El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ABATTI FARMS, INC., and ABATTI PRODUCE, INC., Respondent/Employer and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party, and TORIBIO CRUZ and JOSE DONATE, Petitioners/Intevenors.	Case Nos.	78-RD-2-E 78-CE-53-E 78-CE-53-1-E 78-CE-53-2-E 78-CE-55-E 78-CE-56-E 78-CE-58-E 78-CE-60-E 78-CE-60-1-E 78-CE-61-E 79-CE-5-E
	14 ALRB No. 8 (7 ALRB No. 36)	

SUPPLEMENTAL DECISION AND ORDER

On March 18, 1986, Administrative Law Judge (ALJ) Stuart Wein issued the attached Decision and Order recommending (1) that Respondent (Abatti) pay the amounts set out in his Decision to Maria de la Luz Torres, Maria Valdez, Rosa Briseno and Francisco Salas for the economic losses they suffered as a result of certain acts of discrimination previously found to have been committed against them; (2) that the Regional Director conduct an investigation to determine whether Francisco Salas had received a bona fide offer of reinstatement; (3) that discriminatees Clemente Salazar Fernandez, Gregoria Fernandez and Jose Arinando Fernandez be denied backpay and reinstatement on account of their willful concealment of interim earnings; and, finally, (4) that Respondent make whole its agricultural employees (including the asparagus harvesters found to be employed by it) in the amounts set out in

his Decision for economic losses they suffered as a result of Respondent's refusal to bargain. General Counsel, Charging Party (United Farm Workers of America, AFL-CIO (UFW or Union))[1/] and Respondent duly filed exceptions to various parts of the ALJ's Decision. Subsequently, the parties entered into a bilateral settlement agreement of the backpay claims of Maria de la Luz Torres, Maria Valdez, Rosa Briseno and Francisco Salas, which settlement we approved on January 27, 1988. Remaining for decision, then, are the questions of Salas' entitlement to reinstatement, the Fernandezes' entitlement to any remedy at all and a variety of makewhole issues.

Respondent's Due Process Argument

We first consider Respondent's constitutional attack on the conduct of the proceedings. The exact reach of Respondent's argument is unclear, for while Respondent vigorously contends that contractual makewhole procedures in general are defective, and that the actions of the Regional Director, the ALJ and (some members of) the Agricultural Labor Relations Board (ALRB or Board) in this case were biased against it, in the final analysis it

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[1/] Respondent has moved to strike Charging Party's Exceptions and Brief in Support of Exceptions on the grounds that it does not comply with California Code of Regulations, title 8, section 20282(a)(1) in that it fails to include references to the record. Charging Party's brief does cite to the ALJ's Decision and details the record evidence upon which it relies in support of its one exception to a factual finding. Since the other Exceptions actually rely upon the ALJ's factual findings, and only challenge the legal conclusions which flow from those findings, the regulation has been satisfied. If it has not been clear since United Farm Workers of America, AFL-CIO, (Maggio, Inc.) (1986) 12 ALRB No. 16, fn. 1, we wish to make it clear now that the requirement of citations to the "record" means citations to the transcript where necessary and not merely descriptions of the evidence in the record.

seeks only to have this Board review the entire record in order to issue a decision "independent of, and without reliance on" the decision of the ALJ, and to have such review conducted only by members of the Board who do not "appear" biased against it.

Since we have always read Labor Code section 1160.3[2/] as requiring us to undertake an independent review of the record in order to resolve exceptions to the decision of an ALJ, and since the decisions of this Board are based solely upon the record and applicable legal authority, most of what Respondent urges us to do, we do as a matter of course. It remains to observe that, upon our review of the entire record, we see no reason to disregard the decision of the ALJ: he provided Respondent with ample opportunity to make a full record upon which we can fairly decide its claims. Trial of this case consumed over 50 hearing days and generated hundreds of exhibits. During the course of the often bitterly-contested proceedings, and throughout his decision, the ALJ took careful account of all the parties' -- including Respondent's -- conflicting interests and contentions. A review of his opinion shows that it is founded upon, and explicitly refers to, parts of the entire record. We are satisfied that the ALJ gave Respondent a fair hearing.[3/]

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

[3/] Respondent makes two other procedural arguments which should be addressed. It argues, first, that the Board has no makewhole procedures and, second, that General Counsel failed to follow what procedures the Board does have in that no final specification was ever prepared. Respondent's first argument is incorrect: the Board does have makewhole provisions since the backpay procedures

(fn. 3 cont. on p. 4.)

The Backpay Claims of the Fernandezes

The ALJ struck the backpay claims of the Fernandezes on the grounds that "the cumulative effect of [their deceptive] conduct makes it impossible to ascertain interim earnings . . . with any degree of accuracy." Little purpose would be served by repeating the detailed factual findings of the ALJ which underlie his conclusion since no exceptions have been filed to those findings. The Union excepts only to the ALJ's application of National Labor Relations Board (NLRB or national board) cases denying all backpay.

Since at least 1960, when it issued Jack C. Robinson dba Robinson Freight Lines (1960) 129 NLRB 1040 [47 LRRM 1127] (Robinson), the NLRB has had a policy of denying all backpay when a discriminatee's willful concealment of interim earnings made it impossible for the national board to ascertain how much backpay was due him. (See also M. J. McCarthy Motor Sales Co. (1964) 147 NLRB 605 [47 LRRM 1127] (McCarthy).) Then, in 1979, in what it described as an attempt to balance the "overriding" policy of the National Labor Relations Act (NLRA) to make employees whole against the danger of turning national board proceedings into instruments for private gain, the NLRB held that when a discriminatee voluntarily reveals previously concealed earnings, it would not serve the purposes of the NLRA to "penalize" him by striking backpay so long as backpay could still be accurately

(fn. 3 cont.)

are utilized in makewhole cases. Indeed, Respondent's second argument recognizes this. While it is true that General Counsel did not issue a final specification in this case, in view of the substitution of our formula for that proposed by the General Counsel in his moving papers, we cannot see that Respondent has suffered any prejudice.

determined. (Flite Chief (1979) 246 NLRB 407 [102 LRRM 1570] (Flite Chief.)) Although the decision was reversed on appeal, Flite Chief, Inc. v. NLRB (7th Cir. 1980) 640 F.2d 989 [106 LRRM 2910], the national board adhered to its new rule for several years. (See, e.g., Intra-Rote Incorporated (1983) 267 NLRB No. 167 [114 LRRM 1079]; Gas and Equipment Co. (1982) 263 NLRB No. 127 [111 LRRM 1616]; Great Plains Beef Company (1981) 255 NLRB No. 185 [107 LRRM 1097].)

In 1983, in American Navigation Co. (1983) 268 NLRB No. 62 [114 LRRM 1264] (American Navigation), the NLRB announced a more stringent rule than that of Flite Chief. It now held that discriminatees found to have willfully concealed interim earnings would be "denied backpay for all quarters in which they engaged in the employment so concealed"; the more extreme cases of concealment would continue to come under the Robinson/McCarthy rule which the board expressly declined to overrule. (American Navigation Co., supra, 268 NLRB No. 26 at 426, n. 8 [114 LRRM 1268, n. 8].)

For nearly 30 years, then, the NLRB has stricken backpay claims when the actions of discriminatees made it impossible to determine backpay accurately. Against this, Charging Party asserts that the backpay claims of the Fernandezes can be accurately determined since additional earnings were the subject of a stipulation. We disagree. The deception practiced by the claimants was so extensive that, no matter how much they may have revealed, we cannot be sure they have revealed everything. In Ad Art Incorporated (1985) 280 NLRB No. 114 [122 LRRM 1315], the

national board adopted its ALJ's determination that the Robinson/McCarthy, rather than the American Navigation, rule applied when: the discriminatee withheld relevant evidence, testified falsely, destroyed records to cover up misstatements, and attempted to prevent a witness from testifying truthfully. Even though the concealed earnings were ultimately ascertainable through bank records and the testimony of the discriminatee's partner, the national board struck all earnings on the grounds that it was impossible to "credit" the discriminatee. In our view, the deception of the discriminatees in this case is of the same order as that practiced by the discriminatee in Ad Art; we affirm the conclusion of the ALJ.

The Reinstatement of Salas

Salas admits receiving Respondent's offer of reinstatement which notified him when and where his crew would be working and how to go about rejoining it. In response, Salas went twice to the home of his foreman, Jose Rios, but Rios was not home either time; he also spoke to Clemente Fernandez who told him Rios said there was no more work. Because Rics was never called to deny that he told Fernandez there was no more work, and, further, because Respondent had announced it was going out of business, the ALJ concluded he could not determine whether the reinstatement offer Salas received was bona fide. We conclude the ALJ erred in his recommendation to remand the matter to the Regional Director to determine whether the reinstatement offer was valid.

A valid offer of reinstatement must be "specific,

unequivocal and unconditional." (Standard Aggregate Corp. (1974) 213 NLRB 154 [87 LRRM 1273]; Daniel Construction Co. (1985) 276 NLRB No. 115 [120 LRRM 1216]; Diversified Case Company (1984) 272 NLRB No. 172 [117 LRRM 1478].) Where such an offer has been made, backpay is tolled for employees who do not accept reinstatement "on the date of rejection [or] on the date of the last opportunity to accept." (Southern Household Products (1973) 203 NLRB 881, 882 [83 LRRM 1247].) Upon receipt of a valid offer of reinstatement, the discriminatee is "require[d to make] some sort of response." (Florida Steel Corp. (1985) 273 NLRB 901, 915 [118 LRRM 1359].) What is reasonable will depend upon the circumstances of the case. (See, e.g., Carter of California (1980) 250 NLRB No. 54, p. 348 [104 LRRM 1529].) Where extrinsic evidence indicates that an offer, valid on its face, is not bona fide, backpay is not tolled. (See, e.g., Knickerbocker Plastic Co., Inc. (1961) 132 NLRB 1209, 1235-1236 [48 LRRM 1505].) An employee may be found to have waived reinstatement by failing to respond to a valid offer. (G. W. Emerson Lumber Co. (1952) 101 NLRB 1046 [31 LRRM 1176]; Coca-Cola Bottling Co. of Memphis (1974) 269 NLRB 1101 [116 LRRM 1424]; Eastern Die Company (1963) 142 NLRB 601 [53 LRRM 1103] enforced (1st Cir. 1965) 340 F.2d 607 [58 LRRM 2255] cert. den. (1965) 381 U.S. 951, [59 LRRM 2432].)

