Gilroy, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

A & D CHRISTOPHER RANCH, Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Petitioner.	)	Case No. 80-RC-5-SAL 7 ALRB No. 31

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO (UFW) on July 26, 1980, a representation election was conducted on July 30, 1980, among the" Employer's agricultural employees. The official Tally of Ballots showed the following results:

UFW	188
No Union	5
Challenged Ballots	169
Total	362

The Employer timely filed post-election objections, three of which were set for hearing. In these objections, the Employer alleged that the conduct of picketers intimidated and threatened the Employer's workers and affected the outcome of the election; that the Agricultural Labor Relations Board (Board) improperly forced a stipulation on the opening of eleven challenged ballots; and that the Employer was not at 50 percent of peak employment during the payroll period immediately preceding the

filing of the Petition for Certification.

A hearing was held before Investigative Hearing Examiner (IHE) Michael K. Schmier on November 12 and 13, 1980. In a decision issued on March 5, 1981, the IHE found that the Employer had not shown that the alleged conduct of picketars affected the outcome of the election, nor that the election was conducted in an atmosphere of fear. The IHE found that the Board had not forced a stipulation on the opening of the eleven challenged ballots, and that the Board agent had reasonably determined that the Employer was at 50 percent of peak employment at the time of the filing of the Petition for Certification. The IHE recommended that the Employer's objections be dismissed and that the UFW be certified as the exclusive representative of the Employer's agricultural employees.

The Employer timely filed exceptions to the IHE Decision and a brief in support of its exceptions. The UFW timely filed a response to the Employer's exceptions.

Pursuant to Labor Code section 1146, the Board has delegated its authority in this case to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the IHE's rulings, findings, conclusions, and recommendations as modified herein.

In his Decision, the IHE found that the Board agent had reasonably determined peak by using the "averaging" method adopted in Mario Saikhon, Inc. (Jan. 7, 1975) 2 ALRB No. 2. The IHE determined that in calculating peak, the Board agent had properly

excluded three days from the eligibility week average, since little or no work was performed on those days, allegedly because of a strike.

We do not reach, the representative days issue in this case, because we find that the Board agent could reasonably have determined peak using the "body count" method. We hereby reaffirm our statement in Donley Farms, Inc. (Sept. 22, 1978) 4 ALRB No. 66, that use of the Saikhon averaging method is unwarranted where a conventional count of the number of employees in each of the payroll periods establishes that the employer was at peak during the pre-petition period. Thus the first determination should be whether the peak requirement is satisfied by the employee count method. If that method fails to produce a finding of peak, only then should the Saikhon averaging method be applied.

In the instant case, during the eligibility period there were 429 employees on the payroll, and during the 1979 peak period there were 755 employees on the payroll.[1/] Since 429 is more than 50 percent of 755, peak is established.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes

[1/] The Employer submitted payroll records to the Board agent for the weeks ending August 15, 16, and 17, 1979, as evidence of 1979 peak employment for its regular, steady, and labor contractor employees. At the hearing, the Employer's witness Robert Christopher claimed that labor contractor Cabrera's payroll record which was clearly marked "period ending 8/22/79" was actually applicable to the period ending 8/16/79, and therefore should have been used in place of the smaller list marked "period ending 8/15/79" in determining peak. We note that it is the Employer's burden to keep accurate payroll records, and that the Board agent was entitled to rely on the accuracy of the payroll information submitted to him by the Employer.

have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of A & D Christopher Ranch in the State of California for purposes of collective bargaining, as defined in Labor Code section 1155.2(a), concerning employees' wages, hours, and working conditions.

Dated: October 9, 1981

JOHN P. MCCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

A & D Christopher Ranch (UFW)

7 ALRB No. 31
Case No. 80-RC-5-SAL

IHE DECISION

The IHE found that the alleged conduct of picketers had not affected the outcome of the election conducted July 30, 1980, that the Board agent had reasonably determined peak by using the Saikhon averaging method, and that the UFW should be certified as the representative of the employer's agricultural employees.

BOARD DECISION

The Board affirmed the IHE's findings that the employer was at peak and that the picketers' conduct had not affected the election results, and it certified the UFW as the exclusive representative of the employer's agricultural employees. However, it ruled that the Board agent should first have determined whether peak was established by the conventional employee count method, before applying an averaging method. The Board did not reach the issue of whether peak could reasonably have been established by averaging, since it made its own determination that peak was established by employee count.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
A & D CHRISTOPHER RANCH,	)	
Employer,	)	Case No. 80-RC- 5-SAL
and,	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Petitioner.	)	

Randolph C. Roeder, Esquire
Littler, Mendelson, Fastiff
& Tichy, for the Employer

Carlos M. Alcala, Esquire
United Farm Workers of
America, for the Petitioner

DECISION

STATEMENT OF THE CASE

MICHAEL K. SCHMIER, Investigative Hearing Examiner: This case was heard before me on November 12 and 13, 1980, in Gilroy, California. The objections petitions [1/] filed by A & 0 Christopher Ranch (hereinafter also referred to as the "Employer") and served on the United Farm Workers of America, AFL-CIO (hereinafter also referred to as the "UFW"), alleged twenty-three instances of misconduct which the employer argues require the Agricultural Labor Relations Board (hereinafter also alternatively called the "Board" or the "ALRB") to set aside the election conducted among its employees on July 30, 1980. By order served September 8, 1980, the Executive Secretary of the Board dismissed seventeen objections and ordered that this hearing be conducted to take evidence on the remaining objections. On October 8, 1980, the Executive Secretary granted the Employer's. Request for Review with regard to an additional incident.

