El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| HOLTVILLE FARMS, INC.<br><br>Respondent,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Charging Party. | ) | Case Nos. 79-CE-114-EC<br>79-CE-115-EC<br>79-CE-209-EC<br><br>10 ALRB No. 13<br>(7 ALRB No. 15) |

SUPPLEMENTAL DECISION AND ORDER

On July 8, 1981, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in this proceeding (7 ALRB No. 15), concluding that Holtville Farms, Inc. (Respondent) had violated Labor Code section 1153(e) and (a) by refusing to bargain with the United Farm Workers of America, AFL-CIO (UFW or Union). We ordered Respondent to make its employees whole for the economic losses they suffered as a result of its refusal to bargain.

A hearing was held before Administrative Law Judge Thomas Sobel for the purpose of determining the amount of makewhole due to each of Respondent's employees. Thereafter, on March 31, 1983, the ALJ issued his Decision, attached hereto. General Counsel and Respondent each timely filed exceptions to the ALJ's Decision and a supporting brief. General Counsel filed a brief in response to Respondent's exceptions.

The Board has considered the record and the ALJ's Decision in light of the exceptions, supporting briefs and reply briefs, and has decided to adopt the makewhole award proposed by the General

Counsel, as modified by the ALJ.

Selection of Comparable Contracts

Respondent excepts to the use of only the wage rates in the UFW-Sun Harvest agreement as the basis for computing the make-whole wage rates in the instant case. We find no merit in this exception. Respondent would have us average all the wage rates in all the contracts the UFW has negotiated under ALRB certification and arrive, in each compliance proceeding, at a single, state-wide average wage rate. Although we did average all such UFW contracts in Adam Dairy, we did not indicate that that was the only or even the preferred method of deriving a comparative wage figure. The 37 contracts reviewed in Adam Dairy were far fewer and more uniform than those available in later years,[1/] making an all-contract average increasingly difficult to obtain and inapplicable to all agricultural employers.

In J. R. Norton Company (1978) 4. ALRB No. 39, we considered the continuing usefulness of the Adam Dairy averaging method and determined that more-recently-negotiated contracts would provide a better measure of damages. We stated in Norton that:

> In evaluating the relevance of particular contracts to determination of a make-whole award in this case, the Regional Director should consider such factors as the time frame within which the contracts were concluded as well as any pattern of distribution of wage rates based on factors such as were noted in Adam Dairy, supra, e.g., size of work-force, type of industry, or geographical locations.

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[1/] The makewhole period in Adam Dairy began on January 19, 1976 The contracts considered, therefore, were negotiated within the first year following the enactment of the Agricultural Labor Relations Act.

In Kyutoku Nursery, supra, 8 ALRB No. 73, we approved the Regional Director's use of a single contract for comparative purposes, because that contract was the only contract which substantially met the criteria set out in Norton. In Robert H. Hickam (1983) 9 ALRB No. 6, we approved the averaging of ten contracts for comparative purposes, again based on the Norton criteria. We emphasize that the number of contracts used has not been and is not now a determining factor. The compliance officers should not assume a preference for either locating the single most comparable contract or for gathering as many marginally comparable contracts as possible. The number of particular contracts selected shall continue to be governed by the compliance officer's reasonable application of the Norton criteria to the peculiar circumstances of the case.

As to the case before us, we affirm the ALJ's conclusion that the Sun Harvest agreement was a reasonable contract for comparative purposes because it was executed approximately when the makewhole period began; Sun Harvest grows the same crops in the same geographic region as Respondent; the Sun Harvest contract includes job classifications that are similar to the job classifications in Respondent's work force; and Respondent concedes that it twice unilaterally raised its employees' wage rates to reflect the Sun Harvest rates.[2/] Respondent has not shown that use of the

[2/] Prior cases before this Board have indicated that the Sun Harvest contract set a standard for wages in the lettuce industry in 1979, and that when the lettuce harvest moved from Salinas to the Imperial Valley in December 1979, many Imperial Valley growers paid their employees the Sun Harvest rates, since those were considered the prevailing wage rates in the industry. (See Joe Maggio, Inc., et al. (1982) 8 ALRB No. 72; Martori Brothers (1982) 8 ALRB No. 23.)

Sun Harvest agreement in this case was unreasonable and, in fact, has suggested that we average a group of contracts which generally fail to meet the Norton criteria set forth above.[3/]

Calculation of Fringe Benefits Ratio

In J. R. Norton Company (1984) 10 ALRB No. 12, also issued this day, we changed our long-standing approach to the calculation of lost increases in fringe benefits. The compliance proceeding in Norton was bifurcated, with the actual calculations held in abeyance pending our decision on the appropriate method of calculation. Having established the new rule, we thereafter remanded the case for calculation of the makewhole remedy in accordance with that new rule.

In the instant case, the Regional Director has already calculated Respondent's liability and issued specifications based on the principles set forth in our decisions in Adam Dairy (1978) 4 ALRB No. 24 and Robert H. Hickam, supra, 9 ALRB No. 6. The ALJ reviewed the Regional Director's calculations, based on those principles, and, with some arithmetic revision, approved the specifications. Given the amount of time and expense that has gone into these makewhole proceedings, we find it improvident and unnecessary to apply the new Norton method of calculating fringe benefits retroactively to the instant case.

We therefore decline to remand this case or any other makewhole proceeding in which the ALJ Decision has issued. The rule

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[3/] The only contract introduced by Respondent that met the Norton criteria was the John J. Elmore agreement which was very similar to Sun Harvest.

stated in Norton shall be applied only in pending makewhole cases which have not yet gone to hearing.[4/] In our view, this limited retroactive application best serves the policies of the Agricultural Labor Relations Act without unduly burdening or delaying the administrative process and without unfair surprise to parties who relied on our prior rules. (See In Re Marriage of Brown (1976) 15 Cal.3d 838, 850-51.)

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Holtville Farms, Inc., its officers, agents, successors, and assigns, shall pay, to each employee identified by name or employee number in the lists of employees appended to the Decision of Administrative Law Judge herein, the amount of net makewhole stated for that employee on said list, plus interest at a rate of seven percent per annum computed quarterly from the time the backpay period commenced until the date of issuance of this Order and thereafter in accordance with our decision in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

Dated: March 21, 1984

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

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[4/] In cases in which the hearing has closed, but the ALJ's decision has not issued, the ALJ shall have discretion to reopen the record, upon request of a party, and order recalculation in accordance with the Norton Decision.

# CASE SUMMARY

Holtville Farms, Inc. (UFW)

10 ALRB NO.13
Case Nos. 79-CE-114-EC
79-CE-115-EC
79-CE-209-EC

## ALJ DECISION

The ALJ found that the Regional Director (RD) was reasonable in his calculation of Respondent's makewhole liability. The contract used by the RD for establishing comparative wage rates was reasonable because the contract was signed by a company whose employees performed work similar to Respondent's employees, operated in the same geographical area, sold to the same markets, and hired from the same labor pool. Moreover, Respondent twice raised its own wage rates to the levels in the comparable contract. The ALJ also found that a cost-of-living adjustment in the comparable contract was wages, not fringe benefits; that the paid lunch period was not a fringe benefit; and that the job clasifications of Respondent's employees corresponded to the classifications in the comparable contract.

The ALJ affirmed the RD's use of the formula in Adam Dairy (1978) 4 ALRB No. 24 for calculating makewhole for fringe benefits and allowed Respondent a credit of 6.3 percent for mandatory fringe benefits actually paid, as authorized in Robert H. Hickam (1983) 9 ALRB No. 6.

## BOARD DECISION

The Board affirmed the ALJ's rulings, findings, and conclusions and adopted his recommended revised makewhole specifications.

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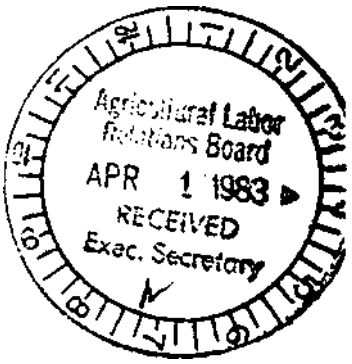


STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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|---|---|---|
| In the Matter of: | ) | Case Nos. 79-CE-114-EC |
| | ) | 79-CE-115-EC |
| HOLTVILLE FARMS, INC., | ) | 79-CE-209-EC |
| | ) | |
| Respondent, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| UNITED FARM WORKERS OF AMERICA, AFL-CIO, | ) | |
| | ) | |
| Charging Party. | ) | |
| | ) | |

Appearances:

Sarah A. Wolfe, Esq., of
Dressler, Quesenbery, Laws & Barsamian
for Respondent

Tomas Gonzalez, Esq.
for United Farm Workers of America, AFL-CIO,
Charging Party

Darrell Lepkowski, Esq., and
Judy Weissberg, Esq,
for General Counsel

Before: Thomas Sobel
Administrative Law Judge

## DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS SOBEL, Administrative Law Judge:

This case was heard by me on November 22, 23 and December 7, 8, 9, 1982, in El Centro, California. On July 8, 1981, the Board issued its Decision and Order requiring Respondent Holtville Farms, Inc. to make its employees whole for its failure to bargain in good faith, the period of liability to extend from the date of the unfair labor practice, August 3, 1979, until such time as Respondent began to bargain in good faith and continued to so bargain until contract or impasse.

