McFarland, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

| | |
|---|---|
| McFARLAND ROSE PRODUCTION, a division of PETOSEED CO., INC a wholly-owned subsidiary of GEORGE BALL, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party. | Case Nos. 76-CE-69-F<br>76-CE-73-F<br>76-CE-73-l-F<br>76-CE-73-2-F<br><br>11 ALRB No. 34<br>(6 ALRB No. 18) |

SUPPLEMENTAL DECISION AND ORDER

On April 8, 1980 the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in this proceeding (6 ALRB No. 18), holding that McFarland Rose Production Co. (Respondent or Company) had violated Labor Code sections 1153(e) and (a)[1/] by bargaining in bad faith with its employees' certified bargaining agent, the United Farm Workers of America, AFL-CIO (UFW or Union) and by unilaterally changing wages without giving the Union notice or opportunity to bargain. The Board also found that McFarland had discriminatorily discharged 16 employees in violation of section 1153(a) on January 3, 1977 for protesting slippery working conditions. Respondent was ordered to make its employees whole for the economic losses they suffered as a result of the bad faith bargaining and the discriminatory

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

discharges. The "makewhole period" for the bad faith bargaining was to extend from March 16, 1976 "until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to contract or impasse." The "backpay period" for each of the discharged discriminatees was to extend from the date of the discharge until "the date on which *he* or she is reinstated or offered reinstatement." (6 ALRB No. 18, pp. 32-33.) A hearing was held before Administrative Law Judge (ALJ) Arie Schoorl for the purposes of determining the amount of bargaining makewhole, and, with respect to the 16 discriminatees, the amount of backpay due employees. Thereafter, on March 9, 1984, the ALJ issued his Decision, attached hereto. Respondent and the Union each timely filed exceptions to the ALJ's Decision and a supporting brief, and Respondent, the UFW, and General Counsel all filed reply briefs.

Pursuant to the provisions of section 1146, the Board has delegated its authority in this proceeding to a three-member panel.[2/]

We have considered the record and the ALJ's Decision in light of the exceptions, supporting briefs, and reply briefs and have decided to adopt the makewhole formula employed by the Regional Director. With respect to the backpay owing for the discriminatory discharges, we have decided to adopt the ALJ's recommendation except for his award of travel expenses incurred

---

[2/] The signatures of Board members in all Board Decisions appear with the signature of the Chairperson first (if participating), followed by the signatures of the participating Board members in order of their seniority.

outside of the backpay period. In addition, for backpay and bargaining makewhole accruing and unpaid after August 18, 1982, interest will be computed according to the formula announced in Lu-Ette Farms, Inc. (1981) 8 ALRB No. 55.

Computation of the Basic Bargaining Makewhole Wage Rate

The Regional Director computed the makewhole wage rate by comparing the average hire-in wage rates from a 1977 survey of 37 UFW contracts -- the "Adam Dairy wage rates" (Adam Dairy (1978) 4 ALRB No. 24.) — with Respondent's hire-in rates, deriving a percentage differential between the two and then multiplying Respondent's actual wage levels by that differential in order to obtain the increases due Respondent's employees at each wage level. Respondent expressly denies that it is challenging the use of the Adam Dairy wage rates. Rather, Respondent questions the Regional Director's use of Respondent's lowest "hire-in" rates as the basis for calculating the differential between its rates and the Adam Dairy rates. Respondent argues that because the lowest "hire-in" rate was only paid to one-quarter to one-third of its work force, it cannot be considered the "basic" rate for purposes of comparison to the Adam Dairy rate.

In fact, however, the "basic" Adam Dairy rates are the "lowest wage rate[s] negotiated in UFW contracts." (Adam Dairy, supra, 4. ALRB No. 24, p. 20.) Regardless of what percentage of their work force was paid the "basic" rate, 30 of the 37 employers who signed the contracts used for the Adam Dairy wage survey negotiated a single base rate of S3.10 per hour. Respondent has presented no evidence that it paid its

lowest rate to a smaller proportion of its work force than did the surveyed employers under contract with the UFW. Even had it produced such evidence, to attempt to apply the basic rate subject to the proportion of the work force paid thereunder would vastly complicate the calculation of the bargaining makewhole differential. Respondent has neither shown that the Regional Director's formula is arbitrary, unreasonable or inconsistent with Board precedent nor has it offered any formula more appropriate than that of the Regional Director. (See Robert H. Hickam (1983) 9 ALRB No. 6.)

Respondent's argument with respect to the application of the differential to piece rate workers is also without merit. As noted in Robert H. Hickam, supra, 9 ALRB No. 6, page 9, UFW contracts generally provide that piece rates shall rise in proportion to hourly wages. We also reject Respondent's suggestion that we refer to the terms actually negotiated by the parties in their June 1978 contract. We have consistently declined to use a contract negotiated after years of bad faith bargaining to limit a Respondent's bargaining makewhole liability. (See J. R. Norton (1984) 10 ALRB No. 42.)[3/]

---

[3/] Chairperson James-Massengale would not rely on the consummation of *a* contract as evidence of what employees would have achieved where, as is the case here, the contract was negotiated in the face of an impending closure of the Company and the Board found that the Company had not complied with its statutory bargaining obligation. However, she believes that in some circumstances a subsequently negotiated contract may serve as the best evidence of what the parties would have agreed to had there not been a bargaining violation.

Fringe Benefits

Respondent excepts to the Regional Director's application of the formula for computing fringe benefits developed in Adam Dairy, supra, 4 ALRB No. 24, and Robert H. Hickam, supra, 9 ALRB No. 6. The Adam Dairy/Hickam formula provides that voluntary fringes be calculated as an automatic 15.7 percent proportion of the makewhole award. Respondent argues (1) that such a substantial fringe package could not have been negotiated in the unique circumstances of the rose industry, and (2) that application of the Adam Dairy/Hickam formula to a work force up to 74 percent of which in some years was paid by piece rate is arbitrary. Respondent seeks to have its fringe benefit liability calculated pursuant to the method announced in J. R. Norton (1984.) 10 ALRB No. 12 (now vacated). That Decision was vacated pursuant to the parties' Motions for Reconsideration after Respondent had filed its exceptions brief in the instant case. However, the Decision which issued on reconsideration, J. R. Norton, supra, 10 ALRB No. 42, provided, as had the earlier vacated Decision, that cases such as this one, in which the ALJ's Decision had issued and the case transferred to the Board before issuance of Norton, should be computed under Adam Dairy/Hickam. The Board's stated reason for limiting Norton to prospective application only was "... the amount of time and expense which has gone into makewhole cases which have already been decided by an ALJ." (10 ALRB No. 42, pp. 23-24.) (See also Holtville Farms, Inc. v. ALRB (1985) 168 Cal.App.3d 388, 395 citing In re Marriage of Brown (1976) 15 Cal.3d 838 [126 Cal.Rptr. 633].)

Even were we to consider retroactive application of Norton to the instant case, however, Respondent has failed to offer or adduce evidence that the Regional Director's use of the Adam Dairy/Hickam formula for computing fringe benefits was arbitrary or unreasonable.

We reject the first of Respondent's contentions because we find its evidence insufficient to support its position that fringe benefits at the level of the Adam Dairy/Hickam formulation could not have been negotiated in the rose industry by the UFW. Roy Hills' rose industry survey was hastily prepared during the three weeks before the hearing. Only four companies were contacted, including Respondent. Of the four, only Respondent had ever signed a union contract and none was operating under contract during the makewhole period. Moreover, the voluntary fringe percentages quoted included only vacations, holidays and contributions to health funds. Overtime, shift differentials and other such benefits were not included. New rose contracts introduced were not signed during the certification year but only after several years of bad faith bargaining. (See Montebello Rose and Mt. Arbor (1979) 5 ALRB No. 64.) The contracts were unaccompanied by evidence of the actual amounts paid under the provisions so it is impossible to tell if overtime and shift differentials constituted a substantial cost. Neither would we be persuaded to abandon the Hickam formula simply by evidence that rose industry employers have been paying more than 6.3 percent of their non-contract wage/benefit package in mandatory benefits (e.g., Social Security and Unemployment

Insurance). The proportion which mandatory benefits bear to the rest of a wage benefit package is obviously reduced as the other elements of that package are increased -- as they admittedly would be under UFW contract.

Respondent's argument that it is unreasonable to base fringes on an inflated piece rate wage base can only be persuasive if, in fact, Respondent's piece rate workers were paid at an average rate substantially greater than their hourly paid co-workers. In such a case, tagging piece rate workers' fringe benefit entitlement to their inflated wage base may very well be inappropriate and unreasonable. Given that Respondent failed to offer proof that, throughout the bargaining makewhole period, its piece rate workers averaged a substantially higher hourly rate of earnings than its hourly paid workers,[4/] Respondent has not shown the Regional Director's application of Adam Dairy/Hickam to be arbitrary or unreasonable. Rather, it would be most unreasonable for us to remand this 9 year old case to permit Respondent to make yet another effort to prove the essential elements of its defense. We therefore approve the Regional Director's computation of fringe benefits.

Duration of the Bargaining Makewhole Period

The Board's Order provided that "makewhole be paid for the period from March 16, 1976 until such time as Respondent;

---

[4/] Respondent's piece rate summary was not based on actual hours worked but rather on a hypothetical 40-hour work week. (See General Counsel's Exhibit 3.)

commences bargaining in good faith with the UFW and thereafter bargains to contract or impasse." The ALJ found the makewhole period ended on April 1, 1978, the effective date of retroactive wages negotiated under the June 27, 1978 contract.

Respondent questions not only the ALJ's finding that bad faith bargaining continued to that date but also the propriety of what it terms the Board's original "open-ended Order." Respondent cites no authority for its objection nor does it attempt to explain how it can now challenge an order which was summarily denied review in the court of appeal.[5/] Moreover, since bargaining has ceased as a result of a contract having been signed by the parties, this Respondent is no longer concerned with open-ended liability.

The ALJ concluded that the issue of which party has the burden of proving good faith or the lack thereof with respect to post-hearing bargaining was "moot" because the Regional Director posited a cut-off date of April 1, 1978. However,

---

[5/] Chairperson James-Massengale believes that the purposes of the Act are better effectuated by makewhole orders which terminate as of the close of the liability phase of an unfair labor practice proceeding or the commencement of bargaining. The makewhole orders generally issued by the Board, in her view, are open-ended in that liability cannot be finally determined except by a ruling of the Board based upon an evaluation of post-hearing conduct after the parties have concluded a contract or the Board concludes that impasse was reached. Such orders, in her view, serve to impede rather than foster good faith bargaining. As she observed in her dissenting opinion in Martori Brothers Distributors (1985) 11 ALRB No. 26, an outstanding makewhole order could net a labor organization more advantageous terms in the form of a makewhole remedy than could have been achieved in a contract resulting from good faith bargaining. Such a possibility may act as a

(fn. 5 cont. on p. 9.)

Respondent's contention that makewhole should be cut off earlier is still very much alive, and resolution of that issue inevitably involves analysis of the parties' respective burdens.

Fair allocations of burdens of proof is one of the major components of due process. Compliance proceedings are remedial rather than prosecutorial, with the General Counsel acting as agent for the Board, rather than as an independent prosecutor. (Ace Beverage (1980) 250 MLRB 66 [105 LRRM 1042].) Whether litigating the amount of backpay or the amount of bargaining makewhole owing to victims of judicially-enforced

(fn. 5 cont.)

disincentive to a labor organization agreeing to anything less than it believes it can obtain by the makewhole remedy. Moreover, the speculative nature of makewhole computations exacerbates what she sees as a presumption that prior unlawful conduct continues, even after issuance of the Board's Order, which, in reality, may well have remedied the conduct. The Chairperson believes that the remedial aspect of makewhole orders is achieved by providing a remedy for conduct which the Board has already evaluated and found to be unlawful.

Although the Chairperson does not argue that without a new charge the Board lacks jurisdiction to review events subsequent to the close of the unfair labor practice hearing, an analogy to liability phase jurisdiction is instructive and supportive of the majority's position. As the United States Supreme Court noted in NLRB v. Fant Milling Co. (1959) 360 U.S. 301 [44 LRRM 2234], "Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigative power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it [footnote omitted]." (44 LRRM 2238.) In that case, the court held that the Board was "not precluded from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board [citations omitted]." (44 LRRM at 2239.) Where, as here, the Board has found the unfair labor practices charged to be ongoing violations, the Board has jurisdiction, as part of its remedial authority, to assure itself that the violations of the Act it has found Respondent guilty of do not continue. Continuation of those unlawful practices is a fortiori appropriately dealt with in proceedings in the same case.

findings of unfair labor practices, the General Counsel retains none of the exclusive prosecutorial discretion at the heart of the prosecutor's role since the charging party is entitled to introduce evidence that *a* greater amount is owing than that specified by the Regional Director.[6/] However, to the extent that effectuation of compliance with a previous Board Order requires a determination of contested facts, the respondent must be put on notice as to specific conduct or omissions which demonstrate non-compliance. By requiring the General Counsel to make a prima facie case that the respondent has not complied with the Board's Order to bargain in good faith, the respondent is afforded notice and the opportunity to make a more meaningful record. Of course, the more closely post-hearing conduct resembles the pre-hearing conduct found to have constituted bad faith bargaining, the more quickly the burden of producing evidence will shift to the respondent, and the more difficult it will be for the respondent to show that it was no longer operating in bad faith. This is because the post-hearing conduct, like any other bargaining segment, must be reviewed in the context of the totality of the bargaining, and evidence of post-hearing bargaining introduced at the compliance phase will inevitably be colored by the Board's previous findings. (Cf. As-H-Ne Farms (1980) 6 ALRB No. 9.) As in any compliance case, the respondent

---

[6/] Chairperson James-Massengale believes that, to the extent that the Administrative Law Judge and the Board are adjudicating issues of liability based on conduct not previously litigated, the process is plainly prosecutorial. Accordingly, the nature of the General Counsel's burden is that of proving by a preponderance of the evidence that the Act has been violated.

will bear its own burden of proving any affirmative defense to non-compliance -- such as impasse or bad faith bargaining by the union.

Shortly after the close of the unfair labor practices hearing, Respondent notified the Union that it was going out of business. Upon request of the Union, three meetings were held during the fall of 1977 with a breakdown in negotiations occurring in December on both economic and non-economic issues. On June 27, 1978, a few months before Respondent was to close, the parties met again and signed *a* collective bargaining contract covering the last digging season. Respondent rightly contends that it cannot be judged by the nature and quantity of concessions or lack thereof made by it during the post-hearing bargaining. (See section 1155.2(a).) Rather, as mentioned above, Respondent's post-hearing conduct must be viewed in the total context of its bargaining history with the UFW.[7/] From that perspective, we are persuaded that Respondent persisted in its illegal strategy of delay throughout the fall bargaining and on into 1978.