All parties were represented at the hearings and were given full opportunity to participate in the proceedings. Both submitted post-hearing briefs. On January 12, 1981, an off the record conference was held before me sitting in San Francisco.

1/ The original objections were filed on August 4, 1980. Supplements were filed August 4, and August 5, 1980.

The attorneys for both parties were present. Subsequently, reply briefs wore received by me from both parties.

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

FINDINGS OF FACTS

I

JURISDICTION

Neither the Employer nor the UFW challenged the Board's jurisdiction. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code section 1140.4 (c), that the UFW is a labor organization within the meaning of Labor Code section 1140.4 (f), and that an election was conducted pursuant to Labor Code section 1156.3 among the Employer's employees.

II

THE ALLEGED MISCONDUCT

The objections set for hearing allege two instances of improper conduct of the election by the Board agent in charge and improper conduct on the part of the UFW. With regard to the Board agent, the Employer first alleges that the Board agent improperly forced a stipulation on the opening of approximately eleven challenged ballots; second, the Employer alleges that the Board agent abused his discretion in conducting the election because the number of employees

employed in the last payroll period prior to the filing of the certification petition did not reflect fifty percent of the Employer's peak agricultural employment for the current calendar year. With regard to the UFW, the Employer alleges that conduct at the El Toro Ranch on July 27, 1980, the Rodriguez labor camp on July 28, 1980, and the Christopher packing shed on July 29, 1980 intimidated and threatened the Employer's employees and affected the results of the election.

III

BACKGROUND AND FACTS

R & D Christopher Ranch is involved in growing harvesting harvesting several agricultural products in California. In conducting its operation, the Employer employs regular and seasonal employees who are hired either directly by the Employer or contracted for through a labor contractor.

A petition for election was filed in this matter on July 2, 1980.[2/] Much of the evidence presented at the hearing went to the sufficiency of the showing of interest, a subject not now at issue. The petition alleged the existence of a strike and this fact was not disputed at the hearing. However, the time the strike began was disputed.

An election was noticed and directed for July 30, 1980 at 6:00 p.m. The tally of ballots for the election showed the following results:

2/ Unless otherwise indicated, all dates herein refer to calandar year 1980.

UFW	-	188	
No Union	-	5	
Challenged Ballots	-	169	3/

One hundred sixty-five ballots were challenged by the Board agent. Five were challenged by both the Board Agent and by Christopher Ranch. At the outset of the hearing, the UFW proposed that all 169 challenged ballots be counted to determine whether or not one of the three issues set for hearing, the stipulation on eleven ballots, could be avoided because the eleven would not be outcome determinative. The Counsel for Christopher Ranch did not join in the stipulation.

With regard to the alleged Board agent misconduct affecting the results of the elections, for the reasons set forth below, I find, first, that the Board agent did not improperly force a stipulation on the opening of approximately eleven challenged ballots; and, second, that the number of employees employed in the last payroll period prior to the filing of the certification petition substantially exceeded fifty percent of the Employer's peak agricultural employment for the current calendar year.

With regard to the alleged UFW misconduct, I

3/ IHE Exhibit 3

find that the Employer failed to present persuasive evidence concerning the alleged incident at the Christopher packing shed on July 29, 1980, and for that reason, this objection is recommended dismissed without further discussion or analysis. Evidence was presented that two other incidents occured at the Toro Ranch on July 27, 1980 and the Rodriguez labor camp on July 25, 1980. However, no evidence was presented that either incident affected one vote. No voter testified that he or she had been affected. Indeed, both. incidents involved workers who, in the main, were not participants in the election. The stipulation objections lacks merit because the employer's attorney at the time directed the Employer's observer to enter into the stipulation.

The major issue raised by Christopher Farms is peak. The petition for certification alleged that the Employer was at 50 percent of its agricultural employment. Although prior to the election, the Employer informed the Board Agent in charge it was not at peak, the Beard Agent determined the peak requirement was satisfied. For the reasons discussed below, I find that the Board Agent's determination that the peak requirement was satisfied is correct.

ANALYSTS AND CONCLUSIONS

A. The Allegation that the Stipulation Initiated by the Company was Forced by the ALRB.

The employer seeks to set aside the election alleging that the ALRB coerced a stipulation to the counting of eleven challenged ballots. Lawrence Alderette, the Board Field Examiner who conducted the election testified that following the election he was approached by Ron Barsamian, attorney for the Employer, concerning the counting of challenged ballots. Alderette testified that Barsamian asked to have some challenges counted. Barsamian then arranged to have the ballots of voters, who could be recognized by Maria Pena, the Company observer, counted. At the request of, and in the presence of Barsamian, eleven voters were identified by Maria Pena as persons she knew to be employees of the Employer.

The Board agent, Alderette, then prepared a stipulation which was reviewed by, and approved by Barsamian who then advised Maria Pena, the Employer's observer, that she should sign.

All eleven challenged ballots were then opened and counted.

Pena testified that Barsamian was present throughout the stipulation incident and that Barsamian advised her to sign the stipulation.

