the voting re-commenced i at the third balloting session. This time, Serrato was with a group of other employees and Scott Washburn. The record fails to reflect that Serrato was inside the quarantine area at the time.

Various witnesses noted Serrato's presence on election day. Their accounts conflicted somewhat with that supplied by Jester.

Board agent Sward recalled that Serrato was one of the first to vote in the morning. However, it was not brought, to her attention that he was the source of any problems. Agent Sanchez, though initially denying any conversation with Serrato on election day, recalled that there was an individual standing next to him when Jester and Campagne came down the hill near the end of the first voting session. Sanchez could not recall the person's name, and further testified that he merely exchanged greetings with him.

Martha Aros stated that she saw Serrato near the time clock in the morning, and that Serrato gave her a union button. Luz Escobedo, stipulated by the parties to be a supervisor, said that she saw Serrato with a Board agent named "Tony" standing by the time clock at about 7:00 AM on the day of the election. She stated that as she punched in, Serrato handed her a union button. According to Escobedo, Serrato remained with Sanchez, near the time; clock, for about five or ten minutes, during which time she observed Serrato conversing with employees Elias and Maria, Gonzalez, and with Carmen Ramiros. Escobedo did not overhear anything Serrato said to these individuals.

This Board has determined that the mere presence of a union sympathizer near a voting area is insufficient to effect the outcome of an election. (See John Elmore Farms, 5 ALRB No. 16 (1977)) Furthermore, in D'Arrigo Brothers of California, 3 ALRB No. 37, it was held that the handing out of campaign buttons inside the polling area could not be utilized as the basis for setting chat election aside. There has been no showing here that Serrato was actually engaged in vocal electioneering on the I morning in question, or that he was in any manner designated by the union as its agent (see Select Nursery, supra; see also Stevenson Equipment Co., 174 NLRB No. 128, 70 LRRM 1303 (1969).

[18/] Jester stated that the time clock was about 200 feet from the noon voting area.

The employer has also failed to demonstrate Board agent bias in connection with these alleged incidents. Neither Jester nor Escobedo was able to testify as to the content of any conversations between Sanchez and Serrato. Sanchez stated that he only exchanged greetings with Serrato.

On the whole, the evidence is insufficient to affirmatively establish that Board agent conduct vis-a-vis Francisco Serrato's presence on the day of the election was of such character to impair "the balloting's validity as a measure of employee choice." Therefore, this objection must be dismissed.

7. Campaigning and Electioneering By Company Supervisors

Oscar Vega, stipulated to have been a supervisor for the employer, worked for the company in the job of foreman for approximately six years. On December 26, 1978, he was separated from the company. Vega stated that he was fired on that day and that the company told him he was terminated "for being 'Chavista.'" The employer maintains that Vega was merely laid off. However, it has not yet recalled him to work, even despite a major influx of employees in April 1979. Vega's discharge is the subject of a separate unfair labor practice proceeding, case number 783-CE-50-X in which it is alleged that he was fired for discriminatory reasons in violation of the Act.

Vega openly admitted that he distributed flyers to all of Ruline's employees inviting them to a union meeting on November 27, 1978. He attended this meeting, as well as two others of a similar nature which took place after his separation from the company. About eighteen workers were present at each of these meetings. He participated in group discussions at the meetings, although he did not address the group as such.

Vega also admitted that all of Ruline's workers knew he was a supporter of the union as a result of his discussions with them. He stated that he personally solicited about five authorization cards.[19/] Furthermore, Vega testified that he gave the cards on which he obtained signatures to other Ruline workers to pass on to Scott Washburn, the union representative.

[19/] The employer, in its brief, contends that Vega "actively participated in soliciting a majority, if not all, of the authorization cards." This is a blantant misstatement of the record evidence, and borders on dissimulation, Nowhere can there be j found support for this position. According to Castenada and Ponce, Vega asked them to sign cards as two of the three remaining individuals among Ruline's entire employee complement who had not already done so. Vega testified, without contradiction, that he obtained possibly "more than five signatures," but it was not possible that he got "at least ten." As will be discussed in the succeeding section, about thirty employees were in the unit in question at the time the election petition was filed.

Employee witness Jack Jester also testified that following the representation election itself, Vega appeared elated at the apparent union victory.