---

[7/]The ALJ erred in his effort to review Respondent's post-hearing conduct by the standard of proof announced in 6 ALRB No. 18 for bargaining which occurs immediately prior to the unfair labor practices hearing. The bargaining herein at issue was capable of full consideration at the compliance hearing, having resulted in a contract over five years before the compliance hearing occurred. Moreover, contrary to characterizations by both the ALJ and Respondent, the Board's holding in 6 ALRB No. 18 did not equate hard bargaining with surface bargaining. "After a lengthy period of surface bargaining, conduct resembling 'hard bargaining' may be [not 'is'] all that is necessary to prevent the execution of an agreement or to cause acceptance of such an unsatisfactory agreement that the union's support among employees will be seriously erroded." (6 ALRB Mo. 18, Slip Op., p. 25. Emphasis added.)

In its Decision, issued almost two years after the contract was signed, the Board found that Respondent's approach to negotiations "... was in fact oriented to an active, although often subtle frustration of the bargaining process." (6 ALRB No. 13, at p. 6.) The salient feature of Respondent's pre-hearing bargaining found by the Board in 6 ALRB No. 18 was a strategy of delay, furthered by a practice of deception and obstruction by the use of legal and philosophical arguments which were neither meritorious nor sincerely held. The same approach is apparent in Respondent's post-hearing bargaining.

A summary of the Respondent's pre-hearing bargaining conduct, as found by the Board in 6 ALRB No. 18, will serve to identify more clearly the strategy of delay utilized by Respondent and its attorney-negotiator, Fred Morgan.[8/]

On March 2, 1976 the UFW was certified as the collective bargaining representative of Respondent's employees. On March 8, the UFW requested to meet with Respondent to bargain over a contract. Respondent notified the Union that it was considering a challenge to the certification. In his March report to the Board of Directors of Respondent's parent company, Respondent's President John Parker stated that the proposed challenge was "primarily a delaying tactic." In a subsequent report, he stated "Our strategy has been primarily one of delay ... Our future

---

[8/] Inasmuch as Fred Morgan is not a named Respondent in this matter, Chairperson James-Massengale believes it is inappropriate for the Board to evaluate his conduct as an individual and personal participant in the negotiations process independent of the conduct of the named Respondent.

strategy will be to delay as much as possible and negotiate the best contract possible."

Between April 6, 1976 and September 21, 1976, Respondent's attorney-negotiator, Fred Morgan, met six times with UFW representatives. During the first two meetings, Morgan agreed to a number of contract provisions, including the UFW's union security/good standing proposal with the exception of the application of check-off to assessments. It was not until the third meeting that Morgan made any objection to "good standing," characterizing his rejection as a "clarification" of his previous response. (See 6 ALRB No. 18, p. 11.)[9/]

Morgan outlined his strategy for this period in a memo to Company principals summarizing the May 7, 1976 meeting as follows: "I believe we can make a reasonable economic package consistent with the company's plans to raise wages ... of course we could bargain to impasse on the economic issues and see what happens."

---

[9/] The Union's proposal tracked the ALRA provision permitting an employer to agree to condition employment on union membership and "good standing," meaning:

> the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing; provided that such membership shall not be denied or terminated except in compliance with a constitution and by-laws which afford full and fair rights to speech, assembly and equal voting and membership privileges for all members, and which contain adequate procedures to assure due process to members and applicants for membership. (Section 1153(c).)

The analogous NLRA provision limits the good standing condition to the "tender [of] periodic dues and initiation fees." (NLRA section 8(a)(3).)

On September 21, 1976 Morgan declared impasse, and shortly thereafter Respondent raised wages for the fall harvest. Between September 21, 1976 and March 2, 1977, Morgan cancelled meetings with the UFW and, after March 2, the last day of the UFW's "certification year," refused to meet on the grounds that it would constitute bargaining with an uncertified union in violation of the Act. Morgan maintained this position even after the Board expressly extended the UFW's certification on March 30, 1977, and for six weeks after the Board's Decision issued in Kaplan's Fruit and Produce (1977) 3 ALRB No. 28, finding Morgan's "interpretation" of the Act "both incorrect and highly mischievous."

Approximately one month before the July 11, 1977 commencement of the unfair labor practice hearing, Respondent renewed negotiations with the UFW. Morgan attended six meetings and agreement was reached on "a few items." At one of the meetings immediately prior to the hearing, Morgan suddenly abandoned opposition to one of the major stumbling blocks of the previous year's negotiations -- the UFW's RFK Medical Plan. Morgan had consistently rejected the plan, citing what the Board found in 6 ALRB No. 18 to be the disingenuous rationale of "lack of patient choice."

Respondent's pre-hearing conduct away from the bargaining table which "displayed its inclination to bypass the UFW," such as its direct dealing and unilateral wage changes, provided further support for the Board's finding that Respondent had no intention of bargaining in good faith with the UFW.

However, the Board's finding of bad faith bargaining was not dependent upon inferences drawn from the direct dealing and unilateral changes. Rather, the Board Decision was grounded on direct evidence of a bad faith strategy executed by a subtle, but identifiable, pattern and style of bargaining. After the unfair labor practice hearing, Morgan continued his delaying practices by shifting positions and injecting new obstacles to agreement in the guise of "clarifying" previous agreements; delaying responses to union proposals and inquiries; and, lacking authority, leading the Union to believe he had agreed to proposals later rejected by his principals.

Post-hearing negotiations were initiated by the UFW in response to Respondent's August 1977 notice that it planned to discontinue operations after the 1979 harvest.

From the time of the unfair labor practice hearing, throughout the fall bargaining, Morgan characterized the negotiations as being "at impasse" and demanded that the Union make concessions. At the three meetings held during the fall of 1977, union security, pension and Martin Luther King Fund (MLK) plans, and hiring were the major foci of discussion. Morgan continued what we found in 6 ALRB No. 18 to be his "active, though often subtle, frustration of the bargaining process." (6 ALRB No. 18, p. 6.)[10/]

---

[10/] Since the obligation to bargain continues even when the parties are deadlocked in their negotiations, the Board draws no negative inference from the fact that Respondent herein continued to meet with the Union while at the same time asserting that negotiations were at a state of impasse.

At the first meeting on September 2, Morgan proposed a hybrid agency/union shop, called the "Alioto Plan," whereby seniority employees who did not desire to join the Union would not be required to join and would pay only a service fee. He purported to be concerned with the freedom of seniority workers not to join the Union although he cited no evidence of their lack of union support. At the second meeting, in response to Morgan's expressed concern, Dolores Huerta provided cards evidencing unanimous union support among Respondent's current -- mostly steady -- employees. Morgan then demanded proof of union support by seniority seasonal workers. Since the harvest had not yet commenced, documenting harvest workers' support would inevitably result in a delay.

Nevertheless, Huerta agreed to poll seasonal workers for current union support. On October 10, Morgan agreed to accept her "word" on the poll, but almost two months later, at the December 2 meeting, he again demanded documentation in the form of membership cards. In the proposal actually submitted to company principals on December 2, he injected yet another requirement for evidence of union support: "written, executed and witnessed" authorization or membership cards, signed within four months of the signing of the contract.

Morgan testified at the compliance hearing that he had agreed to everything in the UFW's union security proposal -- including the "good standing" language -- except that the Company wanted to reserve the right not to fire a seniority worker who refused to join the Union. The union security discussions at

all three meetings during the fall of 1977 dealt solely with the issue of freedom of membership choice, Respondent having apparently abandoned its earlier challenges to ALRA good standing -- at least as to new hires and seniority workers who chose union membership. However, the union security proposal which Morgan submitted to the Company on December 2, and attached to his "clarification" letter to Dolores Huerta of December 9, provided, in section A, that "the company shall not be required to terminate any worker under this Article except for failure to pay initiation fees and periodic dues" (emphasis added). Then, in sections A and D, employment was conditioned on continued "good standing" with the union for new hires and seniority workers who choose union membership and "[t]he union shall be the sole judge" of good standing of its members. Again in the guise of "clarification" (pursuant to his "personal opinion that there has been some ambiguity in [the parties'] conversations with respect to the union security clause"), Morgan infused the process with ambiguity and contradiction.

We do not look to individual substantive provisions of the "clarified" proposal as evidence of bad faith. We do note, however, that the purported December 9 "clarification," coming months after Morgan's apparent agreement to ALRA good standing for union members, and coming in the context of a long-standing pattern of bad faith "clarifications," had the easily foreseeable effect of frustrating negotiations.

One additional example of Morgan's practice of belatedly injecting new and controversial provisions that frustrate

agreement is the MLK proposal which he submitted to the Company after the meeting on December 2. Morgan's opposition to MLK was couched primarily in a legal argument that employer contributions to the fund would violate section 1155.4-. Glen Rothner, a UFW attorney, attempted to counter Morgan's argument, but Morgan rejected his opinion because of his connection to the Union. On December 2, the Union proposed that MLK be limited to the second year of the contract. Morgan then proposed -- and the UFW agreed -- to condition MLK contributions upon receipt of an opinion from a "first class law firm" that the contributions were legal. The proposal that Morgan actually submitted to Company officials, however, included the additional condition that no challenge to the legality of MLK be pending before the Board or courts. Since Respondent itself had raised the legality of MLK in a bad faith bargaining charge against the Union, including such a condition could only frustrate the conclusion of a collective bargaining agreement.[11/]

During the long and apparently substantial meeting of October 10, Morgan agreed not to recommend against pension in the second year and not to recommend against MLK or union security. In fact, however, when he met with Company officials in Chicago on October 31 and November 1, he did recommend against

---

[11/] Our finding is consistent with Morgan's admission on cross-examination that he had made no effort to investigate how MLK funds were spent and that the results of such an investigation would not change his position that contributions would be illegal. Since the nature of fund expenditures would appear to be crucial to the determination of whether the contributions violated section 1155.4, Morgan's testimony indicates that he was interposing the legal argument in bad faith.

all three, and the proposals were rejected without explanation or counterproposal.

At the meeting on December 2, almost five weeks after his visit to Chicago, Morgan finally transmitted to the Union the Company's rejection of the proposals. After additional discussion, he agreed to recommend second year pension (according to his own testimony) and to recommend in favor of conditional MLK as well as some form of retroactivity. According to his letter to Huerta of December 9, his Chicago principals again summarily rejected all three, despite Morgan's testimony that the Company would accept anything he recommended. Although the 'Company did accept a union security provision, Morgan's letter indicates that he had substantially altered the provision to which agreement had previously been reached at the bargaining table.

Huerta responded to Morgan's letter of December 9 by a letter dated January 5, 1978. She expressed her disappointment and frustration with the Company's lack of movement as well as Morgan's mischaracterization of the MLK proposal agreed to by the Union.

Morgan took almost two months to respond to Huerta's letter of January 5, and his response characterized the Company's position as "a final bargaining position."

On May 26, 1978 the Union wrote Morgan requesting another bargaining session in light of its concern that Respondent would be closing in a few months. On June 27 at the meeting that resulted from the Union's request, the parties signed a

contract to cover the last harvest season.[12/]

We note that Respondent's post-hearing bargaining conduct resembles and clearly furthers the strategy of delay outlined by its President and attorney negotiator in their 1976 communications with parent company officials.[13/] Before the underlying liability hearing, Respondent obstructed negotiations with belated "clarifications" of its agreement on union security, frivolous arguments about freedom of patient choice under the Union's RFK Medical Plan and claims of legal prohibitions against bargaining after the termination of the certification year. (See 6 ALRB No. 18, pp. 11, 18, and 22.) Some of these particular arguments were abandoned shortly before the liability hearing. However, between the hearing and the execution of the contract, as outlined above, Morgan took a similar approach with regard to union security and MLK. Instead of refusing to meet with the Union, Morgan met and purported to concede on proposals subsequently rejected without explanation or counterproposal

---

[12/] In the contract, the Union agreed to cede hiring control to Respondent and Respondent agreed to ALRA good standing with *a* side letter providing that Respondent would have 60 days to discharge for loss of good standing for other than nonpayment of dues. (This effectively imposed NLRA-type good standing because Respondent's one remaining season was only approximately 2 months long.) Wages were made retroactive to April and Respondent withdrew its earlier agreement to CPD, substituting a provision whereby only one-half day's wages would be contributed. The Union withdrew its proposal for MLK and pension. The vacation proposal agreed to, originally that of the Union, amounted to a continuation of the status quo due to the reduction of hours and termination of Respondent's operations.

[13/] Because she finds sufficient evidence to support the Board's conclusions independent of the exchange of correspondence discussed above, Chairperson James-Massengale does not rely on those communications.

by his principals. The Company principals' total rejection of their own agent's "concessions" on issues such as the MLK and pension funds indicates either a startling lack of communication between Company representatives or a deliberate stalling tactic intended either to avoid reaching a contract before the Company closed or to lead the Union on until imminent closure eliminated union bargaining power. Either circumstance would fall short of good faith bargaining. Moreover, given Respondent's past conduct as well as Morgan's five-week delay in communicating to the Union his principals' response, we find that the evidence preponderates in favor of a finding of deliberate delay.

Respondent contends that its bargaining makewhole liability should end on July 11, 1977, the last day of the underlying liability hearing. In the alternative, it proposes mid-August 1977, when it notified the Union of its intent to go out of business, or September 2, 1977, the date of the first; post-hearing negotiation meeting. Respondent argues that it engaged in "hard bargaining" during the year following the hearing, but that it discontinued the unilateral wage changes and direct dealing and other away-from-the-table conduct that the Board had found "displayed its inclination to bypass the UFW." (6 ALRB No. 18, p. 8.) Respondent also characterizes its bargaining positions as involving substantial concessions which indicate a good faith intent to reach an agreement.

As discussed above, we do not judge a party's compliance with the bargaining obligation by considering only whether or

to what extent it made concessions. Rather, in order to determine motivation, we view its conduct both at and away from the bargaining table in light of its entire bargaining history. Often a finding of bad faith will rest solely on inferences drawn from specific away-from-the-table conduct, such as the unilateral changes and direct dealing engaged in by Respondent prior to the liability hearing. In such a case, for a respondent to discontinue the specific conduct complained of may be a sufficient indication of good faith. However, in the instant case, the Board's underlying finding of surface bargaining in 6 ALRB No. 18 was grounded on direct evidence of a strategy of delay -- in the form of damaging communications among Respondent's agents -- as well as circumstantial evidence in the form of a pervasive pattern of avoidance and deception. The Board found that Morgan's approach to bargaining was entirely reactive. By repeatedly qualifying previous agreements and raising frivolous objections he successfully avoided agreement throughout the pre-hearing period. Although Respondent's unilateral changes and direct dealing further buttressed the case against it, the Board's finding of surface bargaining in 6 ALRB No. 18 was not dependent upon inferences drawn from those specific acts. Rather, the Board focused more on Morgan's conduct and the direct evidence of intent to delay, and found that Respondent's entire approach was "oriented to an active, though often subtle, frustration of the bargaining process." (6 ALRB No. 18, p. 6.) We find that Respondent continued its strategy of delay and obfuscation throughout the fall of 1977, resulting in a breakdown of

negotiations which lasted until the signing of the contract. That a contract was ultimately signed with the UFW hardly signifies good faith on Respondent's part. Rather it is attributable to the combination of Respondent's imminent closing and the delays which were attributed to Respondent. The contract was, in a sense, the culmination of Respondent's unfair labor practices. (See Underwriters Adjusting Co. (1974) 214 NLRB 388, 391 [87 LRRM 1372].) We adopt the bargaining makewhole termination date of April 1, 1978, because it is the effective date of the wage increases negotiated in June. In addition, it was used in the Regional Director's specification and was not objected to by the Charging Party.

