

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MARSHALL SANCHEZ,)	
dba JESSIE FARMS,)	Case No. 80-RC-87-SAL
)	
Respondent,)	
)	
and)	8 ALRB No. 2
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	
)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO, (UFW) on October 27, 1980, a representation election was conducted on November 2 among the Employer's agricultural employees. The official Tally of Ballots showed the following results:

UFW	28
No Union.	9
Challenged Ballots....	1
Total	38

The Employer timely filed one post-election objection, which was set for hearing. In its objection, the Employer alleges that the Employer was at less than 50 percent of peak agricultural employment during the payroll period immediately preceding the filing of the Petition for Certification, requiring that the election be set aside.

A hearing was held before Investigative Hearing Examiner

(IHE) Ismael Castro in May 1981. In a decision issued on October 5, 1981, the IHE found that the petition was timely filed and therefore recommended that the Employer's objection be dismissed and that the UFW be certified as the exclusive representative of the employer's agricultural employees.

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

Pursuant to Labor Code section 1146, the Agricultural Labor Relations 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 brief, and has decided to affirm the IHE's rulings, findings, and conclusions, and to adopt his recommendations.

Accordingly, the Employer's objection is hereby dismissed, and we shall certify the UFW as collective bargaining representative of the Employer's agricultural employees.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code section 1156, the said labor organization is the exclusive representative of all agricultural employees of Marshall Sanchez, dba Jessie Farms, in the State of California for purposes of collective bargaining, as defined in Labor Code

section 1155.2 (a), concerning employee's wages, hours, and working conditions.

Dated: January 13, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

MEMBER WALDIE, Concurring:

I concur in the result. However, I would dismiss the Employer's objection based on a comparison of the number of employees on the payroll list during the eligibility period and the number of average daily job slots during the Employer's period of peak employment. See Kamimoto Farms (Dec. 21, 1981) 7 ALRB No. 45. (Member Waldie, dissenting).

Dated: January 13, 1982

JEROME R. WALDIE, Member

CASE SUMMARY

Marshall Sanchez dba Jessie Farms

Case No. 80-RC-87-SAL
8 ALRB No. 2

IHE DECISION

The Employer objected to the election on the basis that it was not at 50 percent of peak employment at the time of the Petition for Certification. The IHE found that 74 employees were employed during the pre-petition eligibility period and 133 employees were employed during the peak period. Since 74 is more than 50 percent of 133, he concluded that the election was timely based on a "body count" theory.

BOARD DECISION

The Board adopted the IHE's decision in its entirety.

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

MARSHALL SANCHEZ, dba
JESSIE FARMS,

Employer,

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Howard D. Silver, Esq. of
Dressier, Quesenbery, Laws
& Barsamian, for the Employer.

Carmen Flores, Esq. for
the United Farm Workers
Of America, AFL-CIO.



DECISION

STATEMENT OF THE CASE

ISMAEL A. CASTRO, Investigative Hearing Examiner: This case was heard before me on May 5, 6, and 7, 1981, in Gilroy, California. On October 27, 1980, the United Farm Workers of America, AFL-CIO (hereinafter referred to as "UFW") filed a Petition for Certification^{1/} in case No. 80-RC-87-SAL, in order to obtain a representation election for the bargaining unit of all of the agricultural employees of Marshall Sanchez dba Jessie Farms (hereinafter referred to as "Employer"). An election was conducted on November 3, 1980.^{2/} The Tally of

^{1/} See Investigative Hearing Examiner (IHE) Exhibit 1.

^{2/} See IHE Exhibits 2.

