Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

J. R. NORTON COMPANY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 77-CE-166-E 10 ALRB No. 42 (4 ALRB No. 39) (6 ALRB No. 26)

INTERIM DECISION AND ORDER

On August 10, 1982, Administrative Law Judge (ALJ)[1/] Steve A. Slatkow filed the attached Interim Decision.[2/] Thereafter, J. R. Norton Company, Inc. (Respondent) filed a Request for Review of the ALJ's Decision. General Counsel and Charging Party, United Farm Workers of America, AFL-CIO (UFW or Union) filed a Response to the Request for Review. Upon a motion filed by Respondent, we permitted the parties to file supplemental briefs.[3/]

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

[2/] Pursuant to Cal. Admin. Code, tit. 8, § 20290(a),(c), the Regional Director issued a Notice of Hearing without a makewhole specification. Under the procedure outlined in those sections, Matters in Controversy respecting calculation of backpay awards are identified and litigated in the absence of a detailed specification. In this case the Matters in Controversy were the method of calculating the makewhole wage rate and the duration of the makewhole period.

[3/] Both the UFW and Respondent filed such briefs; additionally, Respondent's motion to strike the UFW's supplemental brief is hereby denied as no prejudice to it has been shown by our consideration of the brief.

On July 20, 1983, we granted Respondent's Request for Review regarding the appropriate makewhole formula(s) to be used. At the same time, we denied Respondent's Request for Review of the appropriateness of the proceeding as a bifurcated hearing under the Regional Director's Statement of Matters in Controversy. Because of the importance of, and general interest in, questions concerning calculation of makewhole awards, we also invited interested parties to present their views in writing and in argument before us. On March 21, 1984, we issued a Decision and Order. Pursuant to Motions for Reconsideration filed by Respondent and the UFW, we vacated that Decision and Order on July 24, 1984. Upon reconsideration of the entire record, we have decided to affirm the ALJ's rulings, findings, and conclusions, as modified herein.

The Adam Dairy Formula

The Agricultural Labor Relations Act (ALRA or Act), Labor Code section 1160.3, provides, in pertinent part, that, when the Agricultural Labor Relations Board (ALRB or Board) finds an employer guilty of refusing to bargain in good faith, it may enter an order "requiring such person to cease and desist from such unfair labor practice, [and] to take affirmative action, including . . . making employees whole, when such relief [is] appropriate, for the loss of pay resulting from the employer's refusal to bargain . . . ." In the first case in which we considered implementation of this unique remedy, we construed our power to award it so as to foster the twin purposes of compensating employees for their losses and of encouraging the

practice of collective bargaining.

> [W]e 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 practice 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.
> (Adam Dairy dba Rancho dos Rios (1978) 4. ALRB No. 24, p. 9.)

With these principles in mind, we considered various proposals for calculating makewhole under the Act. We first determined that the "loss of pay" for which employees would be compensated not only included wages paid directly to them, but also the other benefits susceptible of monetary valuation which flow to them from the employment relationship, including, for example, vacation, bonuses, payments to health, welfare and insurance funds, overtime and holiday pay, and pension premiums. (4 ALRB No. 24, pp. 6-7.) Having defined "pay" as consisting of these two basic components (straight time wages and fringe benefits), we next considered how to calculate each of the components. While we found much to recommend the use of a standard measure such as Congress was then considering in amendments to the National Labor Relations Act (NLRA), which would have plainly given the National Labor Relations Board (NLRB)

the power to award makewhole,[4/] we concluded that we did not have the data necessary to extract an average percentage increase in wages which could be attributed to the collective bargaining process.

In the absence of such evidence, we calculated the general wage rate as an average of the basic wage rates in 37 UFW-negotiated contracts.[5/] We found such an average to be a reasonable measure of the compensation which general labor employees could have expected to receive in straight hourly wages in first time contracts and thus represented the basic makewhole wage rate. Agricultural employees who earned more than the basic

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[4/] As we noted in our Adam Dairy Decision, supra, at p. 4, a divided national board interpreted the NLRA to prohibit it from awarding makewhole, see Ex-Cell-0 Corporation, (1970) 185 NLRB 10 [74 LRRM 1740]. Upon review of the national board's decision, the Court of Appeal for the District of Columbia Circuit held that the national board had construed the scope of its remedial power too narrowly. . (Auto Workers v. NLRB (D.C. Cir. 1971) 4-49 F.2d 1046 [76 LRRM 2753].) Congress later considered amendments to clarify the power of the national board to award makewhole. It was the formula proposed in such legislation which we noted with approval in our Adam Dairy Decision.

> The measure of such damages [would be] an objective one. It consists of the difference between the wages and other benefits received by the employees during the period of delay and the wages and other benefits they were receiving at the time of the unfair labor practice multiplied by a factor which represents the change in such wages and benefits elsewhere in the same industry as determined by the Bureau of Labor Statistics. (H.R. Rep. No. 95-637, 95th Cong., 1st Sess. (1977); see also S. Rep. No. 95-628, 95th Cong., 2d Sess. (1978) on the Labor Law Reform Act of 1978 (S. 2467) at pp. 13-18, quoted in 4 ALRB No. 24, p. 14.)

[5/] These 37 contracts were in effect during the makewhole period and negotiated pursuant to ALRB certifications. Although the type of crops covered by these contracts and the size of the work forces to which they applied varied, we found their wages to be consistent.

makewhole wage rate would have their wages increased in the same proportion that the general labor precontract wage bore to the basic makewhole wage rate.

Turning to fringe benefits, which, both because of their variety and generally complicated eligibility provisions, posed difficult problems in exact quantification, we sought to devise a method which would avoid lengthy post-decisional proceedings, but still serve our goals of redressing employee losses and promoting the course of future good faith negotiations. To that end, we adopted a formula based upon statistics concerning fringe benefits in the nonmanufacturing industrial sector because we concluded that nonmanufacturing industries were the most comparable to the agricultural industry.[6/] Under the formula, the basic makewhole wage was assigned a value of 78 percent of the total compensation package and fringe benefits the remaining 22 percent; the sum of the straight-time wages and fringe benefits owing to each employee, therefore, could be computed by simply dividing the basic makewhole wage rate by .78. In determining how much each employee would receive under our formula, a net makewhole amount would be determined by subtracting wages and benefits actually paid to or on behalf of employees.

Based upon our experience in calculating makewhole awards, we modified our method for calculating the net makewhole

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[6/] We found that the non-manufacturing sector, like agriculture, pays lower wages and tends to be characterized by labor-intensive rather than capital-intensive operations. (Adam Dairy, supra, 4 ALRB No. 24 at p. 28.)

due each employee in Robert H. Hickam (1983) 9 ALRB No. 73. In Hickam, we assumed that mandatory fringe benefit contributions[7/] comprised 6.3 percent of the (total) makewhole rate, and then reduced the makewhole due the employees by that amount, rather than deducting the amount actually paid by the employer. We reasoned that 6.3 percent represented the mandatory contributions as set forth in the 1974. Bureau of Labor Statistics Report from which the Board derived its fringe benefit makewhole formula in Adam Dairy; permitting a respondent to be credited with the ever increasing amount of mandatory contributions it was paying would unfairly erode the makewhole award to the employees.

Our Order in 4 ALRB No. 39

At the time we issued our Decision and Order requiring Respondent J. R. Norton to make its employees whole, we were aware that the contracts relied upon to obtain a basic makewhole wage rate in Adam Dairy might no longer be representative of UFW contracts. Accordingly, we directed the Regional Director to investigate and determine a new basic makewhole wage rate in this matter by surveying more recently-negotiated UFW contracts. We also instructed the Regional Director to calculate the value of fringe benefits in accordance with the Adam Dairy formula described above.

[7/] Mandatory fringe benefits are contributions to those employee benefit trust funds which the employer is required, by state or federal law, to make for the benefit of its employees. They include Contributions to Workers' Compensation, Unemployment Compensation and Social Security (Federal Insurance Contributions Act (PICA)).

The Regional Director first determined that Respondent's operations were most similar to lettuce-based vegetable industry companies, that is, companies which operate in two major areas of the state primarily growing, harvesting or shipping iceberg lettuce and other assorted vegetables. He further found that over the course of the makewhole period, there were between 30 and 35 collective bargaining agreements between the Union and such companies in the geographic areas in which Respondent operates. For the most part, these contracts had uniform wage rates. Out of this total sample, the Regional Director selected as most "comparable" or representative of contracts which the UFW would have negotiated with Respondent, eight contract which the UFW had negotiated with companies of varying sizes, all of which grew or harvested lettuce in the Salinas and Imperial Valleys or in the Blythe area.

After reviewing information concerning Respondent's wage rates, the Regional Director determined that Respondent paid its lettuce harvest employees wages equivalent to those they would have received under these contracts. Accordingly, the only makewhole due these employees would be an amount to compensate them for loss of fringe benefits. He also determined that because of the complexity and volume of Respondent's records, it would be administratively convenient and best serve the remedial purposes of the Act in providing an effective and timely redress for employee losses, to use the Quarterly Reports of the Employment Development Department, rather than Respondent's payroll records, to calculate the net makewhole award.

The Regional Director also found that Respondent's nonharvest employees in Imperial and in Blythe were not paid the same rate they would have received under UFW contracts in either area. After reviewing Respondent's payroll records, he concluded that calculation of a wage rate for each job classification would be so burdensome and time-consuming that, in order to determine the basic makewhole wage rate for these employees, he averaged the highest wage paid to employees in all of the five standard nonharvest labor classifications contained in the UFW contracts and arrived at a single general nonharvest basic makewhole wage rate. This average makewhole wage would be supplemented by the amount necessary to compensate the nonharvest employees for loss of fringe benefits resulting from the absence of a contract.