Despite the employer's statement in its brief that "there is no question [Vega] acted as the union's contact man," insufficient evidence appears in the record to establish such a conclusion. The hearsay statement of Rebecca Ponce that she was told by employee "Reynalda" to "ask Oscar or Martha or Yolanda" if she had any questions about-the union, even if deemed fully probative, does no establish that Vega was the sole individual whom the union relied upon to promote its interests and provide a conduct for communications between it and Ruline's employees. Nor do the facts that Oscar Vega handed out invitations to the first union meeting attended by these workers, had discussions with these workers concerning the union, and solicited authorization cards support the position of the employer casting Vega in the role of "contact man." These facts merely demonstrate that Vega was an active participant in the organizational campaign. No evidence was presented that Vega himself was responsible for initiating that campaign. Throughout, Washbrun's involvement as union representative was apparent. Noteworthy also is that Vega was separated from the company more than two weeks before the election, and was not permitted to enter the employer's property during this period.

It is well established that the mere participation by a supervisor in a union organizational campaign does not, without a I showing of possible objectionable effects, warrant the setting | aside of the representation election in question. Admiral Petroleum Corporation, 240 NLRB No. 122, 100 LRRM 1373 [1979); Gary Aircraft, 220 NLRB 187, 90 LRRM 1216 (1975); Rocky Mountain Bank Note Co., 230 NLRB No. 139, 95 LRRM 1421 (1977); Stevenson Equipment Co., 174 NLRB No. 128, 70 LRRM 1302 (1969); Turner's Express, Inc., 189 NLRB No. 23, 76 LRRM 1562 (1971). The aforecited cases apply a two-pronged analysis in situations involving supervisor organizing. They declare that the supervisor's conduct be examined in light of its effects on employees:

(1) Where a supervisor actively campaigns for a union and the employer takes no known stance to the contrary, employees might be led to believe that the employer favors that union.

(2) The possibility exists that the conduct could coerce employees into supporting the union out of fear of retaliation.

(See particularly, Stevenson Equipment, and Turner's Express, Inc., supra; see also Flint Motor Inn, NLRB No. 115, 79 LRRM

Several pertinent cases draw a distinction between "major" supervisors with a broad range of authority, and "minor" supervisors whose limited powers align them more closely to employees than to the particular employer. With the latter type, the inference that the '"employer favors the union" because of pro-

union supervisorial activity is more tenuous, (See Turner's Express, Inc., supra; Admiral Petroleum Corp., supra; Flint Motor Inn, supra.) The record herein does not reflect any indication of Oscar Vega's range of supervisorial power.

No evidence was presented directly on the type of campaign, if any, waged by this employer. Logically, where an employer takes an obviously anti-union stance during the course of a representation campaign, there is little danger that a supervisor's pro-union attitudes will be construed by employees to be co-extensive with that of their employer. (See Rocky Mountain Bank Note Corp. and Turner's Express, supra.) Nevertheless, as stared in Stevenson, any implication that the employer favors a union created by supervisor organizing" "will be dissipated...if one way or another, the employer's antagonism to the union is brought to the attention of the employees." in that case, the supervisor in question made a statement at a union meeting that he was discharged by the employer for participating in union activities. This statement was held to have dispelled any impression on the part of employees that the employer favored the union.

Similarly, the filing of the charge in case number 78-CE-50-X on December 28, 1978, which alleged that some seventeen employees, including Vega, were discharged for participating in i union activity can in some measure be said to bring "the employer's antagonism to the union" to the attention of its employees, particularly in light of the fact that these seventeen constituted a majority of the employee complement at the time. Whether or not the allegation in the charge is supported by a preponderance of the evidence adduced at the unfair labor practice proceeding, the fact that the discharge (or lay-off, as the employer would have it) was viewed by these employees and the union as prompted by their organizational activities would support the inference that in their minds,, the employer herein did not favor the union. Thus, Vega's participation in the organizational campaign could not, under these circumstances, lead employees to believe that the employer maintained a pro-union stance.

