Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 75-CE-3-I	76-CE-64-E(R)
	75-CE-12-I	76-CE-69-E(R)
	75-CE-23-I	76-CE-69-1-E(R)
	75-CE-69-E(R)	76-CE-69-1-E(R)
	75-CE-2-E(R)	76-CE-78-E(R)
	76-CE-3-E(R)	76-CE-1-E
	76-CE-33-E(R)	76-CE-94-E
	76-CE-56-E(R)	76-CE-105-E
	76-CE-62-E(R)	76-CE-117-E
	9 ALRB No. 50 (5 ALRB No. 44)	

BACKPAY DECISION AND ORDER

On June 25, 1979, the Agricultural Labor Relations Board (Board or ALRB) issued a Decision and Order in this matter (5 ALRB No. 44) concluding, inter alia, that Respondent Mario Saikhon, Inc. had discriminatorily discharged or refused to rehire four groups of employees in violation of Labor Code section 1153(c) and (a)[1/] during December 1975 to February 1976. The Board ordered Respondent to reinstate the employees to their former positions[2/] and to make them whole for all losses of pay and other economic losses they incurred as a result of Respondent's discriminatory conduct.

On November 23-25, 30, and December 1, 2, 14, 1981, a

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[1/] All section references herein are to the California Labor Code unless otherwise specified.

[2/] The Board did not order Respondent to reinstate Victor Acosta, Salvador Aguirre, Carlos Mojica or Moises Soto.

hearing was held before Administrative Law Judge (ALJ)[3/] Beverly Axelrod for the purpose of determining the amounts of backpay due to the discriminatees.[4/] Thereafter, on April 29, 1982, the ALJ issued the attached Supplemental Decision on backpay. Respondent, General Counsel and the Charging Party each filed exceptions and a supporting brief. The Charging Party also filed a response to Respondent's exceptions.

The Board has considered the record and the ALJ's Supplemental Decision in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings,[5/] and conclusions

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[3/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[4/] The ALJ found the backpay period for Flavio Alejo, Cresencio Castillo, Cruz Castillo and Fidencio Castillo was February 9, 1976 to November 19, 1981. The backpay period for Victor Acosta, Salvador Aguirre, Carlos Mojica and Moises Soto was December 26, 1975 to January 26, 1976, per our Order in 5 ALRB No. 44. The parties stipulated that the backpay period for Ramon Montellano Acosta, Domingo Gonzales, Jose Arredondo Meza, Jose Plascencia and Miguel Sosa Romales commenced on December 15, 1975. The ALJ found the backpay liability as to these five discriminatees was tolled on January 26, 1976. The ALJ found the backpay period for the discriminatees in Tony Montejano's crew was December 18, 1975 to January 27, 1976.

[5/] The ALJ found that the testimony of Flavio Alejo, Cresencio Castillo, Cruz Castillo and Fidencio Castillo with respect to interim employment which they may have found during the latter part of the 1976 lettuce season and in the early part of the 1977 lettuce season was too vague to establish the dates of employment or the amounts of wages earned. Respondent excepts to the ALJ's findings and asserts that the testimony of the discriminatees constitutes sufficient evidence of interim earnings. We affirm the ALJ's treatment of the testimony and conclude that Respondent has failed to meet its burden of elucidating facts which corroborate or otherwise establish with specificity the existence of additional interim earnings for these discriminatees. (NLRB v. Miami Coca-Cola Bottling Co. (5th Cir. 1966) 360 F.2d 569, 572-573 [62 LRRM 2155, 2159].)

as modified herein, and to adopt her recommended Order with modifications.

Flavio Alejo

Flavio Alejo could not find work in the Imperial Valley in February or March, 1976. He believed that he had been blacklisted as the result of his union activities at Saikhon. (R.T. Dec. 14, 1981, pp. 34-35, 45-57.) From December 2, 1976 to February 24, 1977, Alejo worked for agricultural employers Cal Coastal, Martori and Lu-Ette. Various incidents of violence and vandalism against his person and his property (R.T. Dec. 14, 1981, pp. 53-57), as well as his difficulty in obtaining employment, led Alejo to move to the Salinas Valley in March 1977.[6/] He began harvesting lettuce for Green Valley Lettuce Company in Salinas in April 1977, and continued to work there each consecutive lettuce season thereafter. The Salinas lettuce season runs from April to October in each yearly cycle whereas Respondent's Imperial Valley lettuce season runs from November to March of each year. Alejo did not work at all from November to March during the 1977-1981 Imperial Valley harvest seasons which coincide with the backpay period herein.

[6/] The National Labor Relations Board (NLRB) recognizes blacklisting as a special circumstance which interferes with a discriminatee's ability to obtain interim employment. (Moss Planing Mill Co. (1956) 116 NLRB 68, 70 [42 LRRM 2393].) While our inquiry here is not whether any of the employers with whom Alejo sought work have violated the Agricultural Labor Relations Act (Act), we recognize that Alejo's state of mind regarding his belief that he was blacklisted is relevant to his reasons for moving to Salinas. The ALJ found that Alejo's testimony regarding his belief that he was blacklisted was credible and that his move to Salinas was justified under the circumstances. (See also discussion of economic necessity leading a discriminatee to move in Florida Steel (1978) 234 NLRB 1089 [98 LRRM 1080].)

During the backpay period, Alejo applied for work each year in Salinas from November to March by registering at the United Farm Workers' hiring hall and at the State Employment Development Department. He also sought work with his Salinas employer, Green Valley, at its Imperial Valley operations but he did not have sufficient seniority with that company to obtain work in its Imperial Valley operations. (R.T. Dec. 14, 1981, pp. 34-37.)

Respondent excepts to the ALJ's finding that Alejo made a diligent effort to seek employment throughout the backpay period. Respondent contends that Alejo should have returned to the Imperial Valley in order to work during the harvest seasons there. Respondent further argues that Alejo purposely removed himself from the Imperial Valley labor market by moving to Salinas in the first place.

We find that Alejo was justified in moving to Salinas to search for interim employment. The harassment suffered by Alejo in his job search in the Imperial Valley and his belief that he had been blacklisted were the compelling factors for his moving to Salinas. We affirm the ALJ's finding that Alejo used reasonable diligence in seeking interim employment. (NLRB v. Cashman Auto (1st Cir. 1955) 223 F.2d 832 [36 LRRM 2269]; S & F Growers (1979) 5 ALRB No. 50.) Furthermore, contrary to Respondent's assertions, we find that Alejo was not obligated to return to the Imperial Valley to seek work since he believed it was futile, nor was his move an effort to avoid his obligation to seek interim employment. (Champa Linen Service Co. (1976) 222 NLRB 940 [91 LRRM 1411]; Carter's Rental (1980) 250 NLRB 344, 351 [104 LRRM 1529].)

Respondent excepts to the ALJ's ruling that Alejo's earnings at Green Valley in Salinas are not deductible as interim earnings from his gross backpay amount. It is well-established that earnings accrued outside the backpay period shall not be included as interim earnings in the calculation of backpay. (Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177, 198, fn. 7 [8 LRRM 439].) Nevertheless, the record here supports a finding that Alejo worked in the Salinas lettuce season in lieu of his lettuce work in the Imperial Valley.[7/]

The purpose of a remedial backpay order is to make employees whole for the economic losses they have suffered as the result of a respondent's unlawful conduct. Alejo did not work during Respondent's lettuce harvesting seasons after he moved to Salinas and thus, he accrued no interim earnings which are deductible from Respondent's gross backpay liability under the standard method of calculating backpay. Notwithstanding our finding that Alejo used due diligence in his job search in Salinas during the backpay period, we cannot ignore the fact that he was employed

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[7/] There is no evidence that Alejo regularly worked in the Salinas lettuce harvest in the years preceeding his discriminatory discharge. If the General Counsel had shown that Alejo had regularly worked as a lettuce harvester, or in any other type of employment during the Imperial Valley off-seasons prior to his discharge, then his work in Salinas could be characterized as a collateral source of income, i.e., supplemental income regularly earned during Respondent's off-season which is not deductible as interim earnings. (Golay & Co., Inc., Lee Cylinder Division (1970) 184 NLRB 241, 245, fn. 18 [76 LRRM 1110], enforced sub nom. NLRB v. Golay & Co., Inc., Lee Cylinder Division (7th Cir. 1971) 447 F.2d 290 [77 LRRM 3041].) We find that Alejo worked only as a lettuce harvester for one full season each yearly cycle until his discharge. The Imperial Valley lettuce season constituted his normal work cycle. After his move to Salinas, the Salinas lettuce season was substituted for the Imperial Valley lettuce season.

as a lettuce harvester during the years containing the seasons for which Respondent owes backpay and that he suffered no economic losses during those years.

We note that Alejo found steady seasonal employment in Salinas as a lettuce harvester during the Salinas lettuce season which is a period equal to or longer than Respondent's Imperial Valley lettuce season. Alejo's position with Green Valley in Salinas was a permanent seasonal lettuce harvesting position as was his job with Respondent and he did in fact work for Green Valley in each year of the backpay period. Alejo performed the same job duties with Green Valley as he had with Respondent. He worked piece rate and the hours were comparable. His wages were the same as and ultimately higher than the wages he would have received from Respondent during the same years. Finally, Alejo and his family lived year-round in Salinas whereas they had lived year-round in Mexicali when Alejo was employed by Respondent. The record does not reveal that Alejo traveled around the state in pursuit of employment in the years that he worked for Respondent. Since we conclude that Alejo substituted his Salinas work cycle as a lettuce harvester for his work cycle with Respondent in the Imperial Valley, his earnings as a lettuce harvester in Salinas shall be offset against Respondent's gross backpay obligation as of April 22, 1977, the date when Alejo was hired as a lettuce harvester by Green Valley in Salinas.[8/] In holding that Alejo's employment as a lettuce

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[8/] Members Waldie and Henning do not join in the conclusion that Alejo's Salinas earnings should be offset against the gross backpay

(fn. 8 cont. on p. 7)

harvester in Salinas offsets Respondent's backpay liability even though he worked during an entirely different lettuce season each year, we recognize that the circumstances surrounding Alejo's employment in Salinas are unique. Therefore, our conclusion that Alejo's Salinas earnings entirely offset Respondent's backpay liability beginning on April 22, 1977, shall be limited to the particular facts of this matter. Respondent's obligation to offer reinstatement to Flavio Alejo continued throughout the backpay period.

Absentee Factor

Respondent also excepts to the ALJ's failure to include an absentee factor in the backpay award. Respondent has appended a chart to its exceptions brief proposing a 6.7 percent absenteeism rate to be used by the Board in calculating the backpay amount. The record is devoid of evidence supporting the proposed 6.7 percent rate. Furthermore, Respondent presented no evidence to support any reduction in the backpay award based on hypothetical absenteeism. Although the NLRB utilizes absenteeism formulas in its calculation of backpay awards, adjustments for absenteeism are made on the circumstances of each case. (See NLRB Casehandling Manual, Part

(fn. 8 cont.)

he would have earned in the Imperial Valley lettuce harvest, absent the discrimination. The evidence indicates that Alejo left the Imperial Valley area only after he was unable, due to his notoriety as a UFW supporter, to find work in the lettuce harvest. Moreover, although the Imperial and Salinas lettuce harvests do not overlap, Alejo was actively and diligently searching for work in the Salinas area during the winter months. Members Waldie and Henning, therefore, would not allow Respondent, who forced Alejo to relocate in order to find work, to obtain an offset for work performed outside the period when Alejo would have worked for Respondent.