Backpay for Discharged Harvesters

Twelve of the 16 employees discharged on January 3, 1977 for protesting slippery working conditions testified at the hearing. Four missing discriminatees, and two of the twelve who testified, were exclusively harvest workers, while the other ten had also traditionally worked in Respondent's spring budding operation. Between January 3, 1977 and Respondent's termination of operations in 1978, there remained only one and one-half days of the 1976-1977 harvest season, one entire budding season in the spring of 1977, and the 1977-1978 and 1978-1979 harvest seasons. Due to rehire, interim employment and three discriminatees' concealment of interim earnings, the ALJ awarded backpay to 11 of the 16 for only the day and one-half remaining in the 1976-1977 harvest season. A twelfth, Daniel Sanchez, was also awarded the difference between what he earned in the

spring 1977 budding at Montebello Rose and what he would have earned budding for Respondent. The only discriminatees who the ALJ recommended be awarded backpay for the other harvest seasons were the four missing discriminatees. Their actual entitlement, however, cannot be ascertained until they appear and subject themselves to examination for interim earnings and other mitigation by Respondent. Respondent excepts to the ALJ's failure to toll backpay for these four missing discriminatees from October 13, 1977, and his allowance of travel expenses for five of the discriminatees who did testify.

Offers of Reinstatement

On October 13, 1977, Respondent claims to have communicated offers of reinstatement to representatives of the discriminatees and to have thereby tolled their backpay as of that date. Respondent's Manager Dave Anderson testified that, at a collective bargaining session on October 13, 1977, he told UFW representatives -- in the context of negotiations over contract provisions on union security and rehire -- that he had sent recall notices to all seniority workers. He also testified that he told the UFW representatives that Respondent had no "black list." He does not claim to have made specific reference to the sixteen discriminatees or to have proposed settlement of their discrimination claims. Neither does he claim to have asked the Union to transmit any reinstatement offer. Unlike its argument before to the ALJ, Respondent does not rely on the mailing of the notices to toll backpay. Each of the twelve discriminatees who testified denied having received them and

the ALJ credited their denial.[14/] Instead, Respondent now argues that Andersen's communication to the Union constituted an offer of reinstatement to the discriminatees. Respondent's eleventh hour contention is not supported by the applicable NLRA precedent. In Stauffer Chemical Co. (1979) 242 NLRB 98 [101 LRRM 1123], the national board held that the union is only deemed the employees' agent to receive offers of reinstatement when it has made an express agreement to that effect. Moreover, even if the union had agreed to transmit reinstatement offers, Andersen's denial of the "black list" and his casual reference to recall notices in the context of collective bargaining does not qualify as an affirmative offer of reinstatement.

Of course, if the four missing discriminatees eventually present themselves to collect their backpay, Respondent will be entitled to inquire into their receipt of the alleged recall notices. If they received the notices and the notices recalled them to the same or substantially equivalent employment with Respondent, backpay will be tolled as of the date of receipt.

Travel Expenses

The ALJ recommended compensating five discriminatees for travel expenses they incurred during job searches after their discharges on January 3, 1977. However, most of those expenses were incurred after Respondent's harvest season had terminated and during a period when, even absent discrimination, Respondent

---

[14/] The ALJ also credited Anderson's claim to have mailed the notices, but we note that Anderson's own testimony indicates that the letters may have been sent in 1978 rather than 1977 and may have been returned unopened.

would have had no work for the discriminatees. We reject as unfounded the ALJ's conclusion that the discriminatees would not have incurred the expenses had they not oelieved, albeit erroneously, that Respondent would not rehire them the next budding or harvest season.

Strikers

The UFW excepts to the ALJ's recommendation that two discriminatees who joined a strike during interim employment be denied backpay during the time they were on strike. The ALJ noted that the discriminatees could have sought alternative work before or after picketing duty. In addition, he rejected the Union's and General Counsel's argument that the strikers reasonably believed that they would have greater job opportunities if they played a full active role on the picket line than if they spent their time seeking work or working elsewhere. We agree with the reasoning of the-ALJ, especially given the fact that the discriminatees had been employed at the struck interim employer for only half a day at the time the strike began.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that McFarland Rose Production, a division of Petoseed Co., Inc., a wholly-owned subsidiary of Geroge Ball, Inc., its officers, agents, successors and assigns shall:

1. Pay to the employees listed in the attached Appendix A the amounts set forth therein beside their respective names, plus interest thereon, compounded at the rate of 7 percent

per annum, computed quarterly, until August 18, 1982 and thereafter in accordance with our Decision in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

2. Pay to the Regional Director of the El Centro Region the sum of $2,517.50 per employee named in Appendix B, attached hereto, plus interest as provided above, to be held in an escrow account pursuant to the provisions of the foregoing Decision.

3. Pay to the employees listed in Appendix C, attached hereto, the bargaining makewhole amounts set forth therein beside their respective names, plus interest as provided above.

Dated: December 20, 1985

JYRL JAMES-MASSENGALE, Chairperson

JORGE CARRILLO, Member

MEMBER WALDIE, Concurring and Dissenting:

I am in agreement with all aspects of this decision except that I believe that Respondent must bear the burden of proof that it came into compliance with this Board's Order to bargain in good faith. That Respondent should bear this burden is consistent with the allocation of burdens regarding any other remedy ordered by this Board.

A makewhole specification will set forth a date upon which General Counsel contends the respondent complied with the Board's Order and commenced bargaining in good faith. Such is no different than what the General Counsel sets forth in a backpay specification, to wit, the date he contends the respondent complied with the Board's Order and reinstated a discriminatee. There the General Counsel does not carry a burden of proving that the worker did not reject an earlier offer of reinstatement from the respondent, nor is General Counsel required to prove the discriminatee did not incur wilful loss of interim earnings. All such issues of diminution of

damages have long been the burden of the respondent. (See e.g., J.H. Rutter-Rex Manufacturing Co. (1966) 158 NLRB 1414, 1441 [62 LRRM 1456], citing with approval Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177, 199-200 [8 LRRM 439]; W.C. Nabors Co. v. NLRB. (5th Cir. 1963) 323 F.2d 686, 692 [54 LRRM 2259]; NLRB v. Brown and Root, Inc. (8th Cir. 1963) 311 F. 2d 447, 454 [52 LRRM 2115]; Fisher Construction Co. v. Lerche [9th Cir. 1956] 232 F.2d 508, 509; Mastro Plastics Corporation (1962) 136 NLRB 1342, 1346 [50 LRRM 1006].)

The Board long ago adopted the NLRB precedent cited above and has distributed burdens in accordance with that precedent. (See e.g., Maggio-Tostado, Inc. (1977) 3 ALRB No. 33; S & F Growers (1979) 5 ALRB No. 50; O.P. Murphy Produce Co. Inc. (1982) 8 ALRB No. 54. I believe that those evidentiary rules should apply equally to all our remedies, including bargaining makewhole.

Dated: December 20, 1985

JEROME R. WALDIE, Member

APPENDIX A

Backpay for Discriminatees Who Testified at Compliance Hearing

| | |
|---|---|
| Rogelio Avila | 48.75 |
| Adolfo B. Galvan | 48.75 |
| Adolfo D. Galvan | 48.75 |
| Adolfo O. Galvan | 48.75 |
| Jose Galvan | 48.75 |
| Roberto B. Galvan | 48.75 |
| Rodolfo Galvan | 48.75 |
| Jesus Oroperza | 48.75 |
| Rafael Reyes | 48.75 |
| Daniel Sanchez, Jr. | 411.45 |
| Daniel Sanchez, Sr. | 48.75 |
| Jose Socorro Vaca | 48.75 |

## APPENDIX B

### Backpay for Missing Discriminatees

| | |
|---|---|
| Luis Bautista | 2,517.50 |
| Oscar Esparanza | 2,517.50 |
| Roberto Galvan Chavez | 2,517.50 |
| Efren Garcia | 2,517.50 |

APPENDIX C

Makewhole as Computed in General Counsel's Exhibit No. 2
Amending Appendix B (6/9/83) of
First Amended Makewhole Specification

| Name | Makewhole Amount Due |
|---|---|
| Juan Francisco Aguilar | 2.54 |
| Miguel O. Aguilar | 235.73 |
| Oscar H. Aguilar | 301.99 |
| Guadalupe C. Aguilera | 178.86 |
| Marshall R. Aguilera | 239.44 |
| Daniel Alegria | 30.29 |
| Lucy Alegria | 252.88 |
| Donna Ambia | 16.48 |
| Benjamin A. Andrade | 867.13 |
| Sarah Ann Andrade | 199.03 |
| Carlos Arellano | 254.78 |
| Maria de Jesus Arellano | 491.40 |
| Linda Armendariz | 40.58 |
| Rogelio R. Avila | 339.02 |
| Arturo P. Ayala | 122.37 |
| Sally H. Balles | 213.32 |
| Ascencion Barrera Jr. | 299.30 |
| Rafael Z. Barron | 3,324.75 |
| Luis Bautista | 47.55 |
| Guadalupe M. Beltran | 126.82 |
| Connie R. Bernal | 244.39 |
| Alejandro O. Bravo | 444.76 |

| | |
|---|---|
| Gilberto Bravo, Jr. | 537.48 |
| Jorge Bravo | 236.14 |
| Jose G. Cantu | 8.05 |
| Antonion Cermeno | 866.61 |
| Epifano A. Chavez | 316.98 |
| Gonzalo B. Chavez | 363.76 |
| Roberto G. Chavez | 4.7.55 |
| Rosalio Coello | 155.04 |
| Merardo DeLeon | 105.24 |
| Merardo DeLeon, Jr. | 225.28 |
| Hosea E. Demrry | 18.39 |
| Juan V. Duarte | 1,977.98 |
| Maria Duran | 156.84 |
| Juan Escobedo | 501.50 |
| Oscar M. Esparza | 233.70 |
| Nicolasa Estrada | 127.52 |
| Alberto Fernandez | 637.95 |
| Alberto T. Fernandez, Jr. | 324.45 |
| Alfredo T. Fernandez | 394.06 |
| Fernando Z. Fernandez | 599.65 |
| Javier Fernandez | 2,339.62 |
| Mario R. Fernandez | 131.88 |
| Rogelio Fernandez, Jr. | 77.04 |
| Salvador F. Fernandez | 50.72 |
| Domingo Flores | 111.04 |
| Neva J. Rhea Franks | 15.22 |
| Magdelana R. Gallardo | 2.54 |

| | |
|---|---|
| Adolfo B. Galvan | 468.41 |
| Adolfo D. Galvan | 1,570.04 |
| Adolfo Q. Galvan | 289.61 |
| Angela B. Galvan | 367.60 |
| Arnulfo O. Galvan | 144.56 |
| Catalina Galvan | 189.00 |
| Carlos S. Galvan | 5.07 |
| Consuelo Galvan | 39.94 |
| Jose Galvan | 161.63 |
| Jose L. Galvan | 372.92 |
| Maria E. Galvan | 101.45 |
| Roberto B. Galvan | 858.52 |
| Rodolfo B. Galvan | 1,124.21 |
| Efren Garcia | 47.55 |
| Jose de Jesus Garcia | 615.39 |
| Juana M. Garcia | 2,126.91 |
| Maria A. Garcia | 1,522.07 |
| Sara M. Garcia | 3,379.81 |
| Rogelio Garibay | 2,633.21 |
| Sergio R. Garibay | 2,817.21 |
| Marina L. Garza | 101.45 |
| Rose S. Garza | 80.69 |
| Deraetria G. Gomez | 496.22 |
| Alexandra Gonzalez | 538.13 |
| Alicia Gonzalez | 39.93 |
| Francisco Gonzalez | 373.34 |
| Jesus G. Gonzalez | 333.37 |

| | |
|---|---|
| Jose Luis Gonzalez | 480.99 |
| Mario Gonzalez | 16.10 |
| Octavio O. Gonzalez | 1,983.32 |
| Rachel R. Gonzalez | 197.09 |
| Rafael G. Gonzalez | 710.21 |
| Rena Gonzalez | 265.48 |
| Rodolofo Gonzalez | 268.83 |
| Santiago O. Gonzalez | 203.26 |
| Rogelio M. Gutierrez | 2,349.08 |
| Alfonso M. Herrera | 153.03 |
| Leonel Herrera | 254.16 |
| Leonides Herrera | 184.02 |
| Otila Herrera | 230.19 |
| Rafael Herrera | 278.27 |
| Jose E. Hinojosa | 184.16 |
| Jose Juan Hinojosa | 3,923.33 |
| Lazara Hinojosa | 2,467.87 |
| Miguel Hinojosa | 2,344.17 |
| Rosa Kates | 27.90 |
| Tommy B. Kelly | 84.36 |
| Gabina Lara | 3,318.86 |
| Oscar Lara | 26.75 |
| Alicia Leyva | 74.78 |
| Jerry Lewis | 5.96 |
| Billy J. Long | 404.39 |
| Adolfo M. Lopez | 1,041.21 |
| Cesar Lopez | 4,058.18 |

| | |
|---|---|
| Cesar Lopez, Jr. | 198.52 |
| Daniel Lopez | 10.46 |
| Jesus G. Lopez | 343.83 |
| Josephina Lopez | 202.16 |
| Olivio P. Lopez | 159.95 |
| Arturo Machuca | 626.62 |
| Amalia Magana | 29.80 |
| Linda D. Maldonado | 180.60 |
| Armandina Marquez | 75.04. |
| San Juana Marroquin | 963.32 |
| Aurelia H. Martinez | 225.51 |
| Eliseo M. Martinez | 140.27 |
| Graciela Martinez | 458.01 |
| Guadalupe Martinez<br>559-45-3719 | 183.10 |
| Guadalupe Martinez<br>558-16-8563 | 247.33 |
| Josefina Martinez | 583.71 |
| Miguel Martinez<br>561-90-9591 | 154.11 |
| Miguel Martinez<br>554-96-8804 | 556.44 |
| Rosa Z. Martinez | 242.26 |
| Manuel Melgoza | 138.74 |
| Jose M. L. Mendez | 292.78 |
| Leopoldo L. Mendez | 354.14 |
| Blanca Vela De Miranda | 203.65 |
| Ronald Montecino | 50.41 |
| Consuelo Montez | 206.77 |