The gist of the employer's objections is that notwithstanding the foregoing, the lateness of the hour, the setting, and the observer's age combined to force a stipulation. This position lacks merit.

Employer's observer denied that anyone forced her to sign the stipulation and, to the contrary, admitted that the Employer's attorney directed her to sign it. Barsamian was never presented as a witness to contradict Alderette.

The ballots were counted only after the Employer's observer signed a declaration under penalty of perjury that she recognized each of the eleven challenged voters, "as employees of Christopher Ranch who worked during the week of July 18-25, 1980 [the eligibility week 1 using the work numbers of family members."

There are no grounds to overturn this election due to the employer's subsequent change of mind regarding its own stipulation. The employer has presented no evidence disputing either the validity of the stipulation or Barsamian's

authority to direct it. Consequently, the Employer's objection concerning the eleven challenged ballots is rejected.

B. The Allegations regarding the Employees of the Toro Field on July 27 and Residents of the Toro Camo on July 28.

The Employer contends that UFW strike activities on July 27 and July 28 interferred with the fair conduct of the election. The UFW contends that this strike activity did not so interfere for two main reasons. First, the activities were observed by workers who were different workers than those who later voted. Second, the picketing activities did not constitute objectionable conduct.

Most of the persons who viewed the strike incidents at Toro Field on July 27 and Toro Camp on July 28 were employees of labor contractor Ramiro Rodriguez, not of the Employer. The Employer was not able to show that the persons who viewed the strike incidents of July 27 and July 28 voted in the election. The evidence suggests to the contrary. Employer's Exhibit 29 lists the Rodriguez employees who worked on July 27, and July 31, the day after the election. There is virtually no overlap between the employees working on each day. There is likewise almost no overlap between Employer's Exhibit 29 and the eligibility list.

Thus, even were the conduct in either of the incidents objectionable, neither incidents took place within the view

of more than a very few, if any, persons who voted in the election. The impact, if any, would be de minimus.

It does not appear that any of the employees listed as working on July 27, the date of the alleged Toro field incident, were participants in the July 30, election. Nor does it appear that any of the residents of the Rodriguez camp on July 28 were participants in the election. No persuasive evidence was introduced to indicate that the non-voters who witnessed the two incidents interacted with eligible voters. Rather, it appears that the witnesses were employed by labor contractor Rodriguez and lived in his separate camp. No specific evidence was presented that a single participant in the election was influenced by alleged misconduct.

Even were the employer's contention that the employees at the Toro field on July 27, 1980 and/or the residents of the Rodriguez camp on July 28, 1980 were participants in the election, no conduct affecting the election is apparent.

On July 27 at the Toro field, the labor contractor told the employees to return to some vans because the strikers "were talking". The strikers asked the workers in the field to "leave with them". The workers were generally about 300 yards from the picketers. There were women and children among those who entered the field. No incident of violence

involving a worker was described. Apparently there was a confrontation between labor contractor Ramiro Rodriguez, a large man more than six feet tall and weighing over 200 pounds, and a woman. The woman apparently threw a garlic' and/or a rock at Rodriguez.

No testimony was offered that any worker was assaulted by the strikers; the only incident of alleged violence involved Rodriguez and the woman.

The incident where the woman threw the garlic and/or rock at Rodriguez was de minimus. It is not believable that the strikers intended to assault a large body of men in a field with women and children as the strikers. The incident does not appear unpeaceful. This does not appear to be an occurence of violence but rather a plea for support.

Due to the 300-yard distance between the pickets and the strikebreakers and the fact that the workers were far from any public street, it is clear that the strikers wished to speak with the Christopher Ranch garlic workers. The only apparent way of doing so was to go where the workers were. These strikers proceeded toward the work area, although by the time they arrived, the workers had been herded

into vans by the foreman. NO evidence of rock throwing by the entering strikers was offered. No violence was directed toward any worker and there is no evidence that any worker was intimidated.

Although no "access violation" is specifically alleged by the Employer/ and although an entry such as that described here may not technically be called "access", it is clear that even unwarranted entries onto an employer's property are not themselves sufficient grounds to set aside an election. See e.g. George Arakelian Farms, Inc., 4 ALRB No. 6 (1978). In fact, in Arakelian, the Board upheld the election in the face of fifteen violations of access of the type complained of by this employer.

The second incident on July 28 occurred when many pickets went to the labor camp and blocked the entrance so strikebreakers would not work. The picketers stood on a public road. No violence was alleged.

There were many many women and children present. No threats and no violence are apparent. Strikers implored the strikebreakers not to break the strike. Most people inside did nothing. The Christopher Ranch workers were outside the camp. Moreover, it appears that no UFW representative present on July 28.

No worker testified that he/she was put in fear. No testimony of violence was offered. No testimony was offered that anyone was blocked or that any person had to force his way out. There were no threats. The picketing in the presence of women and children at the scene had a peaceful nature.

Petitioner produced no evidence indicating that the picketing of July 28 in any way affected the results of the election.

The Board has held that in representation cases where threats or violence are alleged, the election will not be set aside unless it can be shown that the conduct affected the results of the election, or that the election was conducted in an atmosphere of fear. Jack or Marion Radovich, 2 ALRB No. 12 (1976). Cases where the Board has set aside elections because they were permeated by an atmosphere of violence, however, have been much different from the instant case.

