San Diego, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and SUN HARVEST, INC., Respondent, and GEORGE MOSES, MICHAEL MOSES, RONALD MOSES, GUADALUPE BELTRAN and CECILIA SALINAS, Charging Parties.	Casa Nos . 80-CE-6-SD 80-CL-3-SD 13 ALRB No. 26 (9 ALRB No. 40)

SUPPLEMENTAL DECISION AND ORDER

On July 12, 1983, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in this case. The Board found, in part, that the United Farm Workers of America, AFL-CIO (UFW or Union), had violated the Agricultural Labor Relations Act (ALRA or Act) by denying the charging parties due process in suspending their union memberships and causing their discharge from Sun Harvest, Inc., in January 1980. The Board ordered the Union to make the charging parties whole for all losses of pay and other economic losses suffered as a result of the Union's unlawful conduct.

A hearing was held on October 7 and 8 and on December 10, 1986, before Administrative Law Judge (ALJ) James Wolpman for the purpose of determining the amount of backpay due to the charging

parties. Thereafter, on March 31, 1987, the ALJ issued the attached Decision. The UFW timely filed exceptions to the ALJ's Decision and the General Counsel timely filed a reply brief.

We have considered the record and the ALJ's Decision in light of the exceptions and the supporting and reply briefs and have decided to affirm the ALJ's ruling, findings and conclusions, as modified herein, and to adopt his recommended Order, also as modified.

The UFW excepted to the ALJ's award of commuting expenses to George Moses. We affirm the ALJ's allowance of Moses' expenses in commuting to his Imperial Irrigation District job in El Centro before Moses moved his residence from Holtville to El Centro. Although Moses occasionally commuted 20 to 25 miles to Tamarack Ranch while employed at Sun Harvest, he generally worked in the Holtville area where he lived, whereas the commute from Holtville to his interim employment in El Centro was approximately 15 to 25 miles.

However, we disaffirm the ALJ's allowance of a portion of George Moses' increased rent as "commuting expenses" after his move to El Centro. While residing in El Centro, Moses was permitted to take an irrigation district vehicle home with him, and thus had no commuting expenses. We find no authority which would permit offsetting a portion of increased living expenses against commuting expenses which the claimant would have incurred if he had continued commuting from Holtville to El Centro. We also find that Moses is not entitled to the extra $50.00 per month rent as increased living expenses per se, since he was not required by the

irrigation district to move to El Centre.

We also reject the UFW's exception to the ALJ's failure to strike the expense claim of Cecilia Salinas in its entirety. We agree with the ALJ that the amount of gasoline Ms. Salinas estimated that she expended while looking for work is grossly disproportionate to the extent of the search which she credibly described in her testimony. However, a review of the record in that regard does not indicate to us that she wilfully sought to deceive the Board. We find that the ALJ's grant of a partial allowance for gasoline expenses comports with her testimony as to the extent of her job search and is realistically based on a fair estimate of actual miles traveled.[1/]

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders the Respondent, United Farm Workers of America, AFL-CIO (UFW), its officers, agents, successors and assigns, to pay to George Moses, Michael Moses, Ronald Moses, Guadalupe Beltran, and Cecilia Salinas, the

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[1/] Members McCarthy and Henning would deny in its entirety Cecilia Salinas[1] inflated claim of $500.00 per quarter for gasoline expenses incurred in her search for work. They would deny the claim not under the American Navigation Co. (1983) 268 NLRB 426 [115 LRRM 1017] standard of willful deceit, but rather on the basis of the ALJ's finding that Salinas[1] claim was so far out of line that she could not have made any effort to have the expenses reflect the actual circumstances of her job search. Travel expense claims may be based on estimates if the estimates are reasonable. (High and Mighty Farms (1982) 8 ALR3 No. 100; Aircraft and Helicopter Leasing and Sales, Inc. (1975) 227 NLRB 644 [94 LRRM 1556].) However, if such estimates are too indefinite, inadequate and speculative — as are Salinas' — they should be denied. (Charles T. Reynolds Box Company (1965) 155 NLRB 384 [60 LRRM 1343].)

makewhole amounts specified in Appendix A, 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.)[2/]

The Board further orders that the UFW reimburse George Moses and Ronny Moses[3/] for their mileage and witness fees incurred in appearing for the hearing originally scheduled for September 23, 1986.

Dated: December 28, 1987

BEN DAVIDIAN, Chairman[4/]

JOHN P. MCCARTHY, Member

PATRICK W. HENNING, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[2/] Appendix A reflects the ALJ's backpay award as modified by this Decision. Appendix B reflects the ALJ's summary of backpay and expense computations, as modified by this Decision.

[3/] Ronny is his given name. He is incorrectly referred to as Ronald in the pleadings. (See fn. 12 of ALJD.)