| | |
|---|---|
| Sara Montez | 188.06 |
| Alberto B. Mosqueda | 380.17 |
| Jose A. Munoz | 256.53 |
| Rosa Maria Munoz | 247.34 |
| Marcelina Nunez | 101.45 |
| Alejandro Oropeza | 1,393.15 |
| Jesus M. Oropeza | 703.85 |
| Jorge R. Oropeza | 75.88 |
| Roman Reyes Oropeza | 2,312.06 |
| Felix Ortiz | 595.24 |
| Doris L. Patrick | 265.66 |
| Alejandro D. Perezchica | 198.45 |
| Authur Perez | 25.60 |
| Teresa M. Perez | 3,390.15 |
| Gary W. Perkins | 413.47 |
| Carolyn Poulton | 26.17 |
| Leopoldo G. Ramirez | 705.59 |
| Micaela Ramirez | 434.52 |
| Patrocinio Ramirez | 470.69 |
| Victor V. Ramirez | 48.96 |
| Frances Ramos | 155.73 |
| Ramon Razo | 332.34 |
| Gilberto B. Reyes | 150.23 |
| Rafael O. Reyes | 1,641.77 |
| Raul Reyes | 318.06 |
| Sergio Reyes | 2,449.36 |
| Raymond Rinckhoff | 31.07 |

| | |
|---|---|
| Margarita S. Robles | 39.25 |
| Alejandro Rodriguez | 158.73 |
| Estevan Rodriguez | 157.90 |
| Leonard Rodriguez | 7.28 |
| Manual Rodriguez | 149.44 |
| Enrique Salazar | 133.15 |
| Ruth Saldana | 20.29 |
| Cecilia Saldivar | 204.02 |
| Angela S. Salinas | 480.24 |
| Rachel Salinas | 20.29 |
| Daniel M. Sanchez | 3,359.98 |
| Daniel F. Sanchez, Jr. | 1,642.19 |
| Sara Savala | 156.35 |
| Sam Savala, Jr. | 202.97 |
| Antonio R. Segura | 203.53 |
| Rubia R. Serna | 2,721.47 |
| Cutberto M. Servin | 48.82 |
| Juan Silva | 822.44 |
| Henry Sliver | 122.06 |
| Mario C. Soliz | 803.70 |
| Ciriaco Soto | 287.23 |
| Jesus Soto | 288.20 |
| Jose Soto | 216.20 |
| James Stoutingburg | 92.89 |
| Juan M. Thomas | 6.02 |
| Alejandro Tinajero | 511.29 |
| Alicia Torres | 182.81 |

| | |
|---|---|
| Jesus Torres | 1,023.06 |
| Roman or Ramon G. Torres | 1,174.75 |
| Constancio Tovar | 167.39 |
| Juan J. Trevino | 45.65 |
| Jose S. Vaca | 1,632.34 |
| Antonio N. Valdez | 234.32 |
| Gonzalo M. Valencia | 185.88 |
| Otoniel Valencia | 91.30 |
| Antonio H. Vasquez | 864.69 |
| Eleodoro Vasquez | 839.62 |
| Ramiro F. Vasquez | 515.91 |
| Alicia Vega/Oropeza | 425.83 |
| Albertina Alanis Vela | 46.28 |
| Connie C. Vera | 232.43 |
| Consuelo C. Vera | 202.74 |
| Jennie G. Vizcarra | 6.13 |
| Vaster E. White | 562.35 |
| June Wilkinson | 2.54 |
| Alfonso Zamora | 110.44 |
| Antonio Zamora | 284.62 |
| Rosalia Zaragoza | 219.00 |
| Matilde Zepeda | 58.33 |

CASE SUMMARY

McFARLAND ROSE PRODUCTION, et al.

11 ALRB No. 34
Case Nos. 76-CE-69-F
76-CE-73-F
76-CE-73-1-F
76-CE-73-2-F

ALJ Decision

This compliance case involved a determination of the amount of makewhole owing to Respondent's employees for Respondent's bad faith bargaining beginning on March 16, 1976 and still ongoing at the time of the liability hearing, as well as the amount of backpay owing to harvest workers discharged on January 3,1977 for protesting slippery working conditions. Determination of the makewhole amount raised issues respecting duration of Respondent's bad faith bargaining after the liability hearing, computation of the basic makewhole wage rate for both hourly and piece rate workers, and computation of fringe benefits. The backpay issue included the adequacy of alleged "offers of reinstatement," the compensability of certain travel expenses and whether discriminatees who engaged in picket line activities against another employer during the backpay period without seeking other work were entitled to backpay for that period.

The ALJ recommended adoption of the Regional Director's formula for computing the basic wage rate as well as his use of the Adam Dairy fringe benefit formula although he did allow Respondent to make an offer of proof that the formula was unreasonable. He also found Respondent's bad faith bargaining extended 9 months after the unfair labor practice hearing, until the effective date for the retroactive wage raises subsequently negotiated in the June 1978 collective bargaining agreement.

With respect to backpay for the 16 discharged harvest workers, the ALJ recommended compensating 11 of the 16 for only the day and one-half remaining in the 1976-1977 harvest season at the time of the discharges, due to interim earnings and/or rehire during the following harvest season. He recommended a twelfth discriminatee be awarded the difference between what he would have earned in Respondent's spring budding operation and what he earned budding for an interim employer. The only discriminatees the ALJ recommended be awarded backpay -- in escrow -- for additional harvest seasons were 4 missing discriminatees who had not testified at the hearing and who, therefore, remained subject to cross-examination for interim earnings. The ALJ rejected Respondent's argument that their backpay should be tolled as of the date reinstatement notices were allegedly mailed, crediting denials of receipt of the notices by the 12 testifying discriminatees. The ALJ also recommended compensating 5 discriminatees for travel expenses incurred during job searches after the termination of Respondent's harvest

season. Finally, the ALJ rejected backpay for two discriminatees for the period in which they joined a strike against an interim employer and did not seek alternate work.

Board Decision

The Board adopted the ALJ's recommendation to approve the Regional Director's computation of the basic wage rate and fringe benefits. The Board found that Respondent's hire-in rate was the equivalent of the basic Adam Dairy rate and that the Regional Director properly derived a percentage differential therefrom and properly applied that differential to both hourly and ^piece rate workers. The Board also rejected Respondent's exceptions to the fringe benefit calculation, finding that Respondent's offer of proof failed to establish that such a substantial fringe package could not have been negotiated in the unique circumstances of the rose industry or that application of the Adam Dairy/Hickam fringe formula to a work force which, in some years, was paid up to 74. percent in piece rate, was arbitrary. The Board reiterated its intent, stated in J. R. Norton (1984.) 10 ALRB No. 4-2, not to apply the new Norton fringe benefit formula to cases which had been computed pursuant to Adam Dairy/Hickam and transferred to the Board before issuance of Norton.

Relying on the deceptive and unreasonable conduct of" Respondent's, attorney-negotiator -- rather than the ALJ's substantive evaluation of the parties' respective positions, the Board adopted the ALJ's conclusion that Respondent's bad faith bargaining continued at least until the effective date of the retroactive wage raise ultimately negotiated in the collective bargaining agreement. The Board noted that, in compliance proceedings in cases with "open-ended" makewhole orders, although the General Counsel has the burden of proving that bad faith bargaining continued after the close of the liability hearing, that burden is considerably alleviated when the post-hearing conduct resembles the pre-hearing conduct already found to have constituted bad faith bargaining.

The Board adopted the ALJ's recommendations with respect to backpay for the discharged discriminatees and rejected Respondent's argument in its exceptions that backpay should be tolled in October of 1977 by Manager Anderson's casual statement to UFW representatives in the context of contract negotiations that he had sent recall notices to all seniority workers and had no "black list." With respect to the award of travel expenses incurred outside the backpay period, however, the Board rejected as unfounded the ALJ's conclusion that the discriminatees would not have incurred the expenses had they not believed, erroneously, that Respondent would not rehire them during the next season.

The Board adopted the ALJ's findings and conclusions denying backpay to strikers who did not look for alternate work before or after picket duty.

Member Waldie filed a partial dissent. He believes that, as in any other issue of diminution of damages, the respondent must bear the burden of proof that the makewhole period terminated before the termination date set forth in the specification.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

| | |
|---|---|
| In the Matter of:<br><br>McFARLAND ROSE PRODUCTION CO. division of PETOSEED CO. INC., a wholly-owned subsidiary of GEORGE BALL, INC.,<br><br>Respondent,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA AFL-CIO,<br><br>Charging Party. | Case Nos. 76-CE-69-F<br>76-CE-73-F<br>76-CE-73-1-F<br>76-CE-73-2-F<br><br>(6 ALRB Mo. 19) |

Appearances:

John Moore and Derek Ledda
for General Counsel

Frederick A. Morgan and Stan Roman
Bronson, Bronson & McKinnon for
Respondent

Claire McGinnis
for Charging Party

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARIE SCHOORL, Administrative Law Judge:

This case was heard by me on July 13, 14, 15, 19 and 20 in Delano, California. On April 8, 1980, the Board issued its decision and order requiring Respondent, McFarland Rose Production, a division of Petoseed, Inc., a wholly-owned subsidiary of George Ball, Inc., to make whole its agricultural employees for any loss of pay and other economic losses sustained by them as a result of Respondent's refusal to bargain in good faith, the period of liability to extend from March 16, 1976, until such time as Respondent commenced to bargain in good faith. Further, the Board found that Respondent had discriminatorily discharged 16 members of a harvesting crew because of their concerted activities in violation of section 1153(a) of the Act and directed Respondent to offer reinstatement to these employees and to make them whole for any loss of pay or other economic losses suffered as a result, including any loss of pay resulting from Respondent's failure and refusal to bargain in good faith, by payment to each of them of a sum of money equal to the wages he would have earned from the date of his discharge to the date on which he is reinstated or offered reinstatement, less his respective net interim earnings, together with interest thereon at the rate of 7% per annum.

On January 13, 1983, the Regional Director of the Delano Region issued a notice that a controversy existed between him and Respondent concerning the amount of make-whole due Respondent's employees. The notice identified the length of the make-whole period and in that respect General Counsel advances April 1, 1978, as the date Respondent commended bargaining in good faith.

Respondent places the date much earlier, July 11, 1977, the date of the hearing of the allegations in respect to the bad faith bargaining found .by the Board herein. A subsequently filed First Amended Make Whole Specification set forth the amount of make-whole due Respondent's employees and with respect to the formula for computing make-whole, General Counsel proposes that the hourly wages of Respondent's employees be increased by 13.8% in 1976 and the first quarter of 1977 and 3.5% for the last three Quarters of 1977 and the first quarter of 1978, which percentage is the percentage by which their wages under the Adam Dairy [1/] formula exceeded their pre-contract wages.

Respondent does not contest the utilization of the Adar Dairy collective bargaining contract to calculate the employees' wage losses due to Respondent's bad faith bargaining but it objects to the Adam Dairy formula for computing fringe benefits and the validity of the "credit" permitted an employer for mandatory deductions as set forth in the Hickam case, Robert F. Hickam (1983) 9 ALRB No. 6.

At the hearing I ruled that evidence to support Respondent's contention of the inappropriateness of the Adam Dairy formula for computing fringe benefits and the Hickam formula for giving credit to the employer for its mandatory fringe benefits was irrelevant as I, as an Administrative Law judge, was compelled to follow Board precedent.[2/] However, in view of the newness of the

---

1. Adam Dairy (1977) 4 ALRR No. 24

2. Adam Dairy (1977) 4 ALRB No. 24

make-whole remedy, I would permit Respondent to vouch in evidence in this regard. In this way the Board will have the evidence at its disposal if it wishes to reconsider its decisions in the Adan Dairy and Hickarn cases.

Respondent contends that the Board had no authority to decide whether the employer continued to bargain in bad faith subsequent to the Board's decision on Respondent's initial liability for bad faith bargaining, in this supplemental hearing. Respondent further contends that even if that issue could be litigated, Respondent should not have the burden to prove when it commenced good faith bargaining. The Board's Order in 6 ALRB No. 13 places the question of when Respondent began to bargain in good faith at issue here and I am obliged to consider it. The additional issue of which party has the burden of proving good faith or the lack of it is moot because General Counsel in fact put on evidence as to the date he alleged that Respondent began to negotiate in good faith. Respondent in turn presented evidence to dispute the date advanced by General Counsel.

The parties were also unable to agree on the amount of backpay due any of the 16 discriminatees, and on June 17, 1933, the Regional Director issued a backpay specification. The Respondent filed an answer on July 1, 1983.

All parties were given full opportunity to participate in the hearing and, after the close of the hearing, General Counsel and Respondent filed briefs to support their positions. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make

the following:

I. THE MAKE WHOLE AWARD

A. The Make Whole Period

1. The Facts

In order to evaluate the course of the negotiations during the period at issue in those proceedings, some preliminary discussion about the prior positions of the parties is required.

The Board found that Respondent had bargained in bad faith until July 12, 1977. On July 10, 1977, Frederick Morgan, attorney negotiator for Respondent, sent a letter to the UFW's negotiator Dolores Huerta setting forth the parties respective positions on the remaining nine articles to be decided. He added that with respect to those nine articles, that the parties were at impasse but Respondent was willing to continue to bargain at request.

Morgan's comments on the nine articles in the letter are as follows:

(1) Union Security

The UFW wanted "good standing" as provided for in the ALRA while Respondent would only agree to a "maintenance of membership" clause. Morgan pointed out to Huerta that since the union claimed that 100% of the work force was in favor of union membership, the UFW would have no problem with Respondent's suggested language.

(2) RFK Pension Plan

Respondent objected to any pension plan. Morgan explained that the main reason for the companies' objection was economic and he would recommend the pension to Respondent the second

year if the fund and Respondent were healthy.

(3) MLK Plan [3/]

Respondent also objected to this fund because of the economics. Morgan commented that he also doubted its legality.

(4) Hiring

Respondent insisted on continuing to control hiring and rejected the union's suggestion that the ranch committee could perform this function.

(5) Wages

Respondent reiterated its same wage offer. Morgan pointed out that Respondent simply was following its custom of paying 15% below the industrial leaders.

(6) Vacation

Respondent offered 3% for all employees and its present plan for permanent employees. The UFW asked for 2% for one year employees and *a* 5% for two year employees who worked 750 hours in a calendar year. Morgan mentioned that Respondent resisted the UFW's plan because of the increased costs.

(7) Holiday

Respondent offered 8 holidays for permanent employees and three for seasonal employees while the UFW requested ten for both permanent and seasonal workers.

(8) Discharge and Discipline, Overtime

Morgan commented that the parties' differences on these

---

3. MLK (Martin Luther King) fund is a charitable trust used to operate service centers "in all the the different agricultural areas."

two items were minimal and agreement should be possible.

In August the UFW heard that Respondent might be going out of business. It decided to reopen negotiations because it believed that if Respondent were going out of business it might be less stringent and more flexible in reaching a collective bargaining agreement and moreover the union wanted information as to a possible successor to assure the continuation of its certification as the bargaining agent of the employees. The UFW sent a request to Respondent and the parties met on September 2, 1977.

