

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

VERDE PRODUCE COMPANY, INC.,)	
)	
Respondent,)	Case No. 79-CE-215-EC
)	
and)	
)	
UNITED FARM WORKERS)	10 ALRB No. 35
OF AMERICA, AFL-CIO,)	(7 ALRB No. 27)
)	
Charging Party.)	
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SUPPLEMENTAL DECISION AND ORDER

On September 10, 1981, the Agricultural Labor Relations Board (Board) issued a Decision and Order in the above-entitled case, 7 ALRB No. 27, finding that Respondent Verde Produce Company, Inc. had refused to rehire Alberto Ramirez and Eufemio Vargas because of their protected union activities, in violation of Labor Code section 1153(c) and (a).^{1/}

On January 3 and 4., 1983, a hearing was held before Administrative Law Judge (ALJ) Robert Le Prohn for the purpose of determining the amounts of backpay due the discriminatees. On August 29, 1983, the ALJ issued the attached Decision in this proceeding in which he found that the discriminatees were entitled to the amounts of backpay set forth therein. Thereafter, Respondent and the General Counsel filed exceptions with supporting briefs, and General Counsel filed a brief in reply to Respondent's exceptions.

^{1/}All section references herein are to the California Labor Code unless otherwise specified.

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 the ALJ's rulings, findings, and conclusions, as modified herein, and to adopt his recommended Order, with modifications.

Method of Calculating Backpay Liability

The Regional Director (RD), pursuant to the specific order of the Board, calculated the net backpay owed to the discriminatees using a daily comparison of gross backpay liability to interim earnings. The ALJ, noting the Board's recent reaffirmation of the daily method of computation in High and Mighty Farms (1982) 8 ALRB No. 100, found the RD's calculations on a daily basis to be appropriate for both discriminatees.

Since the issuance of the ALJ's Decision, the California Supreme Court has addressed the Board's use of daily backpay computations in Nish Noroian Farms v. Agricultural Labor Relations Bd. (1984.) 35 Cal. 3d 726. In that decision, the Court affirmed the Board's application of a daily formula where the discriminatee's employment pattern was sporadic, noting that the National Labor Relations Board (NLRB) also declines to consider certain interim earnings earned during periods when no gross backpay liability accrued. (Id. at 35 Cal.3d 744, citing Brotherhood of Painters, Local 419, (1957) 117 NLRB 1596 [40 LRRM 1051].)

However, the Court also noted that employment patterns in agriculture, while seasonal or part-time, can also be regular.^{2/}

^{2/}Certain agricultural operations, such as nurseries, dairies, and mushroom or poultry farms, tend to have regular shifts and regular work weeks. Further, some types of work, such as equipment repair, irrigation, and tractor-driving, tend to be more regular.

When a discriminatee who had full-time steady employment with the discriminating employer finds interim employment that fits the same regular pattern, the interim employment should be considered "true substitute employment" and any interim earnings deducted from gross backpay as the pattern of employment dictates. Using the Court's example, if an employee regularly worked a five-day week from Monday to Friday with the discriminating employer and worked a regular five-day week from Wednesday to Sunday with an interim employer, then the interim earnings should be deducted on a weekly basis, despite the partial lack of overlap between the actual work weeks. (See Nish Noroian Farms v. Agricultural Labor Relations Bd., supra, 35 Cal.3d 746.)^{3/}

We agree with the Court's reasoning that "true substitute employment" should be considered a direct replacement for gross backpay earnings and that interim earnings should not arbitrarily be discounted because the actual work days are different. However, the problem in agricultural employment is that even steady, full-time work is often not regular in the sense of five eight-hour days per work week. The work day and the work week in harvesting jobs may vary in length, throughout the season, depending on such factors as the weather, market conditions, and the availability of cooling facilities. However, despite this day-to-day irregularity,

^{3/}The Court noted that the Board used a somewhat similar approach in Mario Saikhon, Inc. (1983) 9 ALRB No. 50, where the Board found that a discriminatee had completely replaced his seasonal lettuce harvesting in the Imperial Valley with seasonal lettuce harvesting in the Salinas area. Although there was no overlap between the gross backpay period and the interim employment, the Board deducted the Salinas earnings on a seasonal basis from gross backpay liability.

it is also possible to observe a certain regularity when work is viewed over an entire season.

In the instant case, both Vargas and Ramirez worked full-time for Respondent as lettuce harvesters in the Imperial Valley during the 1978-79 season. But for the discrimination, the discriminatees would have worked during the 1979-80, 1980-81, and 1981-82 harvests from the beginning of December to the end of March. Respondent's payroll records indicate that the work week would have been from Monday to Saturday and would have varied from three to six days per week (although six days was the norm), depending on the availability of work. As the discriminatees worked on piece rates, the payroll records do not show the hours worked per day. However, the great fluctuation in daily earnings suggests that work days were of widely varying lengths.

Vargas found interim employment as a lettuce harvester for Imperial Valley grower Jack T. Baillie Company and worked for Baillie during each of the three lettuce harvest seasons during the backpay period. The work at Baillie was also from early December to late March, Monday to Saturday, on piece rate, and three to six days per week, depending on the availability of work.^{4/}

We find that Vargas replaced his full-time seasonal work at Respondent with interim work at Baillie that followed the same, overall seasonal pattern. Although there were odd days during each season of the backpay period when no work was available at

^{4/}The payroll records for Vargas' employment at Baillie are all in weekly form and it is impossible to ascertain the exact pattern of his work week. However, Vargas testified that he worked from three to six days per week at Baillie.

Respondent, there is no indication that Vargas would have looked for short-term work to fill in those odd days off. On the contrary, Vargas testified that, during his three years of full-season harvesting at Baillie, he never worked anywhere else. We are convinced, therefore, that a seasonal method of computing backpay is appropriate in Vargas' case.

