El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-187-EC 80-CE-10-EC 80-CE-91-EC 11 ALRB No. 26 (8 ALRB No. 23)

MODIFIED SUPPLEMENTAL DECISION AND ORDER

In its Motion for Reconsideration of our Supplemental Decision in this matter, Respondent Martori Brothers correctly pointed out that we had failed to credit it for the amounts of nonmandatory benefits it paid to its employees during the makewhole period. (See Robert H. Hickam (1983) 9 ALRB No. 6.) We have revised our calculations to correct that error. In addition, we have corrected other errors in our previous calculations.

Appendices C and D, which were attached to our Supplemental Decision and Order, should be replaced with the Appendices and Attachments attached hereto.

Dated: November 13, 1985

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

APPENDIX C

(Makewhole for Farm Employees)

1.	Briseno, Edmundo	$695.64
2.	Briseno, Refugio	$1158.80
3.	Betaran, Jose	$181.32
4.	Bustamonte, Mike	$550.81
5.	Caballero, Isaac	$ 15.76
6.	Caballaro, Joe	$422.61
7.	Cano, Donaciano	$769.99
8.	Fernandez, Tony	$100.21
9.	Gavelon, Gilbert H,	$ 15.04
10.	Gonzales, Joaquin	$175.78
11.	Juarez, Juan	$ 28.20
12.	Lara, Guadalupe	$881.09
13.	Lopez, Antonio	$ 9.40
14.	Martinez, Eduardo	$ 35.72
15.	Moreno, Ramon	$959.55
16.	Navarro, Fren	$101.52
17.	Navarro, Jose	$ 47.00
18.	Navarro, Octavio R	$ 35.72
19.	Ortega, Miguel	$ 15.04
20.	Pacheco, Ramon	$236.85
21.	Palomares, Pedro	$560.45

Formula: [(Hours worked x Adam Dairy proportional increase) x Adam Dairy multiplier (1.20)] - actual wages paid = gross makewhole amount. Gross makewhole - amount of nonmandatory contributions credited to Respondent = makewhole amount due. (See Attachment 1.)

APPENDIX C CONTINUED

22. Rodriquez, Abel	$ 9.40
23. Rodriquez, Gilbert	$ 9.03
24. Ruesgas, Guadalupe	$810.71
25. Ruiz, Daniel	$ 37.60
26. Salas, Isaac	$ 81.78
27. Salas, Jimmy	$ 81.78
28. Salas, Noel	$ 57.34
29. Santiago, Magdaleno	$646.99
30. Sosa, Henry	$ 86.48
31. Vallejo, John	$175.78
32. Verdugo, Paul	$ 54.31
33. Ybarra, Angel	$1054.34
34. Ybarra, Herbert	$449.03
35. Ybarra, Servando	$1637.54
36. Ybarra, Steven	$ 15.04

ATTACHMENT TO APPENDIX C

(Wage Rates - Farm Employees)

MARTORI	ADAM DAIRY FORMULA
Regular	Proportional Increase
$4.12	$5.00
$4.18	$5.07
$4.33	$5.25
$4.80	$5.83
$4.90	$5.95
Overtime	
$6.18	$7.50
$6.27	$7.61
S6.495	$7.88
S7.20	$8.74
$7. 35	$8.92

11 ALRB No. 26

APPENDIX D

(Makewhole for Harvest Employees)

1.	Acosta, Alfredo	$438.52
2.	Acosta, Gilberto	$ 10.34
3.	Acosta, Israel	$ 25.45
4.	Acosta, Jaime	$ 14.80
5.	Acosta, Ruben	$451.68
6.	Aguilar, Cirilo	$ 14.19
7.	Ahumanda, Victor	$308.80
8.	Alanis, Arturo	$ 89.09
9.	Alvarez, Manual	$ 85.59
10.	Alvarez, Paul	$ 85.59
11.	Amial, Antonio	$446.96
12.	Arrendondo, Roberto	$ 9.32
13.	Arzola, Bias	$299.83
14.	Arzola, Leopoldo	$369.22
15.	Arzola, Santos	$323.91
16.	Astobio, Esteban	$ 14.19
17.	Camacho, Jacinto	$ 16.39
18.	Castillo, Juan	$380.89
19.	Cardona, Armundo	$ 93.25
20.	Cavello, Ignacio	$ 45.06
21.	Chaires, Edward	$ 5.48

Formula: [(Actual wages earned x Adam Dairy multiplier (1.20)) - actual wages earned] - amount of nonmandatory contributions credited to Respondent = makewhole amount owed. (See Attachment 2.)

APPENDIX D CONTINUED

22.	Chaires, Eduardo	$312 .53
23.	Chavez , Lorenso	$ 29 .85
24.	Chavez, Martin	$472 .75
25.	Contreras, Jesus	$ 14 .19
26.	Contreras, Mario R.	$406 .74
27.	Corona, Jesse	$311 .24
28.	Corona, Jose	$112 .90
29.	Corona, Luis Q.	$ 67 .85
30.	Coronado, David	$232 .78
31.	Cruz, Alejandro	$ 74 .17
32.	Delgado, Luis	$406 .46
33.	Domenquez , Francisco	$187 .98
34.	Duran, Pedro	$226 .57
35.	Enciso, M.	$129 .09
36.	Enriquez, Leopoldo	$ 16 .64
37.	Escobar, Alonso	$459 .81
38.	Escobar, Jose	$ 6 .94
39.	Espinosa, Fernando	$ 78 .39
40.	Espinoza, Jesus	$413 .48
41.	Estrada, C. Ruben	$265 .07
42.	Farfan, Daniel	$ 39 .53
43.	Fimbres, Andres	$104 .92
44.	Flores, Roberto	$560 .12
45.	Galindo, Carlos	$368 .18
46.	Garcia, Benjamin	$ 13 .53
47.	Garcia, Fausto V.	$415 .24

APPENDIX D CONTINUED

48.	Garcia, Jesus	$ 25 .45
49.	Garcia, Jose L.	$378 .48
50.	Garcia, Manuel	$104 .92
51.	Garcia, Miguel	$ 20 .76
52.	Garcia, Oscar	$195 .67
53.	Garcia, Ramon	$312 .77
54.	Giner, Larry	$203 .76
55.	Gonzales, Cornelia	$ 14 .19
56.	Gonzales, Emigdio	$ 14 .80
57.	Gonzales, Hermigoio	$409 .95
58.	Gonzales, Horacio	$205 .68
59.	Gonzales, Horacio	$ 14 .80
60.	Gonzales, Ignacio	$ 18 .36
61.	Gonzales, Jose	$143 .42
62.	Gonzales, Jose C.	$163 .49
63.	Govea, Benjamin	$366 .25
64.	Govea, Francisco F.	$366 .25
65.	Govea, Ramon	$277 .42
66.	Grando, Norberto	$274 .34
67.	Granado, Norberto	$ 21 .93
68.	Guerrero, Celio N.	$394 .97
69.	Gutierrez, Jose Perez	$ 50 .91
70.	Gutierrez, Richard	$ 7 .89
71.	Haro, Luis	$408 .59
72.	Hernandez, Israel	$306 .54
73.	Hernandez , Juan	$127 .87

APPENDIX D CONTINUED

74.	Izaquirre, Benito	$460.08
75.	Juarez, Jesus	$480.64
76.	Larson, Mariano	$602.22
77.	Leyva, Phil	$435.29
78.	Lizzarago, Guadalupe	$ 9.82
79.	Lppez, Antonio	$ 78.22
80.	Lopez, M. Alfredo	$ 52.36
81.	Lopez, Rafael	$ 14.19
82.	Lopez, Roberto	$579.34
83.	Lopez, Haul	$ 94.72
84.	Lozano, T. Godora	$ 38.69
85.	Madrid, Stanley	$ 11.26
86.	Marines, Anselmo	$489.52
87.	Marquez, Luis	$175.07
88.	Martinez, Jimmy J.	$234.16
89.	Martinez, Pedro	$319.78
90.	Martinez, Pedro	$ 5.48
91.	Martinez, Serjio	$131.04
92.	Medino, Manuel	$ 83.04
93.	Mesa, Alejandro	$ 20.93
94.	Miguel, Jose	$ 36.32
95.	Molina, Francisco	$ 66.20
96.	Mondoza, Salvador	$ 21.14
97.	Montoya, Marcelino	$ 14.19
98.	Morales, Luis R.	$ 89.09
99.	Morales, Miguel	$474.22

APPENDIX D CONTINUED

100.	Morales, Miguel	$ 11.91
101.	Moreno, Roberto	$459.81
102.	Murillo, Everado	$ 60.82
103.	Murillo, Ignacio	$592.65
104.	Murillo, Maria Hortado	$393.94
105.	Murillo, Teofilo	$455.42
106.	Navarro, Conrado	$390.90
107.	Ontiveros, Martin	$ 18.14
108.	Ortega, Moises	$ 14.80
109.	Ortiz, Enrique	$328.59
110.	Parra, Hector	$ 89.04
111.	Perez, Ismael	$357.47
112.	Perez, Jaime	$165.03
113.	Perez, Jaime	$ 20.48
114.	Perez, Juan B.	$556.63
115.	Perez, Juan V.	$ 1.58
116.	Perez, Valdemar	$601.58
117.	Perez, Valdemar	$ 5.48
118.	Quintero, Ernesto	$501.91
119.	Quintero, Ernesto	$ 14.80
120.	Ramirez, David	$154.10
121.	Ramirez, Francisco M.	$435.32
122.	Rios, Jesus	$515.00
123.	Rios, Jesus	$ 14.80
124.	Rico, Lorenzo	$357.48
125.	Rios, Lorenzo C.	$ 19.17

APPENDIX D CONTINUED

126.	Rios, Ramiro	$315.69
127.	Rios, Ramiro	$105.02
128.	Rivera, Santos	$406.70
129.	Robles, Alfredo	$ 7.18
130.	Robles, Francisco	$414.62
131.	Robles, Roberto	$ 65.18
132.	Robles, Rodolfo	$470.62
133.	Robles, Victor	$ 14.19
134.	Rocha, Marcos	$460.07
135.	Rodriquez, Enrique	$447.20
136.	Rodriquez, Luis	$ 52.36
137.	Rosales, Fidel	$ 80.38
138.	Salazar, Federico	$ 14.19
139.	Salazar, Refugio	$ 14.19
140.	Saldivar, Antonio	$ 55.79
141.	Saldivar, Elias	$ 80.09
142.	Salvador, Torres	$116.05
143.	Sanchez, Carlos	$ 25.22
144.	Sandoval, Jesus	$ 10.59
145.	Sandoval, Jorge	$ 23.28
146.	Sandoval, Jose	$472.75
147.	Sandoval, Pedro	$480.64
148.	Sandoval, Marcos S.	$451.30
149.	Sandoval, Mario	$ 39.01
150.	Sandoval, Margarito	$374.39
151.	Sandoval, Miguel	$362.02

APPENDIX D CONTINUED

152.	Saurez, Saturino	$ 5.48
153.	Savaia, Salvador	$ 14.19
154.	Sedano, Jose	$377.11
155.	Sepeda, Lucio	$ 14.19
156.	Sigmund, Carlos D.	$ 17.44
157.	Solis, Elias	$ 14.19
158.	Sota, Federico	$138.49
159.	Soto, Moises	$122.99
160.	Ulloa, Antonio	$ 52.13
161.	Ulloa, Gabino	$ 5.48
162.	Uloa, Gavino	$413.90
163.	Valenzuela, Arnulfo	$119.72
164.	Valenzuela, Jose M.	$443.36
165.	Valenzuela, Manuel	$ 14.80
166.	Valenzuela, Martin	$119.72
167.	Valenzuela, Regilio	$104.92
168.	Valenzuela, Reginaldo	$ 14.19
169.	Villa, Henry	$239.47
170.	Villareal, Vicente	$425.96
171.	Villavicencio, Castantin	$417.29

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1 HOURS WORKED	2 HOURLY WAGES PAID	3 WAGES PAID x hrs. wrk.	4 ADAM FORM. INCREASE x hrs wrk.	5 INCREASE TOTAL (x 1.20)	AMOUNT OWED
1	Briseño, Edmundo	1	2.06	2.06	2.50	3.00	.94
		267	4.12	1100.04	1335.00	1602.00	501.96
		168	4.18	702.24	851.76	1022.11	319.87
		10	6.27	62.70	76.10	91.32	28.62
							851.39
2	Briseño, Refugio	28	4.12	115.36	140.00	168.00	52.64
		278	4.18	1162.04	1409.46	1691.35	529.31
		289	4.33	1251.37	1517.25	1820.70	569.33
		30	6.27	188.10	288.30	345.96	157.86
		36	6.495	233.82	283.68	340.41	106.59
							1415.73
3	Estrada, Jose	75	4.12	309.00	375.00	450.00	141.00
		18	4.60	82.80	102.60	123.12	40.32
							181.32
4	Bustamonte, Mike	1	2.06	2.06	2.50	3.00	.94
		361	4.12	1487.32	1805.00	2166.00	678.68
		15	4.90	73.50	89.25	107.10	33.60
		6.5	6.18	40.17	48.75	58.50	18.33
							731.55
5	Caballero, Isaac	8	4.33	34.64	42.00	50.40	15.76
6	Caballero, Joe	296	4.12	1219.52	1480.00	1776.00	556.48
		13	4.80	62.40	75.79	90.94	28.54
		6.5	6.18	40.17	48.75	58.50	18.33
							603.35
7	Cano, Donaciano	412	4.90	2018.80	2451.40	2941.68	922.88
		16	7.35	117.60	142.72	171.26	53.66
							976.54
8	Fernandez, Tony	87	4.12	358.44	435.00	522.00	163.56
		5	6.18	30.90	37.50	45.00	14.10
							177.66
9	Gordon, Gilbert H.	8	4.12	32.96	40.00	48.00	15.04

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1 HOURS WORKED	2 HOURLY WAGES PAID	3 WAGES PAID x hrs. wrk.	4 ADAM FORM. INCREASE x hrs wrk.	5 INCREASE TOTAL (x 1.20)	AMOUNT OWED
10	Gonzales, Joaquin	86	4.12	354.32	430.00	516.00	161.68
		5	6.18	30.90	37.50	45.00	14.10
							175.78
11	Juarez, Juan	15	4.12	61.80	75.00	90.00	28.20
12	Lara, Guadalupe	101	4.12	416.12	505.00	606.00	189.88
		416	4.18	1738.88	2109.12	2530.94	792.06
		32	6.27	200.64	243.52	292.22	91.58
							1073.52
13	Lopez, Antonio	5	4.12	20.60	25.00	30.00	9.40
14	Martinez, Eduardo	19	4.12	78.28	95.00	114.00	35.72
15	Mendoza, Ramon	476	4.90	2332.40	2833.20	3398.64	1066.24
		40	7.35	294.00	356.80	428.16	134.16
							1200.40
16	Navarro, Juan	54	4.12	222.48	270.00	324.00	101.52
17	Navarro, Jose	25	4.12	103.00	125.00	150.00	47.00
18	Navarro, Octavio R.	19	4.12	78.28	95.00	114.00	35.72
19	Ortega, Miguel	8	4.12	32.96	40.00	48.00	15.04
20	Pacheco, Ramon	1	2.06	2.06	2.50	3.00	.94
		214.5	4.12	883.74	1072.50	1287.00	403.26
							404.20
21	Palomarez, Pedro	1	2.06	2.06	2.50	3.00	.94
		384	4.12	1582.08	1920.00	2304.00	721.92
		6.5	6.18	40.17	48.75	58.50	18.33
							741.19
22	Rodriguez, Abel	5	4.12	20.60	25.00	30.00	9.40
23	Rodriguez, Gilbert	46	4.12	189.52	230.00	276.00	86.48

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1 HOURS WORKED	2 HOURLY WAGES PAID	3 WAGES PAID x hrs. wrk.	4 ADAM FORM. INCREASE x hrs wrk.	5 INCREASE TOTAL (x 1.20)	6 AMOUNT OWED
24	Ruvalcaba, Guadalupe	82	4.12	337.84	410.00	492.00	154.16
		436	4.18	1822.48	2210.52	2652.62	830.14
		12	6.27	75.24	91.32	109.58	34.34
							1018.64
25	Ruiz, Daniel	20	4.12	82.40	100.00	120.00	37.60
26	Salas, Isaac	36	4.12	148.32	180.00	216.00	67.68
		5	6.18	30.90	37.50	45.00	14.10
							81.78
27	Salas, Jimmy	36	4.12	148.32	180.00	216.00	67.68
		5	6.18	30.90	37.50	45.00	14.10
							81.78
28	Salas, Noel	23	4.12	94.76	115.00	138.00	43.24
		5	6.18	30.90	37.50	45.00	14.10
							57.34
29	Santiago, Magdaleno	1	2.06	2.06	2.50	3.00	.94
		170.5	4.12	702.46	852.50	1023.00	320.54
		250	4.18	1045.00	1267.50	1521.00	476.00
		12	6.27	75.24	91.32	109.58	34.34
		10	6.18	61.80	75.00	90.00	28.20
							860.02
30	Sosa, Henry	46	4.12	189.52	230.00	276.00	86.48
31	Vallejo, John	86	4.12	354.32	430.00	516.00	161.68
		5	6.18	30.90	37.50	45.00	14.10
							175.78
32	Verdugo, Paul	60	4.80	288.00	349.80	419.76	131.76
33	Ybarra, Angel	567	4.80	2721.60	3305.61	3966.73	1245.13
		24	7.20	172.80	209.76	251.71	78.91
							1324.04
34	Ybarra, Herbert	282	4.80	1353.60	1644.06	1972.87	619.27
		20	7.20	144.00	174.80	209.76	65.76
							685.03

NATIONAL 35-606 EYE EASE 35-708 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1 HOURS WORKED	2 HOURLY WAGES PAID	3 WAGES PAID x hrs. wrk.	4 ADAM FORM. INCREASE x hrs wrk.	5 INCREASE TOTAL (x 1.20)	6 AMOUNT OWED
35	Ybarra, Servando	761	4.90	3728.90	4527.95	5433.54	1704.64
		52	7.35	382.20	463.84	556.60	174.40
							1879.04
36	Ybarra Steven	8	4.12	32.96	40.00	48.00	15.04

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1	2	3	4 GROSS MAKEWHOLE AMOUNT	5 NON-MANDATORY BENEFITS	6 NET AMOUNT OWED
1.	Briseno, Edmundo				851 39	155 75	695 64
2.	Briseno, Refugio				1415 73	256 93	1158 80
3.	Betaran, José				181 32	0-	181 32
4.	Bustamonte, Mike				731 55	180 74	550 81
5.	Caballero, Isaac				1576	0-	1576
6.	Caballero, Joe				603 35	180 74	422 61
7.	Cano, Donaciano				976 54	200 55	769 99
8.	Fernandez, Tony				1776	77 45	100 21
9.	Gavelon, Gilbert H.				1504	0-	1504
10.	Gonzales, Joaquin				1758	0-	1758
11.	Juarez, Juan				28 20	0-	28 20
12.	Lara, Guadalupe				1073 52	192 43	881 09
13.	Lopez, Antonio				9 40	0-	9 40
14.	Martinez, Eduardo				35 72	0-	35 72
15.	Moreno, Ramon				1200 40	240 85	959 55
16.	Navarro, Fren				101 52	0-	101 52
17.	Navarro, José				47 00	0-	47 00
18.	Navarro, Octavio R.				35 72	0-	35 72
19.	Ortega, Miguel				1504	0-	1504
20	Pacheco, Ramon				404 20	167 35	236 85

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1	2	3	4 GROSS MAKEWHOLE AMOUNT	5 NON-MANDATORY BENEFITS	6 NET AMOUNT OWED
21.	Palomares, Pedro				741 19	180 74	560 45
22	Rodriguez, Abel				940	0 –	940
23	Rodriguez, Gilbert				8648	7745	903
24.	Ruesgas, Guadalupe				101864	20793	81071
25.	Ruiz, Daniel				3760	0 –	3760
26	Salas, Isaac				8178	0 –	8178
27.	Salas, Jimmy				8178	0 –	8178
28.	Salas, Noel				5734	0 –	5734
29.	Santiago, Magdalena				86002	21303	64699
30.	Sosa, Henry				8648	0 –	8048
31.	Vallejo, John				175 78	0 –	17578
32.	Verdugo, Paul				13176	7745	5431
33.	Ybarra, Angel				132404	26970	105434
34.	Ybarra, Herbert				68503	23600	44903
35.	Ybarra, Servando				187904	24150	163754
36.	Ybarra, Steven				1504	0 –	1504