Pursuant to the Board's decision, the Regional Director prepared a make-whole specification for the period August 3, 1979 to June 30, 1981. In choosing June 30, 1981, as the cutoff date for liability, it is not conceded that Respondent has fulfilled its bargaining obligation after that date, see paragraph 3, Make Whole Specification, GCX 1(D), Tr. Prehearing Conference, pp. 45-48.[1/]

The Regional Director in his specification, and Respondent in its answer, propose two different standards for computation of the make whole award. The Regional Director relies on Kyutoku Nursery (1982) 8 ALRB No. 73 and calculates make-whole by reference to the wage levels contained in the contract between Sun Harvest and

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1. Respondent takes the position that its make whole liability in this case should cease as of May 27, 1981, the date that it notified the union it was going out of business, and specifically interposed this date as an affirmative defense to the Regional Director's determination of the length of the makewhole period. See Paragraph 5, First Amended Answer, GCX 1(F). I struck this defense when counsel for Respondent admitted Respondent's crews did not actually cease working until June 30, 1981, see Tr. Prehearing Conference, p. 44, 11. 2-6; p. 50, and I could see no reason to limit the employees' claim to the benefits of a makewhole "contractual" wage prior to the time they actually ceased working.

the UFW as representative of the wages Respondent's employees would likely have received if Respondent had bargained in good faith. Concentrating on the differences between its own operations and those of Sun Harvest, Respondent argues that it is unreasonable and arbitrary to utilize the wages achieved by the union at Sun Harvest as a measure of the losses incurred by Respondent's employees; instead, relying on Adam Dairy (1978) 4 ALRB No. 24, Respondent argues that the most appropriate standard for determining the make whole rate would be to average the wage rates which obtained under a sample of UFW contracts in effect during the make whole period.

All parties were given full opportunity to participate in the hearing and after the close of the hearing all parties -- General Counsel, Respondent and the Intervenor -- filed briefs in support of their positions.

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

## I

## FINDINGS OF FACT

### The Regional Director's Make-Whole Wage

A. Sun Harvest as a Comparable Unit

Richard Delgado is the Field Examiner who prepared the make whole specification. Delgado testified that, in preparing the specification, he utilized the criteria set out in the Board's Norton decision, J.R. Norton (1978) 4 ALRB No. 39, to guide the Regional Director in determining an appropriate makewhole wage in that case. In Norton, supra, the Board said:

> Because the certification in the case issued substantially after the certification in Adam and Perry [Adam Dairy (1978) 4 ALRB No. 24 and Perry Farms (1978) 4 ALRB No. 25] the exact data used to arrive at a basic make-whole wage in those cases does not provide as good a basis for a makewhole computation in this case. [Citation] We therefore direct the Regional Director to investigate and determine a new basic make-whole wage in this matter. The investigation should include a survey of more-recently-negotiated UFW contracts. In evaluating the relevance of particular contracts to determination of a make-whole award in this case, the Regional Director should consider such factors as the time frame within which the contracts were concluded as well as any pattern of distribution of wage rates based on factors such as were noted in Adam Dairy, supra, e.g. size of work-force, type of industry or geographical location. J.R. Norton, supra, at p. 3.

Delgado conducted his investigation in the following manner:

First, in order to familiarize himself with Respondent's operations, he spoke to employees (I:101) and to David Martinez, (I:103) a member of the UFW Executive Committee and chief negotiator for the union in the Imperial Valley during 1981 and 1982 (I:31, 41-42); he also studied the transcripts of previous hearings involving the Respondent. (I:107)

Second, after determining that only one contract -- at Sun Harvest -- had been signed with an Imperial Valley grower during the make-whole period, Delgado sought to compare the operations of the two units.[2/] Although Sun Harvest is much larger than Respondent, I:102, and, unlike Respondent, harvests its own produce, I:42, Delgado considered the two operations similar because Sun Harvest's

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2. Apparently only one "first-time" Imperial Valley contract was signed during the make whole period, but the union did negotiate wages pursuant to a reopener clause in its contract with John Elmore during the make whole period. See GXC 5; I:47-49.

qrowing operations in Imperial were the same as Respondent's.[3/]

Finally, Delgado noted that during the make-whole period Respondent twice unilaterally raised its wages to levels either equivalent to or roughly comparable to those at Sun Harvest.[4/] (I:106, 107)

Delgado also chose to apply the Sun Harvest contract rates from the beginning of the makewhole period (August 3, 1979) even though the Sun Harvest contract was not effective until a bit over a month later, on September 4, 1979. He reasoned that "[Sun Harvest] was in the negotiating stage and . . . it was the same period that Holtville Farms should have been bargaining." (I:108)[5/]

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3. Delgado reached this conclusion by comparing Martinez' and employee descriptions of their jobs with the job classifications contained in the Sun Harvest contract. (I:101,103.)

4. Respondent has admitted in its answer that this is essentially true. A comparison between GCX 1-E Part 1 (attached at Respondent's Answer) and GCX 1-D, Appendix A (attached to Makewhole Specification) shows that Respondent matched the wages at Sun Harvest in several classifications from November 26, 1979 until July 20, 1980 and that it either matched or nearly equalled Sun Harvest wages in the same classifications from July 20, 1980 until the end of the make-whole period.

5. General Counsel now argues that Delgado's use of Sun Harvest prior to the make-whole period finds support in Kyutoku Nursery, supra. In that case, the Board upheld the Regional Director's use of wages from an expired contract as a measure of what Kyutoku's employees would have earned during that part of a make-whole period which ran past the expiration date of the contract. However, because the terms and conditions of a contract survive its expiration, the wages in the expired contract still provide evidence of what employees in a comparable unit would have received as a result of collective bargaining. I'm not sure I can rely on Kyutoku Nursery to provide support for my imposing Sun Harvest's wages prior to the execution of the Sun Harvest contract, especially since the evidence shows that Sun Harvest and UFW had contracts prior to September 4, 1979 (I:32-33). If Sun. Harvest was an appropriate model because of its location, crops grown and work performed, why are its wage levels appropriate only after September 4, 1979?

In support of the Regional Director's determination that Sun Harvest was an appropriate contract, General Counsel adduced testimony from David Martinez that the union used Sun Harvest as a basis for making proposals to the Imperial Valley companies he negotiated with in 1981 and 1982. (I:35) In fact, he proposed using Sun Harvest in just such a way during negotiations with Respondent. (I:33, 35.)[6/] (Ibid.) According to Martinez, Sun Harvest workers perform the same work as Holtville's employees,[7/]

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6. Martinez described the union's use of Sun Harvest as follows:

> Yes. What happens is that we'll adopt the body of the contracts, including the economic benefits and wages, and then, where there may be some individual differences, we will deal with those individual differences in supplements. For example, if an employer simply has tractor drivers and irrigators or for example, melons. Taking the example of tractor drivers and irrigators, we won't throw in all the items in the body of the contract that the tractor driver and irrigator may use because an article in the body of the contract talks about safety and it talks about tools and equipment but simply says that the employer will provide all the tools and equipment, protective garments, that are needed to do the work. We don't throw the list in there and we didn't. Then, what we do with the individual classification, we'll make a list. For example, if a tractor driver will need tool cushions or an umbrella for shade or a 9-inch crescent wrench, we don't need that in the body of the contract because the body of the contract applies to people who are lettuce harvesters and people who are cutting broccoli; so, we normally would throw that kind of thing into a supplementary agreement. It's like a classification supplement or a local supplement. Local supplement more for those companies that are operating in different areas wehre there would be some difference in dealing with the classification. (I:34; I:41-42.)

7. Martinez testified the cultural practices of the two companies with respect to "land preparation, growing . . . tractor driving and irrigating" are similar. (I:42.)

ship to the same markets (I:43)[8/] and are drawn from the same general labor pool. (I:44.)

B. Particular Features of the Sun Harvest Contract

Having selected Sun Harvest as a comparable contract, General Counsel also utilizes its wage classifications and applies its provision for a cost of living increase in computing the basic make-whole wage. Respondent contends that adoption of Sun Harvest's entire wage classification system is arbitrary and that a cost of living adjustment[9/] made pursuant to the contract should not be considered wages, but is instead a fringe benefit. Respondent's Brief, p. 14-15, 19, I:51.

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8. Martinez testified that as a boycott organizer (the transcript reads "bargaining" organizer and is hereby corrected to conform to the witness' testimony) he had to track the lettuce of the various companies being boycotted to market and he discovered that the market for Respondent's lettuce was the same as the market for Sun Harvest. (I:43.) Respondent presented no evidence to contradict Martinez' testimony, although it argues that because of Sun Harvest's much larger size, it's market is larger than Holtville's. Respondent's Brief, p. 10. Repsondent's essentially tautological argument doesn't help me understand where it markets its lettuce and whether its markets are entirely different from or merely broader than Respondent's. Martinez' conclusory testimony doesn't tell me very much either.

9. Article 45 of the Sun Harvest contract provides for a cost of living adjustment to be made contingent upon certain changes in the consumer price index taking place. Respondent's Counsel stipulated that a $.25/hour was given Sun Harvest employees pursuant to the COLA clause on July 21, 1980. Article 45(d) reads: "Such cost-of-living adjustments shall be added into the current rate of pay paid for all hours, wages and related benefits for which workers receive pay from the company such as overtime, vacations, and holidays. The amount of the adjustment shall be paid in addition to wages earned, and [if possible] shall be shown on the worker's check stub, i.e., WAGES -- COLA -- TOTAL." If the intent of the contracting parties were determinative of what I take to be a legal question posed by Respondent, the adjustment appears to be considered part of wages.

