

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

KAMIMOTO FARMS,	)	Case No. 80-RC-34-SAL
)	
Employer,)	
)	
and	)	7 ALRB No. 45
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND DISMISSAL OF PETITION FOR CERTIFICATION

A Petition for Certification was filed by the United Farm Workers of America, AFL-CIO, (UFW) on August 6, 1980. The Employer, Kamimoto Farms, filed a response pursuant to 8 California Administrative Code section 20310(a) (6) (B) in which it stated that 40 employees were working during the payroll period preceeding the filing of the petition (hereafter "the eligibility period") and that 70 were expected to be employed during the period of highest employment for that year (hereafter "the peak period").^{1/} The Employer also stated that its workforce during the eligibility period was less than 50 percent of the workforce at the peak period.

The Board agent determined that the figures of 40 and 70 were not inflated and noted that 40 was greater than 50 percent of 70. At no time did the Board agent ask the Employer to clarify the seeming contradiction in its response, although the Employer had

^{1/}The Employer later testified that he believed the question had asked how many additional employees he expected to hire at the peak period and that his answer (70 employees) was in accordance with that belief.

asked several times for the basis of the Board agent's determination that the petition was timely filed because the number of employees in the eligibility period exceeded 50 percent of the number to be employed in the peak period.

A representation election was conducted on August 9, 1980, among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

UFW	29
No Union.	3
Challenged Ballots.	<u>1</u>
Total	33

The Employer timely filed post-election objections, three of which were set for hearing. In its objections, the Employer alleged that the petition was not timely filed pursuant to California Labor Code section 1156.4,^{2/} that the UFW detained and threatened employees on two occasions, and that its conduct affected the outcome of the election by creating an atmosphere of fear and coercion.

A hearing on the objections was held on November 17 and 18, December 8, 9 and 10, 1980, and January 12 and 15, 1981, before Investigative Hearing Examiner (IHE) Ruth Friedman. On April 13, 1981, the IHE issued her Decision, in which she recommended that the objections be dismissed and that the UFW be certified as the

^{2/} Labor Code section 1156.4 states in part: "the Board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the payroll period immediately preceeding the filing of the petition."

exclusive collective bargaining representative of all the Employer's agricultural employees. The Employer and the UFW each timely filed exceptions to the IHE's Decision with a brief in support of its exceptions.

Pursuant to Labor Code section 1146, the Agricultural Labor Relations Board (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 and recommended Order of Certification in light of the exceptions and briefs filed by the parties, and has decided to affirm the IHE's rulings, findings, and conclusions only to the extent consistent herewith.

Whenever it appears that peak for the current calendar year has been reached, the initial step in determining whether the Petition for Certification was filed when the employer's workforce was at least 50 percent of its peak employment force is the "body count" method; that is, the names on the payroll for the eligibility period are counted and compared with the number of names on the payroll for the peak period. Donley Farms, Inc. (Sept. 22, 1978) 4 ALRB No. 66; A & D Christopher Ranch (Oct. 9, 1981) 7 ALRB No. 31. The next method for measuring levels of employment in determining peak is to compare the average number of employees working each day during the two relevant payroll periods. Or, to explain this method in another manner, we count the number of employees listed on the payroll list for each day of the particular pay period and add them together to arrive at a total number of employee days. This total is then divided by the number of days in the pay period in order to

obtain the average number of employees who worked each day of that period.

Mario Saikhon, Inc. (Jan. 7, 1976) 2 ALRB No. 2.

Before applying these methods, however, we must consider the appropriateness of comparing the 1979 peak figures with the eligibility period. We uphold the IHE's determination that the 1979 payroll records may be used to estimate the prospective peak employment of the year of the election (1980). As the 1980 peak had not been reached at the time the petition was filed, the Employer submitted only the 1979 peak-payroll records to the Regional Director in support of his peak employment contention. This Board has held that, in prospective-peak cases, the Regional Director may rely on peak figures for prior years. Information as to changed circumstances, which would cause higher peak employment in the year of the election, must be provided by the employer at the time of the Regional Director's investigation. Domingo Farms (May 10, 1979) 5 ALRB No. 35.

The Employer has been engaged in row-crop farming in San Benito County for almost 55 years. Employees are hired both directly and through labor contractors. About 15-20 employees work year-round as mechanics, irrigators, tractor drivers, supervisors, and general maintenance workers. A second group of employees is hired through labor contractor Rodriguez who supplies labor only to Kamimoto Farms. The Rodriguez crew works from April to October performing cultivating and harvesting functions. Other employees are hired when needed through a labor contractor or individually. In 1979, Labor Contractor Valenzuela supplied employees from May to October. The following chart summarizes the work patterns for all

crews who worked during the 1979 peak period and/or the 1980 eligibility period.

NUMBER OF EMPLOYEES THAT WORKED EACH DAY AT KAMIMOTO FARMS

	Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
<u>1979 Peak</u>							
<u>(9/7-13/79)</u>							
a) Direct	5	17	21	19	20	18	15
b) Rodriguez	0	35	31	18	26	38	21
c) Valenzuela	<u>17</u>	<u>18</u>	<u>17</u>	<u>12</u>	<u>11</u>	<u>21</u>	<u>23</u>
Total	22	70	69	49	57	77	59
 <u>Eligibility</u>							
<u>(7/25-31/80)</u>							
a) Direct	5	15	16	17	13	15	16
b) Rodriguez	<u>0</u>	<u>1</u>	<u>18</u>	<u>21</u>	<u>21</u>	<u>1</u>	<u>1</u>
Total	5	16	34	38	34	16	17

The evidence shows that under the "body count" method of computation, the petition was not timely filed since only 40 employees worked during the 1980 eligibility period while 103 worked during the 1979 peak period. In comparing the average number of employees working each day during the two relevant payroll periods, we find that there is a total of 160 employee days worked in the 7-day eligibility period from July 25 through 31, 1980. This figure, divided by 7, gives us an average of 23 employees per day. Applying the same method of computation to the 1979 peak period, a total of 402 employee days in the seven-day payroll period from September 7 through 13, 1979, we arrive at an average of 57 employees per day. As the eligibility-period employee count of 23 is less than 50 percent of the 1979 peak-period employee count

of 57, the petition was not timely filed under this method of computation or under the statutory guidelines of Labor Code section 1156.4.^{3/}

In Charles Malovich (May 9, 1979) 5 ALRB No. 33, the Board held that the proper standard of review in prospective-peak cases is whether the Board agent's estimate as to the prospective-peak figure was reasonable in light of the information available to him or her at the time. As this is a prospective-peak case, we find that the Malovich analysis is controlling.