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
	EMPLOYEE NAME	ACTUAL WAGES	MULTIPLIER (x 1.20) (=)	GROSS MAKEWHOLE AMOUNT	NON-MANDATORY BENEFITS	NET AMOUNT OWED
1.	Acosta, Alfredo	2417.37	2900.84	483.47	44.95	438.5
2.	Acosta, Gilberto	51.68	62.02	10.34	0—	10.34
3.	Acosta, Israel	127.27	152.72	25.45	0—	25.45
4.	Acosta, Jaime	74.00	88.80	14.80	0—	14.8
5.	Acosta, Ruben	2483.17	2979.80	496.63	44.95	451.6
6.	Aguilar, Cirilo	70.97	85.16	14.19	0—	14.19
7.	Anumania, Victor	1543.99	1852.79	308.80	0—	308.80
8.	Alanis, Arturo	445.45	534.54	89.09	0—	89.09
9.	Alvarez, Manuel	427.95	513.54	85.59	0—	85.59
10.	Alvarez, Paul	427.95	513.54	85.59	0—	85.59
11.	Amial, Antonio	2234.78	2681.74	446.96	0—	446.96
12.	Arrendondo, Roberto	46.62	55.94	9.32	0—	9.32
13.	Arzola, Blas	1499.17	1799.00	299.83	0—	299.83
14.	Arzola, Leopoldo	1846.09	2215.31	369.22	0—	369.22
15.	Arzola, Santos	1619.53	1943.44	323.91	0—	323.91
16.	Astobio, Esteban	70.97	85.16	14.19	0—	14.19
17.	Camacho, Jacinto	81.94	98.33	16.39	0—	16.39
18.	Castillo, Juan	2129.21	2555.05	425.84	44.95	380.89
19.	Cardona, Armando	466.26	559.51	93.25	0—	93.25
	11 ALRB No. 26					
20.	Cavello, Ignacio	225.28	270.34	45.06	0—	45.06

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1	2 ACTUAL WAGES	3 MULTIPLIER (x 1.20) (=)	4 GROSS MAKEWHOLE AMOUNT	5 NON-MANDATORY BENEFITS	6 NET AMOUNT OWED
21.	Chaires, Edward		27.38	32.86	5.48	0—	5.48
22.	Chaires, Eduardo		1562.63	1875.10	312.53	0—	312.53
23.	Chavez, Lorenso		149.23	179.08	29.85	0—	29.85
24.	Chavez, Martin		2588.50	3106.20	517.70	44.95	472.75
25	Contreras, Jesus		70.97	85.16	14.19	0—	14.19
26.	Contreras, Mario R.		2258.47	2711.16	452.69	44.95	407.74
27.	Corona, Jesse		1556.20	1867.44	311.24	0—	311.24
28.	Corona, José		564.52	677.42	112.91	0—	112.91
29	Corona, Luis Q.		339.23	407.08	67.85	0—	67.85
30	Coronado, David		1163.88	1396.66	232.78	0—	232.78
31.	Cruz, Alejandro		370.85	445.02	74.17	0—	74.17
32	Delgado, Luis		2032.28	2438.74	406.46	0—	406.46
33	Domenquez, Francisco		1164.64	1397.57	232.93	44.95	187.98
34	Duran, Pedro		1132.85	1359.42	226.57	0—	226.57
35.	Enciso, M.		645.46	774.55	129.09	0—	129.09
36.	Enriquez, Leopoldo		83.22	99.86	16.64	0-	16.64
37.	Escobar, Alonso		2523.79	3028.55	504.76	44.95	459.81
38	Escobar, José		34.71	41.65	6.94	0—	6.94
39.	Espinosa, Fernando		39.94	47.33	7.39	0—	7.39
40.	Espinoza, Jesus		2292.14	2750.57	458.43	44.95	413.48

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
	EMPLOYEE NAME	ACTUAL WAGES	MULTIPLIER (x 1.20) (=)	GROSS MAKEWHOLE AMOUNT	NON-MANDATORY BENEFITS	NET AMOUNT OWED
41.	Estrada, C. Ruben	13253	15904	26507	0 —	2650
42.	Farfan, Daniel	19763	23716	3953	0 —	3953
43.	Fimbres, Andres	52459	62951	10492	0 —	10492
44.	Flores, Roberto	28062	33674	5612	0 —	5612
45.	Galindo, Carlos	18490	22208	3698	0 —	3698
46.	Garcia, Benjamin	6767	8120	1353	0 —	1353
47.	Garcia, Fausto V.	20762	24914	4152	0 —	4152
48.	Garcia, Jesus	12727	15272	2545	0 —	2545
49	Garcia, José L.	21174	25407	4233	4495	3738
50.	Garcia, Manuel	52459	62951	10492	0 —	10492
51.	Garcia, Miguel	10381	12457	2076	0 —	2076
52.	Garcia, Oscar	97837	117404	19567	0 —	19567
53.	Garcia, Ramon	178860	214632	35772	4495	31277
54.	Giner, Larry	101878	122254	20376	0 —	20376
55.	Gonzales, Cornelia	7097	8516	1419	0 —	1419
56.	Gonzales, Emigdio	7400	8880	1480	0 —	1480
57.	Gonzales, Hermiggio	204977	245972	40995	0 —	40995
58.	Gonzales, Horacio	10238	12406	2068	0 —	2068
59	Gonzales, Horacio	7400	8880	1480	0 —	1480
60.	Gonzales, Ignacio	9182	11018	1836	0 —	1836

45-606 EYE-EASE
45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1	2 ACTUAL WAGES	3 MULTIPLIER (x 1.20) (=)	4 GROSS MAKEWHOLE AMOUNT	5 NON-MANDATORY BENEFITS	6 NET AMOUNT OWED
61.	Gonzales, José		7170	8602	1432	0 —	1432
62.	Gonzales, José C.		8174	9809	1634	0 —	1634
63.	Govea, Benjamin		18312	21975	3662	0 —	3662
64.	Govea, Francisco F.		18312	21975	3662	0 —	3662
65.	Govea, Ramon		13870	16644	2774	0 —	2774
66.	Granado, Doriberto		13711	16460	2749	0 —	2749
67.	Granado, Doriberto		1096	1315	219	0 —	219
68.	Guerrero, Celio N.		21996	26395	4399	0 —	3049
69	Gutierrez, José Perez		2545	3054	509	0 —	509
70	Gutierrez, Richard		396	475	78	0 —	78
71.	Haro, Luis		20429	24515	4085	0 —	4085
72.	Hernandez, Israel		17574	21089	3514	4495	3065
73.	Hernandez, Juan		6393	7672	1278	0 —	1278
74.	Izaguirre, Benito		23039	27647	4608	0 —	4608
75.	Juarez, Jesus		26279	31535	5255	4495	4801
76.	Larson, Mariano		30111	36133	6022	0 —	6022
77.	Leyva, Phil		24018	28814	4802	4495	4351
78.	Lizzorago, Guadalupe		4908	5890	982	0 —	982
79.	Lopez, Antonio		3909	4693	782	0 —	782
	11 ALRB No. 26						
80.	Lopez, M. Alfredo		2618	3142	523	0 —	523

43-106 EYE-EASE
45-706 20/20 BUFF
NATIONAL

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
	EMPLOYEE NAME	ACTUAL WAGES	MULTIPLIER (x 1.20) (=)	GROSS MAKEWHOLE AMOUNT	NON-MANDATORY BENEFITS	NET AMOUNT OWED
81.	Lopez, Rafael	70.97	85.16	14.19	0—	14.19
82.	Lopez, Roberto	2896.68	3476.02	579.34	0—	579.34
83	Lopez, Raúl	473.59	568.31	94.72	0—	94.72
84.	Lozano, T. Godora	193.45	232.14	38.69	0—	38.69
85.	Madrid, Stanley	56.30	67.56	11.26	0—	11.26
86.	Marines, Anselmo	2447.59	2937.11	489.52	0—	489.52
87.	Marquez, Luis	875.36	1050.43	175.07	0—	175.07
88.	Martinez, Jimmy	1170.81	1404.97	234.16	0—	234.16
89	Martinez, Pedro	1598.90	1918.68	319.78	0—	319.78
90.	Martinez, Pedro	27.38	32.86	5.48	0—	5.48
91.	Martinez, Sergio	655.19	786.23	131.04	0—	131.04
92.	Medina, Manuel	415.21	498.25	83.04	0—	83.04
93.	Mesa, Alejandro	104.67	125.60	20.93	0—	20.93
94.	Miguel, José	181.60	217.92	36.32	0—	36.32
95.	Molina, Francisco	331.00	397.20	66.20	0—	66.20
96.	Mondoza, Salvador	105.68	126.82	21.14	0—	21.14
97	Montoya, Marcelino	70.97	85.16	14.19	0—	14.19
98.	Morales, Luis R.	445.45	534.54	89.09	0—	89.09
99.	Morales, Miguel	2371.12	2845.34	474.22	0—	474.22
100.	Morales, Miguel	59.54	71.45	11.91	0—	11.91

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1	2 ACTUAL WAGES	3 MULTIPLIER (x 1.20) (=)	4 GROSS MAKEWHOLE AMOUNT	5 NON-MANDATORY BENEFITS	6 NET AMOUNT OWED
101	Moreno, Roberto		2523.79	3028.55	504.76	44.95	459.8
102	Murillo, Everado		304.11	364.93	60.82	0 —	60.8
103	Murillo, Ignacio		2963.26	3555.91	592.65	0 —	592.6
104	Murillo, María Hurtado		2194.43	2633.32	438.89	44.95	393.9
105	Murillo, Teofilo		2277.08	2732.50	455.42	0 —	455.4
106	Navarro, Conrado		1954.48	2345.38	390.90	0 —	390.9
107	Ontiveros, Martin		90.68	108.82	18.14	0 —	18.14
108	Ortega, Moises		74.00	88.80	14.80	0 —	14.80
109	Ortiz, Enrique		1642.93	1971.52	328.59	0 —	328.59
110	Parra, Hector		445.22	534.26	89.04	0 —	89.04
111	Perez, Ismael		2012.08	2414.50	402.42	44.95	357.47
112	Perez, Jaime		825.16	990.19	165.03	0 —	165.03
113	Perez, Jaime		102.40	122.88	20.48	0 —	20.48
114	Perez, Juan B.		3007.90	3609.48	601.58	44.95	556.63
115	Perez, Juan Y.		7.89	9.47	1.58	0 —	1.58
116	Perez, Valdemar		3007.90	3609.48	601.58	0 —	601.58
117	Perez, Valdemar		27.38	32.86	5.48	0 —	5.48
118	Quintero, Ernesto		2509.55	3011.46	501.91	0 —	501.91
119	Quintero, Ernesto		74.00	88.80	14.80	0 —	14.80
120	Ramirez, David		770.51	924.61	154.10	0 —	154.10

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
	EMPLOYEE NAME	ACTUAL WAGES	MULTIPLIER (x 1.20) (=)	GROSS MAKEWHOLE AMOUNT	NON-MANDATORY BENEFITS	NET AMOUNT OWED
121	Ramirez, Francisco M.	21760	26112	4352	0—	4352
122	Rios, Jesus	25749	30899	5150	0—	5150
123	Rios, Jesús	7400	8880	1480	0—	1480
124	Rico, Lorenzo	17874	21449	3574	0—	3574
125	Rico, Lorenzo C.	9586	11503	1917	0—	1917
126	Rios, Ramiro	18031	21638	3606	42	3564
127	Rios, Ramiro	5250	6301	1050	0—	1050
128	Rivera Santos	22587	27099	4511	44	4067
129	Robles, Alfredo	359	431	71	0—	71
130	Robles, Francisco	20731	24877	4146	0—	4146
131	Robles, Roberto	3258	3910	652	0—	652
132	Robles, Rodolfo	23531	28237	4706	0—	4706
133	Robles, Victor	709	851	142	0—	142
134	Rocha, Marcos	23003	27604	4601	0—	4601
135	Rodriguez, Enrique	24607	29528	4921	44	4877
136	Rodriguez, Luis	2618	3142	523	0—	523
137	Rosales, Fidel	4019	4822	803	0—	803
138	Salazar, Federico	709	851	142	0—	142
139	Salazar, Refugio	709	851	142	0—	142

140	Saldivar, Antonio	2789	3347	558	0—	558

45-606 EYE-EASE
45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	EMPLOYEE NAME	1	2 ACTUAL WAGES	3 MULTIPLIER (x 1.20) (=)	4 GROSS MAKEWHOLE AMOUNT	5 NON-MANDATORY BENEFITS	6 NET AMOUNT OWED
141	Saldivar, Elias		400.47	480.56	80.09	0—	80.0
142	Salvador, Torres		580.24	696.29	116.05	0—	116.0
143	Sanchez, Carlos		126.11	151.33	25.22	0—	25.2
144	Sandoval, Jesus		52.96	63.55	10.59	0—	10.5
145	Sandoval, Jorge		116.38	139.66	23.28	0—	23.2
146	Sandoval, José		2588.50	3106.20	517.70	44.95	472.7
147	Sandoval, Pedro		2627.95	3153.54	525.59	44.95	480.6
148	Sandoval, Marcos S.		2256.49	2707.79	451.30	0—	451.30
149	Sandoval, Mario		195.05	234.06	39.01	0—	39.0
150	Sandoval, Margarito		2096.71	2516.05	419.34	44.95	374.39
151	Sandoval, Miguel		1810.08	2172.10	362.02	0—	362.02
152	Saurez, Saturino		27.38	32.86	5.48	0—	5.48
153	Savaia, Salvador		70.97	85.16	14.19	0—	14.19
154	Sedano, José		2110.30	2532.36	422.06	44.95	377.11
155	Sepeda, Lucio		70.97	85.16	14.19	0—	14.19
156	Sigmund, Carlos D.		87.22	104.66	17.44	0—	17.44
157	Solis, Elias		70.97	85.16	14.19	0—	14.19
158	Sota, Federico		69.25	83.09	13.84	0—	13.84
159	Soto, Moises		614.95	737.94	122.99	0—	122.99
	11 ALRB No. 26						
160	Ulloa, Antonio		260.67	312.80	52.13	0—	52.13

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
	EMPLOYEE NAME	ACTUAL WAGES	MULTIPLIER (x 1.20) (=)	GROSS MAKEWHOLE AMOUNT	NON-MANDATORY BENEFITS	NET AMOUNT OWED
161.	Ulloa, Gabino	27 38	32 86	5 48	0 —	5 4
162.	Ulloa, Gavino	229 4 24	275 3 09	45 8 85	44 95	41 3 9
163.	Valenzuela, Arnulfo	59 8 58	71 8 30	11 9 72	0 —	11 9 7
164.	Valenzuela, José M.	221 6 83	266 0 18	44 3 36	0 —	44 3 3
165.	Valenzuela, Manuel	74 00	88 80	14 80	0 —	14 8
166.	Valenzuela, Martin	59 8 58	71 8 30	11 9 72	0 —	11 9 7
167.	Valenzuela, Regilio	52 4 59	62 9 51	10 4 92	0 —	10 4 9
168.	Valenzuela, Reginaldo	70 97	85 16	14 19	0 —	14 1
169.	Villa, Henry	119 7 37	143 6 84	23 9 47	0 —	23 9 4
170.	Villareal, Vicente	235 4 57	282 5 48	47 0 91	44 95	42 5 9
171.	Villavicencio, Constantin	208 6 47	250 3 76	41 7 29	0 —	41 7 29

El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)))))))))	Case Nos. 79-CE-187-EC 80-CE-10-EC 80-CE-91-EC 11 ALRB No. 26 (8 ALRB No. 23)

SUPPLEMENTAL DECISION AND ORDER

On November 21, 1983, Administrative Law Judge (ALJ) Stuart A. Wein issued the attached supplemental Decision. Thereafter, Respondent and Charging Party each filed timely exceptions to the ALJ's Decision, with supporting briefs, and General Counsel and Respondent filed reply briefs.

Pursuant to the provisions of Labor Code section 1146[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member pane.

The Board has considered the record and the ALJ ' s Decision in light of the exceptions and briefs of the parties and has decided to affirm his rulings, findings of fact, and conclusions of law as modified herein and to adopt his recommended Order with modifications.

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

MOTIONS[2/]

On May 11, 1984., and on July 10, 1984., Respondent filed motions with the Board seeking reconsideration of the underlying Decision in the instant case, Martori Brothers (1982) 8 ALRB No. 23. On September 7, 1984, General Counsel filed a Request for Reconsideration in which he joined Respondent's previously filed motion. Respondent and General Counsel argued that reconsideration is appropriate because the Admiral Packing Decision (Admiral Packing Company, et al. (1981) 7 ALRB No. 43), upon which the Board relied in finding Respondent had engaged in surface bargaining from November 1979 to May 1980 (see Martori Brothers, supra, 8 ALRB No. 23), was overruled by the Court of Appeal in Carl Joseph Maggio, Inc. v. ALRB (1984.) 154 Cal.App.3d 40.

In Martori Brothers, supra, 8 ALRB No. 23, we found that the totality of Respondent's conduct, including its November 20, 1979 letter to the United Farm Workers of America, AFL-CIO (UFW or Union), regarding its desire to resume negotiations, its summary rejection of the Union's December 18, 1979 offer, and its unexplained delay in submitting a counterproposal, established that Respondent was engaged in bad faith bargaining from November 20, 1979 until May 1980. The Board concluded that Respondent violated section 1153(e)

[2/]Respondent filed a Motion to Disqualify Board Member Jorge Carrillo based on the fact that Member Carrillo was an employee of the regional office during the time when matters involving the instant case were pending. As Member Carrillo did not participate in the Board's consideration of this case, Respondent's motion is moot.

and (a) of the Act by engaging in surface bargaining during that period and by previously unilaterally increasing wages when no bona fide impasse existed. However, our conclusion that Respondent was engaged in surface bargaining during this period was not premised on our finding that the parties were not at impasse. Indeed, the ALJ specifically found that the question of whether or not the parties were at impasse was irrelevant to his finding a bargaining violation (ALJ Decision, p. 9.), and we did not overturn this finding. We therefore deny Respondent's[3/] and General Counsel's motions.

[3/]Respondent's motion of September 24, 1984, raises two other arguments. We find both lacking in merit. Respondent argues that since impasse continued as to wages and fringe benefits for its farm employees and it would not have agreed to the Sun Harvest rates, the Board cannot require it to pay those amounts. The Board's makewhole remedy is premised on the proposition that had the employer bargained in good faith it would have reached a contract with the Union. While the Board cannot say with certainty what the terms of that contract would have been, it will determine the amount of the makewhole owing to employees based on comparable contracts. By refusing to bargain in good faith as required by the Agricultural Labor Relations Act (ALRA or Act), an employer prevents the union from obtaining any benefits for its employees and, therefore, the burden of any uncertainty created by its unlawful act must be borne by the respondent whose violation of the Act created the uncertainty. (See Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73; Robert H. Hickam (1983) 9 ALRB No. 6.)

Respondent's second argument is that since the court in Carl Joseph Maggio, supra, found that its competitors did not engage in surface bargaining, the wages paid by those companies should be used in the calculation of the makewhole remedy herein. Respondent requests leave to amend its answer to present evidence that Carl Joseph Maggio, Inc., Mario Saikhon, Inc., Vessey & Company, Inc., Lu-Ette Farms, Inc., Gourmet Harvesting & Packing Company, Inc., and Colace Brothers are comparable employers for the purpose of calculating a makewhole remedy. Since our makewhole remedy is based upon comparable employers who have contracts with the Union we reject Respondent's argument. (See Adam Dairy d/b/a Rancho Dos Rios (1978) 4 ALRB No. 24.)

The dissent would grant General Counsel's and Respondent's Motions for Reconsideration of the underlying Board Decision. (Martori Brothers, supra, 8 ALRB No. 23.) However, the linchpin of its argument, that the findings in the underlying liability case are inextricably intertwined with the Board's now vacated findings in Admiral Packing, supra, 7 ALRB No. 43, is incorrect. In the underlying case, the ALJ based his finding of a bargaining violation solely on the conduct commencing with Respondent's letter of November 20, 1979[4/] to the UFW. This encompasses the time period subsequent to that involved in Admiral Packing Company, supra. These findings and conclusions were in turn adopted by the Board.