With respect to his use of Sun Harvest's classifications, it will be recalled that Delgado spoke to David Martinez and to Respondent's employees and compared their descriptions of employee job duties with the job descriptions contained in the Sun Harvest contract and concluded that the duties of the two units were similar. I:103-104. David Martinez similarly testified that the operations of the two units were the same, I:42. Although both Delgado's and Martinez' testimony is highly conclusory, it is only specifically disputed with respect to the use of the Sun Harvest "grader" classification. Respondent's Brief, p. 14-15.[10/]

Delgado decided that Respondent's "graders" must do the same as Sun Harvest's heavy equipment operators because, if I understand his testimony, a "grader" is simply a piece of heavy

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10. Respondent's Answer to the Makewhole Specification appears to implicitly contest the application of several other Sun Harvest classifications simply because it excludes them. Thus, while the Regional Director lists eight classifications in his specification -- Tractor A, Tractor B, Irrigator, General Labor, Shop, Water Truck, Service Truck and Grader -- Respondent lists only four classifications -- Tractor Driver "A", Tractor Driver "B", General Laborer and Irrigator -- in its Answer. (Compare GXC I-E to GCX I-F.) Obviously, four categories in the Regional Director's specification are not included in Respondent's Answer -- the Shop, Water Truck, Service Truck and Grader classifications. It appears that the reason Respondent makes an issue only of the wage paid employees in the grader classification is that, despite the differences in the number and nomenclature of categories utilized by the Regional Director and Respondent, three of the Regional Director's categories are paid the same wage (Tractor B, Service Truck and Water Truck Drivers). Respondent appears to be satisfied that this wage is appropriately assimilable to Sun Harvest's Tractor "B" and Truck Driver wages.

equipment. I:110,114.[11/] Without any factual support of its own, Respondent simply argues that its graders perform work equivalent to Sun Harvest's Tractor A drivers and that General Counsel put on no evidence to support the conclusion that they didn't.

In view of the total lack of evidence presented by either side as to what a grader actually does, the only way to resolve the issue is to determine who had the burden of establishing the underlying facts upon which a firm conclusion could be based. I conclude that Respondent had the burden; to be sure, Delgado's reasons for treating graders as heavy equipment operators are weak, but Respondent knows best what they actually do and could have presented evidence about the duties of a grader. Instead, it simply chose to make an argument which depended upon evidence it could have

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11. Delgado testified he did not talk to "anybody" at Holtville Farms or any representative of Holtville Farms regarding the work done as a grader." I:111. Delgado's testimony about the grader classification is as follows:

> By General Counsel: Mr. Delgado, do you know what a grader is?
>
> A: Yes I do.
>
> Q: What is a grader?
>
> A: A grader is -- They're usually a caterpillar type. It's got a very long front end; usually for making roadway. You see them on highways -- public highways. All the time working on highways. Usually used to make roads and/or canals.
>
> Q: And how do you that this is what a grader does?
>
> * * *
>
> A: Well, I've seen them.
>
> (I:114:115.)

introduced. Accordingly, I find General Counsel's attribution of Sun Harvest's heavy equipment operator rate to Respondent's grader classification reasonable.[12/]

Respondent's next argument about the Regional Director's Specification concerns whether the cost of living increase given Sun Harvest's employees should be utilized in computing the basic make-whole wages. As noted, Respondent contends a cost of living increase is a fringe benefit.

A cost of living increase tied to a rise in the Consumer Price Index is designed "to adjust wages to rising prices so as to maintain a worker's purchasing power . . . " Lowenstein, Adjusting Wages to Living Costs: A Historical Note, Monthly Labor Review, Bureau of Labor Statistics, July 1974, p. 21. The rise in the cost of living reflected in the Consumer Price Index is a rise in what is considered a consumer's typical "market basket" of goods, that is, the goods and services which are generally purchased by all consumers. (Reviewing the CPI, A Brief Review of Methods, BLS, 1976 Report 484.) As a measure of expenditures, CPI does not reflect non-cash expenditures by consumers, such as services provided by fringe benefits. The Consumer Price Index: How Will the 1977 Revision Affect It? BLS, 1975, Report 449[13/]. To the fractional

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12. I do not intend by this isolated finding to foreclose consideration of the issue of whether Sun Harvest's wage classification should be utilized in computing makewhole or whether the contract should only be utilized to determine a basic makewhole wage from which proportional increments to employees in higher paid classifications are calculated. See discussion below at pp.

13. "Since the CPI is based on expenditures, it does not reflect noncash consumption, such as fringe benefits received as part of a job . . . ." Report 449, Ibid. at 2.

extent that a cost of living adjustment is made up of certain components such as the cash-cost of health care, see e.g. Table 11 Medical Care, Consumer Price Index Detailed Report, March 1981 p. 44, which because of contractually provided medical insurance an employee never has to absorb out-of-pocket, the percentage of the COLA attributable to these costs might be considered a windfall, but I don't think that would change the nature of the COLA as a wage adjustment. Accordingly, I reject Respondent's argument that the COLA is a fringe benefit and cannot be considered wages in computing make whole.

C.

RESPONDENT'S ALTERNATE FORMULA

Respondent argues that the Sun Harvest operations differ so materially from those of Holtville that the latter's contract is not an appropriate model for determining make-whole. Instead, utilizing an Adam Dairy type approach, Respondent averages a number of contracts from around the state in order to determine a reasonable basic wage rate. Included in Respondent's alternative calculation are a number of contentions about how to calculate the make whole wage of particular employees. I shall describe each of Respondent's arguments in turn.

a.

As Respondent points out, Sun Harvest has operations in two states and seven different areas. (RX 14) Holtville farms only in the Imperial Valley. According to Respondent, then, Holtville cannot hire from the same labor pool. Thus, Respondent contends that one cannot compare how Sun Harvest would have negotiated wage

rates with how Respondent would have: Sun Harvest's rate would be based upon considerations relative to the supply of labor which would not have obtained in negotiations between the union and Respondent.[14/]

If I understand Respondent's argument correctly, to those differences are added others which are principally derived from the fact that Sun Harvest, although operating In many different locations, predominantly operates in the Salinas Valley. To this end, Respondent adduced testimony from Hal Moller, Respondent's President, III:61, about a number of differences in production between Salinas and Imperial Valley farms. Moller testified that Salinas production is much less risky because the climate is more equable than that of Imperial and the growing season is much longer, III:74-75. In Imperial the extremes of weather make for a very short growing season and a short harvesting season which in turn requires more intensive labor needs. (III:75.) Generally riskier, fanning in the Imperial Valley also bears a promise of high return (III:71). However, the overall cost of growing crops in both

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14. Respondent, of course, is considering Sun Harvest's operations in their entirety, rather than, as General Counsel and Intervenor do, merely with respect to Imperial Valley production. I do not understand Respondent to be contradicting General Counsel's evidence that Respondent's employees and Sun Harvest's Imperial Valley employees are drawn from the same labor pool. Of course, if that were the thrust of the argument, Respondent's very general evidence about the extent of Sun Harvest's operations cannot support it: the fact that Respondent farms in places other than the Imperial Valley cannot by itself support an inference that when it farms in Imperial it hires workers from any of those other places.

valleys is the same. III:71.[15/]

Moller's summary of these differences is uncontradicted: what is not clear is why Respondent treats Sun Harvest as primarily a Salinas Valley operation. Sun Harvest farms in a number of locations: Brentwood, El Centro, Huron, Oxnard, Phoenix, Salinas and Yuma. See RX 14. By some measures, Salinas is the largest of these units: for example, in 1978, Salinas employment represented approximately 31% of Sun Harvest's total employee complement; in 1980[16/] Salinas employment represented approximately 35% of Sun Harvest's total employee complement; and in 1981 Salinas employment represented approximately 35% of Sun Harvest's total employment. It would be difficult to conclude that a location which uses at most only 35% of the company's overall labor typifies the totality of its operations. Similarly, other comparative indices also raise questions about the validity of drawing distinctions between Sun Harvest and Respondent on the basis of Sun Harvest's Salinas operations. For example, looking at lettuce production alone, the Tacna/Yuma area produces more cartons of lettuce than Salinas -- apparently because it has two crops. (RX 14.)

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15. Moller testified: "Rent factors would be higher in the Salinas Valley compared to the Imperial Valley. We're talking about lettuce again. . . . Fertilizer in the Imperial Valley would be higher than the Salinas Valley. Water costs in Imperial would be higher than the Salinas Valley, in general. Labor costs would be higher in Salinas than it would be here. Insecticides would be higher down here than up there. But when you get down to the end, it's all very close to the same thing." III:72.

16. No figures are available for 1979 because of the strike. See RX 14.

b.

Respondent's alternative make-whole formula is based upon an average of the wage rates contained in other UFW contracts. Respondent or the General Counsel put into evidence contracts between the UFW and the following companies: Molica Farms (RX 2); Souza-Boster (RX 3); Maggio-Tostado (RX 4); Hiji Brothers and Seaview Growers (RX 5); H & M Farms (RX 6); Donlon Trading Company (RX 7); Watanable Ranch (RX 8); David Freedman/Travertine Vineyard Associates (RX 9); Samuel Vener Co. (RX 13); Colace Bros. (RX 17); and John J. Elmore (GCX 5).