Ramirez, on the other hand, was unable to find steady full-season work as a lettuce harvester in the Imperial Valley after Respondent refused to rehire him in 1979. Although Ramirez found his most regular interim employment at Hubbard Company, he was employed in the least senior lettuce harvesting crew and therefore encountered a more sporadic pattern of work. When he was not working at Hubbard, Ramirez sought work by appearing at several daily pick-up sites in the Imperial Valley. He obtained a variety of short-term jobs as a lettuce harvester through that method. Ramirez regarded Hubbard as his regular place of employment and, on at least one occasion, left his short-term job when his Hubbard crew was called back to work.

Although Ramirez' pattern of interim employment was more sporadic than that of Vargas, it appears that when Ramirez obtained relatively steady work as a lettuce harvester at Hubbard and at least one other lettuce company (Alamo Packing), the work pattern was of the same full-time nature as that at Verde. It therefore would be appropriate, if specific payroll data were available, to lump Ramirez' interim earnings together during these periods of steady work and deduct them from the total gross backpay earnings for the same period of time. The difficulty in Ramirez' case,

however, is that much of the data showing his interim earnings are derived from quarterly reports obtained from the Employment Development Department (EDD). These EDD reports do not indicate the dates within the quarter on which the earnings were earned. Consequently, we cannot, with any accuracy, match Ramirez' interim earnings to the appropriate period of the gross backpay earnings.^{5/} As we believe it was Respondent's burden to produce interim earnings data in more specific form, we will not attempt, in this case, to create a hybrid method of computation. (See High & Mighty Farms (1982) 8 ALRB No. 100.) Rather, we approve the specification as prepared by the General Counsel.

ALJ's Authority to Modify Board Orders

The ALJ herein refused several requests by General Counsel for modification of the original remedial Order in this matter. Those requests were based on either changed circumstances or Respondent's conduct subsequent to the date of the Order. The ALJ held that while certain modifications might be appropriate, only the Board was authorized to modify its own Order.

We disagree. The ALJ in an unfair labor practice proceeding is delegated the full authority of the Board, subject to review by the Board upon the filing of interim appeals or exceptions to the ALJ's rulings, findings, or conclusions. Absent appeals or

^{5/}The record does contain weekly payroll data showing Ramirez' interim earnings at Alamo Packing for the four weeks between December 21, 1979 and January 16, 1980, and at Hubbard Company for the five weeks between January 25 and February 28, 1982. However, given the generality of the remaining EDD quarterly data, we have decided that the slight improvement in the accuracy of the specifications which would result from complete recalculation is outweighed by the administrative delay and cost of such recalculation.

exceptions by a party, the ALJ's decision automatically becomes final 20 days after service on the parties. (Labor Code section -1160.3; 8 Cal.Admin.Code section 20286(a).) The ALJ should therefore exercise such judgment as necessary to assure that the Board's Order effectuates the policies of the Agricultural Labor Relations Act (Act), including the recommended modification of our Order where the facts and the law make modification appropriate.

Conditional Reinstatement

The ALJ found that Respondent did not make unconditional offers of reinstatement to the discriminatees before it ceased growing lettuce in December 1982. Respondent therefore had no jobs to offer the discriminatees after the 1981-82 season. We find merit, however, in General Counsel's request for an order requiring Respondent to reinstate 'the discriminatees if and when it resumes lettuce harvesting operations. (See Admiral Packing Company (1981) 7 ALRB No. 43, Order as to J. J. Crosetti Company at p. 42.)

Attorney's Fees

General Counsel argues that Respondent should be ordered to pay attorneys' fees because Respondent was highly uncooperative during the RD's investigation of the backpay liability in this case. We note that the ALJ herein took General Counsel's motion under submission and ultimately determined that it was legally inappropriate to entertain such a motion in this case. Since General Counsel was never permitted to introduce evidence in support of its motion, we cannot now find that Respondent was, in fact, as uncooperative as General Counsel asserts. However, even taking General Counsel's representations as true, we would not find

Respondent's conduct here to be sufficiently serious to require such an extraordinary remedy. Superior Court enforcement of our Order and the possibility of contempt proceedings are generally sufficient to secure compliance in cases of this magnitude.

Interest Rate

In Mario Saikhon, Inc., *supra*, 9 ALRB No. 50, we held that the Board may modify the interest rate on backpay awards to reflect changes in the prime interest rate, even where our orders have been enforced by a Superior Court. In Sandrini Brothers v. Agricultural Labor Relations Bd. (1984) 156 Cal.App.3d 878, 889, the court stated that court enforcement of a Board order as to backpay does not become a "court judgment," and is therefore not bound by the constitutional limits on interest rates, until the court has reviewed the backpay proceedings and enforced the backpay award fixing a specific amount of liability. Although a Superior Court order was obtained in the instant case, that order was obtained prior to the backpay proceeding and therefore could only apply to such aspects of the order as were subject to immediate enforcement, such as reinstatement, notice, and cease and desist provisions. The backpay award, being inchoate until completion of the backpay proceedings, cannot be considered enforced by the Superior Court's order. Therefore, by analogy to the Sandrini holding, we conclude that the Superior Court's enforcement order is no bar to modification of the backpay provision of our original remedial order in this case to conform to the interest rate formula announced in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

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ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Verde Produce Company, Inc., its officers, agents, successors, and assigns, shall pay to each of the discriminatees, whose names are listed below, the backpay amount listed next to his or her name, plus interest to be computed at seven percent per annum until the date of issuance of this Order, and thereafter interest to be computed as provided in our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

Eufemio Vargas	\$4,527.84
Alberto Ramirez	\$9,343.67

It is further ordered that, should Verde Produce Company, Inc. resume lettuce harvest operations in the future, it will immediately offer the discriminatees reinstatement to their former or substantially equivalent jobs without loss of seniority or other benefits.

