Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GEORGE LUCAS & SONS,	)	Case Nos. 79-CE-67-D
	)	79-CE-134-D
Respondent,	)	80-CE-2-D
	)	80-CE-3-D
and	)	
	)	
PETRA FUENTES, JUAN MORENO, PEDRO VIRAMONTES, SALVADOR SANCHEZ AND MANUEL ALVARADO,	)	10 ALRB No. 6 (7 ALRB No. 47)
	)	
Charging Parties.	)	

BACKPAY DECISION AND ORDER

On December 22, 1981, the Agricultural Labor Relations Board (Board) issued a Decision and Order in the above-entitled case, 7 ALRB No. 4-7, finding, inter alia, that Respondent George A. Lucas & Sons had discharged Pedro Viramontes and Juan Moreno and refused to recall Manual Alvarado, Alma Fuentes, Petra Fuentes, and Ricardo Fuentes because of their protected concerted activities, in violation of Labor Code section 1153(a).[1/] The Board found that Respondent had also violated Labor Code section 1153(d) with respect to the Fuentes family but dismissed all allegations in the complaint concerning Salvador Sanchez.

On October 5, 6, 7, and November 1, 1982, a hearing was held before Administrative Law Judge (ALJ)[2/] Mark Merin

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

[2/] 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.)

for the purpose of determining the amounts of backpay due the discriminatees. On March 30, 1983, the ALJ Issued the attached Supplemental Decision in this proceeding in which he found that the discriminatees were entitled to the amounts of backpay set forth therein. Thereafter, Respondent and the General Counsel filed exceptions with supporting briefs, and General Counsel filed a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Labor Code section 114-6, the Board has delegated its authority in this matter to a three-member panel of the Board.

The Board has considered the record and the ALJ's Supplemental Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions, as modified herein, and to adopt his recommended Order, with modifications.[3/]

Manuel Alvarado

Respondent excepts to the ALJ's assessment of backpay liability for Manuel Alvarado during two separate and distinct backpay periods on the grounds that Alvarado was out of the country during one period and therefore was not available for work and, in the other, that he had failed to make reasonable efforts to secure suitable employment. Respondent also excepts to the ALJ's failure to prorate over the entire calendar year a lump-sum vacation benefit Alvarado received from an interim

[3/] As no party excepted to the ALJ's finding that Juan Moreno was entitled to reimbursable expenses in the amount of $4.6.25, we adopt that finding.

employer. We find partial merit in the exceptions.

February 16 - April 1, 1980

We find no merit in Respondent's exception to the ALJ's award of backpay for the six-week period from February 16 to April 1, 1980. Until he was laid off on February 16, 1980, Alvarado pruned grapes for V. B. Zaninovich who, like Respondent, is a Delano area grape grower. He was recalled six weeks later, on April 1. Alvarado testified that his only attempts to find work during the layoff period were "a couple of times" at Lucas & Sons, the Respondent herein. He said he spoke to supervisor Rolando di Ramos, who advised him that no work was available but promised to notify him as soon as a vacancy occurred. Di Ramos, who supervises the various crew foremen, denied that he saw Alvarado at all during the pertinent period. He also explained that since he does not hire workers, he would not have promised to call Alvarado but would instead have referred him to a crew foreman had the discriminatee in fact contacted him regarding work. No other witnesses testified in support of, or in opposition to, the testimonial claims of either Alvarado or di Ramos.

The ALJ did not expressly discredit di Ramos, but accorded his testimony less weight than that of Alvarado on the basis of two occurrences which he found served to belie di Ramos' assertion that he does not hire employees. The first occurred in June 1979 when Ramon Hernandez, Alvarado's former crew foreman, left Respondent's employ. Hernandez' crew was laid off at that time and several of the crew members subsequently were reassigned

to work under the supervision of the remaining foremen. In August of that year, at a time when both Alvarado's brother and sister were working for Respondent, di Ramos asked the brother to inform Alvarado that he would be assigned to Emilio Rodriguez' crew when he reported for work. (George Lucas & Sons (1981) 7 ALRB No. 47, ALJD pp. 17-18.) The second instance involved di Ramos' notification to Alvarado, at the direction of Respondent and its counsel, that Respondent intended to give effect to the Board's Decision and Order of reinstatement in George Lucas & Sons, supra.

We do not find that either of the incidents the ALJ cited is sufficient to overcome di Ramos' contention that he does not hire Respondent's employees. The evidence indicates that Alvarado had already been hired on the occasion that di Ramos relayed word to him that he was to be reassigned to Rodriguez' crew, and it cannot persuasively be argued that di Ramos exercised hiring authority when he carried out Respondent's instructions to advise Alvarado that Respondent was prepared to comply with the Board's reinstatement Order.

Where, as here, the ALJ's credibility resolution is vague, or is based on entirely irrelevant factors, or on reasons which are factually defective, the Board will, if necessary, make its own credibility findings. (Inland Container Corp. (1979) 240 NLRB 1298 [100 LRRM 1421]; Pete Salemi (1977) 229 NLRB 547 [95 LRRM 1193].) In the context of this backpay proceeding, however, for the reasons discussed below, we need not make an independent judgment as to which of the witnesses we will believe.

An employee's efforts to seek interim employment must not be judged on the basis of isolated periods in the backpay period. As explained by the National Labor Relations Board (NLRB) in Saginaw Aggregates, Inc. (1972) 198 NLRB 598 [81 LRRM 1025], the test is whether the record established that the employee had conscientiously sought other employment during the whole of the backpay period. When determining the reasonableness of an employee's efforts to mitigate losses, the Board may consider such factors as the employee's experience and the labor conditions in the area in which he or she normally works. (Mastro Plastic Corp. (1962) 136 NLRB 1342 [50 LRRM 1006].)

Alvarado was laid off by the interim employer, Zaninovich, as the major, pruning operations were coming to an end. He was recalled six weeks later, when Zaninovich commenced the thinning and tying of grapevines. In George Lucas & Sons (1981) 7 ALRB No. 4.7, the ALJ had occasion to discuss Respondent's cultural practices and seasonal calendar with some specificity. He found that Lucas' pruning season ordinarily ran from January to March. If this was true again in the year pertinent herein, we can assume that Respondent's pruning operations, and likely those of other area growers as well, were nearing completion at about the same time that Alvarado was laid off by Zaninovich. At the most, Respondent would likely have been engaged in primary pruning work for only another two weeks. Therefore, we "cannot conclude that there was an over abundance of employment opportunities in jobs commensurate with those of Respondent." (Matlock Truck Body & Trailer Corp. (1980) 248 NLRB 461, 465

[104 LRRM 1102].)[4/]

Moreover, since Alvarado apparently had a reasonable expection of returning to work for the interim employer, and did return within six weeks, he did not wilfully remove himself from the labor market and, "Under the circumstances, it would appear reasonable that he might await word from [the interim employer] rather than venturing into [the] job market." (Keller Aluminum Chairs Southern, Inc. (1968) 171 NLRB 1252, 1257 [69 LRRM 1348].) Similarly, in I.T.O. Corporation of Baltimore (1982) 265 NLRB No. 169 [112 LRRM 1315], the NLRB excused the discriminatee's failure to seek interim work in the first full four weeks following his unlawful demotion since he had made adequate efforts to seek work during the remainder of the backpay period. As the Board said,