A number of these contracts -- those at Donlon, Watanabe, Hiji Brothers, United Celery Growers, K & K Ito Company, H & F Farms, SKF Farms, Samuel S. Vener, Souza-Boster Inc., David Freedman/Travertine Vineyards -- are with companies located in areas other than the Imperial Valley (in Oxnard, Delano, Santa Maria, Otay Mesa and Coachella) -- and General Counsel contends, among other reasons, that they do not meet Norton comparability criteria because of their location. Only John J. Elmore and Colace Bros, are companies in the Imperial Valley. As to these, General Counsel contends that Colace cannot be considered a comparable contract because it was executed outside the make whole period (on November 19, 1982) and was accomplished by a settlement of make-whole wages.[17/] Some of the contracts proffered by Respondent -- at Hiji

17. I received the Colace contract into evidence because, as a late Imperial Valley contract, in combination with Elmore's and Sun Harvest's contract, it might shed some light on Imperial Valley wages during the make-whole period. Other than to conclude that the 1979-81 wage levels at Sun Harvest appear compatible with some later 1982 Imperial Valley wages, I do not rely on the Colace Bros, contract for any other purpose.

Brothers, H & M Watanabe, K & K Ito, United Celery, Donlon, SKF Farms, Samuel S. Vener, Maggio-Tostado, David Freedman/Travertine Vineyards and Molica -- have wage scales lower than the non-contractual wages paid by Holtville for the same period of time and General Counsel argues that this too means these contracts may not reasonably be considered in assessing what the fruits of collective bargaining would have meant to Holtville's employees.[18/] Some contracts -- at Souza-Boster, David Freedman/Travertine Vineyards, United Celery and Samuel S. Vener -- are at companies which grow no lettuce at all, while some of the contracts -- at Donlon Trading Company, Watanabe, Hiji Brothers, K & K Ito -- are at companies which grow only some lettuce, rather than, as Respondent did, a great deal of it and General Counsel argues that these contracts are inappropriate for this reason too. Finally, some of the contracts -- at Souza-Boster, David Freedman/Travertine Vineyards, Samuel S. Vener, SKF, United Celery Growers, Maggio-Tostado, H & M Farms, Donlon Trading Company, Watanabe Ranch, K & K Ito -- were entered into either before or after the make whole period began and therefore cover greater or lesser portions of it. One contract -- at Hiji Brothers -- even expired before the makewhole period began. Only one contract -- at Molica Farms -- is

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18. Respondent's general laborers (its lowest-paid employees) were receiving $4.12/hour through November 25, 1979; $5.00/hour from September 26, 1979 through July 20, 1980 and $5.20/hour from July 21, 1980 until July 1981. See Respondent's Answer GC 1-E, Part 1, Admitted wage scales. An examination of all the contracts identified above indicates that for comparable years, every contract paid a basic general labor wage rate lower than that paid by Respondent, although some contracts paid a higher rate then Respondent paid employees in other classifications.

more or less coterminous with the make-whole period.

By reason of the crops grown by, or the location of the units referred to in these contracts, or because of the timing or the wage scales contained in them, General Counsel contends that none of these alternative contracts (with the exception of John J. Elmore about which General Counsel makes no argument) can be considered comparable and that Respondent has not met its burden of demonstrating a more appropriate formula.

c.

Besides the broad strokes of its argument outlined above, Respondent makes a number of arguments about particular employee's make whole which also must be considered. The first is that employees paid for their lunch hour were receiving a benefit which should be credited against any benefits owing to them under the Board's method of calculating benefits. The second argument is that two employees, Herberto Cazares and Juan Alvarado, worked only overtime during the makewhole period, and deserve no makewhole wage as a consequence.

To take the contention about Cazares and Alvarado first, the argument goes this way: overtime pay is a benefit, not wages; therefore, since Cazares and Alvarado received no "wages" during the makewhole period, they are not entitled to receive wages or benefits in the form of makewhole. General Counsel, on the other hand, argues that only the overtime differential in excess of the base rate of pay, can be considered a benefit. G.C. Brief, p. 43, et

seq.[19/]

I cannot accept Respondent's argument. As I understand Adam Dairy, supra, the make-whole wage is comprised of straight time wages and fringe benefit payments. Ibid.,at 26-27. Since the Board construes overtime "payments" as part of fringe benefits in Adam Dairy, it can only be treating the differential as the benefit; otherwise, it would be contradicting its use of the concept of straight time in calculating the basic make-whole wage.

The evidence in support of the argument about the paid lunch hour is as follows: Larry Martinez, supervisor of Respondent's irrigators and sprinkler crew, testified that there are two methods of paying crews under his supervision, a daily rate and a "contract" rate. Contract rate is essentially a premium rate. It is reserved for certain kinds of jobs which it is necessary to complete quickly. To typify the use of this rate, Martinez gave the following example:

> If I have water the next day . . . and the field was not set, I would tell the guys, "I need to have this field done. I'll give you ten hours," depending on the amount of workers that I had on a given day. If it was a lot of workers and they could do it in two hours, I'd say "Okay. . . . That [is] contract rate. (III:46)

However, the use of the contract rate does not always work to eliminate the lunch hour: for example, employees could agree to a few hours contract rate for a particular job and actually work 12

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19. RX 15 contains the pay cards of the two employees: that of 9/30 is dated in 1979; the card for 9/16 is dated 9/16/82, outside the makewhole period. I am assuming the men worked both days in the makewhole period since General Counsel did not object to the admissibility of any part of RX 15. Had any part been irrelevant, I assume she would have lodged an objection.

hours, see e.g. III:58, and it is reasonable to infer that whenever those working contract rate worked enough hours to become hungry, they would eat. Employees paid contract rate are identified on payroll records by a "c" notation (III:54, 55).

The "daily" employees, on the other hand, worked regular hours, and included in their workday was provision for half an hour for lunch and a fifteen minute break. III:45.[20/] The classifications which normally worked at the daily rate were tractor operators, shop personnel, service truck operators, water truck operators, shovellers (III:51) irrigators (III:54), and general laborers when they worked at least eight hour days. III:53. Generally, these employees worked eight hours and received paid lunch time (III:52), although even some contract employees, particularly the shovellers, received paid lunch on occasion. III:52. RX-16 is a chart prepared by Respondent showing a breakdown of the employees who received the paid lunch hour. (IV:1-4.)

Respondent's argument is as follows: The California Labor Code defines wages as the amounts paid for labor, Labor Code section 200; since the employees were not working during their lunch hour, the pay they received was not for "labor" and must, therefore, be a fringe benefit. General Counsel cites no authority to the contrary, but contends that the logic is not so ironclad as Respondent makes out.

Apparently paid rest periods, which paid lunch time appears

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20. What this means is that these employees were expected to work seven hours and 15 minutes a day, III:54, 59, but their daily wage was figured on an 8-hour basis.

to resemble, are considered fringe benefits[21/] for some purposes, see e.g., Labor Relations Yearbook, 1981, p. 28: Survey on Basic Employee Benefits, but despite the increasing inclusion of paid lunch time in collective bargaining agreements, BNA Collective Bargaining Negotiations and Contracts, Basic Patterns, Section 57:501, I have not been able to find any particular discussion of their nature. However, there are cases under the Fair Labor Standards Act, 29 U.S.C. section 217, in which courts have had to determine under what circumstances a paid rest period or paid lunch hour will be considered compensable time for the purpose of determining compliance with minimum wage laws. Although the purposes of the FLSA and the ALRA are quite different, the courts have adopted a test for compensable time which appears quite useful in the present context. Among the factors to be considered in determining whether paid lunch or breaktime will be considered as part of basic wages is "whether idle time is spent predominantly for the employer's or employee's benefit and whether the time is of sufficient duration and taken under such conditions that it is available to employees for their own purposes disassociated from their employment time." Mitchell v. Greinetz (10th Cir. 1956) 13 WH Cases 3, 5, 235 F.2d 621.

In this case, the evidence is uncontradicted that Respondent's non-contract employees did not work during their lunch period; but since in general one must eat to work, it cannot be said

21. However, Respondent makes no claim that the wage paid for its employees' break be considered a fringe benefit.

that well fed workers benefit only themselves by eating.[22/] The fact that the lunch period is so short, so that a worker may only eat before resuming work, also indicates that it is not entirely "disassociated from their employment time." Accordingly, I conclude that the paid lunch period is part of the basic wage rate.

ANALYSIS

The main question presented in this case is how shall Respondent's employees be made whole for the loss of pay resulting from Respondent's refusal to bargain? Instrumental to finding an answer to that question is another: what is the standard by which to choose the appropriate model for make whole?

In Kyutoku Nursery (1982) 8 ALRB No. 73, the Board stated:

> We find the precedents of the National Labor Relations Board (NLRB) and this Board concerning the calculation of backpay due a discriminatee are generally applicable to the calculation of the amount of makewhole due to each of Respondent's affected employees.
>
> We recently noted in 0. P. Murphy Produce Co., Inc. (Aug. 3, 1982) 8 ALRB No. 54, that consistent with NLRB practice, this Board may determine the amount of backpay owed by using any formula or combination of formulas which is (are)

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22. Thus, in Mitchell v. Greinetz, Ibid., the court concluded:

> It seems to us on the undisputed facts of the case that while the fifteen minute rest periods are beneficial to the employees they are equally, if not more so, to the benefit of the employer. This is borne out by the employer's testimony that the women workers' condition prior to the fifteen minute break period "was just bad all around, bad for them as well as bad for us" and that thereafter at a conference the suggestion of the employees for the fifteen minute break periods was adopted; that at first it was optional with the workers whether they took it or not but when the employer saw the beneficial results the two break periods were mandatory.