Since the offer of reinstatement is, on its face, clear and unequivocal, General Counsel had the burden of proving that it is other than what it appears to be. Unlike the ALJ, we cannot conclude that Respondent's announcement that it would go out of business in June corroborates Fernandez' testimony that

Rios told him there would be no more work until May. To us, the credibility of Fernandez' testimony on the point turns entirely on Fernandez' credibility. Having already struck, his entire backpay claim because of our lack of confidence in his veracity, we find no reason to credit him as to this. According to Salas, all he did to obtain reinstatement was to try to call Rios twice and to rely on Clemente's account of his conversation with Rios. Even crediting Salas that he relied on Fernandez, the risk that he could be deceived by Fernandez should be borne by him -- since he chose to rely on Fernandez -- rather than by Respondent. The offer having given Salas sufficient opportunity to notify Respondent of his intentions, we conclude that he did not act reasonably in merely calling Rios twice. We conclude that Salas waived reinstatement.

Bargaining Questions

In the underlying decision the Board found that Respondent violated section 1153(a) and (e) on December 27, 1978, when it refused to bargain with Charging Party in reliance on a decertification election which it unlawfully promoted. Our Order issued on October 28, 1981. Respondent's attorneys and negotiators, Merrill Storms and Joe Neeper, testified that after the issuance of the Board's Decision they met with Respondent's president, Ben Abatti, to determine whether to engage in negotiations and, once having decided to do that, what position to take in the negotiations. Neeper attempted to call the UFWs negotiator on December 10, 1981, leaving "a message of the purpose of the call" upon being advised he was not available. There was

no other contact between the parties until the first week of January 1982 -- Storms testified it was the 5th or the 7th -- when the first bargaining session was arranged for January 13, 1982.

In accord with our usual practice, we awarded makewhole in the underlying unfair labor practice (ULP) case from the date of the Respondent's refusal to bargain until Respondent commenced good faith bargaining. The ALJ determined that Respondent bargained in good faith once bargaining resumed and he cut off makewhole with the arrangement of bargaining.

Charging Party excepts to the ALJ's cutting off makewhole at all, contending that Respondent never bargained in good faith. Respondent does not except to the ALJ's treatment of its bargaining conduct, but challenges (1) the Board's practice of determining the cutoff by reference to bargaining conduct (including the Board's power to do so); (2) the particular cutoff date chosen by the ALJ; and (3) the ALJ's failure to find the Union bargained in bad faith. General Counsel concurs with Respondent that makewhole should be cut off when Respondent first "offered" to bargain.

We reject Respondent's argument that its liability should terminate at some point during the makewhole period. So far as Respondent argues that the Board's Order either requires, or should be read to require, a union to request bargaining in order to avoid termination of makewhole liability, we have not interpreted our orders in that way. Moreover, we do not see how either the requirement that a union trigger an initial bargaining obligation, or the presence of a statute of limitations in the

Agricultural Labor Relations Act (Act or ALRA) can be said, as a matter of law, to require a union to request bargaining once an employer has been found to have refused to bargain. As it was Respondent who violated the Act, it is appropriate to require it to act affirmatively to remedy its violation. It is no more onerous to require it to offer to bargain with the Union than it was to require it to offer reinstatement to the discriminatees in this case. We also find unpersuasive Respondent's argument that, because the statute of limitations provision in section 1160.2 bars certain conduct from being alleged as an unfair labor practice, this Board ought to terminate Respondent's makewhole liability if the Union has failed to request bargaining. It was Respondent, not the Union, who was ordered to commence bargaining, and, as we discuss below, we find that it continued to refuse to do so.

Respondent's argument, that there is no evidence it continued to refuse to negotiate with the UFW after its initial refusal, is unfounded. UFW negotiator David Martinez testified without either objection or contradiction that Ann Smith, his predecessor as the UFW's negotiator, told him in March 1981 that Respondent was refusing to negotiate and that one of Respondent's negotiators, Joe Neeper, told him two or three times during the summer and fall of 1981 (after he requested negotiations) that he (Neeper) would "let [him] know <u>if</u> Abatti was willing to meet." Respondent's attorney and Neeper's successor as a negotiator, Merrill Storms, testified that, after the Decision in <u>Abatti Farms</u> (1981) 7 ALRB No. 36 issued, he (Storms), Neeper, and company president Ben Abatti discussed whether to even engage in negotiations. Thus, assuming the General Counsel or Charging

Party ought to have some burden of proving that Respondent continued to refuse to bargain, the testimony of Martinez, Neeper, and Storms indicates that such a burden would have been met.

In reliance on the dissenting opinion by former Chairperson Massengale and Member McCarthy in John Elmore (1985) 11 ALRB No. 22, Respondent also argues that makewhole should end when the Respondent first sought to reach the Union to set up negotiations on December 10, 1981, arguing that recognition and the offer to bargain "undoes" its previous refusal to bargain, and that it is violative of "due process" to put its bargaining conduct at issue without the Union's having filed a charge and the General Counsel's having issued a complaint. General Counsel also argues for a December 10 cutoff date. While we accept the December 10 cutoff date for makewhole, we do so for different reasons than those urged by either Respondent or the General Counsel.

In the first place, we do not believe Respondent's attempt to set up negotiations can, standing alone, be said to have fully remedied its violation of the Act. The unfair labor practice for which Respondent was found liable was not the "mere" refusal to recognize the Union, although Respondent certainly did that too; rather the gravamen of the unlawful action was that Respondent actively sought to oust the Union by, among other things, assisting a decertification campaign among Respondent's employees. As experience teaches us to require something more from a party who has once breached an obligation than the mere offer of a hand, we believe our practice of terminating makewhole by reference to the resumption of actual "good faith" conduct is warranted in cases such as this one where a respondent has so

seriously interfered with the free choice of its employees and has absolutely refused to bargain. In looking to conduct in this case we intimate no opinion as to the conditions for cutting off makewhole in surface bargaining cases.

With respect to Respondent's due process argument, we think it is sufficient to point out that our practice of looking to conduct to cut off makewhole has been judicially approved. (Ruline Nursery Co. v. Agricultural Labor Relations Board (1985) 169 Cal.App.3d 247; William Pal Porto & Sons v. Agricultural Labor Relations Board (1987) 191 Cal.App.3d 1195, 1216.)[4/] Since demonstration of good faith conduct is critical in our view, we will cut off makewhole when that "conduct" may, in the words of our Order, be said to have "commenced." Our review of the record having convinced us that the ALJ correctly concluded that Respondent fulfilled its bargaining obligation once bargaining began, it remains to determine when, for the purposes of our Order, good faith may be said to have commenced: on December 10, when Neeper left a message that he wanted to resume negotiations; on January 5 or 7 when negotiations were arranged; or on January 13, when the parties actually sat down with each other.

[4/] We should point out here that to the extent Respondent argues that the statute only permits its good faith to be put at issue through the unfair labor practice procedure, Respondent is simply incorrect. The statute also provides for determination of good or bad faith by the filing of a petition for extension of certification (Lab. Code § 1155.2.) While the existence of this proceeding for testing good faith does not mean the Board can arbitrarily proliferate additional procedures, it does mean that the elaborate procedural requirements of unfair labor practice proceedings are not the only channel through which contests of good faith may be had. We believe that looking to conduct in this case to terminate makewhole serves the remedial purposes of the Act.

Since Neeper testified without contradiction that he left a message regarding Respondent's desire to resume bargaining, and since an offer to bargain does not have to be in any particular form, we find Respondent's good faith extends back to this date. Such a finding is consonant with our practice of beginning makewhole from the date of the Union's first request to bargain (as opposed to the date of the employer's refusal). (Robert J. Lindleaf (1983) 9 ALRB No. 35.)[5/]

Computational Issues

The ALJ concluded that there were no comparable contracts because Imperial Valley "growing and shipping operations" (which Respondent typified) were unlike any of the operations for which the Union had contracts (with the exception of the piece-rate lettuce-harvesting phase of Respondent's operations with respect to which the ALJ concluded that Respondent owed no makewhole anyway). Specifically, the ALJ found that the economy of agriculture in the Imperial Valley is different from that of the Salinas Valley and that, accordingly, Sun Harvest, which General Counsel had initially contended was the comparable contract, could not be considered comparable.

Left with the task of deriving some other comparative wage for purposes of determining makewhole, the ALJ determined that the most appropriate measure for makewhole was an average

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[5/] In view of our affirmation of the ALJ's conclusion that Respondent was in good faith, we have no need to consider Respondent's argument that the Union was in bad faith. Any inquiry into union conduct would not change our conclusion about the cutoff date.

percentage increase derived from all the companies about which evidence was presented. Based upon his calculations (none of which has been excepted to) he concluded that a 10 percent increase fairly reflected the "range" of average increases. He then applied this 10 percent factor to augment Respondent's prevailing wage rates for each year of the makewhole period. He also held that he would apply the Adam Dairy/Hickam [6/] fringe benefit factor, partly for administrative convenience, and partly owing to his conclusion that there were no comparable contracts from which to derive a fringe benefit formula. All parties have excepted to various parts of the ALJ's conclusions.