The ALJ found each of the elements of the Regional Director's proposed formula reasonable. He also found that the makewhole period ended on December 28, 1979 because Respondent commenced good faith bargaining on that date.[8/] He rejected Respondent's alternate model for makewhole because the contracts upon which such model was based involved farming operations in

[8/] The Union's first request to bargain was made on October 4, 1977. Respondent first indicated its willingness to bargain on December 28, 1979, although the parties did not actually meet until February 6, 1980. There is no record evidence that the parties reached impasse or contract. Since no party disputes that the makewhole period extended at least through December 28, 1979, we find it unnecessary to decide at this time whether it extended beyond that date and will leave that determination, as well as the computation of any additional makewhole award covering any period after December 28, 1979, to future compliance proceedings in this case.

geographic areas in which Respondent had no operations or covered operations fundamentally different from those of Respondent.

Respondent has sought review (1) of the ALJ's approval of the Regional Director's approach; and (2) of the ALJ's reliance upon the Board's Adam Dairy formula for computing fringe benefits. The Union, too, sought review of the Board's fringe benefit formula. Because of the general and continuing interest in the question of how fringe benefits are to be calculated in makewhole awards, we solicited briefing and arguments from all interested parties on the suitability of our Adam Dairy formula for computing fringe benefits.

Respondent's Request for Review

Respondent argues that the Administrative Law Judge erred on a number of grounds in approving the contracts used by the Regional Director as comparable. Respondent's first ground of attack is that the ALJ erred in relying upon the testimony of UFW negotiator Ann Smith concerning the comparability of the contracts. Respondent objected at the hearing to Smith's testimony on the ground that she lacked personal knowledge of the operations covered by the Union's contracts and that, lacking such knowledge, her testimony was based upon hearsay.

The testimony of UFW negotiator Ann Smith regarding the vegetable industry, the pattern of vegetable industry negotiations, and the nature of the operations covered by contracts relied upon by the Regional Director was properly admitted and is relevant. The UFW was a signatory to each of the contracts. In order to negotiate them, as Ann Smith

testified, the Union would obtain information from each of the employers with whom it was negotiating and from a ranch committee composed of employees of each of the employers. Based upon this information the Union would frame its demands and would meet whatever countervailing considerations might be raised by the representatives of whichever employer with whom it was then bargaining. Out of these discussions, the contracts emerged.

Respondent's objections to Smith's testimony concerning the information the Union relied upon in bargaining is misplaced. Our makewhole remedy is designed to compensate Respondent's employees for any loss they may have suffered as a result of Respondent's refusal to bargain in good faith by requiring Respondent to pay any employee the difference, if any, between what he or she actually earned and what he or she would likely have earned had Respondent bargained in good faith with the certified bargaining representative. (Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73; Robert H. Hickam, supra, 9 ALRB No. 6.) The reference point for making such a determination is contracts achieved by the Union in bargaining with employers similarly situated.[9/] It is apparent from the face of the contracts described by Ms. Smith and utilized by the Regional Director that they all cover lettuce growers with operations in the same areas as Respondent. The contracts were in effect during the

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[9/] The Board does not require a detailed showing of contract comparability. It is generally sufficient for General Counsel to present contracts negotiated by the same union and covering operations in at least some of the same commodities and

(fn. 9 cont. on p. 11

makewhole period[10/] and cover nonharvest as well as harvest operations. Ms. Smith testified from her own knowledge as to the Union's strategy in negotiating agreements with growers who farmed such crops and operated in such areas.[11/] Respondent had the opportunity to show that any of the operations of the employers who signed the contracts were not sufficiently comparable to those of Respondent and that their selection was arbitrary or unreasonable.

Respondent next argues that the contracts it presented are more appropriate for calculating makewhole than those used by General Counsel. The contracts utilized by Respondent involve dissimilar crops, cover farming operations in geographic areas in which Respondent had no farming operations, or involve unique

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(fn. 9 cont.)

location(s) as that of the respondent and in effect during the makewhole period. The finer points of comparability may be raised by Respondent or Charging Party, either of which is free to suggest the use of contracts which it contends are more appropriate. If a respondent or charging party can show that General Counsel's method of calculating makewhole is arbitrary, unreasonable or inconsistent with Board precedent or can present a more appropriate method of determining the amount due, the Board may reject or modify the formula(s). (Robert H. Hickam (1983) 9 ALRB No. 6.) Respondent herein has not shown that the operations of the employers who signed the contracts used by General Counsel are not sufficiently comparable to those of Respondent such that it would be arbitrary or unreasonable for the Board to use them in computing the makewhole award.

[10/] Respondent also argues that the comparable contracts do not reflect the correct time period. General Counsel's contracts were each in effect during part of the makewhole period. Contracts need not cover the entire makewhole period in order to be relevant to our determination of a basic wage rate.

[11/] Ms. Smith's testimony indicates that contracts with such uniform wage rates were achieved by the Union with respect to units of that description.

financial/economic circumstances.[12/] We have previously held that such factors preclude contracts covering certain kinds of operations from being considered comparable. (See Kyutoku Nursery, Inc., supra, 8 ALRB No. 73.)

Respondent next contends (1) that the wages of its nonharvest employees[13/] are competitive with union wages in the area and (2) that it has never set its Blythe area employees' wages based on a union contract. Except to note that Respondent's first argument is simply not supported by the evidence, we will not deal with it further. Respondent's second argument is premised on the assumption that it would not have reached an agreement with the UFW which covered its nonharvest employees. Once the Union was certified as the collective bargaining representative, it was the UFW's duty to represent all of Respondent's agricultural employees, including its nonharvest employees, and to negotiate with Respondent over their terms and conditions of employment. By refusing to bargain in good faith, as required by the Act, Respondent has prevented the Union from obtaining any benefits on behalf of its nonharvest employees and the burden of any uncertainty as to what those benefits would

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[12/] Since we find the contracts General Counsel introduced into evidence to be comparable and appropriate, and those introduced by Respondent to be inappropriate, we shall not require the UFW to give Respondent further information in this case. In future makewhole compliance cases (see discussions beginning at p. 19, infra), a respondent will be entitled to receive information concerning the duration, wage and fringe benefit portions of relevant contracts.

[13/] As noted earlier, the Regional Director determined Respondent paid its harvest employees the same wages as those paid under the comparable contracts.

have been must be borne by Respondent whose violation of the Act created the uncertainty. (See Kyutoku Nursery, Inc., supra, 8 ALRB No. 73; Robert H. Hickam, supra, 9 ALRB No. 6.)

Respondent also argues that the averaged wage rate used by the Regional Director's formula for nonharvest employees does not reflect the actual classifications and earnings of the individual employees who work for it. However, we do not require exactitude in our quest to make employees whole especially where, as here, the multitude of classifications and the mobility of nonharvest employees make the pursuit of exactitude prohibitively time-consuming. We require the formula to be reasonably calculated to arrive at a close approximation of the amount the employee(s) would have earned but for the employer's unfair labor practice(s). (See Kyutoku Nursery, Inc., supra, 8 ALRB No. 73, citing Butte View Farms v. Agricultural Labor Relations Board (1979) 95 Cal.App.3d 961; National Labor Relations Board v. Topping and Sons, Inc. (5th Cir. 1966) 358 F.2d 94 [61 LRRM 2655]; 0. P. Murphy Produce Co., Inc. (1982) 8 ALRB No. 54.) This Board has broad discretion in fashioning remedies. Respondent must show that the remedy was designed to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (Butte View Farms v. Agricultural Labor Relations Board, supra, 95 Cal.App.3d 961 citing Fibreboard Paper Products Corp. v. National Labor Relations Board (1964) 379 U.S. 203 [57 LRRM 2609] and National Labor Relations Board v. Seven-Up Bottling Co. (1953) 344 U.S. 344 [31 LRRM 2237]; Abatti Farms, Inc. (1983) 9 ALRB No. 59.) The Regional Director's averaging formula is

intended to be but an approximation of the difference between what Respondent's nonharvest agricultural employees actually earned per hour and what they would have earned per hour had Respondent bargained in good faith with the certified bargaining representative of its employees. This difference represents the hourly wage loss each employee sustained as a result of Respondent's refusal to bargain in good faith. We affirm the ALJ's finding that the formula utilized by General Counsel to compute the makewhole wage for the nonharvest employees is reasonable.

Respondent further proposes that the makewhole formula be based upon a subsequently negotiated collective bargaining agreement, if and when one is entered into by Respondent and the collective bargaining representative. (We note that no collective bargaining agreement has been reached as of the time of this Decision.) Respondent hypothesizes that, if no agreement is reached subsequent to the Board's Order, then the Board should consider the parties' bargaining positions during negotiations in order to calculate an appropriate makewhole formula. Additionally, Respondent argues that makewhole should not be awarded if, after a technical refusal to bargain, a respondent bargained in good faith and no agreement was reached. Respondent further argues that makewhole should be based on out-of-pocket losses suffered by each employee, since, otherwise, the employees would receive a "windfall" by being compensated when no out-of-pocket loss had occurred.

We find Respondent's proposal that we rely on a

subsequently negotiated contract to be inappropriate and unreasonable as applied to this case.[14/] Where an employer, in bad faith, delays the commencement of negotiations, it is likely that a union will suffer a significant loss of support, and thus be bargaining from a weakened position due to the lapse of time between the union's certification and the commencement of good faith bargaining. Additionally, economic conditions may change, as well as any number of other factors that affect the relative bargaining positions of the parties. Thus, a subsequent contract, if any, may result from considerations which only came about because of the employer's refusal to bargain. We do not feel it is appropriate to take into account a variable which is attributable to the employer's unlawful act. Moreover, the practical effect of Respondent's argument would require us to wait for an agreement to be reached before we could ever calculate makewhole. We have a duty to remedy violations of the Act which is not consistent with such delay.