Three, Compliance, § 10564, et. seq.; Marine Welding (1973) 202 NLRB 553 [82 LRRM 1676]; Hickman Garment Co., (1972) 196 NLRB 428 [80 LRRM 1684].) Accordingly, we reject Respondent's proposed 6.7 percent reduction for absenteeism. Unless the parties have stipulated to an appropriate formula for an absenteeism rate, we shall continue to evaluate proposed absenteeism formulas on a case-by-case basis in view of the evidence adduced at the hearing.

Martori Settlement

Flavio Alejo, Cresencio Castillo, Cruz Castillo and Fidencio Castillo (the four employees), who are discriminatees in the instant matter, were also discriminatees in the matter of Martori Brothers Distributing (Martori) (1978) 4 ALRB No. 80. The parties in the Martori matter entered into a settlement agreement resolving Martori's backpay liability with regard to the four employees and the other discriminatees in that case. After the hearing closed in the instant matter but prior to the issuance of the ALJ's decision, Respondent herein moved the ALJ to receive the Martori settlement agreement as newly discovered evidence bearing on Respondent's liability. Respondent alleged that the Martori backpay period overlapped Respondent's backpay period with regard to the four employees. The Martori settlement had been signed after the close of the hearing in the instant matter. The ALJ denied Respondent's motion to include the Martori settlement agreement in evidence since the Board had not approved the settlement at the time of Respondent's motion. Further, the ALJ found that the settlement did not specify either the dates of the alleged overlapping backpay period or the amounts of backpay to be paid to each of the four

employees.

Subsequently, we approved the Martori settlement and Respondent Saikhon submitted a second motion to admit the settlement as newly discovered evidence. It is within the Board's discretion to receive newly discovered evidence as part of the record. (Foster Poultry Farms (1980) 6 ALRB No. 15, fn. 3; Bertuccio Farms (1982) 8 ALRB No. 6.) As the issue of overlapping liability periods presents a novel issue to this Board, we hereby receive the Martori settlement into evidence herein as Respondent's Exhibit 12.

In considering the applicability of the settlement to Respondent's backpay liability, we remanded the matter for the purpose of taking evidence on the dates of overlap, the amounts paid to each of the four employees, the proposed formulas for including the settlement amounts in the backpay calculations, the daily calculations including the settlement amounts and the recalculation of net backpay after inclusion of the settlement amounts. In lieu of a hearing, the parties submitted stipulations of facts on those issues. The parties also submitted briefs in support of their respective positions.

The concept of overlapping liability has traditionally applied only to cases where an employer and union are found liable for the same discriminatory conduct. (See, e.g., Gold Standard Enterprises v. NLRB (7th Cir. 1982) 679 F.2d 673 [110 LRRM 2587]; King Soopers, Inc. (1976) 222 NLRB 1011 [91 LRRM 1292]; Union Starch & Refining Co. v. NLRB (7th Cir. 1951) 186 F.2d 1008 [27 LRRM 2342].) A discriminating union may also deduct the proceeds of a settlement agreement between the discriminatee and a subsequent

discriminating employer when the discriminatory conduct of the subsequent employer is directly related to the union's unlawful conduct. (Teamsters Local 559 (1981) 257 NLRB 24 [107 LRRM 1453].) However, we have found no National Labor Relations Act precedent on the question of whether backpay paid as the result of settlement or otherwise by one discriminating employer can be used to offset another employer's unrelated backpay liability to the same discriminatees where the two backpay periods overlap to some extent.

The purpose of the backpay remedy is to make discriminatees whole for wage losses and other economic losses incurred as a result of a respondent's misconduct. (Maggio-Tostado, Inc. (1978) 4 ALRB No. 36.) The corollary purpose of the remedy is to further the public interest in deterring illegal conduct. (NLRB v. Madison Courier, Inc. (D.C. Cir. 1972) 472 F.2d 1307 [80 LRRM 3377]; NLRB v. Mooney Aircraft Inc. (5th Cir. 1966) 366 F.2d 809 [63 LRRM 2208].) Here, the Board must look at the rights of the discriminatees to be made whole, the public interest in deterring unfair labor practices and the right of the employer to offer evidence in mitigation of its backpay liability.

Respondent Saikhon was obligated to offer reinstatement to the four employees to comply with the Board's Order. Saikhon did not offer reinstatement until the opening of the instant compliance hearing. We do not approve such recalcitrance on the part of any discriminating employer. Nevertheless, our remedial power to fashion backpay awards is limited to making discriminatees whole, given the equitable and practicable limitations under the circumstances of each case. (Maggio-Tostado, Inc., supra, 4 ALRB No. 36.)

The Martori settlement discharged Martori's backpay liability to the four employees; the amounts due to the four employees under the Martori settlement are compromised amounts of backpay owed by that discriminating employer. To prevent the inequity of a double recovery inherent in the receipt by the four employees of backpay owed by both Martori and Saikhon for overlapping liability periods, we shall treat the net backpay amounts received pursuant to the Martori settlement as interim earnings of the four employees deductible from Saikhon's liability. However, by so finding, we do not establish a broad rule allowing settlement amounts paid by one employer to offset another employer's liability. We shall continue to review questions of mitigation on the unique facts of each case.

Based on the stipulations submitted by the parties,[9/] we find that the overlapping liability period extends from January 5, 1977 to February 16, 1978, which is the total backpay period for the four employees covered by the Martori settlement. The Martori backpay period covers 110 days. The number of days on which both Saikhon's and Martori's liability overlap is 82 days. Under the Martori settlement, each of the four employees received $2,957.14 as a lump sum settlement for backpay owed during the 110 day liability period. Consistent with the daily method utilized by the

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[9/] Joint Stipulations No. 1 and No. 2 are hereby admitted into evidence as Joint Exhibits 4 and 5, respectively. Attached to Stipulation No. 2 are copies of the pleadings in the Martori backpay proceedings prior to settlement. Respondent Saikhon propounds the evidence in order to show Martori's actual liability. As a matter of law and policy, we shall not look behind the express terms of a Board approved settlement agreement. The attachments to Stipulation No. 2 propounded as Exhibits 15-19, inclusive, are of no probative value as we find them to be irrelevant.

ALJ and which we approve herein, we shall divide the $2,957.14 amount by 110 days. The resulting figure of $26.88 shall be deducted from Saikhon's liability on each of the 82 days on which Saikhon's and Martori's liability overlap.[10/] The parties stipulated that the mathematical calculations as set forth in the charts attached to Joint Exhibit 4 are accurate. We adopt those calculations herein.

Since the only form in which the Martori interim earnings are available is in the lump sum amount resulting from the settlement agreement, we are bound by that data. Therefore, our conversion of the lump sum interim earnings into daily figures herein does not override the considerations set forth in High and Mighty Farms, Inc. (1982) 8 ALRB No. 100 for converting interim earnings into a form comparable to that of the gross backpay figures.[11/] We conclude that the daily method of calculating the Martori settlement amounts as interim earnings is the most practicable and reasonable means of effectuating the policies of the Act in view of the unusual

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[10/] With respect to Flavio Alejo, we have determined that Respondent's backpay obligation to Alejo is offset by his Salinas earnings beginning on April 22, 1977. During the period of January 5, 1977 to April 22, 1977, there are 33 days on which Saikhon's and Martori's liability overlap. We shall therefore deduct $26.88 from Respondent's gross backpay obligation on each of those days of overlap.

[11/] Members Waldie and McCarthy would not apportion the Martori settlement funds on a daily basis, but would deduct the funds in a lump sum from the net backpay owed to each of the four employees. Since the settlement negotiations with Martori have made it impossible to know, with any certainty, the actual days on which the Martori funds were earned, a lump sum method of computation is consistent with our holding in High and Mighty Farms, supra, 8 ALRB No. 100; i.e., where interim earnings data are not available on a daily basis, we will conform our method of computation to the form of the data available.

circumstances herein. (See Arnaudo Brothers (1981) 7 ALRB No. 25.)

Missing Discriminatees

Fourteen of the discriminatees in this matter could not be located at the time of the backpay hearing.[12/] We take administrative notice that a supplemental backpay hearing has been convened to determine the net backpay owed to those discriminatees. As we do not have any evidence of interim earnings or other mitigating factors before us at this time, we shall defer our findings and conclusions as to the net backpay owed to those fourteen discriminatees pending the results of the supplemental backpay proceedings which are now in progress. We affirm the method of calculating the gross backpay as to those fourteen discriminatees which was utilized by ALJ Axelrod herein. In particular, we find her reliance on the representative crew to be appropriate and reasonable under the circumstances of this case.

Interest Rate

The ALJ denied General Counsel's motion to adjust the backpay award for inflation. Although this Board considered the concept of an inflation factor in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, we chose to adopt the practice of periodically adjusting the interest rate on backpay awards. (See Florida Steel Corp. (1977) 231 NLRB 651 [96 LRRM 1070].) We have further held that we may modify a previously issued remedial Order by adjusting

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[12/] The following discriminatees were missing at the time of the backpay hearing: Enrique Barrera, Ramon Bravo, Enrique Castillo, Ignacio Contreras, Jorge De La Rosa, Jose Arredondo Meza, Ernesto Ozuna, Carlos Marquez Rodriquez, Enrique Rodriquez, Abelardo Rodriquez, Carlos Rodriquez, Canelario Sanchez, Cosme Soto, and Gabriel Velasquez.

the interest rate after a petition for review of such Order has been summarily denied by the Court of Appeal. (High and Mighty Farms, supra, 8 ALRB No. 100; Bruce Church (1983) 9 ALRB No. 19.) In the instant matter, review by the Court of Appeal was summarily denied (Ct.App., 4th Dist., Div. 1, Dec. 4, 1979) and our Order has been enforced by the superior court pursuant to Labor Code section 1160.8 (Super. Ct., Imperial County, Case No. 2675, Nov. 9, 1981).

Labor Code section 1160.8 provides in pertinent part that:

> If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

There is no ambiguity in the language of Labor Code section 1160.8 mandating the superior court to enforce the Board's remedial Orders. The court may not review the merits. Its jurisdiction is limited to situations where the Board properly followed its own procedures and where the respondent failed to comply with the Board's Order. As such, the court's order enforcing the Board's Order is in the nature of an equitable decree. Furthermore, Labor Code section 1160.8 specifically authorizes the court to issue a "writ of injunction or other proper process" to effect compliance with the Board's Order. Here, although the superior court has ordered enforcement of the Board's Order in its entirety, the backpay provisions thereof remain unexecuted pending the determination in this proceeding of the specific amounts due.

Under long-established equitable principles, a court has the inherent power upon application of the parties to modify procedural provisions of its equitable decrees which remain unexecuted. (Witkin, Cal. Procedure (2d ed. 1970) Judgments, § 79, p. 3240 and cases cited therein.) Further, the inherent power "may be exercised either where there has been a change in the controlling facts ... or the law has changed, modified or extended, or where the ends of justice would be served by modification." Sontag Chain Stores Co. v. Superior Court (1941) 18 Cal.2d 92, 95.)