Dated: August 7, 1984

JOHN P. McCARTHY, Acting Chairman

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

PATRICK W. HENNING, Member

CASE SUMMARY

Verde Produce Company, Inc.

10 ALRB No. 35
Case No. 79-CE-215-EC
(7 ALRB No. 27)

ALJ DECISION

In this backpay proceeding, the ALJ held that the General Counsel's daily backpay computations were appropriate and that Respondent failed to prove that it offered the discriminatees reinstatement. The ALJ declined to rule on several requests for modification in the remedy.

BOARD DECISION

The Board upheld the ALJ's findings and conclusions regarding the discriminatees' alleged offers of reinstatement. However, it reconsidered the appropriate method of computing net backpay in light of the decision of the California Supreme Court in Nish Noroian Farms v. ALRB (1984) 35 Cal.3d 726. Based on Nish Noroian, the Board held that a seasonal method of computation was appropriate where full-time seasonal lettuce harvest work was replaced by similar full-time seasonal work of the same overall pattern. The Board also modified the reinstatement remedy and interest rate to conform to changed circumstances, but declined to award attorney's fees against Respondent.

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

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:)
) Case No. 79-CE-215-EC
)
VERDE PRODUCE COMPANY, INC.,)
)
) Respondent,)
)
)
and)
)
)
UNITED FARM WORKERS)
OF AMERICA, AFL-CIO,)
)
)
Charging Party.)
_____)

Appearances:

Helene Cauchon
Deborah Escobedo
319 Waterman Avenue
El Centro, California 92243
for General Counsel

Larry Dawson
Howard Silver
Dressier, Quesenbery, Laws & Barsamian
444 South 8th Street, Suite C-1
El Centro, California 92243
for Respondent

Before: Robert LeProhn
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT LE PROHN, Administrative Law Judge:

This matter was heard before me on January 3 and 4, 1983, for the purpose of determining the amount of back pay due Alberto Ramirez and Eufemio Vargas.^{1/}

The Board in the underlying unfair labor practice case, Verde Produce (1981) 7 ALRB No. 27 ordered that Respondent:

Make whole Alberto Ramirez and Eufemio Zapien Vargas for any loss of pay and other economic losses they have suffered as a result of their discharge, reimbursement to be made according to the formula stated in J & L Farms, (1980) 6 ALRB No. 43, plus interest thereon at the rate of 7% per annum . . . (At p. 12.)

The formula stated in J & L Farms is the following:

Loss of pay is to be determined by multiplying the number of days the employee was out of work by the amount the employee would have earned per day. If on any day the employee was employed elsewhere, the net earnings of that day shall be subtracted from the amount the employee would have earned at J & L Farms for the day only. The award shall reflect any wage increase in work hours or bonus given by respondent since the discharge.

Either at the outset of the hearing or during the course thereof, the parties entered into the following stipulations:

1. The mathematical calculations in both the General Counsel's and Respondent's specifications are correct.
2. If the daily method of calculation is appropriate, Respondent agrees that the formula used by the General Counsel in its specification is correct.
3. If a weekly or quarterly method of calculation is appropriate, General Counsel agrees that the formula used by

1. The parties stipulated that Eufemio Vargas and Juan Ceja are the same person. He used the name Vargas while working for Respondent and Juan Ceja while working for Jack T. Baillie Co., Inc.

Respondent in its specification is correct.

4. The gross earnings figure in the General Counsel's specification was derived from the daily earnings figures available in Respondent's payroll records.

5. Both parties calculated the gross earnings of Vargas on the basis of the average earnings of cutters and packers in Crew Number 1.

6. Both parties calculated the gross earnings of Ramirez on the basis of the average earnings of loaders in Crew 1.

7. Vargas worked at interim employer Jack T. Baillie Co., Inc. during the relevant back pay period.

8. Juan Ceja is the same person as Eufemio Vargas.

9. Ramirez worked at the following interim employers during the following seasons:

1979-80 Alamo Packing and Hubbard Company

1980-81 Morehead, Tom Brian Harvesting, and Hubbard Company

1981-82 Morehead, E & L Avila, and Hubbard Company

10. Vargas paid dues to the UFW while employed at Jack T. Baillie as set forth by General Counsel in his specification.

The following issues are to be decided in the instant proceeding:

(1) whether the use of daily, weekly or quarterly earnings is the appropriate method for determining gross and net back pay; (2) whether the back pay due each grievant should be limited to the season in which each was refused hire; (3) whether the backpay due either discriminatee has a terminal point determined by Respondent's unconditional offer of reinstatement; (4) whether the General Counsel should be awarded attorney's fees; (5) whether

General Counsel's motion to reopen the record should be granted; (6) whether General Counsel's Motion to correct the transcript should be granted;^{2/} and (7) whether General Counsel's motion to modify the interest rate to that established in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, for back pay due after August 18, 1982, should be granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Manner of Determining Gross and Net Earnings

General Counsel makes a two-pronged argument that use of "dailies" in determining gross and net back pay is appropriate: (1) the Board order in the underlying case [7 ALRB No. 27] is dispositive of the issue by specifying that back pay shall be calculated in the manner set forth in J & L Farms; and (2) Respondent failed to prove that daily interim earnings were unattainable for any of the interim employment of either Vargas or Ramirez.

The language of J & L Farms seems quite clear. Gross back pay is to be determined by multiplying the number of days the employee was out of work by the amount he would have earned that day. Thus, gross back pay would require the use of daily earnings. Similarly, when speaking of interim earnings, the order spells out

2. General Counsel's post-hearing motion to correct the record as set forth below is granted. As urged by General Counsel, the context of the question makes it clear that reference was to the 1982-83 season.