We also reject Respondent's proposal that employees be compensated only for out-of-pocket losses as an inappropriate manner in which to remedy a section 1153(e) refusal-to-bargain violation. As we have often noted, employees lose far more than out-of-pocket expenses as a result of an employer's refusal to bargain, most obviously, loss of wage increases and loss of benefit coverage. While the exact amount of damages is difficult

[14/] Although we reject Respondent's proposal as inappropriate in this case, employers and collective bargaining representatives who have reached contracts may choose to settle outstanding makewhole orders in this manner.

to determine, it is Respondent's violation of section 1153(e) which created any uncertainty as to the amount owed employees, and Respondent must bear the risk of that uncertainty.

Finally, we note that comparable contracts such as those used herein are presumed to have been a result of good faith bargaining and are therefore a fair and equitable measure of what the agricultural employees of a respondent would have earned if that respondent had bargained in good faith.[15/] Mindful of the lack of cooperation between Respondent and our Regional Office regarding the makewhole investigation as well as the complexity of Respondent's agricultural operation and employment patterns, as evidenced by Board agent Roger Smith's testimony, we must also take into consideration the reality of this agency's limited resources. Under these circumstances, and in light of Respondent's failure to establish that the Regional Director's formula was inappropriate or arbitrary or to present a more appropriate formula, we find the Regional Director's formula for the makewhole wage rates to be reasonable and appropriate.

[15/] We recognize that, until a collective bargaining agreement is actually agreed upon by the parties, no one knows with certainty what terms that agreement will contain. However, we know with certainty that it was Respondent's unlawful conduct which precluded the possibility of the parties reaching any such agreement during the makewhole period. A finding of a refusal or failure to bargain in good faith in violation of section 1153(e) creates a presumption that an employer's agricultural employees are owed some amount of makewhole. (See Abatti Farms, Inc., supra, 9 ALRB No. 59; National Labor Relations Board v. Mastro Plastics Corporation (2d Cir. 1965) 354. F.2d 170 [60 LRRM 2578].) Because the purpose of a makewhole remedy is to compensate agricultural employees for an employer's unlawful conduct, we must assume that an agreement would have been reached, absent such unlawful conduct. We do not presume to know what terms the parties would have actually agreed upon.

Fringe Benefits

In briefs and oral argument by the parties and amici curiae regarding an appropriate formula for fringe benefits, we received unanimous opposition to Adam Dairy's use of 22 percent to represent the fringe benefit portion of makewhole. The UFW argued that the figure was too low; agricultural employers claimed it was too high. All parties conceded that there were no available statistics for California farm labor wages and fringe benefits.

As a preliminary matter we note that our reasons for adopting the Adam Dairy formula for fringe benefits are still valid and applicable today. Any formula which we adopt must not only compensate the employees for their losses but must also promote the course of good faith bargaining and, as much as possible, avoid lengthy post-decisional proceedings.

In briefs and oral arguments, we found a consensus that mandatory fringe benefit contributions should not be considered in the makewhole formula. We agree. Employers are required to pay mandatory fringe benefits by law and such benefits are therefore not affected by the collective bargaining process. (Robert H. Hickam, supra, 9 ALRB No. 6.) Thus, our makewhole formula will not take mandatory fringe benefit contributions into account.

Only Respondent argued that any formula was inequitable and insisted that all makewhole computations for wages and fringe benefits be based on actual out-of-pocket losses to employees or on provisions arrived at in subsequent contracts, if any,

between the Union and Respondent. We reject Respondent's proposals for the reasons previously stated.

We also reject the employer proposal to take into consideration the probability of the parties reaching an agreement or of the occurrence of an economic strike. Such an inquiry would be speculative at best and agricultural employees should not have their makewhole awards discounted because of such imponderables. Since it was the unlawful action of their employers which caused the uncertainties, those responsible must bear the risk of the uncertainties they created. The proposal based upon a survey of both union and nonunion wages and fringe benefits in a particular commodity and geographic area would not reasonably and appropriately compensate workers for their losses since nonunion wages and benefits do not accurately reflect what workers would have received if an employer had bargained in good faith with the certified bargaining representative. The UFW's proposal that we utilize more current statistics and studies is subject to most of the same criticisms leveled at our Adam Dairy formula, i.e., it is based on nonagricultural statistics, and, therefore, cannot accurately reflect the percentage of fringe benefits received by agricultural employees.

The General Counsel's proposal of a periodic survey appears to us essential to the future resolution of makewhole issues, and we are presently seeking funding to conduct such a survey. However, given this agency's limited resources, we cannot expect to complete a survey for utilization in cases which come before us at this time. We are left with the proposal that

fringe benefits be calculated on a case-by-case basis, just as the makewhole wage is calculated, based on comparable contracts. We have determined that this procedure will adequately compensate the employees for their losses and will promote the future course of good faith bargaining.

Much has changed in the six years since we adopted the Adam Dairy makewhole formula. The Adam Dairy wage-fringe benefit ratio was an appropriate formula, given the facts of Adam Dairy. However, as more of the Board's Orders move toward the compliance stage, we now find that the 78-22 percent ratio is not the most appropriate formula in all cases.[16/]

Given the greater availability of comparable agricultural collective bargaining agreements,[17/] we have decided to modify the Adam Dairy makewhole formula. Rather than calculate fringe benefits from a standard wage-fringe benefit ratio, we shall add to the makewhole wage award the dollar value of fringe benefits which would have been available under comparable contracts. The value of fringes actually paid by an employer during the makewhole period, other than those mandatory contributions to such funds as Social Security and unemployment, shall continue to be deducted from the total amount of makewhole due.

[16/] We will not reject a bilateral settlement, however, merely because it has been computed according to the simpler Adam Dairy formula.

[17/] During oral argument in this matter, the UFW disclosed that it was a party to approximately 175 contracts in effect at that time.

Henceforth, the fringe benefit portion of a makewhole award shall be calculated as follows: The comparable contracts used to calculate the basic makewhole wage shall be surveyed to determine which benefits they provide which should be included in the makewhole award. The value of contract fringe benefits which are paid on an hourly basis, e.g., medical benefit plans, pension plans, and the Martin Luther King Fund, shall be computed from the hours the employee worked by multiplying the amount contributed per hour in the comparable contracts by the number of hours worked. The value of vacation benefits shall be calculated by multiplying the number of weeks of vacation provided for under the comparable contracts by the employees' basic weekly makewhole wage.[18/] Each holiday in the comparable contracts shall represent 32 percent of an employee's annual earnings[19/] so that the 5 holidays in the instant comparable contracts[20/] add 1.6 percent to each employee's gross makewhole wage.[21/] Rest periods shall be calculated as a percentage of the gross makewhole wage by determining the amount by which the rest periods

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[18/] An individual shall be eligible for an amount equal to vacation pay as determined from the comparable contracts if s/he has worked the average minimum hours required by the comparable contracts and has the requisite seniority.

[19/] The .32 percent figure is based on a 312 work-day year, assuming a 6-day work week throughout the year. (See Bruce Church (1983) 9 ALRB No. 19.) (1 holiday * 312 work days = .325.)

[20/] Holidays include Citizens Participation Day (aka Rufino Contreras Day, a holiday often included in contracts negotiated by the UFW. (See Jesus R. Conchola (1980) 6 ALRB No. 16.)

[21/] The fact that not all employees are eligible for every holiday is counter-balanced by the use of a full work year as the basis of the computation.

provided for by comparable contracts exceed the rest periods actually provided for by the respondent during the makewhole period. For example, if the respondent's practice was to provide rest periods of ten minutes for every four hours worked and the comparable contracts provide for fifteen minutes for every four hours, the five minutes in excess of the respondent's practice is equal to approximately 2 percent of an employee's hourly wage (5 minutes 60 minutes = 8.3% and 8.3% + 4 hours = 2.07% per hour). The makewhole remedy for overtime shall be calculated in the following manner: First, we determine the number of hours worked attributable to overtime. If a respondent's records do not lend themselves to a more precise calculation, we shall first calculate the average number of hours worked per day by an employee by dividing the number of hours worked per week by the number of days worked in that week. If this average exceeds the number of hours per day considered straight time under the contract(s), the difference shall be multiplied by the overtime premium, whether expressed as a fixed dollar add-on or as time and a half,[22/] to determine the amount of overtime owing for each day worked in that week.[23/] Additional entitlement to

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[22/] If the contract provides for time and a half for overtime, the gross makewhole wage shall of course be used to calculate this multiplier.

[23/] For example, under the Interharvest contract, a tractor driver who worked overtime in 1977 would be entitled to a premium of $.35 per hour for every hour worked over 8 hours per day. If he worked 50 hours in a 4-day work week, he would be entitled to a premium of $6.30 for 18 hours of overtime worked in that week. (50 hours worked + 4 days worked = 12½ hours per day worked; 12½ hours - 8 straight time hours = 4½ overtime hours per day; 4½ hours X $.35 per hour X 4 days = $6.30 for the week.)

overtime or premium pay for Saturday, Sunday and night shift work should also be proven if feasible, especially if Respondent seeks credit for such voluntary benefits. Of course any overtime actually paid by a respondent under order of the Industrial Welfare Commission, or pursuant to a respondent's own policy, will be credited against the gross makewhole amount.

