Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and ODIS WILLIAM SCARBROUGH, Charging Party.	)	Case No. 80-CL-4-SAL 12 ALRB No. 23 (9 ALRB No. 17) (8 ALRB No. 103)

DECISION AND ORDER

On April 15, 1983, the Agricultural Labor Relations Board (Board) issued a Supplemental Decision and Order in this proceeding (9 ALRB No. 17) modifying the original disposition (8 ALRB No. 103) finding that the United Farm Workers of America, AFL-CIO (Respondent or UFW) had violated Labor Code section 1154 (b)[1/] by denying Odis Scarbrough (Charging Party or Scarbrough) due process in the suspension of his union membership which resulted in his layoff from Sun Harvest, Inc. on September 4, 1979, and his discharge on January 8, 1980. The Board ordered Respondent to make Scarbrough or his estate[2/] whole for all losses of pay and other economic losses suffered as a result of Respondent's discrimination. The backpay period runs from September 4, 1979 to September 27, 1979 (the period of Scarbrough's layoff), and from

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

[2/] Mr. Scarbrough died during the pendency of his case, prior to the backpay hearing.

January 8, 1980 to May 18, 1981 (the period from Scarbrough's discharge until his reinstatement).

A hearing was held on June 25, 1985, before Administrative Law Judge (ALJ) Stuart Wein for the purpose of determining the amount of backpay due to Charging Party. Thereafter, on August 28, the ALJ issued his Decision, attached hereto. Respondent and Charging Party each filed timely exceptions and briefs to the ALJ's Decision. The General Counsel filed no exceptions.

Pursuant to the provisions of section 1146, the Board has delegated its authority in this matter to a three-member panel.[3]/

We have considered the record and the ALJ's Decision in light of the exceptions, supporting and reply briefs and have decided to affirm the ALJ's rulings, findings and conclusions, as modified herein, and to adopt his recommended Order, with modifications. Willful Loss of Interim Earnings

The ALJ found that Scarbrough did not willfully lose earnings on three occasions when he voluntarily left interim work. The ALJ recommended that no deductions from gross backpay be assessed against Scarbrough to which Respondent has taken exception.[4]/

---

[3]/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.

[4]/There is a question as to whether one of Respondent's exceptions covers Scarbrough's departure from interim work on May 15, 1981. When Respondent filed its exceptions, it asserted that its entire argument on the issue of willful loss of earnings

(fn. 4 cont. on p. 3)

The crux of this issue concerns the validity of Scarbrough's reasons for quitting his interim jobs those three times. But, unfortunately, due to his death, the record is very sketchy as to precisely why he chose to leave work. The only evidence on the subject is contained in a stipulation. The parties stipulated that if allowed to testify, witnesses would assert: (1) that Scarbrough worked for Gene Ferraro Land Leveling from September 17, 1979 to September 21, 1979, and that for unknown reasons voluntarily left work when, in fact, work would have been available to him from September 24, 1979 to September 27, 1979;(2) that he left work at Western Farm Services on February 15, 1980, in anticipation of reemployment with Sun Harvest (he returned to Western Farm Services on March 3, 1980); and (3) that on May 15, 1981,[5/] Scarbrough again left the employ of Western Farm Services, this time because of a conflict with another employee.

Federal courts have held that an employee who voluntarily

(fn. 4 cont.)

had been presented on pages 5-6 of its post-hearing brief. But reference to those pages of that brief reveals that Respondent did not address the May 15, 1981 quit. Charging Party argues that as a result, the May 15 departure is not before the Board. However, a review of Respondent's exceptions reveals that it did except to the ALJ's conclusion that, "... Mr. Scarbrough did not willfully lose interm (sic) earnings ..." and referenced for support thereof pages 22-24 of the ALJ's Decision. (UFW's Exceptions to Administrative Law Judge's Decision, p. 2.) Pages 22-24 of the ALJ's Decision include a discussion of the May 15 quit. We conclude, therefore, that the UFW's exception is broad enough to include this event.

[5/]The Stipulation of the Parties incorrectly refers to a 1980 date. (R.T. p. 24.) The ALJ made the proper correction in his Decision. (ALJD, p. 23; Appen. A, pp. 32, 44.)

quits alternative employment without good reason is not entitled to backpay for the period he is off work. The "willful loss of earnings" doctrine was developed in Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177 [8 LRRM 439]. In Phelps Dodge, the Supreme Court stated:

> Since only actual losses should be made good, it seems fair that deduction should be made not only for actual earnings by the worker but also for losses which he willfully incurred. (Id. at p. 198.)

As to what constitutes a willful loss of earnings, Judge Lumbard, in a Second Circuit decision, stated that:

> It is accepted by the Board and reviewing courts that a discriminatee is not entitled to backpay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason. (NLRB v. Mastro Plastics Corportation (2d Cir. 1965) 354 F.2d 170, 174, fn. 3 [60 LRRM 2578], cert. den. (1966) 384 U.S. 972, emphasis added.)

It is often problematic to determine what is a "good reason" for leaving one's interim employment, and it is often difficult to construct a consistent standard. (See Bruce Church, Inc. (1983) 9 ALRB No. 19, ALJD, p. 18.) This is quite possibly because the discriminatee[1]s reasons for leaving are often a mix between perceptions of burdensome conditions and personal convenience. However, the National Labor Relations Board (NLRB) enunciated appropriate guidelines in Knickerbocker Plastic Company, Inc. (1961) 132 NLRB 1209 [48 LRRM 1504], which we adopt herein. In that case, which dealt with a variety of factually different situations, the national board held:

> From the foregoing, it is clear that the jobs which the above-listed claimants quit paid wages at least comparable to the ones they had held with the Respondent. None of these jobs appear to have been more burdensome than those with the Respondent, nor do they appear to have been unsuited to persons of the claimants' skill and experience. We find that in none of the cases discussed above has the claimant quit her employment for sufficient and justifiable cause. In all these cases, the claimants appear to have been motivated more by personal convenience, preference, or accommodation than by necessity or difficulties inherent in the jobs which they quit. This is apparent on the face of many of the explanations and reasons assigned for quitting. In other cases, there is no corroboration of the alleged difficulties nor any assertion by the claimants that other employees were similarly affected because the work was malodorous or otherwise inconvenient or distasteful. On this record, we cannot mitigate the backpay damages by finding that these jobs were unsuitable ways of earning a living, or that the claimants were justified in quitting them with no prospect of other employment. Once these claimants had obtained jobs/ they could not voluntarily relinquish such employment under the circumstances herein involved without incurring what constitutes a willful loss of earnings for the period subsequent to their quitting. (Id. at pp. 1214-1215.)

With this standard in mind, we now turn to a discussion of the three occasions on which Scarbrough voluntarily left his interim employer.

The Departure on May 15, 1981, Due to a Conflict with Another Employee

We do not believe that Scarbrough's leaving can be justified here because his conflict with a co-worker was a matter of mere convenience to him and did not rise to the level of necessity. Scarbrough did not leave his interim employer because he was unable to perform the work, because he found the work distasteful or difficult, or because of lower pay. There is no evidence that this job was any more burdensome than his previous work at Sun.Harvest or that it was unsuited to his skill or

experience. Nor does the record reveal any efforts by him to resolve the conflict with the co-worker or to request from his supervisor a transfer to another position. Likewise, there is no indication that other employees experienced similar difficulties with this particular individual. Rather, it appears that the sole reason for his departure from work was simply a personal dispute between Scarbrough and another employee and was not related to any problem inherent in the job. But for this personal conflict, there is no reason to believe that he was not otherwise happy with his work and would have continued his employment there. Thus, we conclude that Scarbrough engaged in a willful loss of work by quitting his interim employment for reasons not based on necessity or difficulties inherent in the job. (Knickerbocker Plastics, supra, 132 NLRB 1209; see also Shell Oil Company (1975) 218 NLRB 87 [89 LRRM 1534].)[6/]

The ALJ found that all the voluntary quits were justified based on the record as a whole which reflected Scarbrough's generally successful efforts to retain interim employment. We disagree that this consideration should be relevant here. It is

---

[6/]Member Carrillo concurs that the stipulated reason for Scarbrough' s departure from work on May 15, 1981 (i.e., a conflict with a co-worker), is insufficient to rebut Respondent's prima facie showing of a willful loss of earnings. However, he bases his conclusion on the inadequacy of the stipulation, namely that a "conflict," without more explanation, does not meet the Charging Party's burden of showing that the discriminatee's voluntary quit of his interim employment was related to securing other equivalent interim employment or to the nature of the departed interim employment. (See Holiday Radio, Inc. d/b/a KSLM-AM and KSD-FM (1985) 275 NLRB No. 184, slip opn. p. 6 [120 LRRM 1013].) The stipulation does not describe in any detail what the nature of the conflict was; however, it is pure speculation on the part of the majority to infer that the reason was strictly personal.

our view that Scarborough's overall good record in searching for or retaining interim employment should not transform a nonjustifiable relinquishment of interim employment into a justifiable one because this factor has no bearing on the determination of whether the voluntary quit was in fact justified. If the reason for leaving the interim employer was personal or a matter of mere convenience, Scarbrough's prior record of diligence should be irrelevant to the threshold determination. A quitting should be characterized as justifiable or not justifiable based on the reasons for leaving that particular job. (Knickerbocker Plastics, supra, 132 NLRB 1209.)