The more recent case of Admiral Petroleum Corp., supra, declares that where supervisors engage in organizing activity and there is no evidence of an anti-union campaign, the relevant inquiry must look to the substance of that supervisor's statements, and whether or not these statements can be seen by employees as reflecting the employer's position. Little direct testimony, if any, appears in the record concerning Vega's statements co I employees in which he espoused the union's cause. Even if one | were to credit, as I did not, the assertions by Castenada and Corona that Vega made threats regarding immigration and job security, nothing in those remarks can be construed as "reflecting the employer's position," as no specific references to the employer were made therein. Accordingly, it cannot be said chat Vega's remarks in any manner indicated that he and Ruline shared i a common or pro-union attitude or that employees would be disposed to view his remarks in that light.

The second aspect of the impact of supervisor organizing, i.e., that employees could be coerced into supporting the union out of fear of retaliation, is dispelled almost totally by Vega's separation from the company more than two weeks before the election. See Rocky Mountain Bank Note Co., supra. Notwithstanding the employer's assertion that Vega was "laid off," Vega's unrebutted testimony, the unfair labor practice charge which was filed on his behalf, and the failure of the company to recall him, indicate that he was at least under the impression that he had been discharged.[20/] As such, neither Vega nor the employees at Ruline could "reasonably anticipate" that he would be returning to work, and thus be placed in a position of being able to "retaliate," by virtue of his supervisorial authority, for employee attitudes contrary to his own.

The employer also argues that the union's showing of interest, on which this petition is based, was "tainted" by Vega's obtaining several authorisation cards, and thus the election should be set aside. Although the National Labor Relations Board follows the general principle forbidding specific reliance upon pre-petition conduct as grounds for setting aside an election, such conduct may be considered insofar as it lends meaning and dimension to related post-petition conduct. (Ideal Electric Manufacturing Co., 134 NLRB No. 1275, 49 LRRM 1316). I find this precedent not to be "applicable" within the meaning of ALRA §1148, as the time period between organizing activity, petition filing, and the election itself is, unlike under the NLRA, considerably foreshortened (see ALRA §1156,3), Pre-petition activities under our Act may accordingly ante-date an election by a few days and as such affect the election process seriously enough to warrant the setting aside of that election.

Notwithstanding the foregoing, it is determined that Vega's conduct in soliciting authorization cards is insufficient to justify overturning the election, As noted above, counter to the employer's contention, Vega most assuredly did not solicit a majority of such cards; its reliance on Wolfe Metal Products Corp. 119 NLRB No. 95, 41 LRRM 1154 (1957), where a supervisor obtained signatures on ten of twelve cards, is accordingly misplaced. The standard by which this conduct is examined in determining if a card majority is "tainted" is whether the supervisor's participation in soliciting cards "may be said to have deprived employees of the opportunity to exercise free choice in selecting a collective bargaining representative," El Rancho Market, 235 NLRB No. 61, 98 LRRM 1153, 1160 (1978); see also

---

[20/] Despite several transcript references cited by the employer in its brief to buttress their contention in this regard, only i the statement of Rebecca Ponce to the effect that Vega was laid off along with other employees in late December, could agreeably support such a conclusion. This testimony, based on hearsay, and emanating from a rank-and-file employee who perforce would have no direct knowledge regarding Vega's separation, has no probative value.

Juniata Packing Co., 192 NLUB 934, 74 LRRM 1241 (1970).

The National Labor Relations Board applies the same analysis to card solicitation as it does to other forms of supervisor organizing in examining its objectionable impact, that is, "at minimum, it must be affirmatively established that the supervisor's activity was such as to have implied to employees that their employer favored the union or there is cause for believing employees were coercively induced to sign authorization cards because of fear of supervisor retaliation." ET Rancho Market, OP cit. see also Orlando Paper Co. Inc., 197 NLRB 380 (1972), enf'd 480 F2d 1200 (CA 5, 1973); Brown & Connoly, Inc., 237 NLRB No. 48, 98 LRRM 1572 (1978). None of the evidence "affirmatively I establishes" that Vega's card solicitation could be construed as an outgrowth of the employer's pro-union position. Notwithstanding that, I have attached little credence to Lucio Corona's account of a threat of work loss conveyed by Vega. It has nor been shown that Vega actually solicited Corona's signature on an authorization card: the impact of the threat allegedly conveyed by Vega to Corona has not been demonstrated as coercing Corona. in signing a card. In fact, the evidence affirmatively establishes that Corona was neutral and did not care to vote in the election. The other alleged "threat" to Castenada and indirectly to Ponce that Vega would see to it that they would be reported to immigration authorities unless they signed, cannot be viewed as a threat I that Vega would use his supervisorial authority to retaliate against them for not signing a card. Thus, Vega's actions in obtaining endorsements on a number of authorization cards did not deprive "employees of the opportunity to exercise free choice in selecting a collective bargaining representative,"

It is concluded that notwithstanding the organizational activities of supervisor Oscar Vega, the objectionable aspects of such activities have not been established to an extern: which would warrant setting aside this election. Objections based on this conduct are therefore dismissed.