Volume II, page 88, lines 1, 2 are corrected to read as follows:

"Is Verde Produce using the services of a labor contractor to hire harvest workers during the 1982-83 season?"

that interim earnings provide offsets on a day-by-day basis. In order to arrive at the net earnings for that day, such earnings are to be subtracted from the amount the individual would have earned that day had he been working for Respondent. If there were earnings on a particular day at the interim employer and there would have been none that day at Respondent's, the money earned that day at the interim employer provides no offset against gross earnings. Similarly, if more were earned at the interim employer on a particular day than would have been earned working at Respondent's that particular day, the excess interim earnings may not be used to offset gross earnings.

Application of the J & L Farms rule to the instant case means adopting the method used by General Counsel in determining the gross and net back pay due each discriminatee.

Respondent argues that a failure to acknowledge all monies earned by Vargas at Jack T. Baillie penalizes the employer, noting further that the back pay remedy is not intended to achieve such a result. This argument misconceives the role of the interim earnings offset to gross wages. On any day on which Vargas had no gross earnings for Respondent, nothing is due for that day. To permit an offset of any interim earnings for that day would provide Respondent with a windfall, as would using interim earnings for a particular day to over compensate for gross earnings on that day. Having violated the statute, Respondent is hardly in a position to complain if it does not receive a benefit from the fact that interim earnings occurred on a day on which it incurred no gross earnings liability.

The Board has repeatedly stated that calculating net back

pay in the manner done in the instant case is a "reasonable and appropriate method by which to compensate agricultural employees for the losses they suffer as the result of an employer's discriminatory conduct."^{3/}

Vargas has worked at Jack T. Baillie Company, Inc. since December 13, 1979. In determining his interim earnings, General Counsel used a weekly printout of the Baillie payroll. Vargas testified that he worked from three to six days a week at Baillie's.^{4/} General Counsel used a standard five day work week Monday through Friday, and divided each weekly gross pay amount by five days and utilized that figure as an average daily earnings figure. The average daily figure was offset against the average daily figure for cutters and packers in Crew 1 at Vargas.

The Board has recognized the method used by General Counsel as appropriate in situations in which Respondent does not provide proof that daily interim earnings are not obtainable.^{5/} As General Counsel argues, such proof is not found in the present record. Respondent utilized Vargas' total weekly earnings at Baillie, obtained from a computer printout, in making its calculations of back pay due; no evidence was offered to establish that the printout did not reveal the daily earnings for Vargas. The General Counsel did not stipulate that only weekly earning information was available

3. High and Mighty Farms (1982) 8 ALRB No. 100, p. 9; see also: J & L Farms (1980) 6 ALRB No. 43, and Sunnyside Nurseries, Inc. (1977) 3 ALRB No. 42.

4. This testimony was uncontroverted and is credited.

5. High and Mighty Farms, Inc., supra.

from Baillie.^{6/} Thus, I find General Counsel's approximation of daily interim earnings for Vargas to be consistent with established Board law. In doing so, no reliance has been placed upon the General Counsel's argument that the Board order in 7 ALRB No. 27 mandated calculation of net earnings on a daily basis irrespective of what information was available regarding interim earnings. Rather, I read the order as mandating use of daily earnings if a discriminatee's interim earnings can be approximated on a daily basis; such is the case with Vargas.

With respect to Ramirez, Respondent stipulated to General Counsel's method of computing net back pay if the use of daily earnings is found appropriate. Once again, Respondent failed to adduce evidence regarding efforts made to obtain daily earnings from the various interim employers for whom Ramirez worked and once again failed to offer evidence tending to prove that daily earnings figures were unavailable from any or all of the interim employees.^{7/}

Thus, I find General Counsel's calculations of gross back pay and interim earnings on a daily basis to be appropriate in determining money due Ramirez.

Reimbursement for Expenses

In addition to net back pay a discriminatee is entitled to be reimbursed for all legitimate expenses, incurred in seeking or

6. Cf. High and Mighty Farms, Inc., Id..

7. General Counsel directs attention to Labor Code section 1174 which requires that employer's keep daily records of wages and hours on a daily basis and keep such records on file for a year. Presuming compliance with section 1174, it seems likely the raw records examined by Respondent would provide daily as well as weekly earnings for each of the discriminatees during the back pay period.

holding a job, which he would not have incurred but for Respondent's discriminatory act.^{8/} Among the expenses for which a discriminatee is entitled to reimbursement are union dues required as a condition of employment at an interim employer.^{9/}

Union dues are the only expenses claimed by General Counsel. Respondent stipulated to the accuracy of the Vargas claim of \$40.00. General Counsel in calculating (the union dues) reimbursement payable to Ramirez used the following method: Paycheck stubs from Hubbard showed payment of 2% of earnings as dues. General Counsel applied the 2% figure to Ramirez' total interim earnings from Hubbard for the back pay period. The result was a total of \$114.31.

Essential to a claim for reimbursement for union dues is evidence of the existence of a union security clause in a collective bargaining agreement between the interim employer and the UFW. Only under such a circumstance can membership be said to be a condition of employment. That proof is supplied with respect to Vargas by stipulation. With respect to Ramirez, the proof is supplied by inferring from the fact that payroll stubs indicate payment of dues, that membership was mandatory while working at Hubbard. I am prepared to draw that inference in the absence of any evidence to the contrary.

8. Butte View Farms (1978) 4 ALRB No. 90, p. 8.

9. National Labor Relations Board Casehandling Manual (Part Three) Compliance Proceedings 10610 and cases cited therein.

B. Limitation of Back Pay to the Season in Which Vargas and Ramirez Were Refused Rehire

Citing George Arakelian Farms v. A.L.R.B. (1980) 111 Cal.App.3d 258, Respondent argues that back pay due either discriminatee should be limited to the season in which he was refused rehire. In Arakelian, the court stated:

The time period with respect to which the order required back wages to be paid is also incorrect. The order specifies the period "from June 11 [1977] to date he or she is offered reinstatement to the same or a substantially equivalent position." These workers are employed harvesting cantaloupes. Such employment is neither continuous nor permanent and there is no evidence whatever that such employment would have continued from June 11 to . . . the present time. The appropriate period would be from June 11, 1977, until such time as the harvesting of cantaloupes would have been completed. (Id. at 278.)