The ALJ also found that, without more evidence than the stipulation, it was impossible to characterize any of the voluntary departures from employment as unjustified; in short, that Respondent had failed to carry its burden of proof that Scarbrough's lost earnings were willful. We believe that Respondent did carry its burden on this issue. Once the General Counsel has shown a loss of earnings resulting from the discrimination, the burden shifts to the Respondent to establish a reduction in the amount of the backpay award for reasons unrelated to the discrimination. (S & F Growers (1979) 5 ALRB No. 50, citing NLRB v. Brown & Root, Inc. (8th Cir. 1963) 331 F.2d 447 [52 LRRM 2115]; see also NLRB v. Miami Coca-Cola Bottling Company (5th Cir. 1966) 360 P.2d 569 [62 LRRM 2155].) Here, Respondent was able to make a prima facie showing of a willful loss by demonstrating that: (1) Charging Party had obtained interim employment; (2) he voluntarily departed from that employment; and

(3) the stipulated reason for his departure, a personal conflict with another employee, was not related to the nature of the job or the prospect of obtaining better employment. At that point, the burden shifted back to the General Counsel to rebut the evidence that Charging Party's loss of work was willful, in this case, to show that the conflict made the new job totally unacceptable despite any attempts at resolution. But, the General Counsel was unable to show this and failed to rebut Respondent's evidence.

In Holiday Radio, Inc. d/b/a KSLM-AM and KSD-FM, supra, 275 NLRB No. 184, the national board held that it was not a respondent's evidentiary burden to explain and clarify the personal reasons motivating a charging party's quit: "... where, as here, no evidence whatsoever is presented that the voluntary resignation is attributable to anything other than obscure personal desires unique to the claimant, it is inappropriate to place on the Respondent the burden of affirmatively establishing a negative; i.e., that the nature of the interim employment was not a reason for the resignation or that the personal reasons of the claimant were not justified." (Id. at p. 6, fn. 13.)

For these reasons, we conclude that in calculating the backpay award, the ALJ erred in not including an offset for the amount that Charging Party would have earned at Western Farm Services on May 16, 1981 (the first day he did not show up for work), and May 17, 1981 (the day before the end of the backpay

//////////////

//////////////

period.)[7/] However, as there was no backpay owing for the quarter, there is no reduction in backpay.

The Departure on February 15, 1980, in Anticipation of Reemployment with Sun Harvest

We affirm the ALJ. The departure on February 15, 1980, was justifiable in that Scarbrough was attempting to get his old job back. Leaving work in anticipation of receiving an offer of reinstatement, in the absence of evidence that thereafter the discriminatee failed to make a diligent search for work, is not a willful loss of earnings as defined in Miami Coca-Cola Bottling Company (1965) 151 NLRB 1701 [58 LRRM 16753. Respondent therefore failed to carry its burden of showing that Scarbrough's voluntary departure from this interim employer was a willful loss of earnings. The Departure on September 17, 1979, for Unknown Reasons

We affirm the ALJ. Here again, Respondent could offer no further evidence beyond the stipulated fact of unknown reasons for

---

[7/]In drawing this conclusion, we are not unmindful of our ruling in Abatti Farms, Inc. (1983) 9 ALRB 59, ALJD, pp. 38-40. In Abatti, a discriminatee had quit because she did not get along with her co-workers, testifying that they blamed her for their performance and that the supervisor gave them preference over her. The ALJ found, and the Board affirmed, that a review of her entire employment history following her termination by the Respondent indicated that she was not prone to idleness but, rather, was reasonably diligent in seeking work through the backpay period, and that she chose to leave the job in question for reasons directly related to her perception of working conditions which was not unreasonable or indicative of willful idleness. We find the conclusion in that case inapplicable here as it was the supervisor's conduct which made the job burdensome and unacceptable to the discriminatee and not a personal desire to leave. Futhermore, the supervisor's attitude made any resolution of the problem a futile act.

the departure and did not carry its burden. Respondent failed to show that Scarbrough's voluntary departure was a willful loss.

Union Dues

The record in the underlying case established that under the collective bargaining agreement then in existence between Sun Harvest and Respondent, union membership in good standing was required for continued employment and that pursuant to that agreement, Sun Harvest deducted (and would have continued to deduct had he remained an employee) two percent from Scarbrough's pay check as union dues. While Scarbrough worked at his interim employment, however, he was not required to make any such two percent contribution. Therefore, Respondent argues that Scarbrough's gross backpay should be adjusted downward by the two percent figure.

The ALJ rejected this argument, reasoning that the appropriate rule should be to allow the discriminatee to deduct expenses in seeking and maintaining employment only to the extent that such expenses exceeded the expenses that would have been incurred absent the discrimination. As Scarbrough made no claim for reimbursement for union dues incurred in seeking or maintaining interim employment, there would be no offset to compensate for his not having had to pay union dues to Respondent during the period in question. We affirm the ALJ.

In L. B. Hosiery Co., Inc., d/b/a Myerstown Hosiery Mills (1952) 99 NLRB 630 [30 LRRM 1115], two women paid the respondent company a weekly sum for the care of their children while they were at work. They did not have this expense, however, following their

illegal discharge by respondent. Respondent claimed that this child care "savings" should be credited to it. In denying the claim for offset, the NLRB held that, "[p]ersonal or domestic economies of these individuals necessitated by the Respondent's unlawful deprivation of employment does not redound to the Respondent's credit." (Id. at p. 632.) In East Texas Steel Castings Company, Inc. (1956) 116 NLRB 1336, 1341-42, enforced (5th Cir. 1958) 255 F.2d 284 [38 LRRM 1470], the respondent took the position that the discriminatee[1]s transportation expenses (to and from the company plant) that would have been incurred if he had continued in the respondent's employ, should be deducted from his gross backpay. Citing L. B. Hosiery, supra, 99 NLRB 630, the NLRB denied the offset claim. Similarly, a respondent union was denied its claim that the discriminatees' backpay award should be reduced by the amount of transportation, lodging and food expenses that they would necessarily have paid out of their wages on the job site in NLRB v. Laborers' Int. Union of North America (5th Cir. 1984) 748 F.2d 1001 [118 LRRM 2062]. Citing East Texas Steel Casting Co., supra, 116 NLRB 1336, the court held that the benefits to the discriminatees were collateral in nature, personal and the result of the discrimination.

In its exceptions, Respondent argues that the above cases deal with personal expenses (board, lodging, child care, transportation) and should be distinguished from union dues. Respondent asserts that personal expenses are always hard to calculate with any degree of certainty since, by their very nature, they are susceptible to change during the backpay period, while the union

dues are always *a.* specific amount out of each paycheck and cannot be varied by Charging Party. According to Respondent, because dues are a specific and mandatory expense that Charging Party would have had to pay to maintain his employment, the ALJ's refusal to deduct the union dues from Charging Party's backpay results in an unreasonable and arbitrary inflation in gross backpay in the amount of two percent.

This view is not well-taken. A reading of the cited cases indicates that, in at least two of them, the expenses were clearly defined. But more importantly, it is illogical to base distinctions about whether backpay awards should be reduced or increased on the mere difficulty of ascertaining expenses in uncertain situations. Such a distinction did not dictate the results in the cited cases.

We agree with the ALJ that, had Scarbrough been required to pay union dues during the time he worked for the interim employers and made a claim for reimbursement, Respondent would have been allowed to offset the dues he would have had to pay had he remained with Sun Harvest. As Scarbrough made no such claim for union dues reimbursement, there should be no offset for the "savings" to him of not having had any dues deducted.

In any event, it would seem particularly inappropriate to award Respondent an offset for union dues Scarbrough did not have to pay because of his absence from employment at Sun Harvest because it was Respondent that was unlawfully responsible for that very absence. Such a result would reward Respondent for its own wrongdoing and, in addition, would require Scarbrough to pay (two

percent of his wages) for something that was never performed (union services).

Medical Expenses

During the backpay period, Scarbrough incurred medical bills totaling $12,706.73, which were all paid by an insurance company selected by him during the period of his interim employment. Had Scarbrough maintained his union membership and continued to be employed by Sun Harvest during this time, all his medical bills would have been paid by the Robert F. Kennedy Medical Plan, a fringe benefit provided for under the UFW/Sun Harvest collective bargaining agreement in effect at the time. Scarbrough contends that, in addition to the insurance premiums incurred during the period he was not covered by the UFW's Robert F. Kennedy Medical Plan, the UFW should also be liable for the medical bills which were paid by the substitute insurance carrier. The ALJ found that only the expense of the premium costs incurred ($848.58) was chargeable to the UFW. We affirm the ALJ's ruling.

Scarbrough takes the position that his purchase of a "substitute" insurance policy was a "collateral benefit", was done independently of his interim employment, and was not compensation for services performed. As such, the UFW is liable to him for the $12,706.73 medical expense despite the fact that he received full reimbursement in this amount from the substitute carrier.

For this proposition, Charging Party relies on Medline Industries, Inc. (1982) 261 NLRB 1329 [110 LRRM 1280]. In Medline, the discriminatee lost his medical coverage upon his unlawful discharge and chose not to purchase substitute insurance during

his interim employment. When he was seriously injured in an automobile accident and accumulated medical expenses of over $25,000, his father paid all the bills. The discriminatee's father testified that he was never reimbursed for his payment of his son's expenses but that his son had orally agreed to reimburse him if any award of damages were forthcoming from the NLRB. The NLRB held that the father's payment of the medical expenses was not deductible from the discriminatee's gross backpay because it was a collateral benefit:

> ... it is settled law that collateral benefits, such as unemployment compensation and union strike benefit payments, are not deductible as interim earnings or other offset against gross backpay, even when the amount of such collateral benefits equals or exceeds the gross backpay claim. 'Since no consideration has been or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.' Gullett Gin Company v. N.L.R.B. 340 U.S. 361, 364 (1951). Robert Kenney's action in paying his son's medical expenses, whether such payment be deemed as a gift, loan, conditional loan or the meeting of a moral obligation to one's offspring, constituted a collateral benefit which is not an offset against Mark Kenney's claim for lost benefits, because such payment did not constitute compensation to Mark Kenney for services performed. N.L.R.B. v. My Store, Inc., 468 F.2d 1146, 1149-50 (7th Cir. 1972), cert, denied 410 U.S. 910 (1973); Associated Transport Company of Texas, Inc., 194 NLRB 62, 73 (1971) (Medline, supra, 261 NLRB 1329, 1337.)