There are also certain types of fringe benefits which are difficult to evaluate in monetary terms, and which, more importantly, are provided to employees as a necessary part of their employment, to benefit the employer as much as the employee. These benefits are not given to employees as regular compensation for their labor, but are necessary to attract workers or are gifts intended to boost morale or reward loyalty to the employer. Such benefits include, but are not limited to, tools, protective clothing, housing such as labor camps, transportation to the work site, awards, etc. The value of such benefits shall not be deducted from an employee's makewhole award, since the benefit does not flow only to the employee, but also to the employer. We affirm the ALJ's finding that housing, awards dinners and bus transportation Respondent made available to employees shall not be deducted from the makewhole award as voluntary fringe benefits paid to an employee.

Respondent argued that the inclusion of fringe benefits as part of the makewhole award violates the preemption provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. section 1001, et seq. (ERISA). We disagree. Our award of makewhole includes a portion which represents the value of fringe

benefits Respondent's employees would have received had Respondent bargained in good faith and does not deal with any specific benefit trust funds. The monetary value is given directly to the worker as compensation rather than being placed (retroactively) into a specific benefit trust fund. In deriving the value of fringe benefits from comparable contracts, we do not' find that Respondent would have agreed to contribute a specific amount to a specific benefit trust fund but find that had Respondent bargained in good faith it would have reached an agreement with the Union which would have had a fringe benefit package valued at the average value of fringe benefits found in the comparable contracts.

Any impact our order in this proceeding might have on employee benefit plans would be so tenuous, remote or peripheral that a finding that the ALRA "relates to" the plan would be unwarranted. (Shaw v. Delta Air Lines, Inc. (1984) __ U.S. __ [103 S.Ct. 2890, 2901 n. 21] citing American Telephone and Telegraph Co. v. Merry (2nd Cir. 1979) 592 F.2d 118, 121.) See also the recent decision of the Federal District Court for the Southern District of California, finding such makewhole awards not preempted by ERISA. (Martori Bros. Distributors, et al. v. Alfred Song, et al., Case No. 83-1933-G(M) (S.D. Cal. , June 25, 1984).)

The new formula for calculating makewhole fringe benefits announced in this Decision shall be applied to all cases which have not yet gone to hearing before an ALJ. Given the amount of time and expense that has gone into makewhole cases

which have already been decided by ALJs, we find it improvident and unnecessary to utilize additional limited resources on those cases. In those cases in which an administrative hearing has been held, but in which an ALJ's Decision has not yet been transferred to the Board, we shall leave to the discretion of the ALJ whether to reopen the record and/or order recalculation in accordance with this Decision. The limited retroactive application of this makewhole fringe benefit formula effectuates the policies of the 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) 51 Cal.3d 838.)

Computation of Makewhole Wage

The following UFW collective bargaining agreements were in effect during the period October 4, 1977 to July 15, 1978

Employer	Effective Date of Contract
Interharvest, Inc.	1/31/76
Vessey and Co., Inc.	4/16/77
Abatti Farms, Inc.	6/7/78 Wages retroactive to 11/18/77
Lu-Ette Farms, Inc.	12/2/77
Mario Saikhon, Inc.	2/9/78
Growers Exchange, Inc.	2/21/78
Nish Noroian Farms	5/18/78

Each of the above contracts provided the following wages for nonharvest employees beginning on the effective date of the contract or retroactively.

5 Major Job Classifications	Hourly Rate
Tractor Driver A	4.375
Tractor Driver B	4.265
Thin and Hoe	3.55
General Farming	3.55
Irrigator	3.60

The average nonharvest wage rate from October 4, 1977 to July 14, 1978 is therefore 19.34 + 5, or $3.87.

The following UFW collective bargaining agreements were in effect during the period from July 14, 1978 to January 1979:

Employer	Expiration Date
Interharvest, Inc.	1/15/79
Vessey and Co., Inc.	1/15/79
Abatti Farms, Inc.	1/1/79
Lu-Ette Farms, Inc.	1/15/79
Mario Saikhon, Inc.	1/15/79
Growers Exchange, Inc.	1/15/79
Nish Noroian Farms	1/1/79

Each of the above contracts (with the exception of Interharvest, Inc.) provided the following wages for nonharvest employees from July 15, 1978 until the expiration of the contract.[24/]

Job Classification	Hourly Rate
Tractor Driver A	4.525
Tractor Driver B	4.415
Thin and Hoe	3.70
General Farming	3.70
Irrigator	3.75

The Interharvest, Inc. contract provided the following wages from July 15, 1978 until January 1, 1979.

[24/] The contracts were extended to January 15, 1979 by agreement of the parties.

Job Classification	Hourly Rate
Tractor Driver A	4.525
Tractor Driver B	4.425
Thin and Hoe	3.70
General Farming	3.70
Irrigator	3.75

The average nonharvest wage rate from July 15, 1978 to January 15, 1979 is therefore 140.64 ÷35, or $4.02.[25/]

We must assume that there were no comparable contracts in existence for the period January 15, 1979 to September 4, 1979, since none was introduced into evidence. In computing makewhole for the period from January 15, 1979 to September 4, 1979, we will consider the lapsed contracts between the UFW and all of the above-named employers except Nish Noroian, where the UFW was decertified on December 28, 1978, because the terms of those contracts continued to be in effect. Since we have no basis for concluding that the failure of Interharvest, Inc./ Sun Harvest, Inc. and the UFW to make the terms of the new agreement entered into in September 1979 retroactive to January 15, 1979, was a result of bad faith bargaining, we shall compute makewhole based upon the terms of the expired contracts until the new contract was signed.

[25/] 4.525 + 4.415 + 3.70 + 3.70 + 3.75 = $20.09, the sum of the wages of nonharvest employees in the above-mentioned six contracts.

4.525 + 4.425 + 3.70 + 3.70 + 3.75 = $20.10, the sum of the wages of nonharvest employees in the Interharvest, Inc. contract.

20.09 X 6 contracts = 120.54 for 30 classifications
20.10 X 1 contract = 20.10 for 5 classifications
(120.54 + 20.10) ÷ 35 classifications =
4.02/classification

In reaching this conclusion,[26/] we are guided by the principle that the terms of an expired collective bargaining agreement remain in effect until notice and bargaining occur to alter those conditions. (Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85; Peerless Roofing Co., Ltd. (1980) 247 NLRB 500 [103 LRRM 1173]; The Sacramento Union (1981) 258 NLRB 1074 [108 LRRM 1193].) We therefore find it unnecessary to seek other less comparable contracts for computing makewhole, for we view the above-mentioned contracts which expired in January 1979, and the failure to make retroactive the terms of the new Sun Harvest, Inc. contract which was executed in September 1979 to be sufficient evidence of the UFW's bargaining power during the hiatus in the lettuce-vegetable industry contractual relations. Therefore, the total hourly makewhole rate for the period January 15, 1979 to September 4, 1979 is $4.02. (See p. 26, supra.)

On September 21, 1979, Sun Harvest, Inc. (formerly Interharvest, Inc.) and the UFW executed a collective bargaining agreement which provided the following nonharvest employee hourly

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[26/] Member Waldie disagrees with the majority's use of the wage rates in the lettuce industry contracts, which expired in December 1978 and January 1979, as comparable wages for the period between January and September 1979. Since the Sun Harvest contract became the master contract for the lettuce industry in September 1979, Member Waldie would use the September 1979 Sun Harvest wage rates as comparable wages for the makewhole calculations herein. However, since approximately eight months elapsed in which no lettuce industry contracts were in effect, he would reduce the Sun Harvest wage rates by the average periodic wage adjustment found in the Sun Harvest contract and use that reduced rate as the comparable wage rate for the period between January and September 1979.

rates effective September 4, 1979:[27/]

Job Classification	Hourly Rate
Tractor Driver A	6.10
Tractor Driver B	6.00
Thin and Hoe	5.00
General Farming	5.00
Irrigator	5.10

The average nonharvest wage rate from September 21, 1979 to December 28, 1979 is equal to $27.20 ÷ 5, or $5.44.

Respondent paid its nonharvest employees in Brawley the following hourly wage rates:

Classification	10/4/77-7/15/78~	7/15/78-1/1/79	1/1/79-7/1/79
Tractor Driver A	3.90	4.00	4. 50
Tractor Driver B	3.70	3.85	4.00
Thin and Hoe	3.00	3.25	3.25
General Farming	3.00	3.25	3.25
Irrigator	3.00	3.00	3.00
Average	16.60 + 5 = 3.32	17.35 ÷ 5 = 3.47	18.00 -r 5 = 3.60

Classification	7/1/79 to 12/28/79
Tractor Driver A	4.65
Tractor Driver B	4.50
Thin and Hoe	3.95
General Farming	3.95
Irrigator	3.30
Average	20.35 ÷ 5 = 4.07

Respondent paid its nonharvest employees in Blythe the following hourly wage rates.

[27/] Two other comparable contracts between the UFW and Admiral Packing (signed on December 19, 1979) and Growers Exchange (signed on December 26, 1979) provide the same wages and benefits as the Sun Harvest contract.