The dissent also fails to give proper weight to the appellate court's summary denial of Respondent's petition for judicial review of the underlying Decision in the instant case. It is clear that "... an order [by a court of appeal] summarily denying a petition for review is a decision on the merits and raises the bar of res judicata." (ALRB v. Abatti Produce, Inc. (1985) 168 Cal.App.3d 504, 512.) The Board may thereafter seek to enforce its Order pursuant to section 1160.8. (Tex-Cal Land Management v. ALRB (1979) 24 Cal.3d 335.) As the Court of Appeal, Fourth District, said recently in another makewhole case:

> Review of that order (the underlying liability Decision), is not, and cannot be, again before this court. The issue before the court at this time [in

[4/] In fact, as mentioned above, the ALJ specifically found that the issue of whether the parties were at impasse during the period between February 28, 1979 and November 20, 1979 was irrelevant to his finding that Respondent engaged in bad faith bargaining.

> a compliance proceeding] is review of the amount necessary to make employees whole, not whether or not they should be made whole .... (Holtville Farms, Inc. v. ALRB (1985) 168 Cal.App.3d 388, 398.) (Emphasis added.)[5/]

Ignoring this precedent, the dissent nonetheless engages in an inappropriate "second look" at the evidence presented at the previous liability stage of this proceeding.[6/]

In short, the dissent is based on the faulty premise

5/The dissent questions whether these cases which restrict courts from reconsidering a liability decision during their review of a compliance decision are applicable to Board reconsideration of a liability decision. However, the dissent's own attempt to construct legal authority to sidestep the doctrine of res judicata and to reconsider final Board decisions answers the question. Unlike the prefactory condition cited from Davis at footnote 1 of the dissent, our statute is not "silent" as to the limits of reopening a record or reconsidering a decision. Labor Code section 1160.3 states, in relevant part:

> Until the record in a case shall have been filed in a court, as provided in this chapter, the board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside in whole or in part, any finding or order made or issued by it. (Emphasis added.)

In the instant case, the record was filed and the Court's summary denial of the petition for review was a decision on the merits. (See ALRB v. Abatti Produce, Inc., supra, 168 Cal.App.3d 504.) The clear language of section 1160.3 unequivocally prohibits the Board from reconsidering our previous Decision at 8 ALRB No. 23.

6/In reevaluating the evidence presented in the underlying liability case, the dissent interprets conduct of UFW representatives and concludes that the Union's negotiation strategy "impair[ed] the required mutuality of an effort to reach common ground." However, the ALJ specifically considered and rejected the argument that the Union was bargaining in bad faith and the Board adopted that conclusion. (See ALJ Decision at page 15.) Further, we note that in surface bargaining cases, the Board evaluates the employer's bargaining conduct in light of the totality of the circumstances, including the bargaining conduct of the Union. This has been our standard for several years. (See i.e., Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36, Admiral Packing Company, supra, 7 ALRB No. 43.)

that the question before us is whether our previous finding of bad faith bargaining was correct. Since our Decision in Martori Brothers, supra, 8 ALRB No. 23, became res judicata as to this case when the court of appeal summarily dismissed Respondent's petition for review, the sole question before us now, which we will address next, is the compliance aspect of our previous Decision.

MARTINEZ CREW

The Martinez-crew employees were unlawfully discharged for engaging in a work stoppage on February 5, 1980. The backpay period consists of one day, February 6, 1980. The parties stipulated that the gross backpay wages due to each of these workers is $70.97. We agree with the ALJ that the members of the Martinez crew are also entitled to contractual makewhole for the one day they did not work because of their unlawful discharge. (See Dutch Brothers, et al. (1977) 3 ALRB No. 80.) This dual award is required in order to fully remedy Respondent's overlapping misconduct: it discriminatorily discharged these workers and it unlawfully refused to bargain. This remedy places the discriminatees in the same position they would have been absent Respondent's dual misconduct.

We reject Respondent's argument that an escrow account is inappropriate where the discriminatees have not been produced at the hearing to testify about their efforts at mitigating their employment losses. In Mario Saikhon, Inc. (1984.) 10 ALRB No. 36, we adopted the National Labor Relations Board's practice of establishing escrow accounts when discriminatees cannot be

located. We will order Respondent to place the gross backpay and makewhole amounts due each of the Martinez-crew discriminatees who did not testify (See Appendix A)[7] in escrow w±th the Regional Director for a period of up to two years from the date of this Supplemental Decision.

DISCONTINUANCE OF BUS TRANSPORTATION

We previously found that Respondent had unlawfully discontinued its bus transportation from Calexico. We adopt the ALJ's conclusion that Respondent discontinued the Calexico bus transportation on January 31, 1979.

Paragraph 2(a) of the Board's Order in the underlying Decision requires Respondent to "...make whole each employee employed since January 1979, for any loss of pay and other economic losses resulting from Respondent's discontinuance of the Calexico bus transportation for workers." (Emphasis added.) We agree with the ALJ's interpretation of our Order as including the actual cost of alternate transportation, as well as reimbursement for days of work missed due to the employees' inability to secure alternate transportation. We affirm the ALJ's conclusions regarding the claims of the six employees who testified: Mario Contreras, Lorenzo Rico, Noises Soto, Ignacio Soto, Maria Murillo and Tofilio Murillo. (See Appendix B.)

The ALJ recommended that other potential claimants be allowed a period of two years from the date of the Board's

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[7] Discriminatees Mario Contreras and 'Lorenzo Rico did testify and therefore their backpay and makewhole amounts shall be payable directly to them as of the date of this Supplemental Decision.

supplemental decision to present their claims concerning loss of pay and other economic losses suffered as a result of Respondent's unlawful termination of Calexico bus transportation for workers. Respondent excepts to this recommendation. We agree.

The procedure suggested by the ALJ is quite different from the escrow procedure described above for, in the latter procedure, the discriminatees' identities are known and the amount of gross backpay claimed and known interim earnings are established in the General Counsel's specification. In the procedure recommended by the ALJ, not only are the names of the specific claimants not known, but even their number and the amounts of their claims are also unknown. In view of this uncertainty, we find the recommended procedure inappropriate.

CONTRACTUAL MAKEWHOLE

The makewhole period in the instant case extends from November 20, 1979 until May 21, 1980, the date on which Respondent submitted a full counterproposal to the UFW. The employees entitled to makewhole relief are 36 farm employees, 76 thinning-crew employees, and 171 harvest employees (the crews of John Martinez and Camarino Sandoval).

Respondent had harvesting operations in California and Arizona. The two harvest crews worked in both states during the makewhole period. General Counsel argued that the harvest employees are entitled to makewhole relief for the periods of time they worked in either state. Respondent argued that the ALRB does not have jurisdiction to order makewhole to employees engaged in its Arizona operations. The ALJ agreed with

Respondent. The UFW excepts to this conclusion.

The ALJ applied the "contact" analysis outlined in Mario Saikhon, Inc. (1978) 4 ALRB No. 72. As we find that the ALJ's analysis is not applicable to the facts in the instant case, we need not determine whether that analysis is correct.

The issue presented in this case, the appropriateness of imposing an extraterritorial remedy for a refusal to bargain violation, is before us for the first time. This question is distinguishable from situations where we have sought to protect the exercise of California rights during a California employment relation from subsequent out-of-state retaliation. (See J. R. Norton Company (1982) 8 ALRB No. 76; Mario Saikhon,[8/] supra, 4 ALRB No. 72, citing Alaska Packer's Assn. v. Ind. Ace. Conm. of Cal. (1935) 294 U.S. 532 at p. 541, "...[T]he power of the state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences.") The crucial distinction is that in the instant situation, the unlawful conduct, surface bargaining, occurred in California, and more importantly, the status giving rise to the unfair labor practice, Respondent's bargaining obligation, was also limited to Respondent's California employees.

The UFW's certification is limited to Respondent's agricultural employees in the State of California. (Martori Brothers Distributing (1978) 4 ALRB No. 5. See Bruce Church,

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[8/]On reconsideration, the Board reaffirmed its statutory interpretation of the Act but found insufficient evidence to warrant an assertion of its extraterritorial power. (Mario Saikhon, Inc. (1980) 5 ALRB No. 30.)

Inc. (1976) 2 ALRB No. 38: statewide unit appropriate but no jurisdiction over operations outside California; therefore, Arizona employees not included in bargaining unit.) Moreover, as the scope of the bargaining unit is not a mandatory subject of bargaining, Respondent was under no obligation to bargain over its workers while they were employed in Arizona. As Respondent was legally bound to bargain solely over the wages, hours, and terms and conditions of employment of the employees in the California bargaining unit,[9/] our previous finding that it engaged in bad faith bargaining can relate only to those employees. Finally, as our unfair labor practice finding relates only to employees who worked in California, only those employees are entitled to a makewhole remedy.

The ALJ adopted General Counsel's makewhole formula which utilized the Sun Harvest contract for comparative purposes. Respondent excepted to this conclusion.

In makewhole cases, where the General Counsel has established at hearing that the makewhole amounts were calculated in a manner that is reasonable and conforms to the standards set forth in our decisions, the Board will adopt the General Counsel's formula and computations. The Board may reject or modify the General Counsel's formula and/or computations where a respondent

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[9/]There is no evidence in the record that any terms or conditions of the workers' employment (i.e., seniority) in California were affected by their employment history in Arizona. We would view the matter differently if such evidence were present. However, we need not now determine whether such evidence would lead to a different result on the question of Respondent's bargaining obligation.

or charging party can demonstrate that the General Counsel's method of calculating makewhole is arbitrary, unreasonable, or inconsistent with Board precedents, or that some other method of determining the makewhole amounts is more appropriate. (Kyutoku Nursery, Inc., supra, 8 ALRB No. 73. See also, J. R. Norton Company, Inc. (1984) 10 ALRB No. 42.) The Board does not require a detailed showing of contract comparability. To establish a reasonable formula, it is generally sufficient for General Counsel to present contracts negotiated by the same union, covering operations in at least some of the same commodities and location(s) as those of the respondent, and in effect during the makewhole period.

In the instant case, the ALJ rejected the contracts submitted by Respondent for a variety of reasons: some of the companies did not harvest lettuce; all but one of them did not have operations in the same geographical location as Respondent; all of the contracts were executed two years before the makewhole period herein; and, all of the contracts contained a general wage rate lower than Respondent's non-contractual wage rate.

Respondent has excepted to the ALJ's adoption of General Counsel's formula and his corresponding rejection of the contracts it offered as comparable. However, Respondent does not even attempt to dispute the ALJ's conclusions about why the contracts it proffered were not comparable. Respondent's unsupported, blanket exception must be rejected as Respondent has failed to establish that its proposed formula is a more appropriate method of determining the makewhole amount due, or that General Counsel's

formula is arbitrary, unreasonable, or inconsistent with Board precedent. (See Kyutoku Nursery, Inc., supra, 8 ALRB No. 73.)

Respondent filed numerous other exceptions relating to the propriety of our makewhole remedy. As the issues raised by Respondent have been fully addressed by the Board in J. R. Norton, supra, 10 ALRB No. 42, we will not repeat that discussion here.

CONCLUSION

Respondent's harvest employees received the Sun Harvest wage rate and therefore their makewhole remedy will consist solely of the fringe benefit component of makewhole. As discussed above, these employees will be compensated only for the periods of time during the makewhole period when they worked in California. We will adopt the ALJ's recommendation to utilize the proportional increase calculation pursuant to Adam Dairy d/b/a Rancho Dos Rios, supra, 4 ALRB No. 24 and Robert H. Hickam, supra, 9 ALRB No. 6 for those job classifications paid above the general wage rate.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Martori Brothers, its officers, agents, successors, and assigns shall:

1. Pay to the employees listed in the attached Appendix B, and to Mario Contreras and Lorenzo Rico listed in attached Appendix A, the amounts set forth therein beside their respective names, plus interest thereon compounded at the rate of seven percent (7%) per annum, computed quarterly, through the date of this Supplemental Decision, and thereafter in accordance with

our Decision in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

2. Pay to the Regional Director of the El Centro Region, the sum of $90.99 per employee plus interest as provided above, to be held in an escrow account pursuant to the provisions of the foregoing decision on behalf of all of the named discriminatees in Appendix A attached hereto, except that the amounts owing to Mario Contreras and Lorenzo Rico shall be payable directly to them as of the date of this Supplemental Decision.

3. Pay to the employees listed in Appendices C and D attached hereto, the makewhole amount set forth therein beside their respective names, plus interest as provided above.

Dated: October 7, 1985

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

CHAIRPERSON JAMES-MASSENGALE, Dissenting in Part:

As an initial point of departure from the majority decision, I dissent from my colleagues' denial of General Counsel's and Respondent's Motions for Reconsideration of the underlying Agricultural Labor Relations Board (Board or ALRB) decision in light of the court's decision in Carl Joseph Maggio v. Agricultural Labor Relations Bd. (198-4) 154 Cal. 3d 40. In that case, the Court of Appeal reversed our decision in Admiral Packing Company, et al. (1981) 7 ALRB No. 43 that Respondents, a group of agricultural employers which included Respondent Martori, had declared a false impasse and, therefore, were in bad faith from February 21, 1981. On March 23, 1982, the Board issued its Decision and Order upholding the determination of the Administrative Law Judge (ALJ) that, from November 20, 1979 until at least May 1980, Respondent herein was in bad faith. The Board ordered makewhole to remedy Respondent's refusal to bargain.

Although the ALJ's decision was concerned only with the

allegation of bad faith beginning on November 20, 1979, the Board decided to impose makewhole in view of the totality of Respondent's conduct from February 21, 1979. The Board concluded that the make-whole remedy was appropriate based upon its now overruled decision in Admiral Packing Company. The Board stated:

> We agree with the ALO that Respondent's letter of November 20, 1979, was not a good-faith effort to resume the negotiations which Respondent had halted in February 1979. On the contrary, the totality of Respondent's conduct, including the summary rejection of the UFW's December 18, 1979, offer and its delay in submitting a counter-proposal until May 1980, indicates that from November 20, 1979 until, at least, May 1980, Respondent continued the bad-faith bargaining it began on February 21, 1979. In this context, the November 20 letter appears to have been the first step in a preconceived plan to justify a wage increase which Respondent intended to make, regardless of the UFW's position. We so find. (8 ALRB No. 23, pp. 2-3.)

The decision to impose makewhole, then, was expressly predicated upon the finding that the unilateral wage raise was the "first step" of a plan which originated in Respondent's declaration of false impasse on February 21, 1979.

In denying the Motions for Reconsideration, the majority states that the doctrine of res judicata prevents it from engaging in any reconsideration of the propriety of our remedial order. From decisions which hold that in their review of compliance proceedings the courts have no power to reconsider the decision to award make-whole, the majority concludes that the Board similarly has no power to reconsider its previous decision. Here, in reliance on principles of res judicata, the majority is issuing an order directing compliance with a prior Board order which was based on a finding which was subsequently reversed by the appellate court.

It is my belief that the bifurcated nature of the Board's administrative unfair labor practice proceedings does not always permit strict application of judicial principles. Decisions characterizing the relation between reviewing courts and the Board do not seem apposite to the question of the Board's inherent power to reconsider its own decisions. The greater flexibility of an administrative agency to reconsider its actions has been judicially recognized:

> Any deliberative body--administrative, judicial or legislative—has the inherent power to reconsider an action taken by it unless the action is such that it may not be set aside or unless reconsideration is precluded by law. [Citations.] The power of administrative reconsideration is consistent with the principle that '"notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors."' [Citations.]
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> . . . . . .
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> Whether reconsideration of an administrative action is precluded by law depends upon 'when the authoritative law intends it to be final,' which is to be determined in every case 'upon the scheme of law by which [administrative] power is conferred.' [Citations.] Terminal finality of an administrative action is commonly prescribed by enabling law in terms of a post-action period after which the administrative body may not reconsider for lack of jurisdiction. [Citations.] Such finality, and the consequence of lapsed jurisdiction, are not readily to be inferred if the enabling law does not expressly provide for them. [Citations.]
> (In re Fain (1976) 65 Cal.App.3d 376, 388-89.)[1/]

[1/]As Davis points out, the interest in finality, which is at the heart of the doctrine of res judicata, is only one of the elements to be considered in determining the limitations on agency power to reconsider:

> When statutes are silent and legislative intent unclear, agencies and reviewing courts must work out the practices and the limits on reopening. The considerations affecting

(fn. 1 cont. on p. 17)

I point out the above-quoted authorities not to justify reconsidering the Board's initial decision concerning whether Respondent violated the Agricultural Labor Relations Act (Act) by raising wages on November 20, 1979, and by its subsequent pattern of bargaining through May 1980, but only to support my view that the limits of our power in this area should not be so readily circumscribed by merely invoking general principles of res judicata. Where, as here, the Board has predicated its imposition of makewhole liability on a pattern of events which may no longer be said to obtain, reconsideration of the makewhole order does not invoke the broad question of our power to reconsider any decision. The rationale, long ago expressed by the California Supreme Court in a decision not to apply the general rule that an appellate court cannot take judicial notice of matters outside of the record, is equally applicable to the circumstances here. In Sewell v. Johnson (1913) 165 Cal. 762, the court stated:

> Under these circumstances there is in fact presented a situation where we are asked to affirm the present judgment which is based solely upon a judgment which we have reversed, and which affirmance we would have to make unless we take judicial notice of our action which

(fn. 1 cont.)

> reopening to take account of new developments or of new evidence of old developments often differ from those affecting the correction of mistakes or shifts in judgment about law or policy. Usually the search for a basic principle to guide reopening is futile; the results usually must reflect the needs that are unique to each administrative task. Factors to be weighed are the advantages of repose, the desire for stability, the importance of administrative freedom to reformulate policy, the extent of party reliance upon the first decision, the degree of care or haste in making the earlier decision, the general equities of each problem.
> (Davis, Administrative Law Text, §18.09, p. 370.)

> resulted in the reversal of the principal judgment. Certainly there ought to be some way to prevent conflicting decisions in the same tribunal, obviate a situation which practically involves an absurdity, and prevent a result which will not only give to the respondent a benefit to which he is not entitled, but which would be inequitable and unjust to the appellant.

Next, inasmuch as the Board's conclusions in 8 ALRB No. 23 are so inextricably intertwined with the now-vacated Admiral findings, I believe that the Board majority should have engaged in a de novo review of the record in that case in order to assess Respondent's bargaining conduct independent of Admiral. Based on my own such review, I am persuaded that the majority is correct in finding that Respondent implemented a unilateral change in wages on December 15, 1979, in violation of Labor Code section 1153(e) and (a). However, I disagree that there is sufficient evidence to support a further finding that Respondent also engaged in surface bargaining between November 20, 1979, and May of 1980.[2/]

Although Respondent had an obligation to bargain with the United Farm Workers of America, AFL-CIO (Union or UFW), concerning wages and other mandatory terms and conditions of employment when the Union requested it to do so, the Union made no effort to break

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[2/]Essentially, the majority bases its conclusion on the nature and the timing of the proposals exchanged between the parties. But, "In finding a violation of the obligation to bargain in good faith based exclusively on contract proposals, the Board is in effect doing that which it is prohibited from doing--sitting in judgment upon the substantive terms of a proposed collective bargaining agreement." (Seattle-First National Bank v. National Labor Relations Board (9th Cir. 1981) 638 F.2d 1221 [106 LRRM 2621].)

the impasse or resume negotiations.[3] Nevertheless, it is well-settled that an employer has a duty to notify and negotiate with its employees' bargaining representative before changing terms and conditions of employment and violates Labor Code section 1153(e) and (a) by instituting unilateral changes before negotiations have been given a fair chance to succeed. (National Labor Relations Board v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].)

On November 20, 1979, while the parties were still deadlocked on all mandatory subjects of bargaining, wages in particular, Respondent advised the Union in writing that it was considering a change to the "quintero" system of harvesting at the start of the forthcoming 1979-80 lettuce harvest season at a wage rate of 80 cents per carton. Respondent also explained that should it decide to continue with the conventional ground pack method, "we propose to pay what appears to be the industry rate of 75 cents per carton."[4] Respondent offered to meet with the Union in order to

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[3]The parties did meet on one occasion prior to the times pertinent herein, but at the behest of this and certain other Admiral Respondents. Upon the conclusion of that meeting, in August 1979, the Union agreed that the parties were still at impasse because their respective positions remained fixed. (See Maggio v. ALRB, supra, 154 Cal.App.3d 40; and Admiral, supra, 7 ALRB No. 4371

[4]Respondent provided the Union with a written proposal, setting forth with specificity the changes which it contemplated. UFW negotiator Ann Smith testified that Respondent's assessment of the prevailing trio rate was correct and that the prior season's rate had been 57 cents. The Board affirmed the finding of the ALJ that the letter did not "suggest a willingness to bargain" and that it made no mention of an anticipated change to a quintero system. That finding may be explained by the ALJ's footnote no. 7 wherein he observed that Ann Smith had testified that there was no discussion of the wage proposal in the November 20 letter. However, my review of that letter (General Counsel's Exhibit 1-D) reveals three full

(fn. 4 cont. on p. 20)

discuss the proposed changes. In a written response dated November 26, 1979, UFW negotiator Ann Smith expressed her belief that the industry bargaining group, which included Respondent, had declared impasse in bad faith, but that the Union was ready to meet with Respondent if it was prepared to continue those negotiations or modify its bargaining position in any manner. Smith also cautioned Respondent that the Union would view any unilateral implementation of either the "quintero" system or the proposed rates as unfair labor practices.