[4/] The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

APPENDIX A

TOTAL BACKPAY AND EXPENSES

George Moses	$12,267.65
Michael Moses.	4,873.13
Ronny Moses.	4,944.17
Cecilia Salinas.	8,707.34
Guadaluoe Baltran.	12,442.05
Total.	$43,234.34

APPENDIX A SUNMARY OF

MAKEWHOLE AMOUNTS COMPUTATIONS

Name	Gross Backpay	Interim Earnings	Net Backpay	Expenses	Vacation & Pensions	'Total
George Moses	$35,369.90	$25,251.03	$10,420.97	$847.00[a/]	$1,306.68	$12,574.65
Michael Moses	21,195.97	22,489.70	3,231.98	200.00	1,441.15	4,873.13
Ronnie Moses[e/]	6,732.84	2,240.00	4,492.84	-0-	451.33	4,944.17
Cecilia Salinas[e/]	7,713.17[b/]	-0-	7,713.17[b/]	420. 03[c/]	574. 14[d/]	8,707.31
Guadalupe Beltran[e/]	11,543.00	-0-	11,543.00	50 .00[f/]	849.05	12,442.05
						$43,541.31

a. As adjusted per page 11 and footnote 9, page 12, supra.

b. As adjusted per footnote 18, page 17, supra.

c. As adjusted per footnote 21, page 19, supra.

d. As adjusted per footnote 19, page 17, supra.

e. Underlying figures are accepted as stipulated to, despite fact that they cannot be reconciled with tours and rates listed in specification.

f. General Counsel omitted this amount from total, even though it was never contested.

APPENDIX B

SUMMARY OF MAKEWHOLE AMOUNTS COMPUTATIONS

NAME	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY	EXPENSES	VACATION & PENSIONS	TOTAL
George Moses	$35,369.90	$25,251.03	$10,420.97	$510.00[a/]	$1,306.68	$12,267.65
Michael Moses	21,195.97	22,189.70	3,231.98	200.00	1,141.15	4,873.13
Ronny Moses[d/]	6,732.84	2,210.00	1,192.84	-0-	451.33	4,944.17
Cecilia Salinas[d/]	7,713.17[d/]	-0-	7,713.17[b/]	120.03	574.14[c/]	8,707.34
Guadalupe Beltran[d/]	11,513.00	-0-	11,513.00	50.00[e/]	849.05	2,442.05
						$43,234.34

a. As adjusted per Board Decision.

b. As adjusted per footnote 17, page 18, of ALJ Decision.

c. As adjusted per footnote 18, page 18 of ALJ Decision.

d. Underlying figures are accepted as stipulated to, despite fact that they cannot be reconciled with hours and rates listed in specification.

e. General Counsel omitted this amount from total, even though it was never contested.

CASE SUMMARY

UFW/Sun Harvest (Moses)

13 ALRB No. 26
Case Nos. 30-CE-6-SD/
80-CL-3-SD

ALJ DECISION

A hearing was held for the purpose of determining the amount of backpay due the charging parties as a result of the conduct found unlawful in 9 ALRB No. 40. At the hearing, the parties stipulated that the Regional Director had correctly specified the duration of each employee's backpay period as well as the gross backpay for each employee. The parties also stipulated that interim earnings were to be offset against gross backpay on a quarterly basis.

After the close of the initial hearing, one of the charging parties moved to reopen the hearing to correct, as mistaken, her admission that she had been employed during part of the backpay period. The ALJ granted the motion and conducted the reopened hearing on December 10, 1986.

In his Decision, the ALJ concluded that all of the claimants had diligently sought work, and that their failure to appeal the decision of the UFW's National Executive Board upholding their suspensions to the Public Review Board did not constitute a failure to mitigate damages. The ALJ also found that the claimants had no duty to seek reemployment with Sun Harvest when their suspension periods ended; rather, the backpay period remained open until the Employer offered them reinstatement. The ALJ allowed reasonable search-for-work expenses to the claimants, as well as certain commuting expenses for one of the claimants. The ALJ disallowed backpay to one of the claimants during a period when she was unavailable for employment due to hospitalization for surgery and subsequent recuperation. The ALJ awarded mileage and witness fees to two of the claimants who were subpoenaed by the the Union to appear at the hearing but were not informed when the hearing was continued.

BOARD DECISION

The Board affirmed the ALJ Decision on all but one of the issues. With regard to the ALJ's award of commuting expenses to George Moses, the Board affirmed the award for the period when Moses was commuting from Holtville to his interim employment in El Centro. However, the Board disallowed Moses' commuting expenses for the period after he moved his residence to El Centro.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and SUN HARVEST, INC., Respondent, and GEORGE MOSES, MICHAEL MOSES, RONALD MOSES, GUADALUPE BELTRAN, and CECILIA SALINAS, Charging Parties.	Case Nos. 80-CE-6-SD 80-CL-3-3D (9 ALRB No. 40)

Appearances:

Chris Schneider
Keene, California
for the Respondent United Farm Workers

Darra Lepkcwsky-Sillas El
Centro, California for
the General Counsel

Scott Johnson
Littler, Mendelson, Fastiff & Tichy
San Diego, California
for the Charging Parties.