Ballots from the election showed the following results :

United Farm Workers	28
No Union	9
Number of Unresolved Challenged Ballots	1
Total Ballots	$\frac{1}{38}$ ^{3/}

On November 5, 1980, the Employer filed its single objection to the election alleging that Employer was at less than 50 percent of peak agricultural employment during the period immediately preceding the filing of the Petition for Certification requiring the Agricultural Labor Relations Board (hereinafter referred to as "ALRB" or "Board") to set aside the election.^{4/} By order of the Executive Secretary dated March 26, 1981, the Employer's objection was set for hearing.^{5/}

All parties were represented at the hearing and were given full opportunity to participate in the proceedings. Both parties submitted post-hearing briefs on June 8, 1981. The UFW filed a motion to strike portions of the Employer's brief, or alternatively, for permission to file an enclosed supplemental points and authorities dated June 16, 1981. The Employer filed it's response thereto on July 1, 1981.^{6/}

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

^{3/} See IHE Exhibit 3.

^{4/} See IHE Exhibit 4.

^{5/} See IHE Exhibit 5 and 6.

^{6/} A ruling on the UFW's motion is included in this opinion.

FINDINGS OF FACT'S

I. Jurisdiction

Neither the Employer nor the UFW challenged the Board's jurisdiction in this matter. Accordingly, I find that the Employer is an agricultural employer within the meaning of Labor Code section 1140.4 (c), and that the UFW is a labor organization within the meaning of Labor Code section 1140.4(f).

II. Background

The Employer, a partnership employing agricultural workers in the State of California, is engaged in the cultivation and harvesting of a variety of crops in the Gilroy, California, area. In 1980,^{7/} it cultivated and harvested 35 acres of tomatoes, 28 acres of bell peppers, 15 acres of chili peppers, 15 acres of cucumbers, 20 acres of walnuts, and 4 acres of zucchini. Forty percent of the farming effort was devoted to tomatoes in which there were three harvest periods.

A. The Tomato Harvest

The three tomato harvest periods for 1980 occurred in the month of September. The Employer hired labor contractor Leonel Rodriguez to provide agricultural workers for the harvest. The first harvest period was September 3rd and 4th. This harvest period was the busiest for the season. The labor contractor paid his employees daily. Pickers were paid daily while foremen, dumpers, checkers and punchers were paid weekly. The Employer also employed permanent or steady employees who assisted in the

^{7/}All dates refer to 1980 unless otherwise noted.

harvest. There were six steady employees working during this harvest.^{8/} The labor contractor employees numbered 127^{9/} for total workforce of 133.^{10/}

Following the first tomato harvest, the Employer harvested the tomato crop again on September 15, 16 and 17. Leonel Rodriguez was again hired as the labor contractor who provided agricultural workers. There were 96 labor contractor employees who worked for Employer on the 15th. On the 16th, 84 employees worked of which four were new crew members (in addition to 80 employees who also worked on the 15th). On the 17th, the number of workers was reduced to 14, only one of which was a new crew member, the other 13 workers had worked the previous day.

^{8/} Steady employees were Jose Rocha, Francisco Macias, Thomas H. Lovjoy, Fernando Gerrero, Manuel Fabian and Manuel Avalos. Robert Sanchez and Nick Sanchez I find are supervisors within the meaning of the Act. See discussion of their status in section III(B) of this decision.

^{9/} See employer's Exhibit 4. In taking count of the number of workers who were employed during this first harvest period, I find that there were 109 employees who worked on September 3rd. 98 of these employees also worked the following day, the 4th. 11 employees who worked the 3rd did not work the 4th. An additional 18 workers worked the 4th who did not work the 3rd. In sum, by counting the separate number of employees who worked the 3rd and 4th, the total is 127. (i.e. 98 employees who worked the 3rd and 4th + 11 employees who only worked the 3rd + 18 employees who only worked the 4th = 127) See also Attachment "A" to this decision.

^{10/} The UFW contends that 132 workers were employed during this period. However, review of their employee list reveals the omission of employee Gerardo Vargas. The Employer submits that there were 134 workers employed during this period. The Employer, however, did not submit a chronological employee list so that a comparison could be made with my list. In any event, my independent review of the evidence presented reveals that there were 133 workers employed during this period.