When the parties did meet, on December 7, 1979, the Union was adamant in its position that no interim changes be made and offered Respondent two choices: sign an agreement identical to thai which the Union had completed with the Sun Harvest Company in late September 1979, or resume item-by-item bargaining from the respective positions of the parties at the time of the February 1979 impasse. Respondent was equally as set in its position that a start-of-harvest wage increase was necessary and that it could not under any circumstances adopt the Sun Harvest contract. Respondent argued that the alternative of retreating to the preimpasse stage of negotiations would not have been productive because the Union had, from Respondent's viewpoint, materially improved many of its prior proposals during subsequent negotiations with Sun Harvest.

(fn. 4 cont.)

paragraphs in which Martori discussed going to a quintero system at 80 cents per carton or staying with the conventional ground pack method but at a 75-cent rate. Moreover, Ann Smith did in fact testify that the quintero system had been mentioned in Martori's November 20 letter (RT I, p. 58, 1. 22), and that a 75-cent-lettuce-harvest piece rate also had been proposed (RT I, p. 59, 11. 3-4).

According to Smith, the parties remained fixed in their stated positions and no substantive proposals were discussed.[5/]

Upon conclusion of the meeting, as urged by Respondent, the Union promised to submit a counterproposal by December 10. Respondent testified that when it called the Union on December 10, it was assured that it could expect the proposal prior to December 14; however, the Union again failed to provide the proposal by the date promised. The ALJ credited Respondent's assertion in that regard by observing that the Union did not submit the counterproposal on the dates originally promised.

Thereafter, on December 18, Smith telephoned the office of Respondent's counsel and left a message with a secretary which she confirmed in a writing dated December 19. It is not clear when Respondent received either the oral message or the letter but, in any event, it was after the date on which the Board found Respondent had implemented the conventional-pack rate of 75 cents which it had proposed four weeks before.

In that letter, the Union proposed a rate of 80 cents per carton; i.e., five cents in excess of either Respondent's proposal, the rate Respondent actually implemented, the prevailing rate, or

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[5/]Later that same day, in an action which may be interpreted as signifying an assessment by the Union that further negotiations would not be fruitful, it served Respondent with an unfair labor practice charge in which it alleged that Respondent had engaged in bad faith bargaining in violation of Labor Code section 1153(c), (e) and (a) by implementing unlawful unilateral changes on December 7, 1979. The wage change, which was the subject of that charge, was not effectuated by Respondent until December 15, 1979.

the Sun Harvest contract rate.[6/] Respondent interpreted the counterproposal as notice from the Union that if Respondent did not adopt the Sun Harvest contract, the Union would continue to demand terms which, from Respondent's standpoint, were more onerous than those contained in the Sun Harvest agreement and offered to Respondent on December 7. As Respondent explained, in response to specific questions advanced by the ALJ, the Union did in fact reduce certain of its preimpasse demands, but the new levels were in excess of the final terms of the Sun Harvest contract. For example, the Union's medical plan proposal called for a change from 6z percent to 50 cents per hour, a reduction from the rate proposed in February, but still 15 cents over the Sun Harvest contract provision which had been offered on December 7. Similarly, the Union reduced its February pension program demand from 5 percent to 30 cents per hour, yet the same employer contribution figure in the Sun Harvest contract was significantly less (18 cents).

On December 31, 1979, Respondent conveyed to the Union its interpretation of the December 19 proposal, characterizing it as a "take it or leave it" offer to "either sign the Sun Harvest agreement with appropriate cosmetic and procedural changes, or the Union will only agree to something worse in the eyes of the

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[6/] In Bradley Washfountain Co. (7th Cir. 1951) 192 F.2d [29 LRRM 2064], cited by the U. S. Supreme Court in NLRB v. Katz, supra, 369 U.S. 736, the circuit court held that an employer could legally grant a wage increase during negotiations which was less than the union had proposed. Here, however, the Union did not timely contest the amount of Respondent's proposed wage rate and did not timely assert an alternative wage figure. Moreover, when the Union ultimately, and belatedly, submitted a specific wage demand, the figure was higher than the rate which Respondent had already in fact implemented.

employers than the Sun Harvest agreement." Respondent concluded that the parties were again at impasse and would remain so "until such time as the Union is either willing to accept the differences between [Respondent] and Sun Harvest and negotiate an appropriate agreement or until such time as the company feels compelled to sign the Sun Harvest agreement ...." The Union's reply on January 9, disputed Respondent's assessment of the Union's position with regard to Sun Harvest, as well as Respondent's assertion that the parties were at impasse, and offered to resume negotiations.

According to the findings of the ALJ in this matter, the next contact between the parties occurred on January 28, 1980, when Respondent reiterated its perception of the Union's bargaining position insofar as it related to Sun Harvest, and set forth specific concerns with respect to the Union's proposal.[7/] Respondent also expressed a willingness to continue negotiations and sought clarification on specific bargaining subjects which the Union might be willing to modify. The Union responded on February 6, again disputing Respondent's perception that the Union was steadfast in its adherence to the Sun Harvest agreement and urged Respondent to modify its proposals of February 1979. The Union also invited Respondent to meet with the Union in order that Respondent might

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[7/]On January 21, 1980, but in response to the unfair labor practice charge which the Union had filed on December 7, Respondent explained to the Regional Director of the Board's El Centro Region that it had maintained the conventional pack method but with an increase in wages at the start of the 1979-80 season to the prevailing Imperial Valley rate of 75 cents per carton. Respondent defended its action in that regard on the basis of an impasse in negotiations, historical past practices, and exigent circumstances which "commanded that [Respondent] pay the prevailing rate...in order to get its 1979-80 lettuce crop harvested."

reply to the Union's December 19 modifications. Respondent agreed to do so in a letter dated February 12, and subsequently proposed several dates to the Union in telephone calls which resulted in a meeting between the parties on March 4. Respondent agreed at that time to submit a written response to the Union's December 19 proposal, doing so in April on all items except wages which it finally sent to the Union the following month.[8/]

Since the parties were at impasse on November 19, 1979, Respondent could have lawfully implemented its last wage offer (i.e., the proposal made in February 1979) even without notification to and bargaining with the Union. However, on November 19, 1979, Respondent proposed a new and higher wage rate which constituted a modification in prior wage proposals, thus indicating a willingness to resume negotiations, based on a new proposal and thereby breaking the impasse. While Respondent thereafter vigorously resisted the whole of the Sun Harvest contract submitted by the Union, its proposed wage rate precisely paralleled that of Sun Harvest and, to that extent, indicated a willingness to accept at least some of the Sun Harvest terms.

Against this background, however, in order to properly evaluate Respondent's overall bargaining conduct, it cannot be assumed that Respondent's wage change, although a violation of the

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[8/]In its prior Decision in this matter, the Board found that Respondent had agreed to an item-by-item bargaining agenda yet concluded that Respondent's failure to complete its proposal prior to May constituted an inordinate delay which would justify a finding of bad faith bargaining. I would find that completion of the economic proposals in the month following submission of the non-economic package was not unreasonable in light of the item-by-item approach to bargaining which the parties had adopted.

Act, adversely affected the subsequent negotiations process between the parties for, as the U. S. Supreme Court explained in National Labor Relations Board v. Crompton-Highland Mills (1949) 337 U.S. 217 [69 LRRM 2088]:

> [A] unilateral grant of an increase in pay made by an employer after the same proposal has been made by the employer in the course of collective bargaining ... left unaccepted or even rejected in those negotiations ... might well carry no disparagement of the collective bargaining proceedings ... Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations. (337 U.S. 217, 224.)

Moreover, the Board is required to inquire into Respondent's motive during the bargaining process in order to determine whether the duty to bargain in good faith has been violated. (Seattle-First National Bank v. NLRB, supra, 638 F.2d 1221.) Where, as here, the Union adopts a negotiation strategy which impairs the required mutuality of effort to reach a common ground which is contemplated by the collective bargaining process, such inquiry cannot properly be made. It is apparent that the Union sought to prolong the hiatus in bargaining which began in February 1979, in order to first conclude what it intended would become a master agreement for the Imperial Valley vegetable industry (i.e., the Sun Harvest agreement which was signed in late September 1979) and then to require Respondent to agree to the Sun Harvest contract. Several objective factors support such a view. The Union's initial focus throughout the negotiations session of December 7, 1979 centered around the recently completed Sun Harvest agreement. When Respondent objected to adoption of the Sun Harvest contract, the Union responded with

proposals which were significantly in excess of Sun Harvest in order to enhance the desirability of Sun Harvest terms. A further objective factor may be found in the Union's letter of January 9, 1980, in which it stressed its adherence to a master contract concept for the Imperial Valley growers. As the Union pointed out in that same letter, many members of the industry bargaining group had been parties to "master" contracts in the past and therefore the "experience of a 'master' contract is not a new one" for those employers.

While the record does not permit an unequivocal conclusion that the Union would not accept a contract less favorable to it than the Sun Harvest agreement, there is sufficient evidence to indicate that the Union continually exhibited an intransigent position in its adherence to nothing less than Sun Harvest. Moreover, the evidence may fairly be interpreted to indicate that prolonged negotiations were a significant element in the Union's bargaining strategy since there was the possibility that a Board decision and order in the then-pending Admiral case adverse to the Employers, including Respondent herein, might net better terms in the form of a contractual makewhole remedy than would a contract result based on good faith bargaining.[9/] Accordingly, the-Board cannot engage in a meaningful evaluation of Respondent's conduct in order to determine whether its objective was to evade its duty to bargain in good

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[9/]The Union referred to the Admiral matter in its initial response to Respondent's proposal to implement a wage change, stating its belief that the impasse was declared in bad faith, "and as such, has been the subject of an ALRB hearing over the past three months." The fact that the Union filed the underlying unfair labor practice charge even before wage increases were implemented is further evidence that the Union was relying on the ALRB processes as part and parcel of its bargaining strategy.

faith. (of. Utah County Tractor Sales (1953) 103 NLRB 1711 [32 LRRM 1031], Unoco Apparel, Inc. (1974) 208 NLRB 601 [85 LRRM 1169], enforced (5th Cir. 1975) 508 F.2d 1368 [88 LRRM 2956].)

In all other respects I concur in the majority opinion.

Dated: October 7, 1985

JYRL JAMES-MASSENGALE, Chairperson

APPENDIX A

(Martinez Crew)

Employee	BACK PAY	TOTAL OWING (Backpay plus makehole supplement)
1. Acosta, Alfonso	$70.97	$90. 99
2. Acosta, Ruben	$70.97	$90. 99
3. Amial, Antonio	$70.97	$90. 99
4. Contreras, Mario	$70.97	$90. 99
5. Espinoza, Jesus	$70.97	$90. 99
6. Flores, Roberto	$70.97	$90. 99
7. Garcia, Fausto V.	$70.97	$90. 99
8. Garcia, Jose L.	$70.97	$90. 99
9. Guerrero, Celio	$70.97	$90. 99
10. Hernandez, Israel	$70.97	$90. 99
11. Izaguirre, Benito	$70.97	$90. 99
12. Perez, Ismael	$70.97	$90. 99
13. Rico, Lorenzo	$70.97	$90. 99
14. Robles, Francisco	$70.97	$90. 99
15. Robles, Rodolfo	$70.97	$90. 99
16. Sandoval, Marcos	$70.97	$90. 99
17. Sandoval, Margarito	$70.97	$90. 99
18. Valenzuela, Jose	$70.97	$90. 99
19. Villarreal, Vicente	$70.97	$90. 99
20. Villavicencio, Constantino		

Formula: Back Pay/.78 = Total Owing S70.97/.78 = $90.99

APPENDIX B

(Losses From Cessation of Transportation)

NAME	TRANSPORTATION EXPENSE	LOST WORK	TOTAL OWING
Lorenzo Rico	$2.50/day x 23 Days = $57.50	-0-	$129.00
Mario Contreras	$3.00/day x 43 days = $129.00	-0-	$ 57.50
Moises Soto	$3.00/day x 20 days = $60.00	2/13/79 $106.45 2/15/79 $115.43 2/16/79 $ 88.36 $310.24	$370.24
Ignacio Soto	$3.00/day x 9 days = $27.00	2/13/79 $106.45 2/15/79 $115.43 2/16/79 $ 88.36 $310.24 (Less $27/day interim earnings) = $229.24	$256.24

APPENDIX C
(Makewhole for Farm Employees)

1.	Briseno, Eduardo	$447 .98
2.	Briseno, Refugio	$825 .60
3.	Betaran, Jose	$102 .96
4.	Bustamonte, Mike	$410 .95
5.	Caballero, Isaac	$ 8 .83
6.	Caballara, Joe	$338 .95
7.	Cano , Donaciano	$549 .26
8.	Fernandez , Tony	$ 99 .79
9.	Gavelon, Gilbert H.	$ 8 .45
10.	Gonzales, Joaguin	$ 98 .74
11	Juarez , Juan	$ 15 .85
12.	Lara, Guadalupe	$602 .41
13.	Lopez , Antonio	$ 5 .28
14.	Martinez , Eduardo	$ 20 .06
15.	Moreno, Ramon	$675 .12
16.	Navarro, Fren	$ 57 .02
17.	Navarro, Jose	$ 26 .40
18.	Navarro, Octavio R.	$ 20 .06
19.	Ortega, Miguel	$ 8 .45
20.	Pacheco , Ramon	$227 .04
21.	Palomares, Pedro	$416 .33

Formula: [(Hours worked x Adam Dairy proportional increase) - actual wages paid] x Adam Dairy multiplier (1.20) = makewhole amount owed.

APPENDIX C CONTINUED

22.	Rodriquez, Abel	$ 5.28
23.	Rodriquez, Gilbert	$ 48.58
24.	Ruesgas, Guadalupe	$571.54
25.	Ruiz, Daniel	$ 21.12
26.	Salas, Isaac	$ 45.94
27.	Salas, Jimmy	$ 45.94
28.	Salas, Noel	$ 32.21
29.	Santiago, M. A.	$482.72
30.	Sosa, Henry	$ 50.69
31.	Vallejo, John	$ 98.74
32.	Verdugo, Paul	$ 74.16
33.	Ybarra, Angel	$745.16
34.	Ybarra, Herbert	$385.51
35.	Ybarra, Servando	$1056.83
36.	Ybarra, Steven	$ 8.45

ATTACHMENT TO APPENDIX C

(Wage Rates - Farm Employees)

MARTORI	ADAM DAIRY FORMULA
Regular	Proportional Increase
$4.12	$5.00
$4.18	$5.07
$4.33	$5.25
$4.80	$5.83
$4.90	$5.95
Overtime	
$6. 18	$7.50
$6.27	$7.61
$6.495	$7.88
$7.20	$8.74
$7. 35	$8.92

APPENDIX D

(Makewhole for Harvest Employees)

1.	Acosta, Alfredo	$483.47
2.	Acosta, Gilberto	$ 10.34
3.	Acosta, Israel	$ 25.45
4.	Acosta, Jaime	$ 14.80
5.	Acosta, Ruben	$496.63
6.	Aguilar, Cirilo	$ 14.19
7.	Ahumanda, Victor	$308.80
8.	Alanis, Arturo	$ 89.09
9.	Alvarez, Manuel	$ 85.59
10.	Alvarez, Paul	$ 85.59
11.	Amial, Antonio	$446.96
12.	Arrendondo, Roberto	$ 9.32
13.	Arzola, Bias	$299.83
14.	Arzola, Leopoldo	$369.22
15.	Arzola, Santos	$323.91
16.	Astobio, Esteban	$ 14.19
17.	Camacho, Jacinto	$ 16.39
18.	Castillo, Juan	$425.84
19.	Cardona, Armundo	$ 93.25
20.	Cavello, Ignacio	$ 45.06
21.	Chaires, Edward	$ 5.48

Formula: (Actual wages earned x Adam Dairy multiplier (1.20))-actual wages earned = makewhole amount owed. (See Attachment 2.)

APPENDIX D CONTINUED

22.	Chaires, Eduardo	$312.53
23.	Chavez , Lorenso	$ 29.85
24.	Chavez , Martin	$517.70
25.	Contreras, Jesus	$ 14.19
26.	Contreras, Mario L.	$451.69
27.	Corona, Jesse	$311.24
28.	Corona, Jose	$112.90
29.	Corona, Luis Q.	$ 67.85
30.	Coronado, David	$232.78
31.	Cruz, Alejandro	$ 74.17
32.	Delgado, Luis	$406.46
33.	Domenquez, Francisco	$232.93
34.	Duran, Pedro	$226.57
35.	Enciso, M.	$129.09
36.	Enriquez, Leopoldo	$ 16.64
37.	Escobar, Alonso	$504.76
38.	Escobar, Jose	$ 6.94
39.	Espinosa, Fernando	$ 78.39
40.	Espinoza, Jesus	$458.43
41 .	Estrada, C. Ruben	$265.07
42.	Farfan, Daniel	$ 39.53
43.	Fimbres, Andres	$104.92
44.	Flores, Roberto	$560.12
45.	Galindo, Carlos	$368.18
46.	Garcia, Benjamin	$ 13.53
47.	Garcia, Fausto V.	$415.24

APPENDIX D CONTINUED

48.	Garcia, Jesus	$ 25.45
49.	Garcia, Jose L.	$423.43
50.	Garcia, Manuel	$104.92
51.	Garcia, Miguel	$ 20.76
52.	Garcia, Oscar	$195.67
53.	Garcia, Ramon	$357.72
54.	Giner, Larry	$203.76
55.	Gonzales, Cornelia	$ 14.19
56.	Gonzales, Emigdio	$ 14.80
57.	Gonzales, Hermigoio	$409.95
58.	Gonzales, Horacio	$205.68
59.	Gonzales, Horacio	$ 14.80
60.	Gonzales, Ignacio	$ 18.36
61.	Gonzales, Jose	$143.42
62.	Gonzales, Jose C.	$163.49
63.	Govea, Benjamin	$366.25
64.	Govea, Francisco F.	$366.25
65.	Govea, Ramon	$277.42
66.	Grando, Norberto	$274.34
67.	Granado, Norberto	$ 21.93
68.	Guerrero, Celio N.	$439.92
69.	Gutierrez, Jose Perez	$ 50.91
70.	Gutierrez, Richard	$ 7.89
71.	Haro, Luis	$408.59
72.	Hernandez, Israel	$351.49
73.	Hernandez, Juan	$127.87

APPENDIX D CONTINUED

74.	Izaquirre, Benito	$460 .08
75.	Juarez, Jesus	$525 .59
76.	Larson, Mariano	$602 .22
77.	Leyva, Phil	$480 .24
78.	Lizzarago, Guadalupe	$ 9 .82
79.	Lopez, Antonio	$ 78 .22
80.	Lopez, M. Alfredo	$ 52 .36
81.	Lopez, Rafael	$ 14 .19
82.	Lopez, Roberto	$579 .34
83	Lopez , Haul	$ 94 .72
84.	Lozano, T. Godora	$ 38 .69
85	Madrid, Stanley	$ 11 .26
86.	Marines, Anselmo	$489 .52
87.	Marquez, Luis	$175 .07
88.	Martinez, Jimmy J.	$234 .16
89.	Martinez, Pedro	$319 .78
90.	Martinez , Pedro	$ 5 .48
91.	Martinez, Serjio	$131 .04
92.	Medino, Manuel	$ 83 .04
93.	Mesa, Alejandro	$ 20 .93
94.	Miguel, Jose	$ 36 .32
95.	Molina, Francisco	$ 66 .20
96.	Mondoza, Salvador	$ 21 .14
97.	Montoya, Marcelino	$ 14 .19
98.	Morales, Luis K.	$ 89 .09
99.	Morales, Miguel	$474 .22