Charging Party has excepted to the conclusion that Sun Harvest was not the comparable contract. It also contends that the ALJ's formula is inconsistent with what he expected it to accomplish in that the annual increase he describes is actually less than the increase provided by the formula of the General Counsel, which he rejected. Charging Party further excepts to the ALJ's failure to provide any makewhole wage increase for the lettuce harvesters and to his failure to provide a specific makewhole increment for the asparagus harvesters.[7/]

[6/] See Adam Dairy (1978) 4 ALRB No. 24, Robert F. Hickam (1983) 9 ALRB No. 6. In Adam Dairy we determined that, in order to avoid protracted litigation over the fringe benefit component of makewhole, we would utilize a standard wage/fringe benefit formula, In Hickam, we modified the Adam Dairy fringe benefit formula so as to eliminate the percentage of fringe benefits attributable to government mandated fringe benefits.

[7/] The ALJ concluded that the asparagus harvesters were the employees of Respondent and, as such, entitled to makewhole. Respondent has not excepted to that conclusion and we affirm it.

In his Exceptions Brief, General Counsel urged the Board to increase unit wages during each year of the makewhole period by an amount equal to 10 percent of Respondent's wages previous to the makewhole period.[8/] General Counsel further disputes the ALJ's use of the Adam Dairy/Hickam formula to calculate fringe benefits, and excepts to the ALJ's technique of deducting the entire amount of fringe benefits paid by Respondent from the entire gross makewhole amount, as opposed to deducting from each employee's award the actual benefits paid on behalf of each employee.

Respondent makes the most comprehensive attack upon the ALJ's Decision. It first argues that, as between the ALJ's and the General Counsel's proposed formula, the ALJ abused his discretion by rejecting the General Counsel's formula in favor of his own. Respondent next argues that the ALJ's formula is arbitrary in that it fails to take into account wage increases actually made by Abatti and is without evidentiary support. Respondent also charges that the ALJ erred by essentially applying an irrebuttable presumption that Respondent would have signed a contract when he relied on contracts for the measure of what Respondent would have paid had it not refused to bargain. Allied with these arguments is Respondent's contention that because

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[8/] There is some confusion regarding the makewhole formula General Counsel is proposing. In its Exceptions Brief, Respondent has interpreted General Counsel's position as proposing a ten percent yearly increase compounded over the makewhole period. This is not the case: General Counsel is proposing a fixed premium in the amount of ten percent of the first year's wage be added in each year of the makewhole period: in other words, a straight thirty percent increase over three years.

percentage wage increases the employees received under the recently executed UFW/Abatti contract were consistent with the percentage increases its employees received during the makewhole period, no makewhole is due.[9/]

Respondent also argues that it is arbitrary for the Board to require Respondent to pay interest on the entire principal sum of makewhole owed since Respondent must remit 8.5 percent of the award to make Federal Insurance Compensation Act and Supplemental Disability Insurance contributions. Respondent generally contests the propriety of our Adam Dairy/Hickam fringe benefit formula, arguing (1) it should only have to make an employee whole to the extent that he incurred medical expenses which would have been covered by the union plan and were not covered by Abatti's plan; (2) that the Adam Dairy/Hickam fringe benefit formula is arbitrary because Respondent in fact paid higher benefits than any which were paid by any Imperial Valley grower/shipper or under any Southern California based contracts; and (3) that the Adam Dairy/Hickam formula represents an arbitrary and unreasonable presumption. Finally, Respondent contests imposition of the Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 (and now, by implication, E. W. Merritt Farms (1988) 14 ALRB No. 5) interest rates as well as the ALJ's recommendation that interest be compounded. Because of the number as well as the variety of exceptions, it will be useful

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[9/] Without intimating any opinion as to the weight to be accorded this contract, the Board permitted it to come into evidence upon Respondent's and General Counsel's motion to reopen the record. Charging Party opposed the motion on the ground that the contract was irrelevant because it was executed outside the makewhole period.

to deal with them categorically to the greatest extent possible. Two broad classes of exceptions may be immediately identified, (1) those relating to the ALJ's choice of a comparable wage formula and (2) those relating to the ALJ's use of the Adam Dairy/Hickam fringe benefit formula. All the others escape easy classification. We will deal with the miscellaneous exceptions first.

1. Miscellaneous Exceptions

We reject Charging Party's argument that, even though no makewhole wage increase is due the piece-rate lettuce harvesters, they should nevertheless be awarded an additional 2 percent in order to make up for the union dues they would have paid under a contract. Since a union is not entitled to receive any dues in the absence of a contract (TMY Farms, Inc. (1983) 9 ALRB No. 29; Carter Lumber Co. (1977) 227 NLRB 730 [95 LRRM 1139]; Miami Coca Cola Bottling Co. (1965) 151 NLRB 1701, 1710 [58 LRRM 1675]), we do not take dues into account in computing makewhole. Indeed, the Board has already rejected an employer's attempt to decrease a makewhole award by assuming a deduction for dues. (C. Mondavi & Sons dba Charles Krug Winery (1984) 10 ALRB No. 19.)

We also reject Charging Party's argument that we should treat the asparagus harvesters differently from any other group of employees because their base wage remained unchanged over the makewhole period. In the absence of evidence upon which to base a particularized makewhole wage for the asparagus harvesters, we cannot make the sort of adjustment Charging Party seeks. It

simply does not follow from our not awarding any makewhole to the piece rate lettuce harvesters who received the highest contractual wage that we must award the group of employees who received the lowest wage a special wage supplement.

We reject Respondent's argument that the ALJ erred in recommending modification of the interest rate on our underlying order in accordance with our decision in Lu-Ette Farms, Inc., supra, 8 ALRB No. 55 (and now, by implication, E. W. Merritt Farms (1988) 14 ALRB No. 5). Respondent argues that if the Board's Order became res judicata[10/] upon summary denial of its petition for review, we are without jurisdiction to change any of its terms. It might as well be said upon the same grounds that, because our Order provides for reinstatement and backpay, we are without jurisdiction to find, as we have in this case, that an award of backpay and reinstatement of the Fernandezes is now against the policies of the Act, or that Salas is no longer entitled to reinstatement. These examples illustrate that it has always been the practice of this Board, as it has been the historical practice of the national board, to permit appropriate "modification" of its orders. The question of the precise amount of backpay owed being specifically reserved for compliance proceedings, and the interest rate being merely incidental to that question, it does not violate the principle of res judicata for this Board to apply a higher rate than that originally ordered.

We do find merit in (1) Respondent's exception to the

[10/] See Agricultural Labor Relations Bd. v. Abatti Produce, Inc., (1985) 168 Cal.App.3d (revd. on other grounds).

ALJ's compounding of interest and in (2) General Counsel's exception to the ALJ's failure to calculate the fringe benefit owing to each employee individually, as opposed to calculating it for the entire unit. As to the former, we shall order simple interest according to our practice (see Compliance Manual § 4-2700); as to the latter, the Regional Director will be directed to calculate, in conformity with this decision, each employees' makewhole award individually.

2. Determination of a Makewhole Formula

When these supplemental proceedings began, General Counsel contended that Sun Harvest was the comparable contract for purposes of measuring makewhole. In support of this contention, UFW negotiator Arturo Mendoza testified that the Union had been seeking to use Interharvest/Sun Harvest[11] as a model for contracts in the vegetable industry. After the expiration of the Interharvest contract in 1979, the Union began negotiating with Interharvest, and, separate from those negotiations, with 30 other vegetable employers for a new contract. The course of these negotiations has been detailed in this Board's Decision in Admiral Packing Company, et al. (1981) 7 ALRB No. 43, reversed sub nom. Carl Joseph Maggio v. ALRB (1984) 154 Cal.App.3d 40. Agreement was reached on a contract with Interharvest in August 1979. Following this agreement, the Union reached agreements modeled on Sun Harvest with a number of other vegetable companies. Two other companies, California Coastal Farms and

[11] Interharvest changed its name to Sun Harvest in 1979.

Colace Brothers, signed Sun Harvest-type contracts over the next few years.

With the exception of Colace Brothers, all the companies which signed such contracts had Sun Harvest wages in most job classifications, but the contracts contained differences on local issues, e.g., rates with respect to crops Sun Harvest did not grow, or on provisions relating to seniority or the number of paid representatives; one company had only Sun Harvest wages. The companies which signed Sun Harvest-type contracts and had Imperial Valley operations were Grower's Exchange, Admiral Packing, Green Valley Produce, Oshita, John Elmore, California Coastal Farms and Hubbard. With the exception of John Elmore and Colace, none of these Imperial Valley companies was exclusively Imperial Valley based: California Coastal operated in Imperial, Salinas and Blythe; Growers Exchange operated throughout the State in Salinas, Oxnard, Blythe and the Imperial Valley; Admiral Packing operated in Salinas, Imperial and Arizona; Oshita operated in Salinas and Imperial; and Green Valley Produce operated in Salinas and Imperial. Although Hubbard was primarily an Imperial Valley operation, it also did some harvesting in Salinas, Arizona and New Mexico.

Charging Party contends that because these companies signed Sun Harvest-type contracts, and because they all had at least some (and in the cases of Elmore and Colace exclusively) Imperial Valley operations, and because all of them utilized job classifications similar to those used by Abatti to grow some of the same crops as Abatti, that Sun Harvest was the comparable

contract for measuring makewhole. It is undisputed that Abatti itself had a contract with (then) Interharvest wages in 1978.