Under Labor Code section 1156.3 (a), the Board agent has a duty to investigate the timeliness of a petition for certification. The IHE found that the Board agent should have attempted to reconcile the Employer's inadvertent contradiction which was apparent on the face of its response to the Petition. As discussed previously, the Employer stated therein that it had not yet reached its peak employment period for the current calendar year, noting that while it employed 40 workers during the statutory pre-petition payroll period, it expected to employ 70 workers during a future peak period. The Employer, however, meant that it would employ 70 workers over and above its current employment level and this obvious discrepancy, according to the IHE, would have been readily clarified had the Board agent made inquiries of either the Employer or its

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^{3/}As the Employer had a single payroll schedule for all employees in the eligibility and peak periods, we do not reach the modified averaging method of Luis Scattini & Sons (Mar. 3, 1976) 2 ALRB No. 43, wherein the Board held that when the payroll periods for different crews overlap or are of different lengths, these crews may be averaged separately.

attorney, both of whom were available.^{4/} Accordingly, we conclude that the Board agent's determination was not reasonable in light of the information which was available to him at the time. Because of our finding that the petition was not timely filed, it is not necessary that we reach and resolve the merits of the Employer's remaining objections to the conduct of the election or conduct affecting the results of the election.

ORDER

By authority of Labor Code section 1156.3, the Agricultural Labor Relations Board hereby orders that the election heretofore conducted in this matter be, and it hereby is, set aside and that the Petition for Certification be, and it hereby is, dismissed.

Dated: December 21, 1981

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

^{4/}The IHE could not find that the petition was timely filed on the basis of existing Board methods of computing peak. She then devised a new method, a comparison of the body count for the eligibility period to an average for the peak period, and concluded that a determination of peak was obtainable by that method. We reject the IHE's approach since the peak question herein is neither novel nor unique and thus is amenable to established Board precedents.

MEMBER WALDIE, Dissenting:

Since its inception, the Board has struggled with the peak employment requirements of Labor Code section 1156.4. "Peak" is a concept made increasingly complex by the wide range of seasonal employment patterns and practices encountered in agriculture. The Board has labored admirably to obey the command of section 1156.5 "to provide the fullest scope for employees' enjoyment of the rights included in this part," within the framework of rules which will allow employers, employees, and unions "to know with reasonable certainty when they may call for an election at a particular employer's operation." Bonita Packing Co., Inc. (Dec. 1, 1978) 4 ALRB No. 96 at 9.

My concurrence in A & D Christopher Ranch (Oct. 9, 1981) 7 ALRB No. 31 notwithstanding, I am now of the opinion that the Board's peak decisions, including the majority opinion in this case, fail to provide the fullest scope for employee rights and also fail to provide clear guidance to either the parties or our

own field staff charged with investigating election petitions under very difficult time constraints.^{1/}

In Mario Saikhon, Inc. (Jan. 7, 1976) 2 ALRB No. 2, the Board observed that turnover and fluctuation in employment needs are typical in agriculture, therefore making the "employee count" method of determining peak unreliable.^{2/} The Board attempted in Saikhon to insure a reliable and consistent measure of peak by creating an averaging method whereby the numbers of employees working each day during the relevant payroll periods are added and then divided by the number of days in the payroll period. This method yields an "average employee day" for the eligibility and peak payroll periods which may then be compared to determine peak. The averaging concept, in essence, makes a stable work force out of a potentially unstable one for the purpose of the comparison.

Although the Saikhon decision concludes that averaging "is the appropriate measure of employee complement for purposes of determining peak," the averaging method has not entirely

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^{1/}Labor Code section 1156.3(a) requires that an election be held within seven days of the filing of a petition. Considering the need to hold a pre-election conference and give the employees notice of the election, a Board agent may have only two or three days in which to complete an investigation, including "peak" questions.

^{2/}The "employee count" method compares the total number of employees on the the payroll list for the eligibility period with the total number of employees on the payroll list for the period of "peak employment." This was the first method employed by the Board and probably the simplest.

superseded the "body count" method of determining peak.^{3/} In Valdora Produce (Feb. 4, 1977) 3 ALRB No. 8 and Kawano Farms, Inc. (Mar. 16, 1977) 3 ALRB No. 25, the Board used a "body count" to uphold the timeliness of elections, without reference to Saikhon or turnover in the work force. In Bonita Packing Co., Inc. (Dec. 1, 1978) 4 ALRB No. 96, the Investigative Hearing Examiner (IHE) offered a new, unified analysis of the peak question which combined both a "body count" and a job slots theory. The Board, however, rejected the IHE's analysis, ruling that "both the 'body count' and Saikhon approaches are reasonable measures of the timeliness of petitions under this statute, and we shall therefore continue to find petitions which meet either of these formulas to be timely." 4 ALRB No. 96 at 10.^{4/}

Whatever the Board's avowed purpose, the Bonita Packing decision has blurred the distinction between the two approaches, apparently ignoring the relevance of turnover, and has caused greater uncertainty as to which approach applies in which

^{3/}Although the averaging method, at first blush, seems to be an all-purpose formula, the method fails to account for significant fluctuation in the size of the work force when employees are paid daily. In cases such as Jack Brothers & McBurney, Inc. (Dec. 1, 1978) 4 ALRB No. 97, the Board has had to construct a "representative" payroll period, because certain crews had a one-day payroll period. Since "averaging" fails to adequately consider the representative quality of the work force during the eligibility and peak payroll periods, I would rather use the term "job slots." This term more accurately reflects the goal of reducing the Employer's employment pattern to a stable, daily labor need.

^{4/}Since the message in Bonita was not clear enough, we held in A & D Christopher Ranch, supra, 7 ALRB No. 31, that not only are both approaches reasonable, but both should be applied in every case. If the "body count" does not work, then averaging must be applied, effectively giving the Petitioners two chances to show timeliness.

circumstances. I would therefore adopt the analysis of the IHE in Bonita Packing and hereafter compare the number of employees during the eligibility period to the number of job slots in the employer's work force during the period of peak employment.