Following a remand order, the Board issued a Supplemental Decision and Revised Order in which it explained the bifurcated nature of unfair labor practice proceedings and deferred, until after the compliance hearing, resolution of the question regarding the period for which back pay should be awarded.^{10/} The Board noted that Arakelian would have full opportunity at the compliance hearing to adduce evidence on the question of the term for which back pay should run. Thus, the Board did not interpret the Court's remand as establishing a per se rule that back pay for seasonal agricultural workers should be limited to the season in which the unfair labor practice giving rise to liability occurred.

In High and Mighty Farms (1982) 8 ALRB No. 100, the Board in its Supplemental Decision and Order rejected Respondent's argument that the discriminatee's back pay period should be limited

10. George Arakelian Farms, Inc. (1982) 8 ALRB No. 32.

"because [his] employment history indicates he worked sporadically for different employers both before and after the discriminatory layoff, and that the longest he worked for any single employer was nine weeks."^{11/}

We start with the proposition that the back pay period normally runs from the date of the employer's discriminatory act and continues to the date of a bona fide offer of reinstatement. The employer has the burden of offering persuasive evidence establishing that some curtailment of the customary period is appropriate. This burden is not met by "conclusionary statements or speculation."^{12/} Since any uncertainty concerning how long either Vargas or Ramirez would have worked for Respondent had they been rehired was created by Respondent's illicit act, that uncertainty must be resolved against Respondent.

The interim employment history of each discriminatee supports the conclusion that, but for Respondent's discriminatory act, each would have returned to employment during the seasons following the 1979-80 season.

Vargas had been a farm worker for ten to twelve years prior to the 1979-80 season; he worked the 1978-79 season for Verde and was prevented from resuming work for Verde the following season for reasons violative of the Act. The significant thing is that he sought to return to Verde. Following Verde's refusal to hire him, Vargas sought and obtained work at Jack T. Baillie and worked there

11. Id., p. 3.

12. Ibid., p. 3.

regularly during successive seasons thereafter. Respondent has presented no evidence to suggest that his work pattern would have been otherwise had he not been denied employment by Verde during the 1979-80 season, i.e., that he would not have returned season after season to work for Respondent.

The employment history of Ramirez following Verde's refusal of rehire also evidences a stability with respect to his primary interim employment which suggests that he would have continued in Verde's employ season after season but for Respondent's discriminatory act.

Ramirez testified that he always worked at Hubbard when there was work; the evidence supports this testimony. Beyond that, Ramirez filled in with work from other growers when Hubbard was not working. Even there his employment history indicates some stability. He worked during portions of two successive seasons for Moorehead.

Thus, irrespective of the gross turnover figures urged by Respondent to support its argument for limiting back pay to the season in which the discriminatory act occurred, the employment history of each discriminatee warrants the conclusion that he would have returned season after season to work for Verde. Respondent's reliance upon the Board's "remarks" in Seabreeze Berry Farms (1981) 7 ALRB No. 40 regarding the nature of agricultural employment is inapposite in the face of the specific employment pattern of Vargas and Ramirez. Thus, Respondent's turnover argument is unavailing with respect to limiting the back pay period to the season in which each was refused rehire.

C. Unconditional Offers of Reinstatement

Back pay liability arising out of a discriminatory refusal to rehire is customarily terminated by a unconditional offer of reinstatement to like or similar employment.^{13/} Respondent argues that such offers were made by Hector Saikhon to each of the discriminatees during December 1980, thus limiting Respondent's back pay liability to the 1979-80 season.^{14/} Whether such is the case depends upon the resolution of the conflicting testimony of Vargas and Ramirez on the one hand and of Saikhon on the other; and if Saikhon be credited, whether his statements to either discriminatee were legally sufficient to constitute an unconditional offer of reinstatement.

An employer may toll back pay liability arising from the discriminatory discharge of or discriminatory failure to rehire an employee by unconditionally offering to reinstate that employee to his former or like position.^{15/} The offer of reinstatement must be specific and unequivocal. Inquiry regarding whether a discriminatee is available or ready to work is not such an offer, nor is an invitation to a discriminatee to apply for work.^{16/}

13. Maggio-Tosdado, Inc. (1978) 4 ALRB No. 36, ALO Dec. p. 3; Mid-West Hanger Co. (1975) 221 NLRB 911, enf'd in pertinent part 550 F.2d 1101.

14. Saikhon is president of Verde Produce and runs the whole operation. He is also a farmer.

15. Denver Fire Reporter and Protective Company, Inc. (1957) 119 NLRB 1187, 1188.

16. W.C. McQuaide, Inc. (1975) 220 NLRB 593, 610; Rea Trucking Co., Inc. (1969) 176 NLRB 520, 526.

(1) Saikhon's Testimony -- Conversations with Vargas 1980-81 Season

Saikhon testified he had two or three conversations with Vargas during the 1980-81 season. The first took place at a point where one comes out of the ranch into the Highline pavement around the 17th of December.^{17/} The second was sometime after Christmas at the coffee shop by the water cooler.