In sum, the total number of workers employed by the Employer to harvest the second tomato crop was 101.^{11/} The Employer also utilized six of his regular employees who worked during this second harvest period.^{12/} Therefore, the total number of separate employees who worked the second tomato harvest season was 107.^{13/}

The third and last tomato harvest occurred on September 28th, in which Joe Abarca and George Artiaga were hired as labor contractors. Joe Abarca provided 21 pickers, two supervisors and two punchers who worked on the 28th for the 147 Employer. It is not known how many workers George Artiaga provided.

B. Chili and Bell Pepper Harvest

In August, September and October of 1980, the Employer harvested his 15 acre chili crop. The Employer hired agricultural workers directly and did not hire a labor contractor except for the October chili harvest. September 10, 11 and 12, was the

^{11/} See Employer's Exhibit 6.

^{12/} Steady employees were Fernando Gerrero, Thomas Lovjoy, Juan Matinez, Manuel Avalos, Manual Fabian and Leonides Tirado.

^{13/} The Employer did not submit a chronological list of employees working during this period as part of its post-hearing brief. Employer rather submitted into evidence separate copies of employee pay vouchers. My independent review of this evidence reveals 107 workers employed during this period.

^{14/} See Employer's Exhibit 1.

^{15/} Although the UFW served the Employer with a subpoena for pro-production of Mr. Artiaga's payroll records, the Employer did not produce these records at the hearing. Subsequently, the Employer did not introduce into evidence the number of workers provided by labor contractor Artiaga at the hearing.

period in which the Employer hired his greatest number of agricultural workers for the entire chili harvest.^{16/}

On October 22nd and 23rd, the Employer harvested his bell pepper crop using the services of labor contractor Rudy Silva. His payroll period began on Friday and ended the following Thursday. Rudy Silva had three (3) crews working these two days. Fortunado Vega was the crew foreman for the first crew of 16 workers which worked both the 22nd and 23rd. An additional four new employees worked the 23rd for a total of 20. These employees were paid hourly. Jesus Oliveras was the foreman for the second crew of 23 workers which worked only on the 23rd and were paid hourly. Carlos Bravo was the foreman for the last crew of 24 workers which worked only on the 23rd and were paid by the bucket rather than hourly. In sum, the total number of employees working during this two day

^{16/} At the hearing the Employer marked for identification employer's Exhibits 8 and 9 which were punch cards issued by the employer to its employees for picking chili peppers. These cards reflect the days worked by the employees during this harvest period and reflect the number of buckets picked by workers since they were paid by piece rate rather than hourly. The employer sought to introduce the opinion of Marshall Sanchez estimating the number of workers employed during this period by comparing and estimating the average number of buckets picked by an average worker to the number of buckets picked by more than one worker using the same punch card. The UFW objected to this testimony on the basis that this method of determining the total employee workforce was too speculative. The UFW's objection was sustained and employer thereafter submitted his offer of proof. Employer's counsel stated on the record that if each punch card were to be counted as representing one employee, the total would not be sufficient to exceed 50 percent of the total number of workers employed during the pre-petition period. Employer then did not offer into evidence these exhibits, but incorporated them into his offer of proof.

harvest period was 70. The Employer was also assisted by four regular employees who worked on those two days.^{18/} Therefore, the total number of employees who worked those two days, including the regular employees, was 74.

III. Analysis

Labor Code section 1156.4 directs that representation elections be conducted at a time when the employers payroll reflects at least 50 percent of its peak agricultural employment by providing inter alia, as follows:

"Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope of 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 employers payroll reflects 50 percent of the peak agricultural employment for such employer for the current calendar year for the payroll period immediately preceding the filing of the petition." (See also Labor Code section 1156.3 (a) (1))

Moreover, Labor Code section 1156.3 (c) directs that "unless the Board determines that there are sufficient grounds to refuse to do so, it shall certify the election." The Board has interpreted this language to mean that "the legislature has in effect established a presumption in favor of certification and indicated that the burden of proof rests upon the party objecting thereto."