The ALRB is responsible for fashioning appropriate remedies to effectuate the purpose of the Act. (Labor Code § 1160.3; see also Perry Farms (1978) 4 ALRB No. 25, vacated on other grounds (1978) 86 Cal.App.3d 448; NLRB v. Seven-Up Bottling Co. (1953) 344 U.S. 344.) In the intervening years since we issued our Order in Mario Saikhon, Inc. (1979) 5 ALRB No. 44 imposing a seven percent interest rate on the backpay award, we have determined that the imposition of the fluctuating interest formula as announced in Lu-Ette Farms, Inc., supra, 8 ALRB No. 55, more equitably makes the discriminatees whole. Therefore, we shall order Respondent to pay interest on the net backpay amounts found herein in accordance with our Decision in Lu-Ette Farms from the date that the superior court modifies its order to include the Lu-Ette interest formula.

We hereby direct the Regional Director to petition the Imperial County Superior Court to modify that portion of its order enforcing Mario Saikhon, supra, 5 ALRB No. 44 which imposes a seven percent interest rate on the net backpay amounts, by substituting

therefor the Lu-Ette Farms interest formula consistent with our Order attached hereto.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Mario Saikhon, Inc., its officers, agents, successors, and assigns, shall pay to each of the employees, whose names are listed below, the backpay amount listed next to his name, plus interest on each amount computed at the rate of seven (7) percent per annum until the date that the Superior Court of Imperial County modifies its order in Case No. 2675, November 9, 1981, to change the interest rate from seven percent per annum to the formula for calculating interest set forth in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, and thereafter at rates determined in accordance with our Decision and Order in Lu-Ette Farms, supra, 8 ALRB No. 55:

Victor Acosta (Trujillo)	$ 1,412.99
Salvadore Aguirre	710.37
Flavio Alejo	7,198.24
Jesus Arredondo	56.58
Jose Rosalio Arredondo (Meza)	1,195.79
Francisco Barriga (Ayala)	879.61
Juan A. Beruman	56.58
Cresencio Castillo	16,992.77
Cruz Castillo	19,075.35
Fidencio Castillo	17,452.90
Joaquin Flores	1,962.53
Baltazar Garcia	336.83
Jaime Garcia	1,775.44
Domingo Gonzales (Zuniga)	885.16
Vidal Lopez	176.67
Luis Loza	562.11
Antonio D. Martinez	2,269.86
Ignacio Z. Medina	1,775.44
Carlos Mojica	1,412.99
Juan Montano	142.33

Rafael Montejano (Garcia)	997.59
Ramon Montellano (Acosta)	1,539.71
Jose Plascencia	825.16
Andres Reyes (Cortez)	816.37
Roberto Reyes	289.82
Manuel Rodriguez	68.96
Miquel Romales Soza	812.16
Ramon Sanchez (Garcia)	1,775.44
Jose (Jesus) E. Silva	278.87
Moises Soto	629.31
Juvenal Trujillo	850.41
Alfonso Vera	1,528.33

Dated: September 2, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Mario Saikhon, Inc. (UFW)

9 ALRB No. 50
Case Nos. 75-CE-3-I, et al.

ALJ DECISION

In this backpay proceeding, the ALJ recommended backpay awards to 46 discriminatees based on daily calculations. The ALJ found that one discriminatee's move to Salinas from the Imperial Valley did not remove him from the job market nor evidence a failure of due diligence in seeking interim employment. Rather, that discriminatee's move was the result of the harassment he encountered in his job search in the Imperial Valley which he believed was due to Respondent's having blacklisted him in that area. The ALJ concluded that the discriminatee's earnings at his Salinas employer were not interim earnings as they were not earned during the backpay period.

The ALJ further found that although Respondent rehired certain discriminatees during the backpay period, it did not reinstate them to their former or substantially eqivalent positions. Therefore, the ALJ treated the wages earned by the discriminatees during the backpay period with Respondent as interim earnings.

The ALJ denied General Counsel's motion to include an inflation factor in the interest award on backpay. The ALJ also denied Respondent's motion to reopen the record to submit the settlement agreement in Martori Brothers Distributing (1978) 4 ALRB No. 80 in which four of the same discriminatees in the instant matter were entitled to lump sum amounts in settlement of Martori's liability for a backpay period which overlaps with Respondent's backpay period.

BOARD DECISION

The Board affirmed the ALJ's findings, rulings and conclusions with the exception of her conclusion that the discriminatee's earnings during the Salinas lettuce harvest season were not interim earnings. The Board found that the Salinas earnings offset the Respondent's backpay liability as to that discriminatee after he was hired by his Salinas employer. However, the Board limited its conclusion to the facts of this matter. The Board also admitted the Martori settlement and found that the lump sum settlement amounts received by four discriminatees under that settlement were interim earnings deductible from Respondent's liability. The Board apportioned the settlement amounts on a daily basis according to the actual days of overlap during the overlapping backpay periods. The Board limited its treatment of the Martori settlement amounts as interim earnings to the facts of this matter. Finally, the Board directed the Regional Director to seek to vacate the portion of the superior court's order enforcing the Board's Order which awarded a seven percent interest rate on backpay and to modify that order

to include an interest rate consistent with the formula for determining the interest rate as set forth in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. With respect to fourteen discriminatees who were missing at the time of the hearing in this matter, the Board deferred ruling on their net backpay awards until the resolution of a pending supplemental backpay hearing which has been convened for that purpose.

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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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Agricultural Labor Relations Board
MAY 6 1982
RECEIVED
Exec. Secretary

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: MARIO SAIKHON, INC., Respondent, and United Farm Workers of America, AFL-CIO, Charging Party.	CASE NUMBERS: 75-CE-3-I 76-CE-64-E(R) 75-CE-12-I 76-CE-69-E(R) 75-CE-23-I 76-CE-69-1-E(R) 75-CE-69-E(R) 76-CE-69-2-E(R) 75-CE-2-E(R) 76-CE-78-E(R) 76-CE-3-E(R) 76-CE-94-E 76-CE-33-E(R) 76-CE-105-E 76-CE-56-E(R) 76-CE-117-E 76-CE-62-E(R) 76-CE-1-E 5 ALRB No. 44

Jose Antonio Barbosa, Esquire, of
El Centro, California,
for the General Counsel.

Dressler, Quesenbery, Laws & Barsamian,
by Larry A. Dawson, Esquire, of
El Centro, California,
for Respondents.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

BEVERLY AXELROD, Administrative Law Officer: A hearing was held before me on November 23, 24, 25, 30, and December 1 and 2, 1981, in El Centro, California, and on December 14, 1981 in Salinas, California, to determine the amount of back pay owed by the Respondent to certain discriminatees, whose

names are listed in the body of this Decision. The Agricultural Labor Relations Board (herein called "Board"), on June 25, 1979, issued a decision and order (5 ALRB No. 44, review denied, Fourth Appellate District, Division One (1979)) (made part of the record herein as General Counsel's Exhibit 1(A)),[1/] finding unfair labor practices and requiring Respondent to make the discriminatees whole by payment of back pay with 7% interest, and to reinstate most of them to their former positions.[2/]

The parties were unable to resolve informally the amount of back pay due to discriminatees, and, on April 9, 1981, a Regional Director issued Back Pay Specification and Notice of Hearing (G.C. Ex. 1(B)), to which Respondent responded with its Answer to Back Pay Specification and Notice of Hearing (G.C. Ex. 1(C)) on May 18, 1981. Amended back pay specifications are dated November 9, 1981, November 13, 1981, and November 16, 1981 (G.C. Ex. 1(D), 1(E) and 1(G)); Respondent's Answer to Amended Back Pay Specifications is dated November 18, 1981 (G.C. Ex. 1(H)). Copies of all pleadings have been duly served.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel and Respondent each filed a brief in support of its position.

1/ References to General Counsel's exhibits are prefaced by "G.C. Ex."; to Respondent's, by "Resp. Ex."; and to joint exhibits, by "Jt. Ex."

2/ Although enforcement of the Board's order was granted by the Superior Court of Imperial County on November 9, 1981, in case number 2675 (G.C. Ex. 1(R)), Respondent did not comply except to the extent of offering reinstatement by letter to four of the discriminatees (Resp. Ex. 2(A) - 2(E)).

Upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Facts Not in Dispute

The agricultural activities of Respondent in question in this litigation are its lettuce operations in the Imperial Valley. The lettuce season runs from November or December to March or April of each year. The season in question, the 1975-1976 season, began on December 15, 1975, and ended in the latter part of March 1976 (ALO Opinion, p.3).

The obligations owed to the discriminatees by Respondent require treatment in two separate categories:

1. The four discriminatees concerning whom the most expensive financial obligation of Respondent exists are named Flavio Alejo, Cruz Castillo, Cresencio Castillo, and Fidencio Castillo (brothers or half-brothers), known as the "Bullets" because of their rapid work. The Bullets were discharged on February 7, 1976, and never rehired (ALO Opinion, pp. 29, 47).

2. As to 42 other discriminatees, a much shorter back pay period is applicable.

a. As to 4 discriminatees, Moises Soto, Victor Acosta (Trujillo), Carlos Mojica, and Salvadore Aguirre, the back pay period was set by the Board[3/] running from December 26, 1975, to January 26, 1976, inclusive.

3/ Order, Paragraph 2(b).

b. As to five discriminatees, Miquel Romales Sosa, Domingo Gonzales (Zuñiga), Ramon Montellano (Acosta), Jose Arredondo Meza, and Jose Plascensia, the Board did not set the back pay period.

c. The remaining discriminatees, consisting of those 33 individuals listed in Appendix 3-A, were members of Tony Montejano's crew on January 27, 1976, and as to them the back pay period commenced on December 18, 1975.[4/]

The procedures followed by Respondent with regard to hiring were explained in the Administrative Law Officer's opinion (p. 4), adopted by the Board in its decision, as follows:

> In selecting employees for the harvest crews, preference is given to those workers who come every year....
>
> For the most part, Saikhon workers return year after year. None of the regular foremen go to the border in Calexico, "the hole", to recruit employees. It is not necessary. The word is spread among the workers by the foremen and by the workers that the season is about to start. Workers 'present themselves' to their respective foreman at the Gulf station and are employed. In some cases workers are contacted at their homes by their foremen.
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> (ALO Opinion, page 4)

II. Issues Pending for Decision Here

The central issue to be resolved by the hearing was the amount of back pay owed each of the discriminatees. Various aspects of this issue are touched upon in Respondent's Answer to Amended Back Pay Specifications (hereinafter "Answer"), dated November 18, 1981. Prior to and during the hearing,

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4/ Order, Paragraph 2(d), page 11 (Notice to Employees).

certain of the defenses set out in the Answer were withdrawn pursuant to stipulation.[5/]

In light of those stipulations, the issues raised by the Answer which remain for resolution in this Decision are as follows (paragraph numbers following each issue refer to affirmative defenses raised in the Answer):

A. Whether the delay of the General Counsel in issuing the back pay specifications should absolve the Respondent of liability to discriminatees for the 1980-81 season (¶ 5).