Before: James Wolpman
Administrative Law Judge

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN, Administrative Law Judge:

This supplemental proceeding was heard by me on October 7 & 8 and on December 10, 1986, in El Centro, California. It arises out of the Decision and Order of the Board at 9 ALRB No. 40 (July 12, 1983) directing, inter alia, that the Respondent, United Farm Workers of America, AFL-CIO, make each of the Charging Parties whole for lost pay and other economic losses suffered as a rasult of its discrimination against them. When the parties were unable to agree upon the amounts due, the El Centro Regional Director issued a Back Pay Specification, setting forth the amounts claimed for each discriminatee (G.C. Ex. 1.4), and the matter was thereupon noticed for hearing. (G.C. Ex. 1.5.) The United Farm Workers answered, admitting some of the allegations in the Specification, denying others, and raising several affirmative defenses. (G.C. Ex. 1.6) At the Prehearing Conference, General Counsel was granted leave to amend certain portions of the Specification. All of the amendments were eventually embodied in a First Amended Back Pay Specification filed at the close of the hearing on October 3, 1986. (G.C. Ex. 1.12; II: 71-72.)

On November 12, 1986, Charging Party Beltran moved to re-open the hearing to correct, as mistaken, her admission that she had been employed for a portion of the backpay period. Because of the importance of obtaining an accurate record, because of the unique circumstances surrounding the admission,[1] and

[1]The admission was critical. Had her testimony been left uncorrected, it would have reflected adversely not only on her entitlement to back pay, but on her overall credibility as well.

because reopening would result in no material delay in the disposition of the case, I exercised my discretion to grant the motion.[2] The reopened hearing was held December 10, 1986.

The United Farm Workers, the General Counsel and the Charging Parties all appeared through counsel, participated in the hearing, and filed post hearing briefs. Respondent Sun Harvest, Inc. did not appear.[3]

The required jurisdictional findings were made in the initial decision (9 ALRB No. 40.)

Upon the entire record, including my observation of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following findings of fact and reach the following conclusions of law.

I. MATTERS NOT IN DISPUTE

At the opening of the hearing the parties presented me with a written stipulation disposing of several potential issues.

(Footnote 1 Continued)

While there was no order directing the UFW to disclose beforehand its information about possible interim employment, the Union's representative at the prehearing conference (who was different than the one who appeared at the hearing) created the definite impression that there would be full disclosure. Therefore, when the Union, utilizing information which it must have acquired prior to hearing (I: 51-53), sought to impeach Mrs. Beltran, both she and counsel were genuinely surprised. Having heard her subsequent testimony, I am convinced that her surprise and ensuing confusion gave rise to mistaken testimony. (See, pp. 21-22, infra .)

[2]An interim appeal was taken to the ruling but was denied without prejudice to the Union's right to raise the issue by exception.

[3]The Board's make whole order is confined to the UFW. (G.C. Ex. 1.1 p. 20; cf . p. 2 fn. 1 & p. 52 (as corrected) of the underlying ALJ Decision .)

(Joint Sx. A.) They agreed that the duration of each employee's back pay period and the amount that each would have earned if he or she had continued to work at Sun Harvest (Gross Back Pay) was as alleged by the Regional Director.[4] These time periods and gross pay amounts are embodied in the First Amended Back Pay Specification.

The parties also stipulated that interim earnings were to be offset against gross back pay on a quarterly, rather than a daily, weekly, monthly or seasonal basis. Because Counsel for the General Counsel indicated that computations utilizing one or the other shorter periods would, in the circumstances of this case, have no effect the net back pay of Beltran or Salinas (neither of whom had interim earnings) and very little effect on the other three discriminatees and because Counsel for the Charging Parties indicated to me that his clients had assented to the quarterly approach after being apprised of its possible effect on their back pay awards, I accepted the stipulation as a mutually agreeable settlement of a difficult and sensitive issue.

There were a number of allegations in the Specification unique to one or the other claimant which the Respondent either agreed to or did not actively contest. These are better left to

[4]Paragraphs 2(b) and 2(c) of the stipulation specify that the comparable employee method used for the Moses brothers and the crew method used for Mrs. Beltran and Mrs. Salinas were accurate and appropriate.

later sections where each claimant's backpay is separately considered.