Classification	10/4/77-7/15/78	7/15/78-7/1/79	7/1/79-12/28/79
Tractor Driver A	3.60	3.90	4.25
Tractor Driver B	3.45	3.75	4.15
Thin and Hoe	2.95	3.10	3.50
General Farming	2.95	3.10	3.50
Irrigator	2.95	3.00	3.25
Average	15.90 ÷ 5 = 3.1	16.85 ÷ 5 = 3.37	18.65 ÷ 5 = 3.73

Calculation of Gross and Net Makewhole Amount

The total hours each employee worked during the corresponding periods shall be multiplied by the hourly makewhole wage differential; this will yield the gross makewhole wage due each employee. Each employee's total hours shall then be multiplied by the total contract amount contributed on an hourly basis (e.g., RFK, Juan de la Cruz, MLK) and the total gross makewhole wage multiplied by the appropriate holiday and rest period factors (see supra). Overtime and vacation as well as any miscellaneous contract benefit which would actually have been paid under the comparable contracts and which can feasibly be calculated, shall be added to these two figures. From the resulting total (gross makewhole) Respondent's actual voluntary fringe benefit payments shall be deducted for each employee and the difference shall be the employee's net makewhole.

In this case, Respondent employed nonharvest workers who were paid on an hourly basis and lettuce harvest employees who were paid piece rate. Respondent's lettuce harvesters were paid the wages provided in the comparable contracts and thus are only entitled to the value of the fringe benefits in the comparable contracts. Respondent shall provide the Regional

Director with the information necessary to determine the number of hours each piece rate employee worked. The average hourly fringe benefit (RFK, Juan de la Cruz, MLK) will then be multiplied by the total hours worked; other fringe benefits (holidays, vacations, and rest periods) will be calculated from the employee's total piece rate wages and any miscellaneous benefits shall be included in the total.

Actual voluntary benefits paid if greater than benefits owing under the comparable contracts, shall be credited against makewhole wages owing and vice versa.

ORDER

This case is hereby remanded to an Administrative Law Judge, and the Regional Director is hereby ordered to prepare, with all deliberate speed, calculations of the amounts of makewhole due to the agricultural employees of Respondent who were employed during the period October 4, 1977 to December 28, 1979. The aforesaid amounts shall be computed in accordance with the formulas set forth in this Decision. Respondent shall make available to Board agents any and all payroll records or other information necessary for the calculation of the makewhole awards. The General Counsel shall thereafter submit the revised calculations to the other parties and an Administrative Law Judge, who shall reopen the record and take evidence on issues not previously litigated, such as the accuracy of the calculations, whether the makewhole period continues after December 28, 1979 and, if so, how long it continues and how much Respondent must pay in additional makewhole. The Administrative Law Judge

thereafter shall prepare and issue a Supplemental Decision and Recommended Order.

Dated: October 5, 1984

JYRL JAMES-MASSENGALE, Chairperson

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

MEMBERS WALDIE AND HENNING, Concurring and Dissenting:

We disagree with the majority's decision to "cost out" the actual losses of fringe benefits of individual employees under specific provisions in the comparable contracts. While we agree that a survey of the wages and benefits paid to California agricultural labor is necessary, we favor a survey which would result in reasonable, but easily applied generalizations as to specific crops in specific regions.

The majority's approach herein will clearly require a substantial increase in the time, energy and resources necessary to calculate the damages suffered by farmworkers in bargaining cases and will create new issues for litigation. At a time when efforts to obtain compliance with our orders are at a near standstill, we find it very unwise to make the process even more complicated and lengthy.

In Adam Dairy (1978) 4 ALRB No. 24, the Board rejected the option of "costing out" and chose instead to exercise its

authority to compensate employees for losses of wages "... so as to spur the resumption of bargaining and not become a new means to delay the bargaining process through lengthy compliance proceedings" (4 ALRB No. 24 at p. 9). The majority's decision serves to further prolong the actual receipt of makewhole compensation to agricultural workers by further complicating our makewhole formula.

We also believe the majority goes too far towards writing a specific contract between the parties. Despite their statements to the contrary, the majority decision, in fact, assumes that a legal course of bargaining conduct would have resulted in a contract between Respondent and the UFW with certain specific benefit items with specific values. Such specific references to the benefit provisions in comparable contracts, in our view, do not adequately acknowledge the unique needs and priorities of the instant parties and will tend to reduce the parties' flexibility in future negotiations. Moreover, this approach likely runs afoul of the preemption provision in the federal Employee Retirement Income Security Act (ERISA) of 1974 (29 U.S.C. section 1132(e)) which supercedes all state laws that "relate to" or create pension plans. Although the makewhole award in the instant case would go directly to the employee, the amount of damages is clearly "related to" the employer's contribution to a specific benefit plan and therefore may well conflict with controlling federal law. In Martori Bros. Distributors, et al. v. Alfred Song, et al., Case No. 83-1933-G(M) (S.D. Cal. June 25, 1984), the court ruled that the Board's makewhole orders based on the Adam Dairy formula do not "relate to" ERISA-covered employee benefit plans and are not preempted.

However, the court had earlier found that the "...ALRB has scrupulously refrained from deciding what particular benefit plans, if any, would have been effectuated pursuant to good faith bargaining, and the Board has not imposed ... any specific ... benefit program."

Finally, we believe it is unwise to issue a new makewhole formula at this juncture because we currently have two decisions on review before the Courts of Appeal in which the appropriateness of the Adam Dairy formula is an issue. (Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73 and Robert H. Hickam (1983) 9 ALRB No. 6; supplemented by Robert H. Hickam (1984) 10 ALRB No. 2.) Given the possibility that a reviewing Court may devise yet another formula for calculating the makewhole remedy, we are inclined to uphold the Adam Dairy formula and, in the interim, generate the best statistical wage data we can.

The instant majority decision is, at best, a stop gap measure that sacrifices simplicity and speed. If the Adam Dairy formula can be criticized for being inaccurate, it is a tenet of labor law that any uncertainty in the amount of actual loss was created by the employer who refused or failed to obey the law and bargain in good faith, and it is the employer who must bear the result of the uncertainty. (See Fibreboard Paper Products Corp. (1962) 138 NLRB 550 [51 LRRM 1101].) Even the majority acknowledges that exactitude is not required in our quest to make employees whole (at p. 8). Yet as the hairs are split finer and finer in unending

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administrative proceedings, only the farm workers, the injured parties herein will continue to suffer the losses.

Dated: October 5, 1984

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

CASE SUMMARY

J. R. NORTON COMPANY, INC.

10 ALRB No. 42
Case No. 77-CE-166-E
(4 ALRB No. 39)
(6 ALRB No. 26)

ALJ INTERIM DECISION

Pursuant to the Regional Director's proposal, approved by the Board, the compliance proceedings in this case were bifurcated, and this first stage was to determine the length of the makewhole period and the reasonableness of the proposed makewhole formulas. The ALJ found that the makewhole period extended from October 4, 1977 to December 28, 1979. The ALJ also found that the lettuce-based vegetable contracts General Counsel presented were comparable for the purpose of computing makewhole, and that the contracts Respondent introduced into evidence were not comparable because they either covered farming operations in geographic areas in which Respondent has no operations or involved crops dissimilar to Respondent's.

There was no dispute that Respondent paid the lettuce harvest employees the prevailing union rates of pay during the entire makewhole period. The ALJ found that General Counsel's proposed averaging makewhole formula to compute the makewhole amounts of the nonharvest employees was reasonable and equitable, under the facts in this case. The Board's Decision in Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 39 (Adam Dairy) mandated the use of the Adam Dairy fringe benefit formula and the ALJ found that formula to be reasonable and proper. The ALJ found that certain benefits such as housing, transportation to work and award dinners actually provided by Respondent should not offset Respondent's makewhole liability.

BOARD INTERIM DECISION

The Board granted, in part, Respondent's Request for Review of the ALJ's Decision in order to decide the appropriate makewhole formula(s). Because of the general interest regarding makewhole, the Board held oral arguments and received arguments from interested parties in writing and orally. Interested parties were requested to brief the issue of an appropriate formula for the calculation of fringe benefits in a makewhole award.

The Board reaffirmed its finding in Adam Dairy, supra, 4 ALRB No. 24 that the loss of pay as a result of an employer's refusal to bargain in good faith includes wages paid directly to employees and all other benefits capable of monetary calculation which flow to the employee by virtue of the employment relationship.

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The Board affirmed the ALJ's finding that the contracts General Counsel used to determine the makewhole wage rate(s) were comparable contracts and the contracts Respondent introduced were not comparable.

The Board affirmed the ALJ's finding that the averaging formula General Counsel utilized to compute the makewhole wage for the nonharvest employees is reasonable. The Board has broad discretion in fashioning remedies, and does not require exactitude in its quest to make employees whole, but requires the formula be reasonably calculated to arrive at a close approximation of the amount the employee(s) would have earned but for the employer's bad faith bargaining. General Counsel's averaging formula is intended to be an approximation of the difference between what Respondent's nonharvest agricultural employees actually earned per hour and what they would have earned per hour but for Respondents bad faith bargaining.

At oral argument and in briefs submitted to the Board, Interested parties presented alternate makewhole formulas. One proposal was based on a survey of union and nonunion wages and fringe benefits for commodity groups in specific geographic areas; another would take into account the statistical probability that the union and employer would have reached an agreement and the statistical probability of an economic strike. Respondent argued that makewhole should be based on out-of-pocket losses suffered by each employee. Respondent also proposed a formula based on any subsequent contract reached by the parties and argued that, if no contract were reached after a technical refusal to bargain, no makewhole should be awarded. The Board rejected these proposed formulas.

The Board affirmed the use of comparable contracts to determine the makewhole wage rate as appropriate and reasonable. Comparable contracts are the result of good faith bargaining and therefore a fair and equitable measure of what a respondent's agricultural employees would have earned but for the respondent's bad faith bargaining.

Any makewhole formula which the Board adopts must not only compensate the employees for their losses but must also promote the course of good faith bargaining and avoid lengthy post-decisional proceedings. All of the parties who argued before the Board opposed the Adam Dairy 22 percent fringe benefit rate, arguing that it does not accurately reflect the amount of fringe benefits paid to California agricultural employees covered by collective bargaining agreements. The United Farm Workers of America, AFL-CIO, argued that the Adam Dairy fringe benefit percentage was too low, while employer representatives argued that it was too high.