B. Whether the back pay owed to discriminatees should be calculated on a daily basis, or based on the entire back pay period or weekly or quarterly time periods (¶ 1, 12-14).

C. Whether Respondent's liability should be reduced to account for absenteeism, sick days and time off that might have occurred had the discrimination not taken place (¶ 6, 15).

D. Whether interest on the back pay awards should be calculated at the rate of 7% per annum or at a higher rate to adjust for inflation (General Counsel's motion, G.C. Ex. 1(S)).

E. Whether the record should be reopened and additional evidence admitted concerning a tentative settlement of Martori

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5/ Paragraph 2, VI/1 (all references to the Reporter's transcript of the hearing will be in the foregoing form, indicating volume and page; references to the transcript of the Prehearing Conference will be so indicated); ¶ 3; ¶ 8.

Paragraph 4 was apparently withdrawn, as it is not argued in Respondent's Brief. This paragraph advanced the argument that the discharge of the Bullets by Martori Brothers, an interim employer, which the Board has held was unlawful, 4 ALRB No. 80 (1978), should absolve Saikhon from liability for back pay here. This argument is not timely, as the Board has ordered reinstatement and back pay by Respondent.

Bros. Distributors, 4 ALRB No. 80 (Respondent's Motion to Reopen).

F. Whether discriminatee Flavio Alejo failed to adequately mitigate his damages by seeking interim employment (¶ 7).

G. Whether discriminatee Flavio Alejo's earnings in Salinas outside the back pay period should be applied as interim earnings (VII/90).

H. Whether the General Counsel employed the correct formula to calculate the amounts due the members of Tony Montejano's crew (¶ 9A).

I. Whether back pay awards for discriminatees who did not testify or whose whereabouts are unknown should be set aside and placed in escrow (General Counsel's motion, G.C. Ex. 1(T); I/26-28; VII/79-83).

J. Whether the fact that certain discriminatees returned to work for Respondent during the back pay period should be deemed to terminate Respondent's back pay liability to them (¶ 9B-E).

III. The Issue of Board Delay

General Counsel made a written motion to strike certain paragraphs of Respondent's responsive pleadings, and orally made other similar motions in the Prehearing Conference. All of these motions have been rendered moot by stipulations reached by the parties, with the exception of an oral motions to strike ¶ 5 of the Answer, relating to the impact, if any, on Respondent's liability as to the 1980-81 season due to the General

Counsel's delay in issuing the back pay specifications. I reserved ruling on this question, and while General Counsel has discussed it in his brief, Respondent has not. I hold that this issue has been waived. I hold alternatively that even if the General Counsel inordinately delayed in issuing its specifications, to Respondent's detriment, that detriment may not be shifted to the discriminatees. I deny the motion to strike, since the issue is properly raised as a defense, but I overrule the defense on the authority of NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 72 LRRM 2881 (1969). I make no finding as to whether or not any inordinate delay occurred here.

IV. The Method of Calculating Back Pay

Respondent objects in the Answer to the use of daily calculations to determine the back pay owed to the discriminatees. It objects that, as to the Bullets, the General Counsel in making daily calculations estimated from weekly records and therefore submitted inaccurate data (Answer, ¶ 1). Respondent also objects that General Counsel should have placed in evidence the raw data based upon which daily averages were made from weekly earnings. But since the weekly figures were placed in evidence by stipulation, all the information was in the record that was necessary to an evaluation of the calculations used. Further, Respondent stipulated to the accuracy of the General Counsel's calculations (footnote 7 below).

As to the other discriminatees, Respondent asserts that many of them were working at Respondent during the back pay

period and that resulting earnings should be considered as a total, or quarterly or weekly (Answer, ¶ 12-14).

In the Prehearing Conference, Respondent indicated that these objections were made essentially to preserve its record (Prehearing Conference, pp. 13-15, 20-23). I ruled there that, pursuant to the Board's decision in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977), daily calculations were appropriate for all discriminatees, and I adhere to that ruling. See also Martori Bros. Distributors, 4 ALRB No. 80 (1978), review denied (1979); Maggio Tostado, Inc., 4 ALRB No. 36 (1978). I find that sufficient facts have been presented by the parties to enable me to employ daily calculations.

V. The Failure to Account for Work Days That Might Be Missed

Respondent contends that the back pay award should be reduced to account for days which might have been missed had discriminatees been working for Saikhon during the back pay period. However, it is well established that any uncertainty must be resolved against the employer who by his unlawful conduct made certainty impossible. NLRB v. Miami Coca-Cola Bottling Co., 360 F. 2nd 569, 62 LRRM 2155 (5th Cir. 1966); Butte View Farms, 4 ALRB No. 90 (1978), pp. 4-5, aff'd, 95 C.A. 3d 961 (1979).

VI. Interest

The Board ordered that interest be paid at 7% per annum on the difference between unpaid wages and interim earnings. Interest should be calculated on a quarterly basis pursuant to

the NLRB's "Woolworth Formula" (F.W. Woolworth Co., 90 NLRB 289, 26 LRRM 1185 (1950); see also Isis Plumbing & Heating Co., 138 NLRB 716, 51 LRRM 1122 (1962), enf. den. on other grounds, 322 F. 2nd 913, 54 LRRM 2235 (9th Cir. (1963)). Using this formula, interest accrues following the last day of each calendar quarter or part thereof of the back pay period on the amount due and owing at the end of the quarter, and continuing until the order is complied with.

The tables in the Appendix list the amounts of back pay due for each quarter of the back pay period. The General Counsel shall calculate the amount that Respondent must pay, with 7% interest on a quarterly basis, based upon the Board's Compliance-Back Pay recommendations contained in its Operations Manual. This method involves applying the 7% annual rate to each quarterly total for the period of time between the end of the applicable quarter and the date of payment.

The General Counsel has moved that an adjustment to the award be made to account for inflation. Worthy as this suggestion appears, I am constrained to follow the Board's approach in cases of this type and allow only the 7% interest called for in this case.

VII. The Impact of the Tentative Settlement in Martori Bros. Distributors

Subsequent to the hearing herein, Respondent moved pursuant to ALRB Regulations § 20262 (g) to reopen the record and admit a document in Martori Bros. Distributors, supra, entitled "Settlement Agreement" (hereinafter "Agreement"). In that case,

the Bullets were also discriminatees. The Agreement, if approved by the Board, would resolve the litigation in Martori and establish the back pay obligations owed by Martori. The back pay period in Martori overlaps the back pay period in this case but is not identical to it. Respondent argues that the Martori Agreement is "newly discovered evidence" bearing upon the present case, and that the hearing should be reopened and the Agreement entered into evidence. Respondent's Mailgram dated January 18, 1982, also requests that testimony of the Regional Director be admitted to explain the implementation of the Agreement. The General Counsel opposes Respondent's motion.

Respondent's motion is hereby made a part of the record and numbered Respondent's Exhibit 12(A); the Mailgram is numbered Exhibit 12(B).

I note that the Agreement is expressly made subject to approval by the Board. I also note that although considerable time has passed since the Agreement was executed, approval by the Board has not yet been forthcoming. In addition, the Agreement does not specify the amounts of back pay to be awarded to the Bullets, or the beginning and end of the back pay period. It is therefore impossible from the face of the Agreement to determine its impact on this case even if it should be approved. I therefore deny Respondent's motion to reopen.

That motion should be addressed to the Board if and when the agreement, or any modification thereof, is approved.

In the event the Agreement should be approved by the Board and a ruling made reopening this case to determine its impact,

it will be necessary to supplement the record with evidence establishing establishing (1) the amounts to be paid to the Bullets pursuant to the Agreement; (2) the back pay period to which the amounts relate and the extent to which the back pay period overlaps the back pay period in this case; and (3) a breakdown of the amounts by pay period as applicable to each of the discriminatees, in the form of daily calculations if available.

VIII. Back Pay Owing to the "Bullets"

A. The Back Pay Period

The Bullets were discharged on February 7, 1976, and the back pay period commenced February 9, 1976. Offers of reinstatement in English and Spanish (Resp. Ex. 2(B), 2(C), 2(D), 2(E)) were mailed to the four on November 19, 1981, and were received by them, according to their testimony. The General Counsel has agreed[6/] that the back pay period terminates as of that date, so I need not consider whether the period should be extended by a reasonable time to allow response by the discriminatees. The seasons covered by the back pay period are the six Imperial Valley lettuce seasons 1975-76 (commencing February 9, 1976), 1976-77, 1977-78, 1978-79, 1979-80, and 1980-81.

The Board ordered that the Bullets should be made whole for any loss of pay and other economic losses they suffered as a result of Respondent's discrimination, plus interest thereon at 7% per annum, 5 ALRB No. 44, p. 6.

6/ See footnote 7 below.

B. The Back Pay Formula

The parties disagree about whether the back pay owing to discriminatees should be based on weekly or quarterly calculations or calculated as a whole for the entire back pay period. As indicated above, I have already ruled that daily calculations are appropriate, and these calculations were provided by the General Counsel. The parties have stipulated as to the method used by the General Counsel to make the calculations for the Bullets in the Second Amended Back Pay Specifications (G.C. Ex. 1(G).[7/]

Daily figures for gross wages were based on amounts earned by then current employees in the Bullets' crew on each day in question, using daily figures. It was stipulated that the Bullets' crew worked during all of the back pay period except for the period January 25 - March 5, 1979, when it was on strike (Prehearing Conference, p.3). For this period, the General Counsel used harvest figures for the same dates during the prior year and applied the 1979 lettuce piece rate.

Daily figures were also available to calculate most of the interim earnings by discriminatees. (For certain earnings (Hansen Farms) contained in Respondent's stipulated Exhibit 11, both daily and weekly figures were provided (the period was February 1980 through March 1981). I have used the daily figures whether or not they agree with the weekly figures. Respondent also used these in its specifications, Attachments 1-A through 1-D to Brief.) With respect to those interim earnings not avail-

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7/ This stipulation (dated January 25, 1982) is made part of the record as Jt. Ex. 4.

able as daily figures, weekly figures were used, and each weekly figure was divided by 6 based on the fact that a 6-day week is standard during the lettuce harvest. The date of payment was treated as the sixth day of the week, and entries were made on that and the preceding five work days. (Again, this was the approach followed by both parties in their specifications.)

Because the majority of all calculations were based on daily raw figures, I find that it was appropriate for the General Counsel to use averages based on the weekly figures where necessary as indicated above. The alternative would have been to lump together as weekly figures all of the daily figures -- all the gross wages figures and a substantial portion of the interim earnings figures --, which would have caused a vastly greater distortion in the result than the approach the General Counsel followed.