California Lettuce Co. (March 29, 1979) 5 ALRB No. 24. Therefore, in the instant matter, the Employer is the objecting party and as such

^{17/} See Employer's Exhibit 2 and 3. The three foremen are included in this figure since no evidence was introduced showing they were supervisors within the meaning of Labor Code section 1140.4 (j) or that they otherwise would not have been eligible to vote at the election.

^{18/} The regular employees were: Fernando Gerrero, Manuel Fabian, Manuel Avalos and Leonides Tirado.

bears the burden of proof.

The Board has developed two major methods for determining the timely filing of a petition for certification. In Donley Farms, Inc. (Sept. 22, 1978) 4 ALRB No. 66, the conventional or "body count" method was adopted by the Board.^{19/} This method counts the number of employees who worked during the eligibility period preceding the filing of the petition and compares it with the highest number of employees who worked during any period in the current year. In situations where high employee turnover causes a distorted computation of peak, the Board adopted the Saikhon method or "averaging" formula. Mario Saikhon, Inc. (Jan. 7, 1976) 2 ALRB No. 2. This method averages the number of employee days during the pre-petition eligibility period and compares it with the average number of employee days for the peak, or highest period of employment. This Saikhon method was later modified to take into account and to delete unrepresentative days (Ranch No. 1, Inc. (Feb. 23, 1976) 2 ALRB No. 37) and to take into account situations where there were different payroll periods for different groups of employees (Luis A. Scattini & Sons (March 3, 1976) 2 ALRB No. 43).^{20/}

In comparing these two approaches, the Board in Bonita Packing Co. (Dec. 1, 1978) 4 ALRB No. 96, held that "these two approaches to the determination of the peak question in effect represent two separate measures of the representative nature of the vote, neither of which is wholly satisfactory under all circumstances."

^{19/} The Board has also used the body count method in Valdora Produce Co. (Feb. 4, 1977) 3 ALRB No. 8; Kawano Farms, Inc. (March 16, 1977) 3~ALKB No. 25; and Ruline Nursery (June 11, 1980) 6 ALRB No. 33.

^{20/} See also Dell'Aringa & Sons (Sept. 30, 1977) 3 ALRB No. 77 and High & Mighty Farms (Nov. 29, 1977) 3 ALRB No. 88.

In commenting upon the Saikhon formula the Board held that "while this approach to determining the timeliness of petitions promises more stable and consistent results with respect to the seasonal cycle of employment needs experienced by a particular employer, we are not satisfied that it is appropriate in all cases to measure the representative character of an election by counting numbers of jobs rather than numbers of voters." Thereafter, the Board concluded that "(b)oth the 'body count' and Saikhon approach 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."

A. The Appropriate Method for Determining Timeliness

In its brief, Employer uses the Saikhon method for determining timeliness. The Employer asserts that "(t)he second formula, and the one directly relevant to this proceeding, uses averaging to determine the number of job positions in a payroll period." The Employer contends that using the Saikhon formula establishes that the petition herein was untimely filed. However, the Employer fails to state why the Saikhon method is relevant here and fails to suggest any other reason why the Board should use the Scattini method of averaging in lieu of the unmodified Saikhon formula or the "body count" method. Although there is evidence of employee turnover in the instant case, there is no evidence nor was argument presented, indicating that such a turnover presented a distorted computation of peak sufficient to warrant the utilization of the averaging method.