September 2, 1977 Meeting

Dolores Huerta represented the UFW and Fredrick Morgan and general manager Dave Anderson, Respondent. Morgan said that the parties were at impasse on the nine remaining articles and asked whether the UFW had any counter-proposals.

Huerta mentioned the RFK pension plan and the fact that some of the employees had worked a long time at Respondent's and deserved pension coverage. She also mentioned the MLK fund and explained that it benefited Respondent's employees since they were utilizing the MLK clinic and service centers in the nearby vicinity. Huerta pointed out to Morgan and Anderson that the law held that a union steward had the legal right to interview a bargaining unit employee in private in respect to any disciplinary action by an employer so Respondent should agree to language in the contract to that effect.

In respect to union security Morgan offered as a solution to their differences, the "Alioto Plan." It in effect would be the equivalent to a "good standing" union security but would enable

seniority employees to refrain from joining the union and not be subject to discharge at the union's request. However, the UFW rejected this offer.

David Anderson asked Huerta whether the UFW still requested ten vacation days per year and Huerta responded that in practice even though there were ten holidays in the contract, the employees would not receive that many since in seasonal employment, many employees would not be working at the holiday time and thus would not be eligible for all ten.

October 13, 1977 Meeting

The parties reached an agreement on the following three articles:

The UFW accepted the number of holidays Respondent had previously extended to its employees and in return Respondent agreed that a floating holiday would be converted into a Citizen's Participation Day[4/] (the third Sunday of every November).

The UFW convinced Respondent that the law provided that a union steward has the legal right to interview an employee in private in respect to any disciplinary action by an employer and the parties agreed to a Discipline and Discharge article incorporating that concept. The UFW wanted to extend overtime coverage to irrigators but abandoned this request and agreed to Respondent's overtime proposal.

Huerta informed Morgan that Respondent should no longer

---

4. CPD (Citizen Participation Day) is a paid holiday in which the employee's pay is remitted to the union to use for political activities.

have a problem with the union's insistence on all employees belonging to the union because all permanent employees had signed authorization cards, and that the UFW would agree to Respondent's suggested language for the rest of the article. Morgan commented that Huerta need not show him the cards as he took her word that they had been signed. However, he pointed out to her that he meant not just permanent employees but signatures of all seniority employees including harvest workers.[5/] This surprised Huerta who thought that Morgan was only worried about forced unionization of the steady year-round workers. The parties agreed to hold that subject in abeyance.

Huerta asked Anderson how many seasonal employees would qualify for vacation under a 750 hours minimal Qualification and he answered a few in 1977 and none in 1978. Huerta replied that acceptance of the union vacation plan would result in the same vacation plan currently in existence at Respondent's whereby the permanent employees qualified for a yearly vacation and the temporary employees did not and David Anderson responded in the affirmative.[6/]

The UFW suggested a solution on the hiring issue whereby the ranch committee would compose a list of employees to be hired and submit it to the company. Morgan rejected the offer but added

---

5. There were approximately 15 permanent employees and 180 harvest time employees.

6. The reason for this was because Respondent would no longer have a budding season since it was going out of business. So the temporary employees would only accumulate approximately 400 hours a year (harvest season) and not the additional 500 hours (budding season).

that the ranch committee could form a list and Respondent would give it fair and careful consideration in its hiring. Morgan added that Respondent would not reject a suggested named employee arbitrarily. However, the parties did not come to an definite agreement on this article.

Morgan commented that the UFW had not presented any convincing argument for Respondent to increase its wage offer. Morgan also commented that it was difficult to understand why Respondent would pay $10,000 in pension funds when it would be out of business within 14 months. Morgan continued to object to the MLK fund because of its alleged illegality but in addition he stressed his objection because of monetary considerations as he said that it was not fair for the money to go to such a fund when it should go for wages. Huerta replied that the UFW felt very strongly on that subject and that the workers would prefer money to go to the fund rather than for vacations.

December 2, 1977 Meeting

The UFW presented a counterproposal to Respondent. The union would agree to Respondent's wage proposal but wages would be retroactive until October 1, 1977 (and to June 6, 1977 for the de-eyers) and a 15 cent raise at the beginning of the second year. The UFW would agree to the Respondent's language on union security which provided for obligatory union membership for every employee except seniority employees who would have an option of joining the union or paying a service fee to the union.

Furthermore, the union proposed that the two funds, pension and MLK, would not go into effect until the second year of the

contract.

Morgan stated that he would not relay the union's offer on the MLK fund to Respondent's principals in Chicago unless the union consented to Respondent not having to contribute to the fund unless certain conditions were fulfilled to assure its legality. The union agreed and Morgan communicated its offer.

Morgan said that he had previously recommended to the principals in Chicago not to agree to the MLX fund and pension funds but this time he would not make any recommendation but leave it up to Respondent's principals in Chicago to decide.

On December 9, 1977, Morgan sent a letter to Huerta of the UFW informing her that Respondent would accept the wage proposal with the second year raise but rejected any retroactivity, agreed to the union security language[7/] with the clarifying language that Respondent would accept as evidence of current membership, "membership cards dated no earlier than 4 months prior to the signing of the contract." Respondent rejected the union's offer regarding the pension and MLK plans.

There was no communications between the parties until the summer when on May 26 the UFW sent a letter to Respondent requesting a bargaining session. Ken Schroeder, who had replaced Huerta as the UFW negotiator, testified that the reason the UFW decided to reopen negotiations was because Respondent would be closing down its operations within *a* few months and they felt an obligation to at

---

7. Morgan attached to the letter the union security clause to which Respondent would agree. It amounted to the NLRB version of union security whereby the employer is only obliged to dismiss an employee for failure to pay the initiation fee and periodic dues. Moreover, seniority employees had the option to join the union, or pay a service fee.

least secure some sort of a contract for the employees. The union officials realized that the company would probably continue to hew to a hard line so the union strategy was to be very flexible and make almost any concession so as to obtain a contract.

June 27, 1978 Meeting

The UFW agreed to Respondent's continuing to do their own hiring. However, Respondent agreed that the hiring would be done by the general manager or the production manager and not the foremen, who the union had accused of favoritism. Respondent would notify the union at least 5 days before hiring at the beginning of a season. Respondent agreed to the union's good standing language for union security article with a confidential side agreement that seniority employees would have an option to join or not join the union and the Respondent would not have to terminate an employee for 60 days after notice of his loss of good standing with the union as long as he or she maintained their union membership dues current.

The UFW accepted Respondent's wage proposal and Respondent agreed to pay the new wage scale retroactive until April 1, 1978. As the number of employees and work hours were being reduced, the retroactive pay did not signify a costly item for Respondent.

Respondent refused to agree to the pension and MLK proposals so the UFW withdrew the proposals from the table.

Respondent agreed to the Union's vacation plan with the 750 hours to qualify. However, since there would be only one harvest season and no budding season at Respondent's before it closed, the Respondent's acceptance amounted to a continuance of its own vacation policy whereby permanent employees qualified for vacations

but seasonal employees did not.

Although previously Respondent had agreed to a Citizen's Participation Day in lieu of a floating holiday, it demanded and the union agreed that it would only have to pay one-half a day's wage.

The parties did not make any further changes to the other articles that it had agreed to before July 1977 and the three articles it had agreed to at the October 1977 meeting.

2. Analysis and Conclusion

To resolve the question of whether Respondent continued to bargain in bad faith, it is necessary to review the underlying case fi ALR8 18 in which liability was found against Respondent for bad[1] faith bargaining, not only for the factual background but also for the law as stated by the Board regarding the question of the determination of the date on which bad faith bargaining ends and good faith bargaining begins. In the liability phase of this case, the Administrative Law judge decided that the bad faith bargaining had ended June 6, 1977, and had not continued from June 6 to July 12, 1977, the date of the hearing, because the parties had been meeting during this period and Respondent had agreed to some items and since there was not any additional evidence with respect to the events in this period he could not decide on the state of the record that bad faith bargaining had continued. The Board overruled the ALJ on that point and decided that the bad faith bargaining had continued up to July 12, 1977 and thereafter.[8/] The Board stated

---

8. The Board stated in effect that the makewhole period extended from March 16, 1976 . . . until Respondent . . . begins good faith bargaining and continues such bargaining to the point of a contract or a legitimate impasse.

that in surface bargaining, of which Respondent was guilty, a violation occurs over an extended period of time and cannot be analyzed by examining individual bargaining sessions or positions in isolation from the totality of the parties' conduct. So in the instant case Respondent's conduct from July 12, 1977 to April 1, 1978 cannot be analyzed in isolation from the totality of the parties' conduct from March 16, 1976 to July 12, 1977. The Board also stated that Respondent's conduct between June 6 and July 12, 1977, of meeting with the union and agreeing to a few items was not significantly different from Respondent's conduct during that period of time of 15 months previous which the Board found to be the period of time in which Respondent had been guilty of bad faith bargaining.

Moreover, the Board pointed out that Respondent's conduct which consisted of meeting with the union and agreeing to a few items was conduct perfectly consistent with surface bargaining which is by definition an approach which resembles good faith bargaining but is in fact calculated to frustrate agreement. After a lengthly period of surface bargaining, conduct resembling "hard bargining" may be all that is necessary to prevent the execution of an agreement or to cause acceptance of an agreement that the union's support among employees will be seriously eroded.

Respondent's conduct subsequent to July 12, 1977 falls into the aforedescribed category of "conduct resembling hard bargaining". All Respondent did during that period was to meet with the union in September, October and December 1977 and agree to a few items. Once again they were items of minor importance and none in which Respondent made any important concessions, i.e., agreed that a

previously granted floating holiday be converted into Citizen. Participation Day, (no additional expenditures whatsoever), agreed to language in regard to a union steward interviewing an employee in private regarding disciplinary charges (to conform to existing law), overtime not to be extended to irrigators (concession by union as it wanted overtime to be extended so).

Now to analyze Respondent's conduct in respect to the six remaining issues, all of major importance. The only issue where Respondent made some concession was in agreeing to a 15¢ raise the second year of the contract. However, this concession was tied in to a counteroffer by Respondent which rejected the union's request for a pension fund and the MLK fund (even though the union was willing to wait until the second year for implementation) and which contained a union security clause which amounted to the NLRB version whereby the employer is only obliged to discharge an employee for failure to pay initiation fee and periodic dues. Furthermore, a seniority employee would not have to join the union but would have the option to pay a service fee.[9/]

So in review, the union had conceded on union security, hiring, the pension fund, and the MLK fund and the only concession on Respondent's part was a 15¢ an hour raise one year hence.

---

9. Neither the union or Respondent made mention of the two remaining subjects, hiring and vacations in their December 1977 package offer and counteroffer. The union had already abandoned its effort to secure a union hiring hall and had conceded to go along with Respondent's control of the hiring with some safeguard against the alleged favoritism of foreman Hinojosa. The union's vacation proposal with its 750 hours to qualify had become a moot point since no seasonal employee would qualify due to the employer going out of business in a few months.

Is this sufficient to represent a significant break with Respondent's past unlawful conduct or the adoption of a course of good faith bargaining or is it just conduct resembling "hard bargaining" which nay be "all that is necessary to prevent the execution of an agreement"? It certainly appears to amount to the mere semblance of "hard bargaining". In my judgment more is required than an offer of a 15 cent an hour raise one year hence to offset the negative effect of outright rejections of the union's proposal on two items (pension and MLK pensions) and the agreement to two other items (union security and hiring) only after the union had made major concessions.

Respondent can argue that more is involved than just Respondent's behavior at the bargaining table as it ceased to engage in its pre July 1977 per se violations such as unilateral changes, refusal to turn over information to the union and delay of the meetings and consequently that conduct, coupled with its more reasonable approach to bargaining itself is evidence that its conduct at the negotiating table constitutes a significant break with its-past conduct. I disagree.

It is true that Respondent ceased such away-from-the-table conduct subsequent to July 1977 but the significance of their having engaged in this conduct before July 1977 was evidence along with the at-the-table deportment of their desire to frustrate and ultimate agreement. Once that desire has been established, more than corrective action of or the absence of such away from-the-table conduct is needed to prove that it no longer continues. According to the Board, conduct resembling "hard bargaining" is all that is

necessary to show that the bad faith bargaining has not ceased. of course, authentic hard bargaining would end the period of bad faith bargaining, but it means the employer would have to do more than merely make slight modification on three important items after the union has made major concessions thereon and flatly reject the union offer on the two additional important items.

Respondent argues that the fact that the parties eventually signed a contract constitutes a factor that indicates Respondent had engaged in good faith bargaining: An inference to that effect is vitiated by the fact that the union was determined to secure a contract at any cost because Respondent would be completely shutting down its operations shortly. Such determination is substantiated by the union's generous concessions to Respondent's demands.

Respondent also argues that the negotations were adversely affected by the union's insistence that Respondent agree to the MLK fund since such fund was illegal and was not a mandatory subject of bargaining. I disagree since the union included in its December 1977 package offer language whereby Respondent would only be obliged to pay into the fund if it were legal.

Accordingly, I find that Respondent continued to bargain in bad faith and did not bargain in good faith until April 1, 1978 and therefore is liable to make whole its agricultural employees for loss of wages and other economic losses due to such bad faith bargaining until such date.

II. MAKE WHOLE CALCULATIONS

Respondent has not challenged the application of the Adan Dairy formula to the calculation of the make-whole remedy. However,

it challenged the application of the Adam Dairy and Hickam cases formula as to the computation of the fringe benefits and the credit for the mandatory fringe benefits that Respondent has paid. As T have already stated I will not direct any discussion to these latter issues since Board precedent holds that the calculation of fringe benefits and credit for the mandatory payment of a portion of them are to be determined by the formula set forth in the two aforementioned cases without exception.[10/]

Respondent further challenges the General Counsel's method of applying the Adam Dairy formula to the calculation of the monies due each employee. Respondent argues that General Counsel should have utilized the $3.25 per hour rate as the base wage rather than S3.15 per hour.[11/] It was clearly established at the hearing that $3.15 was the hire in rate and $3.25 the recall rate. It is true as Respondent points out, that the sun of S3.25 appeared as the base wage in General Counsel's back pay specification until the last one, General Counsel 1G, but this was based on an oversight by General Counsel and when it was realized that $3.25 was the recall rate while $3.15 was the hire-in rate, General Counsel made the appropriate corrections as embodied in his exhibits 1G and 2. Therefore, I find $3.15 is the correct base wage for the last 6

---

10. However, I permitted Respondent to present evidence on these issues but in a vouched form so if the Board decided to review its rulings in the Adam Dairy and the Hickam cases it would have the evidence available without need to remand.

11. General Counsel has listed $2.75 an hour as the base wage for the first two quarters of the make-whole period, the second and third quarters of 1976. Respondent has not challenged this amount and consequently I find it to be the base wage for such six-month period.

quarters of the make-whole period (October 1, 1976 to April 1, 1978).