Factual bases like those originally urged by the General Counsel and still urged by Charging Party have been used to determine "comparability" at least since J. R. Norton Company (1978) 4 ALRB No. 39 when the Board directed the General Counsel to devise a makewhole formula from contracts executed within the makewhole period covering units with a similar sized work force, similar types of operations, and similar geographic locations. Charging Party correctly points out that in a number of decisions this Board has found Sun Harvest to be the comparable contract for determining makewhole. (See Holtville Farms, Inc. (1984) 10 ALRB No. 13, enforced Holtville Farms v. Agricultural Labor Relations Board (1986) 168 Cal.App.3d 391; J. R. Norton Company, Inc. (1984) 10 ALRB No. 42 revd. in pertinent pt. unpub. Dec. J. R. Norton v. Agricultural Labor Relations Board, Fourth Dist., Div. 2, No. E001505; Martori Bros. (1985) 11 ALRB No. 26.)

Respondent argues that the record as a whole demonstrates that Sun Harvest cannot be considered a comparable contract since, after 1979, the Imperial Valley growers generally refused to follow Sun Harvest because they could not remain competitive under the terms and conditions of employment it established.

Andy Church, the attorney who represented a majority of the employers (including Sun Harvest) in the group bargaining, testified extensively about the emergence of the split between the Imperial Valley based companies and the so-called Salinas or

multiregional companies. At the outset of the industry negotiations, a number of Imperial Valley growers (Colace, Vessey, Lu-Ette, Gourmet, Maggio and Saikhon) took part. However, after impasse was declared, the Imperial Valley companies felt that the Salinas companies had "given away the store" even with their preimpasse offer of February 1979 and, with one exception, refused to be a party to further negotiations.

Prior to the split, the Salinas and Imperial companies were paying the same wages across all job classifications with the exception of the irrigator class. After the split, wages throughout California fell into a number of different levels with Salinas wages occupying the highest level and the San Joaquin or upper Sacramento Valley wages occupying the lowest level. Imperial Valley wages, along with Santa Maria, Oxnard, Coachella, Ventura and San Diego fell within the two extremes.

After 1979, the Imperial Valley growing companies, notably Sun Harvest and California Coastal, wound down their Imperial Valley operations, mainly because the whole southern area -- including not just Imperial, but Phoenix and Tacna as well -- was not a "profitable center" for growing lettuce. With respect to Sun Harvest in particular, its landlords were demanding long term leases when it was only interested in taking lettuce out of the Imperial Valley for three and one-half months in order to complement its other production areas. Even though it could grow other crops on the same land when it was not growing lettuce, such as milo, cotton, wheat or other flat crops, those crops were not very profitable. Church testified:

> [C]ertain landlords took the position that since you could grow lettuce on the ground, the rent should be comparable with what they pay in other areas where the primary crop is lettuce. Whereas, if you just go out and lease cotton ground or wheat or milo ground, it's a standard type price. In other words, the landlords wanted more money if you were going to grow lettuce on their ground. (R.T., Vol. XXXVII, p. 34.)

In addition to the problem of high rents, Sun Harvest's Imperial Valley competitors in flat crops were paying lower wages. Besides these two factors, the cost of water, equipment, pesticides, and an insect infestation tipped the balance against Sun Harvest's continuing in Imperial.

When Cal Coastal and Sun Harvest signed contracts with the Union in 1979, their wage rates were $1.30/hr. above what their Imperial Valley competitors were paying. Church explained that if the two companies had grown only lettuce, the raise in wages would not have put them at such a disadvantage because, the price of lettuce being so volatile, a high market could have covered the increased costs. However, since flat crops have relatively stable prices, the $1.30/hr. wage differential increased the risk in those crops.

Dr. Phillip Martin, a Professor of Agricultural Economics, called and qualified as Respondent's expert, testified in support of Respondent's contentions that the differences between Southern and Central Coast California agriculture were such that Sun Harvest could not be considered a comparable contract. According to him, wages always tend to be lower in field crops than in vegetables. This is true, not only throughout California, but also throughout the country, and not merely now,

but for the past three decades, except for the brief period when Sun Harvest served as a "pattern" agreement. Because Central Coast farmers specialize in vegetables, their wages tend to be higher than those in Imperial who specialize in livestock and field crops.

Dr. Martin further testified to the reasons for this. One reason is that work in field crops and livestock is easier and steadier so that a lower hourly wage is more acceptable to employees. Another reason is that the period of peak demand in Imperial coincides with the minimum amount of alternative work available in California agriculture so that there is an oversupply of labor just when it is needed in Imperial. Also, Monterey (relative to Imperial) has a diversified economy which offers a variety of nonfarm jobs against which agricultural wages have to compete. Finally, because of the relatively low cost of living in Mexico, Imperial, which draws a great deal of its labor force from Mexico, is not under the same kind of pressure as is Monterey to keep wages high.

These differences are linked to others. With the cost of land in the coastal regions being generally higher, the crops required for a sustainable agricultural enterprise along the coast must be high-return per acre crops, such as fruits and vegetables. The only reason the multiregional companies come to Imperial is to maintain their market share by being quality year-round producers. Over the year, the high average prices for vegetables permit them to absorb losses in other crops.

Mixed companies, which Imperial Valley companies have to

be (because they cannot specialize in vegetables), rely on vegetables almost as a gamble, hoping to take advantage of a high market and short supply. The rest of their land is devoted to flat crops which, though stable in price -- either because demand is relatively stable or because government programs offer price supports -- do not offer high profit margins. These companies do not need to pull in the kind of skilled seasonal labor force upon which the vegetable companies rely.

Ron Barsamian, the negotiator for a number of agricultural employers in the Imperial Valley who signed Sun Harvest-type contracts after 1979, namely, Elmore, Growers Exchange and Hubbard, testified that Elmore went out of business after signing a contract with Sun Harvest wages. According to him, Elmore's operations in Imperial were in the worst part of the valley, just south of the Salton Sea, as a result of which he had problems with flooding and salinity which required a costly system of dikes to hold back the "sea". Additionally, pesticide and fertilizer costs became too great for him. He simply could not afford to absorb the increased Sun Harvest costs on top of these costs. Barsamian emphasized, however, that unspecified personal reasons were the overriding factor in Elmore's closing down.

Growers Exchange, too, went out of business after signing a Sun Harvest-type contract for two reasons: one was the lengthy litigation before the Board which just became too onerous for the company's principals; the second was that it was competing against other companies that were not paying Sun Harvest wages. Hubbard ceased operations in Imperial and finally went out of business

completely in 1983 principally because wages and benefits under its Teamster contract were so high.

For reasons to be discussed, we approve the ALJ's rejection of Sun Harvest as the comparable contract. In doing so, however, we do not find the argument about the various companies going out of business solely because of Sun Harvest wages to be very persuasive. With respect to Elmore, Barsamian testified that Elmore had unique costs associated with his operation which made it more expensive than others. To the extent Barsamian's testimony about Growers Exchange cites Sun Harvest wages as a factor in driving Growers Exchange out of business, it was not just because the wages were high at Growers Exchange, but because Growers Exchange was competing with other companies who refused to pay them. Finally, Hubbard can no more be said to have been ruined solely by Sun Harvest wages than it can be said to have been ruined solely by Teamster wages.

Related considerations cause us to discount the evidence about the termination of business by Sun Harvest, Admiral and Cal Coastal as a result of signing UFW contracts. It was, as emphasized by Church, more "complicated" than that: the multiregional companies had trouble in both Southern California and in Arizona because of a combination of market forces, including the cost of money and land, as well as competition from the farmers who, like Respondent in this case, would not accept Sun Harvest. According to Church, too, union wages were no more responsible for Sun Harvest's economic predicament than was the decision of the Imperial Valley growers who, like Abatti, rejected

Sun Harvest wages.

Those factors aside, the heart of Respondent's contention, that the structure of Imperial Valley agriculture made Sun Harvest wage levels unacceptable to Respondent, remains unchallenged. Dr. Martin testified that for decades prior to the Sun Harvest "master" period, wage levels in Salinas and Imperial had diverged and that, after 1979, they began to diverge again. Although Martin's testimony curiously overlooks the presence of a union as the chief factor in eliminating this divergence between 1976 and 1979, the principal conclusion to be drawn from his and Church's testimony is that the profit margin on flat crops was not large enough for Imperial Valley growers to be willing to assume the risk on across-the-board Sun Harvest wages. This conclusion, narrower than Respondent's claim that Sun Harvest wage levels drove any who paid them out of business, seems to us dispositive. Since makewhole represents what the parties were likely to have agreed to, and we are convinced that they would not have agreed to Sun Harvest wages, we conclude that Sun Harvest is not a comparable contract.

Our previous findings, on quite different records, that Sun Harvest was a comparable contract do not call for a different conclusion here. Holtville Farms had twice unilaterally raised wages to reflect Sun Harvest rates. J. R. Norton Company, Inc., like Sun Harvest, was a statewide farming operation which, once again like Sun Harvest, principally grew and harvested lettuce year-round and, for reasons already developed, cannot be compared to Respondent. Finally, Martori Brothers only grew lettuce in the

Imperial Valley and all the evidence in this case indicates that the economics of the lettuce "industry" are distinctive.

With Sun Harvest eliminated as the comparable contract, it remains to decide what the appropriate measure for makewhole will be. Respondent argues a variety of approaches, all of which end in the same result: no makewhole. In his post-hearing brief General Counsel urged the ALJ to award a makewhole increment equal to 10 percent of Respondent's premakewhole wage during each year of the makewhole period. On the basis of the 1986 UFW/Abatti contract, General Counsel now argues that no makewhole is owing. For the reasons stated below, we reject Respondent's and General Counsel's (present) contention that Respondent owes no makewhole and we adopt the 10 percent formula recommended by the General Counsel in his post-hearing brief. In advance of delineating the formula we choose and our reasons for choosing it, we must first dispose of a number of antecedent legal contentions.