8. Timeliness of the Petition (Peak Employment)

a. Preliminary Statement

Under Labor Code Section 1156.4, the Board shall not consider that a representation has been 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." (See also Labor Code § 1156,3 (a).)

The Board has adopted two major methods of determining peak employment. The first of these involves a simple "head count," where the actual number of employees during the payroll period preceding the filing of the petition is totalled and compared which the highest total number of employees that the employer had during; any period in the current calendar year. (See Donley Farms, 4 ALRB No. 6 (1978) : Kawano Farms, 2 ALRB No. 25 (1976); Valdore Produce Co. , 3 ALRB No. 8 (1977)) The other, or Saikhon

method, involves the averaging of the number of employee days during the relevant period which is to be compared with the average for the peak, or highest period of employment. The latt method is utilized in cases where distorted computations of peak are caused by a high rate of employee turnover. (Mario Saikhon, 2 ALRB No. 2 (1976).) As there has been no showing that this employer experiences a high turnover rate among its employees, it is determined that the "head count," rather than the "Saikhon" method, more accurately reflects employee peak herein.[21]

b. Inclusions and Exclusions Within the Appropriate Unit

Before an actual employee count can be established, the employer's designations of certain job classification of particular employees must be examined in order to determine whether these; individuals are to be included in the unit, and thus add to the "head count" for the purposes of ascertaining peak. The eligibility list submitted in connection with this election contains twenty-one "general laborers," over whom there is no dispute as to their inclusion in the unit; seven "supervisors" and four "independent contractors," whom the employer contends should be excluded from the unit, thus establishing by its reckoning a total "head count" of twenty-one to be used for the purposes of determining peak.

(1) Supervisors

Two individuals, Oscar Vega and Luz Escobedo, were stipulated by the parties as being supervisors. That they should not be included in the unit, nor counted for the purposes of determining peak is not subject to question

In addition to these, the following persons were deemed supervisors by the employer: Martha Aros, Mario Duran, Elias Gonzalez, Soccoro Sandoval, and Lucio Corona. [22]

Raul Vega, the brother of Oscar Vega, was the general foreman of the nursery throughout 1978, He supervised the overall; day-to-day operations of the nursery and observed each employee at his or her particular job. He testified that of those termed "supervisors" by the employer on its eligibility list, Martha Aros, Elias Gonzalez, and Mario Duran did not have the authority i to hire, fire, discipline, or direct the work of employees.[23]

---

[21] The evidence clearly demonstrates that Ruline utilizes a central core of employees numbering about 25 throughout most of the year, with certain seasonal additions to its work force. These employees remain on the payroll from year to year as shown by comparisons of payroll records from the year 1976 forward.

[22] Rufus Orson has defined as a supervisor anyone who received a ten cent addition or premium to the base wage.

[23] Vega stated that Duran had the "authority, but not the experience" to direct work, and accordingly did not exercise that authority.

Aros was never told she was a supervisor and like Gonzalez, never attended a supervisor's meeting. Duran, who was deemed “assistant foreman," attended these meetings solely for the purpose of reporting on temperature readings taken at various locations in the nursery. Duran was essentially a mechanic and truck driver, supervised directly by Paul vega.

Glenn Stoller was employed by Ruline from February 1978 to February 1979 as economic adviser and general manager. After performing a profitability study for the nursery, Stoller assumed the managerial post in late February or early March 1978. He was responsible, and did, reorganize the chain of command within the nursery in about August 1978.[24/] According to Stoller, Duran "was in charge" of irrigation, soil mixing, truck loading and temperature monitoring. Stoller testified that Duran had the authority to "give orders," and as an example he stated that Duran was responsible for the project of filling pots with soil: "...at times, there would be three men making soil, and he was in charge to see that it was done properly and the soil was dispersed in the proper areas so that the growing crews could keep moving..." Although Duran had the authority to "request extra help," Stoller did not directly state that Duran could actually pull employees from one job and re-assign them to assist him.