For example, in Merzoian Brothers, 3 ALRB No. 62 (1977), the Board overturned an election when two days before the elec-

tion a company supervisor confronted an employee organizer in the presence of several employees and threatened to kill him. Then on the day before the election employees heard gunshots and company supervisors on loudspeakers saying they would kill all Chavistas. Under these circumstances, the Board held that a free and fair election could not have been held.

Similarly, in Phelan and Taylor, 2 ALRB No. 22 (1976), the Board set aside the election because six days before the election three Teamster organizers beat up two UFW organizers who were taking access at the ranch. Several workers were present. Thereafter, one day before the election, the Teamsters again surrounded and threatened UFW organizers and priests in the presence of company employees. Again, the Board found that the egregious nature of the misconduct rendered the election invalid.

On the other hand, the Board has held that the conduct of a rival union's president who threw a wad of paper at a UFW organizer and challenged him to a fight in the presence of several employees the day before the election was not the sort of conduct deemed sufficient to sustain an unfair labor practice finding. Salinas Lettuce Farmers Cooperative, 5 ALRB No. 21 (1979) Although the election in this case was set aside, it was set aside for grounds other than violence and intimidation as

described above.

An analysis of the cases cited above reveals that the Board is concerned with the nature of misconduct when deciding whether certain conduct affected the results of an election to an extent warranting the setting aside of an election. The Board considers the parties involved, the nature of the misconduct itself and whether news of its occurrence was widespread among employees.

The labor camp incident involved no violence whatsoever. The Toro field incident included a collateral skirmish between Rodriquez and a woman which has been depicted in an overblown fashion. Neither of these incidents involved beatings or shootings or anything vaguely approaching the egregious conduct necessary to set aside an election.

The employer has failed to proffer any evidence that the conduct affected or would tend to affect the outcome of the election. It appears that these strikers were peacefully trying to persuade strikebreakers to join them in their strike. At one point the Employer referred to an incident at the Christopher packing shed on July 29 where employees reported they were threatened or scared. However, no persuasive evidence

was forthcoming developing this subject sufficient to warrant delving into it further. None of these incidents was of a sufficiently grave nature to have affected the results of the election.

PEAK AGRICULTURAL EMPLOYMENT

A petition for certification must allege that the number of agricultural employees currently employed by the employer, 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.[4/] The Board may not consider a petition as timely filed unless the employer's, payroll reflects 50 percent of peak.[5/] In determining whether a peak allegation is correct and the petition timely filed, the Board may not make peak agricultural employment for the prior season alone a basis for its finding, but must also estimate peak employment on the basis of acreage and crop statistics applied uniformly throughout California, and upon all other relevant data.[6/] An objection that an employer's current payroll did not reflect 50 percent of peak must be made within five days after an election.[7/]

The 50 percent of peak provision in the Act recognizes that agriculture is a seasonal occupation for a majority of agricultural employees.[8/] In order to provide the fullest scope for employees

4/ Labor Code Section 1156.3 (a)
5/ Labor Code Section 1156.4; see also Nishikawa Farms v. Mahoney 66 Cal. App. 3d 781 (1977)
6/ Labor Code Section 1156.4
7/ Labor Code Section 1156.3(c); Harden Farms of California, Inc., 2 ALRB No. 30 (1976)
8/ Labor Cede Section 1156.4

enjoyment of their right to select a bargaining representative in a secret ballot election, the 50 percent of peak requirement requires that the Board conduct elections at a time when a representative number of employees arc on an employer's payroll and eligible to vote.[9/] In this regard, the rapid turnover in workforce characteristic of much of California agriculture combines with the requirement that elections be conducted only when an employer's payroll reflects 50 percent of peak to create peculiar difficulties in determining that a petition for certification is timely filed with respect to peak.[10/] As is the case with many provisions of the Act, the burden of confronting these difficulties falls in the first instance on the regional director and Board agent in charge of the election, but parties are expected to provide necessary information. For example, a person or union petitioning for an election must allege that the employer is at 50 percent of peak and provide the approximate number of employees currently employed in the unit and the employer's agricultural commodities,[11/] Within 48 hours of the filing of a petition, an employer must provide the Board with certain information, including a statement based on evidence available to the employer of the highest single week employment during the preceding year and a statement of the acreage devoted to each crop during the current calendar year.[12/] Failure to provide this information may give

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[9/] See Labor Code Section 1156.4.

[10/] See Lu-Ette Farms, 2 ALRB No. 49 (1976) in which the Board observed how the turnover factor affected notice requirements and the responsibilities of the regional director and Board agents under the Act.

[11/] Labor Code Section 1156.3 (a); 8 Cal. Admin. Code Section 20305 (a) (1975); re-enacted as 8 Cal. Admin. Code Section 20305 (a) (1976)

[12/] 8 Cal. Admin. Code Section 20310(d) (1975); re-enacted as 8 Cal. Admin. Code Section 20310 (a) (1976).

rise to a presumption that the petition is timely filed with respect to the employer's peak of season. [13/] An employer against whom the presumptions are invoked may not later raise his own misconduct as a ground for setting aside the election for lack of 50 percent of peak. [14/]

It is clear from these requirements that the Act and regulations contemplate the exercise of reasonable discretion by the regional director and Board agents in determining whether a petition is timely filed with respect to peak. An inquiry into matters related to peak is part of the larger administrative investigation conducted by the regional director and Board agent in charge upon the filing of a petition, to determine whether there is reasonable cause to believe that a bona fide question of representation exists so that an election should be directed.[15/] The requirement that an employer's payroll reflect 50 percent of peak furthers this overriding consideration by making a determination that the petition was filed at a time when a representative number of an employer's employees are working and eligible to vote an element of the determination that a bona fide question of representation exists.