The UFW, on the other hand, uses the conventional or "body count" method to support its assertion that "(a) conventional count of the number of employees in each of the payroll periods establishes that the employer was at 50 percent of peak during the eligibility week." The UFW further asserts, in footnote 1 of its post-hearing brief that "decisions of computations under Mario Saikhon, Louis A. Scattini and Sons, and High and Mighty Farms, are unnecessary here where a conventional body count of workers during each payroll period renders the petition timely." (citations-omitted)

In Donley Farms, Inc., supra, the Employer asserted that the Investigative Hearing Examiner should have applied the Saikhon method for determining the timeliness of the petition for certification. The Board held, however, that "the use of the Saikhon method is unwarranted in the instant case as a conventional count of the number of employees in each of the payroll periods establishes that the employer was at 53.3 percent of peak during the pre-petition period." Accordingly, because I find that the Employer has failed to establish that use of the "body count" method will result in a distorted computation of peak, and that the use of the conventional body count method establishes that the petition was timely filed as asserted by the UFW, use of the Saikhon method is likewise unwarranted here.

B. Employer's Peak Agricultural Employment

Employer's Exhibit 4 establishes that the Employer first tomato harvest on September 3rd and 4th was its period of peak agricultural employment for calendar year 1980. Moreover, the

^{21/} See Employer's Exhibit 4; see also footnote No. 3 in this decision.

Employer asserts in its post-hearing brief that "(t)he payroll were ending Sunday, September 7 was the employer's busiest week of the 1980 season." Although the Employer introduced evidence of other periods of agricultural employment,^{22/} the September 3rd and 4th harvest period was its peak period.

On September 3rd, labor contractor Leonel Rodriguez supplied the Employer with 109 agricultural workers. The following day, September 4th, labor contractor Rodriguez again supplied the Employer with workers. Ninety-eight of those workers who worked the 3rd also worked on the 4th. Eleven employees who worked on the 3rd, did not work on the 4th. On the 4th, in addition to the 98 employees who worked on the 3rd, 18 new workers were employed to assist in the harvest. Therefore, taking a conventional count or "body count" of agricultural employees^{23/} who worked for employer during this peak period, the

^{22/} See Employer's Exhibit 6 and Exhibit 1.

^{23/} The UFW argues that Leonel Rodriguez Jr. and Omar De Leon should be excluded from the bargaining unit of employees since Mr. Rodriguez testified that they both were foremen. At the hearing Leonel Rodriguez Jr. (son of labor contractor Leonel Rodriguez) testified that he was a "field supervisor" during this peak period and that two (2) foremen were also employed during this time. As to the responsibilities of the foremen, Mr. Rodriguez testified on direct examination as follows:

- Q. Okay. Are the foremen able to hire and fire people?
A. They bring them through us, you know, and we usually give them three chances, and if they don't straighten out then we lay them off.
Q. Who makes the decision?
A. My dad does.
Q. Is he the only one?
A. Yes

No evidence was elicited regarding the specific authority delegated foremen. Based on the evidence presented, I cannot find these "foremen" to be supervisors within the meaning of the Act. Anton Caratan and Sons (D c. 21, 1978) 4 ALRB No. 103. As to the status of Leonel Rodriguez Jr. and his self-characterization as a "field supervisor," the board held in Karahadian & Sons, Inc. (March 16, 1979) 5 ALRB No. 19, that reliance on a persons characterization of

(footnote 23 continued on page 12)

total is 127.^{24/}

Marshall Sanchez testified at the hearing that Jose Rocha, Francisco Macias, Thomas H. Lovjoy, Fernando Gerrero, Manuel Fabian and Manuel Avalos were regular or steady employees who worked during the eligibility period. He further testified that Robert Sanchez and Nick Sanchez, his brother, were also employed during this time. Mr. Sanchez described their jobs as "management type" positions "similar to mine." Moreover, Mr. Sanchez testified that they "make^{25/} certain decisions that other employees wouldn't make." Accordingly, I conclude that Robert Sanchez and Nick Sanchez are supervisors within the meaning of Labor Code section 1140.4(j). Mid-State Horticulture Co. (Dec. 19, 1978) 4 ALRB No. 101; Hemet Wholesale (Feb. 2, 1976) 2 ALRB No. 24. They are therefore excluded from my determination of peak here. See also Labor Code 1156.3(a)(1).

The total number of steady employees is 6, which brings the total peak employment figure to 133.