II. AFFIRMATIVE DEFENSES COMMON TO ALL OR MOST OF THE CLAIMANTS

A. Failure to Appeal Suspensions from Membership to the UFW Public Review Board

All of the claimants were terminated pursuant to a provision in their collective bargaining agreement which required union membership as *a* condition of continued employment -- the so-called "Good Standing" clause. All had been union members, but in 1979 they returned to work in the face of UFW strike against their employer. As a result, they were charged, tried and convicted under the Union's internal trial procedures, and the trial committee expelled them from membership. The expulsions were appealed to the Union's National Executive Board (NEB) where they were reduced to one year suspensions for all except George Moses. Because he had been a union officer, the NEB considered George's conduct more reprehensible and therefore set his suspension at two years.

The Union thereupon invoked the "Good Standing" provision in its labor agreement with Sun Harvest, and all five were discharged. They then filed charges with the ALRB, and eventually the Board found their suspensions and consequent terminations to be illegal because their due process rights had been infringed upon.

In the course of the unfair labor practice proceedings, the Union took the position that the ALRB was foreclosed from

reviewing the suspensions because the claimants had failed fully to exhaust internal union remedies by appealing the decision of the NEB to the Public Review Board (PRB) established by the UFW Constitution. The ALRB found that any action by the Public Review Board would have come after the discharges had been effected. Once that had happened, the PRB -- even if it had wished to do so -- was in no position to require Sun Harvest to reinstate the claimants with full seniority. The Board concluded that, since the UFW no longer had the power to rectify the situation, the claimants were excused from pursuing and exhausting an appeal to the PRB. (Id. at p. 13.)

In this supplementary proceeding the Union again argues the failure to appeal to the PRB, but with a new twist. This time, by failing to appeal, the claimants are guilty not of failing to exhaust remedies, but of failing to mitigate their damages.

It is by no means certain that, had they taken their case to the PRB, they would have prevailed. They might or they might not have. Or they might have achieved a "half-way" victory; for example, no backpay and still shorter suspensions. And even if they had prevailled, there is no telling how long the appeal would have taken.[5]

Given that there was no initial obligation to appeal to the PRB, given the uncertainty of success before that body, given

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[5]In the underlying decision the Board pointed out that the charging parties had no basis for assuming that the PRS would be unfair because, in subsequent decisions involving similar issues, it

the possibility that any "success" would only be partial, and given the uncertainty as to how long it might be before a PRB decision issued, the Union's defense is too speculative to be countenanced.

3. Failure to Apply for Reinstatement at the Expiration of the Period of Suspension

With the exception of George Moses, all of the suspensions began in January 1980 and ended in January 1981; yet no offer of reinstatement was forthcoming until May 1981.

The Union contends that the four should have contacted Sun Harvest or the Union to ask for work as soon as their suspensions were completed in January 1981, and argues that their failure to do so terminated its liability for backpay accruing after that date.

The claimants were not suspended from employment; they were suspended from membership and terminated from employment. The expiration of their suspension did not undo their discharges. It merely put them on the same footing with other unemployed union members. To get their jobs back, they would have had to go through the same procedures and face the same uncertainties as other applicants.

(Footnote 5 Continued)

reversed the NEB on due process grounds. (9 ALR3 No. 40, p. 13.) However, the obligation to mitigate damages depends on whether the claimant acted reasonably based on the knowledge and information in his or her possession at the time. At the time in question, the PRB had yet to hear or decide a case. (Underlying ALJ Dec. pp. 49-50.)

Wrongfully discharged workers need not assume that burden; they have no duty to re-apply. It is up to their employer to offer reinstatement, and the backpay period remains open until that happens. (F.W. Woolworth Company (1950) 90 NLRB 289, 292-93.)[6]

III. THE INDIVIDUAL CLAIMANTS

A. George Moses

George was terminated from his position as a tractor driver on January 7, 1980. He began by seeking work both in the agricultural and non-agricultural sectors, but soon gave up hope of finding work in agriculture and concentrated on non-agricultural employment. Early in the second quarter of 1980 he obtained a temporary position with the Bureau of the Census and, a short time later, a permanent job with the Imperial Irrigation District (IID) -- a position which he chose to keep when his suspension from the UPW eventually ended in mid-January 1982.

The UFW does not dispute the amount George earned during the backpay period, but it does question his reasonableness and diligence in seeking work. It argues, first of all, that he acted unreasonably in abandoning his search for farm work - a field in which he was experienced and qualified.

George abandoned his efforts to find work in agriculture when he concluded that his reputation as a union supporter and

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[6]Even in Cases where the union and the employer are jointly liable, the union's liability does not terminate until five days after it notifies the employer that it does not oppose reinstatement. (Niagara Machine & Tool Works (1983) 267 NLRB 561, 663-64.) Here, no evidence was offered to establish when, if at

activist made it unlikely that any grower in the vicinity would hire him. His experience at Lu-Ette Farms where a job offer was withdrawn without explanation (I: 87-90); the inability of Abatti Farms chief grower to persuade his superiors to hire him (I: 95-96); and the similar experience of his brothers, all point in that direction.[7] Then, too, it must be remembered that all of this occurred in the midst of an emotionally charged, wide-ranging UFW strike directed against almost all of the large growers in the Imperial Valley.