[13/] 8 Cal. Admin. Code Section 20310 (3) (1975): re-enacted as 8 Cal. Admin. Code Section 20310 (e) (1) (1976).

[14/] 8 Cal. Admin. Code Section 20365(b)(1975): re-enacted as 8 Cal. Admin. Code Section 20365 (d) (1976).

[15/] See Labor Code Section 1156.3(a); 8 Cal. Admin. Code Section 20300 (b) (1975); re-enacted as 8 Cal. Admin. Code Section 20300(a) (j) (1976). In particular, Section 20300 (j) (2) of the current regulations makes it clear that the regional director's determination as to the average employee days worked in the current payroll period which relates to peak is also part of the administrative investigation into showing of interest.

In carrying out their responsibilities with respect to the 50 percent of peak requirement, the regional director and Board agent in charge must apply methods and standards which will properly assess, under the particular facts of the case, whether a representative vote is possible at the time the petition is filed. Thus, the employer's actual peak, although obviously germane, is not controlling. Because employment patterns vary from crop to crop and from employer to employer, the regional director and Board agent in charge must use methods for making this determination which are flexible enough to permit them to resolve the overriding question of the possibility of a representative vote without being constrained by mathematical formulas which may not be applicable to continually evolving factual situations. Board decisions have recognized the necessity for a variety of methods for determining peak. In Mario Saikhon, Inc., [16/] the Board held that, where an employer's peak employment fluctuated greatly because of a high rate of employee turnover, the proper method for determining peak employment was to take an average of the number of employee days worked on all days of a given payroll period. In later cases, the Board found that this method had to be modified where there were different payroll periods for different groups of employees, [17/] or where a given payroll period contained Sundays or other days which were not representive of the employee complement on other

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[16/] Mario Saikhon, Inc., 2 ALRB NO. 2 (1976)

[17/] Luis A. Scattini & Sons, 2 ALRB No. 43 (1976)

days in the period. [18] In still later cases, the Board has indicated that the proper method for determining whether an employer's payroll reflected 50 percent of peak would compare the number of eligible voters to peak agricultural employment. [19] Thus, in Kawano Farms, Inc. [20] the Board held that the regional director was free to rely on the two relevant payrolls supplied by the employer and that the 649 employees in the current payroll easily reflected 50 percent of the 930 employees employed later that year at peak season and of the 796 employees during the employer's peak the preceding year.

The next issue to arise before the Board was determining the denominator to be used in computing the average. In other words, selecting the number to divide by. This is the real issue in this case. Employers in High & Mighty Farms, 3 ALRB No. 88 (1977) argued that the total number of employees should be divided by the total number of days in the payroll period. Labor contractor employees worked during only three days of a seven-day payroll period. The employer wanted to divide by seven, the UFW by three. The Board ruled that division should be by three because the days not worked were unrepresentative.

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[18] Ranch No. 1, Inc., 2 ALRB No. 37 (1976)

[19] Valdora Produce Company, 3 ALRB No. 8 (1977); Kawano Farms, Inc, 3 ALRB No. 25 (1977). In Valdora, the Board made it clear that the current payroll was not limited to persons on a piece of paper, but would include the persons such as employees absent due to illness or vacation, who would be eligible to vote.

[20] Kawano Farms, Inc., supra, note 19.

In Donley Farms, Inc., 4 ALRB 66 (1978), the Board set forth a maxim of Board law: where the application of one method will establish peak and the application of another method will refute peak, the method establishing peak will be used.

The maxim issued in Donley Farms sets the tenor for the conceptualization of this entire process. The clear policy emanating therefrom is to favor the holding of elections. In G & S Produce, 4 ALRB No. 38 (1978), the Board ruled that if either of two averaging methods results in peak, the method favoring peak will be appropriate. Accord Bonita Packing Co., 4 ALRB No. 96 (1978).

The last issue to arise relevant herein concerned the issue of prospective peak, that is, allegations that peak will come later in the calendar year than the date of the election.

The seminal prospective peak case was Charles Malovich, 5 ALRB No. 33 (1979). In Malovich, employer records showed that peak, like the case before me, occured after the election, and asked the Board to apply a "math computation" standard for prospective peak cases. The Board declined to do so and instead announced the standard of reasonableness. That is, the Board will look only to whether the Regional Director's decision was reasonable" in light of the information available

at the time of the investigation." In doing so, the Board agricultural the same policy reasons it had in D'Arrigo Brothers, supra, a year before— limited opportunity for elections in agriculture -- and added its concern for the possibility of mischief by employers.

The Board ruled in Malovich, supra, that post election employment data will not form the basis for reversal of an election and is admissable only for the limited purpose of determining the reasonableness of the Regional Director's initial determination of timeliness.

Even though the employer there protested that peak was prospective, the Board refused to set aside the election because the employer failed to present any evidence to support its contention. The burden of presenting prospective peak evidence is squarely on the employer, and his failure to present such data, even if due to the negligence of counsel, will not be grounds for setting aside an election.