All parties agreed, and the Board found, that, because mandatory fringe benefits are required by law and not affected by the collective bargaining process, they shall not be considered in any Board makewhole formula.

The Board adopted a new makewhole formula for the computation of the value of voluntary fringe benefits. This formula relies upon the benefits provided in the same comparable contracts used to calculate the makewhole wage rate, and does not utilize a wage-fringe benefit ratio, as did Adam Dairy. The monetary value of voluntary fringe benefits actually paid by Respondent to an employee shall be deducted from the gross makewhole amount due to that employee. Benefits not given to employees as regular compensation for their labor, but necessary to attract workers or as gifts intended to boost morale or reward loyalty to the employer, shall not be deducted from the makewhole award. Such benefits include protective clothing, labor camp housing, tools, transportation to the work site and awards.

The Board gave the new formula limited retroactivity. The formula shall apply to cases in which no administrative hearing has been held. Cases in which an administrative hearing has been held, but an ALJ's decision has not yet been transferred to the Board, shall be left to the ALJ's discretion to decide whether to reopen the record and/or order recalculation in accordance with this Decision. The new formula shall not apply to those cases that have been decided by an ALJ and in which the makewhole amount owed has already been calculated.

In this case the wage rates and fringe benefits in the comparable contracts were virtually identical, due to the existence of a vegetable industry master agreement. The nonharvest makewhole wage rate and fringe benefit rates were calculated based on the comparable contracts for the period October 4, 1977 to January 15, 1979. For the period January 16, 1979 to September 4, 1979, the terms of the expired contracts of several employers, including the respondent employers in the vacated Admiral Packing case (1981) 7 ALRB No. 43, were used to compute the makewhole rates. Because the terms of the expired contracts remained in effect and there were no other comparable contracts, the Board found that terms of these two expired contracts were appropriate for purposes of computing makewhole during this period. The terms of the Sun Harvest contract signed on September 21, 1979, which provided for a wage increase effective September 4, 1979, were used to calculate the makewhole wage and fringe benefit rates for the period September 4, 1979 to December 28, 1979.

MEMBERS WALDIE AND HENNING CONCURRENCE/DISSENT

Members Waldie and Henning dissent from the majority's decision to award some fringe benefits on the basis of eligibility of individual employees, finding that such a method will create new issues for litigation, will require a substantial increase

in the time, energy and resources necessary to calculate makewhole and will further delay actual receipt of makewhole compensation by the victims of bad faith bargaining. Moreover they believe the majority's approach goes too far towards writing a specific contract between the parties and may run afoul of the preemption provision in the Federal Employment Retirement Income Security Act (ERISA) of 1974 (29 U.S.C. section 1132(e)) which preempts all state laws that "relate to" or create pension plans. Finally, given the possibility that one of the Courts of Appeals presently reviewing the Adam Dairy formula may devise yet another formula for calculating makewhole, they are inclined to uphold Adam Dairy pending the court's decision, while gathering statistical data to be used in a new formula.

Member Waldie also dissents from the majority's use of expired contracts to compute makewhole for the period January to September 1979. Member Waldie would apply the wage rates and fringe benefits of the subsequent Sun Harvest contract signed in September 1979, since that contract became the master contract for the lettuce industry. However, he would reduce the makewhole wage rates and fringe benefits by the average periodic wage adjustment found in the Sun Harvest contract for the period January to September 1979 when there were no comparable contracts in existence.

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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 Re the Matter of: J. R. NORTON COMPANY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 77-CE-166-E 4 ALRB No. 39 (6 ALRB No. 26)

DECISION

STEVE A. SLATKOW, Administrative Law Officer:

This case was heard by me on February 23 and 24 in Salinas and on March 1, 2, 3, 15, 16, 17.

This hearing is part of the enforcement action in the underlying Norton case, 4 ALRB No. 39, which on remand from the California Supreme Court (J. R. Norton Co. v. ALRB (1979) 26 Cal. 3d 1) was again heard and decided by the Board, 6 ALRB No. 26. The Board again concluded that the imposition of the make whole remedy was warranted in this case. The Board reinstated its original make whole order to wit:

"(b) Make its agricultural employees whole for all losses of pay and other economic benefits

sustained by them as the result of Respondent's refusal to bargain from the date of the UFW's request for bargaining to the date on which Respondent commences to bargain collectively in good faith and thereafter bargains to a contract or a bona fide impasse.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of this Order."

Following months of effort by the staff to gather the necessary data to propose a make whole award, the Regional Director of the Board's El Centro office issued a "Partial Back Pay Specification and Notice of Hearing" (General Counsel Exhibit 1-C). This was amended on January 29, 1982 (General Counsel Exhibit 1-G). Those pleadings from the General Counsel proposed a two stage hearing process. At this first hearing the length of the make whole period will be determined and the reasonableness of the method of calculating the make whole award would be litigated.

The Respondent moved to dismiss this specification. I denied this motion. The Respondent sought review by the Board. The Board upheld my ruling on February 25, 1982, but characterized General Counsel's pleadings as "a brief state-

ment of the matters in controversy", pursuant to 8 Cal. Admin. Code §20290 (c).

The General Counsel, Respondent, and Intervenor were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs after the close of the hearing.

Based on the entire record, including my observations of the demeanor of the witnesses, and after consideration of all the written and oral testimony, the arguments and briefs submitted by the General Counsel and by Respondent, I make the following findings:

FACTS

I. ATTEMPTS AT COMPLIANCE PRIOR TO DECEMBER 16, 1981

In March of 1981, Respondent's efforts at judicial review of the Board's decision ended. Mr. Roger Smith, the field examiner for the Board in charge of compliance, testified at length at the hearing as to his efforts to gather the necessary facts and data to enforce the Board's make whole order. His efforts continued for seven months and included numerous telephone calls to Respondent's representatives, as well as written requests (R.T. Vol. III, pp. 11-36, General Counsel Exhibits 17-24) .

The first substantive response to Mr. Smith's efforts was on September 25, 1981, when some of the raw payroll data arrived in Respondent's Salinas office. Mr. Smith had

attempted to get Respondent to cooperate by providing summary information and this had been promised (R.T. Vol. III p. 32). Instead, Respondent sent the raw payroll data. Mr. Smith immediately began to examine this raw data and realized that the sheer volume of the information he would need would make the task impossible. He tried summarizing the information himself and then requested permission to photocopy the data the company had made available. This request was denied and Mr. Smith hand copied the information for 18 to 20 days, with three other Board agents assisting for a few days. When it became clear to Mr. Smith that it would take an inordinate amount of time to hand copy all the information he would need to frame a proposed make whole specification, he terminated the task and these proceedings were commenced.

II. GENERAL COUNSEL'S PROPOSED MAKE WHOLE FORMULA

The General Counsel is proposing the following formulas be used to determine the make whole award for the employees of Respondent.

A. LETTUCE HARVEST EMPLOYEES

The Regional Director has determined that Respondent paid its employees in the lettuce harvest classification the prevailing union rates of pay for the entire make whole period. The gross quarterly pay for employees will be used instead of the rates of pay. The Adam Dairy fringe benefit rate will be used, and will be determined by dividing the

gross quarterly pay for each employee by .78. The make whole amount due each employee will be found by subtracting each employee's actual gross pay in the make whole period from the Adam Dairy fringe benefit figure for the same period. Then, actual monies spent by the Respondent for employee fringe benefits would be deducted from the gross make-whole amount to obtain the net make whole amount due each employee.

B. OTHER THAN LETTUCE HARVEST EMPLOYEES

The General Counsel is proposing the following formula to calculate the make whole award for Respondent's non-harvest employees.

The wage rates for the five major job classifications from "relevant" UFW collective bargaining agreements will be extracted. The job classifications actually used by Respondent will be generalized to correspond to the five job classifications in the UFW contracts. Because Respondent paid its employees slightly different wage rates in the Imperial Valley and Blythe areas, Respondent's wage rates for these two areas will be calculated separately.

The wage rates for the five major job classifications in the UFW contracts will then be averaged, obtaining an average make whole hourly wage rate. This rate will then be divided by .78 to obtain the Adam Dairy make whole rate.

The wage rates for the corresponding job classifications of Respondent in the Imperial Valley and in the Blythe area will then be averaged.

This average hourly Norton rate will then be subtracted from the Adam Dairy make whole rate to determine the hourly make whole amount due each employee. This amount will then be multiplied by the number of hours worked by each employee in each month of the make whole period. The fringe benefits paid by Respondent will then be deducted.

III. MAKE WHOLE PERIOD

Following certification of the UFW as the collective bargaining representative of Respondent's agricultural employees (J. R. Norton Co. (1977) 3 ALRB No. 66), the president of the UFW, Cesar Chavez, made a formal written request to Respondent to begin negotiations dated October 4, 1977 (General Counsel Exhibit 12).

Respondent refused to bargain and challenged the certification (General Counsel Exhibit 13). On June 22, 1978, the ALRB issued a decision finding that Respondent had violated Section 1153 (e) of the ALRA by refusing to bargain with the union. (J. R. Norton Co. (1978) 4 ALRB 39.) Respondent challenged that decision in the California Supreme Court and on December 12, 1979, the court upheld the Board's decision as to certification, J. R. Norton Co. v. ALRB (1979) 26 Cal. 3d 1. The union representative, Ms. Ann Smith, again made a bargaining request dated December 19, 1979 (General Counsel Exhibit 15). Respondent's attorney, Mr. Stoll, responded by letter dated December 28, 1979, stating he

would be Respondent's negotiator and requested of Ms. Smith suitable bargaining dates. Bargaining did commence with the first meeting between the parties on February 6, 1980.