APPENDIX D CONTINUED

100. Morales, Miguel	$ 11.91
101. Moreno, Roberto	$504.76
102. Murillo, Everado	$ 60.82
103. Murillo, Ignacio	$592.65
104. Murillo, Maria Hortado	$438.89
105. Murillo, Teofilo	$455.42
106. Navarro, Conrado	$390.90
107. Ontiveros, Martin	$ 18.14
108. Ortega, Moises	$ 14.80
109. Ortiz, Enrique	$328.59
110. Parra, Hector	$ 89.04
111. Perez, Ismael	$402.42
112. Perez, Jamie	$ 20.48
113. Perez, Jaime	$165.03
114. Perez, Juan B.	$601.58
115. Perez, Juan V.	$ 1.58
116. Perez, Valdemar	$601.58
117. Perez, Valdemar	$ 5.48
118. Quintero, Ernesto	$ 14.80
119. Quintero, Ernesto	$501.91
120. Ramirez, David	$154.10
121. Ramirez, Francisco M.	$435.32
122. Rios, Jesus	$515.00
123. Rios, Jesus	$ 14.80
124. Rico, Lorenzo	$357.48
125. Rios, Lorenzo C.	$ 19.17
126. Rios, Ramiro	$360.64

APPENDIX D CONTINUED

127.	Rios, Ramiro	$105 .02
128.	Rivera, Santos	$451 .65
129.	Robles, Alf redo	$ 7 .18
130.	Robles, Francisco	$414 .62
131.	Robles, Roberto	$ 65 .18
132.	Robles, Rodolfo	$470 .62
133.	Robles, Victor	$ 14 .19
134.	Rocha, Marcos	$460 .07
135.	Rodriquez, Enrique	$492 .15
136.	Rodriquez, Luis	$ 52 .36
137.	Resales, Fidel	$ 80 .38
138.	Salazar, Federico	$ 14 .19
139.	Salazar, Refugio	$ 14 .19
140.	Saldivar, Antonio	$ 55 .79
141.	Saldivar, Elias	$ 80 .09
142.	Salvador Torres	$116 .05
143.	Sanchez , Carlos	$ 25 .22
144.	Sandoval, Jesus	$ 10 .59
145.	Sandoval, Jorge	$ 23 .28
146	Sandoval, Jose	$517 .70
147.	Sandoval, Pedro	$525 .59
148.	Sandoval, Marcos	$451 .30
149.	Sandoval, Mario	$ 39 .01
150.	Sandoval, Margarita	$419 .34
151.	Sandoval, Miguel	$362 .02
152.	Saurez, Saturino	$ 5 .48

APPENDIX D CONTINUED

153.	Savaia, Salvador	$ 14.19
154.	Sedano, Jose	$422.06
155.	Sepeda, Lucio	$ 14.19
156.	Sigmond, Carlos D.	$ 17.44
157.	Soils, Elias	$ 14.19
158.	Sota, Federico	$138.49
159.	Soto, Moises	$122.99
160.	Ulloa, Antonio	$ 52.13
161.	Ulloa, Gabino	$ 5.48
162.	Uloa, Gavino	$458.85
163.	Valenzuela, Arnulfo	$119.72
164.	Valenzuela, Jose M.	$443.36
165.	Valenzuela, Manuel	$ 14.80
166.	Valenzuela, Martin	$119.72
167.	Valenzuela, Regilio	$104.92
168.	Valenzuela, Reginaldo	$ 14.19
169.	Villa, Henry	$239.47
170.	Villareal, Vicente	$470.91
171.	Villavicencio, Castantin	$417.29

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

1	2	3	4	5	6
EMPLOYEE NAME	HOURLY WAGES PAID	WAGES PAID x hrs. wrk.	ADAM FORM. x hrs wrk.	DIFFERENCE (=)	AMOUNT OWED (x1.20)
Guadalupe Buenaga	4 12	3 37 84	4 10 00	72 16	86 59
	4 18	12 22 48	22 10 52	388 04	465 65
	6 27	75 24	91 32	16 08	19 30
					571 54
Guadalupe Lara	4 12	41 6 12	50 5 00	88 88	106 66
	4 18	173 8 88	210 9 12	370 24	444 29
	6 27	20 0 64	24 3 52	42 88	51 46
					602 41
Refugio Briceno	4 12	11 5 36	14 0 00	24 64	29 57
	4 18	116 2 04	140 9 46	247 42	296 90
	4 33	125 1 37	151 7 25	265 88	319 06
	6 27	18 8 10	28 8 30	100 20	120 24
	6 495	23 3 82	28 3 68	49 86	59 83
					825 60
Edmundo Briceno	2 06	2 06	2 50	44	53
	4 12	110 0 04	133 5 00	234 96	281 95
	4 18	70 2 24	85 1 76	149 52	179 42
	6 27	6 2 70	7 6 10	13 40	16 08
					477 98
M. J. Santiago	2 06	2 06	2 50	44	53
	4 12	70 2 46	85 2 50	150 04	180 05
	4 18	104 5 00	126 7 50	222 50	267 00
	6 27	7 5 24	9 1 32	16 08	19 30
	6 18	6 1 80	7 5 00	13 20	15 84
					482 72
Mike Bustamonte	2 06	2 06	2 50	44	53
	4 12	148 7 32	180 5 00	317 68	381 22
	4 90	73 50	89 25	15 75	18 90
	6 18	40 17	48 75	8 58	10 30
					410 35
Pedro Primavera	2 06	2 06	2 50	44	53
	4 12	158 2 08	192 0 00	337 92	405 50
	6 18	40 17	48 75	8 58	10 30
					416 33

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

1	2	3	4	5	6
EMPLOYEE NAME	HOURLY WAGES PAID	WAGES PAID x hrs. wrk.	ADAM FORM. x hrs wrk.	DIFFERENCE (=)	AMOUNT OWED (x1.20)
Gilbert Rodriguez	4.12	189.52	230.00	40.48	48.58
Henry Soza	4.12	197.76	240.00	42.24	50.69
Miguel Ortega	4.12	32.96	40.00	7.04	8.45
Steven Ybarra	4.12	32.96	40.00	7.04	8.45
Herbert Ybarra	4.80	1353.60	1644.06	290.46	348.55
	7.20	144.00	174.80	30.80	36.96
					385.51
John Vallejo	4.12	354.32	430.00	75.68	90.82
	6.18	30.90	37.50	6.60	7.92
					98.74
Ramon Pacheco	2.06	2.06	2.50	.44	.53
	4.12	883.74	1072.50	188.76	226.51
					227.04
Juan Navarro	4.12	222.48	270.00	47.52	57.02
Noel Salas	4.12	94.76	115.00	20.24	24.29
	6.18	30.90	37.50	6.60	7.92
					32.21
Ramon Moreno	4.90	2332.40	2832.20	499.80	599.76
	7.35	294.00	356.80	62.80	75.36
					675.12
Serrando Ybarra	4.90	3728.90	4527.95	799.05	958.86
	7.35	382.20	463.84	81.64	97.97
					1056.23
Angel Ybarra	4.80	2721.60	3305.61	584.01	700.81
	7.20	172.80	209.76	36.96	44.35
					745.16
Joe Caballero	4.12	1219.52	1480.00	260.48	312.58
	4.80	62.40	75.79	13.39	16.07
	6.18	40.17	48.75	8.58	10.30
					338.95

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

1	2	3	4	5	6
EMPLOYEE NAME	HOURLY WAGES PAID	WAGES PAID x hrs. wrk.	ADAM FORM. x hrs wrk.	DIFFERENCE (=)	AMOUNT OWED (x1.20)
Graciano Cano	490	201880	245140	43260	51912
	735	11760	14272	2512	3014
					54926
Paul Verdugo	480	28800	34980	6180	7416
Jose Betran	412	30900	37500	6600	7920
	460	8280	10260	1980	2376
					10296
Daniel Ruiz	412	8240	10000	1760	2112
Abel Rodriguez	412	2060	2500	440	528
Isaac Caballero	433	3464	4200	736	883
Joaquin Gonzales	412	35432	43000	7568	9082
	618	3090	3750	660	792
					9874
Juan Juarez	412	6180	7500	1320	1584
Jose Navarro	412	10300	12500	2200	2640
Tony Fernandez	412	35844	43500	7656	9187
	618	3090	3750	660	792
					9979
Antonio Lopez	412	2060	2500	440	528
Jimmy Salas	412	14832	18000	3168	3802
	618	3090	3750	660	792
					4594
Isaac Salas	412	14832	18000	3168	3802
	618	3090	3750	660	792
					4594
Gilbert A Longelon	412	3296	4000	704	845

BACKPAY COMPUTATION WORKSHEET (FARMING EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
EMPLOYEE NAME		HOURLY WAGES PAID	WAGES PAID x hrs. wrk.	ADAM FORM. x hrs wrk.	DIFFERENCE (=)	AMOUNT OWED (x1.20)
Eduardo Martinez		4.12	78.28	95.00	16.72	20.06
Octavio R Navarro		4.12	78.28	95.00	16.72	20.06

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

EMPLOYEE NAME	1	2	3	4 ACTUAL WAGES	5 MULTIPLIER (x1.20) (=)	6 AMOUNT OWED
Navarro, Conrado				195448	234538	39090
Sedano, Jose				211030	253236	42206
Sandoval, Pedro				262795	315354	52559
Perez, Valdemar				300790	360948	60158
Perez, Juan B				300790	360948	60158
Rios, Jesus				257499	308999	51500
Rodriguez, Enrique				246073	295288	49215
Reyes, Phil				240118	288142	48024
Juarez, Jesus				262795	315354	52559
Escobar, Alonso				252379	302855	50476
Chavez, Martin				258850	310620	51770
Ybarra, Roberto				252379	302855	50476
Chumanda, Victor				154399	185279	30880
Morales, Miguel				237112	284534	47422
Grando, Roberto				137170	164604	27434
Sandoval, Jose				258850	310620	51770
Rocha, Marcos				230037	276044	46007
Castillo, Juan				212921	255505	42584
Ontiveros, Martin				9068	10882	1814
Cruz, Alejandro				37085	44502	7417

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF Made in U.S.A.

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

EMPLOYEE NAME	1	2	3	4 ACTUAL WAGES	5 MULTIPLIER (x1.20) (=)	6 AMOUNT OWED
Rico, Lorenzo				178742	214490	35748
Contreras, Mario R				225847	271016	45169
Perez, Juan V.				789	947	158
Gonzales, Emigdio				7400	8880	1480
Gonzales, Horacio				7400	8880	1480
Martinez, Pedro				2738	3286	548
Perez, Valdimar				2738	3286	548
Rios, Jesus				7400	8880	1480
Valenzuela, Manuel				7400	8880	1480
Ulloa, Hermo				2738	3286	548

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF Made in U.S.A.

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
EMPLOYEE NAME				ACTUAL WAGES	MULTIPLIER (x1.20) (=)	AMOUNT OWED
Landaval, Jorge				116638	139966	2328
Lopez, M Alfredo				261822	314186	5232
Alvarez, Paul				427955	513546	8559
Alvarez, Manuel				427955	513546	8559
Acosta, Alfredo				241737	290084	48347
Acosta, Ruben				248317	297980	49663
Bonenguez, Francisco				116464	139757	23293
Lota, Federico				69245	83094	13849
Gonzalez, Ignacio				9182	11018	1836
Murillo, Teofilo				227708	273250	45542
Murillo Tijaria Cortado				219443	263332	43889
Murillo, Everardo				30411	36493	6082
Landaval, Margarito				209671	251605	41934
Landaval, Manuel				225649	270779	45130
Garcia, Jose L				211714	254057	42343
Garcia, Fausto V				207620	249144	41524
Robles, Rodolfo				235312	282374	47062
Villa, Henry				119737	143684	23947
Haro, Luis				204293	245152	40859
Guerrero, Celio R				219960	263952	43942

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF Made in U.S.A.

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

EMPLOYEE NAME	1	2	3	4 ACTUAL WAGES	5 MULTIPLIER (x1.20) (=)	6 AMOUNT OWED
Corona, Jose				56452	67742	11290
Delgado, Luis				203228	243874	40646
Lopez, Raul				47359	56831	9472
Chavez, Lorenzo				14923	17908	2985
Corona, Luis Z.				33923	40708	6785
Galindo, Carlos				184090	220908	36818
Ynoea, Benjamin				183127	219752	36625
Ynoea, Francisco J.				183127	219752	36625
Martinez, Pedro				159890	191868	31978
Sandoval, Jesus				5296	6355	1059
Chaires, Eduardo				156263	187516	31253
Camacho, Jacinto				8194	9833	1639
Granado, Roberto				109666	131159	21493
Espinosa, Fernando				39194	47033	7839
Ynoea, Ramon				138708	166450	27742
Estrada, C. Ruben				132533	159040	26507
Ortiz, Enrique				164293	197152	32859
Lizarraga, Guadalupe				4908	5890	982
Rodriguez, Luis				26182	31418	5236
Yguillo, Ignacio				296326	355591	59265

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF MADE IN U.S.A.

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

EMPLOYEE NAME	1	2	3	4 ACTUAL WAGES	5 MULTIPLIER (x1.20) (=)	6 AMOUNT OWED
Miguel, Jose				18160	21792	3632
Marquez, Luis				87536	105043	17507
Quintero, Ernesto				250955	301146	50191
Morales, Luis R				44545	53454	8909
Alaniz, Arturo				44545	53454	8909
Garcia, Oscar				97837	117404	19567
Martinez, Sergio				65519	78623	13104
Gonzalez, Hermicio				204977	245972	40995
Moreno, Anselmo				244759	293711	48952
Rios, Ramiro				180319	216383	36064
Ramirez, Francisco M				217660	261192	43532
Ulloa, Hermino				229424	275309	45885
Perez, Jamie				10240	12288	2048
Gonzalez, Jose				71710	86052	14342
Rivera, Santos				225827	270992	45165
Rios, Ramiro				52508	63010	10502
Gonzalez, Horacio				102838	123406	20563
Medina, Manuel				41521	49825	8304
Gutierrez, Richard				3946	4735	789
Covello, Ignacio				22528	27034	4506

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF Made in U.S.A.

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

EMPLOYEE NAME	1	2	3	4 ACTUAL WAGES	5 MULTIPLIER (x1.20) (=)	6 AMOUNT OWED
Gimbres, Andres				524.59	629.51	104.92
Molina, Francisco				331.00	397.20	66.20
Sigmond, Carlos D.				87.22	104.66	17.44
Coronado, David				1163.88	1396.66	232.78
Farfan, Daniel				197.63	237.16	39.53
Corona, Jesse				1556.20	1867.44	311.24
Amial, Antonio				2234.78	2681.74	446.96
Meca, Alejandro				104.67	125.60	20.93
Acosta, Gilberto				51.68	62.02	10.34
Enriquez, Leopoldo				83.22	99.86	16.64
Saldivar, Elias				400.47	480.56	80.09
Diner, Larry				1018.78	1222.54	203.76
Sanchez, Carlos				126.11	151.33	25.22
Saldivar, Antonio				278.96	334.75	55.77
Garcia, Manuel				524.59	629.51	104.92
Garcia, Jesus				127.27	152.72	25.45
Gonzalez, Cornelio				70.97	85.16	14.19
Lopez, Rafael				70.97	85.16	14.19
Montoya, Marcelino				70.97	85.16	14.19
Mondoza, Salvador				105.68	126.82	21.14
Rosales, Fidel				401.90	482.28	80.38
Robles Victor				70.97	85.16	14.19
Solis, Elias				70.97	85.16	14.19
Soto, Moises				614.95	737.94	122.99
Sepeda, Lucio				70.97	85.16	14.19
Saravia, Salvador				70.97	85.16	14.19
Salazar, Refugio				70.97	85.16	14.19
Salazar, Federico				70.97	85.16	14.19
Salvador, Sosa				580.24	696.29	116.05
Valenzuela, Agustin				70.97	85.16	14.19
Valenzuela, Martin				598.58	718.30	119.72
Vizenzuela, Rigilio				524.59	629.51	104.92
Madrid, Stanley				56.30	67.56	11.26
Escobar, Jose				34.71	41.65	6.94
Ulloa, Antonio				260.67	312.80	52.13
Gutierrez, Jose Perez				254.57	305.48	50.91
Robles, Ignedo				35.91	43.09	7.18
Garcia, Miguel				103.81	124.57	20.76
Rios, Lorenzo C.				95.86	115.03	19.17
Acosta, Jaime				74.00	88.80	14.80

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF Made in U.S.A.

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
EMPLOYEE NAME				ACTUAL WAGES	MULTIPLIER (x1.20) (=)	AMOUNT OWED
Ortega, Moises				74.00	88.80	14.80
Quintero, Ernesto				74.00	88.80	14.80
Saurez, Saturino				27.38	32.86	5.48
Arendondo, Roberto				46.62	55.94	9.32
Hernandez, Israel				1757.44	2108.93	351.49
Garcia, Ramon				1788.60	2146.32	357.72
Lozano, Teodora				193.45	232.14	38.69
Arzola, Leopoldo				1846.09	2215.31	369.22
Lopez, Antonio				391.09	469.31	78.22
Izaguirre, Benito				2300.39	2760.47	460.08
Robles, Francisco				2073.12	2487.74	414.62
Villavicencio, Costantin				2086.47	2503.76	417.29
Valenzuela, Jose M				2216.82	2660.18	443.36
Villareal, Vicente				2354.57	2825.48	470.91
Gonzales, Jose L.				817.47	980.96	163.49
Espinoza, Jesus				2292.14	2750.57	458.43
Garcia, Benjamin				67.67	81.20	13.53
Encinas, M.				645.46	774.55	129.09
Arzola, Santos				1619.53	1943.44	323.91
Arzola, Elso				1499.17	1799.00	299.83
Duran, Pedro				1132.85	1359.42	226.57
Sandoval, Miguel				1810.08	2172.10	362.02
Martinez, Jimmy J.				1170.81	1404.97	234.16
Perez, Ismael				2012.08	2414.50	402.42
Larson, Mariano				3011.11	3613.33	602.22
Lopez, Roberto				2896.68	3476.02	579.34
Flores, Roberto				2800.62	3360.74	560.12
Hernandez, Juan				639.35	767.22	127.87
Robles, Roberto				325.88	391.06	65.18
Cardona Armando				466.26	559.51	93.25
Parra, Hector				445.22	534.26	89.04
Perez, Jaime				825.16	990.19	165.03
Ramirez, David				770.51	924.61	154.10
Sandoval, Mario				195.05	234.06	39.01
Morales, Miguel				59.54	71.45	11.91
Vizcaino, Ernesto				598.58	718.30	119.72
Acosta, Israel				127.27	152.72	25.45
Aguilar, Cirilo				70.97	85.16	14.19
Astorio, Esteban				70.97	85.16	14.19
Contreras, Jesus				70.97	85.16	14.19

NATIONAL 45-606 EYE-EASE 45-706 20/20 BUFF Made in U.S.A.

BACKPAY COMPUTATION WORKSHEET (HARVEST EMPLOYEES)

MARTORI BROTHERS, 79-CE-187-EC, et al.

	1	2	3	4	5	6
EMPLOYEE NAME				ACTUAL WAGES	MULTIPLIER (x1.20) (=)	AMOUNT OWED
Chaires, Edward				2738	3286	548

CASE SUMMARY

Martori Brothers
(UFW)

Case Nos. 79-CE-187-EC et al.
11 ALRB No. 26
(8 ALRB No. 23)

ALJ DECISION

Following a summary denial of a petition for review of the Board's liability decision by the Court of Appeal, a compliance proceeding was held in the instant case. The ALJ determined the amount of backpay due to the 20 members of the Martinez lettuce harvesting crew who had been unlawfully discharged. In addition, the ALJ concluded that these employees were also entitled to makewhole relief. The ALJ recommended that an escrow account be established for the backpay and makewhole amounts due to discriminatees who did not testify at the proceeding. The ALJ interpreted the Board's Order to make employees whole "for any loss of pay or other economic losses" resulting from Respondent's discontinuance of bus transportation to include the actual cost of alternate transportation as well as the amount of pay for work missed due to the employees' inability to secure alternate transportation. He calculated the amounts owed to six testifying employees. In addition, he recommended that other potential claimants be allowed a period of two years from the date of the Board's supplemental decision to present their claims. As a primary matter on the issue of makewhole, the ALJ concluded that Respondent's Arizona harvesting crews are not entitled to makewhole relief. He concluded that Respondent's alternate makewhole formula did not present a more appropriate calculation of the makewhole due to Respondent's employees since the operations of the agricultural employees whose contracts were submitted by Respondent did not contain operations comparable to Respondent. He found that the Sun Harvest contract was an appropriate comparable contract.