> equitable, practicable, and in accordance with the purposes of the Act . . . .
>
> * * *
>
> NLRA precedent requires that the burden of any uncertainty in the calculation of backpay be borne by the respondent, whose violation of the Act makes the compliance proceeding necessary.
>
> * * *
>
> Therefore, 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, we shall adopt the General Counsel's formula and computations. We may reject or modify his formula and/or computations where a respondent proves 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.

Following Kyutoku Nursery General Counsel argues that I adopt her use of the Sun Harvest contract because it is "reasonable." Post Hearing Brief, p. 7; see also Robert B. Hickam (1983) 9 ALRB No. 6. However, I do not understand the Board's decisions in Kyutoku Nursery, supra, and 0. P. Murphy, supra, to require me to ignore the totality of the evidence presented even when, considered alone, the General Counsel's formula is reasonable, In High and Mighty Farms (1982) 8 ALRB No. 100, the Board recently explained that the responsibility of its administrative law judges in backpay cases is "to consider whether General Counsel's formula is the proper one in view of all the evidence and to make recommendations to the Board as to the most accurate method of

determining the amount of backpay due."[23/] High & Mighty Farms, supra, p. 2, n. 3.

Makewhole "is designed to remedy a Respondent's unfair labor practice by placing the employees in the economic position they would likely have been in but for . . . [a] Respondent's unlawful refusal to bargain." Kyutoku Nursery (1982) 8 ALRB No. 73, p. 9. In construing the scope of the remedy, the Board has not viewed its compensatory purpose in isolation; rather it has utilized its power to award make-whole to encourage the practice of collective bargaining:

> [We] seek initially to make employees whole for a deprivation of their statutory rights and in so doing we must assess the actual monetary value of their loss with reasonable accuracy. In making that assessment, however, we must also strive to encourage the process of collective bargaining, since it is clear that employees may lose far more than wages when there is no contract as a result of a refusal to bargain. Non-monetary improvements in working conditions such as grievance procedures, seniority systems, and provisions for health and safety on the job are not restored to employees by an award of wages, no matter how broadly defined. These benefits must be obtained, if at all, through bargaining; hence our concern that our authority to compensate for loss of wages should be applied so as to spur the resumption of bargaining and that it not become a new means to delay the bargaining process through lengthy compliance proceedings.

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23. In American Manfacturing Company (1967) 167 NLRB 520, the Board rejected the analysis of its Trial Examiner, who stated that "he was not faced with the issue of whether other formula ought to be considered [but] that his sole duty was to determine whether the formula utilized by the General Counsel is fair and reasonable." The national Board stated: "Contrary to the Trial Examiner's view, it is for the Trial Examiner to consider whether the General Counsel's formula is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to the most accurate method of determining the amounts due." Cases in which courts have deferred to the Board's exercise of discretion do not justify the Board's paying the same deference to the General Counsel's discretion. Under the Act, it is for the Board to exercise its independent judgment in fashioning remedies. Labor Code section 1160.3.

> We note further that the Board's remedial powers were created not to redress private causes of action, but to implement public policy embodied in the Act. [Citations] It doe snot serve the purposes of the Act for the state, in seeking to remedy unfair labor practices which undermine collective bargaining, to so intertwine itself in the details of bargaining that the dictates of the state are substituted for agreement of the parties. Adam Dairy (1978) 4 ALRB No. 24, pp. 9-10.

The board further noted that the statutory proscriptions against requiring the parties to agree and against imposing contract terms, Labor Code Section 1155.2, also operate to prevent the remedy from intruding further into the bargaining process this is necessary to compensate employees for their losses. Adam Dairy, supra, p. 11.

> Section 1155.2(a) of the ALRA contains language identical to Section 8(d). Under the ALRA, however, that language must be weighed in the remedial context against the explicit authority found in Labor Code Section 1160.3 to assess a make-whole remedy in refusal to bargain cases. The granting of make-whole authority makes it clear that we are not to read Section 1155.2(a) in such a way that it permits employers who refuse to bargain in good faith to shield themselves from any effective remedy, while retaining economic benefits unlawfully obtained at the expense of their employees. Instead, we read these provisions, taken together, to authorize the Board to assess a make-whole remedy for periods in which an employer refuses to bargain in good faith and to order good faith bargaining in the future, without imposing a requirement that the parties reach a contract and without dictating any terms of a contract. We also read these two sections as a directive to fashion a make-whole remedy which is minimally intrusive into the bargaining process and which encourages the resumption of that process. "It is the business of the Board to give coordinated effect to the policies of the Act." N.L.R.B. v. Seven-Up Bottling Co., supra.

Thus, it is within the framework of satisfying the statutory goal of compensating employees without contravening the parallel statutory constraint against imposing contract terms that I shall consider the parties' opposing contentions. Respondent first argues that there is no evidence to support the conclusion that it would have agreed

to anything at all, see Respondent's Brief p. 13, and next argues that it is unreasonable to conclude that a unit of its size and nature would have agreed to Sun Harvest rates in particular.

So far as Respondent's first argument appears to require proof of its subjective willingness to agree at all, it has been answered by the statute which requires the Board to utilize its discretion in determining how to compensate employees for an employer's refusal to bargain. Labor Code section 1160.3, J.R. Norton v. Agricultural Labor Relations Board (1979) 26 Cal.3d. 1.

Respondent's second argument is essentially that the Board must take into account the differences between Sun Harvest and itself in determining the likelihood that Respondent would have agreed to Sun Harvest's wages. According to Respondent, the differences between Sun Harvest and itself -- in terms of size, location, availability of labor and, I take it, the overall nature of agricultural operations -- makes it extremely unlikely that it would have agreed to Sun Harvest as a standard contract. To a certain extent, Respondent's argument is a truism -- I do not doubt that, if Holtville had bargained, it would have bargained from the point of view of its own best interests. However, Respondent's having failed to bargain, it is no longer possible to say exactly how the differences it has identified would have translated themselves into concrete proposals. The freedom it initially possessed to reject any and all of Sun Harvest's terms cannot be confused with the Board's obligation, in Grafting a make whole remedy, to bargain on its behalf. Thus, it seems to me that it is not enough for Respondent to point to differences between itself and

Sun Harvest in order to prove that General Counsel's use of Sun Harvest is arbitrary, unless Respondent can also show that similar differences exerted themselves in other bargaining contexts.[24/] From the undoubted differences Respondent has identified between it and Sun Harvest, I cannot determine how Respondent's contract would have differed from that at Sun Harvest.

Of course, to the extent that the Sun Harvest contract stands alone, its use as a model for imposing make whole appears highly selective, but there is additional evidence that comparable wage levels were contained in other Imperial Valley union contracts. Thus, at John J. Elmore, Inc., general laborers earned $5.00/hour from 6/1/79 until 7/15/80, GXC 5, Appendix "A". General Laborers earned the same rate under Sun Harvest's contract during the same period of time, see GCX 1-(F) Respondent's Attached Wage Schedules. The only class of tractor driver at John Elmore earned the same wage as Sun Harvest's Tractor Driver "A" from 6/1/79 until 7/15/80. Ibid. Some wages are even higher at John Elmore than they are for same classification at Sun Harvest: thus at John J. Elmore the service truck operators earned $6.40/hour from 6/1/79 to 7/15/80 while service truck operators at Sun Harvest earned only $6.00/hour during the comparable period. GCX 5, GCX 1(F).

In addition to the evidence from the Elmore contract, Respondent's Answer admits that it twice raised wages to match those

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24. Respondent sought to introduce evidence about its economic condition during bargaining and I excluded such evidence on the grounds that it would have drawn me into the heart of the bargaining process. The sort of evidence I have identified above is far more objective evidence than that sought to be introduced by Respondent.

at Sun Harvest -- another strong piece of evidence that the Sun Harvest contract represented the prevailing wage in the Imperial Valley. Thus, on the basis on the entire record, I conclude Respondent has not met its burden of showing that General Counsel's use of the wage levels in the Sun Harvest ocntract is unreasonable.

Neither am I convinced that Respondent's averaging provides a reasonable alternative to General Counsel's technique. As General Counsel points out, too many of the contracts have wage rates lower than the starting wage at Holtville and, absent a showing that the union made no wage gains in negotiation of these particular contracts or in union contracts generally, I believe loss of wages from a refusal to bargain is presumed by the statute.[25/] Stripped of these contracts, the Respondent's sample is too small to permit a meaningful average.