First, to the extent Respondent's argument that the ALJ erred in substituting his formula for that of the General Counsel may be construed to suggest that this Board must adopt any reasonable formula proposed by the General Counsel, the argument must be rejected. The Board has the ultimate responsibility for determining the appropriate remedy for an unfair labor practice. (Harry Carian v. Agricultural Labor Relations Board (1985) 39 Cal.3d 209.)[12/] However, as we have frequently stated, in the absence of evidence preponderating towards a different formula

[12/] Inasmuch as we have rejcted the ALJ's recommended formula, Respondent's particular argument about the ALJ's abuse of his discretion is moot.

than that proposed by the General Counsel, we will defer to his judgment where it is reasonable to do so. (See, e.g., Kyutoku Nursery (1983) 8 ALRB No. 73.)

Second, for the reasons stated below, we reject Respondent's related arguments that (1) the Board cannot look to contracts as a measure of makewhole without impermissibly presuming that Respondent would have signed a contract, and (2) that this Board should apply the rebuttable presumption in William Pal Porto and Sons v. Agricultural Labor Relations Board (1978) 191 Cal.App.3d 1195 (Dal Porto) to the facts in this case. We take the Dal Porto argument first.

In Dal Porto, the court held that in imposing the makewhole remedy in refusal to bargain cases this Board has, in effect, established and relied upon a conclusive presumption that a union and an employer would have reached an agreement in the absence of the unlawful conduct. Such a presumption, the court held, contravenes the language of Labor Code section 1160.3 which requires a threshold showing that the employees suffered a loss of pay as a result of the employer's refusal to bargain before makewhole may be awarded. As a result, the court imposed a new analytical framework for awarding makewhole in bad faith refusal to bargain cases. Under this new analysis, the Board may use a presumption that the parties would have consummated a collective bargaining agreement providing for higher pay had the employer bargaining in good faith, but the resumption is rebuttable and the offending employer must be given the opportunity to prove that even in the absence of its bad faith no contract would have resulted.

Prior to issuance of the Dal Porto Decision, Respondent had argued somewhat similarly that the Board's practice of looking to comparable contracts to determine the loss suffered by employees conclusively presumed that the employer would have agreed to a contract. Respondent contended, as the Dal Porto court has now concluded, that such a presumption could only be rebuttable and, moreover, that it effectively rebutted it.

Despite the court's endorsement of the principal elements of Respondent's argument, the Dal Porto opinion ultimately provides no support for the conclusion Respondent would have us reach. This is so because the court draws a distinction between cases in which a Respondent has actually engaged in bargaining (as the employer in Dal Porto did) and cases such as we face here in which a Respondent has not bargained at all. The court recognized that in technical refusal to bargain cases, it would be impossible to prove that the refusal to bargain had no effect on the failure to conclude a collective bargaining agreement; since bargaining never took place, the refusal necessitated the failure to reach agreement.[13/] (Dal Porto at 863.) This is in accord with prior precedent which has never

[13/] By analogy to the burden-shifting approach in discharge cases upon which the Dal Porto court so much relies, cases in which no bargaining has taken place are like pretext cases in that the ground upon which liability may be disputed is "wholly without merit" (Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]), because it is impossible to maintain that the lack of bargaining had no effect on the "failure" to reach agreement.

required a burden shifting approach in "nonsurface" bargaining cases.

Thus, our Supreme Court has held that in technical refusal to bargain cases the Board need only find the employer's stated grounds for refusing to bargain to be either without merit or to have been asserted only for the purposes of delay in order to justify our award of makewhole. (J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, 27.) Similarly, other Courts of Appeal have upheld makewhole awards in other kinds of "absolute" refusal to bargain cases[14/] without requiring any particularized showing that the refusal to bargain prevented consummation of a collective bargaining agreement. (F & P Growers Association v. Agricultural Labor Relations Bd. (1985) 168 Cal.App.3d 667 (F&P).) Indeed, to provide an employer who has absolutely refused to bargain the opportunity to prove that the parties would not have reached agreement had he bargained, would be to permit a wrongdoer to profit from his own wrongdoing by providing him with the benefit of bargaining which did not actually take place. Thus, the logic of Dal Porto, as

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[14/] By "absolute" refusal to bargain cases, we mean cases in which no bargaining at all has taken place within the makewhole period. We do not interpret the Dal Porto Decision as being applicable to such cases. We believe that our interpretation of Dal Porto is fully consistent with prior precedent and still permits the Board freedom to consider the applicability of Dal Porto to those cases in which some bargaining has taken place within the makewhole period.

as well as preexisting appellate and Supreme Court precedent, do not require this Board to reconsider our award of makewhole in this case.[15/] The award of makewhole being appropriate even under Dal Porto's analysis, this Board is permitted to "impute to the parties an 'agreement' and [to] measure losses of pay and benefits with reference to the imputed contract." (William Pal Porto and Sons, Inc. v. Agricultural Labor Relations Bd., supra, 191 Cal.App.3d 1209.)

We reject Respondent's related contention that we look to noncontract wage levels at other Imperial Valley growers who were found to have reached impasse in Carl Joseph Maggio v. ALRB, supra, 154 Cal.App.3d 940. Since good faith bargaining leads either to contract or impasse, and since all uncertainties are to be resolved against Respondent as the wrongdoer (Bigelow v. RKO Pictures (1946) 327 U.S. 251, 265; Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal. 3d 845, 863), we will look to contractual wage levels; we do not think it appropriate to treat Respondent, who did not bargain at all, as though it stood in the shoes of those who did and bargained to impasse.

Finally, we reject General Counsel's and Respondent's argument that the recent UFW/Abatti contract proves that no makewhole is due: the fact that the parties may have finally

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[15/] No matter whether the propriety of Respondent's refusal to bargain in the underlying case be considered under a Norton-type standard or an F&P-type standard, our makewhole award was appropriate since this Board specifically found that Respondent's refusal to bargain in reliance on the decertification election it fostered was not in good faith.

agreed to a wage benefit/package consistent with that which Respondent offered during the period in which it bargained in good faith does not settle the question of what the parties would have agreed to during an earlier period when Respondent unlawfully refused to bargain. This is so, because the refusal to bargain itself affects the parties' bargaining positions:

> Employee interest can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees.
>
> * * *
>
> Thus the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses either because the union is gone or because it is too weak to bargain effectively. (International Union of E., R.M.W., AFL-CIO (Tiidee Products) v. NLRB (D.C. Civ. 1970) 426 F.2d 1243, 1249 [73 LRRM 2870].)

Ordinarily, evidence about what the parties would have agreed to comes in the form of wages from "comparable" contracts executed by the union during the makewhole period. Such evidence is notably absent in this case because of the decision by, on the one hand, the Union to push for wage uniformity in the vegetable industry and, on the other hand, the decision of the Imperial Valley growers to go their own way. As a result, having accepted the argument that the Imperial Valley is, as Respondent has argued, "unique," there simply are no contracts that are comparable according to our conventional criteria, either because there are no contracts at all (in the case of employers who bargained to impasse) or because the contracts that do exist

cannot be considered comparable (if we look to units with Sun Harvest wages or in other geographic areas.) Even the Colace contract, which was at least partly intended as a settlement of the outstanding litigation between the parties, does not permit us to isolate the likely result of negotiations between the Union and Respondent. In such circumstances, we, like General Counsel and the ALJ, must look to other measures of makewhole. Both General Counsel and the ALJ utilized a percentage gain approach; indeed, both utilized the same percentage, though each applied it in a different way. We conclude that a percentage gain approach is reasonable.[16]

General Counsel urges that we increase Respondent's premakewhole wages a straight 10 percent per year. General Counsel derived his 10 percent figure in reliance: (1) on Ben Abatti's testimony[17] that he was prepared to provide 10 percent

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[16] Because of the uniqueness of the makewhole remedy, there is little precedent to guide us in our application of it. We note, however, that when makewhole was being considered under the national board, a percentage gain approach was recommended as the most appropriate measure. (See Note, Monetary Compensation as a Remedy for Employer Refusal to Bargain (1968) 56 Georgetown Law Journal 474, 497-98; Comment, Employee Reimbursement for an Employer's Refusal to Bargain; The Ex-Cell-0 Doctrine (1968) 46 Texas L.Rev. 758, 767.) When the Labor Law Reform Act was being considered, the Senate version of the bill contained language measuring makewhole by Bureau of Labor Statistics data showing the average percentage gain achieved in union contracts during the makewhole period. (H.R. Rep. No. 95-637, 2d Sess. (1978).)

[17] We are reluctant to place great weight upon Ben Abatti's testimony about the raises he was prepared to give. In the first place, the testimony refers to his intentions outside the makewhole period and we have already indicated that the focus in these proceedings is on what the parties would have done within the makewhole period. Secondly, like the ALJ, we are concerned that to accord great weight to such testimony would be to invite

(fn.17 cont. on p. 35.)

raises when bargaining resumed; (2) the Colace contract, with its roughly 30 percent wage increase divided over the makewhole period; and (3) the average percentage increase given by the Southern California companies. The ALJ derived his 10 percent formula from a wider range of data.

> In reviewing Appendices G-l through G-4 and H-l through H-4, I note the following: Average yearly increases for farm employees (tractor drivers, irrigators, and general laborers) were generally in the 10-11% range or higher. These wage rate increases varied by company grouping (Abatti plus the non-contract Imperial Valley companies increased 4-6% per year; the Southern California union contract companies increased some 9-10% per year; Sun Harvest and derivative companies increased some 10-16% per year. The Colace contract reflected no such

(Fn. 17 cont.)

future litigants to construct hypothetical negotiating strategies for us to choose from.