(footnote 23 continued)

of his job has a supervisor is misplaced. "While an employee's belief that he possesses supervisory authority may be evidence that he does, supervisory status is to be determined by analyzing the particular authority that the person possesses and not by the individual's legal conclusions about his own status." Therefore, based upon the evidence presented, I cannot find Leonel Rodriguez Jr. to be a supervisor within the meaning of the Act.

^{24/} See Employer's Exhibit 4 and footnote No. 8 of this decision for an explanation of how I derived with the 127 figure. See also Attachment "A" to this decision.

^{25/} At the hearing Marshall Sanchez testified that he was in a management position with the company. Indeed the company name is Marshall Sanchez dba Jessie Farms. Mr. Sanchez also testified that he directs the efforts of all the people and also leads the crews. Moreover, Jesse Sanchez is the father of Marshall, Nick and Robert Sanchez. Accordingly, I conclude that Marshall Sanchez is a 'supervisor' within the meaning of Labor Code section 1140.4(j).

C. The Pre-Petition Period

On October 27, 1980, the UFW filed its Petition for Certification in this matter. The Notice and Direction of Election advised that all employees employed by employer during the week of October 17, to October 24, 1980, were eligible to vote at the election scheduled for November 3rd. This eligibility period encompassed employer's bell pepper harvest of October 22nd and 23rd.^{26/}

Rudy Silva testified at the hearing that he was the labor contractor hired by the Employer to provide agricultural workers for this harvest. Mr. Silva provided three crews during this period.^{27/} In one crew, Fortunado Vega was the foreman of a crew of 16 employees who worked the 22nd and 23rd. Four additional employees worked the 23rd for a, total of 20. Jesus Olivares was the foreman of a second crew of 23 employees who worked only on the 23rd. Carlos Bravo was the foreman of a crew of 24 employees who also worked only on the 23rd.^{28/} In sum, by taking a conventional count

^{26/} See Section II (B) of this decision.

^{27/} See Employer Exhibits 2 and 3.

^{28/} In it's post-hearing brief, the Employer appears to argue that the employees in this crew should not be considered here as eligible voters for the purpose of determining peak. The basis for this contention is that the Bravo crew was disenfranchised by the Board at the election, (see my discussion of this disenfranchisement argument in footnote 29 of this decision). However, the evidence presented clearly establishes that Rudy Silva's three crews were employed during the eligibility period. Employer Exhibit 3 and the testimony of Marshall Sanchez clearly establish that the Bravo crew of 25 workers was employed by the Employer on the 23rd of October within the eligibility period.

Labor Code section 1157 provides, in part, that "(a)ll agricultural employees whose names appear on the payroll applicable to the payroll

(footnote 28 continued on page 14)

of all labor contractor workers employed by the Employer during the

appropriate eligibility period, the total is 70.^{29/}

(footnote 28 continued)

period immediately preceding the filing of the petition of such an election shall be eligible to vote." To disregard the Carlos Bravo crew as eligible voters at the November 3rd election would be expressly contrary to statutory mandate. Therefore, I reject the Employer's request to disregard the Carlos Bravo crew as eligible voters for purposes of determining peak.

^{29/} In it's post-hearing brief, the Employer for the first time asserts that the eligibility list (Employer's Exhibit 7) provided by employer to the Board agents prior to the November 3rd election did not contain the Carlos Bravo crew (see Employer's Exhibit 2 and 3) and that they were therefore "effectively disenfranchised" and should not be counted for the purpose of determining peak. Because the Employer is asserting its disenfranchisement argument for the first time in it's post-hearing brief, the UFW moved to strike this portion of the Employer's brief or in the alternative requested leave to submit supplemental points and authorities. For the following reasons I deny employer's untimely disenfranchisement argument and accordingly grant the UFW's motion to strike. The Employer's motion to reopen the record for the purpose of hearing this disenfranchisement objection is likewise denied.