Saikhon's testimony with respect to the first 1980-81 conversation was as follows: he encountered Vargas going onto the Highline pavement, stopped him and asked if he needed anything. Vargas responded that he needed a job. Saikhon responded: "Fine, now why don't you go to the office instead of driving around the fields like a policeman." "We sure have work because we have a lot of lettuce, but . . . this is not the place to look for work, . . . driving around the fields like a policeman . . . why don't you go to the office?"^{18/}

Saikhon asked: "How come you're always looking for a job and I never see you out in the fields? . . . Have you had any problems with me or my company?" To which, according to Saikhon, Vargas responded, "No." Vargas then stated he would go to the office and leave his Social Security number and come to work.^{19/}

A second conversation occurred around December 26 or 27 at Verde's lettuce cooler at a coffee shop located 50 to 100 feet from

17. Saikhon later testified was around the 12th or 14th.

18. Tr. II: 36-37.

19. Tr. II: 35-39.

the Verde office. Saikhon testified that Vargas opened the conversation by telling him that he would get fat eating so many doughnuts. He then asked whether there was work; Saikhon said yes. Vargas asked whether there was anyone at the office; Saikhon said yes. He saw Vargas walk toward the office, but did not see him go inside.^{20/}

1981-82 Season

Saikhon testified he had three conversations with Vargas during the 1981-82 lettuce season. The first occurred at the Verde shop where the stitcher trucks are gassed. Vargas was looking for Pancho. Saikhon told Vargas that Pancho was in one of the fields being harvested. Vargas said he would go to talk to Pancho. He told Saikhon he had been sick lately. Saikhon asked: "Are you guys working for him?" Vargas responded: "No, I've been sick, but I got my name in the office."^{21/}

There was, according to Saikhon, a second conversation with Vargas between December 12th and 20th which occurred in a field where cutting was taking place. Vargas asked where Pancho was. Saikhon asked why Vargas always asked about Pancho. Vargas responded that he wanted to talk to him. Saikhon said he had the impression Vargas was trying to harass him because he was always asking for Pancho. In response to Saikhon's question, Vargas stated he had deposited his Social Security number at the office. "So I [Saikhon] says, 'Do you want to work?' And he says, 'I don't know

20. Tr. II: 41-43.

21. Tr. II: 44-45.

yet, I want to talk to Pancho.'"^{22/}

There was purportedly a third conversation between Saikhon and Vargas right after New Years at the Texaco Station. Vargas was still looking for Pancho.^{23/}

(2) Conclusions re Vargas

Assuming arguendo the conversations between Vargas and Saikhon occurred as Saikhon testified, none was an unconditional offer of work. For the most part the conversations were not even invitations to apply for work. Reinstatement offers must be unambiguous. Saikhon's testimony regarding his conversations with Vargas do not manifest a clear statement to Vargas that he was being offered a job. Any uncertainty in this regard must be resolved against Respondent.

An unconditional offer of employment is an affirmative defense against ongoing liability. Respondent had the burden of proving such an offer was made to Vargas. It failed to do so. Thus, so far as Vargas' back pay is concerned, Respondent's liability was not tolled by an unconditional offer of reinstatement during either the 1980-81 or 1981-82 seasons. It is therefore unnecessary to resolve the conflicts between the testimony of Saikhon regarding alleged conversations with Vargas and the testimony of Vargas specifically denying any contact or conversations with Saikhon during either the 1980-81 or 1981-82 seasons.

22. Tr. II: 46.

23. Tr. III, 47-48.

(3) Saikhon Testimony -- Conversations with Ramirez 1980-81
Season

Saikhon testified he had two conversations with Ramirez during this season. The first occurred at Clark's Service Station in Holtville between the 7th and 15th of December.

"He [Ramirez] asked me if I had a job, and I says -- I looked at him, and I turned around. I says, 'Yeah, you worked for us before, You know where the office is at.'"^{24/} He said to Ramirez, "My wife is there and the other payroll girl. Leave your Social Security and your -- your name."^{25/} After getting gas, Saikhon proceeded to his office. Ramirez followed in a separate vehicle. When they arrived at the office, Saikhon observed Ramirez headed toward the main payroll office. "I seen him going in to our main office where all the workers are, the men are."^{26/} Saikhon did not know whether Ramirez ever provided the office with his name and Social Security number. However, he was sure that Ramirez did not go into the sales office at that time. This apparent conflict in Saikhon's witnesses testimony is unexplained. When pressed by his own counsel, Saikhon said the above conversation could have occurred during some other season.^{27/}

Saikhon testified to a second conversation with Ramirez around Christmas 1980.

24. Tr. II: 20.

25. Tr. II: 21.

26. Tr. II: 21.

27. Tr. II: 24.

Q [Dawson] Okay. Who spoke first?

A [Saikhon] I -- then I said, "Well, what do you want," you know, and he says, "I'm looking for work." I says, "I'm sure you came a week or ten days ago." I says, "Did you put your name in for -- and Social Security number and everything?" . . .

Q What did he say?

A He says -- he says, "Well, I'd rather have you tell me I got a job because I don't think Fidel likes me too much."

Q Okay. What did you say to that?

A I said, "That's immaterial, whether Fidel likes you or not." I says, "I run the company;" I says, "You got a job all the time." I says, "Go over there and put your name and go to work." I says, "you know where the fields are." I says, "You're always around them enough."

* * *

Q Did you say anything else in the conversation?

A I said, "Go to work in the morning." I talked to him in Spanish, and I says, "No problem."

Q Okay. And what happened next?

* * *

ADMINISTRATIVE LAW OFFICER LePROHN: Did Mr. Ramirez say anything else?

THE WITNESS: He says, "Good." He says, "I'll go and put my name and Social Security number, and I'll see you out in the field tomorrow." I says, "Fine."

(Tr. II, pp. 27-28.)