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[4/] The ALJ also indicated that it would be immaterial whether or not Alvarado had applied for work during the time he was on layoff status from the interim employer, reasoning that he could not "expect to get work during the relatively slack period prior to the time he was recalled" because his lack of seniority would have precluded an employer from hiring him at a time when a limited amount of pruning work is reserved for more senior employees. In reaching this conclusion, the ALJ relied solely on a general assessment of Delano area grape industry employment practices provided by Juan Cervantes, Delano area field manager for the United Farm Workers of America, AFL-CIO, (UFW) whom he permitted General Counsel to qualify as an expert witness. Although the UFW was not a charging party in the present proceeding, or in George Lucas & Sons, supra, 7 ALRB No. 47, that the UFW had been certified by the Board as the exclusive bargaining representative of Lucas' employees on September 10, 1982, just one month before Cervantes testified in the present proceeding. We do not believe that it was prudent of the ALJ to rely on the testimony of someone in Cervantes' position. While we do not doubt his experience in employment patterns in the Delano area, we doubt that he can be characterized as a disinterested witness. Moreover, we find his testimony irrelevant to the question of whether Alvarado exercised reasonable diligence in mitigation of damages.

> McFadden's work record in the whole backpay period leaves no doubt that he sought, in good faith and with reasonable diligence, to mitigate his backpay. We therefore find it unnecessary to consider what McFadden did during the initial 4 weeks in question. (Id. at slip opn. p. 4.)

While it was Respondent's burden to prove that reasonable efforts by Alvarado could have produced work during the six-week layoff period, Respondent presented no evidence showing that, with reasonable diligence, someone with Alvarado's skills, qualifications, and experience should have been able to secure employment, and that appropriate work was available at times pertinent herein, either with Respondent, or at other area growers.

Respondent merely proposes that we follow Mercy Peninsula Ambulance Service, Inc. (9th Cir. 1979) 589 F.2d 1014 [96 LRRM 1338 wherein the court, in reversing the NLRB, found that a discriminatee's attempts to seek work "an average of only three times a month during each of the nine months he was in the job market after his discharge does not rise to reasonable diligence." But, in a subsequent decision, in Alfred M. Lewis, Inc. v. NLRB (9th Cir. 1982) 681 F.2d 1154 [110 LRRM 3280], the same court explained that it had reached its Mercy finding because the discriminatee had spent most of his time on projects unrelated to the job search and had pursued employment opportunities with "disinterest." Moreover, the backpay claimant had conceded that his job search would have been successful had he diligently sought employment. Contrasting the situation in Mercy, the court found no evidence that the Lewis discriminatee was insincere and noted, in particular, that the 19-month period of unemployment in Lewis

coincided with a period of substantial unemployment in the job search area.

Given all of the circumstances, particularly Alvarado's work history during the whole of his backpay period, we do not believe Respondent has articulated a persuasive evidentiary or legal basis for denying Alvarado his entitlement to backpay during the six week period from February 16 to April 1, 1980.

November-December 1980

During the course of the hearing, counsels for Respondent and General Counsel stipulated that Alvarado was in Mexico from November 29 to December 29, 1980, the second of the disputed backpay periods. While the ALJ found that Alvarado vacationed in Mexico during that same period, he nevertheless held Respondent liable for four days of back pay during that time (December 16, 17, 18 and 19). According to Alvarado's own testimony, he again worked for Zaninovich, through October 31, 1980, and then left for Mexico on November 3, 1980, staying in that country until he returned to resume work for Zaninovich the following January 3, 1981.[5/]

Gross back pay does not accrue while a discriminatee is unavailable for work. In NLRB v. Mastro Plastics Corp. (2d Cir. 1965) 354 F.2d 170, 174 n. 3. [60 LRRM 2578] cert. den. (1966) 384 U.S. 972 [62 LRRM 2292], the court held that:

[5/] Alvarado also testified that at the conclusion of the 1980 harvest, in late October, he had been assured by Zaninovich of work during the pruning season, which commenced on or about December 5, 1980. On December 20, while in Mexico, he received confirmation from his Zaninovich foreman that he could return to work at any time. The evidence indicates that he could have returned to work as early as December 5.

> [A] discriminates is not entitled to backpay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails to diligently search for alternative work, or voluntarily quits alternative employment without good cause.

Therefore, whether Alvarado was in Mexico from November 3, 1980, through January 3, 1981, as he testified, or, from November 29 to December 29, 1980, as the ALJ found and the parties stipulated, it is clear that he was not available for work on December 16, 17, 18, and 19 and we will direct that his net backpay award be adjusted accordingly.

Vacation Pay.

Respondent excepts to the ALJ's failure to deduct as interim earnings vacation pay received by discriminatee Alvarado on November 23, 1981. Respondent concedes that Respondent had no backpay liability on that date but argues that the vacation pay should be prorated over the 1981 calendar year, the period in which it was earned. We disagree. The vacation pay received by Alvarado was interim earnings; however, the burden is on Respondent to establish that that interim vacation pay was earned during the gross backpay period. (Abatti Farms, Inc. (1983) 9 ALRB No. 59.) We can find no authority for Respondent's theory that the vacation pay should be prorated. We will, in future cases, allow vacation pay to be deducted as interim earnings only if the discriminatee was entitled to vacation benefits during the period of the discriminatee's vacation or the period of time for which vacation benefits were paid.

Pedro Viramontes - Alleged failure to mitigate damages.

Pedro Viramontes' backpay period covers approximately

two years, from January 15, 1980, through January 22, 1982. Viramontes, who was 24- years of age at the time of the hearing, testified that he had worked exclusively for area grape growers. His gross backpay award was computed by the General Counsel at $9,519.38. The ALJ found that Viramontes had not made adequate attempts to seek work from March 15 through June 10, 1980, and again from October 16, 1980, to July 21, 1981, and concluded that Viramontes should be denied backpay for those periods on the theory that his interim earnings would have equaled his gross backpay during those same periods. Accordingly, he adjusted Viramontes' total net backpay award down to $2,987.44. General Counsel excepts to any diminution of the backpay award, contending that Respondent failed to prove that Viramontes did not make reasonable attempts to secure interim employment during the whole of the two periods of time set forth above. We find the exception to be lacking in merit.

Viramontes worked intermittently for at least six different agricultural employers during the backpay period following his discriminatory discharge by Respondent in January of 1980. He testified at length concerning his unsuccessful applications for additional work during the backpay period, describing with considerable specificity the persons to whom he applied for work, as well as places and times. Respondent produced a number of witnesses, persons from whom Viramontes allegedly sought work, to refute his testimony. Crediting "totally" the testimony of three of Respondent's witnesses in particular, the ALJ found that for the period from March 15, 1980, through June 10, 1980, Viramontes "exaggerate[d] his attempts to find work to give the

impression that he made reasonable efforts to mitigate his damages." Viramontes reported no earnings whatsoever during the nine-month period from October 16, 1980, through July 21, 1981. Again, in reliance on rebuttal witnesses called by Respondent, the ALJ found Viramontes' description of his efforts to seek work during that time to be equally suspect. We have reviewed the ALJ's credibility determinations in light of the relevant record evidence and conclude that his findings are free from prejudicial error.

Pedro Viramontes - Alleged willful concealment of interim earnings.