Here, Charging Party never explained why the substitute insurance obtained, the consideration for which was the payment of premiums, should, as a matter of law, constitute a collateral benefit. To credit Scarbrough for medical expenses already reimbursed when there has been no additional out of pocket loss (except for the insurance premiums he had to pay to obtain the

coverage for which he is being reimbursed) would bestow upon him a windfall benefit to which he is not entitled.

For some time it has been the policy of the NLRB and federal courts to make the innocent victims of discrimination whole for the losses actually suffered. Reimbursement of those losses is logically tied to the actual, out of pocket consequences of the wrongdoer's conduct. In NLRB v. Rice Lake Creamery Co. (B.C. Cir. 1966) 365 F.2d 888, [62 LRRM 2332], the court held that hospital and medical expenses should be included in the backpay so as to make the employees whole so long as an amount equal to the premium the employees would have been required to pay was deducted. The court also held that the company was entitled to deduct premiums the employees would have had to make whether or not medical expenses were actually incurred; "... otherwise they would be unjustly enriched...." (Id. at p. 893.) In Sam Tanksley Trucking, Inc. (1974) 210 NLRB 656 [86 LRRM 1446], medical expenses were assessed against the company (minus the premiums that would have been paid) citing NLRB v. Lake Creamery, supra, 365 F.2d 888 because the discriminatee carried no insurance from a substitute carrier. The discriminatee testified that neither he nor his interim employer could afford substitute insurance. In Saginaw Aggregates, Inc. (1972) 198 NLRB 598 [81 LRRM 1025], the employer had to pay medical expenses that would have been covered under its insurance plan because the discriminatee could not obtain alternate coverage for a preexisting condition. (See also Local Union No. 418, Sheet Metal Workers' International Association (1980) 249 NLRB 898 [104 LRRM 1503] [labor union required to reimburse the

discriminates for his costs in obtaining other insurance to replace that which had been denied him]; and Angelus Block Co., Inc. (1980) 250 NLRB 868 [105 LRRM 1141] [discriminatees made whole by being reimbursed for any medical or dental expenses paid directly to health care providers that would have been covered, as well as any premiums they may have paid to "third-party insurance companies" to continue medical and dental coverage in the absence of the employer's required contributions].)

No precedent exists to authorize payment to Scarbrough for medical expenses for which he has already been fully reimbursed by the substitute carrier, and we decline to adopt such a rule here. To do otherwise would be to punish Respondent rather than to focus on making the discriminatee whole.[8/]

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent United Farm Workers of America, AFL-CIO to pay Odis Scarbrough the amount of $2,638.84 in backpay and $848.58 reimbursement for medical insurance premiums, plus interest on such amounts computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

Dated: November 18, 1986

JYRL JAMES-MASSENGALE, Chairperson

JOHN McCARTHY, Member

JORGE CARRILLO, Member

[8/]As we have denied the exception, Charging Party's "Motion to Reopen Record" is likewise denied.

CASE SUMMARY

United Farm Workers of America,
AFL-CIO,
(Odis Scarbrough)

12 ALRB No. 23
Case No. 80-CL-4-SAL

ALJ DECISION

A hearing was held for the purpose of determining the amount of backpay due the Charging Party as a result of Respondent's arbitrary suspension of his union membership and subsequent layoff. The ALJ recommended use of the NLRB's quarterly formula rather than the daily formula as suggested by General Counsel since the daily formula unreasonably inflated the backpay owing. The ALJ also found that Charging Party did not willfully lose interim earnings when he voluntarily left work and consequently recommended no backpay deductions. The ALJ examined Charging Party's expenditures related to substitute health insurance and subsequent medical bills resulting from Charging Party's illness. Relying on the compensatory purpose of backpay awards and on the inapplicability of the collateral source rule, the ALJ found no additional out-of-pocket losses suffered by the Charging Party, apart from the additional insurance premiums, and recommended that the Board disallow a reimbursement for medical bills paid by the supplemental insurance carrier.

Finally, the ALJ recommended against Respondent's request for a setoff in an amount equal to the union dues Charging Party would have been required to remit had he not been discharged. The ALJ reasoned that it would be incongruous for the Union to receive credit for money not collected during the discriminatee's absence from work when it was the Union that had unlawfully caused the absence.

BOARD DECISION

The Board began its analysis by examining the ALJ's finding that Charging Party did not willfully lose earnings when he voluntarily left interim employment on three separate occasions. After determining that the crux of the issue concerned the validity of Charging Party's reasons for quitting those three times, the Board reviewed the federal doctrine on willful loss of earnings. Noting the difficulty surrounding the Board's determination of a "good reason" for leaving interim employment, the Board relied on the NLRB guidelines balancing a discriminatee's perceptions of burdensome conditions and personal convenience, as enunciated in Knickerbocker Plastic Company, Inc. (1961) 132 NLRB 1209 [48 LRRM 1504]. The Board proceeded to apply the federal standard to Charging Party's May 15, 1981 departure, due to a conflict with another employee. Overruling the ALJ, the Board held that Respondent carried its burden of proving that Charging Party engaged in a willful loss of work by quitting interim employment for reasons other than necessity or difficulties inherent in the job.

The Board, finding that Respondent failed its burden of proof, affirmed the ALJ's determination that Scarbrough did not willfully lose earnings for purposes of the Act when he left employment on February 15, 1980, in anticipation of an offer of reinstatement, and when he left employment for unknown reasons on September 15, 1979.

The Board also affirmed the ALJ's refusal to offset union dues Charging Party was not required to pay due to his absence from employment caused by Respondent. The Board believed this conclusion to be in line with the NLRB rule that personal or domestic economies caused by respondent's illegal acts did not redound to respondent. Moreover, the Board noted that Charging Party did not claim a reimbursement for union dues at the interim employers; consequently, there could be no offset for his "savings."

The Board, recognizing that no precedent existed authorizing payment to Charging Party for medical expenses which had been fully reimbursed by a substitute carrier, declined the opportunity to expand the backpay remedy. As a result, the Board affirmed the ALJ's award only of the premium expense incurred in maintaining the substitute insurance plan.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS

BOARD

In the Matter of:

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondent,

and

ODIS SCARBROUGH, an individual,

Charging Party.

Case No. 80-CL-4-SAL
(9 ALRB No. 17) (8 ALRB No. 103

Appearances:

Paul Lafranchise
of Salinas, California
for the General Counsel

Chris A. Schneider
of Calexico, California
for the Respondent

Nigel S. Maiden
Robin Rivett
Pacific Legal Foundation
of Sacramento, California
for the Charging Party

Before: Stuart A. Wein
Administrative Law Judge

SUPPLEMENTAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE

STUART A. WEIN, Administrative Law Judge:

On 15 April 1983, the Agricultural Labor Relations Board issued a Supplemental Decision and Order[1] in the above-captioned proceeding (9 ALRB No. 17) finding that Respondent UFW violated Labor Code section 1154(b) by denying Odis Scarbrough due process in the suspension of his union membership which resulted in Mr. Scarbrough's layoff from Sun Harvest, Inc., on September 4, 1979, and discharge on January 8, 1980. The Board directed,[2/] inter alia, that Respondent make whole Odis Scarbrough or his estate, for all losses of pay and other economic losses he has suffered as a result of Respondent UFW's discrimination against-him on 4 September 1979 and 8 January 1980.

By published decision of 24 May 1984 (Pasillas v. A.L.R.B. (1984) 156 Cal.App.3d 312), the Court of Appeal for the First Appellate District, Division Two, ordered enforcement of the Board orders in 8 ALRB No. 103 and 9 ALRB No. 17. Hearing was denied by the California Supreme Court on August 8, 1984.

The parties were unable to agree on the amount of backpay due Mr. Scarbrough, and on 5 June 1985, the Regional

---

[1] The Board's Order in 9 ALRB No. 17 modified the original disposition of the Charging Party's case (Case No, 80-CL-4-SAL) which was reflected in the Decision and Order in United Farm Workers of America, AFL-CIO, (Severe Pasillas, et al. (1982) 8 ALRB No. 103.

[2] Mr. Scarbrough died during the pendency of his case. (See 9 ALRB No. 17, p. 3, fn. 3.)

Director of the ALRB (Salinas) issued a partial[3] backpay specification. The Respondent filed an answer on 18 June 1985. A hearing was held before me in Salinas, California, on 25 June 1985, during which the specification was amended orally, the parties defined the areas of controversy, and one witness was called to testify.[4] All parties were given a full opportunity to participate in the hearing, and General Counsel, Charging Party, and Respondent filed post-hearing briefs pursuant to 8 Cal. Admin. Code section 20278.

I. ISSUES

By way of pleadings, motions, stipulations, or references in post-hearing briefs, the parties have placed at issue the following:

A. Methodology of Backpay Calculations

General Counsel and Charging Party contend that backpay should be calculated on *a.* daily basis, with no setoffs for interim earnings on days of employment for which no gross earnings would be expected. Respondent suggests

---

[3] The specification was issued without reference to insurance benefits, death benefits, and pension benefits, if any, due and owing Mr. Scarbrough. The amounts claimed for these items were identified at prehearing conference on the morning of the hearing and will be included in the discussion of the issues and findings, infra.