Although I find that Respondent has not met its burden of demonstrating that the Sun Harvest contract in general is an inappropriate model for computing make-whole, a few outstanding questions about its use remain. The first is the wholesale adoption by the General Counsel of Sun Harvest's wage classifications. In the recent case of Robert H. Hickam (1983) 9 ALRB No. 6, the Board utilized the same technique in determining wage rates for higher paid classifications as it used in Adam Dairy, supra; it simply granted a wage increase in the higher paid classifications

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25. Contracts with lower wage scales than those obtaining at Holtville might still have shown a percentage gain in wages existing prior to the advent of collective bargaining; accordingly, such contracts are not per se irrelevant even if their aboslute wages might have been lower than Holtville's.

proportional to the gain in wages made by workers in lower paid classification:

> The average general labor hourly makewhole wage rate is equivalent to Respondent's lowest wage rate (general labor). (See Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24.) However, some of Respondent's employees were paid more than the general labor wage rate. In order to make those higher-paid employees whole, General Counsel proposed that they receive a proportional increment about the makewhole base wage (average general labor hourly wage) applicable in the given quarter. The proportional difference between what the higher paid employees were paid and the general labor wage rate Respondent paid would then be used to calculate the makewhole amounts.
>
> * * *
>
> The cost of the applicable fringe benefits are then added to this proportionally increased hourly rate to calculate the total makewhole rate.
>
> The ALJ found this to be an appropriate method of making the higher paid employees whole. We affirm his finding, as we find the formula is appropriate and reasonable.

Adam Dairy appears to express a preference for utilizing such a proportional technique on the grounds that wage classifications are more suitably a subject for bargaining than for Board fiat. Thus, the first time the Board used the technique, it explained:

> We could presumably obtain data concerning more highly paid job classifications and subject it to the same analysis described above. However, in order to apply this data in the calculation of an award, we would have to classify the employees in each case according to categories set forth in a hypothetical UFW contract. Respondent's wage structure herein currently reflects differentials among some of its employees, which were apparently not established according to any systematic criteria. Its employees could reasonably have expected that some of these differentials would be eliminated, and new ones created pursuant to a contract as a result of systems for determining seniority and job classifications. Notwithstanding the clear impact of such changes on the income of particular employees, we do not consider these potential contract items to be "pay" within the meaning of section 1160.3. Any attempt to project the application of such systems to particular employers takes

> us rather far afield from our basic task here which is to compensate employees for loss of pay. Rather than engaging in such speculation, we shall order that the award be calculated in such a way as to assure that employees currently earning higher rates will be made whole to the same extent as other employees. This shall be accomplished by assuming that the average negotiated wage of $3.13 per hour is equivalent to Respondent's lowest basic wage rate. Each employee who received during the makewhole period a differential above the Respondent's base wage shall be credited withg a proportional increment above the makewhole base rate.

However, the Board did recognize that, in an appropriate future case:

> [I]f it found a close correspondence between a respondent's job classifications and those specified in UFW contracts, or if wage data constituting averages from all wage categories become available to us, it might take another approach. (Ibid.)

The question, then, is whether General Counsel has shown a "close correspondence" between Respondent's job categories and those under the Sun Harvest contract. Delgado's testimony is weak and that of Martinez in support of it is highly conclusory, but none of it was specifically contradicted by the Respondent and, I conclude that Respondent has not met its burden of showing insufficient correspondence between the wage classifications at Sun Harvest and those of its own operations.[26/]

Only the question of the fringe benefit factor remains to be considered. At the hearing, General Counsel sought to utilize a new formula for computing fringe benefits. I ruled that I was bound

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26. Although I am troubled by application of the Sun Harvest rates prior to the effective date of the Sun Harvest contract, the wage rates in the Elmore contract, which were effective at the commencement of the make-whole period provide sufficient evidence that application of Sun Harvest's rate from August 3, 1979, would not be inequitable.

by the Adam Dairy formula which presumed fringe benefits of all kinds would comprise 22 percent of an employee's wages. My determination to be bound by Adam Dairy was upheld by the Board on interim appeal. Now it appears that the formula General Counsel sought to utilize is very similar to the one recently adopted by the Board in Robert B. Hickam, supra, and I believe I am bound to reverse my earlier ruling and rely on the Board's new technique. Accordingly, I will accord Respondent a 6.3 percent credit for amounts of mandatory fringe benefits actually paid. The following charts detail my calculations.

I.

STEADY EMPLOYEES

GCX 1(L) represents General Counsel's makewhole calculations with a straight 22 percent Adam Dairy calculation. If I understand the Hickam formula, I am now to simply accord a 6.3 percent credit to Respondent for mandatory benefits paid. Since General Counsel's calculations contain the total amount of fringes owed at 22 percent of the basic wages, I shall compute the 6.3 percent mandatory benefit credit as a proportion of that total in the following manner:

$$\frac{.063}{.22} = \frac{X}{\text{total 22 percent benefit package}}$$

This yields the more generalized formula for a 6.3% benefit credit: .063/.22 x (the amount of the percent benefit package figured at 22 percent). Accordingly, I will multiply the 22 percent benefit package in GCX 1(L) stipulated by Respondent to be correct as to amount by the constant 28.5 percent to yield the amount that should be credited as mandatory benefits.

II.

THIN AND WEED CREW

GCX 1(M) represents the make-whole due employees computed under General Counsel's 6.8% benefit credit theory.[27/] Since the Hickam formula provides only a 6.3 percent benefit credit, each of the figures in the Total Due Column of GCX 1(M) must be multiplied by the ratio of 6.3/6.8 or 1.8.

III

Interest is to be computed on each award in accordance with the Board's Order in Lu-Ette Farms, 8 ALRB No. 20, see High and Mighty Ranches, 8 ALRB No. 100.

DATED: March 31, 1983.

THOMAS SOBEL
Administrative Law Judge

27. Apparently, no makewhole would be due employees figured under a straight 22 percent Adam Dairy fringe benefit formula. III:10-11.

STEADIES

| EMPLOYEE NUMBER | TOTAL DIFFERENTIAL | 22% BENEFIT | TOTAL MAKEWHOLE | VOLUNTARY BENEFIT CREDIT | MANDATORY BENEFIT CREDIT | NET MAKEWHOLE |
|---|---|---|---|---|---|---|
| 80-004 | $ 922.20 | $ 3,793.37 | $ 4,715.57 | $1 ,249.04 | $1 ,081.11 | $2,385.42 |
| 80-014 | 1 ,782. 15 | 8,871.71 | 10,653.86 | 2,888.20 | 2,528.44 | 5,237.22 |
| 80-022* | 2,087.43 | 9,109.33 | 11 ,196.76 | 3,426.37 | 1,421 .03 | 6,349.36 |
| 80-026 | 1,804.34 | 8,823.17 | 10,627.51 | 2,947.42 | 2,514.60 | 5,165.49 |
| 80-087 | 2,046.74 | 8,495.29 | 10,542.03 | 3,119.86 | 2,421.16 | 5,001.01 |
| 80-120 | 2,040.50 | 9,118.62 | 11,159.12 | 2,873.03 | 2,598.81 | 5,687.28 |
| 80-124* | 1 ,978.85 | 9,118.10 | 11,096.95 | 3,536.00 | 2,598.66 | 4,962.29 |
| 80-125 | 1,159.40 | 7,143.93 | 8,303.33 | 2,427.88 | 2,036.02 | 3,839.43 |
| 80-130 | 1,438.10 | 8,035.75 | 9,473.85 | 2,334.81 | 2,290.19 | 4,848.85 |
| 80-132 | 1,071.80 | 4,589.67 | 5,661.47 | 1 ,552.20 | 1 ,308.06 | 2,801.21 |
| 80-133 | 1,624.40 | 8,563.96 | 10,188.36 | 2,379.76 | 2,440.73 | 5,367.87 |
| 80-135 | 1,487.74 | 5,251 .80 | 6,739.54 | 1,799.10 | 1,496.76 | 3,083.68 |
| 80-136 | 2,025.08 | 10,362.45 | 12,387.53 | 3,291.34 | 2,953.30 | 6,142.89 |
| 80-137 | 304.64 | 1 ,292.86 | 1 ,597.50 | 198.26 | 368.47 | 1 ,030.77 |
| 80-138 | 609.77 | 1 ,702.92 | 2,312.69 | 398.70 | 485.33 | 1 ,428.66 |
| 80-139 | 1,937.54 | 8,547.93 | 10,485.47 | 3,166.27 | 2,436.16 | 4,883.04 |
| 80-141 | 1,987.55 | 8,649.62 | 10,637.17 | 2,907.07 | 2,465.23 | 5,264.87 |
| 80-147 | 1,103.51 | 5,531.15 | 6,634.66 | 2,004.64 | 1,576.38 | 3,053.64 |

* Asterisks denote employees who according to GCX 1(L) actually received less than 6.3% of the total makewhole due in fringe benefits. Therefore, it seems inappropriate to mechanically apply a Hickam 6.3% credit.