As noted previously, Viramontes reported no employment for the nine-month period between October 16, 1980, and July 21, 1981. Respondent contends that Viramontes worked for Montemayor Trucking Company for several weeks prior to July 22, 1981, that he wilfully and fraudulently concealed earnings received from Montemayor, and that for those reasons, as well as the fabricated accounts of his efforts to seek interim employment, he should be required to forfeit the whole of his backpay award. In his Decision, the ALJ took into consideration Respondent's contentions and found that while it was probable that Viramontes and Montemayor had entered into a joint venture business relationship, and while there was some evidence from which he could infer that Viramontes must have been earning but concealing money received from Montemayer, there was insufficient record evidence by which to make such a finding. He concluded that Respondent had failed to carry its burden of proving interim earnings.

Called by Respondent as an adverse witness early in the hearing, Viramontes named all of his employers during the whole

of the backpay period except Montemayor and two other employers.[6/] He said he did not work at all from October 1980 until he began hauling grapes for Montemayor on or about July 22, 1981. He also testified, however, that although he did some work for Montemayor prior to July 22, 1981, he did so without compensation.

Later in the hearing, in response to questioning by Respondent, Viramontes said he had purchased a truck in behalf of Montemayor Trucking in the Summer of 1981 for $2500. He testified that he was not the owner of the truck, that he used it only to haul grapes for three named companies which had contracted with Montemayer for that purpose in the summer of 1981,

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[6/] Viramontes made no testimonial references to employment with either Eugene T. Nalbandian, Inc. (May 1980, $83.38) or Tonko L. Zaninovich (Sept. 1980, $57.53). When Respondent confronted Viramontes with payroll data obtained from the California Employment Development Department, the witness said he had forgotten that he had worked for Zaninovich but denied that he had worked for Nalbandian. The latter had listed a Pedro Viramontes on its payroll records, but with a different social security number than that of the witness as well, as an address where the witness stated he had never lived. Viramontes said he had lost his wallet and suggested that someone else had worked for Nalbandian using his name and number.

The ALJ acknowledged that although he is not a handwriting expert, the signature on the cancelled Nalbandian check appears to be in the same hand as the one on the Lucas and Zaninovich payroll checks which Respondent produced and Viramontes acknowledged he had endorsed.

The ALJ refused to accept Respondent's characterization of Viramontes' failure to disclose the Zaninovich employment, until prodded, as conscious or willful. He observed that the employment was for a short period and that Zaninovich did not issue Viramontes a W-2 form which might have aided his recall. As for Nalbandian, the ALJ found an absence of proof that the two Viramontes' are the same person. Accordingly, he concluded that Respondent had not, by the evidence set forth above, established willful and/or fraudulent concealment of earnings sufficient to warrant a total forfeiture of the entire backpay award. We affirm the ALJ's findings.

and that he worked without pay in order to learn how to operate a bobtail truck. Six months later, in December 1981, Viramontes purchased that same truck from Montemayor for $1,000.

Viramontes conceded that he used the truck to haul cantaloupes, for one or two days prior to July 15, 1981, but insisted that he did so without compensation. Upon further questioning by Respondent, he said he worked at Myco Enterprises[7/] hauling cantaloupes but that work was not done until the summer of 1982. Respondent produced payroll records from Myco showing that Montemayor hauled cantaloupes for that company on 16 different days prior to July 15, 1981. Those records indicate that the Company paid Montemayor a total of $3,913 for the services of three drivers, one of whom was Viramontes. Viramontes alone was credited with hauling 931 running feet of melons at $.25 per foot. Thus, Montemayor would have been paid $1629.25 by Myco for the work performed by Viramontes alone.

On the final day of the hearing, General Counsel called Juevenal Montemayor, of Montemayor Trucking, who testified that while Viramontes, as well as two other drivers, had indeed worked for his trucking company while it was under contract to haul melons for Myco in the summer of 1981, all of them did so without pay in order to gain job experience for the coming grape harvest. In his Decision, the ALJ expressed the view that Montemayor had been less than truthful with respect to his business arrangement

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[7/] Viramontes did not include Myco in the list of three companies which had contracted with Montemayor to haul grapes in the summer of 1981.

with Viramontes, stating that:

> The explanation for the absence of compensation from Montemayor to Viramontes that the latter was just learning a new skill; i.e., driving a bobtail truck, is not compelling since, as Respondent elicited, Viramontes had driven a similar truck the previous year . . . and that nonetheless it would only take approximately five hours for a person with no experience to learn that skill.

However, the ALJ found that Respondent failed to carry its necessary burden of proving that Viramontes had in fact concealed interim earnings.[8/]

Respondent concedes that its only evidence consists of an inference that Viramontes was paid for his services for Montemayor but contends that the lack of other evidence is the result of the ALJ's prejudicial failure to enforce a subpoena by which Respondent sought to elicit from Viramontes documents establishing income received during the disputed backpay period. In the alternative, Respondent argues that even on the present record, the Board reasonably could find something inherently suspect in Montemayor's purchase of a truck for $2500 and subsequent sale of that same vehicle, just six months later, to Viramontes for $1000 because, "The highly favorable terms of this transaction from Viramontes' standpoint suggest strongly that the price cut

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[8/] Even assuming, for purposes of discussion only, that Viramontes in fact entered into a partnership or joint-venture business arrangement with Montemayor, that fact alone would not establish earnings subject to being credited against the backpay award. "As in all enterprises conducted for profit, only the balance after the deductions for costs and expenses of doing business represent earnings from self-employment." (Hyster Co. (1975) 220 NLRB 1230 [90 LRRM 1544] enforced (9th Cir. 1977) 549 F.2d 807 [95 LRRM 108] cert. den. (1977) 431 U.S. 955 [95 LRRM 2575].) Moreover, self-employment is not to be equated with failure to search for interim employment. Consequently, periods of self-employment are not to be exempted from the gross backpay period.

was intended to reward Viramontes for the services he had performed for Montemayor at Myco Enterprises and perhaps elsewhere."

While we agree with the ALJ's ultimate conclusion that the record will not support a finding of willful concealment of earnings, we also believe, for reasons discussed below, that the ALJ erred in excluding evidence material to Respondent's burden of establishing that Viramontes intentionally understated interim earnings for the purpose of receiving backpay in excess of the claimed actual loss.

Subpoenas Duces Tecums

Respondent served each of the discriminatees, except Juan Moreno, with subpoenas duces tecum by which it sought disclosure of certain specified information concerning the discriminatees' efforts to seek work, a schedule of their interim earnings, and certain other financial data.[9/] None of the discriminatees complied with the subpoenas nor moved to revoke

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[9/] The information the discriminatees were asked to produce at hearing is as follows:

> Where and from whom each sought employment during the whole of his or her backpay period and the manner in which the application was made (i.e., oral, written or otherwise), as well as the responses they received to such applications. Also, for the entire backpay period, all sources of income, a list of expenses incurred or paid (including but not limited to rent or mortgage payments), utility payments, automobile and travel expenses, child support or alimony, medical payments or hospitalization costs, and the satisfaction of any court judgments). The exact dates of any vacations taken and any and all occasions when the discriminatee quit employment or was discharged, and the reasons therefor.

them.[10/]

Respondent contends in its exceptions that the ALJ wrongfully rejected its plea for enforcement of the discovery requests in their entirety and now urges the Board to direct the discriminatees to fully comply with the subpoenas and the ALJ to conduct further proceedings as necessary. In the alternative, Respondent proposes, as an appropriate sanction for the discriminatees' disregard of the discovery requests, that each of them, except Moreno, be denied the whole of his or her backpay award.