C. Mitigation of Damages

Discriminatees have an obligation to mitigate damages by making efforts to secure employment following an unlawful discharge. Phelps Dodge Corp. v NLRB, 313 U.S. 177 (1941) 8 LRRM 439; Sunnyside Nurseries, Inc., supra; Butte View Farms, supra; S & F Growers, 5 ALRB No. 50 (1979), review denied; Mastro Plastics Corp., 136 NLRB 1342, 50 LRRM 1006 (1962), enf'd in relevant part, 354 F. 2d 170, 60 LRRM 2578 (2d Cir. 1965); NLRB v. Arduini Mfg. Corp., 394 F. 2d 420, 68 LRRM 2129 (1st Cir. 1968). Only reasonable efforts to this end are required. S & F Growers, supra. It is the Respondent's burden to establish by a preponderance of the evidence that a discriminatee

did not fulfill this obligation. NLRB v Brown & Root, Inc., 311 F. 2d 447, 52 LRRM 2115, supra; Mastro Plastics Corp., supra; Butte View Farms, supra, ALO Opinion, p. 9; S & F Growers, supra; Frudden Produce, Inc., 8 ALRB No. 26 (1982). These determinations are to be made upon the record as a whole, taking into consideration each employee's particular background and experience. NLRB v. Madison Courier, Inc., 472 F. 2d 1307, 80 LRRM 3377 (DC Cir. 1972), remanded on other grounds, 505 F. 2d 391, 87 LRRM 2440 (DC Cir. 1974). Any uncertainties must be resolved against the employer since the employer's conduct has made certainty impossible. Rutter-Rex Mfg. Co., Inc., 194 NLRB 19, 78 LRRM 1640 (1971), enf'd in relevant part, 473 F. 2d 223, 82 LRRM 2264 (5th Cir.), cert. denied, 414 U.S. 822, 84 LRRM 2421 (1973); Kawano, Inc., 4 ALRB No. 104 (1978), aff'd, 106 CA 3d 937 (1980).

Respondent has raised an objection based on failure to mitigate only in the case of Flavio Alejo. His case is discussed below. As to the remainder of the Bullets no such objection is made. I find that sufficient mitigation has been shown by each of them.

D. Consequential Damages

The Board's order in 5 ALRB No. 44 requires compensation for all economic loss, including expenses incurred as a result of the discrimination. Discriminatees are entitled to extra expenses incurred in seeking or maintaining interim employment. Butte View Farms, supra; East Texas Steel Casings Co., 116 NLRB 1336, 38 LRRM 1470 (1956), enf'd, 255 F. 2d 284,

42 LRRM 2109 (5th Cir. 1958); Crossett Lumber Co., 8 NLRB 440, 2 LRRM 483, enf'd by consent, 102 F. 2d 1003, 4 LRRM 792 (8th Cir. 1938). Most of the discriminatees who testified gave evidence of out-of-pocket travel expenses in looking for work and in working for companies more distant from their homes than Respondent's fields.

Expenses are to be computed for the entire back pay period and not applied against wage figures on a daily or quarterly basis. Butte View Farms, supra.

Most of the discriminatees lived in Mexicali and traveled daily to Calexico to be picked up and transported to Respondent's fields. Respondent objects that testimony concerning expenses for transportation to the border to seek work was irrelevant because these amounts did not exceed what the discriminatees would have expended in the absence of the discrimination. Respondent correctly points out that the previous ALO decision in this case, affirmed by the Board, found that the assembly point for Saikhon workers was in Calexico. ALO Opinion, p. 5, n. 1. I am persuaded by this contention and these amounts are disallowed.[8/]

Some of the Bullets also seek reimbursement for extra travel to interim employers. The General Counsel has carried its burden as to these amounts, and they are allowed. Figures are listed in Appendices 2-A and 2-B. They are allowed, however, only as to time periods for which the matter of travel

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8/ In the event that I am overruled by the Board in this regard, I have included calculations of these amounts in Appendices 2-C and 3-B.

expenses was specifically covered in the evidence. The number of days listed is the number of work days during each period, since the expenses were incurred only if the discriminatees actually travelled the mileages in question. Where daily figures were based on 1/6 of weekly figures, credit is given for 6 days' work per week. Expenses for travel are calculated at 20¢ per mile, the current rate allowed by the Internal Revenue Service. Such expenses were awarded in Butte View Farms, supra, at 15¢ per mile. Given the increase in inflation since that time (1978), which accounts for the IRS increase, the IRS figure seems appropriate.

Interest on the expenses is allowed at 7% per annum, to be calculated by the quarter method specified in VI. above. Expense figures in the Appendix are listed by quarter.

Mileages used for all discriminatees are from a standard California State Automobile Association map, used pursuant to stipulation (VII/78-79).

Certain expense figures appear in the back pay specifications concerning which no evidence was offered in the hearing. These figures are disregarded here.

E. The Back Pay Figures

Little dispute remains between the parties as to the figures used to calculate the back pay due to the Bullets. The General Counsel issued its Second Amended Back Pay Specifications on November 16, 1981 (G.C. Ex. 1(G)), giving daily figures of gross wages, interim earnings and back wages due for each of the Bullets. This exhibit was admitted without objection

(I/23-24). The accuracy of the gross pay figures therein was stipulated to (Jt. Ex. 4).

The parties entered into a stipulation subsequent to the hearing listing interim earnings of the Bullets, and this stipulation has been made Attachment 2 to Respondent's Post-Hearing Brief. I will make this stipulation a part of the record as Jt. Ex. 3. The stipulation states that the figures in question supercede all previous interim earnings figures. The parties agree as to the employment history and amounts earned by the Bullets at Martori Brothers, Lu-Ette Farms, Inc., Growers Exchange, Inc., and Hansen Farms. The actual figures are stipulated to and constitute Resp. Ex. 8-11. Respondent also filed its own specifications using the stipulated interim earnings figures (Brief, Attachments 1A, 1B, 1C, and 1D).

Appendix 1 to this opinion shows the total amounts owed to each of the Bullets. The calculations in the Appendix were based on General Counsel's Exhibit 1(G). The stipulated interim earnings figures were inserted therein and daily totals made.

Although there was considerable testimony, as well as stipulations entered into during the hearing, concerning employment during various periods at various companies, in most cases no amounts or dates were ever offered into evidence by Respondent. And although Respondent's proposed specifications often differ from the back pay specifications, no evidentiary support was offered for many of Respondent's alternative figures; thus I follow those in Resp. Ex. 8-11 or the back pay specifications. Only where specifics as to dates and amounts earned

were placed in evidence are the amounts used as interim earnings in the Appendix.

I have compared these documents and recalculated the back pay due each of the Bullets, correcting entries and erroneous calculations, of which there were many. Only interim earnings given in the stipulated exhibits were used, as these figures supersede earlier figures. The daily calculations themselves are extremely voluminous and are not made part of this opinion; they are contained in the record (G.C. Ex. 1(G)).

F. The Individual Cases

Each of the Bullets was employed in the lettuce operations of Respondent. Each worked as a cutter and packer in the lettuce harvesting. Each apparently had little other agricultural experience and little, if any, work experience outside the agricultural field.[9/]

After their discharge, each of the Bullets proceeded to seek other agricultural employment daily or almost daily,[10/] from employers and contractors who hired workers along Imperial

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9/ Cresencio Castillo testified that he had no non-agricultural work experience, which was apparently true of all the discriminatees. He also said he had a few days' experience in thinning of lettuce. Fidencio Castillo stated that in addition to working as a cutter and packer he sometimes worked as a closer. Flavio Alejo testified that he did some weeding and thinning of lettuce as well as cutting and packing, and a little melon picking.

10/ The circumstances are somewhat more complicated as to Alejo and are discussed under a separate heading below. Cruz Castillo did not look for work in February 1976 because of illness. Although the General Counsel stated in the hearing that sick pay was being sought for this period, that claim has not been pursued here. In any event, due to General Counsel's failure to establish Respondent's policy with respect to sick pay, such a claim would not be well founded.

Avenue in Calexico and from "the hole," an area just inside the border in Calexico.

Particular calculations concerning the Bullets are discussed below.

1. Fidencio Castillo.

Respondent argues that certain interim employment testified to by Fidencio Castillo should be deducted from the award. The discriminatee testified that he worked in 1976 or 1977 for between 6 and 12 days for $30 to $40 daily for one contractor, and during the same period for another contractor for possibly 6-10 days, or fewer, at the same rate (VI/25-29).[11/] Testimony about these earnings was quite vague, and since no further evidence was introduced to tie them to specific dates, I find that they should not be included in the calculations. The amounts cannot be arbitrarily assigned to dates because the choice of dates can greatly affect the amount of the deduction for interim earnings. To illustrate, if a day's earnings were $40, and the gross wages for the day listed in the specifications were $10, only $10 of the interim wages would be deducted from the back pay due. If no gross wages were listed for the day (this occurred here on many dates where interim earnings were listed), none of the interim amount would be deducted from the back pay due.

Fidencio Castillo also testified that he worked for El Toro (Growers Exchange) for 15-20 days in November 1977 at $40-70

11/ Respondent proposes deducting $35 per day on six days during the period December 4-10, 1976.

per day. He believed that Cruz and Cresencio Castillo also worked during at least some of the same days (VI/37-39). The amounts proposed by Respondent as deductions for this period[12/] are based on the stipulated amounts (Resp. Ex. 10) shown for Cresencio Castillo for those weeks. But the stipulation is based on records of the grower for the period and shows no entry for Fidencio, but for Cresencio alone. I therefore find that the records do not support the witness's recollection, and Respondent is bound by his exhibit. In addition, the same problem holds true with regard to these amounts as for the previous amounts; the indefiniteness of the evidence results from Respondent having failed to meet its burden of proof as to these items.

Finally, Respondent proposes deducting $75 per day for three days (December 1-3, 1976) based on testimony in the hearing (VI/44-45) concerning Fidencio's work for Hansen Farms. Again the same failings of this evidence bar its use in the calculations. Respondent has provided records from Hansen but not for 1976. If the witness was correct that the work took place in December 1976, I note that most of the gross wages entries for that month are less than $75; thus, much or all of the amounts would have been offset and not deducted.

With respect to consequential damages, Castillo testified that he worked in Blythe in November 1978 (the record shows twelve days' work) and in March 1979 (he testified he worked

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12/ Respondent proposes deducting $327.93 for the week of November 26, 1977, and $362.30 for the week of December 3, 1977.

three weeks in Blythe and one in Brawley in March (VI/46-47); the record shows 17 days of work; I will allow travel expenses to Blythe for three-fourths of 17 days, or 13 days). Travel to Brawley from Calexico is also allowed (including earnings information used in my interim calculations and any entries based on testimony of the discriminatees. Both Cresencio and Fidencio Castillo testified that this driving was shared by them approximately equally; thus, for the days both are shown to have worked, 50% of these expenses are allowed to each of them. There are some days when the records reflect that only Fidencio should be credited with having worked, and on those days the travel expenses are allowed entirely to him. The chart in Appendix 2-A provides the details.

2. Cresencio Castillo[13/]

The parties stipulated that Cresencio Castillo earned $305.14 during the week ending November 26, 1977 and $337.49 during the week of December 3, 1977, at Grower's Exchange. These amounts have been divided by six and are reflected in the appropriate daily calculations used to calculate the award.

As to the consequential damages sustained by Mr. Castillo, his testimony was that he shared transportation with his brother Fidencio both during periods of interim employment and during periods they were seeking work. Fidencio Castillo testified in detail concerning which periods were spent in Brawley and

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13/ Obvious errors in the years in G.C. Ex. 1(G) for the periods March 28, 1976, through April 3, 1976, and January 23-29, 1977, have been corrected.

which in Blythe, and expense figures for Cresencio are based upon Fidencio's testimony. Half of the expenses for days both brothers worked are allowed to each of the brothers.