| EMPLOYEE NUMBER | TOTAL DIFFERENTIAL | 22% BENEFIT | TOTAL MAKEWHOLE | VOLUNTARY BENEFIT CREDIT | MANDATORY BENEFIT CREDIT | NET MAKEWHOLE |
|---|---|---|---|---|---|---|
| 80-150 | $1,953.14 | $ 8,363.86 | $10,317.00 | $2,916.74 | $2,383.70 | $5,016.56 |
| 80-153 | 1,874.48 | 8,466.07 | 10,340.55 | 2,977.43 | 2,412,83 | 4,950.29 |
| 80-154 | 2,001 .36 | 10,810.1 1 | 12,811 .47 | 3,024.53 | 3,080.88 | 6,706.06 |
| 80-155 | 1,11 1 .87 | 4,528.99 | 5,640.86 | 1 ,382.92 | 1,290.76 | 2,967.18 |
| 80-157 | 8.80 | 89.92 | 98.72 | -0- | 25.63 | 73.09 |
| 80-158 | 891 .52 | 3,253.72 | 4,145.24 | 1 ,086.04 | 927.31 | 2,131.93 |
| 80-166 | 975.20 | 4,386.34 | 5,361 .54 | 1 ,501 .47 | 1,250.11 | 2,609.96 |
| 80-172 | 1 ,550.60 | 7,058.64 | 8,609.24 | 1 ,91 1 .50 | 2,011.71 | 4,686.03 |
| 80-174 | -0- | 203.78 | 203.78 | 90.55 | 58.08 | 55.15 |
| 80-176 | 1,084.74 | 4,531 .46 | 5,616.20 | 1 ,990.02 | 1 ,291 .47 | 2,334.71 |
| 80-177 | 949.20 | 4,505.50 | 5,454.70 | 1,808.03 | 1,284.07 | 2,362.60 |
| 80-179 | 970.62 | 3,542.33 | 4,512.95 | 1 ,362.89 | 1,009.56 | 2,140.50 |
| 80-180 | 880.01 | 3,105.11 | 3,985.12 | 1 ,262.38 | 884.96 | 1,837.78 |
| 80-184 | 692.07 | 2,306.74 | 2,998.81 | 617.99 | 657.42 | 1,723.40 |
| 80-185 | 973.33 | 3,887.39 | 4,860.72 | 1 ,349.16 | 1,107.91 | 2,403.65 |
| 80-186** | 7.04 | 74.74 | 81 .78 | 69.50 | 21.30 | -0- |
| 80-189 | 1,207.57 | 6,043.76 | 7,251 .33 | 2,151 .25 | 1,722.47 | 3,377.61 |
| 80-192 | 1,864.40 | 8,451 .70 | 10,316.10 | 2,950.16 | 2,408.73 | 4,947.21 |

** General Counsel would award this employee the amount of the differential, $7.04. So long as the actual amount received by the employee is in excess of the total makewhole due, I see no reason to make any award at all.

| EMPLOYEE NUMBER | TOTAL DIFFERENTIAL | 22% BENEFIT | TOTAL MAKEWHOLE | VOLUNTARY BENEFIT CREDIT | MANDATORY BENEFIT CREDIT | NET MAKEWHOLE |
|---|---|---|---|---|---|---|
| 80-194 | $1,178.33 | $4,971 .88 | $6, 150.21 | $1,555.20 | $1,416.99 | $3,178.02 |
| 80-196 | 669.25 | 1 ,985.80 | 2,655.05 | 579.65 | 565.95 | 1,509.45 |
| 80-197 | 216.00 | 304.62 | 520.62 | 65.00 | 86.82 | 368.80 |
| 80-200 | 511 .08 | 1 ,231 .08 | 1 ,732.16 | 236.04 | 350.86 | 1,145.26 |
| 80-201 | 508.00 | 1,231.94 | 1,739.94 | 203.64 | 351 .10 | 1,185.20 |
| 80-208 | 1 ,644.33 | 5,460.47 | 7,104.80 | 1 ,874.60 | 1,556.23 | 3,673.97 |
| 80-213 | 1 ,390.48 | 7,353.40 | 8,743.88 | 1 ,845.44 | 2,095.72 | 4,802.72 |
| 80-216 | 682.48 | 2,108.53 | 2,791.01 | 531 .01 | 600.93 | 1,659.07 |
| 80-218 | 1 ,344.76 | 5,530.79 | 6,875.55 | 1 ,595.37 | 1,576.28 | 3,703.90 |
| 80-226 | 763.69 | 2,182.39 | 2,946.08 | 572.05 | 621.98 | 1,752.05 |
| 80-231 | 588.60 | 1,648.93 | 2,237.53 | 602.13 | 469.95 | 1,165.45 |
| 80-236 | 26.40 | 42.31 | 68.71 | -0- | 12.06 | 56.65 |
| 80-237 | 73.92 | 118.46 | 192.38 | -0- | 33.76 | 158.62 |
| 80-240 | -0- | 33.85 | 33.85 | -0- | 9.65 | 24.20 |
| 80-242 | 900.60 | 3,715.79 | 4,616.39 | 857.88 | 1,059.00 | 2,699.51 |
| 80-243 | 801.60 | 1,144.96 | 1,946.56 | 169.20 | 326.31 | 1,451 .05 |
| 80-245*** | -0- | 28.21 | 28.21 | -0- | 8.04 | 28.21 |

*** General Counsel's figures, GCX 1(L), show that Respondent actually paid no mandatory benefits. It seems highly artificial, therefore, to credit this employee with receipt of 6.3% of the total makewhole in benefits.

| EMPLOYEE NUMBER | TOTAL DIFFERENTIAL | 22% BENEFIT | TOTAL MAKEWHOLE | VOLUNTARY BENEFIT CREDIT | MANDATORY BENEFIT CREDIT | NET MAKEWHOLE |
|---|---|---|---|---|---|---|
| 80-246* | $ -0- | $ 14.10 | $ 14.10 | $ -0- | $ 4.02 | $ 14.10 |
| 80-247**** | 87.12 | 139.36 | 226.48 | 32.50 | 38.44 | 155.54 |
| 80-248 | 236.72 | 379.36 | 616.08 | 83.58 | 108.12 | 424.38 |
| 80-249 | 605.73 | 1,700.95 | 2,306.68 | 454.44 | 484.77 | 1,367.47 |
| 80-250 | 640.47 | 1 ,726.48 | 2,366.95 | 484.46 | 492.05 | 1,390.44 |
| 80-251 | 678.81 | 1 ,602.08 | 2,280.89 | 405.24 | 193.46 | 1,682.19 |
| 80-252 | 582.64 | 1 ,786.62 | 2,369.26 | 454.62 | 509.19 | 1,405.45 |
| 80-253 | 518.31 | 1,625.38 | 2,143.69 | 405.85 | 463.23 | 1,274.61 |
| 80-254 | 288.64 | 462.56 | 751 .20 | 113.88 | 131 .83 | 505.49 |
| 80-255 | 427.10 | 1,168.78 | 1,595.88 | 279.63 | 333.10 | 983.15 |
| 80-256 | 80.00 | 195.01 | 275.01 | 54.56 | 55.58 | 164.87 |
| 80-268 | 8.80 | 14.10 | 22.90 | -0- | 4.02 | 18.88 |
| 80-269 | 101.20 | 307.44 | 408.64 | 20.44 | 87.62 | 300.58 |
| 80-270 | 115.25 | 533.14 | 648.39 | 177.60 | 151 .94 | 318.85 |
| 80-271 | 67.50 | 242.98 | 310.48 | 87.80 | 69.25 | 153.43 |
| 80-272 | 27.04 | 39.49 | 66.53 | -0- | 11.25 | 55.28 |
| 80-273 | -0- | 78.97 | 78.97 | -0- | 22.51 | 56.46 |
| 80-274 | 26.50 | 119.28 | 145.78 | 10.80 | 33.99 | 100.99 |
| 80-275**** | 40.00 | 56.41 | 96.41 | -0- | 13.62 | 82.79 |

**** Asterisks denote employees who actually received less than 6.3% in mandatory benefits; therefore, they are credited with the amounts actually received.

| EMPLOYEE NUMBER | TOTAL DIFFERENTIAL | 22% BENEFIT | TOTAL MAKEWHOLE | VOLUNTARY BENEFIT CREDIT | MANDATORY BENEFIT CREDIT | NET MAKEWHOLE |
|---|---|---|---|---|---|---|
| 80-276* | $ -0- | $104.36 | $104.36 | $ 36.50 | $ 29.74 | $ 38.12 |
| 80-277 | -0- | 74.74 | 74.74 | -0- | 21.30 | 53.44 |
| 80-279 | 2.00 | 12.75 | 14.75 | -0- | 3.63 | 11.12 |
| 80-280 | 113.00 | 720.30 | 833.30 | 161.15 | 205.29 | 466.86 |
| 80-281 | 101 .75 | 648.59 | 750.34 | 155.51 | 183.85 | 409.98 |
| 80-282 | 66.25 | 422.30 | 488.55 | 38.26 | 120.36 | 329.93 |
| 80-283** | 7.50 | 47.81 | 55.31 | 36.50 | 13.63 | 5.18 |

* General Counsel would award this employee $7.50, the total differential due.