It was not incumbent upon George to come forward with conclusive proof that he would not have been hired because of his union past. Rather the burden was on the UFW to show his belief to have been unreasonable, and "reasonableness" is to be tested by what a normal worker, knowing what George knew and having-experienced what he experienced, could legitimately have concluded.

I find his conclusion to have been not at all unreasonable. The union, therefore, has not met its burden of proof on this issue.

(Footnote 6 Continued)

all, such notification was given. And even if it had been given, the union's backpay obligation would have continued until after reinstatement was offered because its liability was primary, not joint. (See, G.C. Ex. 1.1, p. 20 and p. *2* Fn. 1 and p. 52 of underlying ALJ Decision, and with the cases there cited.)

[7]George was frank and forthright. I fully credit his testimony on this and other issues.

The UFW's next argument picks up where the previous one left off and asserts that —-given George's conclusion that he was being refused hire because of his union past -- he should have filed discrimination charges against those involved. By failing to do so, he again failed in his duty to mitigate damages.

This argument, like the earlier one directed to the failure of the claimants to appeal their suspensions to the Public Review Board, fails because there was no assurance that Board proceedings could or would have been prosecuted through to a successful conclusion. To say that George was not unreasonable in believing that he was being discriminated against is quite different from saying that there is evidentiary proof of an section 1153(c) violation. That proof was not forthcoming at the instant hearing, and it is entirely possible that, even after a Board investigation, it would still have been lacking. Moreover, even if it were found, the union's liability would not have terminated. It would remain liable, jointly and severally, with the offending employer or employers.

Next, the Union points to the evidence that George worked, on an average, 60 to 70 hours a week as a tractor driver, but only 40 hours a week as an employee of the IID, and argues that his interim employment was therefore only part-time and he was obligated to seek additional employment to make up the difference.

I have already determined that he acted reasonably in forsaking farm work. That being so, his only obligation was to

obtain "full-time" employment as that term is used in the industry in which he eventually found work. He was a full-time employee with the IID, and so I reject the union's argument.

Expenses. The union did not actively dispute the $270.00 which George claimed -- primarily for oil and gasoline --- as his expense in searching for work (SFW). Nor does it dispute the $140.00 medical expense. I accept the figures as reasonable.

The union does dispute the $100.00 per quarter commute to work (CWT) expense, as well as the additional $50.00 a month living expense which resulted from moving the trailer in which he lived from a space in Holtville ($100.00/ino.) to one in El Centro ($150.00/mo.) This move made it possible for him to gain the full use of a company vehicle to commute to work. (I: 107)

Had the privilege of using a company vehicle been a benefit he enjoyed at Sun Harvest, then he might be entitled to deduct from his interim earnings the added expense (increased rent of $50.00/mo.) of gaining a similar benefit at his interim employer, but it was not. Only occasionally did Sun Harvest allow him the use of a company vehicle. (I: 107.) However, since it appears that he had to travel further to his IID job than he did at Sun Harvest where, for the most part, he worked near the ranch on which he lived (I: 103), I shall allow him his commuting expense prior to the move and that portion of his subsequent increased rent which reflects commuting expenses. I fix this at two-thirds of the commuting expenses as set forth in the

Specification since those appear to be his total expenses, not his additional expenses (I: 104-106)[8]

Waiver of re-employment and back pay. Finally, the union points to two statements made by George indicating that he would not return to work if doing so meant again subjecting himself to a "good standing" clause, and argues that those statements disclose a determination, early on, to refuse reinstatement sufficient to terminate its further liability for backpay.

The statements appear in declarations executed in March and August 1982, after reinstatement had been offered and refused. George testified without contradiction that it was not until he was offered reinstatement that he decided firmly and finally not to return to work at Sun Harvest. (I: 112-113.) Even assuming that he had considered this beforehand, "[a]s he made no final choice regarding his ultimate status until Respondent offered re-employment, I cannot find any waiver of this right by this previous subjective state of mind." (Abatti Farms, Inc. (1983) 9 ALRB No. 59, ALJ Dec. pp. 17-18, citing East Texas Steel (1956) 115 NLRB 1336.)