A person served with a subpoena is required to appear and to give testimony pursuant to such subpoena. (Bob's Motors, Inc. (1979) 241 NLRB 1236 [101 LRRM 108]; Lab. Code §§ 1151, 1151.2.) The Board's regulations, at California Administrative Code, title 8, section 20250(b), require that any person who does not intend to comply with a subpoena shall petition in writing to revoke the subpoena within five days after the date of service except where, as here, the subpoena has been served less than five days before the hearing, in which case the petition to revoke is due on the first day of hearing.

In Giumarra Vineyards Corp. (1977) 3 ALRB No. 21, we gave effect to the well-settled principle that respondents have

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[10/] Alma Fuentes was served at her home, 716 Diaz, Delano, at 9 p.m., on October 4, the evening before the hearing commenced, as were her mother, Petra Fuentes, and father, Ricardo Fuentes. Alvarado also was served at home, 1942 Randolph Street, Delano, at 9 a.m., on October 5, the day on which the hearing commenced. Viramontes was served at the Tex-Cal Company, where he was employed at the time, at 7:30 a.m., also on October 5, the first day of the hearing.

only a limited right of pre-hearing discovery in unfair labor practice proceedings. However, we also proposed that in backpay proceedings, since there no longer is a need to maintain witness confidentiality:

> . . . full disclosure be available of information tending to verify, contradict, or further clarify the materials in the files of the General Counsel.

Manuel Alvarado testified that he had already turned over to General Counsel some tax returns and had others at home. The ALJ ruled that the documents were relevant, that the witness had' waived any claim of privilege he might otherwise have made with respect to tax returns when he turned over certain of them to General Counsel, and therefore all other tax returns should be produced. Accordingly, he directed the witness to return later in the hearing with the missing returns. Respondent reserved further cross-examination until such time as the documents were produced. We find no record evidence that Alvarado again appeared at the hearing.

Alma Fuentes said she lives with her mother (Petra Fuentes) and father (Ricardo Fuentes). She reads English and understood the import of the subpoena which was addressed to her. She said she saw that her father and mother had received what appeared to be similar documents, and assuming that that was the case, she neither opened them nor told them about them. She also testified that she had already turned over some documents to the General Counsel and had no other documents that might come within the subpoena.

When Viramontes similarly was questioned by Respondent,

General Counsel handed Respondent two documents provided by Viramontes. They are captioned Unemployment Insurance and Notice of Computation and appear to list employers in the area for whom Viramontes had worked during the backpay period.[11/] Respondent then asked Viramontes whether he believed that he could produce any of the remaining documents set forth in the subpoena. Counsel for General Counsel asserted her objection to disclosure of tax data on the grounds of privacy. The ALJ disagreed, noting that such documents are routinely used as a reliable gauge of income when applying for credit, in domestic relations situations, or to show income as the basis for getting a court award. But noting that Viramontes had filed a joint return with his wife, and expressing concern for the wife's privacy, the ALJ directed that he produce all available tax forms for an in camera inspection, explaining that gross income has no meaning absent corresponding W-2 forms. He also directed the witness to produce W-2 forms and applications for credit subject to an initial perusal by him to determine only if they revealed current or prior employment. Viramontes returned with the available documents that afternoon. The ALJ reviewed them, and since they made no mention of prior employers, he decided they were not probative and declined to make them available to Respondent.

Respondent renewed its motion to enforce the subpoena served on Viramontes, particularly that portion which requested

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[11/] On the basis of these documents, Respondent was able to elicit from Viramontes the fact that he had worked for Zaninovich and raise the question of the disputed employment with Nalbandian, discussed more fully, infra, at footnote No. 6.

records demonstrating applications for credit, and expenses incurred during the backpay period, including rent and mortgage payments made. The motion was denied by the ALJ on the grounds that one cannot deduce from expenses paid what the source of revenue might have been, and that therefore an examination of the documents for such a purpose would consume much time and not necessarily be probative as to any of the issues.

Respondent proposes that it was prejudiced by Viramontes[1] defiance of the subpoena on the apparent theory that the requested documents would have revealed, for example, applications for credit in which the discriminatee would have disclosed sources and amounts of interim income or assets, which would serve to impeach his claim that he had no earnings from October 16, 1980, until July 22, 1981, when he commenced working for Montemayor Trucking Company for compensation.

Absent a timely filed motion to quash the subpoena served on Viramontes, we find no explanation or precedent for the ALJ's in camera inspection of the requested documents and his ruling that they would not be probative of the issues and therefore would not be disclosed to Respondent. In so ruling, the ALJ substituted his judgment for that of Respondent and denied Respondent an opportunity to receive and litigate evidence, or attempt to impeach the witnesses' credibility, regarding earnings other than those which Viramontes had disclosed voluntarily. We find that the ALJ's prejudicial exclusion of evidence material to Respondent's burden of establishing willful concealment of earnings constitutes reversible error. Accordingly, we will remand this case to an

ALJ for further action consistent with our Decision herein, including enforcement of the Viramontes' subpoena and the reopening of the record to adduce additional evidence with respect to the alleged concealment of interim earnings.[12/]

Summary

In accordance with our Decision herein, we shall remand this proceeding to an Administrative Law Judge to resume and conduct this proceeding in a manner consistent with our Decision herein concerning enforcement of the subpoena duces tecum served on Pedro Viramontes.

Apart from that specific issue subject to remand and reconsideration, we see no purpose in delaying implementation of the remainder of our Decision herein. Therefore, in order to further the purposes and policies of the Act as expeditiously as possible, we will order immediate compliance with the other features of the recommended Order of the ALJ subject to the following modifications: delete from the backpay award of Manual Alvarado the sum of $149.50, which represents the period from December 16 through December 19, 1981, when he was not available for work, and, in addition, hold in abeyance the whole of Pedro Viramontes' backpay award until such time as a final resolution of that matter has been reached.

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[12/] We do not believe that a remand is warranted with regards to the other subpoenas. Alma Fuentes testified that she did not possess any of the documents specified, and we have addressed Respondent's material exceptions to the ALJ's findings regarding Alvarado.

ORDER

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

Juan Moreno	$ 46.25
Alma Fuentes	2,482.86
Petra Fuentes	2,447.65
Ricardo Fuentes	2,447.56
Manuel Alvarado	3,043.60

It is also ordered that this proceeding be, and it hereby is, remanded to an Administrative Law Judge for the purpose of reopening the record, enforcing the subpoena duces tecum served on Pedro Viramontes , and adducing additional evidence, if necessary, concerning Viramontes' alleged willful concealment of interim earnings .

It is further ordered that, upon the conclusion of such further proceedings, the Administrative Law Judge shall prepare and serve on the parties a Second Supplemental Decision containing findings of fact upon the evidence received, conclusions of law, and recommendations; and that following service of the Second

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Supplemental Decision on the parties, the provisions of California Administrative Code, title 8, section 20282, shall be applicable.