While the foregoing remarks moot Respondent's argument about what Ben Abatti meant by his testimony, we should point out that there is no support for Respondent's contention that he meant to increase wages ten percent over the contract period. Abatti testified:

> General Counsel: Prior to the commencement of negotiations, did you believe that agreeing to a contract would necessarily mean an increase of wages for the workers?
>
> Ben Abatti: Yes, eight to ten percent.
>
> * * *
>
> General Counsel: How did you arrive at this eight to ten percent figure?
>
> Ben Abatti: Being competitive with what the rest of the farmers are paying in the Valley.

If Abatti meant to speak of "spreading" the "ten percent" increase over the contract term, he did not say so. The manner in which he replied is consistent with the meaning both General Counsel and the ALJ gave it.

increase during the makewhole period, but percentage increments of 32-33% in November 1982 following the UFW contract.

These projections are similar to the tabulations of Dr. Martin (which reflected increases in the 12-13 percent per year range) for farm employees during the makewhole period (see CPX 3, Appendix K).

The harvesting categories were even more problematical, varying from 14% per year increases (Sun Harvest and derivative company lettuce harvest piece rates, Abatti lettuce harvest piece rate) to 4% per year (Abatti non-lettuce harvest increases) and 32% (hourly) with 10% increases in 1982 for Colace piece rates (cantaloupe harvest wages).

Keeping in mind the wage trends reflected on this record, the various contracts negotiated by the UFW during this period, the economic differences between the Imperial Valley and Salinas Valley, as well as the wage increases actually paid by Respondent (without bargaining), I recommend that the makewhole wage rates be set at 10% over and above the actual Abatti rate per year for each of the non-lettuce harvest job categories. I find that said figure represents the best approximation of what Abatti would have paid its employees absent its refusal to bargain . . . . (ALJD,p. 126.)

Although primarily contending for Sun Harvest wages, Charging Party has excepted to the ALJ's formula and urges we augment Respondent's premakewhole wages by 10 percent compounded over each year of the makewhole period. Respondent argues there is no evidentiary support for any makewhole award and further argues that the ALJ's formula in particular provided for greater than 10 percent increases[18/] Indeed, as between the

[18/] In the first year of the makewhole period, of course, Respondent's argument is inapplicable. In any subsequent year and in any wage classification in which Respondent increased wages, the ALJ's ten percent formula will provide a greater than 10 percent increase but only as measured against the premakewhole wage.

ALJ's formula and General Counsel's, Respondent urges we adopt that of General Counsel. Respondent's last argument is similar to General Counsel's argument against compounding the makewhole rates, and both General Counsel's and Respondent's arguments conflict with Charging Party's argument that the ALJ's formula is deficient because it does not compound at a 10 percent rate.

Putting aside for the moment the matter of how to apply the 10 percent formula recommended by both the ALJ and the General Counsel, we reject Respondent's contention that there is no evidentiary support for the formula. Indeed, like the ALJ and the General Counsel, we are impressed by the compatibility of a 10 percent formula with so much data; no matter whether we look at averages derived from Southern California contracts, or at averages derived from statewide contracts, or at averages from the Imperial Valley (Colace factored over three years), or at the averages contained in Dr. Martin's study, a 10 percent figure reasonably reflects the wage gains employees could expect to enjoy from the collective bargaining process.

The remaining question is whether to apply the General Counsel's version of the formula, that of the ALJ, or that urged by the Charging Party. Inasmuch as the General Counsel's formula is reasonable and we find neither that of the ALJ nor that of the Union more reasonable, we shall adopt the General Counsel's formula.

3. Computation of Fringe Benefits

Both General Counsel and Respondent have excepted to the ALJ's resort to the Adam Dairy/Hickam formula. Since we have

affirmed the ALJ's conclusion that there is no comparable contract, there is nothing to rely upon in order to "cost out" fringe benefits. Respondent's argument that a fringe benefit formula is arbitrary has already been rejected in Holtville Farms v, Agricultural Labor Relations Board (1985) 168 Cal.App.3d 388. That Respondent paid "more" in fringe benefits than any other Imperial Valley grower, even if true, does not affect our conclusion. It receives a credit for every dollar it paid in fringes; our makewhole award measures what it would have paid had it bargained in good faith. We also reject Respondent's argument that the Board's method of calculating makewhole requires it to pay interest on government mandated contributions since we do not include any such contributions in the makewhole award. Finally, we reject Respondent's argument that payment of medical premiums directly to employees is arbitrary and unreasonable and that we are required to recompense employees only to the extent they had medical expenses which were not covered by Respondent's plan and would have been covered by the Union's plan. Respondent's "claim-by-claim" approach to medical benefits is onerous and unnecessary.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent Abatti Farms, Inc., its officers, agents, successors, and assigns shall:

1. Provide each employee (except the piece-rate lettuce harvesters) employed during the makewhole period defined in this

Decision, a basic makewhole wage supplement equal to 10 percent of their premakewhole wage for each year of the makewhole period, and further augment the wages of each employee employed during the makewhole period by the Adam Dairy/Hickam (see Adam Dairy (1978) 4 ALRB No. 24, Robert F. Hickam (1983) 9 ALRB No. 6) fringe benefit factor. All makewhole amounts shall bear interest therein computed at the rate of 7 percent per annum, computed quarterly through the date of this supplemental Decision and thereafter in accordance with our Decision in E. W. Merritt Farms (1988) 14 ALRB No. 5.

Dated: July 26, 1988

JOHN P. McCARTHY, Member[19/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[19/] 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. Member Smith did not participate in the consideration of this case.

CHAIRMAN DAVIDIAN, Concurring and Dissenting:

I concur in the majority opinion with the exception of its holding regarding Respondent's and General Counsel's Motions to Reconsider the previous awards of makewhole. I do not read the Dal Porto Decision as requiring the distinction which the majority draws between "non-surface" bargaining and "surface" bargaining cases. Accordingly, I would apply the William Pal Porto and Sons v. Agricultural Labor Relations Board (1987) 191 Cal.App.3d 1195 standard to this case and would grant Respondent's and General Counsel's motions to reconsider and to re-open the record.

Dated: July 26, 1988

BEN DAVIDIAN, Chairman

CASE SUMMARY

Abatti Farms, Inc., and . Abatti Produce, Inc., (UFW/Toribio Cruz and Jose Donate)	14 ALRB No. 8 Case Nos. 78-RD-2-E 78-CE-53-E 78-CH-58-E 78-CE-53-1-S 73-CS-60-E 78-CE-53-2-E 78-CE-6Q-1-E 78-CE-55-E 78-CE-61-E 78-CE-56-E 79-CE-5-E (7 ALRB No. 36)

ALJ DECISION

Backpay Issues

The ALJ found that Respondent owed Rosa Briseno, Maria de la Luz Torres and Maria Valdez the amounts set out in his decision to make them whole for losses suffered as a result of Respondent's discrimination against them. No party excepted to his decision in these respects. He also found that Clemente Fernandez, Jose Armando Fernandez and Gregoria Fernandez willfully concealed interim earnings and that such concealment made it impossible to determine the amount of backpay owing to them. As a result he recommended striking their backpay claims in their entirety. He also found that Francisco Salas was entitled to backpay computed on a quarterly basis in the amounts set out in his decision; but that there was not sufficient evidence to conclude that Respondent made a bona fide offer of reinstatement. Accordingly, he recommended the Regional Director conduct an investigation to determine when backpay should be tolled.

Makewhole Issues

The ALJ found that Respondent bargained in good faith once it commenced bargaining; accordingly, he terminated makewhole with the arrangement of bargaining. He found that Sun Harvest was not a comparable contract because predominately Imperial Valley companies are different from Sun Harvest with its statewide lettuce operations. In seeking a measure for makewhole, he applied a percentage increase derived from all the contracts about which evidence was presented; this percentage was added to Respondent's prevailing wages during the makewhole period. He also applied the Adam Dairy (1978) 4 ALRB No. 24, Robert F. Hickam (1983) 9 ALRB No. 6 (Adam Dairy/Hickam) fringe benefit formula because there was no applicable contract.

BOARD DECISION

Backpay Issues

Prior, to the issuance of the Board Decision, the Board accepted a bilateral settlement of the backpay claims of Rosa Briseno, Maria Valdez, and Maria de la Luz Torres and the amount of backpay owing to Francisco Salas. Remaining for decision were the issues of the propriety of denying all remedy to the Fernandezes on

account of their willful concealment of earnings and the question whether Salas received a bona fide offer of reinstatement.

The Board affirmed the decision of the ALJ to deny any remedy to the Fernandezes, but rejected his decision to conduct an investigation concerning the offer of reinstatement. The Board held that the offer was bona fide and that Salas waived reinstatement by failing to timely and reasonably respond.

Makewhole Issues

The Board affirmed the conclusion of the ALJ that Respondent bargained in good faith after bargaining began. It determined that makewhole should be cut off on the date Respondent first offered to bargain on the grounds that this was earliest date that bargaining could be said to have begun. It also affirmed the decision of the ALJ that Sun Harvest was not a comparable contract. The Board found that a 10 percent makewhole formula was compatible with all the evidence presented and that General Counsel's 10 percent formula was reasonable. It therefore adopted the formula recommended in General Counsel's brief. In the absence of a comparable contract, the Board applied the Adam Dairy/Hickam fringe benefit factor and E. W. Merritt Farms (1988) 14 ALRB No. 5 (Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55) interest rate from the date of its order.