This analysis makes sense for several reasons. First, the purpose of the peak requirement is simply to insure a representative election; it is not a mathematically precise formula. Labor Code section 1156.3(a)(1) states that the "agricultural employees currently employed" during the pre-petition payroll period are to be considered in determining peak. This, it seems to me, calls for a "body count" during the eligibility period.^{5/} The period of peak employment, however, is not defined in the statute and is a more elusive concept. Since an employer's peak employment period has often not yet occurred at the time of the petition, prospective peak is determined by estimates which cannot possibly determine with certainty whether or to what extent there is turnover. Therefore, a "body count" is an impracticable measure in many peak cases. The most useful and consistent measure of the peak period, in my opinion, is the job slots theory.

In accord with the IHE in Bonita Packing, I would refer to the number of job slots that the Employer has in its work

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^{5/}Although the number of employees who are eligible to vote may be great or small depending, somewhat randomly, on turnover, the fact remains that all of these eligible voters have an interest in the choice of representative. The question is whether their number is sufficiently large to be representative of the Employer' total work force.

force.^{6/} The peak employment period would then correspond to the period when the employer's needs for labor, and therefore its labor costs, are the greatest. If the number of employees employed during the eligibility period is at least 50 percent of the highest number of job slots the employer has in its work force during any payroll period of the year of the petition, then the petition is timely.

I believe that one formula, applicable in all peak cases, will greatly simplify peak determinations in the future for everyone concerned. Over and above the efficiency of a unified system, this formula serves the statutory command to interpret the peak requirement in a way which provides "the fullest scope for employees' enjoyment of rights." Labor Code section 1156.4. That section, read in conjunction with section 1156.3(c),^{7/} requires that an election petition be considered timely when the eligible voters constitute a reasonably representative work force. Although the rule described above is not perfect, I believe it is workable and most clearly reflects the intent of the Legislature in creating the peak requirement.

Since the payroll records in this case indicate that 40

^{6/} Since this concept does aim to determine the number of employees that would be employed during the peak period if the employer's work force was stable, it is functionally equivalent to an average number of job slots per day.

^{7/} Section 1156.3(c) states in relevant part that: "Unless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." This section has been interpreted to create a presumption favoring certification where the employees voting have chosen to be represented. See California Lettuce Co. (Mar. 29, 1979) 5 ALRB No. 24.

people worked during the eligibility period and that the employer had approximately 57 job slots in its work force during the peak period, I would find the election petition was timely. I would also dismiss the objection regarding threatening conduct by UFW agents. The conduct was not of such character as would affect the outcome of the election. Frudden Enterprises, Inc. (Aug. 21, 1981) 7 ALRB No. 22; Joseph Gubser Co. (Oct. 9, 1981) 7 ALRB No. 33.

Based on all the foregoing, I would certify the UFW as the exclusive representative of the agricultural employees of Kamimoto Farms. Dated:
December 21, 1981

JEROME R. WALDIE, Member

CASE SUMMARY

Kamimoto Farms (UFW)

7 ALRB No. 45

Case No. 80-RC-34-SAL

IHE DECISION

A hearing was held before an IHE to determine whether the petition was filed when the employer was at 50 percent of its peak employment for the year and whether certain conduct of UFW agents affected the outcome of the election. On the peak question, the IHE compared the "body count" in the eligibility period to the average number of employees who worked during the prior peak season and found the election timely. The IHE also concluded that the misconduct of the UFW agents was not of such serious character as would affect the outcome of the election. She therefore recommended certification of the UFW.

BOARD DECISION

The Board rejected the IHE's conclusions regarding peak. Using first a "body count" for both the eligibility and peak periods, then an averaging method for both periods, the Board found that neither method indicated 50 percent of peak employment. The petition was therefore dismissed as untimely.

DISSENT

Member Waldie would adopt the IHE's analysis and recommendation, concluding that it is appropriate to compare eligible voters to projected average job slots at peak.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

KAMIMOTO FARMS)

)
)
) Respondent)

and)

)
) UNITED FARM WORKERS OF AMERICA,
) AFL-CIO)

)
) Petitioner)
)
_____)

Case No. 80-RC-34-SAL



APPEARANCES:

Arthur V. Plank and
A. Randall Smith
Sims & Plank
For the Respondent

Federico G. Chavez
For the United Farm Workers
of America, AFL-CIO

DECISION

Ruth M. Friedman, Investigative Hearing Examiner: On August 9, 1980, a representation election was held among the employees of Kamimoto Farms (hereinafter the "Employer") in San Juan Bautista, California. The election was based on a petition for representation filed by the United Farm Workers of America, AFL-CIO (hereinafter the "Union," or "UFW") on August 6, 1980. The UFW

received 29 votes to three votes for no union,

The Employer filed objections to the election pursuant to Labor Code §1156,3(c). The Board dismissed some of the objections pursuant to §20365(e) of its Regulations and set three objections for hearing pursuant to 8 Cal, Admin, Code §20365(g). These issues were set for hearing;

1. Whether the representation petition in the above-captioned case was timely filed pursuant to Labor Code Section 1156,4;

2. Whether, on or about August 7, 1980, agents and/or adherents of the United Farm Workers of America, AFL-CIO arrived at the Kamimoto Ranch, parked their cars in front and back of the truck of E, B, Rodriguez, and detained the crew, and if so, whether such conduct unlawfully affected the outcome of the election; and

3. Whether on or about August 8, 1980, agents and/or adherents of the UFW followed E. B. Rodriguez and his crew to the labor camp, threw rocks and yelled, and if so whether such conduct unlawfully affected the outcome of the election.

A hearing was held in Salinas on November 17 and 18, December 8, 9 and 10, 1980, and January 12 and 15, 1981. The Employer and the UFW were represented by counsel. After the hearing, both parties filed briefs. Based on the evidence presented at the hearing, and on the record as a whole, I make the following findings of fact and conclusions of law:

THE EMPLOYER'S OPERATION

Kunijo Kay Kamimoto has been engaged in row crop farming in San Benito County for almost 55 years. He has been the owner of Kamimoto Farms for 45 years. During 1980, Kamimoto Farms are

tomatoes, lettuce, garlic, cucumbers, potatoes, sugar beets and beans.

Employees are hired both directly and through labor contractors. About 15-20 employees work year-round as mechanics, irrigators, tractor drivers, supervisors, and general maintenance workers. Another group of employees are on the payroll of labor contractor E, B, Rodriguez, though at one time they were paid directly by Kamimoto, Most of these employees live year-round in a labor camp owned by Rodriguez, Rodriguez supplies labor only to Kamimoto Farms; he does not contract labor to other growers. The Rodriguez employees work from about April to October performing cultivating and harvesting functions. Typical work includes thinning and weeding lettuce, tomatoes, sugar beets and cucumber pulling and topping garlic and picking cucumbers. Employees in Rodriguez crew also work as sorters on the tomato harvesting machines during the tomato harvest.