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| EMPLOYEE NUMBER | EMPLOYEE NAME | MAKEWHOLE AMOUNT DUE |
|---|---|---|
| 81,001 | Yolanda Hernandez | $469.40 |
| 81,002 | R. Lopez Mendoza | 401.92 |
| 81,003 | Hermila Soriano | 473.02 |
| 81,004 | Guadalupe Soriano | 473.02 |
| 81,005 | Francisco Orozco | 455.00 |
| 81,006 | Praxeols Orozco | 465.86 |
| 81,007 | Onoiro Soriano | 473.02 |
| 81,008 | Jose Soriano | 429.15 |
| 81,009 | Ponparo Leon | 432.77 |
| 81,010 | Jesus Cobarrubias | 458.55 |
| 81,011 | Francisco Huerta | 253.63 |
| 81,012 | Roberto Soriano | 42.21 |
| 81,013 | Maria De Jesus Tanori | 396.12 |
| 81,014 | Antonio Dorantes | 420.34 |
| 81,015 | Antonio Paez | 11.46 |
| 81,016 | Ramiro Reynoso | 379.14 |
| 81,017 | Norberto Orozco | 465.85 |
| 81,018 | Alfonso Lujano | 321.83 |
| 81,019 | Jesus Medina | 387.85 |
| 81,020 | Geronima R. De Medina | 413.16 |
| 81,021 | Jesus Valdez Badillo | 22.93 |
| 81,022 | Maria Meza | 434.81 |
| 81,023 | Benedicto Meza | 99.58 |
| 81,024 | Maria Isabel Torres | 320.22 |
| 81,025 | Juan R. Sanchez | 215.63 |
| 81,026 | Max Moreno | 277.35 |

| EMPLOYEE NUMBER | EMPLOYEE NAME | MAKEWHOLE AMOUNT DUE |
|---|---|---|
| 81,027 | Richard Celayo | 24.35 |
| 81,028 | Elvira Rios | 338.15 |
| 81,029 | Cesar Noriega | 387.77 |
| 81,030 | Jesus Valdez | 329.31 |
| 81,031 | Juana Zavala | 424.31 |
| 81,032 | Rogelia Ramos | 404.25 |
| 81,033 | Gabriel Meza | 153.31 |
| 81,034 | Angel Espino | 38.69 |
| 81,035 | Maria Rios | 141.85 |
| 81,036 | Gloria Rios | 128.95 |
| 81,037 | Sofia Ana Celaya | 38.69 |
| 81,038 | Felipe Ruedas | 25.79 |
| 81,039 | Guillermo Castro | 12.90 |
| 81,040 | Rosa Tanabe | 352.95 |
| 81,041 | Alfredo Chiqueta | 311.34 |
| 81,042 | Arcadio Polanco | 12.90 |
| 81,043 | Sergio Chiquete | 335.34 |
| 81,044 | Ramon Ruez | 375.59 |
| 81,045 | Ernesto Castillo | 71.71 |
| 81,046 | Evangel ina Baez | 223.47 |
| 81,047 | Manuel Mendez | 351.78 |
| 81,048 | Manuel Vasquez | 50.87 |
| 81,049 | Hugo Soriano | 320.19 |
| 81,050 | Josef ina Torres | 25.08 |
| 81,051 | Antonio Cervantes | 25.08 |
| 81,052 | Vicky Del Real | 12.90 |

| EMPLOYEE NUMBER | EMPLOYEE NAME | MAKEWHOLE AMOUNT DUE |
|---|---|---|
| 81,053 | Jose Vasquez | 25.79 |
| 81,054 | Rebeca Vasquez | 12.90 |
| 81,055 | Jose Torres | 12.90 |
| 81,056 | Rosendo Munoz | 12.90 |
| 81,057 | Andres Guerrero | 12.90 |
| 81,058 | Juan Jose Ruiz | 267.31 |
| 81,059 | Rodrigo Orozco | 303.03 |
| 81,060 | Laura Del Rio | 321.12 |
| 81,061 | Pedro Ramos | 195.61 |
| 81,062 | Miguel Galvan | 91.77 |
| 81,063 | Jesus Fletes | 262.16 |
| 81,064 | Jose Luis Garcia | 262.76 |
| 81,065 | Jesus Chavez | 12.90 |
| 81,066 | Maria Grimaldo | 238.41 |
| 81,067 | Jose Felix | 258.54 |
| 81,068 | Leonardo Cabrera | 51.58 |
| 81,069 | Norberto Uribe | 51.58 |
| 81,070 | Oscar Canez | 214.20 |
| 81,071 | Heriberto Astorga | 215.74 |
| 81,072 | Ramon Perez | 25.79 |
| 81,073 | Ruperto Aispudo | 253.49 |
| 81,074 | Leopoldo Perez | 176.44 |
| 81,075 | Rafael Munoz | 77.37 |
| 81,076 | Reynaldo Haro | 25.79 |
| 81,077 | Oscar Marquez | 29.52 |
| 81,078 | Mario Lopez | 12.90 |

| EMPLOYEE NUMBER | EMPLOYEE NAME | MAKEWHOLE AMOUNT DUE |
|---|---|---|
| 81,079 | Andres Cisneros | 12.90 |
| 81,080 | Lore to Carrera | 143.41 |
| 81,081 | Arturo Gonzalez | 104.74 |
| 81,082 | Apolinar Esparza | 247.36 |
| 81,083 | Rosa A. Esparrza | 248.57 |
| 81,084 | Antonio Mayorga | 25.79 |
| 81,085 | Jose Ruiz | 141.27 |
| 81,086 | Socorro Camacho | 210.11 |
| 81,087 | Teresa Polanco | 194.21 |
| 81,088 | M. Casas | 12.90 |
| 81,089 | Adeline Jimenez | 121.25 |
| 81,090 | Francisco Huerta | 197.22 |
| 81,091 | Martin Delgado | 208.68 |
| 81,092 | Jesus Chavez | 147.65 |
| 81,093 | Jose Zamora | 199.86 |
| 81,094 | Rosa Maria Zamora | 178.16 |
| 81,095 | Olga Torres | 12.90 |
| 81,096 | Susana Sanchez | 64.48 |
| 81,097 | Teresa Dorantes | 14.93 |
| 81,098 | Joaquin Rodriguez | 96.07 |
| 81,099 | Hector F lores | 112.69 |
| 81,100 | Alfredo Pradiz | 38.69 |
| 81,101 | Antonio Sanchez | 75.33 |
| 81,102 | Graciela Hernandez | 101.73 |
| 81,103 | Maria Dolores Celayo | 55.20 |
| 81,104 | Humberto Sotelo | 12.90 |

| EMPLOYEE NUMBER | EMPLOYEE NAME | MAKEWHOLE AMOUNT DUE |
|---|---|---|
| 81,105 | Edwardo Garcia | 12.90 |
| 81,106 | Silvia Ochoa | 12.90 |
| 81,107 | Sofia Garcia | 12.90 |
| 81,108 | Rodolfo Sanchez | 12.90 |
| 81,109 | Gildardo Medina | 88.84 |
| 81,110 | Salvador Floras | 45.92 |
| 81,111 | Mario Robledo | 20.13 |
| 81,112 | Jesus G. Lopez | 12.90 |
| 81,113 | Fernando Monreal | 12.90 |
| 81,114 | Lourdes Molina | 12.90 |
| 81,115 | Maria Molina | 50.22 |
| 81,116 | Jaime Ruiz | 90.15 |
| 81,117 | Roberto Moya | 42.21 |
| 81,118 | Librado Ortega | 36.18 |
| 81,119 | Carlos Alvarado | 61.50 |
| 81,120 | Andres Leon | 28.94 |
| 81,121 | Salvador Gomez | 14.47 |
| 81,122 | Alfredo Villa | 18.09 |
| 81,123 | Mario Espinoza | 61.50 |
| 81,124 | Manuel Leon | 7.24 |
| 81,125 | Maria Micaela Ruiz | 7.24 |
| 81,126 | Gloria Castaneda | 10.85 |
| 81,127 | Margarito Ramirez | 14.47 |
| 81,128 | Maximiliano Chavez | 3.62 |
| 81,129 | Jesus Medina | 14.47 |
| 81,130 | Candelaria Saldana | 36.18 |

| EMPLOYEE NUMBER | EMPLOYEE NAME | MAKEWHOLE AMOUNT DUE |
|---|---|---|
| 81,131 | Hermenegilda Leingruber | 36.18 |
| 81,132 | Norma L. Roman | 36.18 |
| 81,133 | Robe r to Lopez | 10.85 |
| 81,134 | Delfino Mendez | 21.71 |
| 81,135 | Ramon Perez | 10.85 |
| 81,136 | Manuel Reynolds | 3.62 |
| 81,137 | Ramon Chavez | 21.71 |
| 81,138 | Sergio Marquez | 14.47 |
| 81,139 | Guadalupe R. Castillo | 21.71 |
| 81,140 | Jose Avalos | 3.62 |
| 81,141 | Juana Gonzalez | 3.62 |
| 81,142 | Alfonso Leon | 14.47 |
| 81,143 | Juan Lemus | 14.47 |
| 81,144 | Micaela R. Morales | 10.85 |
| 81,145 | Juan Antonio Franco | 14.47 |
| 81,146 | Raul Rodriguez | 14.47 |
| 81,147 | Robe r to Lopez | 7.24 |
| 81,148 | Samuel Sanchez | 7.24 |
| 81,149 | Leticia Mendoza | 3.62 |
| 81,150 | Francisca Padilla | 3.62 |
| 81,151 | J. Carmen Nuno | 3.62 |

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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|---|---|
| In the Matter of:<br><br>HOLTVILLE FARMS, INC.,<br><br>Respondent,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br><br>Charging Party. | Case Nos. 79-CE-114-EC<br>79-CE-115-EC<br>79-CE-209-EC<br><br>ERRATUM TO DECISION OF ADMINISTRATIVE LAW JUDGE |

The following correction could be made the the Decision of the Administrative Law Judge dated March 31, 1983:

1) Page 30, line 7 should read:

"by the ratio of 6.8/6.3 or 1.08."

DATED: April 8, 1983.

THOMAS SOBEL
Administrative Law Judge