Taken as a whole, it appears that it has not been established by a preponderance of the evidence that Duran was a supervisor within the meaning of Section 1140(J) of the Act. Stoller's description of Duran's directing work does not indicate that in .doing so he exercised "independent judgment" but merely took the output of his soil mixing crew to where it was needed. His attendance at supervisorial meetings was of a "clerical nature," reporting as he did on temperatures throughout the nursery which he had recorded. Accordingly, it is determined that Duran was an employee, and not a supervisor under Section 1140 (j) of the Act, and should be included within the bargaining unit. (See generally, Mid-State Horticulture Co., 11 ALRB No. 101 (1978); Anton Caratan and Sons, 4 ALRB No. 103 (1978).)

Stoller testified that Aros was a "lead girl... in charge of the propagation [of plants] under Oscar." He stated that she gave her crew of three to five women orders, and had the authority to assign tasks and obtain additional helpers, Stoller did not relate specific instances of her exercising this authority. Faced with a direct conflict in the testimony, and without any definitive examples of Aros' work functions, it cannot be determined on the basis of this record that Aros was in fact a supervisor under Section 1140 (j). As such, the employer has not met its burden of proof in this regard, and it is concluded that Aros should, as an employee, be included within the unit.

[24/] Pursuant to this re-organization, Oscar Vega was put in charge of foliage and new color crops. Haul was assigned to supervise the "support" areas of the nursery such as construction and the azaleas. Both Raul and Oscar were to report directly to Stoller, rather than Rufus Orson, owner of the nursery, as they had in the past.

Likewise, Elias Gonzalez, according to Stoller, had the authority to, and did, direct the work of an order pulling crew: “Every morning we would send down order sheets for the day and they would be posted. And it was Elias' duty to physically go to the different growing areas and assemble the plants and bring them to the order filling area..." Gonzalez himself, when called to testify, stated that he selected plants and had people help him which were assigned for that purpose by Raul Vega. The record fails to demonstrate that Gaonzalez exercised "independent judgment" but rather worked with a crew which transferred plants ready for shipment from the various growing areas to the shipping area. As with Aros, no direct examples were proffered which would indicate the manner in which Gonzalez allegedly directed work. Therefore, it is determined that Gonzalez also should properly be included within the bargaining unit.

Raul Vega testified that neither of the two remaining individuals alleged by the employer as supervisors, Lucio Corona and Socorro Sandoval, had the authority to hire, fire or discipline employees. Corona stated, however, that he irrigated the avocado grove owned by the nursery and was "in charge" of the avocado harvest. He testified that during that harvest, he tells workers where and what to pick, and has the authority to fire, transfer, suspend, lay off and recall workers. Unlike rank-and-file employees, Corona earns a salary, rather than an hourly wage, although Vega stated that this method of compensation was necessitated by the fact that Corona lives on nursery property and is required, at times, to tend the avocado grove at night. Vega noted that he would assign people to Corona for the harvest and that the nursery would from time to time engage a contract crew for the harvest, and Corona would, at such times, perform regular tasks in the nursery, apart from the work of the harvesting crew. Vega also testified that generally about half of Corona's work time would be spent in the nursery doing the work of other rank-and-file employees.

Sandoval functioned as a general handy man, plumber, mason and carpenter at the nursery, Raul Vega designated him as foreman. At the hearing, Sandoval testified that he was currently the only carpenter employed by Ruline. He stated that he has helpers or a construction crew working with him most of the time, and "tells them what to do," giving them "advice how to do the work." When not engaged in construction or repair, he "does the same work as everyone else."

It is concluded that Sandoval and Corona are in fact supervisors within the meaning of the Act. The evidence demonstrates both of these individuals, as per Section 1140(j), are empowered to and do direct the work of employees in a manner which involves the exercise of "independent judgment." It appears that both the avocado crew under Corona and the construction crew under Sandoval work apart from the rest of the nursery's operations, and that each crew is told what to do and how to do it by Corona and Sandoval, respectively. Corona's expertise in the avocado grove, and Sandoval’s expertise with construction, indicate that their judgment is required to perform these

particular functions.