Other employees are hired when needed through a labor contractor or individually. In 1979 labor contractor Alfredo Valenzuela supplied employees who worked during various payroll on periods from May to October, During the peak payroll period they were harvesting machine tomatoes, but during other periods they worked at other tasks such as hoeing lettuce and picking peppers. In 1980, the year of the election, labor contractor Y. G, Reyes supplied employees to work in cucumbers on August 7, 8, 11, 12 and 13. The days in which the Reyes crew worked overlapped the election period, a UFW strike in the San Juan Bautista area and the

Employer's peak employment for 1980.

THE PEAK EMPLOYMENT ISSUE

A. The Board Agent's Determination Of Peak

Labor Code §1156.4 requires the Board to consider a representation petition as timely only if the employer's employment in the payroll period immediately preceding the election is at least 50% of the peak agricultural employment for current calendar year.^{1/}

In this case, peak employment for 1980 occurred after the election petition was filed. In such a case, where peak is prospective, the Board determines whether the Board agent who investigated the petition made a reasonable determination that the representation petition was timely filed based on the information that

^{1/}Labor Code §1156.4 reads:

Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of the rights included in this part, the Board shall not consider a representation petition or a petition to decertify as timely filed unless the employer's payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition.

In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the Board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data.

available. Charles Malovich (1979) 5 ALRB No. 33,

The Board agent in charge of this election made a minimal investigation of the peak issue because he considered that the Employer had not properly questioned the allegation made in the Union's petition that the election petition was timely filed.

The Union's petition for certification was served during the late afternoon of Sunday, August 3, and presented to the ALRB Salinas office on Tuesday, August 5, On that day, a lawyer who had been contacted by Mr. Kamimoto called the Board office and was told that the petition had not yet been assigned to a Board agent. On Wednesday, the petition was formally filed, and in the late morning or early afternoon the Board agent in charge of the petition called the attorney and told him that the Employer's Response to Petition for Certification, a document that the Board's Regulations require an employer served with a petition to file, was due at 4:09 that afternoon since the petition alleged that a strike was in progress, 8 Cal. Admin. Code §20377.

The attorney, who had requested that the Employer fill out the response form himself, met the Employer for the first time at 2:30 on Wednesday, He reviewed and signed the response form and the records that the Employer had brought and drove them to the Board office. He told the Board agent that the employees were not on strike and employment was not anywhere near one-half peak. The Board agent agreed to look into it.

The response that the attorney gave the Board agent contained contradictory information. In answer to Question 8a, the

Employer said that 40 employees were employed in the payroll period immediately preceding the filing of the petition for certification. In answer to Question 8c, the Employer said that 70 employees would be employed during the peak payroll period. These answers do not raise the issue of whether the petition was timely since more than half as many employees were employed during the eligibility period as were projected to be hired during the peak employment for the calendar year. However, in response to Question 8f, the Employer answered "No," he did not agree that the number of employees employed in the payroll period immediately preceding the filing of the petition for certification was at least 50% of the Employer's peak for the calendar year. The payroll records supplied indicated that 100 employees worked during the peak period in 1979, or more than twice as many as employed during the eligibility period, No if information was supplied indicating a change in crops, acreage, or farming methods.

At the hearing, the Employer testified that he had misread the question asking the number of employees expected at peak and entered the number of employees he was expecting in addition to those already employed.^{2/} The Board agent testified that he did not consider the timeliness of the petition to be an issue since the Employer estimated that 70 employees would work at peak in 1980.

^{2/}The Employer also said that peak was expected between August 22 and September 12, 1980, which was close to the time of the 1979 peak. Instead, peak occurred the week after the election, when the Reyes crew was engaged to work in cucumbers, work that had previously been done by the Rodriguez crew. The Union alleged and the Board agent found that the regular workers, including the Rodriguez crew, were on strike,

The Board agent used the 1979 peak figures with which he was supplied merely to ascertain that the Employer's projection for 1980 was not inflated. When he saw that the 1979 peak payroll contained at least 70 names, he did not investigate further. He did not ascertain how many employees in total worked during the peak of 1979, and he did not attempt to average the payroll figures even though sufficient information was supplied for him to do so. The Board agent did not attempt to reach the Employer or his attorney in order to consult with them about peak or other issues raised by the petition, even though the Employer's attorney left him two telephone numbers where he could be reached, was in the Board office several times a day during the two days of the investigation and left telephone messages which were not returned. The attorney was only contacted at 4:30 on Friday, August 3, when he was told that a pre-election conference would be held at 6:00 in San Juan Bautista for an election to be held the next morning. The attorney was not able to get any information from the Board agent on how he had determined that the petition was timely other than that he had "done an investigation outside the office."

Based on these facts, I find that the Board agent's investigation was inadequate. There was a mistake on the face of the Employer's response. Given the availability of the Employer and his attorney and given that the Employer provided adequate documentation for its claim that the petition was not timely, it was the responsibility of the Board agent to discuss the projected peak 26 figures with the Employer. Had a discussion taken place, the

mistake on the petition would have been discovered. It is the Board's Board's responsibility to make an investigation that assures employees the fullest scope for their enjoyment of their right to representation. The Board's responsibility does not cease because of an error or false allegation of an employer.

B. What The Board Agent Would Have Found If He Had Investigated

In Charles Malovich, supra, the Board held that it would not limit its determination of the timeliness of election petitions to a consideration of the methods actually employed by the Board agent in investigating the petition, but would independently determine whether a finding of timeliness was reasonable based upon the information available at the time. Such a determination in this case is complicated.

1. The Body Count Method.

(a) Employment During The Eligibility Period

During the payroll period immediately preceding the filing of the petition, which for all employees started on Friday, July 25, and ended on Thursday, July 31, the Employer had 19 direct employees who worked year-round ("steadies").^{3/} Twenty-one employees worked through labor contractor E. B. Rodriguez. In total, 40 employees worked during the eligibility period.

^{3/}This figure includes Cedric Martinez who was on sick leave, and would be eligible to vote. It also includes three employees, including one on vacation at the time, who the Employer claims are supervisors. The question of whether these employees are supervisors is contested and involves determinations of credibility. I have not resolved the question because no matter how peak is calculated, the result would not be affected by the supervisory status of these three employees.