BOARD DECISION

The Board did not adopt the ALJ's recommendation to permit potential claimants more time to present their claims of economic loss due to Respondent's discontinuance of bus transportation. In addition, while the Board agreed with the ALJ that only employees working in California are entitled to makewhole relief, it found that the ALJ's "contact" analysis of the jurisdictional issue was not applicable to the facts of this case. In all other respects, the Board adopted the findings and conclusions of the ALJ. It also proceeded to calculate the makewhole amounts due to Respondent's employees.

DISSENT

Chairperson Massengale dissented in part from the Board's Decision. She believes that the Board's Decision in the liability case is inextricably intertwined with the Board's findings in Admiral Packing (1981) 7 ALRB No. 43. Since that case was reversed

by the Court of Appeal, the dissent believes there is insufficient evidence to support the Board's finding that Respondent engaged in surface bargaining.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: MARTORI BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-187-EC 80-CE-10-EC 80-CE-91-EC (8 ALRB No.

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Appearances:

Darrell Lepkowsky, Esq.
of El Centro, California
for the General Counsel

Sarah A. Wolfe, Esq.
Dressier, Quesenbery, Laws of Barsamian
El Centro, California
Charley M. Stoll, Esq.
Merrill, Schultz, Hersh & Stoll
of Newport Beach, California
for the Respondent

Ira L. Gottlieb, Esq.
of Keene, California
for the Charging Party

Before: Stuart A. Wein
Administrative Law Judge

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STUART A. WEIN, Administrative Law Judge:

On 23 March 1982, the Agricultural Labor Relations Board (hereinafter "Board") issued a Decision and Order in the above-captioned proceeding finding, inter alia, that Respondent had violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter the "Act" or "ALRA") by unlawfully discharging members of the Martinez (lettuce harvesting) crew. Respondent was further found to have violated section 1153(e) of the Act by unilaterally discontinuing bus transportation from Calexico to job sites in Brawley. Finally, Respondent was found to have violated Labor Code section 1153(e) and (a) by unilaterally increasing employees' wages in the absence of bona fide impasse and engaging in surface bargaining with the UFW regarding a collective bargaining agreement. The Board directed that Martori:

(1) "(m)ake whole all agricultural employees employed in the Martinez crew on December 5, 1979, (sic)[1] for any loss of pay and other economic losses they have suffered as a result of their discharge . . . plus interest thereon at a rate of seven percent per annum" (¶2e);

(2) "(m)ake whole each employee employed since January 1979, for any loss of pay and other economic losses resulting from Respondent's discontinuance of the Calexico bus transportation for workers" (¶2a);

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1. By Erratum issued on 26 April 1982, the Board corrected certain dates in its original Order and Notice to Agricultural Employees. Additionally, all parties have agreed that the date of the discharge of the Martinez crew was 5 February 1980. See discussion, infra.

(3) "(m)ake whole all of its agricultural employees for any loss of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to bargain in good faith with the UFW regarding a collective bargaining agreement and the wage increases Respondent unlawfully granted to its employees in December 1979, plus interest computed at seven percent per annum" (¶2d).

Respondent's Petition for Review was summarily denied by the Court of Appeal for the Fourth Appellate District, Division One, on 3 September 1982. Hearing was denied by the California Supreme Court on 29 September 1982.

The parties were unable to agree on the amounts due any of Respondent's employees, and on 16 July 1983, the Regional Director of the ALRB (El Centro Region) issued a Makewhole/Backpay Specification. Respondent served its Answer to Makewhole/Backpay Specification on 29 July 1983.[2/] On 4 August 1983, a First Amended Makewhole/Backpay Specification was issued, and Respondent filed a First Amended Answer on 19 August 1983. At the hearing held before me in El Centro, California, on 16 August 1983, General Counsel further moved to amend its Makewhole/Backpay Specification to take into account newly discovered information concerning the loss of transportation issue.

Either by way of pleading, motions, stipulations or references in post-hearing briefs, the parties have contested the following:

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2. The document was filed on 3 August 1983.

I. ISSUES

A. Backpay Due the Martinez Crew (6 February 1980)

The parties dispute whether these employees are entitled to any make-whole supplement for the one (1) day they were "discharged" by virtue of the findings concerning the bargaining violations in Paragraph 2(d) of the underlying decision. Additionally, there is no agreement as to the mechanism by which to pay the discriminatees -- a majority of whom were unavailable to testify at the time of hearing.

B. Makewhole Due Employees Resulting From Discontinuance of the Calexico Bus Transportation

Apart from the factual issue of when the transportation was discontinued,[3/] the parties disagree about the sufficiency of proof of various out-of-pocket expenses, the propriety and documentation of various claims for work loss resulting from the discontinuance, and the status of the claims of employees "missing" at the time of the hearing.

C. Makewhole (Bargaining)

The parties disagree on virtually all aspects of this issue including the period of liability, the identity of the employees entitled to makewhole (i.e., whether or not to include Respondent's Arizona harvesting crews), the prevailing wage rates for

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3. No finding of the precise date of the discontinuance was rendered in the underlying decision. See 8 ALRB No. 23, supra, ALJD, p. 17, footnote 17.

Respondent's farm[4] employees, and the calculation of fringe benefits owing. Additionally, Respondent has raised various affirmative defenses re the appropriateness of make-whole relief in general, as well as the specific methodologies proposed by General Counsel.

D. Interest Rate

By motion filed 19 July 1983,[5] General Counsel has requested that the Board modify the seven (7) percent interest rate ordered in 8 ALRB No. 23, supra, to the rate established in Lu-Ette Farms (1982) 8 ALRB No. 55. Respondent opposes this modification request.[6]

All parties were given a full opportunity to participate in the proceedings, and General Counsel and Respondent filed post-hearing briefs. Upon the entire record, including by observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings:

II. BACKPAY OWING THE MARTINEZ CREW

All parties agree that the Martinez crew members entitled to backpay were appropriately identified in General Counsel's original backpay/makewhole specification (GCX 1-G). There is no

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4. All parties agree that Respondent paid "prevailing wages" to its (California) harvesting crews.

5. GCX 1-H.

6. GCX 1-L.

dispute re the period (one day) of liability — 6 February 1980. Nor does any party contest the methodology of calculating the backpay due -- by reference to the wages of a cutter/packer who actually worked on 6 February 1980.[7/] Thus, each of the 20 discriminatees listed in the specification is entitled to $70.97 as backpay.

In Dutch Brothers (1977) 3 ALRB No. 80, review denied, Ct. App., 2d Dist., Div. One, August 18, 1979, the Board suggested that discriminatees are entitled to wages they would have earned had they remained in Respondent's employ, including the make-whole supplement (less interim earnings from other sources) during the backpay period. Thus, the 20 discriminatees from the Martinez crew are entitled to the net backpay plus the makewhole "supplement" hereinafter formulated, as compensation for Respondent's unlawful conduct -- which conduct not only resulted in the loss of salary for one day, but also in the economic losses calculated in the contractual makewhole portion of this decision insofar as those losses are coterminous with this (limited) backpay period. Such a "double" award is no more punitive than any award to discriminatees who may have been replaced by a wrongdoing Respondent during the backpay period. The "dual" nature of the award is required to fully remedy Respondent's "overlapping" misconduct, and the discriminatees are merely placed in the same position they would have been -- e.g., on Respondent's 6 February 1980 payroll at wages/fringes consistent with the contractual makewhole analysis

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7. All individuals in these particular job categories earned equivalent sums on the date in question.

discussed infra -- had there been no unlawful acts by Respondent. I therefore recommend that each of the 20 discriminatees identified in the specification be awarded the net backpay and make whole supplement indicated in Appendix A attached herewith.

I also recommend that said award should be made directly to the discriminatees -- Lorenzo Rico and Mario Contreras -- who testified at the compliance hearing and for whom no mitigation proof was adduced. With respect to the eighteen remaining discriminatees who were missing at the time of the hearing,[8] I recommend that the amounts awarded by held in escrow by the Regional Director, who is to make suitable arrangements to accord the Respondent, together with the General Counsel's representative, an opportunity to examine them as to any interim earnings or any other factors which may reduce the amount of net backpay due under existing Board precedent. In the event the Regional Director determines that deductions are warranted, the amount so deducted shall be returned to the Respondent. I further recommend that the Regional Director be instructed to report to the Board when these matters have been finally resolved, and in any event, no later than one year from the date of the Board's supplemental decision in this regard. (See Mastro Plastics Corporation (1962) 136 NLRB 1342, enforced in relevant part (2d Cir. 1965) 354 F.2d 170 [60 LRRM 2578].)

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8. See General Counsel's Response to Respondent's Appeal of Order Severing Proceedings (GCX 1-J) for discussion of General Counsel's efforts to contact the employees involved in the bus transportation issue -- many of whom may also have been members of the Martinez crew and thus affected by the backpay award.

III. LOSSES DUE TO THE DISCONTINUANCE OF BUS TRANSPORTATION

A. Facts

1. Mario Contreras

Mr. Contreras commenced working for Respondent in 1977 or 1978 in Alfonso Reyes crew. Later, as a member of Johnny Martinez' crew he would arrive every day to work from his residence in Calexico by company bus. When the bus transportation was ceased during the 1979 season (in February),[9] Mr. Contreras obtained a ride with a co-worker ("Tony" and later Celio Guerrero) and paid three dollars per day. On other occasions, he would take his own car, but more often obtained a ride from his co-workers. He recalled missing work on one or two occasions (during the 1980 season) because he missed his ride and was unable to find work elsewhere. On cross-examination, Mr. Contreras stated that he missed his ride two consecutive days because Mr. Guerrero had been drinking. Contreras denied making any effort to return to his home to drive to work in his own car on those occasions (one-way taxi fare was approximately $1.00-2.00), or secure some other means to reach the field directly, (some 25 miles) even though work did not commence until 7:00 - 8:00 a.m. and he would normally wait for his ride between 4:30 - 6:00 a.m.

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9. At the underlying unfair labor practice proceeding, Mr. Contreras testified that the bus transportation was discontinued on 10 February 1979. (R.T. II, pp. 33-34, original proceeding.)

2. Maria Murrillo[10]

Mrs. Murrillo recalled working in Juan Martinez' crew during the 1978 season and arriving to work by car (more often) or company bus. She believed that approximately 30 people rode the bus until transportation was discontinued in 1979, but could not specifically recall the precise date the transportation stopped. She thereafter rode to work in the family car -- along with her husband and her husband's cousin (Mr. Haro). The latter contributed $3.00 per day. On those occasions that the Murrillos rode to work in Mr. Haro's car, the discriminatees paid $6.00 ($3.00 per person) for the transportation.

Mrs. Murrillo recalled missing work when the car broke down or when there was much traffic at the border -- but she was unable to specify the number of occasions during the relevant period.

On cross-examination, Mrs. Murrillo admitted occasionally riding to work in Mr. Haro's car prior to the discontinuance of the bus transportation. However, she denied that any money was exchanged until after the company transportation had ceased.

3. Lorenzo Rico

Mr. Rico testified that he worked for Respondent for two days during the 1976 season. At first he denied riding the company bus to work, then insisted that he did so for the two-day employment period. When Mr. Rico returned to work in the Martinez crew in 1980, he rode with other people at a cost of $2.00/3.00 per

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10. The parties stipulated that Mrs. Murrillo's testimony reflected the transportation history of her husband (Teofilio Murrillo) as the two worked together for Respondent. (R.T., Vol. I, pp. 19-20.)

day or $10.00/12.00 per week.

4. Moises Soto

Mr. Soto took the company bus daily from Calexico to the fields along with some 40 other workers whose names he could not recall. He did remember that Respondent stopped providing bus transportation in the middle of the 1979 season. Thereafter, Mr. Soto went to work with different friends, paying $3.00 per day. He missed 2-3 days of work because there was no ride during the 1979 season, near the time when the bus transporation was discontinued. He sought work on these occasions by looking "wherever he could" -- where the buses were waiting (on Imperial Avenue) in Calexico.

5. Ignacio Soto

Mr. Soto worked for Martori during the 1979 (but not the 1980) season. He rode the company bus to work along with 24-25 workers, identifying only his brother Moises. Mr. Soto recalled that Respondent stopped providing transportation in the middle of the 1979 season (mid-January), compelling him to seek rides with others for which he paid $3.00. He thought that he "possibly" missed more than five (5) days of work when he was unable to find a ride. On the latter occasions, he sought and obtained employment with a labor contractor -- 1-2 days per week for some 3-4 days total earning $27.00 per day.

B. Analysis and Conclusions

The Board has directed Respondent to make whole its employees for any losses of pay and other economic losses resulting from Respondent's discontinuance of the Calexico bus transportation.

Contrary to Respondent's assertion,[11] I interpret such language to include all the underlying losses occasioned by the cessation of transportation — be they out-of-pocket expenses incurred by virtue of having to secure other transportation, or work missed because transportation was unavailable. Nor do I find General Counsel's rather late (day of hearing) motion to amend the specification to detail such claims prejudicial in that Respondent has had an opportunity to fully litigate the nature and scope of these claims (closely related to the claim for out-of-pocket transportation costs) at the compliance hearing. (See Anderson Farms Co. (1977) 3 ALRB No. 67. p. 10 fn. 6, citing Monroe Feed Store (1955) 112 NLRB 1336.)

Whether the claim is for compensation for missed work (e.g., similar to back pay) or for out-of-pocket transportation costs (more akin to expenses), the burden of proving the gross amount due is upon the General Counsel. (See Mastro Plastics Corporation (1962) 136 NLRB 1342; enforced in relevant part (2d Cir. 1965) 354 F.2d 170 [60 LRRM 2578]; High & Mighty Farms (1982) 8 ALRB No. 100.) Although hearsay testimony may be sufficient to establish such claims,[12] testimony which is "too indefinite, inadequate, and speculative" will require a denial of the claim, and estimates must have some foundation in fact. (See Bruce Church, Inc. (1983) 9 ALRB No. 19; Charles T. Reynolds Box Company (1965) 155 NLRB 384 [60 LRRM 1343]; Neely's Car Clinic (1981) 255 NLRB 1421; W.C. Nabors Company (1961) 134 NLRB 1078, 1093.)

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11. See Respondent Brief, p. 9.

12. Frudden Produce, Inc. (1982) 8 ALRB No. 26.

In the instant case, there is an initial problem of ascertaining the precise date the transportation was discontinued. Although the date was not specified in the underlying decision, General Counsel suggests that the unfair labor practice hearing testimony of Respondent field supervisor Steve Martori fixes the date as of 5 January 1979.[13/] Respondent, on the other hand, contends that the date should be 10 February 1979, as recalled by employee witness Mario Contreras at the earlier hearing,[14/] and adopted by General Counsel in its previous post-hearing brief.[15/] The witnesses at the compliance hearing variously attributed the discontinuance to February 1979 (Mario Contreras), the middle of the 1979 season (Moises Soto), or mid-January (Ignacio Soto). Relying upon the testimony adduced at the compliance hearing,[16/] as well as Respondent payroll records which reflect that the season lasted from 26 December 1978 until 1 March 1979, I conclude that the transportation was discontinued in the middle of the 1978-79 season -- on or about 31 January 1979. I therefore find the following with respect to the claims of the testifying witnesses:

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13. See General Counsel Brief, pp. 45-46; R.T., Vol. IV, pp. 55-61 (original proceeding).

14. R.T., Vol. II, pp. 33-34 (original proceeding).

15. General Counsel's Post-hearing Brief (original proceeding), p. 41.

16. I had no opportunity to observe the demeanor of the witnesses at the unfair labor practice phase of the hearing and decline to draw factual inferences therefrom which were not made by either the Board or the Administrative Law judge in 8 ALRB No. 23, supra.

1. Mario Contreras

Mr. Contereas incurred out-of-pocket expenses of $3.00 per day for the period February 5, 1979, through March 1, 1979, and from January 3, 1980 to February 20, 1980, (43 days of work)[17] for a total of $129.00.[18] I decline to recommend any award for days missed, however, as Mr. Contreras' recollection of missing two consecutive days when driver Guerrero had been drinking was not corroborated by Respondent payroll records which indicate he missed work only on 21 February 1979 and 16 February 1980 during the relevant period.[19]

2. Maria and Teofilio Murrillo

I am unable to ascertain from this record what out-of-pocket loss, if any, the Murrillos suffered by the cessation of transportation. With respect to the cost of the transportation, Mrs. Murrillo conceded that her husband's cousin (Mr. Haro) paid approximately $3.00 per day when he rode in the Murrillo vehicle. Although the Murrillos spent $6.00 per day ($3.00 apiece) when riding with their cousin, there is insufficient evidence to

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17. RX 19, 20.

18. On both these occasions, Mr. Guerrero appeared to have worked (RX 19,20.)

19. I am unable to ascertain from the payroll records (RX 19) whether or not Mr. Contreras "missed" work on 6 February 1980, as a full crew did not work on that date.

I have not distinguished the (unspecified) occasions that Mr. Contereras drove his own car, as there is no basis on the record to compare the cost of this transportation to any similar costs he may have or may not have incurred while the company bus was in operation. Additionally, Mr. Contreras referred to his out-of-pocket loss as a "daily" expense whenever he was working. (R.T. Vol I, p. 18.)

apportion this exchange of funds. Additionally, Mrs. Murrillo conceded riding to work by car (both the Murrillo and the Haro vehicles) prior to the discontinuance of the bus. Even if I were to credit Mrs. Murrillo's recollection that the relatives exchanged money only after the cessation of the bus transportation, there is no basis on this record to conclude that there was an actual out-of-pocket loss which resulted from the company's actions. Similarly, I find Mrs. Murrillo's recollection that she missed work (on unspecified occasions) when the car broke down or when there was much traffic at the border insufficient to establish any compensable loss. Nor are Respondent's payroll records which reflect various days missed for either or both of the Murrillos during the 1979-80 season (January 11, February 9, February 13, February 14) sufficient to sustain General Counsel's burden in that regard. I therefore recommend that the Murrillos[1] claim be denied in its entirety.

3. Lorenzo Rico

Mr. Rico's recollection of having paid $2.00-$3.00 per day for rides to work during the 1979-80 harvest entitles him to be reimbursed for $57.50 (23 days x $2.50 per day).[20] Even though his recollection of having previously utilized the company bus (in 1976) was somewhat murky, it is Respondent's conduct which deprived Mr. Rico of the opportunity to take this mode of transportation when he returned during the 1979-80 season. As there is no evidence[21] that Mr. Rico missed any work during the pertinent season, I would

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20. See RX 19.

21. The two days of work missed -- 25 and 26 January 1979 --preceded the 31 January 1979 discontinuance of the bus.

recommend no further award.

4. Moises Soto

Mr. Soto credibly detailed out-of-pocket expenses of $3.00 per day for the period 5 February 1979 through 1 March 1979 and from 6 February 1980 to 20 February 1980 for a total of 20 days at $3.00 per day or $60.00. Mr Soto's recollection of having missed 2-3 days of work due to the absence of a ride " near the time the bus was discontinued " is supported by Respondent's payroll records[22/] which reflect his missing work on 13 February 1979, 15 February 1979, and 16 February 1979. According, I recommend that he additionally be awarded the following sums:

DATE	PIECE RATE (From RX 20)	
February 13, 1979:	21.25 units @ .54/unit	$11.47
	213.44 units @ .445/unit	$94.98
		$106.95
February 15, 1979:	259.39 units @ .445/unit	$115.43
February 16, 1979:	61.53 units @ .54/unit	$33.22
	123.91 units 0 .445/unit	$55.14
		$88.36
	TOTAL OWING:	$310.24

I find that Mr. Soto's efforts to seek other work were reasonably diligent, and as there was no proof of interim earnings, I recommend that he be reimbursed for the entire loss.

5. Ignacio Soto

Mr. Soto is entitled to $3.00 per day for rides to work for the period 5 February 1979 through 1 March 1979 for a total of 9

22. See RX 20.

days at $3.00 per day or $27.00. As the payroll records[23] reflect that he missed the same days during the relevant period as his brother, Moises Soto, I rely upon those records to substantiate his claim for lost work -- as opposed to his imprecise collection re the number of days actually missed. Mr. Soto is therefore entitled to an additional $310.24 less $81.00 (27.00 per day for three days) interim earnings, or $229.24. (See Appendix B.)