Respondent offered no evidence that Saikhon communicated at any time during the 1980-81 season with the office to advise them that Ramirez was to be hired. Nor is there evidence that Ramirez took any steps to verify Saikhon's statements. Nor did Ramirez act

upon Saikhon's direction to "Go to work in the morning."^{28/}

Absent any evidence from Respondent that Saikhon instructed persons working in the payroll office to put Ramirez to work if he deposited his SSA number in the office, it can be argued his offer was not unconditional. On the other hand it can be argued, the direction to Ramirez to advise the office of his SSA number and go to work was an administrative requirement, ministerial in nature, and not a precondition of hire unique to Ramirez.^{29/} Thus, the offer was unconditional. The latter position is more persuasive. Therefore, it becomes necessary to resolve the conflict between the testimony of Saikhon and Ramirez and to determine whether Saikhon's testimony regarding his interaction with Ramirez is to be credited in the face of Ramirez's denial that he had any contact or conversations with Saikhon during the 1980-81 or 1981-82 seasons.

Saikhon's Credibility

Saikhon did not testify during the trial on the merits. His demeanor while testifying in the instant proceeding on this question of reinstatement offers did little to inspire confidence in the truthfulness of his testimony. When questioned regarding his conversations with Vargas or Ramirez, he was aggressive and argumentative. He conveyed a scorn for the proceedings which is epitomized by his statement while on stand: "It's a bunch of bullshit."^{30/} While a witness' arrogance and verbalized contempt

28. Tr. II: 27.

29. Cf. Midwest Hanger Co. (1975) 221 NLRB 911.

30. Tr. II, 54.

for the process in which he is a witness may not always warrant his being discredited, Saikhon's demeanor together with inconsistencies in his testimony and the detail with which he recalled conversations with both Ramirez and Vasquez after a substantial lapse of time coupled with his inadequate explanation for the need of a notation indentifying Vargas as the short one and Ramirez as the tall one, leads me to conclude his testimony regarding offers of employment to Vargas and Ramirez is not credible.^{31/} When Saikhon took the stand, he brought a piece of paper, subsequently admitted as G.C. No. 3 which characterized Vargas as "short one" and Ramirez as "tall one." He was unable satisfactorily to explain why the notiations appeared on the paper, or why he brought it to the witness stand. The quality of Saikhon's testimony regarding reinstatement offers stands in sharp contrast to his straightforward and unargumentative responses when cross-examined regarding whether Verde contemplated 1983 lettuce operations. The latter testimony, I find to be credible.

For the foregoing reasons Saikhon's testimony regarding conversations with Ramirez during the 1980-81 season is not credited. Thus, Ramirez received no unconditional offer of

31. An additional factor suggesting that Saikhon's testimony regarding offers of reinstatement should not be credited is his testimony that during the 1980-81 and 1981-82 seasons he talked at one time or another with all his workers -- approximately 100 each season. It is likely he did so; this degree of interaction with his workers makes it more unlikely that he would remember in detail conversations with either Vargas or Ramirez.

reinstatement during the 1980-81 season.^{32/}

1981-82 Season

Saikhon testified to two conversations with Ramirez during the 1981-82 season. The first occurred at Clark's Service Station prior to the commencement of the season, about December 4th.^{33/} Ramirez asked when work was going to start, Saikhon said he would know in a couple of days. There followed some conversation regarding who was to be head man. Saikhon asked Ramirez whether he was going to work that year, Ramirez responded, "Yeah."

Saikhon stated: "Well, you know where the office is Make sure you go in and sign up right away because I might buy a patch of lettuce right away and we're going to start earlier maybe."^{34/}

Saikhon's second conversation with Ramirez is said to have occurred around the 27th or 28th of December 1981. Saikhon testified he almost bumped into Ramirez walking out of the office.

"... I was trying to get back to the field 'Don't tell me you're [Ramirez] out looking for a job again,

32. As contrasted with Saikhon, Ramirez was straightforward though understandably vague with respect to questions regarding his interim employment. He impressed me as one who was making a serious effort to respond accurately to all questions put to him. He denied any contact with Saikhon during the 1980-81 or 1981-82 lettuce seasons. This testimony is credited.

33. On cross-examination, Saikhon testified all his 1981-82 conversations with Ramirez occurred at his office and placed with first "sometime in December." When asked whether he had a conversation with Ramirez at Clark's Service Station during the 1981-82 season, Saikhon responded: "I don't think so, no. I can't remember right now." (Tr. II:.77.)

34. Tr. II: 30.

You've been offered it.' He [Ramirez] says, 'Yeah," he says, 'I was -- I didn't know you people were cutting that heavy; I hear you're going real heavy.' I says, 'Yeah, we're even working on Sundays.' . . . 'There's plenty of work I got to go; I'll see you later.'"^{35/}

For the reasons enumerated above, Saikhon's testimony is not credited. In sum, I conclude that Respondent has failed to present credible evidence that Saikhon made Ramirez an unconditional offer of reinstatement. Therefore, Respondent's back pay liability was not tolled during the 1980-81 or 1981-82 lettuce harvest season with respect to Ramirez.

D. Termination of Lettuce Operations

Saikhon testified in a straightforward and credible manner regarding the cessation of California lettuce operations by Verde Produce with the end of the 1981-82 season.

Verde planted no lettuce in California during the 1982-83 season. It placed only carrots, onions and cantaloupes. There were no plans for Verde to have a 1982-83 lettuce operation.

Verde does not own equipment used for lettuce harvesting. It leased such equipment during the 1981-82 season; the leases had expired as of the date of hearing. Verde was not involved in any way with the growing or shipping of lettuce during the 1982-83 season.

Saikhon is not a principle in any corporation engaging in agricultural operations in California.

35. Tr. II: 33.

The evidence adduced at the hearing supports the conclusion that Respondent's back pay liability terminated with the end of the 1981-82 lettuce harvest season.

E. Motion to Reopen Hearing

Following the close of the hearing, General Counsel moved, pursuant to 8 Cal. Admin. Code section 20240, to reopen the hearing on the ground of newly discovered evidence. The Motion and accompanying affidavits was originally filed January 25, 1983. Thereafter, General Counsel requested that its Motion be held in abeyance until April 15, 1983.