(b) Employment During The 1979 Peak Period;

During the 1979 peak payroll period, which occurred between Friday, September 7, and Thursday, September 13, the Employer employed 21 direct employees, including three alleged supervisors, and 40 employees through labor contractor E. B. Rodriguez,^{4/} An additional 37 employees worked through labor contractor Alfredo Valenzuela on tomato harvesting machines.^{5/} In addition, Manuel Sanchez Corona and Ramiro C. Prado were employed at a piece-work rate to "pick the head line" on the tomatoes, that is, to pick the tomatoes on both ends of the rows by hand so that the tomatoes would not be squashed when the mechanical harvester turns around. Mr. Corona^{6/} and Mr. Prado brought a total of three family members to help pick the bins of tomatoen for a total of five additional employees during the peak period. Adding the 21 direct employees, the 40 Rodriguez employees, the 37 Valenzuela employees and the five picking the head lines yields a total of 103 employees during the 1979 peak.^{7/}

(c) Employment _During The 19 80 Peak:

Figures for the 1980 peak payroll period, which occurred during the week of August 8 through August 14, 1980, were

^{4/}Not Including Rodriguez himself.

^{5/}This figure excludes a "Freddie Valenzuela" who is listed as a foreman.

^{6/}As Mr. Kamimoto referred to him at the hearing.

^{7/}Excluding the three alleged supervisors, the figure is 100.

not supplied to the Board agent. Records supplied at the hearing showed that during the 1980 peak payroll period, the Employer directly employed 19 workers, including three alleged supervisors, employed 24 workers through E. B. Rodriguez and 107 workers^{8/} through labor contractor Y. G, Reyes, for a total of 150 employees.^{9/}

(d) Summary Of Peak Using Body Count Method:

The total number of employees working at any time during the relevant periods is as follows:

Eligibility period:	40
1979 peak	103
1980 peak	150

The number of employees working during the eligibility period is less than 50% of the peak employees during the year preceding the election or during the year of the election. Based on the employee count method, the petition was not timely.

THE AVERAGING METHOD

A petition is timely if employees working during the eligibility period makeup 50% of the peak employment either by counting the total number of employees who worked or by averaging the number of employees who worked each representative day during the relevant payroll period. Mario Saikhon (1976) 2 ALRB No. 2; Donley

^{8/}This figure is based on a list supplied by Reyes. I have subtracted two names from the list to reflect the fact that Reyes charged the Employer for a maximum of two foremen each day, I am assuming that the same foremen worked each day of the payroll period, since I have no information otherwise. This assumption in no way affects the outcome.

^{9/}Excluding the three alleged supervisors, there would be 147 employees.

Farms, Inc. (1978) 4 ALRB No. 66.

A. Average Number Of Employees During Eligibility Period

During the eligibility period, July 25 through 31, 1980, the Employer's direct employees worked 92 employee days^{10/} during the six representative days of the payroll^{11/} period, or an average of 15.3 employees on each day.^{12/}

The employees who worked through labor contractor Rodriguez worked three days during the eligibility period.^{13/} During these three days, they worked 60 employee days. If the three days they actually worked are representative of their ordinary work week, and the four days they did not work are not representative, an average of 20 employees worked during the payroll period. If all six days of the payroll period are representative days, on the other hand, an average of 10.5 employees worked, during the eligibility period (63 employee days divided by six). As will appear, a

^{10/} The employees days are the sum of the number of employees who worked each day during the payroll period.

^{11/} It is well established that under the Saikhon averaging method, Sunday is not considered a "representative" day when no or few employees worked that day. The few employees who worked on Sunday are not counted for purposes of averaging and the employee days are divided by the six remaining days of the week, Ranch No. 1, Inc. (1979) 2 ALRB No. 37.

^{12/} If alleged supervisors are excluded, 16 employees worked 80 employee days, or an average of 13.3 employees for each of the six days.

^{13/} On the third day they worked, Thursday, July 31, the Rodriguez employees worked only three hours because on that day they left the fields at 10:30 when so requested by the UFW, which was attempting to organize a strike. See *infra*. In any calculation, I am counting July 31 as a full work day "since the Employer clearly intended it as such."

determination of which days are representative is critical to the outcome of the objection petition.

In sum, during the eligibility period, an average total of 25.8 employees worked if six days are representative for both the direct employees and the Rodriguez crew and an average of 35.8 employees worked if only the three days the Rodriguez crew actually worked are representative.^{14/}

B. Average Number of Employees During 1979 Peak

During the 1979 peak, the direct employees worked 110 employee days during six representative days, for an average of 18.3 employees.^{15/} The Rodriguez crew plus the Corona/Prado employees worked 169 employee days during six representative days, for an average of 28.1 employees. The Valenzuela crew worked 119 employ days during seven representative days, for an average of 17 employees. The total average number of employees for the 1979 peak payroll period is 63.4 (18.3 plus 28.1 plus 17).^{16/}

C. Average Number Of Employees During 1980 Peak

During the 1980 peak payroll period, the direct employees worked 103 employee days, so an average of 17 employees

^{14/}Excluding two alleged supervisors, the average number of employee's is 33, dividing by three days for the Rodriguez crew (13.3 direct employees plus 20) or 23.8 dividing by six representative days (13.3 direct employees plus 10.5).

^{15/}Excluding the three alleged supervisors, the figure is 15.3 (92 employee days divided by six days).

^{16/}Excluding the three supervisors, the average figure 60.4.

worked each of six days.^{17/}

The Rodriguez crew worked three days. During these three days they worked 68 employee days, so an average of 11.3 employees worked if all six days are representative and 22.7 employees worked if only the three days they actually worked are considered representative.

The Reyes crew worked 244 employee days during five days, taking off both Saturday and Sunday, No evidence was presented as to why the crew did not work over the weekend. I assume that Sunday is not a representative day and divide the employee days by six to get an average of 40.7 employees.^{18/}

The total average employment during the 1980 peak was then 69, if the Rodriguez crew is divided by six days (17 direct plus 11.3 Rodriguez plus 40.7 Reyes) or 80.4 if the Rodriguez crew is divided by three days (17 plus 22.7 plus 40.7).

D. Summary Of Average Number Of Employees

	<u>Pre-Petition 1980</u>	<u>Peak 1979</u>	<u>Peak 1980</u>
Kamimoto direct employees	15.3	18.3	17
Kamimoto without alleged supervisors	13.3	15.3	14.5
Rodriguez with three representative days	20	.....	22.7
Rodriguez with six representative days	10.5	28.1	11.3
Valenzuela	.....	17	.....
Reyes with six representative days	.....	.....	40.7
Reyes with five representative days	.....	.....	48.8

The figures on the chart summarize the findings of the previous section.