3. Cruz Castillo

Respondent proposes interim earnings for Cruz Castillo beyond those stipulated to, based on his testimony. The testimony (VI/61-68) was that he worked part of November and December 1976 for various employers, but the number of days and earnings were not related clearly, except for a statement he worked three days for Hansen. Respondent suggests entries for interim earnings of $35 per day during the period November 15 - December 7, 1976, stating the "Rate at these companies was testified to be 35-40 dollars by Fidencio (6, 26)" (Respondent's Brief, Attachment 1-B). Fidencio's testimony as to the rate of pay concerned only some of the contractors in question in Cruz's testimony. Respondent has not met its burden as to these amounts.

Respondent also relies on Cruz's testimony that he worked for various labor contractors every day during the period November 7 - December 4, 1977, at $45-50 per day (VI/72-73), for the entries in its proposed specifications (Attachment 1-B) of interim earnings in the amount of $45 per day during the period November 7 - November 30, 1977. Since specifics as to dates and amounts are provided by this testimony, I will allow these entries.

As to consequential damages, Cruz stated that he almost never drove his car to interim employers, but usually rode with

his brothers (VI/87-89). This is confirmed by their testimony. No travel expenses will be allowed Cruz for these periods.

He did testify that he drove his car to Calexico to look for work every day that he was not employed, except for the month of February 1976, when he was ill (VI/85). As indicated previously, these expenses are disallowed, but are listed in Appendix 2-C.

The General Counsel sought sick pay for Cruz, but this argument is not advanced in his Brief, presumably because he failed to prove a causal connection to Respondent.

4. Flavio Alejo

Flavio Alejo's case is somewhat different from those of the other discriminatees. Alejo moved to Salinas after the 1976-77 season. The lettuce season in Salinas runs from April to October each year, thus falling within the months not covered by the back pay period in this case. (The Imperial Valley season runs from November or December to March or April.) Respondent argues that Alejo failed to fulfill his duty of mitigation by being willfully idle, and that its liability to him should be nullified for this reason, or at least reduced by the amount of his earnings in Salinas.

Alejo moved from Mexicali to Holtville in August 1976 but was unable to find work, after the discharge, until December 1976. After the 1976-77 season he moved to Salinas, under circumstances which are discussed below. He then began regularly working for Green Valley Produce Coop during the Salinas season. He sought but failed to obtain work in each of the remaining back pay periods (the Salinas off-season periods).

Respondent argues that Alejo was willfully idle because he chose to move to Salinas where no work was available during those periods. The facts demonstrate, however, that he did make reasonable efforts to secure work during the back pay period: each year he sought employment referrals from the union frequently, sometimes daily; and he also visited the unemployment office twice a month looking for work. He offered to train himself for different work if it became available (VII/58-63).

I find that Alejo made all efforts that were required of him to seek employment during the period he was living in Salinas. His periodic contact with the UFW job referral agent and with the unemployment office is evidence of his good faith.[14/] See East Texas Steel Casings Co., supra. He may not be found willfully idle because he looks for work outside the area of the discrimination. See NLRB v Reynolds, 399 F. 2d 668, 68 LRRN 2974 (6th Cir. 1968). It is appropriate to seek employment in another area where continuous employment is available. Maggio Tostado, Inc., 4 ALRB No. 36 (1978). A discriminatee's right to back pay is not affected by his leaving the area as long as he continues to exercise due diligence in seeking work.

Respondent contends that Alejo was willfully idle because he did not seek employment in the Imperial Valley after he moved to Salinas. It would put Alejo in a contradictory position to say that he should have remained in the Imperial Valley

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14/ It is, of course, well established that unemployment benefits received are not considered interim earnings (Arnaudo Bros., 7 ALRB No. 25 (1981).

when he was having difficulty finding regular work there, whereas work was available for him in another area, albeit during a different part of the year. And it is unreasonable to suggest that he should have returned to Calexico, a distance of 553 miles from Salinas (VII/78) to look for work. An employee is not required to seek interim employment at an unreasonable distance from his home. Arnaudo Bros., supra, ftn. 14; NLRB v Madison Courier, Inc., supra.

In any event, Alejo testified that he did not inquire unsuccessfully about work in the Imperial Valley. Green Valley, his Salinas employer, also operated in the Imperial Valley under the name California Corporation or California Lettuce Corporation, run by the same foreman. Alejo inquired periodically about openings wth California Corporation, but was always informed that workers there were hired on the basis of seniority with the Imperial Valley operation, which he lacked (VII/40-43). I hold that no failure to mitigate by Alejo has been shown.

Respondent asks, in the alternative, that Alejo's Salinas earnings be applied as interim earnings. Its position is, in effect, that Alejo merely shifted from being a winter lettuce worker in the Imperial Valley to being a summer worker in Salinas, and that fairness requires deducting the Salinas earnings. This argument was not pleaded in Respondent's Answer, but I consider it because the General Counsel has shown no prejudice in its being argued.[15/]

15/ The General Counsel objected during the hearing, but I permitted the argument to be made there (VII/16, 90-95). The objection is not repeated in General Counsel's Brief.

Respondent's argument neglects the fact that workers are always free to obtain employment outside the back pay period, and it is not suggested that such earnings could normally be considered interim earnings. The worker must eat, and he or she is free to work or not during other periods without impinging upon the right to back pay based on discrimination. I find that Respondent's position is not well taken.[16/]

I also find that Respondent has not shown that Alejo failed to make reasonable efforts to secure employment prior to the move to Salinas (between February and December 1976). He testified (VII/21-25, 44-47) that he looked for work with numerous companies, including California Corporation (Green Valley) and contractors. He asked his brothers to find him work at El Toro, where at least some of them were working, but they refused because they said Alejo had been blackballed by Respondent. Further testimony concerning what Alejo believed to have been harrassment directed against him was elicited (VII/47-53) to demonstrate the reason for his move to Salinas. He said that he was frequently refused work because he was known as a "Chavista" and organizer. He was denied work although the companies needed people. After he moved to Holtville, eggs were thrown at his car numerous times, windows were broken, and someone fired shots in front of his house and near his car (VII/53-57). Alejo's move to Salinas was, in my opinion, a reason-

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16/ I therefore disregard Respondent's use of the Green Valley earnings in its proposed specifications for Alejo, beginning with the 1977-78 season (Brief, Attachment 1-A).

There is no overlap between the period covered by the Green Valley earnings and the back pay period. (The Green Valley records are Resp. Ex. 6.)

able response to these events. Respondent objects that this testimony was self-serving, but it introduced no testimony to contradict it.

Very few interim employment earnings appear on the back pay specifications for Alejo, used by me to calculate the award. Alejo testified he worked for Coastal for seven days at $40-70 per day in December 1976, just prior to his employment by Martori. Respondent has entries in its proposed specifications for three days, December 2-4, 1976, at $50 per day, for this employment, and I have used these entries. I am disregarding entries for December 8-10, 1976, in the General Counsel's specifications, because the evidence does not support them.

As to consequential damages, the back pay period breaks down into the period Alejo was in the Imperial Valley and the period he was in Salinas. As to the latter, no evidence was offered of expenses in travelling to work or in seeking work, and no award can be made. As to the prior period, the time in question was February 9, 1976, through February 24, 1977, the end of Alejo's period of work in the Valley, shortly after which he moved. During this period he worked only from December 2, 1976, through February 24, 1977, while he was living in Holtville. Compensation for his travel on the days he worked is awarded. (See Appendix 2-B.)

There remains only the question of Alejo's moving expenses of $150, which the General Counsel sought to have compensated (VII/65). I find that the move was work-related, and this amount is allowed.

IX. Back Pay Owing to the Remaining 42 Discriminatees

The Board's order in ¶¶2(b) and 2(c), sets out a make-whole order for nine named discriminatees.[17/] In ¶2(d) it orders similar relief for the members of Tony Montejano's crew.

According to the stipulation made a part of the record as Jt. Ex. 2, Tony Montejano's crew included 34 members. These individuals are named in the Appendix.[18/]

General Counsel Exhibit 1(G) includes the Amended Back Pay Specifications for all 42, consisting of daily gross wages based upon the formula discussed below, together with interim earnings primarily based on days some of the discriminatees worked for Respondent during the back pay period. The exhibit was admitted without objection (I/23-24). The mathematical accuracy of the entries and totals was stipulated to in Jt. Ex. 2.

A. The Back Pay Period

The period runs between Dec. 15, 1975 and Jan. 26, 1976 with

17/ Victor Acosta (Trujillo), Salvadore Aguirre, Domingo Gonzales (Zuñiga), Jose Arredondo Meza, Carlos Mojica, Ramon Montellano (Acosta), Jose Plascencia, Miquel Romales Soza, and Moises Soto.

18/ Ramon Montellano (Acosta) was both a member of Tony Montejano's crew and one of the nine named discriminatees. The total, therefore, is 42.

By stipulation of the parties made during the hearing on December 14, 1981 (VII/84), Victor Acosta, one of the nine named discriminatees, and Juvenal Trujillo, one of Tony Montejano's crew, are one and the same individual. However, as both individuals testified, the stipulation is obviously in error and it is disregarded. I also note that Rosalio Arredondo and Jose Arredondo Meza were treated as separate individuals and are so treated here, the data concerning them being different. When Rosalio Arredondo testified, however, he gave his full name as Jose Rosalio Santiago Arredondo Meza.

different starting and ending periods for different discriminatees as shown in the back pay specifications. Twenty-two of the discriminatees returned to work at Saikhon during some part of the back pay period (Jt. Ex. 2, p. 3, n. 4). Respondent contends that their rehiring should in each case terminate the back pay period as of the date they resumed work, rather than treating their earnings at Saikhon during the period as interim earnings. The General Counsel points out that the work was not completely regular and that in some cases the job was not in the same position that the worker had previously occupied. In every case, the worker missed one or more days during the back pay period, and/or did not earn the amount of the gross wages entry on some days.

It was Respondent's burden to establish in any such case that the worker was "made whole" -- i.e. was rehired and suffered no economic loss as a result of the discrimination. Maggio Tostado, Inc., supra. Respondent has made no effort to meet this burden other than relying on the face of the back pay specifications. This will not suffice. The uncertainty as to why particular discriminatees did not work on certain days or earned less than the representative crew must be resolved against Respondent. Maggio Tostado, Inc., supra; Kawano, Inc., supra. Respondent has also offered no authority in support of its position. (The financial consequences of Respondent's position would be fairly minor.)

B. The Back Pay Period

Throughout the proceedings,[19/] Respondent has taken exception to the formula used by the General Counsel to calculate the back pay owing to these discriminatees.[20/] This issue is now, however, not raised in Respondent's Brief, and I find it to have been waived.

Even if not waived, however, I find Respondent's position incorrect. It was stipulated in Jt. Ex. 2 that the formula was based on the earnings of Crew #1, deemed by the General Counsel to be a representative crew. Attached to Jt. Ex. 2 are tables listing the earnings of Respondent's five crews during the back pay period. Crews numbers 4 and 5 were disregarded because their very hiring was a major issue in the unfair labor practice proceeding, and they were fired for incompetency. Crew #1 was chosen because that crew's production during the back pay period most closely approximated the average production record of crews numbers 1-3.[21/] Crews numbers 1-3 worked prior to and during the back pay period. Also, most of the discriminatees who were rehired by Respondent joined Crew #1.