Dated: February 10, 1984

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

CASE SUMMARY

George A. Lucas & Sons

10 ALRB No. 6
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(7 ALRB No. 47)

Background

In George Lucas & Sons (1981) 7 ALRB No. 47, the Board found that Respondent had discharged two employees (Pedro Viramontes and Juan Moreno) and refused to recall four more employees (Manuel Alvarado, Alma Fuentes, Petra Fuentes and Ricardo Fuentes) because of their protected concerted activities in violation of the Act. Thereafter, the Regional Director issued a backpay specification setting forth his assessment of the amounts Respondent owed each of the discriminatees for economic losses resulting from the unfair labor practices. Respondent excepted to the proposed backpay specifications with regard to all of the discriminatees except Juan Moreno and the contested matters were set for an evidentiary hearing before an Administrative Law Judge.

ALJ's Decision

The ALJ found that all of the discriminatees except Pedro Viramontes were entitled to the amount of backpay specified by the Regional Director. With respect to Viramontes, the ALJ found that he had failed to mitigate his losses during two distinct periods in his backpay period by failing to make adequate efforts to obtain interim employment. Accordingly, he recommended that Viramontes[1] gross backpay award of $9,519.38 be reduced to a net backpay award of $2,987.44. Respondent filed exceptions to certain aspects of the ALJ's Decision, contending in the main that Viramontes had fraudulently concealed interim earnings in order to maximize Respondent's liability to him, and therefore he should be required to forfeit the whole of his net backpay award. Respondent also contended that Alvarado should not be awarded backpay during a six-week period when he allegedly failed to make reasonable attempts to seek interim employment or during a three day period during which he was out of the country.

Board Decision

The Board upheld the ALJ's determination that Alvarado had met his obligation to mitigate losses during the disputed six-week backpay period. The Board also found, however, that gross backpay does not accrue while a discriminatee is unavailable for work, that Alvarado was on vacation in Mexico during three days of his backpay period, and adjusted his net backpay award accordingly. The Board also found merit in Respondent's position regarding the subpoenas, but only as it concerned Viramontes. Since Viramontes had not moved to quash the subpoena which Respondent had served

on him, the Board found that it was error for the ALJ to have examined the requested documents in isolation and then declined to turn them over to Respondent because he believed that the information contained therein would not serve any valid purpose. The Board remanded to an ALJ that portion of this proceeding which concerns Viramontes, with directions to enforce the subpoena served on Viramontes, to reopen the hearing and adduce further evidence, if necessary, and to issue a Second Supplemental Decision setting forth his or her findings of fact and conclusions of law. The Board also directed that the whole of Viramontes' recommended net backpay award be held in abeyance pending the Board's final resolution of that issue but ordered that all other aspects of its Decision be deemed final within the meaning of Labor Code section 1160.3.

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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.

* * *

STATE OF CALIFORNIA

BEFORE THE AGRICULTURE LABOR RELATIONS BOARD

In the Matter of

GEORGE A. LUCAS AND SONS,

Respondent

and

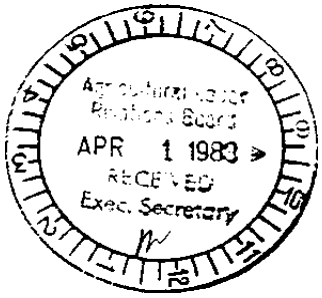
PETRA FUENTES, JUAN MORENO, PEDRO VIRAMONTES, SALVADOR SANCHEZ and MANUEL ALVERADO,

Charging Parties.

_____/

Case Nos. 79-CE-134-D
79-CE-67-D
80-CE-3-D
80-CE-2-D

ECISION



APPEARANCES:

Constance Cary, Staff Counsel, Agriculture Labor Relations Board, for the General Counsel;

Paul Coady, Sayfarth, Shaw, Fairweather and Geraldson, for Respondent.

MARK E. MERIN, Administrative Law Judge:

On December 22, 1981, the Agriculture Labor Relations Board issued its Decision and Order (7 ALRB No. 47) directing Respondent, inter alia, to take certain affirmative action to remedy unfair labor practices found therein, including the reinstatement of unlawfully discharged employees Pedro Fuentes, Juan Moreno, Pedro Viramontes, Salvador Sanchez and Manuel Alverado with compensation for any loss of pay and other economic losses they suffered, as a result of their discharge or Respondent's failure to rehire them.

A back pay hearing was set for October 5, 6, and 7, by notice dated July 12, 1982, and thereafter General Counsel filed its Back Pay Specification to which Respondent, George A. Lucas and Sons

(hereinafter sometimes referred to as "LUCAS"), replied. The present controversy concerns Respondent's objections to General Counsel's calculation of gross back pay for calendar years 1981 and 1982 for its alleged failure to take account of predictable absenteeism; Respondent's challenge to any back pay for Pedro Viramontes on the grounds that he fraudulently concealed interim earnings, and failed to mitigate damages; and Respondent's objections to General Counsel's calculations of the amount due Manuel Alverado, Ricardo Fuentes, Petra Fuentes, and Alma Fuentes on the ground that those Charging Parties failed to discharge fully their obligation to mitigate damages. This hearing was held before me in Delano on October 5, 6, 1, and continued to November 1, 1982, at which time it was concluded. Thereafter, General Counsel and Respondent filed briefs which have been fully considered.

Upon the entire record of this case, including my observations of the demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

GROSS BACK PAY FOR CALENDAR YEARS 1981 AND 1982 - ADJUSTMENT FOR ABSENTEEISM

In his May 14, 1982 letter to Respondent's counsel, Paul Coady, incorporated by reference into the Back Pay Specification, John Moore, ALRB Regional attorney, states that "after January 1, 1981 there is no accounting for normal absenteeism. We would be willing to negotiate utilization of an absentee factor for the gross during 1981 and 1982", two calendar years within the back pay period. Responding to the Back Pay Specification, on August 26, 1982, Respondent's counsel, Mr. Coady, stated in Footnote 2 of

page 9 of his response:

> With respect to the "absenteeism factor" referred to in Paragraph 4 of your letter of August 9, 1982, I am unable to recollect any specific proposal you may have made for calendar years 1981 and 1982. It is gratifying, however, that you now recognize that some further adjustment is necessary in the calculations which you provided to me. I would be interested in receiving any such proposal which would incorporate the absent-eeism factor for the last two years of the back pay period.

Mr. Coady then objected to the computations in the Back Pay Specification for Manuel Alverado and Pedro Viramontes, on the grounds that the absenteeism factor for the years 1981 and 1982, was not considered.

Prior to objecting to the lack of an absentee factor, Respondent's counsel objected to the method General Counsel employed to compute gross back pay liability for calendar years 1981 and 1982 and proposed an averaging method which was illustrated by specific computations. In its amendment to the Back Pay Specification, General Counsel's Exhibit 2, filed on October 5, 1982, General Counsel accepted the averaging method for computing back pay liability for the calendar years 1981 and 1982 as proposed in Respondent's reply to the Back Pay Specification but maintained that no absentee factor was included because the averaging method "includes the earnings of short term employees

and employees with low production and does not accurately reflect the productive capacity of the discriminatees. . ." At no time, however, did the Respondent waive its position that the computations for 1981 and 1982 were still defective for excluding an absentee factor.

In its brief, General Counsel argued that since Respondent did not suggest how the absentee factor should be applied, and as there was "no evidence in the record on which to base any such factor", Respondent's claim that the absence of an absentee factor is a defect must be rejected.