^{17/}Excluding three alleged supervisors, the figure is 14.5.

^{18/}Dividing the employee days by the five days actually worked yields an average of 48.8 employees for the Reyes crew. Dividing by seven days yields an average of 34.9.

1. Dividing the Rodriguez employee days by only the three days they actually worked during the two 1980 figures as 1 presentative days and the Reyes crew as having five representative days, yields these total average figures:

Pre-petition 1980:	35.3 (15.3 plus 20)
1979 peak:	63.4 (18.3 plus 28.1 plus 17)
1980 peak:	88.5 (17 plus 22.7 plus 48.8)

2. Dividing the Rodriguez crew by the six days during the payroll period that the steady crew worked and dividing the Reyes crew by seven representative days yields these average figures:

Pre-petition 1980:	25.8 (15.3 plus 10.5)
1979 peak:	63.4 (18.3 plus 28.1 plus 17)
1980 peak:	63.2 (17 plus 11.3 plus 34.9)

3. These figures reveal that employment during the pre-petition period was not at one-half peak during the calendar year of the election (1980) under either the employee count method or the averaging method.^{19/} However, the pre-petition payroll was at one-half the peak of 1979 if the three days that the Rodriguez employees worked during the eligibility period are considered representative of their work week since 35.3 employees is more than 50% of 63.4 employees, are average 1979 peak. Therefore, we must examine first whether the three-day week was representative and second, whether the Board is justified under Labor Code §1156.4 in determining peak on the basis of the peak agricultural employment for the prior season alone.

E. Evidence On Whether The Three-Day Work Week Worked By The Rodriguez Crew During The Eligibility Period Was Representative

In the case of California Lettuce Co. (1979) 5 ALRB No.

^{19/}See Section "G" on the application of a - [cont.]

of employees who worked during a payroll period for purposes of computing peak, the number of employee days should be divided by the number of days in a typical agricultural payroll period (usually six) or should be divided by the number of days during the particular payroll period that employees actually worked.

After remanding the case for hearing on the reasons why employees of that Employer worked a short work week during the eligibility period, the majority of the Board held that it was the burden of the Employer in challenging the results of the election to establish that a short work week was not representative. Absent evidence that days on which no work was performed during the eligibility week were unrepresentative of the usual work pattern, the Board decided to consider the short work week usual and divide by the smaller number. In the California Lettuce Co. case, as in the present one, dividing by the smaller number favors the Board's presumption that elections should be upheld.

At the time of the investigation of the election petition in the present case, the Board agent had the information that the Rodriguez crew worked a three-day week during the eligibility week and he should have had the information that they worked a three-day week the following week and the preceding week, since he was charged with investigating whether or not a strike was in progress. Had he had no more information, and had he determined that there was no unusual activity, and had he confronted the Employer with this information, and had the Employer provided him with no further information, then the Board, under the California

Lettuce test, would be justified in presuming that the three-day work week was typical.

However, that is not what happened. The Board agent, because of his view that peak was not an issue, did not average the employment figures and did not consider whether or not the three-day work week was typical.

On the present record, there is inconclusive evidence which indicates that the three-day work week was not typical. The Employer offered into evidence a document which purported to contain payroll records from E. B. Rodriguez for the years 1979 and 1980. The 1979 records show that during the weeks that the Rodriguez crew worked in 1979 between June 30 and October 11, there was one week in which employees worked two days, one week in which they worked four days, nine weeks in which they worked four days, nine weeks in which they worked six days, and one week in which they worked seven days, for an average work week of 5.2 days. The 12 payroll periods in evidence in 1980 from July 20 through October 9 show that the crew worked three days during three weeks, four days during three weeks, five days during two weeks, and six days during four weeks, or an average of 4.7 days a week. The trouble is that these records may be incomplete. Employees Rosalia Lopez testified in the presence of Kay Kamimoto that she worked during April, May and June in 1979 and 1980 in the Rodriguez crew for the Employer. The records of these payroll periods are not in evidence and it is possible that this crew had less work earlier in the season, particularly since the first three payroll periods in

evidence during 1980, and the only ones that would have been available to the Board agent show three-day weeks.

This is not a situation where the Board should find that the three day work week was representative because of the Employer's failure to produce evidence. This is not a case like California Lettuce Co., supra, where the employer was specifically requested to provide information on this subject and failed to do so conclusively, It is not a case like Dominco Farms (1979) 5 ALRB No. 35, where the Board agents approached the company manager during the pre-election investigation for information upon which to base the employer's projection that expected employment would be greater in the election year than the previous year and only got the vague answer that the employer would be "loaded down with a lots of work" later in the year. Here, the Employer provided the Board agent with information which it reasonably thought refuted the allegation of peak in the petition and then although available to the Board agent through its attorney, did not hear from the Board agent until the eve of the election when the decision to go ahead was already made. In addition, the rules regarding peak, and particularly this refinement of the averaging concept, have become so complicated and specialized that it is illogical to hold an employer to a burden of proof, especially when complicated and everchanging calculations are required in a period when time and tempers are short. It makes sense for the Employer to maintain the burden of coming forward with information when he or she is asked to produce specific information in his or her possession, and fai

to do so. It does not make sense for the burden of investigation to be on the Employer when the issue is the rights of employees to a representative election.

In short, the record does not provides sufficient information to determine whether the three days that the Rodriguez employees worked during the eligibility period and during the 1980 peak periods were representative. In order to determine whether the three-day week was representative, the case must be remained so that both sides can present evidence on the question. The Employer should be ordered to produce payroll records for the Rodriguez crew for all of 1979 and 1980, excluding those records already produced.

F. Can The Board Consider Only The Peak Employment Of The Previous Season For A Projection Of The Current Peak?

Labor Code §1156,4 says both that the Legislature "wishes to provide the fullest scope for employee's enjoyment of the rights included in this part" and that

In this connection, the peak agricultural employment for the prior season shall alone not be a basis for such determination, but rather the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data.

If the Board finds in this case that employment during the eligibility period was more than half of employment during the peak period in the previous season, is it justified in finding the election petition timely?

The Board discussed the quoted language in Bonita

Packing Co., Inc. (1978) 4 ALRB No. 96, and determined that until such time as it develops standards for estimating state-wide peak periods in particular crops, it would measure peak by the body count and averaging methods. As dicta, the Board noted that its approach "in effect designates the total number of employees who were working at peak for the prior season as a first estimate of peak employment for the current calendar year." Bonita Packing Co., supra, at 9.