(2) Independent Contractors

Four individuals, Luz Euyoque, Agustin Madrid, Jose Melo and Vistorino Olivas, were termed "independent contractors" by the employer, which asserted that as such they should be excluded; from the unit and not counted for the purposes of determining peak.

These individuals perform the same tasks and are under the direction and control of the same supervisors as the "general laborers" employed by Ruline. They are hired on an "as needed" basis. The employer determines their status by reference to the manner in which they are paid: if paid out of the general nursery account, with no withholding or social security deducted from their checks, and no worker's compensation insurance provided, the workers are deemed "independent contractors"; if paid from the nursery payroll account, with the appropriate deductions the workers are placed in the "general labor" category.[25/] "Independent contractors" also do not earn benefits such as paid holidays, life and health insurance, which are available to regular employees. The particular status which a worker at Ruline enjoys is solely at the discretion of the employer. The National Labor Relations Board in determining whether an individual is an "employee" or an "independent contractor," and thus excluded from coverage under that Act, utilizes the "right to control" test: workers are considered employees, and not independent contractors, if the person for whom they perform services reserves the right to control not only the end to be achieved by their work, but also controls the manner and means used in reaching such a result. See National Freight, Inc., 146 NLRB No, 17, 55 LRRM 1259 (1964); Associated General Contractors of California, 201 NLRB Mo. 36, 82 LRRM 1242 (1973). In the instant situation, the employer exerts control over the "manner and means" of the so-called independent contractors work. Ruline sets the hours and rates of pay of these workers, supervises them on the job, and essentially has them perform services under the same conditions as its employees in the "general labor" category. As such, despite the employer's designation, these workers are not independent contractors in the legal sense, but employees to be included within the unit, and counted for the purposes of determing peak.[26/]

[25/] As will be more fully discussed below, in April 1979, the employer employed approximately 80 workers for a period of about one week. These individuals were labeled "general laborers" because of "insurance problems" according to the employer.

[26/] It should also be pointed out that work designations by an employer that are sat on a more or less arbitrary basis, without any reference to leagl considerations, carry a wide potential for abuse in the disenfranchisement of employees as well as the possibility of manipulation of employee numbers in determining employment peak.

(3) Conclusion

Thus, in addition to the twenty- one "general laborers" named on the eligibility list, four so-called "independent contractors" and three of the individuals deemed supervisors Aros, Duran and Gonzalez) are employees within the meaning of the Act, and are to be included within the bargaining unit. Accordingly, the total number of employees who comprise that unit is twenty-eight and peak computations should be based on this figure.

c. The Employer's Peak

In April 1979, this employer experienced its highest employee complement to date: some seventy-eight employees worked during the payroll period of April 9 - 15.[27/] The employer contends that this period should be utilized as the index of its "peak." During the payroll period preceding the filing of the petition, which ended on December 24, 1978, twenty-eight employees were included in the unit. As this number does not comprise fifty percent of the number employed during April 1979, the employer argues that the petition should be dismissed, Subsumed within this argument is the contention that the phrase "current calendar year" set forth in Labor Code §1156.4 should be interpreted in this case as the year when the petition itself was filed, or 1979, as opposed to 1978, or the year of the relevant payroll period.

Essentially the issue presented by the employer is one of statutory construction: if "current calendar year" means the year in which the petition was filed, or 1979, then reference to the April 1979 period should be utilized to ascertain peak employment, bearing in mind, however, that if such is the case, then this situation should be treated as one involving a "prospective" peak, as the petition was in fact filed before the alleged peak occurred. In the event that "current calendar year" is construed as the year of the relevant payroll period, or 1978, then the instant petition has been timely filed: the twenty-eight eligible employees denoted on the pertinent list comprise at least fifty percent of the highest number employed during any payroll period in 1978.[28/]

Notwithstanding the foregoing, have determined that it is

[27/] The list submitted by the employer contained 81 names, including Luz Escobedo and Socorro Sandoval, whom I found to be supervisors, and Bandelio Castenada, who became a supervisor as noted above, earlier in the year when he replaced Raul Vega. As such, these names should be eliminated from the list and not counted for the purposes of determining peak.