Use of a representative crew upon which to base the back pay award is an appropriate method for calculating the sums due. See Butte View Farms, supra; NLRB v. Charley Toppino &

19/ See Answer, ¶9A; Jt. Ex. 2, p. 4, lines 9-11.

20/ The formula is applicable to all 42 discriminatees. Jt. Ex. 2, page 1.

21/ See General Counsel's Brief, page 9.

Sons, Inc., 358 F. 2d 94, 61 LRRM 2655 (5th Cir. 1966). Respondent's objection to the General Counsel's approach is not spelled out clearly, in the absence of argument in its Brief; in its Answer it discusses in detail only the issue of the back pay period. Presumably the objection went to the use of daily calculations. However, daily calculations were appropriate here since all of the raw figures were available as daily calculations, as I have already ruled on this issue. Sunnyside Nurseries, Inc., supra.

C. Mitigation of Damages

All discriminatees who testified stated that they constantly sought work during the back pay period. Since Respondent does not now contest this, it is not necessary to spell out in detail the efforts made in each case.

D. Consequential Damages

The back pay specifications do not list expenses incurred by the discriminatees. I have previously ruled that job-seeking expenses for travel from Mexicali to Calexico are not allowable as they do not exceed the workers' ordinary commuting expenses when they were working at Saikhon. However, these amounts are listed in Appendix 3-B for the discriminatees who testified.[22/] No evidence was offered as to expenses of non-testifying discriminatees.

22/ Most of the witnesses referred to costs in terms of pesos. These are converted to dollars at the rate of 22.6 pesos to the dollar, the rate in effect prior to devaluation in 1976. One peso equals $ .044.

E. The Back Pay Figures

The awards for each of the 42 discriminatees are listed in Appendix 3-A. The figures are based on the stipulated figures in General Counsel's Exhibit 1(G) as corrected. Corrections to that exhibit are found on the face thereof. The Appendix shows totals for each discriminatee.

Interest on these expenses is allowed at 7% per annum, on the quarterly basis commencing with the end of the first quarter of 1976.

F. Certain Individual Cases

Entries for Salvadore Aguirre and Moises Soto were corrected pursuant to Jt. Ex. 1 to reflect interim earnings. Respondent contends that these two discriminatees concealed the existence of interim earnings in their testimony and that the back pay period should therefore terminate as to them on the date such earnings commenced. I find that they did not intentionally conceal earnings in their testimony. One of the problems of the hearing was that it occurred so long after the events in question, which, as to these witnesses, occurred during a one-month period six years previous. Much confusion was inevitable in the witnesses' testimony, and it was compounded by the fact that the witnesses had not kept records to refresh their memories.

In the case of Soto, however, the General Counsel now states in its Brief that Soto should be entitled to back pay for only 4 days pursuant to the stipulation concerning his work for Vessey & Company (Jt. Ex. 1). The 4 days are days on which

there were no interim earnings. I see no reason to treat Soto differently from all other discriminatees and reject this approach. Instead, the interim earnings figures are applied against daily gross wages amounts in the usual manner.

Earnings as to Juan Montano are also corrected pursuant to Jt. Ex. 1. (This does not affect the amount due as to him.)

For five discriminatees -- Miquel Romales Soza, Domingo Gonzales (Zuñiga), Ramon Montellano (Acosta), Jose Arredondo Meza, and Jose Plascencia -- the parties stipulated that the back pay period should commence December 15 rather than December 12, as alleged in the back pay specifications (stipulation of December 14, 1981, VII/84). The relevant adjustments have been made and the totals modified accordingly.

In the case of Jose Plascencia, it was also conceded by the General Counsel (Brief, page 15) that January 2 and 3, 1976, should be omitted from the calculations, and this has been done. Respondent contends that there should be a deduction from the amount due Plascencia based on his testimony that he earned $60 during 2-3 days of the back pay period (II/52-58). As discussed in the cases of the Bullets, such interim earnings might be offset by gross daily wages, depending upon the dates earned. However, in this case, the figures demonstrate that the earnings would not be offset. Whether the $60 were earned over two days at $30 or three days at $20, no daily gross amounts during the back pay period are low enough to offset any part of these amounts, and the deduction is therefore allowed as a deduction from the total net gross back pay due to the discriminatee.

G. The Question of Establishing an Escrow for the Discriminatees Who Did Not Testify.

Seventeen of the 42 discriminatees other than the Bullets testified in the hearing. Of the remaining 25, 11 were available to testify, but their testimony was waived by Respondent;[23/] and 14 were unavailable or their whereabouts unknown.[24/]

Respondent contends that it is inappropriate to order that back pay awards for the 42 discriminatees be placed in escrow at this time, as the General Counsel has moved (G.C. Ex. 1(T); I/26-28).

The fact that claimants are not called to testify by either of the parties does not affect their entitlement to back pay once it has been established that unlawful discrimination has occurred and that a make-whole order is an appropriate remedy. In this case the Board's order establishes those prerequisites. This being the case, the burden was on Respondent to establish any lack of entitlement to back pay on the part of the non-testifying discriminatees. Brown & Root, Inc., 132 NLRB 486, 48 LRRM 1391 (1961), enf'd, 311 F. 2d 447, 52 LRRM 2115 (8th Cir. 1963), clarified, 327, F. 2d 958, 55 LRRM 2520 (8th Cir. 1964), on subsequent hearing, 151 NLRB 241, 58 LRRM 1459 (1965);

23/ Respondent did not wish to call the following 11 witnesses, who were available: Jesus Arredondo, Juan A. Berumen, Baltazar Garcia, Jaime Garcia, Vidal Lopez, Luis Loza, Juan Montano, Roberto Reyes, Manuel Rodriguez, Jose E. Silva, and Alfonso Vera (G.C. Ex. 1(T), p. 3, n. 3; VII/80-81).

24/ The 14 included all those who either did not testify or were not listed as available. The chart in the Appendix lists all of the 42 discriminatees and indicates whether or not they testified and, if not, whether or not their whereabouts were known at the time of the hearing.

Mastro Plastics Corp., supra. In Brown & Root, the Labor Board pointed out that the General Counsel's function is merely advisory and cooperative; there, as here, the General Counsel was admittedly diligent in making the whereabouts of the claimants known to the Respondents. The Board there said:

> We do not think that the failure of the General Counsel to call these employees to testify, or to discover evidence as to their interim earnings, is a substitute for affirmative evidence by Respondents on these matters.
>
> (48 LRRM at 1395)

Respondent's argument here -- that the NLRB's rule on establishing escrows applies only to missing discriminatees, but not to witnesses not called to testify -- is frivolous. In the case cited by Respondent in its Brief, No Ho's Unique Clothing Whse., Inc., 246 NLRB 537, 102 LRRM 1614 (1979), the Board found that the ALO should have ordered that the funds be placed in escrow. It is therefore appropriate that I so order here.

The NLRB procedure as to missing discriminatees is to require that the amounts of gross back pay, less any interim earnings known to the General Counsel, be placed in escrow with the Regional Director for a period of one year, during which time the General Counsel shall attempt to determine the whereabouts of the missing parties.[25/] As they are located, they are to be made available to Respondent for inquiry as to their interim earnings; it is Respondent's responsibility to obtain

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25/ The Court of Appeals, in reviewing the Board's decision in Brown & Roots, Inc., supra, pointed out that providing this opportunity to Respondent was not mandatory and was beneficial to Respondent. Therefore its denial would not be prejudicial. 311 F. 2d 447, 52 LRRM 2115.

evidence from them concerning these facts. Thereafter, the parties are to attempt to reach agreement on the net amount owing to each individual. Where the General Counsel is satisfied that an individual has received interim earnings in an established amount, the gross amount less this amount, plus interest as provided in section VI of this opinion, shall be paid to the discriminatee and the balance refunded to Respondent. Where no agreement is achieved, either party may apply to the Board to reopen the hearing. At the end of one year the General Counsel may petition the Board to extend the period for a like period if this is deemed appropriate.[26/] Brown & Root, Inc., supra; Tri-Maintenance & Contractors, Inc., 257 NLRB No. 14, 107 LRRM 1477 (1981); No Ho's Unique Clothing Warehouse, Inc., supra. I order that this procedure be followed here.

With respect to discriminatees who were available but not called by Respondent, no legitimate purpose would be served by the above procedure. Respondent has forfeited its opportunity to inquire of these individuals as to their interim employment, and the amounts listed in the back pay specifications, as modified (all of which will be found in Appendix 3-A), together with interest as provided in this opinion, are ordered to be paid to the Regional Director to be held in escrow. Brown & Root, Inc., supra.[27/]

26/ If any discriminatees have not been located by the end of the escrow period and any extensions thereof, the Regional Director shall apply to the Board for instructions concerning the disposition of the remaining funds.

27/ See footnote 25.

X. The Remedy

Respondent's obligation to make the discriminatees whole will be discharged by payment of the net back pay due them as set forth in the Appendices, plus interest at the rate of 7% per annum, to accrue pursuant to the quarterly method and owing to the discriminatees until the date this decision is complied with.

Upon the basis of these findings and conclusions, and upon the entire record of this proceeding, I hereby issue the following recommended:

ORDER

The Respondent, Mario Saikhon, Inc., shall make the discriminatees in this proceeding whole by payment to them of the amounts listed in the Appendices hereto, together with interest at the rate of 7 percent per annum as more fully described above.

Beverly Axelrod

BEVERLY AXELROD
Administrative Law Officer

DATED: April 29, 1982

APPENDIX 1

BACK PAY AWARDS TO THE BULLETS

	Fidencio Castillo	Cresencio Castillo	Cruz Castillo	Flavio Alejo
1975-76 Season:				
1st Quarter 1976	$ 2,578.34	$ 2,080.34	$ 2,343.77	$ 2,352.89
2nd Quarter 1976	421.95	421.95	421.95	421.95
1976-77 Season:				
4th Quarter 1976	1,981.22	1,981.22	1,981.03	1,969.72
1st Quarter 1977	2,549.53	2,630.03	2,494.75	2,268.24
2nd Quarter 1977	421.98	443.50	583.05	583.05
1977-78 Season:				
4th Quarter 1977	1,922.80	1,606.81	1,276.28	2,630.36
1st Quarter 1978	2,801.44	2,839.62	2,783.02	4,342.03
1978-79 Season:				
4th Quarter 1978	1,399.68	1,400.08	2,267.35	2,646.50
1st Quarter 1979	2,332.44	1,785.65	3,206.06	4,646.74
1979-80 Season:				
4th Quarter 1979	360.63	374.74	407.55	890.31
1st Quarter 1980	827.35	925.16	837.48	3,965.36
1980-81 Season:				
4th Quarter 1980	288.47	555.60	416.99	1,255.00
1st Quarter 1981	756.32	1,196.32	1,168.54	4,312.46
TOTALS	$18,642.15	$18,241.02	$20,187.82	$32,284.61

APPENDIX 2-A

FIDENCIO CASTILLO AND CRESENCIO CASTILLO -- CONSEQUENTIAL DAMAGES
REIMBURSABLE EMPLOYMENT-RELATED TRAVEL EXPENSES

Mileage @ 20¢ per mile. Distances Calexico-Blythe 200 miles round trip, Calexico-Brawley 50 miles round trip.