In Charles Malovich (1979) 5 ALRB No. 33, p. 5, the Board noted:

The number of employees hired in a single year may not accurately reflect the size of the potential bargaining unit. An estimate based on crop and acreage statistics, as well as "all other relevant data" however, enables us to decide whether the electorate is representative of the number of employees who will eventually be affected.

However, in the same opinion, it also said:

It is reasonable for a Board agent to assume that the peak figure closest in time to the year of the election is most relevant to an estimate of peak for that year. In Kawano Inc., 3 ALRB No. 25 (1977), we held that, in estimating prospective peak, Board agents may rely on peak figures for the year preceding the election, plus crop and acreage information for the year in which the election occurs.

[Charles Malovich, supra, at 10, fn. 5.]

In this case, I find that reliance on the 1979 peak figure is reasonable. In the first place, the Employer, in his Response to Petition for Certification, chose to submit only

payroll information from the previous year. His attorney, who was at the time representing other agricultural employees, was chargeable with the inference that there were no factors which would make peak in the present year different from last year's peak. Second, c no information was introduced at the hearing which indicated that L there were any differences in crops, acreage or production methods which would result in different employment figures for 1980 and which information was available at the time of the pre-election investigation. And, third, during the hearing the Union had access to payroll records for the years 1977 through 1980 and had crop and acreage figures available and chose not to introduce them, Therefore, there is no reason to refuse employees what would ether-wise be a representative election because the Employer failed to produce crop and acreage information which would not have affected the result.

G. The Timeliness Of The Petition Under The Method Of Comparing Eligible Voters And Average Employees During Peak

I have previously found that 40 employees working during the payroll period immediately preceding the filing of the petition were eligible to vote.^{20/} Further, an average of 63.4 employees worked during the 1979 peak and an average of 63.2 employees worked during the 1980 peak.^{21/}

Several investigative hearing officers have suggested

^{20/}If all the alleged supervisors are excluded, the figure is 37.

^{21/}Assuming that six days are representative during the 1980 peak, when a strike was alleged to be in progress.

that in cases where peak is an issue, it might be appropriate to compare the number of eligible voters with the average number of employees at peak. See, for example, Donley Farms, Inc. (1978) 4 ALRB No. 66, IHE Opinion at 13; Bonita Packing Co., Inc. (1978) 4 ALRB No. 96, IHE Opinion at 11. The Board has not reached the question of whether it will adopt this method of comparison. Charles Malovich (1979) 5 ALRB No. 33 at 11. If this method were adopted here, the petition was timely, both in regard to the actual, peak and the peak that could have been projected from the 1979 figures.

While on first impression the method of comparing the gross number of employees during the eligibility period with the average for the peak period smacks of comparing apples and oranges and seems unfair, on examination, the idea has much to recommend it. For one thing, this method is consistent and even prescribed by the statutory language. Labor Code §1156.3(a)(1) states that a petition for representation 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," The first number is a concrete number of actual voters, not an average. The word "peak" is not defined, but what is referred to is employment in the aggregate, or the employer's labor needs. A calculation of the average number of employees is an appropriate way of determining aggregate employee needs. That the Legislature considered

"peak" to be an aggregate figure is indicated in the second paragraph of Labor Code §1156.4 which directs the Board to estimate peak employment on the basis of acreage and crop statistics applied uniformly throughout the state.

Second, in this case, the employees working during the eligibility period were all permanent employees; the direct employees worked all year and the Rodriguez employees worked throughout the cultivating season. There was virtually no turnover the growing season, let alone during the eligibility period.

Therefore, there is no basis for applying the Saikhon and Scattini^{22/} averaging formulas to the work force employed during the eligibility period. On the other hand, most of the employees who worked during the peak periods in 1979 and 1980 were transients to this Employer. Their employment was characterized by great deal of turnover during the peak payroll periods and it is appropriate to use the averaging method of determining job slots as to them.^{23/}

Third, the Board has already, in effect, adopted the method of comparing the number of eligible employees with average number of employees in the cases of Valdora Produce (1977) 3 ALRB No. 8; and Kawano Farms, Inc. (1977) 3 ALRB No. 25. In both those

^{22/} Mario Saikhon (1976) 2 ALRB No. 2; Luis Scattini (1976) 2 ALRB No, 43.

^{23/} In 1979, 37 employees worked through labor contractor Valenzuela during the peak payroll period, with an average employment of 17. In 1980, 107 employees worked through labor contractor Reyes, with an average employment of 40.7 or 48.8, depending on the number of days considered representative.

cases, the Board compared the number of workers on the eligibility list with the number of workers that it expected to employ at peak. The number of workers expected at peak had to be an average, since the employer was estimating its labor needs in terms of job slots, Were the Board to reject the suggested method, it would, in effect, be condemning the use by the Regional Office of any projections of peak by the employer, particularly in those cases where peak is not challenged and no averaging is performed.

H. Conclusions On Objection That The Petition Was Not Timely

The purpose of the peak employment requirement is to provide the fullest scope for employees' employment of the right to decide whether or not they wish to be represented by a labor organization. Labor Code §1156.4. In this case, all of the employees who regularly worked for the Employer were eligible to vote in the election.

During 1979, peak employment occurred during the tomato harvest. During 1980, a relatively large number of employees were hired to begin working in the cucumbers two days after a petition was filed alleging that a strike was in progress. The Rodriguez employees, who walked out of the fields on July 31, had been weeding and hoeing cucumbers for three or four days. At the hearing, the UFW made an offer of proof that members of the Rodriguez crew were not allowed to work the week of August 11, after the election, because they had been temporarily replaced by other workers during the strike. This was presumably the Raves crew. The Reyes crew was larger than the 1979 peak tomato harvesting crew. There is an

indication from the record that assuming the same tomato acreage, fewer people would have worked in the tomato harvest because some harvesting machines which used fewer employees for the same amount of work were being used.

This evidence indicates that the high peak employment for 1980 was not typical and would not have occurred but for the strike or threat of a strike. It can be inferred from the evidence that were the Reyes crew not hired during the week after the election, peak employment in 1980 would have been lower than that in 1979. It can also be inferred that the employees in the Reyes crew who worked during the peak payroll period but were not eligible to vote had but a marginal long-term, interest in employment conditions at Kamimoto Farms.