The make whole order in the Board's decision in J. R. Norton Co. (1978) 4 ALRB No. 39 orders Respondent to make its employees whole, "from the date of the UFW's request for bargaining to the date on which Respondent commences to bargain collectively in good faith and thereafter bargains to a contract or a bona fide impasse."

The UFW's letter of October 4, 1977, meets the first criteria of the Board's order and I find that the make whole period commences on October 4, 1977.

Although no evidence was presented at the hearing that Respondent and the UFW had bargained to a contract or a bona fide impasse, I find that the date of December 28, 1979, represents the commencement of collective bargaining and therefore is the termination date of the make whole period.

In addition, it should be noted that throughout the hearing and in the parties' briefs, these dates were constantly used. The Respondent vigorously pursued his legal and factual defenses in this case, but did agree that if a make whole period was to be established, it should terminate on December 28, 1979. (R.T. Vol. II, p. 67; Vol. III, p. 57.

The date of December 28, 1979, is the date that Respondent expressed its intent to bargain and better reflects the meaning of the Board's statement in Norton,

supra., that the period should run "...to the date on which Respondent commences to bargain...." Since no evidence was presented at the hearing of a contract or a bona fide impasse, it is the only date possible to terminate the make whole period and proceed with the next step in this case--the make whole formula.

IV. METHOD OF COMPUTING THE .MAKE WHOLE AWARD FOR LETTUCE HARVEST EMPLOYEES

It was undisputed in the hearing that Respondent paid its lettuce harvest employees the wage rate prevailing at comparable employers under union contract during the make whole period.

The method of computing the actual earnings of these employees proposed by the General Counsel is to use the quarterly wage reports submitted by Respondent to the Employment Development Department of the State of California (DE-3 Form). Mr. Smith testified that these forms contain the gross wages earned during a calendar quarter.

Mr. Smith testified extensively on the difficulty of using the Respondent's weekly payroll sheets to compute the actual earnings of each employee, rather than the proposed quarterly reports. His examination of those records revealed that there were 200 to 250 job slots, and that 600 to 700 employees filled those job slots every month. He estimated, from his review of Respondent's records, that there were

possibly 2,000 to 2,500 lettuce harvest employees for whom a make whole award had to be computed.

The company's records were kept by crews rather than by individual employees, and Mr. Smith found that many employees would appear in one crew, and within the same week appear in another crew, with a different job classification and different earnings. There was not one single computation which would show the employee's earnings for that week. He stated that in order to get an accurate earnings figure for one employee, he would have to follow each employee for each week, in all the crews that the company had, in order to determine what the employee earned during the relevant week.

Mr. Smith testified that once he obtained the gross earnings for each employee from the quarterly reports (DE-3 Forms), he would apply the Adam Dairy .78 formula to actual earnings to arrive at the make whole award for each quarter. After determining the employee's quarterly make whole award, he would deduct the employee's wages and fringe benefits actually paid by Respondent from that amount for each quarter.

V. METHOD OF COMPUTING MAKE WHOLE AWARD FOR NON-HARVEST EMPLOYEES

To support the reasonableness of the proposed make whole formula for Respondent's non-harvest employees, the General Counsel presented extensive evidence on the nature

of Respondent's growing operation, and the relationship of this operation to vegetable companies under the UFW contracts to be used in the formula. Respondent's evidence disputed the generalizations inherent in the General Counsel's proposed formula.

1. RESPONDENT'S FARMING OPERATION

Respondent maintains a large farming operation in the Salinas Valley, Imperial Valley and Blythe areas.

Lettuce represents a large portion of Respondent's operation, producing between 2 3/4 and 3 1/4 million boxes of lettuce annually. The lettuce operation begins in the Blythe area around the middle of November and runs until mid- or late December; it then moves to the Imperial Valley in late December or early January and runs until early March; the operation returns to the Blythe area for the spring harvest throughout March. From April 15 to October 1, the lettuce operation is in the Salinas Valley. In October and November the operation is in New Mexico and Arizona. The company's equipment, trucks, harvest supervisors and ground crew workers follow this harvest.

Respondent, in its Imperial Valley operation, also grew flat crops such as cotton, alfalfa and wheat. In the Blythe area, Respondent maintained a citrus operation as well as flat crops. Respondent did not harvest these flat crops.

In its Blythe operation, Respondent employed about 15 year-round workers and when necessary, a thin and hoe

crew of about 40 workers. In the Elythe area, Respondent employed about 75 non-harvest workers and a thin and hoe crew of about 25 workers when necessary. The operation in the Blythe area is both varied and extensive, with much of the operation in year-round flat and citrus crops.

2. COMPARABLE UFW CONTRACTS

As stated above, the General Counsel's proposed formula for non-harvest employees includes the averaging of wage rates in "relevant" union contracts.

Mr. Smith concluded that Respondent was similar in its operation to lettuce based vegetable industry companies and he used contracts from those companies for the relevant time period in the formula. He did not use contracts of employers in other industries such as flower, grape, tomatoe, or citrus industries.

During the period from 1977 to 1979, there were between 30 and 35 collective bargaining agreements between the UFW and vegetable industry companies in the geographic areas of Salinas, Imperial and Blythe areas where Respondent had operations. Using a vegetable industry master agreement, uniform wage rates had been established in all these contracts. Since the wage rates in all contracts were the same, Mr. Smith only used those contracts which were with companies which he concluded were most similar to Respondent's in the type of operation as well as their geographical locations. Ultimately, Mr. Smith used the contracts with eight companies in the

proposed formula. These eight contracts were introduced into evidence in the Hearing (General Counsel Exhibits 2-11). The eight companies whose contracts are to be used are: Abatti Farms, Inc., and Abatti Produce, Inc., Vessey and Company, Inc., Mario Saikhon, Inc., Lu-ette Farms, Growers Exchange, Inc., Interharvest, Inc., Admiral Packing, Hish Noroian Farms.

All of these companies had contracts which covered all or part of the make whole period. The master agreement controlled the wage rates for these companies. All these companies grew and/or harvested lettuce in the Salinas Valley, Imperial Valley and/or Blythe area. Many of these companies also had other farming operations in the Imperial Valley, as does Respondent. The Nish Noroian Company operated exclusively in the Blythe area, growing lettuce and flat crops. The number of employees and crews of these companies ranged from somewhat smaller than Respondent to the same size or larger.

Respondent also put into evidence various UFW contracts. These contracts for the most part covered farming operations in geographic areas in which Respondent has no operation and involved crops dissimilar to Respondent's.

To rebut the use of the Nish Noroian contract in the Blythe area, Respondent introduced into evidence the contract between the UFW and CAL-PAC Citrus (Respondent Exhibit 4). This company farmed 2,500 acres of citrus in the Blythe area (Respondent had about 300 acres of citrus in the Blythe area),

Respondent also introduced into evidence four contracts with growers in the Ventura area (Respondent Exhibits 11-15). Those companies grew a variety of crops but not flat crops or iceberg lettuce. Mr. Roy, the attorney for the Ventura County Growers Association, testified that employers in the Ventura area traditionally receive wage concessions from' the UFW because of a high unemployment rate. These contracts were not under the master agreement.

In addition, Respondent introduced into evidence the contract of the San Diego County company, Eggert Ohio, growing tomatoes and celery; the Delano area company, Molica Farms, mainly cotton, grain and wine grapes; and Klein Ranch in the Tracy area, growing mainly alfalfa, asparagus and tomatoes.

VI. WAGE RATES AND JOB CLASSIFICATIONS

The contracts used by the General Counsel in the proposed formula contain five job classifications which were used in the computations: Tractor Driver A, Tractor Driver B, Irrigator, Thin and Hoe, and General Labor. Each of these classifications has a corresponding wage rate.

Mr. Smith, in his examination of the Respondent's payroll records, found approximately 20 different job classifications. He then grouped these various classifications into the five categories contained in the UFW contracts. Mr. Smith then found the highest wage rate paid by Respondent in each

of the five categories and testified that that rate was used in the proposed formula.

Separate averaged wage rates will be used for the Blythe and Imperial Valley areas. These were not grouped together in the proposed formula, because it was clear from Respondent's records that the wage rates for the various job classifications were different.

VII. FRINGE BENEFITS TO BE DEDUCTED FROM THE MAKE WHOLE AWARD

The proposed formula will include the deduction from the gross make whole amount of those fringe benefits which Respondent has actually paid to its employee during the make whole period.

The parties stipulated that health insurance, retirement, vacation pay, Christmas and holiday pay, Social Security, Workers Compensation, unemployment insurance, are all to be deducted from the make whole award. The Respondent also agreed that he would provide the necessary figures to the General Counsel so that the actual dollar amounts of those fringe benefits could be deducted. Respondent agreed to provide this information "for the purposes of preparing the specification" (R.T. Vol. VII, p. 100).

Respondent also offered testimony of non-monetary fringe benefits including bus transportation, labor camp housing, and awards dinners and pins. No evidence was introduced on the value of these benefits. The bus transportation was

available to all employees, but no records were kept as to which employees utilized the transportation. The same was true for the housing; it was made available to all employees but no records were kept as to which employees used the facilities. The housing was the typical labor camp type consisting of barracks, with the workers cooking for themselves. Some employees received a Christmas turkey and a Christmas bonus, but no dollar value of these benefits was presented.