[4] Terry Foster Isherwood testified re the nature of Mr. Scarbrough's duties during his primary interim employment at Western Farm Services, Inc.

that all interim earnings should be deducted from the gross amount owing, with the calculations done on a yearly basis.

B. Medical/Insurance Expenses

Charging Party contends that in addition to the premium charges incurred by Mr. Scarbrough during the period he was not covered by the Union's Robert F. Kennedy Medical Plan, Respondent should also be liable for the medical bills which were paid by the substitute insurance. Respondent concedes only that the expenses for premiums may be legitimately claimed.

C. Union Dues

Respondent requests that 2% of the gross backpay owing Mr. Scarbrough be deducted for Union dues which the discriminatee would have paid had he remained working at Sun Harvest, Inc. Charging Party objects to any setoffs from the gross earnings claimed.

D. Willful Loss of Interim Earnings

The Respondent contends that it should bear no liability for the periods following Mr. Scarbrough's voluntary departure from employment (in September 1979 and February 1980). The specification makes no deduction for such alleged "willful loss" of interim earnings.[5]

---

[5]It is unclear whether the Union suggests that Mr. Scarbrough incurred an additional willful loss of earnings post-May 15, 1981, following his departure from Western Farm

(Footnote Continued)

Upon the entire record, and after consideration of the argument and briefs filed by the parties, I make the following findings:

II. FINDINGS OF FACT

Pursuant to stipulation of the parties, and the testimony of the lone witness, the facts relating to this compliance matter are not in dispute. The legal significance to be afforded same constitutes the substance of the issues in controversy.

All parties agree, and I find, as directed by the Board, that the backpay period runs from 4 September 1979 to 27 September 1979 (the period of Mr. Scarbrough's layoff) and from 8 January 1980 to 18 May 1981 (the reinstatement date). The parties also concur that Mr. Scarbrough was unavailable for work by virtue of medical disability unrelated to Respondent's discriminatory conduct for the period 12 August 1980 through 19 October 1980.[6]

(Footnote Continued)
Services, Inc., because of a conflict with another employee (see Respondent's post-hearing brief, p. 5). I have included the latter period in the discussion of the issue, infra.

[6] Thus, the total net backpay claimed in August 1980 is 127.98; $0 for September 1980; and $100.80 for October 1980. See GCX 1; Appendix A.

The specification was amended orally at hearing to reflect these agreements of the parties. The following additional amendments were made at General Counsel's request:

(Footnote Continued)

The parties further agree, and I so find, that General Counsel's calculations of gross backpay owing -- by utilization of the daily earnings of a representative tractor driver (Jose L. Marquez) accurately reflect the predicted earnings of Mr. Scarbrough at Sun Harvest, Inc., during the backpay period.[7]

(Footnote Continued)

Elimination of net backpay from February 14, 1980 ($41.35) and February 15, 1980 ($41.35), leaving a total owing of $500.83 for that month.

Addition of net backpay for April 5, 1980 ($61.00), changing the net backpay amount to $244.00.

Addition of net backpay for July 3, 1980 ($12.62); deletion of net backpay for July 6, 1980 ($8.05) and entry of same for July 8, 1980. The net backpay for the month should be $359.92.

Addition of net backpay for November 15, 1980 ($47.04), changing the net backpay total to $415.16.

Addition of net backpay for January 10, 1981 ($59.36) and January 24, 1981 ($22.65), changing the net backpay total to $285.03.

Addition of interim earnings for the period 11 May 1981 through 15 May 1981 ($94.23 per day) which eliminates net backpay due for those dates.

Exclusion of amounts for the period May 19, 1981 through May 23, 1981. See R.T., pp. 19-23; Appendix A.

[7]Use of the representative employee methodology is one of the four approved NLRB formula for calculating gross backpay. See O.P. Murphy Produce Company (1982) 8 ALRB No. 54; NLRB Case Handling Manual, Part 3, Compliance Proceedings, section 10542. In the instant case, Mr. Marquez shared similar seniority to that of the discriminatee; he worked both prior to the Union's unfair labor practice as well as during the backpay period as a tractor driver in Mr. Scarbrough's former crew.

Mr. Scarbrough was employed as a tractor driver at Sun Harvest, Inc., working generally 8-10 hours per day, but on occasion this would fluctuate as reflected in the daily earnings of representative employee Jose L. Marquez (GCX 1). Thus, Mr. Scarbrough would have worked full time[8] (4-5 days per week) during September 1979; and generally full time from January 1980 through May 1981 (4-7 days per week) with time off in January (17 days in 1980; 6 days in 1981), late-February/early-March (20 days in 1980; 12 days in 1981); and late-November/December (35 days).

The claimant obtained interim work with Gene Ferraro Land Leveling, Inc., from 17 September 1979 until September 21, 1979, when he voluntarily left said employment. He also obtained interim employment with Western Farm Services, Inc. (WFS), from 4 February 1980 until 15 February 1980, when he left in anticipation of reemployment with Sun Harvest, Inc. He was reemployed with WFS from 4 March 1980 through May 15, 1981,[9] when he left WFS because of a conflict with another employee.

---

[8] Excluding September, 1979, Mr. Scarbrough was predicted to have worked on 300 days had he not been discharged from Sun Harvest. His total predicted gross earnings were $16,253.86 (Appendix E).

[9] By letter of 8 July 1981, the parties corrected the erroneous reference to May 15, 1980, in their stipulation. I have marked the letter in evidence as ALJ Exhibit No. 1 so that the document may be incorporated into the record.

Ms. Isherwood described Mr. Scarbrough's WFS employment (apart: from the period of his disability in August-October 1980) as "full time" -- working whatever hours it took to get the job done. (R.T., p. 7.) Although he held three job titles during this employment (lister driver, liquid delivery person, liquid delivery supervisor), he essentially had one task -- which was to provide a service for growers of assuring that the liquid fertilizer was available and functional. As such, he did no tractor driving work, had some clerical responsibilities, and from July, 1980, had certain supervisorial duties as business needs dictated. During this interim period (at WFS), Mr. Scarbrough worked a total of 270 days with only one week off (during the week of December 27, 1980) and earned a total of $19,601.85 (Appendix E).

Under the then-existing UFW-Sun Harvest contract, Mr. Scarbrough was covered by the Robert F.Kennedy Medical Plan. During the backpay period, he paid the sum of $632.58[10] for premium payments on a medical insurance policy (Traveler's Insurance Company) through Western Farm Services, Inc., and paid additional premiums of $216.00[11] on a MediCal insurance policy to supplement the Traveler's

---

[10] $48.66 per month from April, 1980, to May, 1981 (excluding September 1980 when Mr. Scarbrough apparently received no paycheck).

[11] This sum was paid during August-October 1980.

policy. The total medical bills incurred by Mr. Scarbrough ($12,706.73) were paid by these insurance policies provided by Medi-Cal and Western Farm Services, Inc. They would have been covered by the Union's Robert F. Kennedy Medical Plan.

III. ANALYSIS AND CONCLUSIONS

A. Methodology of Backpay Calculations

The Board has repeatedly affirmed that "the policy of the Act reflected in a backpay order is to restore the discriminatee to the same position he or she would have enjoyed had there been no discrimination." Arnaudo Brothers (1981) 1 ALRB No. 25, rev. den., Third Appellate District, March 18, 1982, citing Maggio-Tostado (1978) 4 ALRB No. 36; N.L.R.B. v. Robert Haus Co. (6th Cir. 1968) 403 F.2d 979 (69 LRRM 2730]; N.L.R.B. v. United States Air Conditioning Corp. (6th Cir. 1964) 366 F.2d 275 [57 LRRM 2068]. In Sunnyside Nurseries, Inc., 3 ALRB No. 42, modified on other grounds in Sunnyside Nurseries v. Agricultural Labor Relations Board (1979) 93 Cal.App.3d 922, the Board set forth a formula calculating backpay on a daily basis. While it has since authorized the calculation of backpay to be made on a weekly basis, or by any method that is practicable, equitable,

---

[12] In the context of a pending bankruptcy proceeding, the Board in Kawano, Inc. (1983) 9 ALRB No. 62, reduced the General Counsel's original (daily) net backpay figures by a sixteen percent "inflation factor" to more fairly set off daily interim earnings from predicted daily gross earnings.

and in accordance with the policy of the Act (Butte View Farms, 4 ALRB No. 90, aff'd Butte View Farms v. Agricultural Labor Relations Board (1979) 95 Cal.App.3d 961), the Board has adhered to the daily method of computation in High and Mighty Farms (1982) 8 ALRB No. 100. In Abatti Brothers, Inc. (1983) 9 ALRB No. 59, daily computations were mandated because of the sporadic seasonal nature of agriculture in California. The quarterly Woolworth[14] formula of the NLRB was therefore presumptively held inapplicable to cases decided under the ALRA.

While the Board's general use of the daily formula was approved by the California Supreme Court in Nish Noroian Farms v. Agricultural Labor Relations Board (1984) 35 Cal.3d 726, that court cautioned against application of "dailies" to all situations. Thus, where an employee replaced a steady full-time Wednesday-Sunday job with similar full-time Thursday-Tuesday (interim) work, Monday and Tuesday wages should not be exempt from offset. The Board thereafter agreed with the court's reasoning that "true substitute employment" should be considered a direct replacement for gross backpay earnings, and that interim earnings should not

---

[13] The Abatti decision suggests that daily calculations may be inappropriate where the Respondent could prove that daily interim earning information was unavailable. (Abatti Brothers, Inc., supra, p. 13.)