B. Michael Moses

Michael was discharged from his position as a tractor driver on January 7, 1980. Like George, he began by searching for

[8]His allowable expenses are therefore reduced to $67.00 for the second quarter of 1980 and to $60.00 per quarter thereafter (prorated to $10.00 for the first quarter of 1982).

work both in and out of agriculture, but soon abandoned hope of finding agricultural employment and concentrated his efforts elsewhere. (II: 5-7, 15-17.) In the second quarter of 1980, he obtained a job with Ryerson Concrete and then with Magma Electric Company, where he chose to remain when Sun Harvest offered him reinstatement in May 1981.

The UFW questions his diligence and reasonableness in seeking interim employment for the same reasons it questioned George's: His abandonment of agricultural work and his failure to file unfair labor practice charges against the growers who refused him employment.

I find that he engaged in a diligent search for employment.[9] I also find that he was not unreasonable in believing that his union past would be held against him and therefore that he was justified in concentrating his job search outside of agriculture (See especially II: 7.)[10] I further find that, like George, he was not obligated to mitigate damages by filing charges against growers who failed to hire him.[11]

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[9]Michel was a straightforward and honest witness: I fully credit his testimony.

[11]I also reject the UFW's argument that the three brothers should have tried to find agricultural work with local labor contractors. Since contractors do not, as a rule, hire tractor drivers, the three had no obligation to seek employment with them. (See II: 10.)

[11]it is not clear whether the UFW makes the additional argument that Michael and Ronald, like George, were not full time workers because they found jobs with 40 hour work weeks. (See II: 3.) If this is the Union's contention, then I reject it for the same reason I rejected it as applied to George. (Supra, pp. 10-11.)

Expenses. In its brief the union did not contest the $200 he claimed for expenses in searching for work (II: 14), and I find the amount to be reasonable and justified.

Waiver of Reinstatement and Backpay. I reject the UFW's argument that the declarations Michael filed in March and August 1982 indicate an earlier resolve to refuse reinstatement, and I do so for the same reasons that *I* rejected the argument as applied to George.

C. Ronny Moses[12]

Ronny also worked as a tractor driver, but he had much less seniority than his brothers, and so, as the Specification discloses, would have earned considerably less than they had he continued on at Sun Harvest. He, too, eventually gave up hope of obtaining work in agriculture and confined his search to non-agricultural employers.

He was unable to find work until June 1980, when he was hired for a short time as a mechanic's helper at the Jack Armstrong Used Car Lot. After being laid off for lack of work, he continued to look for non-agricultural jobs and in August obtained one with Horn's Meats, where he stayed until he was once again laid off for lack of work. He resumed his search, but without success.

[12]Ronny is his given name, he is incorrectly referred to as Ronald in the pleadings. (I: 65.)

As with Michael and George, the UFW questions Ronny's diligence and reasonableness in abandoning agriculture and in failing to file charges with the ALRB. I find that he was diligent in seeking employment; that, like his brothers, he was excused from seeking farm work (I: 68-69, 73, 82-84); and that he had no obligation to file charges with the ALRB.[13]

Finally, I reject the UFW's contention that the declarations he filed in March and August 1982 indicate an earlier resolve to waive reinstatement.

D. Cecilia Salinas

The parties agree that Cecilia Salinas' backpay period began January 7, 1980, when she was terminated, and the General Counsel concedes that it ended at the beginning of January 1981, when, due to illness, she became unavailable for work. During that period she had no interim employment whatsoever.

Her previous experience was confined to agriculture, primarily in thinning and weeding crews and occasionally on lettuce machines. During the nine years she worked at Sun Harvest, she moved with the seasons from one area in California to another--Huron, Salinas and the Imperial Valley.

The union questions her diligence in seeking work throughout the backpay period and her availability toward its end.

[13]I also found Ronny to be an honest witness, and I fully credit his testimony.

Diligence in seeking interim employment. Salinas was examined, month by month, as to her whereabouts and her efforts to find work, first in Huron in February 1980 (II: 25-28),[14] then in Salinas (II: 28-37, 41-45), and finally in the Imperial Valley (II: 45-56). She steadfastly claimed that she had sought employment almost daily in each area. She named the companies and contractors she approached; she described the pickup points and offices visited and the crops involved; and she recounted the postponements and rejections she received, either for lack of work or lack of experience.

Nevertheless, I have difficulty with her testimony. It is hard to believe that she would not have met with at least one or two successes during the 12 months she claims to have continually canvassed for work. It is also odd that she could not recall the names of any of the individuals she approached during the entire time. Nor did her demeanor inspire much confidence: Her responses were given in a dry, flat, matter of fact tone, at times resentful, but usually lacking any affect. All of which leads me to believe that, while she attempted to find work in each area,

[14]The UFW points to the discrepancy in February between the location of the Sun Harvest crews (who, according to the specification, remained in Huron throughout that month) and Salinas' testimony, that she left early in the month to seek work in Salinas. It may be that she did not correctly recall how long the Huron season lasted. (See II: 28-29.) But even if she left before it finished, I find nothing amiss since the evidence indicates that the Salinas season had begun.

her efforts were not nearly so persistent or exhaustive as she claims.