Concurring and Dissenting Opinion

Chairman Davidian dissented from the majority opinion only insofar as he would grant Respondent's Motion for Reconsideration of the Board's initial award of the makewhole remedy in light of the subsequent Court of Appeal Decision in William Dal Porto and Sons v, Agricultural Labor Relations Board (1987) 191 Cal.App.3d 1195. Chairman Davidian does not believe that the court has conclusively ruled out application of the Dal Porto standard to every case in which no bargaining occurred.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case Nos. 78-RD-2-E
ABATTI FARMS, INC., and ABATTI PRODUCE, INC., Respondent/Employer,	78-CE-53-E
	78-CE-53-1-E
and	78-CE-53-2-E
	78-CE-55-E
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	78-CE-56-E
	78-CE-58-E
and	78-CE-60-E
TORIBIO CRUZ AND JOSE DONATE, Petitioners/ Intervenors.	78-CE-60-1-E
	78-CE-61-E
	79-CE-5-EC
	(7 ALRB No. 36)

Appearances:

Antonio Barbosa of
El Centro, California
and James E. Flynn
(Post-Hearing Brief)
of Sacramento, California
for the General Counsel

Merrill F. Storms
Gray, Gary, Ames & Frye of
El Centro, California
Richard Paul of
Gray, Gary, Ames & Frye of
San Diego, California for
the Respondent

Chris Schneider
of Calexico, California
Clare McGuiness of
Keene, California for
the Charging Party.

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

STUART A. WEIN, Administrative Law Judge:

On 28 October 1981, the Agricultural Labor Relations Board (hereinafter "ALRB" or "Board") issued a Decision and Order in the above-captioned proceeding, finding, inter alia, that Respondent(s) Abatti Farms Inc., and Abatti Produce Inc., hereinafter "Abatti" or "the Company"[1] Violated Labor Code section 1153(e) of the Agricultural Labor Relations Act (hereinafter "ALRA" of "Act") by refusing to bargain following its unlawful assistance in a December 1978 decertification campaign. Respondent was further found to have violated section 1153(c) by its discriminatory discontinuation of the rapini crop prior to the 1978-79 harvest. Finally, Respondent was found to have violated section 1153(a) and (c) of the Act by its discriminatory layoffs of employees Clemente Fernandez, Gregoria Fernandez, Jose Armando Fernandez, Francisco Salas, Maria Valdez, and Maria de la Luz Torres, and by its discriminatory suspension of Rosa Briseno.

The Board directed that Abatti:

> (1) "Make whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time during the period of December 27, 1978, to the date on which Respondent commences bargaining which results in a contract or a bona fide impasse, for all losses of pay or other economic losses they have incurred as a result of Respondent's refusal to bargain in accordance with the formula set forth in Adam Dairy,/dba Ranch Dos Rios, (April 26, 1978) 4 ALRB No. 24, plus interest computed at seven percent per annum, (citations omitted) (Para. 2(e)).

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[1]Abatti Farms, Inc., and Abatti Produce, Inc., have operated only under the name Abatti Produce, Inc., since 1981. (See RT. Vol. V, p. 107.)

2. "Make whole its employees for any loss of pay or other economic losses they have suffered as a result of Respondent's discontinuance of the rapini crop (1978) plus interest on such sums at the rate of seven percent per annum. (Para. 2(c)).[2]

3. Make whole Glemente Fernandez Gregoria Fernandez, Jose Armando Fernandez, Francisco Salas, Maria Valdez, and Maria de la Luz Torres for any loss of pay or other economic loss they have suffered as a result of their discharge or layoff, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (August 12, 1980) 6 ALRB No. 43, plus interest at a rate of seven percent per annum. (Para. 2(a)).

4. Make whole Rosa Briseno for any loss of pay and other economic losses she has suffered as a result of her suspension, plus interest on such sum at the rate of seven percent per annum. (Para. 2(b)).

Respondent's petition for review was summarily denied by the Court of Appeals for the Fourth Appellate District, Division One, on 2 March 1983. Hearing was denied by the California Supreme Court on 4 May 1983.

The parties were unable to agree on the amount due any of Respondent's employees, and on 21 June 1983, the Regional Director of the ALRB (El Centro Region) issued a "Notice of Matter in Controversy and Notice of Hearing" (GCX 1.1). A Makewhole and Backpay Specification issued on 15 October 1983.

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[2] Respondent's motion to dismiss regarding this issue was granted at hearing because of a lack of proof that the crew suffered any (backpay) losses as a result of the 1978 crop discontinuation. Indeed, the employees merely worked for Ben Abatti's brother-in-law, Albert Studer, during the relevant period. See 7 ALRB No. 36, supra, at pp. 11-12. Said ruling was without prejudice to inclusion of the rapini workers in the bargaining makewhole portion of the remedy. See discussion infra. (R.T. Vol. XVI, p. 7.)

(GCX 1.2.)[3]

Respondent filed its Answer to Makewhole and Backpay Specification on 9 November 1983 (GCX 1 . 3) , and a Supplemental Answer 5 December 1983 (GCX 1 . 5) .

Hearing was held before me in El Centro, California, on 54 dates between 7 December 1983 and 25 September 1984.[4]

During the hearing, General Counsel sought and was granted leave to amend its pleadings. On 13 February 1984, a First Amended Makewhole Specification issued (GCX 1 . 7) ; on 7 May 1984 a Second Amended Makewhole Specification issued (GCX 1 . 8) . A First Amended Backpay Specification issued on 20 January 1984 (GCX 1 . 6) , and an Amendment to First Amended Backpay Specification to Conform to Proof issued on 17 September 1984, By way of post-hearing briefs, the parties summarized their

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[3]That specification alleged, inter alia, that Respondent had failed and/or refused to provide the necessary payroll records to compute makewhole and backpay liability so that the document contained estimates which gauged Respondent's total liability to be in excess of $18,000,000. For its part, Respondent contended that as it was still appealing the propriety of the Board's underlying decision by Petition for Certiorari to the United States Supreme Court, it was under no legal obligation to provide the requested information. The United States Supreme Court denied Respondent's Petition for Certiorari on 31 October 1983. Further documentation was provided by Respondent on 16 December 1983 after commencement of the compliance proceeding, which led to the issuance of amended specifications discussed, infra.

[4]The hearing was interrupted for significant periods of time between December-January 1983-84 due to conflicts in the schedule of counsel and/or witnesses, and between March-June 1985 and July-September 1984 due to the pendency of two proposed unilateral settlements ultimately rejected by myself and the Board and/or withdrawn by the parties. By order of the Superior Court for Imperial County all proceedings were stayed from October 1984 to July 1985.

positions and provided revised makewhole/backpay calculations concerning each of the contested issues.

Either by way of pleading, motions, stipulations, or references in post-hearing briefs, the parties have contested the following:

ISSUES

A. Backpay Due Discriminatees Rosa Briseno, Maria Valdez, Maria de la Luz Torres, Clemente Fernandez, Gregoria Fernandez, Jose Armando Fernandez, Francisco Salas

The parties dispute the methodology of computing the net backpay for Francisco Salas and Maria Valdez (General Counsel and Charging Party suggest a "daily" computation; Respondent suggests "quarterly" calculations pursuant to the NLRB's formula in F.W. Woolworth Co. (1950) 90 NLRB 289 [26 LRRM 1185]), as well as whether or not Mr. Salas diligently sought interim employment during the backpay period. The entire entitlement of the Fernandezes is in dispute as General Counsel and Respondent suggest that all backpay should be stricken because of the discriminatees' intentional concealment of interim earnings. Additionally, the backpay period for the Fernandezes and Mr. Salas is also in dispute as General Counsel questions the adequacy of the company's offer of reinstatement, and Respondent suggests that backpay should be compiled only through 23 May 1979 -- when Mr. Salas briefly returned to work for Abatti.

B. (Bargaining) Makewhole Calculations

The parties disagree on virtually all aspects of this

issue including the period of liability, the identity of the employees entitled to makewhole (i.e., whether the asparagus harvesters should be included), the comparable contracts to be utilized in order to determine prevailing wage rates and the calculation of fringe benefits owing.

All parties were given a full opportunity to participate in the proceedings, and General Counsel, Respondent, and Charging Party filed post-hearing briefs. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs and arguments submitted by the parties, I make the following:

FINDINGS

I. BACKPAY ISSUES

A. Methodology of Gross Backpay Calculations

General Counsel has utilized a crew-averaging method for calculating gross backpay due each of the seven-named discriminatees. The gross figures were derived on a daily basis by multiplying the total hours worked (by Jose Rios' crew for all named discriminatees except for Rosa Briseno who was a member of the Pedro Palacio crew) by the respective pay rates, and dividing the total daily pay-out by the number of workers in the crew for that day. This quotient would provide the average daily gross earnings per crew member. (See GCX 1.6, Amendment to First Amended Backpay Specification to Conform to Proof.)

According to Ben Abatti, the thin and hoe employees worked for ten, eleven months per year, with little or no work in July or August. (R.T. Vol. XV pp. 34, 35.) This work force varied from approximately 40 to 75 during the backpay period, with the employees divided up into two crews -- the larger Palacio crew with up to 45 workers, and the smaller Rios crew with some 25 people. Work needs would determine which if any of the crews would be employed during a given period. The specification suggests that the Rios crew discriminatees could expect work on 9-28 days per month during the 10-11 more "active" months of the year. The crews were paid weekly, based on the existing hourly rate for thin and weed employees.

No party has challenged this calculation of gross earnings, which I find to be reasonable, appropriate and in accordance with typical formulae utilized by this Board as well as the NLRB.[5] See P.P. Murphy Produce Co., Inc. (1982) 8 ALRB No. 54, NLRB Case Handling Manual, Part III, section 10542.

B. Individual Discriminatees

1. Rosa Briseno

General Counsel has computed the backpay owing Ms.