Respondent also argues that the union did not achieve any substantial increase in hourly or piece rates in its bargaining but I have already decided that Respondent continued to bargain in bad faith until April 1, 1978. That factor plus the union's resolve to secure a contract at any cost in the summer of 1978 because Respondent was to go out of business shortly are the explanations for no increase in employee compensation and has no relationship with what the union would have achieved in a wage increase if Respondent had bargained in good faith.

In Robert H. Hickam (1983) 9 ALRB VQ. 6, the Board specifically stated that:

> In make whole cases, where the General Counsel has established at the hearing that the proposed make-whole formula(s) and calculations are reasonable and conform to the standards set forth in our decisions, we shall adopt the General Counsel's formulas and computations. He may reject or modify his or her formulas and/or computations where a respondent proves that the General Counsel's method of calculating makewhole is arbitrary, unreasonable, or inconsistent with Board precedents, or presents some other method of determining the makewhole amount which is more appropriate. Hickam, supra, at p. 3. See also Kyutoku Nursery, Inc. (1982) 8 ALRB *No.* 73, at pp. 10-11.

The formulas utilized by General Counsel are based on the formula adopted by the Board in the precedent-setting Adam Dairy, supra, as a reasonable and equitable method for calculating the make-whole remedy. It is clear that the Adam Dairy formula should be used because (1) no rose industry contracts were in existence during the make whole period (1976-78) except for one at the end of such period; (2) the board's decision in the underlying case 6 ALRB No. 18 ordered computation in accord with Adam Dairy: and (3)

Respondent did not object to the utilization of such formula and failed to offer an alternative formula.

Accordingly, I recommend that the Board adopt General Counsel's make-whole formula in the instant case as set forth and applied in General Counsel's exhibits 1G and 2 respectively.

In general, General Counsel has appropriately calculated the make whole amounts due Respondent's employees in the following manner: The base wage in Adam Dairy, supra, has been calculated on a quarterly basis, in respect to Respondent's base wage of $2.75 and $3.15 paid during respective quarters of the make-whole period. in respect to the added remuneration for fringe benefits, the formula as set forth in the Adam Dairy case and the Hickam case has been correctly applied whereby the difference in wages is increased by .22 to compensate for' fringe benefits less 6.3 percent credit for mandatory benefits paid by Respondent.

There is no dispute concerning the identity of Respondent's employees entitled to the make-whole remedy, including the 16 employees discriminately discharged at the end of the 1976-77 harvest season. Respondent did not contest their identity either in its answer or at the hearing. Therefore, all of the employees listed in General Counsel's make-whole specifications as set forth in his Exhibit 1G are entitled to be included in any makewhole award pursuant to the Board's order.

Since the Board is presently considering the applicability of its makewhole formula in the pending J.R. Norton, Case No. 77-CE-166-E, I have refrained from redoing the General Counsel's calculations in this decision to avoid potentially unnecessary

computations.

The Board has upheld its authority to modify its own orders, including therein the interest rate to be paid on backpay and makewhole awards, where the ALRB has not lost jurisdiction by virtue of appellate court review. (High and Mighty Farms (1982) 8 ALRB No. 100.) The rationale for such decision was that the Board's jurisdiction remained intact following summary denial of review – because such summary denial by the court of appeals neither affirmed nor reversed a Board decision. The Board thus ruled in High and Mighty, supra, that it had retained the power to modify its order as if there had been no appeal. Recent Board precedent[12/] has recommended that the Lu-Ette (1982) 8 ALRB No. 55 interest rate formula be applied prospectively from the date of a Board's supplementary decision. Here review was denied summarily by the Court of Appeals, and by the California Supreme Court. I thus recommend in accordance with Board precedent that the Lu-Ette interest rate be applied prospectively from the date of the Board's supplemental order, as the original Board order specified 7 percent per annum (High and Mighty, supra, p. 14). II. Back Pay Award for the 16 Discharged Discriminatees

A. Facts

The discriminatees involved in the backpay proceeding represent members of a harvesting crew who were discriminatorily discharged on January 3, 1983, with *a* day or two left in the harvest season. The discriminatees had protested to foreman Eutemio

12. Bruce Church, Inc. (1983) 9 ALRB No. 10.

Hinojosa about the adverse working conditions, i.e., the ground was muddy and slippery and a worker was likely to slip and fall and injure himself. Foreman Hinojosa told the discriminatees that they had to work and if they didn't they should go home because they had no more jobs. The workers left the job site and did not return the next day as they considered that they had been discharged.

The Board found that they were discharged because of the concerted activities and ordered Respondent to reinstate and reimburse them for lost wages.

In determining the amount of backpay due the discriminatees it is necessary to decide exactly what were their employment expectations at Respondent's. Six of the discriminatees only worked at Respondent's during the harvest season(s) (the last part of October through the first part of January) and ten of them who were budders on tiers worked both the harvest season and the budding season (April through June). However 3 discriminatees Rafael Reyes, Jose Galvan and Adolfo O. Galvan testified that foreman Eutemio Hinojosa had promised them that most of the harvest crew would continue to work at Respondent's during the interval between the harvesting and budding seasons.

Foreman Hinojosa did not testify and there was no record evidence to directly counterdict the 3 discriminatees' testimony about Hinojosa's promise of future employment.[13/]

A few of the discriminatees testified that the harvest

---

13. However there is authority to permit a determination that testimony uncontradicted by direct evidence is false. (See Operative Plasterers, Local 394 (1973) 207 NLRB 147 [84 LRP.M 1471].)

season continued for an additional week or two after the discharge of the discriminatees. However, general manager David Anderson credibly testified that the rose harvest ended a day and a half after the dismissal of the discriminatees.

Respondent's Exhibit 10 indicates that in 1975-76, the previous harvest season, that the number of workers for the weeks ending December 26, 1975, January 2, 9, 16, 23 and 30 and February 6, 1976 were 106, 99, 93, 95, 96, 76 and 51 respectively, while in the 1976-77 season they were 138, 135, 105, 60, 52, 50, and 47 for the comparable weeks. The figures indicate that in the 1976-77 season there was a sharp drop in the number of employees at Respondent's after the discriminatee crew was discharged which indicates that no new employees were hired to replace them. In the 1975-76 season the number of employees working during the harvest season remained steady until approximately the middle of January.

Respondent's Exhibits 9 and 10 also indicate that the number of employees employed at Respondent's in January, February and March 1977 was markedly lower than during the previous year.

In 1976 the weekly figures for the four weeks in January were 99, 93, 95, 96 and 76 and for the comparable weeks in 1977: 105, 60, 52 and 50. Four weeks in February 1976: 51, 32, 30 and 28 February 1977: 47, 34, 33 and 17. March 1976: 29, 28, 30 and 23. March 1977: 8, 8, 21 and 20. So it appears that there was less work during January, February and March at Respondent's in 1977 than in 1976.

David Anderson, former general manager for Respondent, who is no longer connected with Respondent, credibly testified that

there was only 1½ days of harvest work left for the crew when they were dismissed. He further testified that there were cutbacks on the number of workers assigned to topping and weeding, which activity went on until the budding season began. Anderson readily testified that Respondent had a custom of allowing budders and tiers to do nonbudding work a week to ten days before the budding begins. In respect to the hiring authority, Anderson stated in his testimony that he and Duncan Hanson had the authority to hire but that Hinojosa could only recommend such hiring.

The three discriminatees who returned to work on March 28 performed clean up work and other varied tasks before the actual budding work began on April 18.[14/] At least two or three of them had asked for work in March before their return and Hinojosa informed them that there was no work for them yet and one discriminatee testified that Hinojosa added that the reason for no work was because they had been fired. A fourth discriminatee returned to work during the budding season (on April 4), but quit after one day.

Anderson credibly testified that in September 1977 or 1978 (he could not remember exactly which year) that he had supervised the sending out of the reinstatement letters to the discriminatees. Robert Stumpf, of Respondent's law firm, sent him instructions to do so. Anderson ordered the secretary to send out the letters to the 16 discriminatees. He observed the secretary do so but did not check the names and addresses on the envelopes to see whether they

---

14. General Counsel's Exhibit 4 indicates the budding work began April 18, 1977.

coincided with the names and addresses of the discriminatees. The secretary sent the letters certified (return receipt requested). Anderson credibly testified that "some" letters came back unclaimed. Respondent did not present a copy of the reinstatement letter supposedly sent to the 16 discriminatees. Anderson and Morgan testified that Respondent made searches of all its records and could not find any file or other document indicating that the letter was sent and to whom.

Adolfo D. Galvan

Adolfo D. Galvan had worked as a budder for Respondent for three to four years. After his discharge at Respondent in January 1977 he searched for work at local rose bush companies, i.e., Armstrong, Conklin, and Jackson and Perkins but unsuccessfully as the harvest season had ended. He also looked for work at some grape ranches in the same general area, i.e. Superior, Tex-Cal and Pandol but in vain. He testified that he spent SRO on his travel expenses in the employment-seeking effort.

In March he returned to Respondent's and requested work on several occasions. Respondent hired him on March 23, 1977 and according to his testimony he immediately began budding work and continued to do such work until the end of the season. He testified that in previous years Respondent had always hired him before the budding season actually started and he would perform hoeing, cutting and topping work until the budding started.

Jose Galvan

Jose Galvan went to work for Respondent the first time in the 1976-77 harvest system. He testified that foreman Eutemio

Hinojosa promised them that after the harvest season they would continue to work i.e. in hoeing and whatever else might come up. He further testified that after being discharged in January he looked for work at the rose bush growers in the area, i.e., Jackson-Perkins, Montebello, Conklin and also grape growers but without success. He went to the Salinas Valley and the Salinas Cooperative promised him work in the Imperial Valley in December. According to Calvan's testimony he returned to Respondent's and asked Hinojosa for work but the latter told him that he did not want to have anything to do with them in the future.

He testified that he worked for Jackson & Perkins during the budding season, April through June 1977. He continued to search for employment during the summer. In July he returned to Respondent and again asked Hinojosa for work and the latter said no, that he had already fired "us". In December, Galvan testified that he went to work for the Salinas Cooperative harvesting lettuce. He also testified as to the extra expenses he incurred for room and board in the Imperial Valley and his transportation expenses twice a month back to Delano to visit his family. Jose Galvan denied that he had any knowledge that his fellow crew members, many of whom were his relatives, had returned to work at Respondent's in March for the budding season or in October for the harvest season. He also denied receiving any reinstatement letter from Respondent.

Salinas Cooperative records indicate that Jose Galvan secured employment there on January 5, 1977, and worked through March 18, 1977. However, records from Jackson & Perkins and Salinas Cooperative indicate he worked at the latter employer's from May

through August 1977 and not at the former employer's. Galvan failed to mention in his testimony anything about his employment in January, February and March 1977 at the Salinas Cooperative.

Adolfo O. Galvan

Adolfo O. Galvan first went to work for Respondent in November 1976. He testified that Hinojosa said that after the harvest he and his fellow crew members could continue to work there. After the discharge in January, he testified that he looked for employment at Jackson & Perkins and Conklin rose growers and also for pruning work at the grape producers Tudor and Tenneco without success. He returned to work as a tier at Jackson & Perkins and worked there the entire budding season. After the budding season ended in June, he searched for employment at such grape growing firms as Sandrini, Tudor and Pandol, but in vain.

Respondent's pay records indicate that Adolfo O. Galvan returned to work for Respondent in October, worked two days in the harvest and then left.[15/] Galvan denied in his testimony that he returned to work for Respondent. According to his testimony, Galvan secured employment in December with the Salinas Cooperative in the Imperial Valley and worked there for 3½ months commuting twice

---

15. Respondent also submitted a notice of change of status signed, by Duncan Hanson, general manager, attesting to these two days' work and subsequently quit. Hanson, as Respondent's witness, testified as to the authenticity of the notice. However, Respondent's attorney objected to General Counsel detailed cross-examination because of Hanson's heart condition. General Counsel deferred to Respondent's attorney's request to cut short the cross-examination but objected to Respondent's Exhibit 12 being admitted into evidence. Although I admitted the notice of change of status into evidence I do not depend on it to determine that Adolfo O. Galvan returned to Respondent's employ in October 1977 because of the limited extent of General Counsel's cross-examination.

monthly to his family in Delano. He testified as to his extra expenses incurred traveling between the Imperial Valley and Delano and his residing away from home.

Salinas Cooperative payroll records indicate that Adolfo O. Galvan secured employment at their facility on January 5, 1977 and worked through March 18, 1977. Galvan failed to mention this employment in his testimony.

Rafael Reyes

Rafael Reyes worked in the 1975-75 harvest season and in the 1976 budding season for Respondent.[16/] In the budding season he worked as a budder and his tier was Daniel Sanchez, Jr. He testified that Hinojosa had promised him and members of the Galvan and Sanchez families and other harvest workers continued employment after the 1976-77 harvest season. He testified that after being discharged at the end of Respondent's 1977-77 harvest season he and his tier Daniel Sanchez, Jr. looked for employment for 3 weeks to one month at both rose and grape growing firms in the Delano area. Afterwards he testified that he searched for a job on his own[17/] and frequently traveled out of the area in this endeavor. He provided details as to the travel expenses incurred. He further testified that he worked at Montebello rose growers during the budding season and afterwards went to work in the grapes for Tudor. After leaving Tudor, he asked crew leadman Rafael Barron, for a job at

16. He remembered doing some topping and/or suckering in mid February or March for Respondent.

17. By February Reyes had his automobile reparied so he no longer had to depend on Sanchez for transportation.

Respondent's and Respondent hired him back for the 1977-78 harvest season.

Tudor payroll records reveal that eyes went to work at their establishment in January a few days after his discharge at Respondent's and worked straight through at Tudor until approximately October 26, 1977, except for 6 to 7 weeks during which period he worked at Montebello. The Montebello records indicate that his employment dates there dovetail perfectly with the dates that he did not work at Tudor.

Daniel Sanchez, Jr.

Daniel Sanchez, Jr. went to work for Respondent in March 1976. At first he performed suckering work but promptly switched to budding and worked as a tier with Rafael Reyes for Respondent during the entire budding season. He testified that he thought he would continue to work after the harvesting season because Hinojosa liked his work and that he had experence in rose work. After the discharge in January he testified that Rafael Reyes and he looked for work at both rose and grape growing firms in the Delano area without success.

After Reyes had his automobile repaired, Sanchez continued to look for employment on his own. He testified that he spent $350 to $400 on travel expenses which included 6 trips to Fresno. In April 1977 Sanchez found work for the first time and it was as a tier with Reyes working as a budder at Montebello. Later he worked at Tudor's during July, August and September and in October he returned to work at Respondent's when foreman Hinojosa recalled him.