For its part, the union confined itself to cross-examination and introduced no affirmative evidence to contradict her testimony; for example, records indicating that companies to whom she claimed to have applied were in fact hiring new employees at the time.

Because the burden of proof is with the union on this issue (0. P. Murphy & Sons (1982) 3 ALRB No. 54; S & F Growers (1979) 5 ALRB No. 50), and because any uncertainty is to be resolved against the party responsible for creating the situation which led to the uncertainty (J. H. Rutter-Rex Mfg. Co., Inc. (1971) 194 NLRB 19, 24), I must conclude that the UFW has failed to carry its burden. There 'is insufficient evidence to establish a lack of diligence on Salinas' part.[15]

Unavailability due to medical problems. The parties stipulated that Salinas entered the hospital for a hysterectomy in the last week of October 1980, and that she returned to the hospital in November and was discharged on November 8th. (II: 59-60, 65-68) She testified that, when first admitted, she spent 3 or 4 days in the hospital; that she eventually spent three weeks

[15]Salinas also testified that she may have been blacklisted in Imperial Valley. As with the Moses brothers, I find that her obligation to mitigate damages did not require her to file charges of discrimination with the ALRB.

recuperating; and that she "looked for very little work" in December. (II: 62, 64, 65}

On these facts, I conclude that from October 27, 1980 on, her medical condition was such that she was—for all intents and purposes—unavailable for employment.[16] I have therefore reduced her gross backpay for the 4th quarter of 1980 to $643.12 to reflect the fact that she was available only 3 1/2 of its 13 weeks.[17] A similar adjustment has been made in the amounts necessary to make her whole for lost vacation and pension benefits.[18]

After the close of hearing the UPW submitted a letter dated December 30, 1980, from Paul H. Goodley, M.D., to Tenoco Garcia, M.D., which can be read to indicate that Salinas admitted to Dr. Goodley that, 4 months prior to her visit, she had spent three weeks in bed due to pains in her right shoulder.

At the close of hearing the parties were advised that such a letter could only be admitted by stipulation or through a motion

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[16]I do not consider her understandably very limited efforts in December to be enough to make her available for work during that month.

[17]$\frac{3.5}{13}$ x $2388.72 = $643.12

[18]Vacation: .04 [$9,458.77 - ($2388.72 - $643.12)] = $303.53

Pension; Reduce by: $\frac{3.5}{13}$ x 414 hrs. = 111.5 hrs.

Then recompute as follows:

$0.13 (399.25) + $0.19 [349 - (414.5 - 111.5)] = $265.51

to re-open the record. (II: 73-74.) No stipulation was forthcoming and no motion to re-open was made. I therefore decline .to admit or consider the letter as evidence.

Expenses. Salinas claimed $500.00 per quarter, solely for gasoline in connection with her search for work. (II: 43) That amounts to $167.00 per month, or $38.50 per week. The $38.50 should have purchased her at least 330 miles of travel each week.[19] But, with the exception of trips from Salinas to King City in April and June and from Calexico to Blythe in October, her travel was confined to locations only a few miles from her residences. When questioned about slightly longer trips from Salinas to Chular, a distance of 10 to 15 miles, she actually claimed that each round trip required 15 to 20 gallons of gas! (II: 40)

While Salinas does not drive (she was driven to possible work locations by family members), she is not an ignorant person, incapable of making a reasonable estimate of her expenses. Yet the amounts she claims are far out of line--so far out of line that I am convinced that she made no effort whatsoever to have them reflect the actual circumstances of her job search.

I am sorely tempted to invoke the rationale of the NLRB in American Navigation Co. (1983) 268 NLRB 426, and strike all of her expense claims in order to express my dismay at her testimony and

[19]Based on 12 mpg at $1.40 per gallon (See fn. 21, infra.)

to deter others from similar behavior. However, the American Navigation standard is confined to "willful deceit" (Id. at 423), and Salinas' conduct, while verging on that, is more accurately characterized as one of careless disregard for the facts. I have therefore cut her expense claim to the reasonable cost of. traveling 100 miles per month, with an additional allowance for 10 trips to Blythe between October 1 and 25 (round trip: 200 miles) and trips to King City twice a week in April (9 trips) and once during June (round trip: 100 miles).[20]

Waiver of reinstatement. Finally, I reject any claim by the UFW that the declaration filed by Salinas in March 1982, indicated an earlier resolve to waive reinstatement.

E. Guadalupe Beltran

Guadalupe Beltran's backpay period began January 7, 1980, when she was terminated, and ended April 23, 1981. During the 15 1/2 month period, except for a brief visit to Salinas, she remained in the Imperial Valley. Beltran testified that she found no interim employment whatsoever during this time.