[28/] The payroll period for the week ending January 22, 1978, contained 51 names, excluding supervisors Luz Escobedo and Socorro Sandoval. Another list was submitted containing 42 name excluding supervisors, for the period ending March 18, 1978.

unnecessary to resolve this issue since, regardless of the interpretation placed on the phrase "current calendar year," it is concluded that the petition was, in fact, timely filed. As noted above, the number of employees employed during the period ending December 24, 1978, was at least fifty percent of the peak reached during 1978. However, if 1979 is utilized as the "current calendar year," the case involves a "prospective peak" situation. Generally speaking, a Regional Director's peak determination where a prospective peak is contemplated will be upheld if it was reasonable in light of the information available at the time of the investigation surrounding the petition. Charles Malovich, 5 ALRB No. 33 (1979); Domingo Farms, 5 ALRB No. 39 (1979). Specifically, the Board will not, in the absence of extraordinary circumstances, set aside a Regional Director's peak determination, where there exists a prospective peak, on the basis of hindsight information, particularly post-election peak employment figures introduced at a hearing on objection (Malovich, supra.).

In its Written Reply to the union's Petition for Certification, filed before the election, the employer set forth its contention that it anticipated a future peak, in 1979, where there would be more than twice the number of employees than had worked during the payroll period immediately preceding the filing of the petition. In support of its position, the employer submitted the declarations of Rufus Orson and Wilbur Cook, a man having a wide range of exerpience in the nursery business including previous employment with Ruline and current employment with Wilsey Bennet Company, a horticultural transportation concern, where Cook co-manages the transportation of azaleas, Ruline's principal crop.

The declarations and the testimonies of these individuals, as well as the testimony of Edward Arneson, president of California Camelia Gardens, Inc., demonstrated that Ruline underwent a substantial revision of its basic operations in 1979. Due to economic necessity, it phased out most, if not all, of its foliage production, and concentrated on the production of "color" crops, Principally azaleas, and some poinsettias, hydrangias, caladiums", cinerarias, and cyclamens. In addition, the azalea industry as a whole bad discovered a more efficient way of producing that crop[29/] which essentially called for replacing the old method of putting one shoot, or baby plant, per four-inch pot, to placing three shoots in a six-inch pot. As a result, California Camelia Gardens, Inc., which had, in previous years, provided propagation material, or shoots, to Ruline, was no

---

[29/] Testimony indicated that the industry has an annual convention under the auspices of the Wilsey Bennet Company, for which Wilbur Cook works. The convention is attended by nearly all representatives of the approximately 15 azalea growers on the West Coast. Propagation and production techniques are discussed and information exchanged. Presumably, it was at such a gathering that the latest method for azalea propagation was disseminated.

longer in a position to do so: all of its available material was going to be utilized by California Camelia itself and none sold to other growers. Ruline was thereby placed in the position of having to obtain its own shoots, which it could gather from the already existing mother plants within the nursery.

These shoots or cuttings had to be taken from the mother plants at a critical period in the growing cycle, or when the "wood" was "ripe," occurring for a few weeks during the spring. The employer anticipated that it wanted to produce 250,000 saleable plants by 1981. Over one million shoots would have to be propagated to reach that result. To accomplish this, as well as to prune the mother plants, both Orson and Cook, in their declaration submitted before the election, estimated that Ruline would require the services of some seventy workers in the spring.

Post election data adduced at a hearing may be considered only to the extent that it explains or amplifies pre-election information submitted to the Regional Director (Holtville Farms, Inc. 5 ALRB No. 48 (1979)). As it turned out, in April 1979, the employer engaged in a crash program for one week. A large influx of employees, among whom numbered many college students with little or no previous agricultural experience, was hired. In Rufus Orson's own words, the situation was a "very unusual" one. Short-cut methods were employed to accomplish in a brief period what would ordinarily take several weeks. Even the taking of cuttings, usually done by hand, was expedited through the use of electric shears and a chemical pinching agent. In addition to the taking and planting of azalea cuttings, Ruline did the "spring cleaning" of its avocado grove, the elimination of weeds in and around the nursery, the shipping of Easter plants and the taking and planting of poinsettia cuttings. As Orson testified, "due to weather conditions and climatic response, the roof caved in": the azaleas "flushed" or were ready for shoot removal, and, simultaneously, the poinsettias also reached that phase. Ruline sought to, and presumably did, attend to all of the foregoing tasks during the peak week in April. When asked if the situation, and the large work force, would be duplicated in ensuing years, Orson's response was somewhat indefinite, in that the nursery's need for such a large group of employees would depend on a number of factors and could not be predicted with certainty.[30/] It appears that the taking of azalea cuttings was accomplished by the more experienced members of the nursery's work force who were employed for the bulk of the year. Those hired for the "crash program" primarily hoed, weeded, sprayed, spaced and moved plants and performed tasks which, in general, required little or no skill or prior experience. Significantly,