Labor Code section 1156.3(c) provides that objections to the election must be filed within five (5) days after an election. In the instant matter, the Employer timely filed it's sole peak objection which did not contain any allegation of voter disenfranchisement. (see IHE Exhibit 4) Indeed, even at the hearing, six months after the election, the Employer did not raise it's disenfranchisement objection nor did it seek to introduce evidence on the issue. Therefore, the Employer's attempt to raise this objection in it's post-hearing brief is untimely. See Triple E Produce Corp. (April 13, 1978) 4 ALRB No. 20.

The Employer additionally asserts that the Carlos Bravo crew was "apparently" disregarded and that the Board agent at the election "determined" that only those workers on the submitted employee list were eligible to vote. The Employer misinterprets the procedures of the Board in conducting representation elections. With a few exceptions, all agricultural workers employed by the employer during the relevant payroll period are eligible to vote. Labor Code section 1157; 8 Cal. Admin. Code section 20352 (a)(1). If a worker's name does not appear on the submitted payroll list he can be challenged by the Board agent at the election. 8 Cal. Admin. Code section 20355(a)(8). After the election if the challenged ballots are outcome determinative, the regional director conducts an

(footnote 29 continued on page 15)

At the hearing, Marshall Sanchez testified that there were four regular employee who assisted during this harvest period.^{30/} Therefore, by taking a conventional count of all workers (labor contractor employees and steadies) who were eligible to vote in the election, the total is 74.

CONCLUSION

Having found that during the period of the Employer's peak agricultural employment for calendar year 1980, it employed a total of 133 agricultural workers, and also having found that during the eligibility period immediately preceding the filing of the petition for certification the Employer employed a total of 74 agricultural workers, I therefore conclude that the petition for

(footnote 29 continued)

investigation to determine whether the challenged employees were employed during the eligibility period. If the worker is determined to be eligible to vote, his or her ballot is opened and counted. 8 Cal. Admin. Code section 20363. Therefore, the Employer's assertion here that the employees in the Carlos Bravo crew were disenfranchised because their names were not on the payroll list submitted to the Board agent at the election lacks merit.

The Employer's assertion that the vote at the election was not representative likewise lacks merit. Of the 74 eligible voters at the election, 38 voted, which represents 51 percent participation by those workers eligible to vote. Moreover, even if a minority of eligible voters had participated at the election this "does not in itself, mean that the vote is unrepresentative." *Lurette Farms* (Sept. 29, 1976) 2 ALRB No. 49. "Failure of eligible voters to participate in an election is construed under our Act, as under the NLRB and in political election, as assent to the choice of those who exercise their franchise." *Sun World Packing Corp.* (April 15, 1978) 4 ALRB No. 23. Therefore, the Employer's allegation that the vote was unrepresentative is misplaced.

^{30/} See footnote 17 of this decision

certification filed in this matter was timely, as 74 is obviously more than 50 percent of 133. Labor Code section 1156.4; 1156.3(a)(1).

RECOMMENDATION

Based on the findings of fact, analysis and conclusions herein, I recommend that the Employer's objection be dismissed, that the election be upheld, and that the United Farm Workers of America, AFL-CIO, be certified as the exclusive collective bargaining representative of all the agricultural employees of the Employer in the State of California.

DATED: October 5, 1981

Respectfully submitted,

ISMAEL A. CASTRO
Investigative Hearing Examiner

Labor Contractor Employees working both 9/3/80 and 9/4/80;