[14] F. W. Woolworth Company (1950) 90 NLRB 289 [26 LRRM 1185].

be arbitrarily discounted because the actual days are different. Verde Produce Company, Inc. (1984) 10 ALRB No. 35.[15]

General Counsel and Charging Party herein suggest that since the interim employment obtained by Mr. Scarbrough -- liquid delivery person -- was different functionally[16] from that of his tractor driver job at Sun Harvest, Inc., and hence, not "true substitute employment," the Verde exception to "dailies" is inapplicable and the specification computations should be accepted as prepared by General Counsel. I do not agree. I do not read the concerns of the

---

[15] As to one discriminatee, the Board nonetheless approved the daily specification prepared by General Counsel in Verde Produce, supra, because of the absence of specific payroll data reflecting interim earnings.

[16] General Counsel and Charging Party suggest the following differences between Mr. Scarbrough's former work at Sun Harvest and the interim employment at Western Farm Services, Inc.: At Sun Harvest, Scarbrough was employed as a tractor driver, with duties including precision planting, precision border driving, precision application of agricultural chemicals, etc. He generally worked 8-10 hours a day for an hourly wage. At Western Farm Services, Inc., the claimant was a salaried employee and part-time supervisor who did not work on a farm, drove no tractor, and whose duties included assuring the availability and delivery of liquid chemicals to customer growers. Additionally, General Counsel (post-hearing brief, p. 11) contends that the pattern of gross employment (e.g., the predicted earnings of the claimant had he not been discharged from Sun Harvest as evidenced by the actual earnings of "representative" employee Jose L. Marquez), suggests a sporadic pattern consistent with the application of the presumptive daily formula under the ALRA. Said gross earnings, it is argued, are not comparable, or "truly substituted by" the regular weekly work performed by Mr. Scarbrough as a delivery person for Western Farm Services, Inc.

California Supreme Court and the Board for fair allocation of replacement earnings to be limited to only those situations where the interim employment was precisely the same type of work as that of the gross employment. Rather, the focus of inquiry more logically seems to be whether or not the discriminatee has essentially found interim employment of the same general pattern (e.g., full-time, 40-hours/week, or intermittent) as that of the gross employment, so as to "replace" the former work. Thus, if the claimant finds full time interim work, whether or not within the same job category, or even the same occupation as the gross employment, strict application of the daily formula may be inapplicable. I reach this conclusion mindful of the articulated purpose of the Board's remedial orders to restore the victims of discrimination to status quo ante. Phelps Dodge Corp. v. N.L.R.B. (1941) 313 U.S. 177 [61 S.Ct. 845]. I reject General Counsel's intimation (see General Counsel post-hearing brief, pp. 5 and 6) that the Board's primary concern should be to prevent future wrongdoing as suggestive of a punitive function not called for under the statute or applicable precedent. See Nish Noroian Farms v. Agricultural Labor Relations Board, supra, at pp. 745-746.[17]

[17] I recognize that some courts of appeal have placed great emphasis on the "deterrence" aspect of the National Board's remedial orders. See, e.g., N.L.R.B. v. Rutter-Rex Manufacturing Co. (1969) 396 U.S. 258, 263.

In the instant case, Mr. Scarbrough found full-time interim work which exceeded in earnings, although not in the number of hours or days employed, the position he lost as a result of Respondent's unlawful conduct.[18] As disclosed by witness Foster Isherwood, the interim employment was much more closely akin to that of the industrial labor model. At WFS, Mr. Scarbrough actually worked 270 days during the backpay period (excluding September 1979) or roughly 90% of the predicted number of days he would have worked at Sun Harvest. (See Appendix H.) Indeed, his original gross employment as a tractor driver at Sun Harvest, Inc., was of the more regular variety referred to in Verde Produce Co. (supra, p. 2, ft. 2) -- which did not fall within the general sporadic/seasonal pattern of agriculture. Scarbrough was predicted to have worked an average of 21.79 days per month out of a normal complement of 21.7 days per month.[19]

---

[18] Such is not the case with respect to Mr. Scarbrough's very brief work with Gene Ferraro Land Leveling, Inc., in September 1979. However, apart from Respondent Union's contentions regarding willful loss of interim earnings (see discussion infra), all parties agree to the amounts owing for that month, which sum does not vary whether or not a daily, quarterly or yearly approach is utilized. I thus recommend that the calculations for the month of September 1979 as contained in the General Counsel's specification be approved by the Board.

[19] Based on a 5-day week times 52 weeks equals 260 days per year divided by 12 months equals 21.7 days per month.

The imposition of daily calculations unreasonably inflates"[20] the net amounts owing from April 1980 to May 1981 -- precisely the period during which Mr. Scarbrough had secured full-time interim employment. While it is true that mathematical precision is not required in General Counsel's backpay formula, and at best, the net amount owing will always be a mere approximation of the claimant's actual loss[21] (since the victim was unable to retain his former job, there is no certain way of assessing what he would have earned), the quarterly calculations seem to more accurately reflect the harm caused by Respondent's unlawful conduct.

Nor does this situation present a case where the claimant might consider prematurely waiving reinstatement in order to maximize backpay, as Mr. Scarbrough had been offered reinstatement long prior to this compliance proceeding. Additionally, there is no indication from the specification that Respondent has gained anything by tardy offer of reinstatement since Scarbrough's interim earnings had remained constant from March 1980 and indeed, net

---

[20] Upon review of Appendices A, B, and C, it would seem that the lack of congruity in the few "off" periods of Scarbrough's gross and interim employment (see particularly December 1980) coupled with the greater daily rate of pay at WSF cause the mathematical disparity.

[21] See Maggio-Tostado, Inc. (1978) 4 ALRB No. 36.

amounts owing increased during the latter three quarters of the backpay period.[22]

In this factual context, where the gross employment is of the regular variety, where the interim earnings are full-time, non-agricultural, have exceeded the predicted gross wages and have been accumulated over fewer hours/days, I am of the opinion that there is no legally cognizable reason why the NLRB quarterly formula should not be made applicable to the instant proceeding. See Labor Code section 1148.[23] While I note that the Board has previously approved daily calculations for similarly situated employees,[24] I find the quarterly formula to be the more appropriate calculation following the California Supreme Court decision in Nish Noroian and the Board's subsequent Verde Produce Company decision. Conversely stated, the daily formula contained in General Counsel's

---

[22] These two policy considerations - the discouragement of tardy reinstatement offers by employers to reduce backpay, as well as previous efforts by employees to waive reinstatement rather than see backpay amounts decrease — significantly impacted upon the NLRB's choice of the quarterly (as opposed to set offs for the entire backpay period) formula, in Wgolworth, supra, and, upon our Board's choice of dailies over quarterlies in Abatti Brothers, Inc., supra, pp. 8-9, 11-12.

[23] Both General Counsel and Charging Party concur that this quarterly approach should be applied if the daily method is deemed improper. See General Counsel post-hearing brief, p. 10; Charging Party post-hearing brief, p. 11.

[24] See the discussion of employees Reynaldo Bermea and Agustin Rodriguez (shovelers) in Abatti Brothers, Inc. (1983) 9 ALRB No. 59.

specification unreasonably inflates the backpay owing due to the regular nature of the gross and interim earnings, the relative rates of pay, and the noncongruent time periods of each employment. As it is the duty of the Administrative Law Judge to recommend the most appropriate formula based on the record evidence,[25] I find that the NLRB quarterly calculations will most nearly compensate the claimant for the discrimination suffered and effectuate the purposes of the Act.[26] See Miranda Mushroom Farm, Inc., 8 ALRB No. 75; Am-Del-Co., Inc. (1978) 234 NLRB 1040 [97 LRRP! 1419].

Still unresolved, however, is the question of whether or not only those interim earnings for days when there was predicted gross income should be included in the computation. Under the NLRB, only interim earnings for periods during which gross backpay is accruing should be counted. NLRB Casehandling Manual section 10600, citing San Juan Mercantile Corp. (1962) 135 NLRB 698, 699; Brotherhood of Painters (Spoon Tile Co.) (1957) 117 NLRB 1596, 1598. The rationale for this rule is two-fold: (1) There is no occasion for the discriminatee to attempt to minimize

---

[25] See Miranda Mushroom Farm, Inc., 8 ALRB No. 75; Am-Del-Co., Inc. (1978) 234 NLRB 1040 [97 LRRM 1419],

I conclude that Respondent has "proven too much" by its argument that the Verde exception to dailies applies to the instant proceeding. There is no precedent for the yearly (or greater based) computations which the Union contends would be the most appropriate calculation. I therefore reject its suggestion in favor of the standard quarterly model suggested by the NLRB.

his/her loss of earnings during a period when no gross earnings are attributable; (2) in analogous situations, where a discriminatee has held a second job prior to the commission of the unfair labor practice, and continued to hold it during the backpay period, the earnings from that job are not deductible as interim earnings. The first reason suggests procedural concerns [27] -- any earnings outside of the backpay period are irrelevant; the second refers to the nature of the claimant's loss -- the "moonlighting" rule which affords no deduction for earnings accumulated prior to and subsequent to the unlawful conduct and thus not causally related to the latter. While there is nothing on this record to suggest that Mr. Scarbrough utilized his "off periods" at Sun Harvest to seek or retain alternate employment,[28] I am reluctant to alter the NLRB rule in the instant case. No party has suggested any reason why variation from this precedent would be suggested by the nature of agriculture or this particular factual context. The concerns of the California Supreme Court in Nish Noroian, supra, are not realized by such formulation as any

---

[27] Since the determination of predicted gross earnings is made post facto, this rationale is unrelated to the claimant's expectations.