---

30/ Although the evidence did indicate that as a general rule the size of the unit increased when propagating took place in the; spring, the increase was not as large as the one experienced in April 1979.

the projections of peak employment made by Cook and Orson in their pre-election declarations were based on their estimate of labor requirements in the event that a particular, or manual, method of taking cuttings was utilized. The additional casks performed by the April 1979 work force were not taken into consideration. The method of obtaining shoots actually employed by the nursery in April 1979, i.e., electric shears and a chemical pinching agent, required far fewer employees for a much-reduced period of time than was contemplated by Orson and Cook prior to the election. Orson testified that under ordinary circumstances, it would take six to eight weeks for his experienced employees to accomplish the pinching that was finished, with the aid of the chemical, within two or three days. Thus, the highly speculative aspect of peak projections is underscored: information submitted to the Regional Director prior to the election was based on a set of factors wholly different from those which actually eventuated. Taking the evidence adduced at the hearing as a whole, it appears that Ruline's need to obtain its own shoots was only one small element contributing to the April 1979 peak. Other considerations, including weather and economic demands, contributed to a far greater extent. As with situations involving unforeseeable climatic conditions, the unusually high post-election peak employment figure herein therefore does not accurately reflect the size of a normal, or reasonably predictable, bargaining unit at peak, (See Malovich, supra,.) By the employer's own admission, the April 1979 large employee complement was an unusual occurrence.

The Regional Director, prior to the election, was supplied with peak employment figures for 1975, 1976 and 1977. These figures demonstrated that approximately fifty individuals, excluding supervisors, were employed at such times. Although past payroll records are only one factor to be taken into consideration in prospective peak cases, along with other relevant available information (see Domingo Farms, 5 ALRB No. 35 (1979)), these records, viewed in conjunction with the 1978 peak information, provide a reasonable basis for the Regional Director's peak determination herein. The highly speculative nature of the projected peak information submitted, the fact that the large April 1979 employee roster was an extraordinary circumstance not necessarily reflective of a normal peak, and with little likelihood of being repeated, and the supposition that the Regional Director may have considered 1978 to be the "current calendar year" on which peak was to be adjudged, all underscore the reasonableness of the Director's decision. Furthermore, that determination, due to basic policy considerations inherent in the Act, will not be overturned in the absence of extraordinary curcumstances (Malovich, supra.) which I find to be present in the instant case.[31/]

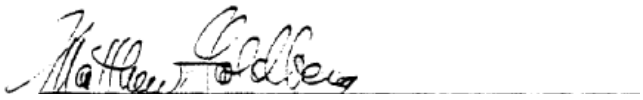
[31/] The manner in which the April 1979 peak was achieved also emphasizes the necessity for abiding by the Director's determination. Peak numbers attained after the election could very well be manipulated to the detriment of the petitioning union. Although seasonal conditions dictated that propagation material

Accordingly, it is determined that the filing of the petition herein was timely, when the payroll reflected fifty percent of the employer's peak agricultural employment, notwithstanding the "prospective peak" which occurred in-April 1979. The objection based on failure to timely file the petition herein is therefore dismissed.

III. Conclusion

Having decided that the employer's objections do not provide a sufficient basis for setting the election herein aside, it is concluded that the results of that election be certified.

DATED: 11/26/79



MATTHEW GOLDBERG
Administrative Law Officer

[31/] (con't) be taken from azaleas and poinsettias at a particular time, the other tasks accomplished by the short term work force were not so necessitated. That the employer herein determined to perform them in this same period points up the uncertainty inherent in prospective peak situations and their potential for abuse: a managerial decision might create a peak which was unrepresentative of the general overall labor requirements of a particular agricultural entity.