On May 13, 1983, General Counsel filed a new Motion to Reopen Hearing to which Respondent filed a response in opposition on May 26, 1983. The Motion was referred to the ALJ on May 20, 1983.

General Counsel's Motion rests upon a Declaration Under Penalty of Perjury of Rita Gonzales to the effect that she worked for Verde Produce in a lettuce crew in Posten, Arizona for approximatley one month; that she was waiting to begin work for Verde in melons; that she was paid with a Verde Produce check; and that she saw Saikhon in the Arizona fields. The Motion was also accompanied by a Declaration by ALRB Field Examiner Mike Castro which states that he went to Arizona but saw no harvesting done by Verde Produce, nor did he see lettuce boxes bearing the Verde Produce label (Oro). The balance of his declaration consists of hearsay statements regarding information purportedly obtained from Rita Gonzales. However, the Gonzales Declaration does not contain the same information. Treating the Declarations as an offer of proof, they do not present facts which controvert Saikhon's

testimony at the hearing nor his Declaration filed in opposition to the Motion.

In opposition to the Motion, Respondent filed a Declaration of Saikhon which reinforces his testimony at trial regarding Verde's 1983 operations and explains his presence in Arizona as well as the use of Verde paychecks to pay employees of Great Western Sales.

In summary: the newly discovered "evidence" offered by General Counsel does not provide any reason for reopening the hearing.

The Motion is denied.^{36/}

F. Conditional Reinstatement as a Remedy

General Counsel urges that if Respondent is not currently engaged in lettuce operations, "a conditional reinstatement offer" is appropriate, i.e., that if and when Respondent resumes lettuce operations, discriminatees must be offered immediate reinstatement to their former or substantially equivalent positions.

General Counsel notes that the NLRB has used such a remedy in situations in which an employer has ceased operations. However, in the cases cited by the General Counsel, the Board itself modified the remedy previously recommended by the Trial Examiner (ALJ) to incorporate such a remedy into its final order.^{37/} Here, General Counsel seeks to have an ALJ modify a remedial and final order of

36. The foregoing ruling assumes arguendo the legal appropriateness of the Motion, i.e., that the newly discovered evidence was in existence at the time of trial, a fact not self-evident.

37. Beech Branch Coal Co. (1982) 260 NLRB No. 122; Southland Manufacturing Corp. (1966) 157 NLRB 1156.

the Board. General Counsel has pointed to no authority permitting such modification. While the modification suggested by General Counsel seems appropriate, it is the Board rather than the ALJ who must effect it.

G. General Counsel's Motion for Attorney's Fees

On December 30, 1982, General Counsel filed a Motion for Attorney's Fees. The stated basis for the Motion was as follows:

[R]espondent's conduct has been repeatedly and egregiously uncooperative, so as to demonstrate a blatant indifference to the Agricultural Labor Relations Board's (ALRB) process, and resulting in a needless expenditure of resources.

The Board's Order in the underlying case does not provide for such a remedy. As noted above in discussing General Counsel's request for a conditional reinstatement order, the purpose of the instant proceeding is to ascertain the amount of back pay due persons found by the Board to have been discriminatorily denied reinstatement. It is not the function of the ALJ in a back pay proceeding to prescribe additional remedies. This conclusion seems particularly appropriate in the instant case when, because of General Counsel's failure to except to a ruling of the ALJ striking an allegation in the complaint the Board declined to discuss the issue of attorney's fees, stating:

During the hearing, the ALO granted Respondent's motion to strike the portion of the complaint which alleged that Respondent refused to cooperate with the Board during the investigation of the charges (General Counsel sought attorney's fees under this allegation.) Because the General Counsel has not excepted to the ALO's granting of the motion to strike, we will not discuss or decide the attorney's fees issue in this case. (Verde Produce Company, supra, p. 2, fn. 1.)

As the Board instructs in its Supplemental Decision and Revised Order in George Arakelian Farms, Inc., supra, 8 ALRB No. 32,

unfair labor practice proceedings are bifurcated proceedings. Liability and the appropriate remedies for violations of the Act are established by the Board as a result of a hearing on the merits; it is the function of the instant proceeding to determine the period for which back pay should run.

General Counsel's Motion for Attorney's Fees is denied.

RECOMMENDED BACK PAY ORDER

For all the reasons set forth above, the following back pay is due Vargas and Ramirez.

Eufemio Vargas	1979-80	\$3,122.10
	1980-81	961.71
	1981-82	3,087.21
		\$7,170.93
Alberto Ramirez	1979-80	\$6,332.41
	1980-81	1,007.44
	1981-82	2,003.82
		\$9,343.67

Interest shall be added to back pay due; interest to be calculated in the manner prescribed in the Board's order in 7 ALRB No. 27.^{38/}

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38. General Counsel filed a Motion to Modify Interest Rate pursuant to the Board's opinion in Lu-Ette Farms (1982) 8 ALRB No. 15. As with General Counsel's motions discussed above, I have no authority to modify final Board orders. The Board in Lu-Ette established a new interest rate; it did so as part of the remedy fashioned in that case by modifying the ALJ's recommended order and applied application of the new rate prospectively. The situation was the same in L.E. Cooke (1982) 8 ALRB No. 56. Were the situation here one of choosing a remedy having found a statutory violation, the Lu-Ette formula as applied in Cooke would be appropriate; it is not, General Counsel's motion is denied.

As reimbursement for union dues paid the UFW, Eufemio Vargas shall receive \$40.00. As reimbursement for union dues paid the UFW, Alberto Ramirez shall receive \$114.31.

DATED: August 29, 1983.

A handwritten signature in black ink, appearing to read "Robert Leprohn", written over a horizontal line.

ROBERT LEPROHN
Administrative Law Judge