- | | |
|-----------------------|-------------------------|
| 1. Felix Arreola | 25. Miguel A. Hernandez |
| 2. Alfredo Higareda | 26. Jose Hernandez |
| 3. Jose Ramirez | 27. Rafael Hernandez |
| 4. Rodolfo Garcia | 28. Fernando Inocencio |
| 5. Adan H. Garcia | 29. Gerardo Vargas |
| 6. Julian Zarabia | 30. Raul Vargas |
| 7. Jesus Munoz | 31. Roberto Vargas |
| 8. Jesus Munoz | 32. Fausto Maldonado |
| 9. Jesus Fraile | 33. Jesus Inocencio |
| 10. Jose Chavez | 34. Felipe Leon |
| 11. Jorge Avalos | 35. Antonio Leon |
| 12. Jose Avalos | 36. Jaime Lemos |
| 13. Manuel Gonzalez | 37. Gerardo Laguna |
| 14. Pedro Garcia | 38. Eliajar Laguna |
| 15. Antonio Ceja | 39. Victor Reyes |
| 16. Ubaldo Lopez | 40. Elizalde Laguna |
| 17. David Becerra | 41. Usebio Reyes |
| 18. Arturo Murillo | 42. Ricardo Renterria |
| 19. Alfonso Miramonte | 43. Hector Sanchez |
| 20. Primitivo Munoz | 44. Manuel Sarabia |
| 21. Alfredo Leon | 45. Rogelio Sanchez |
| 22. Ruben Hernandez | 46. Belas Palma |
| 23. David Sanchez | 47. Samuel Ramirez |
| 24. Luis Pantoja, Jr. | 48. Arturo Santos |

Labor Contractor Employees working both 9/3/80 and 9/4/80 (Con't)

- | | |
|--------------------------|-------------------------|
| 49. Eliseo Salcedo | 73. Ana Maria Monsevace |
| 50. Reyneldo Rodriguez | 74. Juan T. Martinez |
| 51. Francisco Delgado | 75. Carlos Orozco |
| 52. Antonio Vargas | 76. Jose Moreno |
| 53. Baltazar Torres | 77. Martin Rodriguez |
| 54. Antonio Saucedo | 78. Ignacio Perez |
| 55. Rafael Urvino | 79. Eddie Cavazos |
| 56. Dora Ruiz | 80. Erasmo Ramirez |
| 57. Chris Felix | 81. Martin Baldovino |
| 58. David Casillas | 82. Enrique Ramirez |
| 59. Leonel Rodriguez Jr. | 83. Antonio Gonzalez |
| 60. Delia De Leon | 84. Luis Estrada |
| 61. Jimmy De Leon | 85. Guadalupe Espinoza |
| 62. Omar De Leon | 86. Jose Cavazos |
| 63. Elena De Leon | 87. Antonio Belalla |
| 64. Estela Cortinas | 88. Arturo Cervantez |
| 65. Francisco Becerra | 89. Jose Luis Cardenas |
| 66. Juan Ramirez | 90. Miguel Cortez |
| 67. Leopaldo Trujillo | 91. Manual Carrasco |
| 68. Angel Orvina | 92. Raul Figueroa |
| 69. Juan M. Cerna | 93. Rufino Reyes |
| 70. Serafin Parra | 94. Santana Diaz |
| 71. Jose Martinez | 95. Javier Jiminez |
| 72. Jaime Carbajal | 96. Carlos Salcedo |
| | 97. Jaime Laguna |
| | 98. Jaime Lemos |

Labor Contractor Employees only working on:

9/3/80

1. Tom Cavazos
2. Joe Martinez
3. Rudy Areaga
4. Cristino Cruz
5. Jose Vargas
6. Fernando Chavez
7. Pafalo Canela
8. Pelomeno Sanchez
9. Gabino Torres
10. Leonides Tirado
11. Tomas H. Lopez

9/4/80

1. Luciano Cuevas
2. Adan Pantoja
3. Santiago Flores
4. Rafael Sanchez
5. Andres Calderon
6. Gilberto Hermocillo
7. Estanislado Garcia
8. Alejandro Alicia
9. David Ledesma
10. Frank Ledesma
11. Selestino Garza
12. Francisco Serrano
13. Pedro Goday
14. Bulmaro Zamora
15. Jose Sandoval
16. Jose Yapez
17. Enrique Becerra
18. Luis Rodriguez