Rogelio Avila

Rogelio Avila {neither a budder nor a tier) first went to work for Respondent in the 1976-77 harvest. Avila testified that he thought that he would continue to work at Respondent's after the harvest season because Hinojosa had said that perhaps he could remain and besides he got along very well with Tino. Subsequent to his discharge in January, Avila searched for employment at rose and grape growing companies in the Delano area but without success. He testified that he spent $150 in tranportation costs in his search for employment. Avila secured employment at Tex-Cal in July and returned to work for Respondent in the rose bush harvest in October. He had previously asked Hinojosa for a job in the harvest but Hinojosa had rebuffed him. His wife's brother intervened with Hinojosa and the latter consented to Avila returning to work.

Adolfo B. Galvan

Adolfo B. Galvan, a budder, first went to work for Respondent as *a* budder in 1975. Previously he had performed a variety of work with rose plants at Jackson & Perkins, Mount Arbor, etc. Galvan testified that he did not remember what foreman Eutemio Hinojosa had told him about work following the harvest season. After being discharged he testified that he searched for employment at such rose companies as Jackson & Perkins, Conklin, Armstrong and the grape companies such as Lucas, Tex-Cal, Radovich and several others, but without succcess. He and his brother Roberto Galvan, a tier, went to work at Mount Arbor but only worked one-half day of the budding season as they joined a season-long strike. He testified that the reason he had continued to engaged in the strike

was because he thought it was a way to secure a better salary, and working conditions. He added that the other reason was that he was afraid if he returned to work and later the strike was successful, that he would lose his job.[18/] He further testified that he did not look for work while participating in strike activities at the interim employer because he picketed from 6:00 a.m. to 4:00 p.m. and had no time left to seek alternate employment. He admitted it was not too late in the season to secure employment at another rose company in the area. He could not remember whether he had returned to work at Respondent's in October but he added that if the records showed that he had returned then he must have done so. General Counsel stipulated that Galvan had actually returned to work at Respondent's in the 1977-78 harvest. Salinas Cooperative payroll records indicate that Adolfo B. Galvan worked at their establishment in February and March 1977. He failed to mention this employment in his testimony.

Roberto B. Galvan

Roberto B. Galvan, tier, first went to work for Respondent in the 1975-76 harvest season. He worked in the 1976 budding season and remembered that he and fellow workers had done some weeding, cleaning and suckering and ones and twos for two weeks before the budding began. He worked in the 1976-77 harvest season and after being discharged he looked for work at the rose and grape growing companies in the Delano area but was unsuccessful. He testified

---

18. In his opinion a successful union would ask the employer to discharge the strikebreaking employees and the employer would comply.

that he spent $150 a week for transportation costs in his search for employment. In April he and his brother Adolfo B. Galvan went to work at Mount Arbor, as a budder tier team, but only worked a half a day of the budding season when they joined in what proved to be a season-long strike. He testified that he continued to participate in the strike and perform picket duty eight hours a day because he considered it the surest way to return to work soon and with a good salary. He was fearful that if he continued to work at Mt. Arbor as a strikebreaker he would jeopardize his chances of continuing to work there once the strike had ended and the company came to an agreement with the union. He did not look for work elsewhere during the strike because he thought that it would lessen his chances of going to work at Mount Arbor if and when the strike ended. Re and his brother Adolfo B. Galvan found work in August at Pandol's and worked the entire grape harvest season.

They both returned to work at Respondent's in October 1977. He testified that he received no reinstatement letter from Respondent but someone told him about the beginning of the harvest season at Respondent's. He added that the foreman Hinojosa had gone to a bar where his friends and relatives congregated frequently and told several of them that "we are going to get back to work".

Rodolfo B. Galvan

Rodolfo B. Galvan first went to work for Respondent in the 1975-76 rose bush harvest. No one at Respondent's told him that there would be any work after the harvest season finished. Subsequent to his discharge he searched for employment at both the rose and grape growing companies in the Delano-Wasco area, but

without success. He testified that he spent $40 to $45 a week in transportation costs in his search for employment during the months of January, February and March. He returned to Respondent's for the 1977 budding season. He performed some cleaning work before he actually began the budding work.

Jose S. Vaca

Jose S. Vaca had worked several years at Respondent's, first as a tier and later as a budder during the budding season. He also worked during the harvest seasons. After being discharged near the end of the 1976-77 harvest season, he sought and secured another job within two weeks as an harvester at the Mount Arbor rose growing company. In April Respondent recalled vaca for the budding season, but he returned for only one day because he considered he had a better job at Mt. Arbor.

Jesus Oropeza

Jesus Oropeza (a harvest-only worker) had worked several years at Respondent's during the harvest. Subsequent to his discharge near the end of the 1976-77 harvest season, he secured employment at the Giumarra ranch within a week or two. After some month's work there, he went to work for Pandol and worked there in the grape harvest. He returned to work at Respondent's in October 1977 for the harvest season.

Daniel M. Sanchez, Sr.

Daniel Sanchez, Sr. had worked at Respondent's during the budding (as a budder) and harvest season for two years before his discriminatory dismissal near the end of the 1976-77 harvest season. Shortly thereafter he began to look for work at various grape and

rose growing companies in the Wasco-Delano area but without success. He also left the area and traveled to Stanton and spent three weeks in the area looking for *a* job in vain. He testified that he scent $30.00 a week for three weeks looking for employment in Stanton and spent approximately $10 a week for gasoline during the months of January, February and March. In March he returned to Respondent's and asked Hinojosa for work, and the latter said he had fired them and there was no job for then there anymore. However, Daniel Sanchez returned again to ask for work because he knew the company would need his services during the budding season and he needed the money. Respondent rehired him and he worked a week or two and then switched over to budding work.

Sanchez testified that as a general practice Respondent would give him and fellow workers a week or two of work before the budding season began.

ANALYSIS AND CONCLUSION

There is no dispute that the Hinojosa crew members entitled to backpay were appropriately identified in General Counsel's backpay specifications. (G.C. Ex 1-6). However, there is a dispute as to the periods of liability in general and also in respect to certain discriminatees.

The members of the harvest crew, who were discriminatorily discharged in January 1977, consisted of budding and harvest season employees (budders and tiers) and harvest-only employees. So their expectations of future employment would normally be restricted to those two seasons. However, General Counsel contends that based on an alleged promise by foreman Eutemio Hinojosa to several members of

the crew of employment after the 1976-77 harvest season was over, the discriminatees should also be entitled to backpay during the period between the harvest and budding seasons (January to April). In addition General Counsel claims reimbursement for backpay to those employees who did not return to work for 1977-78 harvest season or thereafter for the entire two-year period January 1977 through January 1979 (excluding the months of July, August and September).

First I will analyze General Counsel's claim that if the discriminatees had not been discharged they would have worked straight through the months between the harvest and the budding seasons. It is interesting to note that the three employees, who testified that Hinojosa had made such a promise of continued employment were the discriminatees who failed to tell the entire truth about their interim earnings: Rafael Reyes, Jose Calvan and Adolfo O. Galvan.

Rafael Reyes testified that he looked for employment for one month with Daniel Sanchez, Jr. as his own automobile was not in running order. According to his testimony, once it was repaired he continued his job search on his own for two months until he located work at Montebello in April. However, ALRB Ex 1 indicates that a day or two after his discharge at Respondent's, Reyes secured employment at the Pandol grape ranch. After I called attention to the discrepancies between Reyes' testimony and the Pandol records, General Counsel recalled Reyes and he denied working at Pandol before his employment as a budder with Montebello in April. Nevertheless, ALRB Ex 1 indicates that a day or two after Reyes left

his employ with Pandol, he went to work for the Montebello rose company and a day or two after he left Montebello he went to work for Pandol. General Counsel argues that perhaps another worker used Reyes name and social security number from January to April 1977 at Pandol's. However, it is too coincidental that the day that the suggested impostor supposedly stopped working at Pandol's, according to the payroll records, happened to be the exact day before Reyes went to work for Montebello. The only reasonable conclusion is that it was actually Reyes and not an impostor who worked at Pandol's from January until he went to work for Montebello in April.

The other two employees who testified about Hinojosa promising continued employment after the 1976-77 harvest season, Jose Galvan and Adolfo O. Galvan also concealed interim earnings subsequent to their January 1977 discharge at Respondent's. These same two employees went to work at the Salinas Cooperative in January 1977 and neither of the two mentioned that employment at the hearing. Respondent's payroll records show that Adolfo O. Galvan returned to work at Respondent's the first few days of the 1977 harvest season but he failed to mention such employment in his testimony. This discrepancy between the company's records and Adolfo O. Galvan's testimony throws further doubt on his veracity.

The fact that neither Reyes, Jose Galvan or Adolfo O. Galvan were truthful about their interim employment casts doubt on their entire testimony. This doubt plus the coincidence that 3 of the 12 discriminatee witnesses, who testified about the promise by Hinojosa of future employment, concealed a part of interim earnings,

amounts to persuasive evidence that Hinojosa did not make such statement.[19/] That conclusion is supported by the fact that Respondent employed markedly fewer employees in January, February and March of 1977 that it had in 1976.[20/] It was uncontroverted that Respondent's regular employees customarily worked during the interval period between the harvest season and the budding season and that the budders and tiers customarily returned to work ten days to two weeks before the bunding season began.

The next question to be decided is whether the discriminatees are entitled to their travel expenses that they incurred in their respective jobs searches after the January discharge.

Respondent argues that the discriminatees are not entitled to travel expenses because Respondent hired budders and tiers the next budding season and the harvest-only workers along with these same budders and tiers at the next harvest season. According to

---

19. There was a fourth employee who concealed part of his interim earnings and did not testify that Hinojosa had promised continued employment. Adolfo B. Galvan, upon being asked a question on about such alleged promise testified that he did not remember one way or the other. There were two additional employees, who did not conceal interim earnings but did testify on the issue of continued employment at Respondent's between the end of the harvest season and the beginning of the budding season. Daniel Sanchez, Jr. testified that he thought he would continue to work because Hinojosa liked his kind of work and he had work experience in roses. Rogelio Avila testified that Hinojosa said that maybe he, Avila, would remain and he thought he might because he got along well with the foreman. Regardless of these details, the significant fact remains that the three employees who claimed a promise by Hinojosa to provide continued employment were guilty of concealing part of their interim earnings.

20. 1977: 106, 60, 52, 50, 47, 34, 33, 8, 8, 21 and 20.
1976: 99, 95, 96, 76, 32, 30, 28, 29, 28, 30, and 28.

Respondent, the discriminatees are only entitled to the day and a half they lost for the 1976-77 harvest season and since in any event they would not have continued to work *at* Respondent's during the interval between the harvest season and the budding season they are not entitled to travel expenses for job-seeking during that same interval. I disagree. The discriminatees believed that they were no longer to work at Respondent's since they had been fired. Even though most of them were rehired later in the same year either at the budding season or at the harvest season, they had no way of foreseeing that eventuality during their work seeking efforts during the first few months of 1977. Therefore, in January they began to look for work in other rose companies. Perhaps if they were unable to secure employment in January at least they had a probability of going to work at another rose company during the next budding and/or harvest, season. If the discriminatees had not been fired there is a minimum likelihood that they would have looked for work at the other rose companies since they had seniority for work during the budding and harvest seasons at Respondent's. Accordingly, I find that the discriminatees are entitled to travel expenses with the exception of Rafael Reyes, Adolfo O. Galvan, Jose Galvan and Adolfo B. Galvan who misrepresented the facts about their transportation costs since all three of them secured employment shortly after their January 3, 1977, discharge from Respondent's.

In the normal course of events Respondent would have hired the budders and tiers among the discriminatees in March and April, 10 days to 2 weeks before the beginning of the budding season and the remaining harvesters along with the budders and tiers at the

next harvest season.

Adolfo B. Galvan, Rodolfo Galvan and Daniel Sanchez, Sr., returned to work as budders or tiers in March and Respondent's liability for back pay ended at that time.

There is no record evidence that would indicate that any of the harvest-only employees would have worked during the budding season so I find that they are not entitled to reimbursement of back pay during that period of time.

At the hearing General Counsel clarified that he was not requesting any reimbursement for backpay from the end of the budding season in 1Q77 and the beginning of the harvest season in October 1977 since there was no evidence that the discriminatees would have worked during those months.

Furthermore in 1978 there was no budding season as Respondent closed down its operation in December 1973 (and there is a two-year lead time between budding and the harvest of the rose bush plant.) Consequently the maximum recovery, i.e., a budder or tier would be: the 1977 budding season, the 1977-70 and 1978-79 harvest seasons. The maximum recovery for harvest-only workers would be reimbursement for the two harvest seasons 1977-78 and 1978-79.

INDIVIDUAL DISCRIMINATEES

In regard to Adolfo D. Galvan, Rodolfo Galvan and Daniel Sanchez, Jr. who returned to work on March 28, 1977, I must decide whether Respondent's duty to provide them with substantially equivalent employment compelled Respondent to rehire them before March 28. Respondent admits that it customarily hires budders and

tiers a week to 10 days before the budding season begins to perform various tasks to assure that there will be a sufficient number of budders and tiers on hand when the budding work actually commences.

In 1977 the budding season began on April 18, and therefore the three employees actually did more than 7 to 10 days work before the budding season began. In fact they worked 21 days (March 28 to April 17). Sanchez and Rodolfo Galvan confirmed that fact in their testimony. Adolfo D. Galvan testified that upon returning to work he immediately began budding but the records (G.C. 4) and the testimony of his two coworkers show otherwise. Since the three employees did return to work, as customary, some three weeks before the budding season began, Respondent is not liable for any additional back pay for this period.

Daniel Sanchez Jr. testified that when he returned to work in early March, foreman Hinojosa told him that he had been fired and there was more work for them there any more. I doubt Sanchez' testimony on this point since he was not dissuaded from continuing to return to Respondent's to ask for work and later on "in the same month he was rehired.

Jose S. Vaca who returned to work on April 4, 1977 quit after one day and returned to work at Mr. Arbor because he preferred his job there. He testified that he had secured work at Mt. Arbor within two weeks of his discharge at Respondent's and had worked there until he returned to Respondent's in April. Since he returned to work 14 days before the actual budding season began, as was Respondent's custom, he is not entitled to any additional backpay other than the day and a half he lost at the time of the

discriminatory discharge.

Jesus Oropeza and Rogelio Avila were harvest-only employees at Respondent's so they would only be entitled to reimbursement for backpay during the harvest seasons. Since they returned to work at Respondent's at the beginning of next harvest season they are entitled to only the day and a half they lost at the end 1976-77 harvest season when Respondent discharged them.

Daniel Sanchez Jr., tier, did not return to work at Respondent's during the budding season as he worked at Montebello during that period. He returned to work for Respondent at the beginning of the 1977-73 harvest season. Consequently, he would be entitled to the difference between what he earned at Montebello and what he would have earned at Respondent's. See Appendix 3 for the dollar amount which Sanchez is entitled to in this respect. Sanchez is also entitled to the 1½ days wages for the remainder of the 1976-77 harvest season.

I have discredited the testimony of Adolfo C. Galvan, Jose Galvan and Rafael Reyes. They intentionally concealed the fact that they had secured employment shortly after having been discharged at Respondent's and also misrepresented Hinojosa's promise of continued employment at Respondent's between the harvest and budding seasons.