C. Missing Employees

By motion of 11 August 1983, General Counsel requested that it be allowed to attempt to locate additional Martori employees affected by the discontinuance of company bus transportation and proposed a March 1, 1984 cutoff day for these efforts. Charging Party suggests that the affected employees be given at least one full year to litigate their claims, with leave to seek extension thereof, and additionally, requests that an escrow be opened on behalf of all potential claimants. Respondent opposes any escrow account at this stage of the proceedings on the ground that the unlitigated claims are too speculative to impose immediate monetary liability. I agree. Neither the identity of the potential discriminatees nor the number of such potential claimants has been established as of this date. Witnesses have alternatively estimated the number of bus riders as anywhere from 15 to 40-plus per day. Nor can the per diem rates of out-of-pocket loss be properly ascertained in light of testimony affixing the rides at $2.00-3.00 per person, with varying "schedules" depending upon who was driving,

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23. See RX 20.

who owned a car, and the number of passengers. Similarly, it is impossible to fairly gauge days missed as a result of the discontinuation of the transportation in light of the innumerable variations suggested by the five employees who had been located at the time of the compliance hearing. I would be reluctant to rely upon a "representative" employee or any other methodology to calculate the potential claims owing in the absence of any further proof that a given claim is typical, or that the class of claimants is of a particular magnitude. I therefore recommend that no escrow account be opened at this time in light of the uncertainty of the data regarding these transportation-related claims. To allow the parties to litigate these matters, I would recommend in accordance with NLRB guidelines that the potential claimants be allowed a period of two (2) years from the date of the Board's supplemental decision in this regard to present their claims. See Carter of California, Inc. dba Carter's Rental (1980) 250 NLRB 344; NLRB Casehandling Manual (1975) Part III, Section 10584.2(b).

IV. CONTRACTUAL MAKEWHOLE (¶2d)

A. Period of Makewhole Liability

The Board has ordered Respondent to make its employees whole for any economic losses they have suffered as a result of its bad faith bargaining during the period from November 20, 1979, until May 1980 and the period from May 1980 until Respondent commences good-faith bargaining which results in a contract or bona fide impasse. (8 ALRB No. 23, supra, p. 3.) As the record indicates

that Respondent submitted a full counter-proposal on 21 May 1980 (R.T., Vol. I, pp. 59-60), I find that the latter date is the appropriate cutoff for Respondent's liability. I thus reject General Counsel's suggestion that 31 May 1980[24] -- the last date in May affixed in light of Respondent's previous discontinuance of operations -- is the outside date of liability. I further decline to decide whether in some circumstances Respondent's cessation of California operations in March of 1980 would alter the cutoff date in light of the Board's order and the fact that liability would be identical for any cutoff date between 20 March and 21 May 1980.[25] I thus conclude that Respondent's contractual makewhole liability in this case runs from 20 November 1979 through 21 May 1980.

B. Identity of Employees Entitled to Makewhole Relief

There is no real dispute[26] concerning the identity of Respondent's California employees, including 36 farm employees, 76 thinning crew workers (20 November - December 1979), and 171 harvesting members from the Martinez and Sandoval crews. All are reflected in Respondent's Answer to Specification (Exhibts D, H and I), and are entitled to be included in any makewhole award pursuant to the Board's order.

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24. Jt. Ex. 1, p. 4.

25. This result stems from Respondent's cessation of California operations and my decision re the exclusion of the Arizona work force as discussed, infra.

26. In the instances where names have been omitted, misspelled, or misidentified, in either or both General Counsel's Specification or Respondent's Answer, I have relied upon the latter -- based on pertinent payroll records (RX 19, 22) in identifying individuals entitled to contractual make-whole relief.

General Counsel contends, however, that the employees in the two harvest crews (Martinez and Sandoval) who worked both in Arizona and California are entitled to makewhole during the time they worked in either state (G.C. Brief, p. 36). Respondent, on the other hand, argues that the Board has no jurisdiction to order makewhole for the employees involved in the Arizona operations (see Respondent Brief, pp. 33-37; Respondent Motion to Dismiss Segment of Specification for Lack of Jurisdiction dated 4 August 1983). By stipulation[27/] the parties have agreed to the factual bases of the parties' contentions.

1. Facts

Respondent is an agricultural operation with headquarters in Glendale, Arizona, during the relevant (1979-80) period. Since 1969, Martori has been involved in California lettuce (with the exception of 1974-75) until its California operations ceased in 1980. For 1979-80, Respondent harvested some 475 acres of lettuce in the Imperial Valley. The season would begin in October in Aguila, Arizona, where the crews would form. Harvesting continued in Aguila until approximately 1 December when the crews would move to the Imperial Valley and harvest from 15 December to March 1. Thereafter (until May) the harvest crews would return to Aguila, Arizona.

Although the vast majority of the property controlled by Respondent was in Arizona, approximately 60 employees were hired directly for the California lettuce harvest, most of whom also

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27. Jt. Ex. 1.

worked in the Arizona harvest. The two foremen who worked consistently with Martori from 1976-1980 were John Martinez and Camarino Sandoval. The crews that were originally hired in 1976 were primarily Arizona residents and continued to be so through 1979-80. They were generally hired in Arizona and maintained their residences (90%) in Arizona, normally living in a motel in Westmoreland, California, during the Imperial Valley harvest. Approximately one-third of the Martinez crew were residents of Arizona and were hired in Arizona. Approximately 40% were from Mexicali, and 27% from California. Martinez himself resided in El Centre, California. Mid-season "new hires" were recruited from the state where the particular harvest operation was being undertaken. While operating in the Imperial Valley, the new hires were primarily from Mexicali; while in Aguila, the new hires were from the Phoenix area. There was no interchange among farming employees between the two sites.

While operating in Arizona, no interstate transportation was provided. Daily transportation from Phoenix to Aguila (approximately 60 miles) was provided by the company. Employees were paid by checks drawn on Valley National Bank of Arizona (Phoenix) during both the California and Arizona harvests. All payroll, accounting, and invoicing was accomplished at the Arizona office, while sales and shipping were done from either California or Arizona, depending upon the location of the harvest. Unemployment and other taxes were paid pursuant to state law of the state of a particular harvest operation. The same insurance carrier (Pan American Underwriters of Arizona) provided workers' compensation

coverage.

In January, 1978, the UFW was certified as the collective bargaining representative of Martori's California employees. The Respondent has never had a contract with the UFW nor has there been any certification or election of any union under the Arizona Agricultural Employment Relations Act (AERA) for Martori's Arizona agricultural workers.

As was its practice,[28] the UFW proposed including the Respondent's Arizona's operations in a California contract. At no time during the negotiations did Martori agree to bargain about the Arizona employees, taking the position that that was not a mandatory subject of bargaining, and that it would never enter into a contract which included Arizona.

2. Analysis and Conclusions

The ALRB has exerted extra-territorial jurisdiction in a variety of settings: In Mario Saikhon (1978) 4 ALRB No. 72, the Board concluded that it possessed jurisdiction to remedy an unlawful layoff (or discharge) of an agricultural employee whose employment was commenced in California, and whose employer engaged in agriculture and maintained its principal place of business in this state, even where the layoff occurred in Arizona. In J.R. Norton Company (1982) 8 ALRB No. 76, the ALRB found violations of the Act where the employer refused to rehire workers in its New Mexico and Arizona operations. In Bruce Church, Inc. (1982) 8 ALRB No. 81, the

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28. Other companies which have previously included an Arizona supplement as part of their collective bargaining agreements with the UFW include Nish Noroian, Mario Saikhon, Vessey, Bruce Church, and Sun Harvest. (See GCX 2 - GCX 6.)

Board affirmed the ALJ's finding of jurisdiction to consider alleged discrimination in Arizona in retaliation for protected activities in California.

I note, however, that no previous ALRB decision has addressed the problem raised in the instant case -- that is, the appropriateness of imposing an extraterritorial remedy for section 1153 (e) (refusal to bargain) violations of the Act.[29] In this matter, the UFW has been certified as the exclusive bargaining representative of Respondent's California employees. (Martori Bros. (1978) 4 ALRB No. 5.) And the Board has previously limited its certification orders to a company's California employees in Bruce Church (1976) 2 ALRB No. 38. In the latter case, the Board found a statewide unit of all agricultural employees of the employer -- excluding those who worked exclusively outside the state of California -- to be the appropriate unit for purposes of collective bargaining. It observed that,

> Unlike the NLRB, we have no jurisdiction over operations outside the State of California, and consequently cannot include the employer's Arizona operations within the bargaining unit. (Bruce Church, supra, p. 9.)

NLRB precedent would seem to call for a similar result. In Detroit and Canadian Tunnel Corp. (1949) 83 NLRB 727, the National Board excluded employees from a bargaining unit who worked exclusively in Canada. In Retail Clerks International Association, AFL-CIO (1965) 153 NLRB 201, Trial Examiner's Decision, p. 226, n.

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29. This factual context is distinguishable from that in Nish Noroian (1982) 8 ALRB No. 25, hearing granted, California Supreme Court (week of 11 July 1983, 183-88) wherein the Respondent's policy eliminated the employees' California work component.

52, Canadian representatives of the Respondent union were excluded from the appropriate units. More recently, in North American Soccer League (1978) 236 NLRB No. 181 [98 LRRM 1445] enforced in (5th Cir. 1980) 619 F.2d 1229 [103 LRRM 2976], the NLRB declined to assert jurisdiction over two soccer clubs that operated teams in Canada and were members of a non-profit association of soccer teams (although it asserted jurisdiction over the nonprofit association of professional soccer teams collectively with the U.S. constituent member clubs). The Board's (2-1) decision was based on the following factors: The two teams were owned and operated by Canadian citizens (or corporations) with all offices in Canada, and with one-half of the games played in Canada; they paid business and license fees and taxes to Canadian authorities; players and other employees were subject to Canadian income tax and labor laws; all registration and affiliation fees were paid to the Canadian Soccer Association, rather than to the United States Soccer Federation.

Moreover, under NLRB precedent, the scope of the unit is not a mandatory subject of bargaining. (See Morris, the Developing Labor Law (1983), pp. 848-852.) As formulated by the Second Circuit, the difference between bargaining about mandatory subjects and deciding the appropriate bargaining unit is as follows:

> The Statute imposes on labor and management alike a duty to bargain in good faith with respect to wages, hours and other conditions of employment in the expressed belief that such bargaining is the most effective way to settle differences without disrupting commerce. This duty 'does not compel either party to agree to a proposal,' as Section 8(d) states, 'or require the making of a concession' and the Board has no power to settle any of these questions. By way of contrast, it not only has the power, but is indeed directed, to decide what is the appropriate bargaining unit in each case. (Douds v. International Longshoremen's Ass'n. (2d Cir. 1957) 241 F.2d 278, 282 [39 LRRM 2388].)

Thus, it would be an unfair labor practice for either party to insist to impasse that employees be added or excluded from a certified unit. (Salt Valley Water Users' Assn. (1973) 204 NLRB 83 [83 LRRM 1536], enforced (9th Cir. 1974) 498 F.2d.393 [86 LRRM 2873]; Sperry Rand Corp. v. N.L.R.B. (2d Cir. 1974) 492 F.2d 63 [85 LRRM 2521, cert, denied (1974) 419 U.S. 831 [87 LRRM 2397].)

While General Counsel suggests (G.C. Brief, pp. 40-41) that the issue of Arizona harvesting wages might have been discussed during the Martori-UFW negotiations, evidence that either or both of the parties voluntarily bargained over the issue of out-of-state operations, or refused to bargain over same, should not be determinative of the assertion of jurisdiction, as such a standard would unduly intrude upon the bargaining process. To reason otherwise would discourage the parties from voluntarily entering into such agreements, lest the potential for make whole liability arise. In any event, the record evidence in this case suggests that the UFW, but not the Respondent, desired to negotiate over the Arizona harvesting operations, and at no time were such "negotiations" undertaken. Thus, it would appear that the Hoard is without jurisdiction to award make whole to the Arizona component of an Arizona company's harvest work force.

Insofar as the relief sought herein involves Arizona employment which was part of a continuous cycle regularly placing agricultural employees in and out of California, however, reference to the Saikhon[30/] "contact" analysis may provide an appropriate

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30. Mario Saikhon (1978) 4 ALRB No. 72.

standard by which to consider the General Counsel's contention that the Arizona harvesting operations[31] are properly includeable in the makewhole award. In Saikhon, the Board formulated certain criteria for the exercise of extraterritorial jursdiction:[32]

1. The interest of the state in providing a forum for its residents and regulating the business involved;

2. The relative availability of evidence and the burden of defense and prosecution in one place rather than in another;

3. The ease of access to an alternative forum;

4. The avoidance of a multiplicity of suits and conflicting adjudications; and

5. The extent to which the cause of action arose out of the defendant's activities in the forum state.

In reviewing these factors in the context of Respondent's bargaining responsibilities vis-a-vis its Arizona harvesting operations, I conclude that the record does not support the exercise of jurisdiction by the ALRB:

a. The Interest of the State in Providing a Forum

In Saikhon, the Board found that California had a special interest in protecting all agricultural employees (resident

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31. Both General Counsel and Respondent have relied upon the Saikhon case in setting forth their positions in this regard. See Respondent's Motion to Dismiss Segment of Specification for Lack of Jurisdiction (4 August 1983) and General Counsel's Opposition to Respondent's Motion (8 August 1983). Furthermore, neither the relevant ALRB certification decisions cited nor the Board's remedial order in this case specifically exclude the possibility of an assertion of jurisdiction over the Arizona component of Respondent's multistate harvesting operations.

32. Mario Saikhon (1978) 4 ALRB No. 72, citing Belmont Industries, Inc. v. Superior Court (1973) 31 Cal.App.3d 281, 286.

and non-resident), and Respondent was a resident of California. In the instant case, Martori is an Arizona business whose Arizona harvest operations are the focal point of General Counsel's request for make-whole relief. Arizona crews primarily consisted of Arizona residents, and although harvesters do travel between California and Arizona, it is only the Arizona portion of the operation which is at issue herein.[33/]

b. The Relative Availability of Evidence and the Burden of Defense

As in Saikhon, the instant hearing has been conducted in California. All parties were present and participated. However, there has been no evidence presented -- aside from General Counsel's showing that Arizona supplements have been common to certain California collective bargaining agreements (GCX 2-GCX 6) -- of comparable Arizona contracts during the relevant period. Indeed, trial of that issue might well involve the Board in full-scale investigation of prevailing Arizona wages -- a task which would be potentially burdensome and thus problematical to assertion of jurisdiction.

c. The Ease of Access to an Alternative Forum

As in Sakihon, Arizona is the alternative form.

d. Avoidance of a Multiplicity of Suits and Conflicting Adjudications

Since Saikhon, the United States Supreme Court has upheld the constitutionality of the Arizona Agricultural Employment

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33. There is no dispute regarding the Board's jurisdiction over Respondent's California harvesting operations, and no claim that the Arizona farm employees (e.g., tractor drivers, irrigators, etc.) are entitled to any make whole relief.

Relations Board in Babbit v. United Farm Workers National Union (1979) 442 U.S. 289 [99 S.Ct. 291, 60 L.Ed.2d 895]. Whether or not that Board's validity is still in question (see Respondent's Motion to Dismiss Segment of Specification for Lack of Jurisdiction [August 4, 1983]), the fact that the Arizona forum is a possible alternative raises the potential of conflicting adjudications -- which was of concern to the Board in Saikhon. While the Ninth Circuit has conceded the apparent anomaly of employees being represented by different unions upon crossing the Colorado River, it has also indicated that such situation is the natural result of "our constitutional system of cooperative federalism". (United Farm Workers v. Arizona Agricultural Employment Relations Board (9th cir. 1982) 669 F.2d 1249, 1256, citing Nevada v. Hall (1979) 440 U.S. 410, 424, n. 24 [99 S.Ct. at 1190.) Thus, the Court of Appeal has envisioned the possibility of one company's workers being represented by different unions by virtue of the grower's multi-state enterprise.

e. The Extent to Which the Cause of Action Arose in the Forum State

In Saikhon, Respondent was a California corporation, with its principal place of business in this state, it had most of its property here, employed the majority of its employees here, and the only issue in dispute arose out of its California agricultural operation. In the instant case, all such indicia compel a finding that Arizona, rather than California, is the appropriate forum to oversee the collective bargaining relationship between Respondent's Arizona harvesting work force and the latter's duly elected representative. While, in a sense, the

misconduct "arose" in the State of California -- where negotiations took place and the unilateral wage increases were made -- the relief prayed in this instance relates solely to the Arizona component of Respondent's operations. And, as Respondent had no duty to bargain re its Arizona operations, it cannot be said that its unlawful California actions impacted upon the Arizona harvest. There is thus no "reverse" Nish Noroian[34/] situation in the instant case which might call for assertion of jurisdiction.

I thus recommend that no makewhole award be made to the Respondent's Arizona harvesting crews.

C. Prevailing Wage Rates

There is no dispute re General Counsel's utilization of the UFW-Sun Harvest contract (GCX 2) in determining the wage rate of Respondent's harvesting employees had there been no bad faith bargaining. All parties concede that Martori paid its harvesters at the Sun Harvest rate, so that no makewhole is due (except for the fringe benefits discussed, infra) with respect to this group of employees. General Counsel suggests that Sun Harvest[35/] is the appropriate comparable contract with respect to Respondent's farm employees as well. Respondent disagrees, and suggests a number of alternative formulae, including a state-wide survey of UFW

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34. (1982) 8 ALRB No. 25, supra.

35. The effective date of the UFW-Sun Harvest contract was 4 September 1979 through 31 August 1982 (GCX 2).

contracts,[36] as well as a sampling of first-time contracts from various areas.[37]

1. Facts[38]

John Hernandez, the ALRB field examiner charged with the responsibility of preparing General Counsel's specification, discovered only two UFW contracts between the period February 1979 and November 1982 signed by companies which operated in the Imperial Valley: Sun Harvest and John Elmore.[39] Only Sun Harvest included lettuce among the crops harvested. Numerous differences may be observed between Sun Harvest and the Martori operations: There was a wide discrepancy in the size of the two operations -- Sun Harvest farms and harvests thousands of acres of land in the states of California and Arizona; Respondent farms and harvests less than 500 acres of lettuce in the state of California. Sun Harvest farms and harvests a wide variety of crops which Respondent does not -- the only commodity which the two entities have in common is lettuce. Sun Harvest employs thousands of employees throughout the year in California and operates in Huron, Brentwood, Salinas, Oxnard, and

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36. Maggio Tostado, Inc. (RX 13); Klein Ranch (RX 9); Egger & Ohio (RX 14); Samuel S. Vener Co. (RX 5); H & M Farms (RX 11); SKF Farms (RX 2); K & K Ito Farms (RX 6); Molica Farms (RX 12); Donlon Trading Company (RX 7); United Celery Growers (RX 3); Cal Pac Citrus Co. (RX 15); Watanabe Ranch (RX 4); Hiji Bros. (RX 8).

37. SKF Farms (RX 2); Samuel S. vener Co. (RX 5); K & K I to Farms (RX 6); Donlon Trading Company (RX 7); Klein Ranch (RX 9); Maggio Tostado, Inc. (RX 13); Egger & Ghio (RX 14); Cal Pac Citrus Co. (RX 15). See Respondent Brief, pp. 29-30.

38. The parties stipulated to a great portion of these facts. (See Jt Ex. 1.)

39. The latter consisted of a contract wage reopener. (See GCX 7.)

the Imperial Valley in California as well as in Yuma and Phoenix, Arizona. Respondent operated only in the Imperial Valley as well as in Aguila and Harquahela, Arizona. However, both companies paid the same rate to its lettuce harvesters during the pertinent period, both shared Imperial Valley locations, and both grew and harvested their own (imperial valley) lettuce.[40/]

In 1975-76, two Salinas companies – Interharvest[41/] and the Salinas Marketing Co-op -- signed a UFW agreement which became the latter's "standard" for the vegetable industry. Following that time, this standard agreement was brought into the Imperial Valley, and various Imperial Valley growers signed contracts based on this standard, including Colace, Vessey, Maggio-Tostado, Growers Exchange, and Hubbard. During the period 1979-81, certain employers who operated out of Salinas also began to come down to the Imperal Valley, under the Sun Harvest contract, including Cal Coastal, Green Valley, Produce Co-op, Sun Harvest, Hubbard, and Oshita. The UFW utilized the Sun Harvest contract as a basis for making proposals to Imperial Valley vegetable growers because of the similarity of work forces, crops, operations, and markets.[42/]

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40. During the relevant period, Respondent's general laborers and miscellaneous workers (farm employees) were earning $4.12 per hour, $4.18 per hour, and $4.33 per hour; the lowest Sun Harvest base wage for general labor was $5.00 per hour. See GCX 2. With the exception of certain irrigators and/or machine operators who were earning $4.80-$4.90 an hour, these workers were categorized by Mr. Hernandez at the $5.10 per hour Sun Harvest irrigator's rate and in two instances at the $6.10 per hour Sun Harvest equipment operator rate.