Respondent, on the other hand, proposes that an equitable formula to reflect absenteeism could be based on the assumption that each of the discriminatees would have been absent at least 10% of the available work days and, accordingly, proposed reducing each of their back pay awards by 10%. Cited in support of this proposal were various cases which establish that it is proper for the NLRB to factor in absenteeism, but the method by which predictable absenteeism was calculated varied in the cases cited from 6% to 13%.

Since no evidence was presented at the hearing to establish what the actual absentee rate was in the crews to which the discriminatees would have been assigned had they been employed, nor what the discriminatees' actual historical absenteeism experiences were, the determination of appropriate absenteeism factors by the Hearing Officer, following the close of evidence, would be arbitrary at best. As an absenteeism factor necessarily reflects the conditions of employment at the time and in the area where the employment took place, a proper development of an

appropriate absenteeism factor must depend upon the specific facts in that locale. Absent an adequate record on which to develop an appropriate absenteeism factor, the Hearing Officer must decline to speculate on an appropriate figure and accordingly rejects the Respondent's suggestion that it be fashioned out of judicial whole cloth. No absenteeism factor, therefore, will be included to reduce the back pay awards for the years 1981 and 1982. By agreement, absenteeism was taken into consideration in the prior years included within the back pay period.

PEDRO VIRAMONTES

There is no dispute as to the back pay period which runs from January, 1980, through the conclusion of January, 1982. During that back pay period, Viramontes was employed at installations of various other agricultural employers and earned money which was properly offset against Respondent's back pay liability, producing a net back pay claimed owing by the General Counsel to Pedro Viramontes in the amount of $9,519.38.[1/]

Respondent challenges not the specific total on the back pay calculation applicable to Viramontes, but rather claims that Viramontes concealed interim employment, testified falsely relating to efforts to obtain employment to mitigate his damages, and withheld information so that the accurate calculation of the back pay due him was rendered impossible. The greatest part of the hearing was consumed by the taking of evidence both from and

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1/ This is the amount I totalled from exhibits attached to the brief reflecting adjusted net back pay calculations, adding $51.74 for August 17, 1981, as per the Stipulation filed as ALO Exhibit 1.

relating to Viramontes in Respondent's efforts to demonstrate the witness[1] deceitfulness and fraudulent concealment of actual earnings.

Respondent argues that NLRB precedent requires the disallowance of any and all back pay to Viramontes, if it is found that he wilfully concealed earnings and falsely testified regarding efforts to mitigate his damages, and emphasized in his brief the power of the Board to protect against abuse of its own process by fashioning an appropriately punitive measure and denying any relief to back pay applicants who testify falsely and conceal earnings from the Board.

General Counsel steadfastly defended Viramontes[1] good faith and rejected the Respondent's conclusions that Viramontes engaged in fraud, misrepresentation, or wilful concealment. Because of the detailed nature of the alleged concealments and deceit, each of the specific allegations will be examined in detail below.

March 15 through June 10

Following his discharge by Lucas, Viramontes obtained employment with Tex-Cal Land Management Company. In mid-March, 1980 Viramontes was laid off by Tex-Cal and, according to his testimony, did not obtain employment until hired by Jim Hironis on June 12, 1980. When questioned by Respondent's counsel as to his attempts to find employment during the approximate 12 week period prior to his employment with Hironis, Viramontes described filing for unemployment compensation and asking unnamed foremen whom he met on the street or knew through friends if he could obtain employment with their companies. When pressed, Viramontes mentioned three companies, Sumner and Peck, Tenneco, and Superior,

where he recalled seeking employment. His attempts to gain employment at the three named companies, Viramontes described in some detail, detail which in all instances was totally contradicted by the specific persons whom he claimed he contacted. Maurillio Pimentel, for instance, also known as "Barrelito", a supervisor for Tenneco, denied knowing Pedro Viramontes or having been asked by him for employment. Furthermore, he denied having authority to hire employees and denied ever telling an applicant that he would notify him when work became available. Viramontes maintained that "Barrelito" did know him personally and had told him that the company was not then hiring but that he, "Barrelito", would let him know when the company was going to employ more workers. Aurelio Menchaca, the labor superintendent for Superior Farms, whom Viramontes contended he contacted during this period, from whom he testified he obtained a card, and whom he described attempting to reach by telephone on several occasions, contradicted Viramontes[1] testimony by denying ever seeing Viramontes, denying there was room in his office for an applicant to wait, and rejecting Viramontes' contention that his secretary could have called him on the radio since his instructions to his secretary were never to call him except in an emergency.

Among the companies at which Viramontes testified he sought employment, was Tex-Cal from which he had been laid off in mid-March. According to Viramontes, he repeatedly contacted his previous foreman, Joe Medina, who lived near him, to inquire when he would resume work with that company. According to Viramontes, he was repeatedly encouraged that he would get reemployment at the first opportunity, but that more senior people would be called

back first. Viramontes specifically testified that he approached Medina looking for work following his lay off in mid-March and specifically renewed his request when suckering began in May. Medina, called by Respondent, contradicted Viramontes' version saying that he was never approached by Viramontes seeking employment and that, contrary to Viramontes[1] description, Viramontes never came to his house to seek work.

I find it implausible, at best, that Medina who admittedly knew Viramontes personally as his former foreman, would be mistaken as to his subsequent contacts with Viramontes, and I decline to assume that Medina, a supervisor for an independent farming corporation, would testify falsely merely to aid the fortunes of a sister grower. The total contradiction by "Barrelito", Menchaca and Medina of Viramontes' version of his efforts to find employment during the March 15 through June 10 period, does not bolster Viramontes' credibility, but rather substantiates Respondents' contention that Viramontes is fabricating testimony to exaggerate his attempts to find work to give the impression that he made reasonable efforts to mitigate his damages.

October 16, 1980 through July 21, 1981

Viramontes reported no employment between the period from October,16, 1980, through July 21, 1981 at which time he began driving one of Montemayor Trucking Company's trucks for A. Catanni & Son. Explaining his efforts to locate work during that nine month period, Viramontes mentioned seeking work at Giumarra, Sumner and Peck, Tex-Cal, at the United Farm Worker's Delano office known as "Forty Acres" and from foremen of different

companies he contacted at their Delano homes or in the fields where he saw crews working. On one occasion he applied at the union hiring hall for work in roses although his prior work experience had been limited to grapes. Specifically, Viramontes recalled speaking with a foreman for Giumarra named Padilla at one of the labor camps. Further, he reiterated his testimony that he made repeated requests of Joe Medina, foreman for Tex-Cal, to return there for work. None of these efforts, according to Viramontes, yielded results.

Respondent maintains that Viramontes' description of his efforts to find work during this period is fictitional. Respondent produced testimony from the Delano field officer manager for the UFW, Juan Cervantes, to the effect that the union has not operated a hiring hall in Delano since 1973, evidence was also provided from a Tex-Cal receptionist, Janie Quintana, to refute Viramontes' claim that he was told by a receptionist at Tex-Cal to apply at Forty Acres. Ms. Quintana has been Texcal's receptionist for six years and denied that she had ever referred any applicant to the UFW Delano office. Not only did Joe Medina contradict Viramontes' contention that Viramontes sought work regularly from Medina, but Medina testified that at one point during the pruning season in 1981 he tried to recall Viramontes but found that he was working somewhere else.