These considerations, though not a basis for my decision in this case, bolster the conclusion that the petition was timely filed. The petition was timely filed because, as explained in the previous section, the number of eligible voters was more than half of the average number of employees employed during the peak employment in the previous year, and so the Board agent could have projected that the number of eligible voters was more than half of the average number of employees who would work during the peak payroll period for the current calendar year. Therefore, the objection that the petition for certification was not timely should be dismissed.

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THE ISSUES OF UNION INTIMIDATION

In addition to the Employer's challenge to the timeliness of the election petition, two other issues were set for hearing. They were as follows:

1. Whether, on or about August 7, 1980, agents and/or adherents of the United Farm Workers of America, AFL-CIO, arrived at the Kamimoto Ranch, parked their cars in front and back of the truck of E. B. Rodriguez, and detained the crew, and if so whether such conduct unlawfully affected the outcome of the election.

2. Whether, on or about August 8, 1980, agents and/or adherents of the UFW followed E. B. Rodriguez and his crew to the labor camp, threw rocks and yelled, and if so whether such conduct unlawfully affected the outcome of the election.

The facts, based solely on testimony of witnesses for the Employer, and crediting those witnesses, are as follows: On July 31, 1980,^{24/} nine days before the election, at 10:15 in the morning, about 35 or 40 people drove on a road adjacent to the fields where about 15 members of the crew of labor contractor E. B. Rodriguez were hoeing cucumbers. The people carried red flags with the UFW insignia. The crew members were on their morning break. The people, who had been instructed by UFW agents who were organizing strike activity throughout the area, and who I therefore find to be UFW agents, got out of their vehicles. Though some came as much as 50 feet into the field, most stayed on the road. The UFW supporters told the workers to get out of the fields; they told them.

^{24/} Not on August 7, two days before the election, as alleged in the objection.

that they should not work. The workers earns out of the fields.

When the workers were leaving the field, labor contractor Rodriguez got into his pickup truck, which was parked on the road. He sat there for a short time ("like one second"). He did not ask anyone if he could leave. He did not turn en the motor. He then got out of the pickup and stood at the door. He asked the assembled group, which consisted both of UFW agents and his own crew, if he could leave. He was told to wait a minute until the crew finished filling out the authorization cards. The leader of the UFW agents asked him for a pencil and also asked permission to have the crew member sign authorization cards, which was granted. Most of the employees signed the cards; some did not. Rodriguez did not attempt to enter the pickup again until after the caravan of agents left. The whole incident took about half an hour.

Rodriguez said that he could not leave because employees were signing cards on top of his truck. He testified that the UFW agents did nothing but ask the employees to leave the field and sign cards. They did not say they were going to physically harm anyone and did not make threatening gestures.

The next day, Friday, August 1, a caravan of UFW supporters, bearing UFW flags, who I find to be UFW agents, found four Rodriguez employees working in the same field as they were working the day before. According to one of the four, the UFW agents, again 35 or 40, stopped their vehicles on the road and yelled "strike, strike, get out of the fields" and "that if we continued working that they were going to have violence." The four

workers ran to their van, put in their hoes and sped to the E. B. Rodriguez labor camp, about a mile and a half away. About five minutes later, at around 11:00 in the morning, the caravan of UFW strikers arrived at the camp, got out of their vehicles and stood between the road adjacent to the camp and the camp. They did not enter the camp. They were yelling words such as "support the strike." It is unclear how many employees were in the camp at the time; one witness estimated seven; other estimates were lower. Several people who were fixing their cars continued fixing their cars. A few children were playing outside. Some employees watched the goings on from inside their houses in the camp.

At one point, E. B. Rodriguez, who had been in Gilroy, pulled into the camp in his pickup. He was driving very slowly in order to avoid the crowd, but no one attempted to block his entrance or touch the vehicle. The strikers shouted words to the effect that "now the old man has arrived," Rodriguez then went to his house inside the camp. The strikers called him to come out ("Come outside you old starved man"), so he came onto the veranda along with his wife, brother-in-law, daughter and son-in-law. Children were playing around. The strikers called him bad words, such as "son of a bitch," which he says insulted his mother. Several witnesses heard the strikers say they would burn the camp, Several witnesses heard, but did not see, rocks being thrown. I infer that the "rocks" were pebbles thrown at a tree adjacent to Mr. Rodriguez's house which were heard when they fell on the roof of the veranda under which he and his family were standing. They we

not directed at, and did not hit any people,

Neither of these incidents constitute grounds for setting aside the election. They are normal, nonviolent strike activity. All six employee witnesses testified that they were aware that the UFW was organizing a strike in the area and had been told that the employees of this Employer would be asked to join the strike. With the possible exception of the uncorroborated statement to the few workers who did not honor the strike that "if we continued working they were going to have violence," no violence or threats of violence were directed toward employees. Offensive words used against an employer supervisor by union adherents do not constitute threats, West Foods, Inc.(1975) 1 ALRB No, 12. There was no proof that the UFW intimidated an employee during the signing of authorization cards; indeed some employees did not sign and were not confronted. Ron Nunn Farms (1978) 4 ALRB No. 31.

At any rate, even assuming that some language could be considered a threat, there was no showing that the election was conducted in an atmosphere of fear. Jack or Marion Radovich(1976) 2 ALRB No. 12, Some employees brought water to the strikers. There was laughing and jokes. Most significantly, the incidents occurred over a week before the election and there was no evidence of any questionable activity between the activities and the election. The objections should be dismissed.

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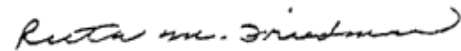
CONCLUSION AND RECOMMENDATION

The objections should be dismissed. The United Farm Workers of America, AFL-CIO, should be certified as the exclusive bargaining representative of the employees of Kamimoto Farms.

Dated: April 13, 1981

Respectfully submitted,

AGRICULTURAL LABOR RELATIONS BOARD



Ruth M. Friedman
Investigative Hearing Examiner

NOTICE TO EMPLOYEES

After charges were made against us by Efrain Gonzalez Vasquez and a hearing was held where each side had a chance to present its side of the story, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers to act together to help one another as a group. The Board has ordered us to distribute and post this Notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join, or help unions;
3. To bargain as a group and to choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help and protect one another; and
5. To decide not to do any of these things. Because this is

true, we promise that:

WE WILL NOT do anything in the future that forces any employees to do, or stops any employee from doing, any of the things listed above.

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One is located at 627 Main Street, Delano, California 93215, telephone (805) 725-5770.

DATED: _____

MINI RANCH FARMS

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.