Her experience at Sun Harvest was confined to thinning broccoli, cauliflower and lettuce, and occasionally cutting broccoli. Before that, she had picked onions, garlic, tomatoes, plums and other kinds of produce, as well as doing some packing shed work.

[20]This results in the following travel expense amounts: January, $11.67; February, $11.67; March, $11.67; April $116.67; May, $11.67; June, $23.33; July, $11.67; August, $11.67; August, $11.67; September, $11.67; and October, $175.00. The amounts are calculated using 12 mpg [based on here testimony as to the

The union questions her diligence in seeking employment and also claims that she found work for a portion of the period, but concealed her earnings.

Diligence in seeking interim employment. Beltran, like Salinas, was examined, month by month, as to her efforts to find work. (I: 9-33, 38-49.) She, too, asserted that she had looked for work almost daily, without success, for the entire period, and she named and described in more detail than Salinas the companies and contractors she approached, the pickup points and offices she visited, the crops involved, and the postponements and rejections she received.

Despite its greater care and detail, I have the same difficulties with Beltran's testimony that I had with Salinas': Not one job in 15 1/2 months of supposedly continual effort and an almost complete inability to name those she spoke with.

From the standpoint of testimonial demeanor, I found her more credible than Salinas. She was calm, but not without affect, and she was much less guarded. Because of this and because the union introduced no affirmative evidence to impeach her testimony, I find that it has failed to sustain its burden of proof, and I conclude that there is insufficient evidence to establish a lack of due diligence on her part.[21]

(Footnote 20 Continued)

condition of the family automobile (II: 40)], and a price per gallon in 1980 of $1.40. The parties are apprised of this latter figure so that, in accordance with the rules of administrative notice., they are afforded an opportunity to controvert it when this Recommended Decision is considered by the Board.

[21]As with Salinas, the UFW points to the discrepancy between the

Alleged interim employment. In the course of Beltran's initial cross-examination, the union surprised her by asking whether she had performed janitorial work at the offices of an Imperial Valley job training program—SER Jobs for Progress—where her son was the Director. (I: 51-52) She replied that she had worked there and had earned $400 or $500 a month. (I: 52-53) She was then asked when in 1980 that had happened, and she answered that it was in August and September. (I: 54-55.) Later, after the hearing had concluded, her counsel moved to reopen the record to correct, as mistaken, her admission that she had worked for SER in 1980. The motion was granted. (See discussion at pp. 2-3, supra.) At the reopened hearing, she explained that she had confused the dates, and she testified that it was not until 1982 that she worked for SER. (III: 13-15.)

Having heard her testimony and observed her demeanor on both occasions, I am convinced that she was surprised by the initial questioning and, in her confusion, misstated the date. I therefore find that her employment with SER occurred in 1982, after the backpay period had ended. She is therefore entitled to

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(Footnote 21 Continued)

movement of the Sun Harvest crews (as evidenced by the Specification) and Beltran's continuing residence in the Imperial Valley, and claims that she was duty bound to look elsewhere when Sun Harvest crews were working elsewhere. For that argument to be tenable, it would have to have been accompanied by proof that there was little or no agricultural work going on in the Imperial Valley when the Sun Harvest crews were working elsewhere. That was never established.

full credit for lost wages and benefits during August and September 1980.

IV. CONCLUSION

Based on the above findings, I recommend that the United Farm Workers be ordered to make whole each claimant named below in the amount set forth opposite his or her name. The amounts reflect gross backpay less interim earnings, computed quarterly, with additional allowances for expenses and fringe benefits,[22] as summarized in Appendix A attached. To the total due each claimant is to be added interest computed in accordance with Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, as it may accrue to the date of payment.[23]

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[22]At no point did the UFW dispute the pension and vacation figures, except to the extent that adjustments were required pursuant to the union's other arguments. I have therefore accepted those figures, except in Salinas[1] case where an adjustment has been made due to her unavailability for work after October 25, 1980.

[23]There remains one procedural issue. The UFW caused subpoenas to be issued directing George and Ronny to appear at the hearing originally scheduled for September 23, 1986. When it was continued to October 7, the UFW assumed that their counsel would inform them. However, counsel was unaware of the subpoenas and evidently said nothing to his clients about the continuance. And so both appeared.

While one cannot help but wonder why a lawyer would fail to inform his clients that their hearing had been continued, the fact remains that these were UFW's subpoenas, and George and Ronny did appear. They are therefore entitled to their mileage and witness fees from the Union.

George Moses	$12,574.65
Michael Moses.	4,873.13
Ronnie Moses	4,944.17
Cecilia Salinas	8,707.31
Guadalupe Beltran	12,442.05
TOTAL	$43,541.31

Dated: March 31, 1987

JAMES WOLPMAN
Administrative Law Judge