Thus, Respondent argues that Viramontes has falsely described his efforts to seek employment in an attempt to appear to have sought to mitigate his damages. Furthermore, Respondent offered evidence and has argued that not only did Viramontes exaggerate or falsely describe his efforts to seek employment, but he also

wilfully concealed employment he did have during this particular period. Although Viramontes at first testified that he did not drive a truck for Montemayor Trucking Company at Myco Enterprises in 1981, and only hauled cantelope for one or two days when he was invited to go out and get some, when payroll records of Myco Enterprises showed he had hauled cantelopes from the fields to the Myco packing shed between June 22 and July 8, Viramontes called Juvenal Montemayor, owner of the trucking company, who testified that he did not pay any of the drivers who drove his three trucks at Myco during 1981 but was giving them an opportunity to get job experience and intended to call them for paying work when the grape harvest began. Raetta Maples, custodian of Myco Enterprises' records, testified that the Montemayor Trucking Company was paid $1.75 per running foot for cantelopes hauled by its drivers, and that Juvenal Montemayor, himself, received an additional $.25 per running foot for providing the truck drivers.

Respondent maintains that the lack of compensation is so improbable, that the explanation of the relationship between Viramontes and Montemayor Trucking Company must be rejected. Improbable as it may sound, the Hearing Officer could believe that the economic relationship between Montemayor and Viramontes was not that of paid employee. Particularly since Viramontes testified he purchased a truck for Montemayor Trucking Company for $2500 in the summer of 1981 and later bought it back for $1,000, it appears probable that Viramontes and Montemayor were involved in some sort of joint venture, a fact which was not fully explored at the hearing. The explanation for the absence of compensation from Montemayor to Viramontes that the latter was just learning a

new skill, i.e., driving a "bobtail truck", is not compelling since, as Respondent elicited, Viramontes had driven a similar truck the prior year when he worked at Jim Hironis' during the harvest, and that nonetheless it would only take approximately five hours for a person with no experience to learn that skill.

Employment at Zaninovich and Nalbindian Companies

Respondent contacted companies listed as employers of Viramontes on a Notice of Computation form issued by the State of California Employment Development Department. From Tonko L. Zaninovich, Respondent obtained evidence that a Pedro Viramontes had been employed during the payroll period ending September 11, 1980, and earned $57.53. From Eugene Nalbandian, Inc., Respondent obtained evidence that a Pedro Viramontes with a Social Security number different from the Charging Party's was employed there during the period ending May 26, 1980 and earned $83.38. Viramontes explained his failure to disclose these employers by acknowledging that he had forgetten about his employment with Zaninovich and denying that he worked for Nalbandian, explaining that he had lost his wallet and identification permitting someone else to work under his name and Social Security number.

Respondent, while offering no expert testimony from a handwriting specialist, maintains that a comparison of the signatures on the backs of the checks from Nalbandian and Zaninovich with Viramontes' signature on his tax return and on Lucas checks, demonstrates that it was Viramontes who received both checks showing wilful concealment, at least of the Nalbandian employment.

Since the Zaninovich check appears to be for one day's work,

with no evidence that the company issued a W-2 form to Viramontes, I decline to find that Viramontes[1] failure to disclose this employer was either conscious or wilful. Viramontes was shown the Nalbandian check and did not "have recall of having a check like this." He denied ever working for the company and added that he never lived at the address listed with the company, 430 Glenwood in Delano. While the signatures on the two checks do appear, to this Hearing Officer, to be quite similar, I claim no particular expertise in the handwriting area and am not qualified to make a categorical determination that the signature on the Nalbandian check is Viramontes'. Absent such evidence, and in the face of the denial by the witness of ever having worked for Nalbandian, I do not find that Respondent sustained its burden of proof to prove that Pedro Viramontes wilfully concealed earnings at the Nalbandian company.

Conclusion

The case of Pedro Viramontes presents serious difficulties. While he claimed to be unemployed during the period following his Tex-Cal layoff from mid-March to the second week in June, there was no corroborating evidence of any effort he made to secure employment during that period. To the contrary, Respondent's witnesses contradicted every specific description of his job search that Viramontes made during this period, leaving the Hearing Officer to conclude not that no efforts were made during the period in question, but only that the description of the efforts, particularly those contacts described in detail, is false.

While there was no comparable attack on Viramontes' descrip-

tion of efforts he made to receive employment during the period from October 16, 1980 through July 21, 1981, the absence of comparable contradicting evidence mirrors the lack of specific testimony of detail relating to a job search in this period. There was, however, evidence from which I could infer that Viramontes must have been earning and concealing money received from Monte-mayor Trucking Company during at least part of that period. While I am not troubled by the failure to disclose the Zaninovich short term employment, and I am prepared to accept an innocent explanation of the failure to list the Nalbandian employment, I still do not feel the record adequately reflects the true relationship between Montemayor Trucking Company and Pedro Viramontes. Nonetheless, suspicions of inadequate reporting do not provide the affirmative evidence which it is the burden of the Respondent to provide to prove intentional concealment of earnings. Recognizing the difficulty of securing such evidence, the Hearing Officer adjourned the hearing from October 7 through November 1 to permit the gathering of additional evidence. That period of time was not used, however, to set to rest any doubts about, or to explain the economic relationship between Montemayor Trucking and Pedro Viramontes. While it is possible to speculate that Viramontes must have been compensated for the work he did driving Montemayor's truck for Myco prior to July 21, 1981, conjecture does not substitute for fact. Similarly, although the existence of a friendship, and a truck secured for Montemayor through the efforts of Viramontes, suggest that Viramontes may have been driving for Montemayor Trucking Company prior to the June 21 - July 8 period in which Viramontes admitted, belatedly, driving Montemayor's

truck without compensation, there is not sufficient evidence in the record from which such a conclusion may be drawn.

Viramontes' employment following August, 1981, is spotty, bat there is no evidence to suggest he concealed other employers, or failed to make reasonable efforts to secure employment throughout the conclusion of the back pay period.

While I suspect that Viramontes was attempting to put his position in its best light, even to the extent of misdescribing his efforts to seek employment, I am not satisfied that the Respondent has proved intentional concealment of earnings sufficient to require me to sanction that conduct by denying a back pay award in its entirety. However, the misdescription, and I believe intentional exaggeration of efforts to find employment from March 15 through June 10, 1980, and the absence of convincing testimony adequately to explain the eight month period of unemployment between Otober 16, 1980, and July 21, 1981, frustrates any attempt to determine if there were reasonable efforts made to secure employment because the efforts made are so unreliably described. I cannot rely, upon the description given by the Charging Party in this case/ and, consistent with the NLRB approach, such as it set out in Brotherhood of Painters, Local 419 (1957) 117 NLRB 1596, I will find that Pedro Viramontes failed to mitigate his damages during the period from March 15 through June 10, 1980 and from October 16, 1980 through July 21, 1981, and further that he should be denied back pay for the pay periods encompassed within those periods on the theory that his interim earnings would have equaled his gross back pay during the same periods.

Accordingly, reducing Pedro Viramontes' back pay award to

eliminate any net payment to him during the period from March 15 through and including June 10, 1980, and from October 16, 1980 through and including July 21, 1981, and subtracting the earnings attributable to Zaninovich of $57.53 as reflected on the check accepted into evidence as Exhibit U, I conclude that Respondent is obligated to pay to Pedro Viramontes as and for back pay for the period from January 15, 1980, through January 22, 1982, the amount of $2,987.44.