FINDINGS AND CONCLUSIONS

I. NATURE OF HEARING

Pursuant to 8 Cal. Adm. Code §20290, the only regulation governing this proceeding, a hearing is required when the General Counsel finds a controversy exists. The parties herein not only cannot agree on the amount owed, they cannot even agree on the method of calculation or on the means of compiling the necessary facts to compute the dollar amounts owed.

The drafters of this regulation wisely anticipated the types of problems this case presents in computing a make whole award when they authorized the initiation of a hearing based on a statement of the matters in controversy. The Board has already ruled that this hearing is authorized pursuant to that section (interim ruling February 25, 1982).

Respondent aggressively expressed his opposition to General Counsel's proposed formula for computing the make whole award and to a lesser extent, the make whole period. If there was no opposition to this formula by Respondent, then Respondent would be correct that this hearing was not necessary. By conducting a formal hearing first on the issues of the relevant make whole period and the proposed formula for computing the make whole award, Respondent's procedural and substantive due process rights are not only being protected but are being expanded beyond those of parties to other types of back pay proceedings. The General Counsel correctly surmised that the proposed formula would be contested and Respondent has been given every possible opportunity to rebut the proposed formula.

II. THE REASONABLENESS OF THE PROPOSED FORMULA

The proceedings in this case are only for the purpose of enforcing the existing Board decision and order contained in J. R. Norton Co. (1978) 4 ALRB No. 39 as reaffirmed in 6 ALRB No. 26, as well as the interim decision rendered by the Board on February 25, 1982, during the course of the hearing. These decisions define the scope of this hearing and put to rest many of the issues which Respondent is again attempting to raise.

In 4 ALRB No. 39, p. 3, this Board stated that,

"We will 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 [sic] 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 geo-graphical locations. We note, however, that the Bureau of Labor Statistics data which we used in Adam Dairy to calculate the dollar value of fringe benefits are unchanged, so that the investigation herein need only be concerned with establishing an appropriate wage rate or rates for straight-time work."[emphasis added]

The use of the make whole remedy by the ALRB is fairly new and the guidelines for its implementation either in regulatory or decision form are sparse. The standards for back pay awards must govern these proceedings. Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24.

The computation of an award in back pay cases usually can be made more precisely than a make whole award. In a make whole situation, the nature of the violation, the company's refusal to bargain and its affect on all employees make an exact or specific award impossible. Even in back pay cases, exact specificity of the amount is not required. Maggio-Tostada, Inc. (1978) 4 ALRB No. 36. If back pay awards can be calculated by a reasonable and equitable method, considering the information available, Frudden Produce, Inc. (1982) 8 ALRB No. 26; Arnaudo Brothers (1981) 7 ALRB 25, then make whole awards considering the nature of

the violation being remedied and the lack of a wage contract from which exact computations can be made, cannot be held to a higher standard. Finally, it should be noted that any uncertainty in the formula should be resolved against Respondent, especially when the uncertainty was caused by Respondent's illegal conduct. Butte View Farms (1978) 4 ALRB 90.[1]

III. USE OF THE ADAM DAIRY FORMULA

The proposed formula for calculating the make whole award incorporates the Adam Dairy - 78% factor. Not only is it reasonable and proper to utilize this factor in this formula, it is mandated by the Norton Board decision (4 ALRB No. 39) and my interim decision which was affirmed by the Board.

IV. USE OF QUARTERLY REPORTS TO DETERMINE ACTUAL EARNINGS

The complexity of the facts (the number of employees, the period of time, the nature of Respondent's payroll records, the movement of workers from one crew to another) in itself would justify the use of the quarterly reports in this case.

[1] In this case, uncertainty and lack of specific facts are not only caused by the underlying violation, the refusal to bargain, but in addition we have Board agent Smith's testimony on the difficulty in getting payroll information from Respondent prior to this hearing being noticed and Respondent's refusal to comply with General Counsel subpoena during the course of the hearing.

In addition, Respondent's lack of cooperation and attempts to frustrate the preparation of the make whole award cannot be ignored in finding that using these reports is reasonable and to deny access to these reports would be unreasonable. [1]

Respondent did not object to the reasonableness of the use of these quarterly wage reports, but has continued to refuse to give them to the Board's agent, even after a valid subpoena was served on Respondent. Respondent's objection to the release of this information (the quarterly reports) was raised in a motion to revoke the subpoena of the General Counsel. I denied that motion and that ruling was affirmed by the Board in its interim order of February 25, 1982. In the hearing following this ruling, Mr. Smith testified that he was allowed to see these reports in Respondent's office in Salinas (R.T. Vol. III, pp. 72-73). Not only has there been a waiver of the privilege claimed by Respondent (See Crest Catering Company v. Superior Court (1965) 62 Cal. 2d 274, 42 Cal. Rptr. 110), but the same information contained in these EDO quarterly reports (although not summarized) is legally obtainable by the Board. Using an accurate summary of the facts necessary to compute the make whole award is clearly reasonable, justified, and proper.

[1] Although Respondent allowed Mr. Smith to handcopy its payroll data, he was denied the right to photocopy the same data. I find there was no justification for this distinction and its only purpose was to frustrate and delay the resolution of the make whole award.

V. THE USE OF AVERAGING IN THE PROPOSED MAKE WHOLE FORMULA

The concept of averaging in computing back pay and make whole awards is already recognized and accepted. Maggio-Tostado, Inc., supra.; Butte View Farms, supra. In the proposed make whole formula herein, the General Counsel is proposing to average the wage rates of the five job classifications in the relevant union contracts and then average the comparable Norton wage rates. Under the facts of this case, this proposed averaging is both reasonable and equitable. The effect of this type of averaging will be to grant the same hourly make whole increment to all of Respondent's employees.

Along with averaging the wage rates of the five job classifications, the General Counsel is proposing to first combine the approximately 20 job classifications which appear in Respondent's records into five categories corresponding to the five categories contained in the UFW contracts which are to be used. Unless this is done, the averaging method in the proposed formula will not work.

The combining of the Norton job classifications into the five categories was reasonable and necessary. The type of work the Norton employees performed corresponded to the work performed by the companies under union contracts, in the vegetable industry, and using these standardized classi-

fications instead of Respondent's numerous classifications is reasonable for purposes of a make whole award. [1]

VI. THE REASONABLENESS OF THE COMPARABLE UFW CONTRACTS

The Board in the earlier Norton decision established criteria for the type of comparable contracts which should be used to frame a make whole award. These include the timing of the contracts, the size of the work force, the type of industry and the geographical location.

I find that the contracts used by the General Counsel in the proposed formula meet this criteria and establish a reasonable and fair standard for computing the make whole award. They represent as close an approximation as is possible to the wage rates Respondent's non-harvest employees would have received if Respondent would have bargained in good faith.

Although Respondent strenuously argued that it does not fit the model of a lettuce based vegetable company and did present evidence of the size of its operation outside the lettuce and vegetable criteria, this evidence was not persuasive. Respondent's lettuce and vegetable operation was definitely large enough that for purposes of formulating a make whole award the contracts used in the proposed formula

[1] Mr. Smith stated that he used the highest wage paid in each of the five categories in which the Norton employees were grouped and that if wage increases were given during the make whole period, the increased rate was then used.

were correct. The contracts presented by Respondent in rebuttal varied from the criteria established by the Board. These companies had very little in common with Respondent's farming operation and provided no assistance in determining a reasonable sample of union contracts. Their crops were different and most were in totally different geographical areas.

The General Counsel is not just proposing to take the wage rates out of these contracts and apply them to the entire make whole period. Rather, the make whole period is divided into three segments to reflect wage increases which occurred during the relevant period. The use of these three periods and their corresponding wage rates as contained in Appendix A in the "Statement of Matters in Controversy" (actually entitled "Partial Back Pay Specification") is necessary if these contracts are to be used in the computation of the make whole award for the non-harvest employees. The wage rates changed during the relevant period and the three segments of the make whole period proposed by General Counsel accurately reflect the wage increases and thus should be included in the formula.

VII. THE DEDUCTION OF FRINGE BENEFITS FROM THE MAKE WHOLE AWARD

As stated supra., most of the categories of deductions for fringe benefits have been agreed to by the parties.

Respondent has agreed to provide the specific information needed by General Counsel to deduct fringe benefits in the preparation of the specification for the individual employees. If Respondent provides evidence of actual payments on behalf of employees for other benefits such as private health insurance plans, life insurance, retirement, or bonuses, these should also be deducted. If the information is provided to General Counsel and Respondent is not satisfied with computations in the specification, he should have the opportunity to rebut those computations at the hearing on the specification.

The housing, award dinner and bus transportation made available to Respondent's employees do not meet the criteria of monetary benefits actually paid an employee (Adam Dairy, supra.) and should not figure into the computation of the make whole award.

VIII. THE MAKE WHOLE PERIOD

The basis for defining the make whole period has already been discussed. The General Counsel and the union as Intervenor have agreed to a termination of the make whole period on December 28, 1979. If any make whole award is to be ordered, a closing date is necessary. This date agreed upon by the representatives of the employees is the date which best reflects the intent of the Board's order in the earlier Norton decision. The commencement date of October 4, 1977, has been proven by the evidence discussed supra.

RECOMMENDED ORDER

1. That the formula proposed by the General Counsel for computing the make whole award for Respondent's lettuce harvest and non-harvest employees be approved as a reasonable method of computation.

2. That the General Counsel prepare a specification containing the actual make whole award owed to each employee of Respondent.

3. That Respondent provide all necessary and relevant data for the computation of the make whole award for each of its employees, including the quarterly reports (EDD Forms DE-3) and all amounts actually paid as approved fringe benefits.

STEVE A. SLATKOW
Administrative Law Officer