In order to determine peak, employment during the eligibility period must be compared to employment in the peak employment week. The eligibility period is the payroll period immediately preceding the filing of an election petition. California Administrative Code section 20352. The peak period is the period in which the greatest number of agricultural employers is employed.

The petition in this matter was filed on July 26, 1980. The payroll period for regular employees immediately preceding the filing of the petition was the period ending July 24, 1980.[21/] The relevant payroll period for steadies was the period ending July 23, 1980. [22/] Additionally two contractors were employed: John Fernandez's payroll period was identical to the payroll period for regular Christopher Ranch employees; Fernandez employees also worked on the same days as regular Christopher Ranch employees. [23/] No regular employee or Fernandez employee worked July 22, 1980 or thereafter. July 22 was the first full day that nearly all the Christopher employees were out on strike.

However, the employees of labor contractor Ramiro Rodriguez did work one day after the strike began and in a payroll period which ended at a time prior to the filing of the election petition. [24/]

Regular employees, Fernandez employees, and Rodriguez employees had the same payroll period the week ending July 24.

Steady employees had a payroll period ending July 23.

Each is separately averaged. Scattini and Sons, supra. The subtotals for the employees who worked during the payroll period ending July 24, 1980 are as follows:

[21/] Employer's Exhibit 19.

[22/] Employer's Exhibit 20.

[23/] Exhibit 21.

[24/] Exhibit 22.

Payroll Period Ending July 24, 1980

	7/18	7/19	7/20	7/21	7/22	7/23	7/24
Regular	231	210	Ø	189	Ø	Ø	Ø
Fernandez	19	30	Ø	24	Ø	Ø	Ø
Rodriguez	Ø	Ø	Ø	Ø	Ø	37	Ø
	250	240	Ø	213	Ø	37	Ø

(250 + 240 + 213 = 703; 703 ÷ 3 days = 234.33 average)

July 18, 19, and 21, 1980 are representative days when many employees worked. July 22, 23, and 24, 1980 are unrepresentative days. No employees worked on July 20, 22, or 24, 1980; only 37 employees worked on July 23, 1980.

July 20, 1980 was a Sunday excludable under Ranch No. 1, 2 ALRB No. 37 (1976), p.2, n. 4. July 22, 23, and 24, 1980 are excluded as days on which little or no work was performed. High & Mighty Farms, 3 ALRB No. 88 (1977); California Lettuce, 5 ALRB No. 24 (1979).

Exclusion of such representative days was sanctioned in California Lettuce. It is of import that only a few employees actually worked on July 23, 1980. This is insufficient to make a day representative. See Ranch No. 1, supra (a few employees working insufficient to make day representative).

The employer contends that July 22, 23, 24 are countable representative days. Obviously, the attainment of peak status is destroyed if the denominator is boosted to six days rather than three representative days used by the Board agent. This then frames the key issue in the case: Whether lack of on the job workers because of a strike renders those-days unrepresentative? The employer argues the dissenting position in California Lettuce, 5 ALRB No. 24 (1979). The Board majority rejected this argument commenting:

> The dissent's contention that to obtain an average number of employees per day during the eligibility week we should divide the total of employee-days worked by the six calendar days of the payroll period rather than the three days on which work was actually performed seems to us overly mechanical and, in the circumstances of this case, quite unrealistic.

Assuming the Employer's figures, the Employer was at peak. Even if the Employer's peak statistics were supplemented by the twenty percent it claims represented the anticipated increase in employment for 1981 which the employer forecast to the Board Agent,[23/] the Employer was at Peak.

The Employer argues that if the Employer's witnesses are fully credited and the Union's witnesses are fully discredited, the 1979 peak data would be supplemented by twenty percent in order to arrive at the following prospective peak figures:

[23/] Alderrete denied having been told that 1981 employment would increase by 20%. However, because the 20% does not affect the outcome of this matter, I make no credibility determination. Alderrete however, is experienced with the process for determining peak.

	8/10	8/11	8/12	8/13	8/14	8/15	8/16
1979	266	129	9	271	438	349	270
20% :	53	26	2	54	88	70	54
Expected 1980 Peak :	319	155	11	325	526	419	324

The Employer variously acknowledges that the average number of employees during peak week is either 296 or 345, depending on whether the total-person-days worked (1979) is divided by seven days or six days. Accepting the Employer's best position, the average number of employees that could have been anticipated in 1980 was 345. The Employer's best peak-week average is close to the UFW's estimate of 324 work persons during peak week.

In tabulating the average number of workers employed in the eligibility week, the Employer arrived at the following numbers:

	7/17	7/18	7/19	7/20	7/21	7/22	7/23	7/24
Employ-er's [24/]	15	254	260	10	232	19	54	Ø

If only the days in the pay period when many workers were harvesting and when no strike interferred with operations are counted,

[24/] The Employer's table includes two pay periods: 7/17/80-7/23/80 for steadies and 7/18/80-7/24/80 for regulars. The Employers statistics for July 17, 1980 do not include Christopher regular employees-only the steadies.

then the workers employed on July 18, July 19, and July 20, 1980 will be totaled and divided by three; the resulting average would be 249.

This figure is quite close to the UFW s tabulation which yields a 254-work-person average in the eligibility period.