In the American Navigation Co. case (268 NLRB No. 62) the NLRB stated that in cases where a discriminatee has intentionally concealed employment, two matters must be considered (1) Respondent's liability for the consequences of its unlawful conduct and (2) the Board's administration of its compliance proceedings consistent with public interest and that each of these factors is of

equal importance.

In balancing these factors the Board in effect decided that in situations in which a discriminatee has willfully concealed interim earnings he must be penalized to a certain extent so that there will be some deterrent effect. The Board stated:

> We note that an award of full backpay in these circumstances not only rewards the specific individual's perfidy but may also encourage deceit by others in the future, because claimants will know they have nothing to lose by concealing employment. If the concealment is undetected, the claimant enjoys a windfall; if detected, he suffers no loss but foregoes only the amount of concealed earnings, an amount to which he was not entitled in any event.

The Board went on to say that the Board should not penalize the discriminatee more than is necessary to deter because that would amount to an unjustified windfall for a respondent employer and to permit it to avoid the consequences of its unlawful conduct for no useful purpose. The Board concluded that a remedy which denies backpay for quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondent employers from committing further unfair labor practices.

In the instant case an analysis must be made of each employee's interim earnings to determine if an application of the American Navigation rule would serve as a deterrent.[21/]

---

21. The ALPB customarily utilizes a daily rather than a quarterly basis to calculate net back pay because of intermittent employment prevalent in California agriculture. So I will utilize the underlying rationale of the American Navigation case in determining any penalties for the 3 discriminatees.

Rafael Reyes would have earned more at Respondent's during the budding season than he did at Montebello, so the denial of a backpay award for the two quarters, January-March 1977 and April-June 1977 the two quarters during which he concealed interim earnings {January through the middle of April) would penalize him and serve as a deterrent.[22/]

However, with respect to Adolfo O. Galvan and Jose Galvan, the application of the American Navigation rule does not serve as a deterrent. They wilfully concealed earnings during the months of January, February and March and to deny them back pay during just that quarter and to permit then to receive a backpay award for the remaining quarters signifies no penalty whatsoever. So with the application of the American Navigation quarterly earnings rule they would have nothing to lose in wilfully concealing employment during that quarter. Such a result would not enhance the Hoard's administration of compliance proceedings consistent with the public interest, as it would certainly encourage deceit by others in the future because claimants who like, Adolfo O. Galvan and Jose Galvan, would not be entitled to any backpay award during the rest of the quarter or quarters, in which they concealed interim earnings, because there was no work available for them at an employer (between seasons), will know that they have nothing to lose by concealing

---

22. However, the result would have been the same if Reyes had been denied all backpay, other than for the day and a half lost at the time of the discriminatory discharge, since he returned to work at Respondent in the fourth quarter of 1977 and during the third quarter none of the discriminatees were entitled to any backpay because no work was available for them as the budding season had ended and the harvest season had net yet began.

interim employment. Accordingly I find that Adolofo O. Galvan and Jose Galvan be denied all back pay. They, along with Rafael Reyes, not only intentionally concealed interim earnings but also prevaricated a promise by Respondent's foreman of continued employment during the same period they wilfully concealed earnings.

Adolfo O. Galvan worked at Jackson & Perkins during the budding season and earned approximately $3,800, considerably more than he would have earned at Respondent's[23/]

In respect to Jose Galvan he may have been entitled to a backpay award from October 1977 to December 1978 for two harvest seasons and one budding season less his interim earnings at the Salinas Cooperative plus travel expenses. His brother Adolfo O. Galvan returned to work for Respondent at the end of October 1977 and quit after two days. Jose Galvan testified that he had no knowledge that his brother returned to work at Respondent's or that any other discriminatee had returned to work for Respondent. It is extremely unlikely that Jose Galvan would not have learned this fact from his brother since Jose and his family live with his brother in October and November 1977. There is also testimony that Respondent's foreman Hinojosa sent word to Jose Galvan's brothers, cousins and uncles that they all could return to work at Respondent's for the 1977-78 harvest season. So even in the remote possibility that Jose Galvan did not know of Respondent's offer of

---

23. The Jackson & Perkins documents indicates only a seasonal amount so it is impossible to discern if Galvan would have been entitled to back pay on a daily basis. If he had it would have been minimal since he would have earned only approximately $2,nno as a tier at Respondent's.

reinstatement, he should not be entitled to any back pay award since in that event there is no penalty whatsover for his misrepresenting the facts about his interim earnings and possible further employment at Respondent's, and thus no deterrent effect. However, I will leave intact the backpay award to Reyes and the two Galvan brothers for the day and one half they were denied work at Respondent's at the end of the 1976-77 harvest season to maintain a balance between the two factors mentioned in the American Navigation case of not only a deterrence to avoid concealment of interim earnings on the part of discriminatees but also a deterrence to avoid unfair labor practices on the part of employers.

Adolfo B. Galvan also failed to mention in his testimony his interim earnings at Salinas Cooperative in February and March 1977 after his January discharge at Respondent's. However, he did not testify that foreman Hinojosa had promised continued employment. He testified that he could not remember. Consequently, the evidence is not clear that he wilfully concealed interim, earnings as it is with regard to Rafael Reyes, Adolfo O. Galvan and Jose Galvan and therefor I will not deny him backpay in this respect.

However, there is the question of whether he and his brother Roberto B. Galvan would be entitled to backpay while on strike at an interim employer's. In April, Adolfo B. Galvan and Roberto B. Galvan, brothers, obtained employment at Mt. Arbor, but after working only a half a day they joined in a strike which lasted the entire budding season. General Counsel argues that the Galvan brothers' participation in the strike is not necessarily a failure to mitigate and in fact their continuing to strike would be the best

approach to take in returning to work.

It is settled ALRB and NLRB law that in order to be entitled to backpay an employee must make "reasonable efforts" to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience.

Both Adolfo B. Galvan and Roberto B. Galvan made such reasonable efforts throughout the months of January, February and March until they secured employment at Mt. Arbor. The subsequent question to be decided is whether they are entitled to backpay for the period of time they were on strike at Mt. Arbor. While they were engaged in the strike, can it be said that they were making a reasonable effort throughout the strike period to find new employment?

General Counsel argues that it was more reasonable for the Galvan brothers in their job seeking to engage in strike action rather than to stay on the job at Mt. Arbor. General Counsel further argues that the two brothers did not search for employment elsewhere during the strike because they thought it might take them longer to get back to work if they abandoned participation in picketing duty.

According to NLRB precedent an employee is able to go on strike against an interim employer without losing his right to backpay as long as he continued to make some effort to look for alternative employment.

In Abatti Farms, Inc., 9 ALRB Mo. 59, the Board found that two employees were entitled to backpay while participating in a

strike against an interim employer but found that the two employees had searched for interim employment during the strike and therefore had not been willfully idle even though they had participated in picketing activities.

In Nabors v. N.L.R.B. (5th Cir. 1966) 323 F.2d 686 [54 LRRM 2259], cert. den. 376 U.S. 911 [55 LRRM 2455] (1964), the Board decided that an employee was entitled to backpay even though he did not work for his interim employer because of a strike as the record showed that he looked for other work during this period. In N.L.R.B. v. Rice Lake Creamery (D.C. Cir. 1966) 365 F.2d 888, 894 [62 LRRM 2336], the Board found that the employee should receive backpay during a period when he was picketing as the record did not indicate that the picketing prevented him from searching for other employment.

In the instant case, Adolfo B. Galvan and Roberto B. Galvan admitted in their testimony that they failed to look for alternative employment while they were on strike and picketing the interim employer Mt. Arbor. Although they were on the picket line 8 or 10 hours a day, as they testified, they still had the opportunity to seek employment during the time before and after the picketing duty.[24/] in Abatti, supra, the discriminatee always looked for work early in the morning before joining the strike activity. Accordingly, I find that Adolfo B. Galvan and Roberto B. Galvan

---

24. Adolfo B. Galvan testified that it was not too late in the season for them to secure employment at another rose company in the area. He also testified that the strike began only one-half day after the budding season started so it is evident it would have been worthwhile to check for job openings with the other rose companies in the area.

failed to make reasonable efforts to find new employment and therefore are not entitled to back pay during the time they were on strike.

There still remains the question of the backpay award for the four discriminatees who were missing at the tine of the hearing: Luis Bautista, Roberto Galvan Chavez, Oscar Esparza and Efren Garcia.

The four of them were harvest-only employees so at most they would only be entitled to backpay during the two remaining harvest seasons at Respondent's in addition to the 1½ days lost work in January 1977 when Respondent discriminatorily discharged them.

Respondent argues that the four should only be entitled to the 1½ days pay and nothing additional for the two harvest seasons since Respondent properly made valid offers of reinstatement to all the discriminatees for the 1977 harvest season. To support its argument Respondent points to the evidence concerning the mailing of the certified letters (return receipt requested) in the fall of 1977 just before the harvest season began. I find that Respondent sent the letters as general manager Anderson credibly testified to having instructed his secretary to do so, actually observed her do so and saw some of the certified letters returned. However, everyone of the 12 discriminatees, called by General Counsel as witnesses, testified that they did not receive the letter. Furthermore, Anderson admitted that he failed to check whether the addresses on the envelopes conincided with the names on the lists of discriminatees. Respondent employed other harvest crews so the secretary could have mailed the certified letters to members of

another crew. Therefor, I find Respondent has failed to meet its burden of proof in respect to mailing out offers of reinstatement to the 16 discriminatees including the four discriminatees who could not be located at the time of the hearing. Accordingly, the four discriminatees, Luis Bautista, Roberto Galvan Chavez, Oscar Espanza and Efren Garcia, are entitled to backpay for the two harvest seasons. I recommend that the amounts awarded to the four discriminatees to recompense them for their lost wages for the 1½ days at the end of the 1976-77 harvest season and for the entire 1977-78 and 1978-79 harvest seasons,[25/] be held in escrow by the Regional Director, who is to make suitable arrangements to accord the Respondent, together with the General Counsel's representative, an opportunity to examine them as to any interim earnings or any other factors which may reduce the amount of backpay due under existing Board precedent. In the event the Regional Director determines that deductions are warranted, the amount so deducted shall be returned to the Respondent. I further recommend that the Regional Director be instructed to report to the Board when these matters have been finally resolved, and in any event, no later than one year from the date of the Board's supplemental decision in this regard.

The backpay and transportation costs due each of the

---

25. See Appendix C for exact amounts

members of the harvest crew discriminatorily discharged on January 3, 1977, is reflected in Appendix A attached hereto.

DATED: March 9, 1984

ARIE SCHOORL
Administrative Law Judge

APPENDIX A

| | TRANSPORTATION* COSTS | | | |
|---|---|---|---|---|
| Rogelio Avila | $150.00 | 1½ days | x $32.50 | $48.75[26/] |
| Adolfo B. Galvan | | 1½ days | x $32.50 | $48.75 |
| Adolfo B. Galvan | $ 80.00 | 1½ days | x $32.50 | $48.75 |
| Adolfo O. Galvan | | 1½ days | x $32.50 | $48.75 |
| Jose Galvan | | 1½ days | x $32.50 | $48.75 |
| Roberto B. Galvan | $400.00 | 1½ days | x $32.50 | $48.75 |
| Rodolfo Galvan | $400.00 | 1½ days | x $32.50 | $48.75 |
| Jesus Oropeza | | 1½ days | x $32.50 | $48.75 |
| Rafael Reyes | | 1½ days | x $32.50 | $48.75 |
| Daniel Sanchez, Sr. | $350.00 | 1½ days | x $32.50 | $48.75 |
| Daniel Sanchez, Sr. | $180.00 | 1½ days | x $32.50 | $48.75 |
| Jose Socorro Vaca | | 1½ days | x $32.50 | S48.75 |

*TRANSPORTATION EXPENSES. I have determined that each discriminatee is entitled to reimbursement for the amount of money beside each name respectively. I based the amounts on the credible testimony of each discriminatee and the fact that the amount testified to is reasonable. Jesus Oropeza and Jose S. Vaca failed to mention any transportation costs in their testimony. I already have decided not to reimburse Adolfo B. Galvan, Adolfo O. Galvan, Jose Galvan and Rafael Reyes because they concealed facts about their interim earnings.

---

26. Adjustment for make whole compensation has not been made because of the reason stated in the body of my decision. (See P. 21.)

APPENDIX C

Backpay Due Luis Bautista, Oscar Esparaza, Poberto Galvan Chavez and Efren Garcia

| | |
|---|---|
| l½ days (end of 1976-77 harvest season) | $ S32.50 |
| | $ 48.75 |
| 1977-78 Harvest Season | |
| October 31, 1977 | $ 32.50 |
| November 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 28, 29, 30 x $32.50 per day | $715.00 |
| December 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 19, 20, 21, 22, 30 | $520.00 |
| December 10, 16 x $9.75 | $ 19.50 |
| December 23 x $13.00 | $ 13.00 |
| December 26 x $26.00 | $ 23.00 |
| December 29 x $19.50 | $ 19.50 |
| January 2, 3, 4, 5, 6 x $32.50 | $162.50 |
| January 7 x $19.50 | $ 19.50 |
| 1978-79 Harvest Season | |
| October 30, 31 x $31.05 | $ 62.10 |
| November 1, 2, 3, 6, 7, 8, 9, 10 x $31.05 | $243.40 |
| November 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29 x $34.50 | $448.50 |
| December 4, 5, 6, 7, 8, 11, 12 x $33.00 | $231.00 |
| Total | $2,517.50 |

In the event one or more of these discriminatees are located the question of interim earnings and transportation costs is still open for determination.

APPENDIX B

Daniel Sanchez, Jr.

| Date (1977) | Gross Wages | Interim Earnings | Net Backpay |
|---|---|---|---|
| April 21 | $61.57 | $49.58 | $11.99 |
| April 23 | $61.43 | 0 | $61.43 |
| April 26 | $53.40 | $51.16 | $ 2.24 |
| April 27 | $63.22 | $51.16 | $12.06 |
| April 30 | $18 .75 | 0 | $18.75 |
| May 3 | $61.99 | $60.29 | $ 1.70 |
| May 5 | $60.56 | $60.29 | $ 0.27 |
| May 7 | $31.09 | 0 | $31.09 |
| May 11 | $76 .30 | 0 | $76.30 |
| May 14 | $40. 22 | 0 | $40.22 |
| May 19 | $68.56 | $66.52 | $ 2.04 |
| May 21 | $ 6.10 | 0 | $ 6.10 |
| May 24 | $55 .89 | $49.32 | $ 6.57 |
| May 25 | $73.47 | $49.32 | $24.15 |
| May 28 | $56.01 | 0 | $56.01 |
| May 31 | $42.78 | $31.00 | $11.78 |

The net backpay has been calculated on a daily basis pursuant to General Counsel's specification. Respondent has not disputed this method of calculation and I find it to be reasonable and in accord with the standards set forth in previous ALRB decisions.