41. Interharvest became Sun Harvest in 1978.

42. Such was not the case, for example, with respect to Santa Maria vegetable growers, whose markets were not necessarily identical to those of the Salinas and Imperial Valley companies, and whose work forces were not nearly as interchangeable.

For its part, Respondent rejected the terms of the Sun Harvest "package" -- feeling that the farm wages proposed were substantially above the farming wages in the Imperial Valley. Since September 1979, only one Imperial Valley based farming/harvesting operation (Colace Brothers in 1982)[43/] without operations in Salinas had signed a UFW Sun Harvest agreement. The only other contract signed in 1979 in the Imperial Valley by a company which did business only in the Imperial Valley was that negotiated with John J. Elmore in March 1979.[44/] The latter, however, did not harvest its own crops, and "farmed substantially more acreage and varieties of crops than did Martori." (Jt. Ex. 1, p. 27.) Martori paid during 1979-80 competitive farming wages with those that were paid by other employers in the Imperial Valley.

Respondent has also provided a number of statewide UFW contracts[45/] which were executed at various times and which contained an average basic contract wage (general labor) of $3.52 per hour and which would result in no makewhole liability even after computation of fringe benefits. Respondent contends (Respondent Brief, pp. 29-30) that a sample of the first-time contracts from this group provide an appropriate prediction of what Martori and the UFW would have negotiated absent the former's bad faith:

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43. See RX 10.

44. The UFW-John J. Elmore reopener was effective on 1 March 1979, but the Addendum was actually signed on 31 March 1980 (GCX 7).

45. See Respondent's First Amended Answer to Makewhole/Backpay Specification, Exhibit A.

COMPANY	LOCATION	CROPS	WAGES	DURATION	WORK FORCE
SKF Farms (RX 2)	San Diego County	Mixed lettuce, cucumbers, cabbage , bell peppers	$3.20/hr. (4/79-4/80)	1 1/77-4/80	
Samuel S. Vener Co. (RX 5)	San Diego County	Tomatoes	$3.20/hr. (4/79-4/80)	4/77-4/80	
K & K I to Farms (RX 6)	Oxnard	Celery, tomatoes , string beans, mixed lettuce, cabbage (200-250 acres)	$3.55/hr. (3/79-3/80)	3/23/78-2/9/80	Employs 4-5 irrigators and 4-5 tractor drivers
Donlon Trading Co. (RX 7)	Oxnard	Celery, tomatoes , cucumbers , mixed lettuce, cabbage , cauliflower, strawberries (350 acres)	$3.55/hr. (3/79-3/80)	3/1/77-2/29/80	Employs less than 20 people, including irrigators and tractor drivers
Klein Ranch (RX 9)	San Joaquin Valley	Milo, asparagus , safflower , tomatoes , wheat, beets, (1,650 acres)	$3.45/hr. (2/79-2/80)	11/9/77-11/9/80	Employs irrigators, tractor drivers, thinners, general laborers, and harvesting employees
Maggio Tostado (RX 13)	Coachella Valley, Salinas, Westmor eland	Carrots, corn, lettuce, mixed vegetables	$3.47/hr. (2/79-2/80)	2/14/77-2/24/80	
Egger & Ghio (RX 14)	San Diego County	Tomatoes, celery (400-450 acres)	$3.20/hr. (4/79-4/80)	4/7/77-4/6/80	Employs irrigators, tractor drivers, harvest employees, thin and weed crews, planting crews, and maintenance crews. A majority of the labor force are from Tijuana.

COMPANY	LOCATION	CROPS	WAGES	DURATION	WORK FORCE
Cal Pac Citrus Co. (RX 15)	Blythe	Lemons , oranges, grapefruit (1,700-2,500 acres)	$3.60/hr. (10/79-10/80)	10/19/77 10/19/80	Employs approximately 20 as irrigators and tractor drivers

Average
Base Wage: $3.40/hr.

2. Analysis and Conclusions

In Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73, the Board first suggested that NLRB and ALRB precedents concerning the calculation of backpay owing a discriminatee were generally applicable to the calculation of the amount of makewhole due to the Respondent's affected employees. Where the General Counsel had established at hearing that the makewhole amounts (in its specification) were calculated in a manner that was reasonable and conformed to the standards set forth in ALRB decisions, its formula would be adopted. Where Respondent proved that the General Counsel's methodology was arbitrary, unreasonable, or inconsistent with Board precedent, or that some other method of determining the makewhole amount was more appropriate, the General Counsel's formula may be modified or rejected. Ultimately, the responsibility of the administrative law judge is "to consider whether General Counsel's formula is the proper one in view of all of the evidence and to make recommendations to the Board as to the most accurate method of determining the amount due." (High & Mighty Farms (1982) 8 ALRB No. 100, p. 2, n. 3.)

In the instant case, I note that there exist certain differences between the Sun Harvest[46/] and Martori operations -- in factors considered significant by the Board: Respondent's Imperial Valley operations consisted entirely of lettuce; Sun Harvest grew wheat, carrots, milo, cotton, tomatoes, and onions in the imperial Valley in addition to lettuce during the relevant period. While Sun

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46. See RX 24.

Harvest planted over 1,000 acres of lettuce during the relevant season, Respondent's acreage was 475. The Sun Harvest work force exceeded 1,000 workers in 1978 and was in excess of 700 for 1980 and 500 for 1981. Martori employed fewer than 150 individuals in both farm and harvest operations in the Imperial Valley. On the other hand, there were at least some similarities of work force (with respect to the farm employees), crop (lettuce), particular job categories and operations (tractor drivers and irrigators), as well as similar markets for Martori and the Sun Harvest Imperial Valley operations.[47/] The only other UFW contract in the area during the relevant time period -- John Elmore[48/] (although the latter farmed substantially more acreage and varieties of crops than did Martori and did not harvest its own crops) -- paid its farm employees wages comparable to those contained in the Sun Harvest agreement, including the identical Sun Harvest base labor wage $5.00 per hour).[49/]

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47. Jt Ex 1, pp. 8-13. Stipulated testimony of David Martinez.)

48. GCX 7.

49. I am further aware of the administrative law judge's decision (issued 1 April 1983) in Case No. 79-CE-114-EC, et al, pp. 25-26 (Holtville Farms) and Respondent's Answer to Backpay Specification on file in that case wherein the Respondent Holtville Farms admitted to raising farm wages to match the Sun Harvest rate during the relevant period. (26 November 1979.) As the case is presently pending before the Board, I do not rely upon any of the ALJ's factual findings in reaching my decision herein. (See Labor Code section 1160.3; 8 Cal. Admin. Code section 20286.) However, such facts, if ultimately found by the Board, would provide further support for the decision that the Sun Harvest $5.00 base rate is the appropriate comparable wage for Respondent's farm employees.

I am not persuaded by Respondent's contention (Resp. Brief, pp. 26-29) that it would never have agreed to the Sun Harvest farm rate, as it was Respondent's bad faith negotiating posture which mandates this determination of the appropriate makewhole wage. (Labor Code section 1160.3; J.R. Norton v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1.) As this Board has observed in rejecting a Respondent's "financial inability" defense to a proposed makewhole formula:

> An agricultural employee's right to receive makewhole is based on having worked for Respondent at any time during the makewhole period. Respondent's liability has been established in a prior unfair labor practice (ULP) proceeding where we concluded that Respondent unlawfully refused to bargain in good faith with the certified bargaining representative of its agricultural employees. Respondent may not now seek to mitigate or negate its liability based on any defense it raised or could have raised during the ULP proceedings. (Robert H. Hickam (1983) 9 ALRB No. 6, pp. 13-14.)

Thus, proof of Respondent's subjective willingness to agree to particular items of a contract is beyond the scope of the task at hand.[50]

I am not convinced that Respondent's alternative make-whole formula (based upon an average of the wage rates contained in any of the eight (8) UFW contracts) referred to in Respondent's Brief (pp. 29-30) better approximates the farm wages that Respondent would have negotiated absent its bad faith. Only Maggio Tostado of the "comparative" contracts had operations within the Imperial Valley

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50. By the same token, proof of the UFWs subjective motivation in proffering the Sun Harvest contract cannot be determinative of the question of what the parties would have negotiated absent Respondent's bad faith posture.

(Westmoreland).[51] The other companies were located in Oxnard, San Diego County, San joaquin Valley, and Blythe. All of the contracts reflected wage scales between $3.20 per hour and $3.60 per hour -- or lower than the non-contractual wages paid by Martori to its farm employees. Some of the contracts -- Egger & Ghio, Klein Ranch, Cal Pac Citrus, Samuel S. Vener Co. -- were at companies which did not harvest lettuce. Additionally, each of the contracts was entered into well before the make-whole period. And there is no historical evidence of the companies' pre-contractual wage rates by which to evaluate the effect, if any, of good faith bargaining[52] on the negotiations in question. Because of these differences -- and in particular the fact that each of the contracts contained wage rates lower than the basic Martori wage,[53] I do not find that the

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51. There is no evidence on this record of the scope/nature of the Maggio Tostado (Westmoreland) operation — and thus no indication of its relative comparability to Respondent in terms of workforce, crop, acreage, etc. Nor have I been able to find Board precedent describing the pertinent Maggio Tostado operation.

52. It is thus unhelpful to know that the eight contracts were "first-time agreements" with the UFW. This factor, absent some objective criteria of the companies' wage-rate histories does not help predict what the parties would have negotiated in the instant case.

53. While it may be possible that no wage adjustment would be derived from the collective bargaining process -- e.g., in the case of Respondent's harvest wages which General Counsel has conceded were comparable to the Sun Harvest standard -- I find it difficult to infer that the outcome of negotiations re the farm employees would result in a lower base wage than that was earned without contract. I note that even after application of the Adam Dairy fringe benefit factor to the Respondent's recommended average wage based on the 8 sample contracts, no makewhole would be due. I believe that some economic loss from a refusal to bargain is presumptive from the statute. See N.L.R.B. v. Mastro Plastics Corp. (2d Cir. 1965) 354 F.2d 170, cert, denied (1966) 384. U.S. 972; Labor Code section 1160.3.

averaging approach presents a more appropriate calculation of the make whole due Respondent's employees.

Nor does the fact that the Colace Brothers base wage ($5.45 per hour) negotiated in 1982 was lower than the existing Sun Harvest rate ($6.55 per hour) compel the conclusion that the Martori 1979-80 negotiated farm wage would be lower than the Sun Harvest rate. Without evidence of the actual (non-contractual) Colace Farm wage during the make whole period, there is no means by which to ascertain the impact, if any, of collective bargaining on the Colace operations. Consequently, there is no evidence with which to analogize the Colace bargaining history to the instant proceedings.

Finally, I reject Respondent's contentions (Resp. Brief, pp. 38-43) that General Counsel's unsupervised calculation violates the anti-trust provisions of the Sherman Act (15 U.S.C. §1). It is the Board's function to find the most appropriate formula -- in view of all the evidence -- for calculating the employees losses resulting for Respondent's violations of section 1153(e). Such a role has been statutorily mandated by section 1160.3. As I conclude only that in this context -- where the Sun Harvest operations involved the identical crop in the same geographic area as Martori, where the harvest employee wages were comparable to Respondent's harvesting wage[54/] -- the Sun Harvest contract is the most

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54. I note similar "factors'of comparability" in the John J. Elmore operation (crop, location, harvest and farm employee wage). See John Elmore, Inc. (1978) 4 ALRB No. 98, ALJD, pp. 2-3, rev. denied, Ct. App. 4th Dist., Div. 1, May 21, 1979; hg. denied June 27, 1979, for brief description of said operations.

appropriate standard for ascertaining the wages which would have been negotiated absent Respondent's bad faith. Indeed, since I have rejected the alternatives proposed by Respondent, and in the absence of any history of wages at Colace Brothers, or at any of the other operations Respondent suggests are comparable, Respondent's view at best would call for some estimate of farm employee wages between its $4.12 per hour base wage (pre-contractual) and the $5.00 per hour base wage at Sun Harvest. Such a result on this record -- i.e., "splitting the difference" -- would seem to be purely arbitrary and an abdication of the responsibility of the ALJ to recommend the most appropriate rate based on the available evidence. I reject such approach, and recommend that the utilization of the $5.00 per hour base wage contained in the Sun Harvest contract be relied upon as the best approximation of the prevailing wages (for farm employees) which would have been negotiated absent Respondent's bad faith.[55/]

D. Fringe Benefits

In Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB no. 24, the Board adopted a fringe benefit formula based on the 1974 Bureau of Labor Statistics report for non-manufacturing industries. As fringe benefits then represented 22 percent of an employee's total wage package, the makewhole wage was assigned a value of 78 percent (.78). That formula was adopted, and an individual contract-by-contract analysis rejected in Robert H. Hickam (1983)

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55. Of course, there may well be significant objective reasons why the Sun Harvest farm wage would not be an appropriate comparable wage (or the only comparable contract) in other situations -- particularly, where the historical pattern of wages labor pool demands, etc., so indicate. Such factors are not present, however, on this record.

9 ALRB No. 6, in order to simplify the compliance proceedings, provide appropriate redress for the discriminatees, and promote future collective bargaining. I therefore reject Respondent's suggestion that the fringe benefits offered in another contract (Admiral Packing)[56] should be utilized as the basis for allowable fringes in the instant case.[57] Also, I recommend reducing the gross make whole wage by 6.3 percent pursuant to Robert H. Hickam, supra, in light of the evidence that Respondent made its mandatory fringe benefit contributions during the relevant time period. I also would allow credit for the amount of voluntary fringe benefits actually paid by Martori (See Respondent's Answer to Specification, Exhibits D, G.)

V. INTEREST RATE

The Board has upheld its authority to modify its own orders where the ALRB had not lost jurisdiction by virtue of appellate court review. (High and Mighty Farms (1982) 8 ALRB No. 100.) The rationale for such decision was that the Board's jurisdiction remained intact following summary denial of review — because such summary denial by the court of appeals neither affirmed nor reversed a Board decision. The Board thus ruled in High and Mighty, supra, that it had retained the power to modify its order as if there had been no appeal. Recent Board precedent has recommended that the

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56. See Respondent's Answer to Backpay Specification.

57. As Hickam represents the Board's most recent ruling in connection with the calculation of fringe benefits, I must reject Respondent's contention that the fringe benefit calculations are either improperly punitive or prompted by the Employee Retirement Income Security Act (29 U.S.C. 1001, et seq. ["ERISA"]).

Lu-Ette[58] interest rate formula be applied prospectively from the date of the Board's supplemental decision, where the Board's original order specified seven percent per annum. (Bruce Church, Inc. (1983) 9 ALRB No. 19.) Here, review was denied summarily by the Court of Appeals, Fourth District, Division One, and by the California Supreme Court. I therefore recommend prospective application of the Lu-Ette interest rate formula from the date of the Board's supplemental decision in this matter. In all other respects, the interest rate ordered originally by the Board should remain unchanged.

VI. THE COMPUTATIONS

The backpay (plus makewhole supplement) due each of the members of the Johnny Martinez crew discriminatorily discharged on or about 5 February 1980 is reflected in Appendix A attached hereto. Said sum for each discriminatee has bee calculated by dividing the gross backpay owing by the .78 Adam Dairy factor: $70.97 divided by .78 equals $90.99 -- the total owing (including makewhole supplement) during the backpay period. No credit for mandatory contributions has been allowed as the discriminatees were not on Respondent's payroll for the one day involved, and thus no payment of such contributions can be presumed.

The losses due each testifying discriminatee for Respondent's discontinuance of the Calexico bus transportation are summarized in Appendix B attached hereto.

With respect to the (contractual) makewhole amounts due

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58. (1982) 8 ALRB No. 55.

Respondent's employees, I recommend the following computations:

1. The make whole amounts due the Respondent's harvesting employees listed in Respondent's Answer to Specification (Exhibit D) may be calculated by simply multiplying the gross wage (actual earnings) by 1.20 (1.201282051), which number represents the ratio derived by the Adam Dairy factor and the Hickam credit for mandatory contributions. With respect to the farm employees (see Respondent Answer to Specification, Exhibit H), I recommend utilization of the proportional-increase calculation pursuant to Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24 and Robert H. Hickam (1983) 9 ALRB No. 6.[59] Because of the difficulty in equating the various Sun. Harvest classifications with the rather complex payroll accounting categories reflected in Respondent's scheme (RX 23),[60] I am not persuaded that there is the necessary "close correspondence" between the Respondent's job classifications and those specified in the Sun Harvest contract to adopt General Counsel's calculations en toto. See Robert H. Hickam, supra.) I have therefore included in Appendix C the appropriate wage scales which have apparently been improperly computed in Respondent' Answer to Specification.

Since the Board is presently considering the applicability of its makewhole formula in the pending J.R. Norton, Case No. 77-CE-166-E, I have refrained from redoing the parties' calculations

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59. Those employees earning more than the $4.12 per hour (lowest Martori wage) are simply granted a wage increase proportionate to the $5.00 per hour Sun Harvest base wage.

60. The document, refers to some thirty-four (34) job categories, each given a particular code related to Respondent's payroll accounting.

in this decision to avoid potentially unnecessary (and lengthy) computations.

Pursuant to Labor Code section 1160.3, I hereby issue the following recommended:

ORDER

Respondent, Martori Brothers, its officers, agents, successors, and assigns, shall pay:

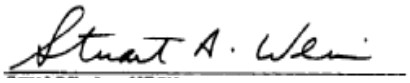
A. To the employees listed in the attached Appendix B, and to Mario Contreras and Lorenzo Rico listed in attached Appendix A, the amounts set forth therein beside their respective names, plus interest thereon compounded at the rate of seven percent (7%) per annum through the date of the Board's supplemental decision and thereafter in accordance with the formula set forth in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

B. Respondent, Martori Brothers, its officers, agents, successors, and assigns, shall further pay to the Regional Director (El Centre Region) the sum of $90.99/individual plus interest as provided above to be held in an escrow account pursuant to the provisions of the foregoing decision on behalf of all of the named discriminatees in Appendix A (with the exception of Mario Contreras and Lorenzo Rico).

C. General Counsel is ordered to prepare a new (contractual) makewhole specification consistent with the. provisions of this decision with respect to Respondent's harvesting and farm employees. This portion of the order shall be automatically stayed if any party files exceptions during the applicable time period

provided by 8 California Administrative Code section 20282.

DATED: November 21, 1983



STUART A. WEIN
Administrative Law Judge

APPENDIX A

(Martinez Crew)

Employee	BACK PAY	TOTAL OWING (Backpay plus makewhole supplement)
Alfonso Acosta	$70.97	$90.99
Ruben Acosta	$70.97	$90.99
Antonio Amial	$70.97	$90.99
Roberto Flores	$70.97	$90.99
Rodolfo Robles	$70.97	$90.99
Celio Guerrero	$70.97	$90.99
Benito Izaguirre	$70.97	$90.99
Francisco Robles	$70.97	$90.99
Constantino Villavicencio	$70.97	$90.99
Jose Valenzuela	$70.97	$90.99
Vicente Villarreal	$70.97	$90.99
Jesus Espinoza	$70.97	$90.99
Ismael Perez	$70.97	$90.99
Margarito Sandoval	$70.97	$90.99
Marcos Sandoval	$70.97	$90.99
Jose L. Garcia	$70.97	$90.99
Fausto V. Garcia	$70.97	$90.99
Lorenzo Rico	$70.97	$90.99
Mario Contreras	$70.97	$90.99
Israel Hernandez	$70.97	$90.99

Formula: Back Pay/.78 = Total Owing

$70.97/.78 = $90.99

APPENDIX B

(Losses From Cessation of Transportation)

NAME	TRANSPORTATION EXPENSE	LOST WORK	TOTAL OWING
Mario Contreras	$3.00/day x 43 days = $129.00	-0-	$129.00
Lorenzo Rico	$2.50/day x 23 days = $57.50	-0-	$ 57.50
Moises Soto	$3.00/day x 20 days = $60.00	2/13/79 $106.45 2/15/79 $115.43 2/16/79 $ 88.36 $310.2	$370.24
Ignacio Soto	$3.00/day x 9 days = $27.00	2/13/79 $106.45 2/15/79 $115.43 2/16/79 $ 88.36 $310.24 (Less $27/day interim earnings) = $229.24	$256.24

APPENDIX C

Wage Rates (Farm Employees)

MARTORI	SUN HARVEST	DAM DAIRY FORMULA
Regular		
$4.12	$5.00	$5.00
$4.18		$5.07
$4.33		$5.25
$4.80		$5.83
$4.90		$5.95
Overtime		
$6.18		$7.50
$6.27		$7.61
$6.495		$7.88
$7.20		$3.74
$7.35		$8.92