[28] The employment pattern suggested in General Counsel's specification (GCX 1) which predicts nearly full-time employment throughout the backpay period would seem to indicate that Scarbrough held only the one job with Sun Harvest.

potential inequities in the result would have been assuaged by the quarterly calculations.[29] I therefore recommend that General Counsel's specification be approved with the modifications suggested (quarterly computations with no deduction of interim earnings on days with no gross income), and that backpay be awarded in accordance with the calculations hereinafter referred.

B. Medical/Insurance Benefits

This Board has approved an award for medical expenses which would have been covered under the Respondent's medical insurance plan. (Abatti Farms, Inc. (1983) 9 ALRB No. 59, ALJD, p. 29, citing Medline Industries, Inc. (1982) 261 NLRB 1329 [110 LRRM 1280]; Rice Lake Creamery Co. (1965) 151 NLRB 1113, 1129-1131, enf'd as modified in other respects, 365 F.2d 88 (D.C. Cir. 1966); Deena Artware, Incorporated (1958) 112 NLRB 371, 375, 382, aff'd 228 F.2d 871 (6th Cir. 1955)-,) Thus, there is no real dispute[30] re the Union's liability for the premium payments ($848.58) made during the backpay period, as they were costs

---

[29] Thus, the instant case presents no problem of overlapping seasons, or full-time Wednesday-Sunday work "replaced" by full-time Thursday-Tuesday interim earnings. Nor is there any "inflation" factor suggested in Kawano, Inc., supra, because the specification fairly sets off daily interim averages with the predicted gross wages.

[30] The Union concedes same in its post-hearing brief (Respondent post-hearing brief, pages 6-7).

not been discharged, he would have had coverage under the Union's Robert F. Kennedy Medical Plan and been responsible for no premium costs.

On the other hand, I have found no precedent in our cases which would authorize reimbursement for the medical bills actually paid by the "substitute" insurance policies. Indeed, applicable NLRB precedent suggests that compensation is limited to out-of-pocket losses only. Big Three Industrial Gas and Equipment Co. (1982) 263 NLRB 1189; Local Union No. 418, Sheet Metal Workers' International Association, AFL-CIO (1980) 249 NLRB 898 (discriminatee entitled to unreimbursed medical expenses which would have been covered by Respondent's group insurance); Angeles Block Co., Inc. (1980) 250 NLRB 867 (unpaid medical bills plus insurance premiums awarded).

The cases cited in Charging Party's post-hearing brief (page 11) do not suggest any contrary result.[31] In NLRB v Rice Lake Creamery Co. (D.C. Cir. 1966) 365 F.2d 888, out-of-pocket medical expenses less the premiums the employee was required to pay under the company's effective policy were included in the amount owing. In Tanksley Trucking, Inc. (1974) 210 NLRB 656, and Saqinaw Aggregates, Inc. (1972) 198 NLRB 598, medical expenses were awarded, but

[31] General Counsel's position on this issue is not clear. No reference is made to such claim in the specification as amended, nor is the matter raised in its post-hearing brief.

only in the context of a discrirainatee who was unable to obtain alternate coverage. Thus, it is only in the situation where, for example, a family member pays such bills that the National Board has ruled that the "collateral" benefit would not be offset against an employee's claim for lost benefits "because such payment did not constitute compensation to the employee for services performed." Medline Industries, Inc., supra.[32]

Nor am I persuaded that the California Supreme Court reaffirmation of the "collateral source rule" in Helfend v. Southern California Rapid Transit Dist. (1970) 2 Cal.Sd 1, is particularly supportive of Charging Party's position. That court's policy judgment in favor of encouraging a citizen to secure and maintain insurance for personal injuries, as well as helping juries ascertain damages in personal injury cases, seems inappropriate to the remedial goals of this Act. As the purposes of the ALRA are to make whole the innocent victims of discrimination for losses suffered, reimbursement should logically be tied to the actual (out-of-pocket) consequences of the wrongdoer's conduct. Since there has been no additional out-of-pocket

---

[32] The underlying rationale of the Medline decision would seem to be the difficulty of evaluating the financial arrangement between the discriminatee and the family member. That is, insofar as the claimant testifies that he must repay his donating relative, the former is still out of pocket. Such is not the case where the bills are paid through insurance coverage.

loss to the claimant apart from the insurance premiums in the instant case, I would disallow the request for reimbursement of medical bills paid through insurance.

C. Union Dues

I have found no authority for the proposition proffered by the Respondent Union that a two (2%) percent reduction for gross backpay should be incorporated into the gross backpay formula to reflect the union dues which Mr. Scarbrough did not have to pay by virtue of his discharge from Sun Harvest, Inc. While there is some logic to Respondent's position in this regard (this portion of Mr. Scarbrough's salary would have been deducted directly from his Sun Harvest paychecks), requests for similar offsets under the NLRB have been rejected. In Laborers' Local. 38 (1982) 262 NLRB 167, affirmed in relevant part (5th Cir. 1984) 748 F.2d 1001, the National Board denied the respondent union's request for an offset representing expenses of board and lodging which the claimants did not incur during the interim period. The Board reasoned that such "personal or domestic" economies resulting from the discrimination do not redound to the Respondent's benefit, citing Myerstown Hosier Mills (1952) 99 LRRM 630, 632 (child care expenses discriminatee did not incur during interim period may not be used as an offset against the backpay due).

Similarly, in East Texas Steel Castings Co. (1956) 116 NLRB 1336, 1341-43, enf'd. 255 F.2d 284 (5th Cir. 1958), the Respondent was not entitled to reduce gross backpay by the amount of extra transportation expenses the discriminatee would have incurred by traveling to the employer's plant had there been no discrimination. There, as here, the appropriate rule would seem to allow the discriminatee to deduct expenses in seeking and maintaining employment only to the extent that such expenses exceed the expenses that would have been incurred absent the discrimination. The offset, then, would only be a deduction from interim earnings, rather than a component of gross backpay. In the instant case, as there is no claim for reimbursement for union dues incurred in seeking or maintaining interim employment, there should consequently be no offset for the "economy" to Mr. Scarbrough of having no dues deduction. Indeed, it would seem particularly incongruous if the Union were to receive "credit" for dues which were not collected by virtue of its unlawful conduct in effectuating the claimant's discharge. I would reject Respondent's claim in this regard.

D. Willful Loss of Interim Earnings

The burden of proof is upon Respondent to show that the discriminatee failed to mitigate his/her losses by not making a reasonable effort to seek and maintain interim employment. (S & F Growers (1979) 5 ALRB

No. 50; Phelps Dodge Corp. v. N.L.R.B. (1941) 313 U.S. 177 [8 LRRM 439].) In "voluntary quit" situations, the applicable NLRB standard inquires whether there is justification for quitting or rejecting interim employment. John S. Barnes Corp. (1975) 205 NLRB 585 [84 LRRM 1254] (employee did not like working underground); My Store, Inc., 468 F.2d 1146, 1151 (7th Cir. 1972) enf'g as modified 181 NLRB 321 (1976), cert. den. 410 U.S. 910 (1979) (justified rejection of employment where foreman made employee nervous by yelling).

This Board has rejected the employer's arguments that the claimant willfully incurred a loss of earnings by quitting work for "personal and family difficulties" (Bruce Church, Inc. (1983) 9 ALRB No. 19, or because co-workers made it difficult to maintain employment (Abatti Brothers, Inc. (1983) 9 ALRB No. 59).

In the instant case, the evidence suggests that Mr. Scarbrough voluntarily left interim employment at Gene Ferraro Land Leveling, Inc. on 21 September 1979, for reasons unknown. He left Western Farm Services, Inc., on 15 February 1980 in anticipation of reemployment with Sun Harvest, Inc., and on 15 May 1981 because of a conflict with another employee. Without further evidence, it is impossible to characterize any of these rejections of employment as "unjustified" even though there apparently was work available with the interim employers. Rather, the

record as a whole[33] reflects Mr. Scarbrough's highly successful efforts to retain interim employment. From the period 4 February 1980 through 15 May 1981, he received interim earnings for some 270 days of work or some ninety percent (90%) of the number of days (300) he would have worked had he not been discharged. Indeed, his interim earnings surpassed his predicted gross backpay at Sun Harvest, Inc. As the burden of proof on this issue is upon Respondent, I find insufficient evidence on this record that Mr. Scarbrough incurred any willful loss of earnings. I therefore recommend that backpay accrue for the entire period.

IV. THE CALCULATIONS

I have attached (as Appendix A), a summary of the pertinent backpay period, gross backpay, interim earnings, and net backpay plus expenses owing the legal administrator of Mr. Scarbrough's estate, or any person authorized to receive such payment under applicable California law.[34] The amounts are listed monthly, with daily breakdowns of gross

---

[33] This Board has suggested that it is appropriate to look at the entire backpay period in analogous situations involving the issue of the efforts of the claimant to seek interim employment. See George Lucas & Sons (1984) 10 ALRB No. 6.

[34] See NLRB Casehandling Manual, Part III, section 10645

backpay, interim earnings,[35] and net pay owing. The quarterly omputations are contained in Appendix B. For convenience, I have also summarized the net amounts owing under a daily formula (Appendix C) and a yearly formula (Appendix D).

RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders the Respondent UFW, its officers, agents, successors, and assigns, shall pay to the legal administrator of Odis Scarbrough's estate, or to any person authorized to receive such payment under applicable California law, the amount of $2,638.84 in backpay and $848.58 reimbursement for medical insurance premiums (Appendix B), plus interest on such amounts computed at rates determined in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

DATED: August 28, 1985

Stuart A. Wein

STUART A. WEIN
Administrative Law

[35] "Credited" interim earnings pursuant to San Juan Mercantile Corp., supra, and Brotherhood of Painters (Spoon Tile Co.), supra, are indicated in parenthesis.

APPENDIX A

(Earnings by Month Broken Down on a Daily Basis)

SEPTEMBER 1979

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1			
2			
3			
4	57.95		57.95
5	57.95		57.95
6	57.95		57.95
7	57.95		57.95
8			
9			
10	57.95		57.95
11	57.95		57.95
12	57.95		57.95
13	57.95		57.95
14	57.95		57.95
15			
16			
17	57.95	28.75	29.2
18	57.95	57.5	.45
19	57.95	57.5	.45
20	57.95	57.5	.45
21	57.95	57.5	.45
22			
23			
24	57.95		57.95
25	57.95		57.95
26	57.95		57.95
27	57.95		57.95
28			
29			
30			
	1043.1	258.75	784.35

JANUARY 1980

DATE	GROSS Backpay	INTEIM EARNING	NET BACKPAY
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21	$57.95		$57.95
22	57.95		57.95
23	48.80		48.80
24	57.95		57.95
25			
26			
27	57.95		57.95
28	57.95		57.95
29	57.95		57.95
30	33.55		33.55
31	24.40		24.40
Over time	73.20		73.20
TOTAL	$585.60	0	$585.60

FEBRUARY 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$57.95		$57.95
2	30.50		30.50
3			
4	57.95	$41.35	16.60
5	57.95	41.35	16.60
6	61.00	41.35	19.65
7	48.80	41.35	7.45
8	57.95	41.35	16.60
9	57.95		57.95
10	56.93		56.93
11	61.00	41.35	19.65
12	61.00	41.35	19.65
13	61.00	41.35	19.65
14		41.35	
15		41.35	
16			
17			
18			
19			
20			
21			
22			
23			
24			
25	54.90		54.90
26	45.75		45.75
27	61.00		61.00
28			
29			
TOTAL	$831.63	$413.50	$500.83

($330.80 credited)

MARCH 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1			
2			
3		$21.53	
4		21.53	
5		21.53	
6		21.53	
7		21.53	
8			
9			
10	$65.57	21.53	$46.35
11	65.67	21.53	46.35
12	65.67	21.53	46.35
13	48.80	21.53	27.27
14	65.67	21.53	46.35
15	65.67		65.57
16	65.67		65.57
17	65.67	60.73	4.84
18	65.67	60.73	4.84
19	48.80	60.73	
20	73.20	60.73	12.47
21	65.57	60.73	4.84
22	65.57		65.57
23			
24			
25	61.00	60.73	.27
26	61.00	60.73	.27
27	48.80	60.73	
28	65.57	60.73	4.84
29	51.85	60.73	
30			
31	0.00	64.93	0.00
	$1,114.72	$887.53	$441.75

($714.95 credited)

APRIL 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	61.00	64.93	
2	61.00	64.93	
3	61.00	64.93	
4	61.00	64.93	
5	61.00		
6			61.00
7	61.00	64.93	
8	48.80	64.93	
9	61.00	64.93	
10	61.00	64.93	
11	61.00	64.93	
12	61.00		61.00
13	61.00		61.00
14	36.60	79.38	
15	61.00	79.38	
16	61.00	79.38	
17	48.80	79.38	
18	24.40	79.38	
19	61.00		61.00
20			
21		79.38	
22	48.80	79.38	
23	24.40	79.38	
24	51.85	79.38	
25	61.00	79.38	
26			
27			
28	61.00	89.29	
29	48.80	89.29	
30	61.00	89.29	
	$1,369.45	$1,646.04	$244.00

$48.66 insurance premiums

MAY 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$61.00	$89.29	
2	61.00	89.29	
3	54.90		54.90
4			
5	61.00	89.29	
6	61.00	89.29	
7	61.00	89.29	
8	61.00	89.29	
9	61.00	89.29	
10			
11			
12	61.00	85.12	
13	24.40	85.12	
14	36.60	85.12	
15	24.40	85.12	
16	61.00	85.12	
17	36.60		36.60
18			
19	61.00	85.12	
20	61.00	85.12	
21	61.00	85.12	
22	61.00	85.12	
23	36.60	85.12	
24	61.00		61.00
25			
26	61.00	88.00	
27	48.80	88.00	
28	36.60	88.00	
29	61.00	88.00	
30	36.00	88.00	
31	36.00	0.00	
	$1,348.10	$1,916.23	$189.10

$48.66 insurance premiums

JUNE 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1			
2	$61.00	$88.00	
3	61.00	88.00	
4	61.00	88.00	
5	61.00	88.00	
6	61.00	88.00	
7	36.60		$36.60
8			
9	61.00	90.41	
10	61.00	90.41	
11	61.00	90.41	
12	61.00	90.41	
13	61.00	90.41	
14	36.60		36.60
15			
16	24.40	90.41	
17	48.80	90.41	
18	61.00	90.41	
19	61.00	90.41	
20	61.00	90.41	
21	36.60		36.60
22			
23	61.00	85.34	
24	61.00	85.34	
25	61.00	85.34	
26	61.00	85.34	
27	61.00	85.34	
28	48.80		48.80
29			
30	61.00	71.25	
	$1,390.80	$1,842.05	$158.60

$48.66 insurance premiums

JULY 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$42.70	$71.25	
2	18.30	71.25	
3	83.87	71.25	$12.62
4	48.80	71.25	
5	48.80		48.80
6			
7	48.80	71.25	
8	79.30	71.25	8.05
9	61.00	71.25	
10	61.00	71.25	
11	79.30	71.25	8.05
12	42.70		42.70
13			
14	63.50	71.25	
15	63.50	71.25	
16	25.40	71.25	
17	38.10	71.25	
18	63.50	71.25	
19	38.10		38.10
20	67.20		67.20
21	26.88	71.25	
22	67.20	71.25	
23	40.32	71.25	
24	67.20	71.25	
25	53.76	71.25	
26	67.20		67.20
27	67.20		67.20
28	40.32	73.77	
29	26.88	73.77	
30	67.20	73.77	
31	67.20	73.77	0.00
	$1,565.23	$1,648.83	$359.92

$48.66 insurance premiums

AUGUST 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$67.20	$73.77	
2			53.76
3			
4	67.20	73.77	
5	80.64	73.77	6.87
6	73.92	73.77	.15
7	47.04	73.77	
8	53.76	73.77	
9	67.20		67.20
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
29			
30			
31			
	$510.72	$442.62	$127.98

$48.66 insurance premiums

SEPTEMBER 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
29			
30			
31			
	0.00	0.00	0.00

OCTOBER 1980

DATE	GROSS EARNINGS	INTERIM BACKPAY	NET BACKPAY
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20	$67.20	$77.82	
21	53.76	77.82	
22	67.20	77.82	
23	33.60	77.82	
24	67.20	77.82	
25	33.60		$33.60
26	67.20		67.20
27	67.20	77.82	
28	67.20	77.82	
29	67.20	77.82	
30	67.20	77.82	
31	53.78	77.82	0.00
	$712.34	$778.20	$100.80

$ 48.66 insurance premiums

\+ 216.00

$ 264.66

NOVEMBER 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$40.32		$40.32
2	53.76		53.76
3	87.36	$71.25	16.11
4	127.67	71.25	56.42
5	77.28	71.25	6.03
6	110.88	71.25	39.63
7	77.28	71.25	6.03
8	87.36		87.36
9			
10	97.44	71.25	26.19
11	53.76	71.25	
12	107.52	71.25	36.27
13	36.96	71.25	
14	40.32	71.25	
15	47.04		47.04
16			
17			
18	60.48	71.25	
19	26.88	71.25	
20	67.20	71.25	
21	40.32	71.25	
22	67.20	71.25	
23			
24			
25			
26			
27	65.52		
28			
29			
30			
31			
	$1,372.55	$1,425.00	$415.16
		($1140.00 credited)	
		$48.66 insurance premiums	

DECEMBER 1980

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1		$71.25	
2		71.25	
3		71.25	
4		71.25	
5		71.25	
6			
7		71.25	
8		71.25	
9		71.25	
10		71.25	
11		71.25	
12			
13			
14			
15		71.25	
16		71.25	
17		71.25	
18		71.25	
19		71.25	
20			
21			
22			
23			
24			
25			
26			
27			
28	$53.76		$53.76
29	60.48		60.48
30	53.76		53.76
31	33.60	0.00	33.60
	$201.60	$1,425.00	$201.60

($0.00 credited)

$48.66 insurance premiums

JANUARY 1981

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$26.88		$26.88
2	33.60		33.60
3	33.60		33.60
4			
5	59.36	$72.50	
6	59.36	72.50	
7	59.36	72.50	
8	59.36	72.50	
9	59.36	72.50	
10	59.36		59.36
11			
12	80.64	72.50	8.14
13	60.48	72.50	
14	53.76	72.50	
15	53.76	72.50	
16	60.48	72.50	
17	47.04		47.04
18			
19	58.23	72.50	
20	19.41	72.50	
21	38.82	72.50	
22	25.88	72.50	
23	32.35	72.50	
24	22.65		22.65
25			
26			
27			
28			$53.76
29			60.48
30			53.76
31	53.76	0.00	33.60
	$1,057.50	$1,450.00	$285.03