Dates	Location	Number of Days Both Fidencio & Cresencio Worked	Expenses	Fidencio's 50% Share	Cresencio's 50% Share	Number of Days Fidencio Worked Alone	Expenses
4th Quarter 1977:							
November 1977	Blythe	9*	$360	$180	$180	9	$360
				180	180		360
4th Quarter 1978:							
November 1978	Blythe	12	480	240	240		
December 1978	Brawley	18	180	90	90		
				330	330		
1st Quarter 1979:							
January 1979	Brawley	25	250	125	125		
February 1979	Brawley	24	240	120	120		
March 1979	Brawley (25%)**	4	40	20	20		
	Blythe (75%)	13	520	260	260		
				525	525		
4th Quarter 1979:							
December 1979	Brawley	11	110	55	55		
				55	55		
1st Quarter 1980:							
January 1980	Brawley	27	270	135	135		
February 1980	Brawley	26	260	130	130		
				265	265		

APPENDIX 2-A (cont.)

Date	Location	Number of Days Both Fidencio & Cresencio Worked	Expenses	Fidencio's 50% Share	Cresencio's 50% Share	Number of Days Fidencio Worked Alone	Expenses
4th Quarter 1980:							
December 1980	Brawley	10	$100	$ 50	$ 50	5	$ 50
				50	50		50
1st Quarter 1981:							
January 1981	Brawley	19	190	95	95	6	60
Feburary 1981	Brawley	23	230	115	115	1	10
March 1981	Brawley	5	50	25	25		
				235	235		70
TOTALS				$1640	$1640		$480
AWARD TO FIDENCIO CASTILLO				$2120			
AWARD TO CRESENCIO CASTILLO				$1640			

* Fidencio Castillo testified he worked 15-20 days in November 1977 (VI, 48). This testimony was not rebutted. Fidencio Castillo is credited with 18 days (average of 17.5 rounded to 18) for expense purposes, based on this testimony. (The records show no interim earnings figures for him and none are entered in the Back Pay Specifications.)

The records show that Cresencio Castillo worked nine days in November 1977. I treat both brothers as having worked together during these nine days and Fidencio alone as having worked for an additional nine days.

** See explanation in opinion.

APPENDIX 2-B

FLAVIO ALEJO -- CONSEQUENTIAL DAMAGES
REIMBURSABLE EMPLOYMENT-RELATED TRAVEL EXPENSES

Mileage @ 20¢ per mile. Distance Holtville-Calexico 34 miles round trip.

Dates	Employer	Number of Days	Expenses
December 2-4, 1976	Coastal	3	$ 20.40
December 13-30, 1976	Martori	8	54.40
January 3-February 24, 1977	Lu-Ette	32	217.60
			$292.40
Moving expenses (March 1977)			$150.00
TOTAL			$442.40

APPENDIX 2-C

THE BULLETS -- NON-REIMBURSABLE JOB-SEEKING TRAVEL EXPENSES (DISALLOWED)
Mileage @ 20¢ per mile

	(A)	(B)	(C)	(D)	(E)
Discriminatee	Number of Days in Pay Period	Number of Days Worked	Number of Days Sought Work (A-B)	Mileage from Discriminatee's Home to Calexico (Round Trip)	Expenses (CxDx.20)
Fidencio Castillo	560	333	227	2	$90.80
Cresencio Castillo	560	327	233	1¼*	58.25
Cruz Castillo	560	308	237**	1½	71.10
Flavio Alejo	136***	43	93	3	55.80

+ As shown in back pay specifications.

* Cresencio testified the distance one way was one-half to three-quarters of a mile.

** Reflects deduction of 15 sick days in February 1976.

*** February 9, 1976 through February 24, 1977.

APPENDIX 3-A

42 DISCRIMINATEES -- BACK PAY AND CONSEQUENTIAL DAMAGES AWARDS

Group: 9 = one of nine named discriminatees in Board's order in 5 ALRB No. 44, ¶¶ 2(b) & (c). C = member of Tony Montejano's crew, Board's order ¶ 2(d).

Code: T = testified. A = available but did not testify. M = missing; whereabouts unknown at time of hearing.

Discriminatee	Group	Code	Back Pay Period (1975-76 Season)	Back Pay Award
Victor Acosta (Trujillo)	9	T	12/26 - 1/26	$1,412.99
Salvadore Aguirre	9	T	12/26 - 1/26	710.37
Jesus Arredondo	C	A	12/18 - 1/26	56.58
Jose Rosalio Arredondo (Meza)	C	T	12/18 - 1/26	1,195.79
Enrique Barrera	C	M	12/18 - 1/26	1,775.44
Francisco Barriga (Ayala)	C	T	12/18 - 1/26	879.61
Juan A. Beruman	C	A	12/18 - 1/26	56.58
Ramon Bravo	C	M	12/18 - 1/26	210.23
Enrique Castillo	C	M	12/18 - 1/26	1,775.44
Ignacio Contreras	C	M	12/18 - 1/26	1,123.63
Jorge De La Rosa	C	M	12/18 - 1/26	1,713.75
Joaquin Flores	C	T	12/18 - 1/26	1,962.53
Baltazar Garcia	C	A	12/18 - 1/26	336.83
Jaime Garcia	C	A	12/18 - 1/26	1,775.44
Domingo Gonzales (Zuñiga)	9	T	12/15 - 1/2	885.16
Vidal Lopez	C	A	12/18 - 1/26	176.67
Luis Loza	C	A	12/18 - 1/26	562.11
Antonio D. Martinez	C	T	12/18 - 1/26	2,269.86
Ignacio Z. Medina	C	T	12/18 - 1/26	1,775.44
Jose Arredondo Meza	9	M	12/15 - 1/2	930.06
Carlos Mojica	9	T	12/26 - 1/26	1,412.99
Juan Montano	C	A	12/18 - 1/26	142.33
Rafael Montejano (Garcia)	C	T	12/18 - 1/26	997.59

APPENDIX 3-A (cont.)

Discriminatee	Group	Code	Back Pay Period (1975-76 Season)	Back Pay Award
Ramon Montellano (Acosta)	C,9*	T	12/15 - 1/20	$1,539.71
Ernesto Ozuna	C	M	12/18 - 1/26	1,392.89
Jose Plascencia	9	T	12/15 - 1/3	825.16
Andres Reyes (Cortez)	C	T	12/18 - 1/26	816.37
Roberto Reyes	C	A	12/18 - 1/26	289.82
Carlos Marquez Rodriguez	C	M	12/18 - 1/26	1,195.79
Enrique Rodriguez	C	M	12/18 - 1/26	1,775.44
Abelardo Rodriguez	C	M	12/18 - 1/26	2,724.68
Carlos Rodriguez	C	M	12/18 - 1/26	2,824.69
Manuel Rodriguez	C	A	12/18 - 1/26	68.96
Miquel Romales Soza	9	T	12/15 - 12/31	812.16
Canelario Sanchez	C	M	12/18 - 1/26	1,775.44
Ramon Sanchez (Garcia)	C	T	12/18 - 1/26	1,775.44
Jose (Jesus) E. Silva	C	A	12/18 - 1/26	278.87
Cosme Soto	C	M	12/18 - 1/26	929.68
Moises Soto	9	T	12/26 - 1/26	629.31
Juvenal Trujillo	C	T	12/18 - 1/26	850.41
Gabriel Velazquez	C	M	12/18 - 1/26	1,775.44
Alfonso Vera	C	A	12/18 - 1/26	1,528.33

* See footnote 18 in opinion.

APPENDIX 3-B

42 DISCRIMINATEES -- NON-REIMBURSABLE JOB-SEEKING TRAVEL EXPENSES OF INDIVIDUALS WHO TESTIFIED (DISALLOWED)

Mileage @ 20¢ per mile 1 peso = $ .044 Discriminatee	(A) Daily Transportation Expenses Paid	(B) Number of Days in Back Pay Period	(C) Number of Days Worked	(D) Number of Days Sought Work (B-C)	(E) Mileage (Round Trip)*	(F) Expenses (DxA or DxE x .20)	Explanation
Victor Acosta (Trujillo)		26	0	26	2	$10.40	
Salvadore Aguirre	.31	26	20	6		1.86	Paid 3-4 pesos daily for taxi (each way to border from Mexicali).
Jose Rosalio Arredondo (Meza)		32	14	18	8	28.80	
Francisco Barriga (Ayala)		32	18	14	12	33.60	
Joaquin Flores		32	17	15	4	12.00	
Domingo Gonzales (Zuñiga)		15	1	14	34	95.20	Witness lived in Holtville. Distance to Calexico 34 mi. round trip.
Antonio D. Martinez		32	6	26	6	31.20 +68.00 99.20	Travelled from Mexicali to Calexico daily, plus [illegible] times to fields [illegible] Holtville. Calexico-Holtville = 34 miles round trip.
Ignacio Z. Medina		32	0	32	3	19.20	
Carlos Mojica	.26	26	0	26		6.76	Paid 3 pesos daily for bus (each way to border from Mexicali).
Rafael Montejano (Garcia)		32	15	17		18.33**	

APPENDIX 3-B (cont.)

Discriminatee	(A) Daily Transportation Expenses Paid	(B) Number of Days in Back Pay Period	(C) Number of Days Worked	(D) Number of Days Sought Work (B-C)	(E) Mileage (Round Trip)*	(F) Expenses (DxA or DxE x .20)	Explanation
Ramon Montellano (Acosta)	.26	30	2	28		$ 7.28	Paid 3 pesos daily for taxi (each way to border from Mexicali).
Jose Plascencia		16	0	16	3	9.60 +4.84 14.44	Looked for work alternate days. Paid 10 pesos 5-6 times (avg. 5.5) (each way to border from Mexicali).
Andres Reyes (Cortez)		32	31	1		1.10	No evidence offered, but lived in Mexicali. Allowed approximate median daily expense of other discriminatees.
Miquel Romales Soza		14	2	12		0.00	No evidence offered. Lived in Calexico.
Ramon Sanchez (Garcia)		32	0	32	5.5	35.20	
Moises Soto	.26	26	19	7		1.82 +29.50 32.32	Paid 3 pesos*** daily for taxi (each way to border from Mexicali).
Juvenal Trujillo		32	18	14		0.00	Received rides from a friend.

APPENDIX 3-B (cont.)

Notes:

* Where only mileage is listed, the witness drove his own car daily the distance indicated (which represents twice the distance from his home, usually Mexicali, to Calexico).

** Montejano either took a taxi or bus or paid carfare daily. He did not recall the number of times he did each. I have made the calculations allowing taxi 5 days (5 x 15 x $.044), bus 5 days (5 x 4.7 x $.044), carfare 7 days (7 x $2.00) (approximately one-third of the time by each method of travel).

*** Soto also paid carfare to travel to the fields to look for work. He paid $3.00 six times and $2.00 four times. He also paid an unstated amount to travel to Holtville three to four times; this travel is calculated at $1.00 x 3.5 trips.