MANUEL ALVARADO

As to Manuel Alvarado, there was no dispute as to the length of the back pay period; rather, Respondent argues that during several intervals in the back pay period Alvarado failed to discharge his obligation to mitigate damages. Specifically, Respondent argued that Alvarado was unavailable for work during a vacation in Mexico he took after he was laid off by VBZ, his then employer, on October 31, 1980, as part of a general reduction in force. The vacation lasted from November 29, 1980 until December 29, 1980, even though, as testified by Alvarado, his foreman had advised Alvarado to speak with him about work at the beginning of the pruning season which began, on or about, December 5. While Alvarado was on vacation in Mexico, on December 20, 1980, his VBZ foreman sent word to him, through a friend of Alvarado[1]s, that he could return to work whenever he desired. He did not present himself to ask for work, however, until the first week of January.

General Counsel in its Amended Specification attached to its Post-Hearing Brief, acceeded to Respondent's position insofar as it was acknowledged that Alvarado was not available for work

during the period from December 20 through January 1, 1981. {See footnote 20 to General Counsel's Post-Hearing Brief.)

Respondent also argues that Alvarado should be denied back pay for the period between February 16, 1980 and April 1, 1980. Alvarado had been laid off by VBZ in mid-February and was not reemployed until April 1 when he was recalled to VBZ. According to Alvarado, he sought employment at Lucas through Rolando DiRamos, one of Respondent's supervisors, from whom he sought work once or twice during the period in question but was told there was no work available and that he would be notified when a vacancy occurred.

But for a few short periods of time, Manuel Alvarado was employed almost continuously during the period that the Lucas Company was employing comparable workers. Alvarado testified that his family depended upon him and that he could not be without work too long. His record of employment supports his testimony that he did not have long periods of unemployment. While DiRamos testified that Alvarado did not contact him to request work during the lay off period from February 16 through April 1, by no means was DiRamos an independent witness, and instead was a crew supervisor with authority over crew foremen. Only Respondent's superintendent is of higher authority. There was no evidence offered to contradict Alvarado's testimony that he sought work at VBZ after his lay off and before he was recalled.

Respondent essentially relies upon the period of unemployment itself to prove Alvarado's lack of due diligence in attempting to find employment. According to Juan Cervantez, qualified as an expert on the patterns of employment in the Delano area, only

seniority people are employed in pruning which runs from the first week in December into the first week in March, and small work forces are used in tying, suckering and hoeing which is the work done, beside pruning, prior to the thinning and budding which begins in April. Alvarado had been laid off while pruning for VBZ, and it is unlikely that he, without seniority at another company, could expect to get work during the relatively slack period prior to the time he was recalled at VBZ.

While an employee is obliged to seek employment in order to mitigate damages, he need only make reasonable efforts. He need not exhaust his resources searching for the elusive job, especially when he is likely to be shortly recalled to seasonal work. Furthermore, the Respondent has the burden to establish by the preponderance of the evidence that the discriminatee failed to make adequate efforts to secure employment. Merely challenging Alvarado's testimony that he asked DiRamos for work during the lay off from VBZ, does not discharge Respondent's burden or establish that Mr. Alvarado failed to make reasonable efforts to locate employment. All it establishes is the conflict between DiRamos[1] and Alvarado's recollection.

General Counsel argues that DiRamos' testimony should be rejected since while he testified he did not have the authority to hire anyone, it was he who attempted to rehire him in 1979 by contacting Alvarado's sister and brother and he, again, who put Alvarado back to work at the direction of Respondent and his counsel. Since there are these internal inconsistencies in

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DiRamos' testimony, I would give his testimony less weight than I give Alvarado's on the question of whether or not Alvarado requested employment at Lucas during his lay off from VBZ.

Accordingly, I find that the back pay due Alvarado is as amended on the exhibit attached to General Counsel's Post-Hearing Brief, or, as I calculated it, the amount of $3,193.10.

ALMA, PETRA AND RICARDO FUENTES

Petra and Ricardo Fuentes, and their daughter, Alma, were not rehired by Lucas for the harvest season beginning in August, 1979. They were rehired on January 20, 1980, so their back pay period spans the months from August, 1979, through January 20, 1980. Respondent objects to payment to the members of the Fuentes family of back pay for the period from August 1 through September 1, 1979 on the theory that they failed to discharge their duty to mitigate damages during that period.

I reject that contention and find that Respondent has not sustained its burden of proof relative to the wilful failure to mitigate damages. The Fuentes[1] entire back pay period demonstrates their assiduousness in seeking and maintaining employment. For the specific period in question, the Fuentes' maintained that they sought employment in the way most conducive to finding it, i.e., stopping at crews they saw working in fields and seeking employment. They did not know, therefore, at which companies they inquired, nor the names of the foreman or supervisors whom they approached. Alma Fuentes testified that she did not know the family would not obtain work with Respondent until sometime late

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in August, therefore, the only period that would really be in question would be perhaps the last week in August. Given the history of their employment during the back pay period, their lack of notice that they would not be employed at all in the 1979 Lucas harvest, and the efforts that they testified they made to seek employment, I am satisfied that there was no wilful failure to mitigate in this instance. Accordingly, Respondent is liable for back pay for Alma Fuentes in the amount of $2,482.86; for Petra Fuentes in the amount of $2,447.65; and for Ricardo Fuentes $2,447.56.[2/]

JUAN MORENO

There' being no evidence offered by Respondent in opposition to Juan Moreno's claim for back pay in the amount of $46.25, it will be recommended that Respondent be ordered to pay that amount to said Charging Party.

THE REMEDY

The Respondent's obligation to make the Charging Parties whole in this case will be discharged by payment to them of the net back pay set out below, plus interest at the rate of 7% per annum to accrue commencing with the last day of each week of the

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2/ The figures given for back pay for members of the Fuentes family were taken from the total net pay displayed on the exhibits attached to General Counsel's brief. These figures reflect changes made to the work sheets for the back pay computations, previously provided as part of General Counsel's back pay specification, to reflect the amendment to the back pay specification and the stipulations admitted as ALO's Exhibit 1. While these figures cannot be reconciled with those previously demanded in the back pay specifiction, in that they are approximately $200 different as to each individual, the principal part of that discrepancy is attributable to the unexplained omission of the period from September 17 through September 22, 1979, from the amount included in the back pay specification.

back pay period when each such sum became due and owing to the respective Charging Parties until the date this decision is complied with, minus any tax withholding required by federal and state law.

Upon the entire record in this proceeding, and consistent with these findings and conclusions, I issue the following recommended:

ORDER

The Respondent, George A. Lucas and Sons, its officers, agents, successors, and assigns, shall make the Charging Parties in this proceeding whole by paying to them the following amounts together with interest at the rate of 7% per annum as more fully described above:

Pedro Viramontes: $2,987.44;

Manuel Alvarado: $3,193.10;

Alma Fuentes: $2,482.86;

Petra Fuentes: $2,447.65;

Ricardo Fuentes: $2,447.56;

Juan Moreno: $46.25.

Dated: 2/26/93

MARK E. MERIN
Administrative Law Judge