As 249 is more than fifty percent of 345, the Employer was at peak.[25/] However, the Employer argues a theory without precedent.

The Employer argues that July 22, 23, and July 24, 1980 should be counted because these were work days. In advancing this theory, the Employer first denies that a strike took place on these days (adopting the position that no one worked because the season ended)[26/] and alternatively that even if a strike did take place on those days, the Court of Appeal should adopt the Employer's interpretation of the dissent's arguments in California Lettuce, 5 ALRB No. 24 (1979).

25/ It should be noted that the Employer's argument, that apples and oranges would be compared if we were to divide the eligibility week by three and the peak week by six, is erroneous' in its reliance on Malovich, 5 ALRB No. 33 (1979). In Malovich the Board, while not rejecting mixing methods, seemed to disapprove of using two different types of methods i.e., head count method and averaging method. That is quite different from using the same method – Averaging, but dividing each period by a different number of representative days. In the instant case, only one method has been used to arrive at peak: averaging. As long as the Board's guiding precedents are adhered to, dividing by a different number of representative days for the eligibility and peak periods is acceptable. Logic may demand no less. See Malovich, supra; High and Mighty, 3 ALRB No. 88 (1977) (1977) (rejecting division by the number of days in a pay period rather than representative days).

26/ No persuasive evidence was presented to support the argument that the season had ended.

Neither is persuasive.

Moreover, the Employer's contention that the evidence will not support a finding of a strike beginning on July 21, 1980 lacks merit. The evidence indicates that by July 22, the strike was in effect.

Based on the evidence of this case, I cannot conclude that regular employees failed to work on July 22, 23, and 24, 1980, duo to any lack of work or because a season had ended. The apparent reason people did not work on July 22, 23, and 24 was the strike.

The Employer argues that even if a strike had begun, those days when no one worked due to a strike should nontheless be averaged into the work week.

The petition in this matter was submitted on July 26, 1980, five days after the Christopher employees went out on strike. The eligibility list must be drawn from the payroll period immediately preceding the filing of the petition. For regular employees and labor contractor employees, the relevant payroll period was July 18, to July 24, inclusive. Because the strike began July 21, at least three days in the relevant payroll period were strike days. It is these three days that the employer would add into the denominator for computing the average.

Unlike the National Labor Relations Act, the Agricultural Labor Relations Act, herein called the "Act", provides for expedited elections in strike situations when the Board should make every effort to hold an election within forty-eight hours of the filing of the petition. Labor Code section 1156.3 (a). This section must be read in conformity with Labor Code section 1156.3 (a) (1) which requires elections to be held in peak periods.

I am unable to find Board precedent directly disposing of the question as to whether to disregard the strike days and their resultant low worker complements in determining the denominator. Although my mandate from the Board is not to make those policy determinations reserved to the Board, my analysis of the question appears proper.

It may be argued that the dissent's position in California Lettuce, does not address the instant question because there the dissent wrote that unrepresentative .days should be those days where external factors such as a holiday or weather caused non-work. In this vein, a strike appears external. At the least, it is a factor generally beyond the control of the employer. Otherwise one would have to count a day in which no one worked in the average which seems to fly in the face of the overall logic of setting elections at times when a representative complement of employees is present. The process was not intended to set up a game, but rather perform an important function integral to the Act's mandate of respecting the wish of the majority.

Adding the employees on the three representative days of July 18, 19, and 21, 1980 and dividing by three days, the average number of employees employed during the eligibility period for the payroll period ending July 24, is 234.3.

Payroll Period Ending July 23, 1980.

The steady employees have a payroll period ending July 23, set forth as follows:

Payroll Period Ending July 23, 1980.

	7/17	7/18	7/19	7/20	7/21	7/22	7/23
Steadies	15	15	10	13	19	19	19

(15 + 15 + 10+ 13+ 19 + 19 + 15 = 106:)

106 ÷ 7 days = 15.14 average)

Clearly each of the seven days is a representative day for steadies. Dividing the sum of all seven days by seven, the average number of steadies in the payroll period ending July 23, 1980 is 15.4.

Applying the Scattini formula, the average for both eligibility payroll periods is then added (234.33 + 15.14 = 249.47) and the result, 249.47, is the average number of employees during the eligibility period.

This figure must now be compared to the average number of employees in the peak period.

The Peak Period

The Employer argues a prospective peak theory.[27/] The Employer alleged that peak would actually occur during the payroll period ending August 16, 1980. As it did in the eligibility period, Christopher Farms employed regular, steady, and labor contractor employees in the payroll period ending August 16, 1980. The relevant payroll period for each group ended on the following dates:

Regular	August 16, 1979
Steady	August 15, 1979
Labor Contractors:	
Fernandez	August 16, 17, 1979
Cabrera	August 15, 1979
Gutierrez	August 16, 1979

Payroll period ending August 16, 1979

Four groups of employees had payroll periods ending August 16, 1979: the regulars, Fernandez employees whose last names began with letters A - G, Fernandez employees whose last names began with letters M - P, and the Gutierrez employees.

Payroll period ending August 15, 1979

Two groups of employees had payroll periods ending August 15, 1979: The steadies and the Cabrera employees.

Payroll period ending August 17, 1979

Only one group of employees had a payroll period ending August 17, 1979, Fernandez employees.