($1,087.50 credited)

$48.66 insurance premiums

FEBRUARY 1981

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$51.76		$51.76
2	51.76	$72.50	
3	51.76	72.50	
4	51.76	72.50	
5	25.88	72.50	
6	25.88	72.50	
7	51.76		51.76
8			
9		72.50	
10		72.50	
11		72.50	
12	38.82	72.50	
13	32.35	72.50	
14	22.91		22.91
15	48.53		48.53
16	38.82	72.50	
17	16.18	72.50	
18	32.35	72.50	
19	29.12	72.50	
20	35.59	72.50	
21	25.88		
22			
23	29.12	72.50	
24	48.53	72.50	
25	61.47	72.50	
26	32.35	72.50	
27	48.53	72.50	
28	42.06	0.00	42.06
	$893.17	$1,450.00	$242.90
		($1,222.50 credited)	
		$48.66 insurance premiums	

DATE	GROSS BACKPAY	MARCH 1981 INTEIM EARNING	NET BACKPAY
1	$45.29		
2	16.18	$72.50	
3	61.47	72.50	
4	25.88	72.50	
5	38.82	72.50	
6	51.76	72.50	
7	14.56		14.56
8			
9		72.50	
10		72.50	
11		72.50	
12		72.50	
13		72.50	
14			
15			
16		72.50	
17		72.50	
18		72.50	
19		72.50	
20	55.00	72.50	
21	32.35		32.35
22			
23	30.24	72.50	
24	63.84	72.50	
25	26.88	72.50	
26	26.88	72.50	
27	26.88	72.50	
28	20.16		20.16
29			
30	77.64	72.50	5.14
31	25.88	72.50	0.00
	$639.71	$1,595.00	$117.50
		($942.50 credited)	

APRIL 1981

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$103.52	$72.50	$31.02
2	109.99	72.50	37.49
3	84.11	72.50	11.61
4	71.17		71.17
5	77.65		77.65
6	64.70	72.50	
7	64.70	72.50	
8	64.70	72.50	
9	64.70	72.50	
10	64.70	72.50	
11	51.76		51.76
12	64.70		64.70
13	64.70	72.50	
14	64.70	72.50	
15	32.35	72.50	
16	32.35	72.50	
17	64.70	72.50	
18	19.41		19.41
19			
20	45.29	72.50	
21	19.41	72.50	
22	64.70	72.50	
23	64.70	72.50	
24	64.70	72.50	
25	51.76		51.76
26	64.70		64.70
27	64.70	90.57	
28	64.70	90.57	
29	38.82	90.57	
30	25.88	90.57	
	$1,733.97	$1,667.28	$481.27

$48.66 insurance premiums

MAY 1981

DATE	GROSS BACKPAY	INTEIM EARNING	NET BACKPAY
1	$64.70	$90.57	
2	51.76		$51.76
3	64.70		64.70
4	64.70	90.57	
5	64.70	90.57	
6	64.70	90.57	
7	28.88	90.57	
8	38.82	90.57	
9	32.35		32.35
10	26.88		26.88
11	67.20	94.23	
12	94.08	94.23	
13	67.20	94.23	
14	67.20	94.23	
15	53.76	94.23	
16	13.44		13.44
17			
18	64.70		64.70
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
29			
30			
31			
	$926.77	$1,014.57	$253.83

$48.66 insurance premiums

APPENDIX B

CALCULATION BY QUARTERLY (WOOLWORTH) FORMULA

September 1979 - Amount owning: $784.35

1st Quarter 1980	Gross Backpay	Interim Earnings Credited		Net Owning
January	$585.60	$0.00		
February	831.63	330.80		
March	1,114.72	714.95		
	2,531.95	1,045.75	=	$1,486.20

2nd Quarter	Gross Backpay	Interim Earnings Credited		Net Owning
April	$1,369.45	$1,566.66		
May	1,348.10	1,916.23		
June	1,390.80	1,842.05		
	$4,108.35	$5,324.94	=	$0.00

Insurance Premiums : 145.98

3rd Quarter	Gross Backpay	Interim Earnings Credited		Net Owning
July	$1,565.23	$1,648.83		
August	510.72	442.62		
September	0.00	0.00		
	$2,075.95	$2,091.45	=	$ 0.00

Insurance Premiums : 97.35

4th Quarter	Gross Backpay	Interim Earnings Credited		Net Owning
October	$ 712.34	$1,648.83		
November	1,372.55	442.62		
December	201.60	0.00		
	$2,286.49	$2,091.45	=	$ 368.29

Insurance Premiums : $145.98

+216.00

$361.98

1st Quarter 1981	Gross Backpay	Interim Earnings Credited		Net Owning
January	$1,057.50	$1,087.50		
February	893.17	1222.50		
March	639.71	942.50		
	$2,590.38	$3,252.50	=	$ 0.00

Insurance Premiums : $145.98

2nd Quarter	Gross Backpay	Interim Earnings Credited		Net Owning
April	$1,733.97	$1,666.28		
May	926.77	1,014.57		
	$2,660.74	$2,681.85	=	$ 0.00

Insurance Premiums:$97.32

	TOTAL OWNING	
	Backpay	Insurance Premiums
September 1979	$ 784.35	
1st Quarter 1980	1,486.20	
2nd Quarter 1980	0.00	$145.98
3rd Quarter 1980	0.00	97.32
4th Quarter 1980	368.29	361.98
1st Quarter 1981	0.00	145.98
2nd Quarter 1982	0.00	97.32
TOTAL	$2,638.84	$848.58

APPENDIX C

Monthly Summaries of Net Backpay Owning
As Calculated on a Daily Basis

September 1979	$ 784.35
January 1980	585.60
February 1980	500.83
March 1980	441.75
April 1980	244.00
May 1980	189.10
June 1980	158.60
July 1980	359.92
August 1980	127.98
September 1980	0.00
October 1980	100.80
November 1980	415.16
December 1980	201.60
January 1981	285.03
February 1981	242.90
March 1981	117.90
April 1981	481.27
May 1981	253.83
NET OWNING	$5,490.22

APPENDIX D

Yearly Calculations

	1979	1980	1981
Gross	$ 1,043.10	$ 11,002.74	$ 5,251.12
Interim	258.75	12,425.00	7,176.85
Net Owning	784.35	$ 0.00	$ 0.00

Total Net Owning : $784.35

Appendix E

(Total Earnings, September,1979,Exclude)

MONTH/YEAR	TOTAL GROSS EARNINGS	TOTAL INTERIM EARNING
January 1980	$ 585.60	$ 0.00
February 1980	831.63	413.50
March 1980	1,114.72	887.53
April 1980	1,369.45	1,646.04
May 1980	1,348.10	1,916.23
June 1980	1,390.80	1,842.05
July 1980	1,565.23	1,648.83
August 1980	510,23	442.62
September 1980	0.00	0.00
October 1980	712.34	778.20
November 1980	1,372.55	1,425.00
December 1980	201.60	1,425.00
January 1981	1,057.50	1,450.00
February 1981	893.17	1,450.00
March 1981	639.71	1,595.00
April 1981	1,733.97	1,667.28
May 1981	926.77	1,014.57
	$16,253.86	$19,601.85

APPNEDIX F

Patterns of Employment

Patterns of Gross Employment

Full Time:	September	1979
Full Time:	January - Mid-February	
Off:	February 14-24;March 1-9	
Full Time:	March 10-August 9	
Disability	August 9-Octomber 19	1980
Full Time:	October 20-November 22	
Off:	November 23-December 27	
Full Time:	December 28-31	
Full Time:	January 1-24	
Off:	January 25-30	
Full Time:	January 31-March 7	1981
Off:	March 8-19	
Full Time:	March 19-May 18	

Pattern of Interim Employment

Off:	September 4-16	
Full Time:	September 17-21	1979
Off:	September 22-30	
Off:	January 21-February 3	
Full Time:	February 4-15	
Off:	February 16-March 2	1980
Full Time:	March 3-August 8	
Disability:	August 9-Octomber 19	
Full Time:	October 20-December 26	
Off:	December 27-31	
Off:	January 1-4	
Full Time:	January 5-May 15	1981
Off:	May 15-May 18	

APPENDIX G

Total Number of Days Worked Days Off

Gross Employment (Excluding September 1979

MONTH	DAYS WORKED	DAYS OFF
January 1980	10	1
February 1980	15	14
March 1980	18	13
April 1980	25	5
May 1980	26	5
June 1980	25	5
July 1980	29	2
August 1980	8	1
September 1980	-	-
October 1980	12	0
November 1980	20	10
December 1980	4	27
January 1981	22	9
February 1981	23	5
March 1981	17	14
April 1981	29	1
May 1981	17	1
	300	113

300/413 = X/360

X = 261.50/12 = 21.79 days per month

APPENDIX H

Total Number of Days Worked Days Off
Gross Employment (Excluding September 1979

MONTH	DAYS WORKED	DAYS OFF
January 1980	0	11
February 1980	10	19
March 1980	21	10
April 1980	22	8
May 1980	22	9
June 1980	21	9
July 1980	23	8
August 1980	6	3
September 1980	-	-
October 1980	10	2
November 1980	20	10
December 1980	20	11
January 1981	20	11
February 1981	20	8
March 1981	22	9
April 1981	22	8
May 1981	11	7
	270	143

270/413 = X/360

X = 235.35/12 = 19.61 days per month

Number of days interim work versus number of days gross : 270/300 = .90

Number of days interim work versus number of days gross (excluding January 1980): 270/290 = .93