27/ At the off the record meeting held before me on January 13, 1981 in San Francisco, counsel for both parties agreed that once the question of how to determine the number of representative days in order to compute the denominator was decided, the remaining arithmetic was unimportant to the disposition of the case.

Applying the Scattini formula the average for each of the three peak payroll periods is the added (244.5 + 24.57 + 54.75 = 323.82) and the result, 323.82, is the average number of employees who worked during the peak period in 1979.

Comparing the average number of employees who worked in the eligibility period, 249.47, with the average number of employees in the peak period, 323.82, it is established that the employer was well-above peak in the eligibility week. In fact, the employer was at 79% of peak.

Any further inquiry is irrelevant. Even if another method would refute peak, the fact this Saikhon/Scattini method yields peak creates a finding of peak. See Donley Farms, 4 ALRB, No. 66.(1978); G & S Produce, 4 ALRB NO. 38 (1978); Bonita Packing, 4 ALRB No. 96 (1978).

The Employer contends that the Regional Director could not have accurately determined peak with the data available. However, Labor Code section 1156.3 (c) specifies that the objection must be that the employer was not actually at peak. Kawano Farms, Inc., 3 ALRB No. 25 (1977). Whether or not peak was correctly arrived at is irrelevant so long as peak in fact existed. Valdora Produce Co., 3 ALRB No. 8 (1977). The Board agent found peak to be 320 and eligibility to be 237, which is remarkably close to the 324 peak and 250 eligibility arrived at by the above process. Thus, whether or not the Board agent was correct in each calculation is not the question; it suffices to find, as I do, that the Employer was at peak.

The Employer contends that there is prospective peak in this case. However, whatever may have been the average number of Employees in 1980 is of little import to these proceedings. The standard in Malovich places the burden squarely on the employer to present data indicating the prospective peak. The Employer provided data from August 1979 showing that peak existed, supra. The Employer contends that Employer's Exhibit 18 was offered to the Board agent, but was refused. The Board agent credibly denied refusing any document. I find that the Employer failed to provide persuasive prospective peak data and thus did not meet its burden of proof. Malovich, supra.

Moreover, the Employer failed to meet its burden of providing the Board with information to support its contention that it had not yet achieved 50% of its anticipated peak for the calendar year. See Domingo Farms, 5 ALRB No. 35 (1979)

The Employer contends that the Board agent knew or should have know that peak would occur in August, 1980. This is unpersuasive.

It is noted that the prospective peak written data provided to the Board agent did not bear out the Employer's prospective peak argument. There was nothing which contained information sufficient to allow averaging.

Moreover, the prospective peak oral data was not substantiated and was highly suspect. Robert Christopher testifies that he anticipated more work due to increased acreage. However,

in 1980, 1153 acres were planted, whereas in 1979, 1327 acres were planted, and in 1978, 1061 acres were planted. Although garlic was described as a labor intensive crop, less garlic was planted in 1980 that in 1979 (540 + 83 for seed in 1979 as compared to 535.2 acres in 1980) The amount of late garlic declined from 327.5 acres in 1979 to 303.51 acres in 1980. Thus, there appears to be less garlic harvested in 1980 than in 1979. [28/] And although an increase in anticipated work was

attributed to increased acreage in peppers, 270 acres of peppers were planted in 1979. The difference in the planting of Marcella corn amounted to only 18 acres. In 1980, corn plantings were listed as miscellaneous and amounted to only a fraction of other acreage. Thus, the acreage data would not have supported the Employer's argument.

The Employer's rigid application of the minority position in California Lettuce distorts the overall purpose of the Act. It is beyond my mandate to hold that the majority rule set forth, supra, should be abandoned. Even were this not so, I would decline to so hold. Using the Employer's best figures and applying the California Lettuce minority test for representative days, the Employer was at peak.

28/ The employer's contention that an increased harvest was based upon improved methods and technology was not supported by adequate persuasive evidence.

The Employer has presented no cogent reason for abandoning Board precedent. The Board's reasons for averaging by the number of days actually worked rather than the number of days in a payroll period remain compelling.

I am not inclined to recommend abandonment of those precedents, and especially not in a case whore oven the minority position in California Lettuce supports a peak finding. Any method for computing whether an employer's payroll reflects 50 percent of peak is valid only as long as it is an effective tool which can be used by the regional director or Board agent in charge to determine that a petition is timely filed because a representative vote, consistent with statutory standards, is possible at the time a petition is filed. This finding is not susceptible to strictly mathematical computation, but rather requires a weighing of relevant factors and an exercise of sound judgement based on available data. High & Mighty Farms, 3 ALRB No. 88.

In this case, the Employer informed the Board agent in charge on Monday July 28, two days before the election, that it was not at 50 percent of peak. The day of the election, on July 30, the Board agent determined that the Employer's payroll reflected 50 percent of peak, and directed that an election be conducted. Based on the facts in evidence, the Board agent in charge could reasonably have determined that the petition was timely filed with respect to peak.

RECOMMENDATION

Based on the findings of fact, analysis, and conclusions, I recommend that the Employer's objections be overruled and dismissed and that the United Farm Workers of America, AFL-CIO be certified as the exclusive bargaining representative of all the agricultural employees of the Employer in the state of California

Dated: March 5, 1981.

Respectfully submitted,

MICHEL M. SCHMIER
Investigative Hearing Examiner