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[5] I recommend that gross earnings attributed to Mr. Salas for the period June 25-27, 1979, be deleted in light of the payroll documentation and testimony of Board agent Jose Carlos to the effect that only 1-3 members of the Rios crew worked on those days. See GCX 61. R.T. Vol. XXX, pp. 64-65, 70-71, 74.

Briseno for the two (2) days work lost[6] by the crew-averaging methodology (Pedro Palacio's crew) discussed above for November 28 ($29.60) and 29 ($24.05), 1978. This calculation is unchallenged by any party. I find that she is thus owed the sum of $53.65 plus interest as discussed infra.

2. Maria Valdez

Gross backpay for Ms. Valdez has been computed on a daily crew-aver aging basis for the period 13 December 1978[7] through 24 January 1979.[8] Interim earnings from Pedro Padilla's lettuce harvesting crew (Respondent) were deducted for the periods 26 December through 30 December 1978 and 2 January 1979 through 24 January 1979. General Counsel has determined that net backpay of $92.90 was owing Ms. Valdez for the month of December (and $3.05 holiday pay differential lost)[9], with $91.80 owing for January and $2.81 holiday pay lost, for a total owing of $189.86 plus interest.

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[6]See 7 ALRB No. 36, ALJD pp. 38-40, 59-61, for discussion of the circumstances surrounding the company's unlawful 2-day suspension of Ms. Briseno. The parties stipulated that Ms. Briseno was not entitled to the Thanksgiving holiday pay alluded to in the ALJ decision (7 ALRB No. 36, ALJD p. 39, fn. 63), because the Palacio crew did not work the day subsequent to the legal holiday (pursuant to the then-existing contract). (R.T. Vol. XII, p. 31.)

[7]The date of Ms, Valdez' layoff from the Rios crew. See 7 ALRB No. 36, ALJD, pp. 34, 36.

[8]She returned to the Rios crew on 25 January 1979.

[9]Holiday pay equals the daily average of pay earned during the payroll week immediately preceding the holiday. (GCX 23, p. 38.)

Respondent produced payroll records (RX 2) reflecting that Ms. Valdez was hired as a waterperson in the Padilla lettuce harvesting crew commencing 19 December 1978 and received the following pay which was not reflected in the specification because there were no anticipated gross earnings for those dates:

	HOURS	RATE	TOTAL
Dec. 19	6	$3.70	$22.20
Dec. 20	6	$3.70	$22.20
Dec. 21	5	$3.70	$18.50
Dec. 22	7	$3.70	$25.90
Jan. 16	2	$3.76	$7.52
Jan. 18	6	$3.76	$22.56

The entire predicted gross earnings computed by General Counsel for the relevant period (13 December 1978- 24 January 1979) thus totaled $623.40 ($224.50 December, $398.90 January). Ms. Valdez' interim earnings from the Padilla crew totaled $571.47 ($221.08 for December and $350.39 for January). She was thus out-of-pocket in the sum of $51.93 (including holiday pay differential) for the period in question.

Although not referred to in Respondent's Post-Hearing Brief, it is clear that General Counsel's calculation does not provide full crediting for interim earnings because the latter do not mesh exactly with the daily gross calculations. As the work involved merely a transfer of crew and job function with the same company (Respondent) for a fixed and extremely limited period of time it would seem that rigid adherence to the Board's usual

daily[10] formula would provide a windfall to the discriminatee. I note specifically that the hours and rate of pay of the interim employment were similar to those of the predicted gross work. Ms. Valdez was predicted to have worked 24 days at $3.70 per hour with the Rios crew; she actually worked 27 days at $3.70/$3.76 per hour with the Padilla crew during the interim period.[11] General Counsel's calculations therefore overstate the backpay owing as envisioned by the California Supreme Court in Nish Noroian Farms Co., Inc. v. Agricultural Labor Relations Board (1984) 35 Cal.3d 726[12] as well as by this Board in Verde Produce 10 ALRB No. SS.[13] I recommend that Ms. Valdez be awarded the sum of $51.93[14] plus interest for the (partial)

[10]See Sunnyside Nurseries, Inc. (1977) 3 ALRB No. 42, modified on other grounds in Sunnyside Nurseries v. Agricultural Labor Relations Bd. (1979) 93 Cal.App.3d 922; J & L Farms (1980) 6 ALRB No. 43.

[11]I note that the number of hours worked by the discriminatee in interim employment was necessarily less than what she would have worked as a member of the Rios crew, since her interim wage rate was at times higher than that of the gross employment, and the total interim earnings were less than predicted gross wages.

[12]The Supreme Court thereby hypothesized the situation where an employee replaced a steady full-time Wednesday through Sunday job with similar full-time Thursday through Tuesday interim work and suggested that Monday and Tuesday wages should not be exempt from offset.

[13]I find that Ms. Valdez' work with the Padilla crew was true substitute employment for her previous work with the Rios crew.

[14]$3.42 for December 1978; $48.51 for January 1979.

seasonal[15] loss of pay due her as a result of Respondent's unlawful layoff and failure to reinstate her to her former position with the Rios crew.

3. Maria de la Luz Torres

Backpay for Ms. Torres has been calculated by the daily crew-averaging methodology (Rios crew) for the period 13 December 1978 through 6 March 1979 (the respective dates of Ms. Torres' layoff and return to the Rios crew). She did not find employment during the interim period. General Counsel has thus computed the amount owing (including holiday pay) to be $1,348.27 plus interest. (GCX 1.6, Amendment to First Amended Backpay Specification.)

Ms. Torres testified that she sought work during the interim period at two sewing factories in Los Angeles (with an aunt) as well as a cannery and two sewing factories in San Pedro (with her godparents). She could not recall the precise dates or even approximate the number of times per week she sought work during the interim period, but did remember filing for unemployment and denied any illness, vacation or picketing activity during this time.

Ms. Torres could not recall seeking any agricultural work during this period or remember the precise dates of departure from and return to the Imperial Valley. The

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[15] The same result would obtain under the NLRB's Woolworth quarterly formula, assuming that credit were given for each day of interim work.

discriminatee had no previous sewing experience, but studied sewing in Mexicali while in secondary school. Nor had she previous agricultural experience except for work with Respondent that she commenced after immigrating in April 1978. Because she wanted "something better than working out in the field", Ms. Torres sought work in the Los Angeles area where there were more possibilities (factories). (R.T. Vol. XXIV, p. 83.) She returned to Abatti on 6 March 1979 (as soon as she learned of her recall) where she worked through November 1983.

I conclude that Ms. de la Luz Torres was reasonably diligent (albeit unsuccessful) in seeking interim employment -- which issue was not raised in Respondent's Post-Hearing Brief. She is thus owed the sum of $1,348.27 plus interest, as claimed in the amended specifications.

4. Francisco Salas

a. Facts;

Mr. Salas denied unavailability for work during the backpay period[16]" due to illness,[17] vacation, union activity, school, or jail. He denied working under any other names or social security numbers. He would look for work 2-4 days per

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[16]13 December 1978 through 3 February 1984, see discussion infra.

[17]Mr. Salas spent approximately 15 days in Mexico during July 1981 due to the death of his father. Although the discriminatee conceded not looking for work during this time, the specification does not allege projected gross earnings for the dates in question.

week in December 1978, and 4-6 days per week thereafter by going to Calexico to speak with labor contractors, or to companies (e.g., Bruce Church and Bud Antle), as well as to White Wing Ranch in Arizona. Salas would often be accompanied by other members of his farming community from Mexicali (including members of the Fernandez family), sometimes arriving as early as 1:00-2:00 a.m. in these efforts.

Salas could recall interim work at the following: Abatti, Juan Reyes, Sun West, El Don, and Hyder Ranch. He did not keep records of all interim earnings during the backpay period, and his wife threw out at least some check stubs reflecting such work. By review of payroll documentation, the parties stipulated to interim earnings for the following places and dates:

1979	Employer
May 21, 23	Abatti[18]
June 1, 2, 4, 6-9, 11-13, 19-21, 25	Sun West

1980	Employer
February 24	Horizon Harvest
October 9	Anaya
October 10-11, 13-14, 17	El Don

[18]Salas could recall returning to work for Abatti for only one day. On the second day, Salas testified that he reported to work but that foreman Rios said there were no orders to take him (or the Fernandezes). See R.T. Vol. XXX, pp. 12-13. This testimony was confirmed by Clemente Fernandez. R.T. Vol. XVII, pp. 29-30, 33.

November 18-29	Hyder Ranches
December 1-23	Hyder Ranches

1981	Employer
January 6-31	Hyder Ranches
February 2-3, 9-10	Hyder Ranches
March 31	Hyder Ranches
April 3-30	Hyder Ranches
May 1-13	Hyder Ranches
June 6-30	Hyder Ranches
July 1-6	Hyder Ranches

1982	Employer
January 23-30	Hyder Ranches
February 1-12	Hyder Ranches
March 19-31	Hyder Ranches
April 1-9, 24-30	Hyder Ranches
May 1-21	Hyder Ranches
June 12-30	Hyder Ranches
July 1-12	Hyder Ranches
November 4-5	Araujo &
November 27-30	Guillen Hyder
December 1-22	Ranches Hyder
	Ranches

1983	Employer
January 3-18	Hyder Ranches

March 11-31	Hyder Ranches
April1-12	Hyder Ranches
May 2-18	Hyder Ranches
June 15-30	Hyder Ranches
July 1-12	Hyder Ranches
November 28-30	Hyder Ranches
December 1-31	Hyder Ranches
	(RX 27)

As reflected in the payroll data, Mr. Salas commenced "regular" seasonal work at Hyder Ranches (Arizona) in the grape vineyards, pruning during the winter months, thinning in the spring, and harvesting in the early summer. During "slack" seasons when there was no work, Salas would return to Mexicali where he would collect unemployment, and seek interim work. Salas missed the early pruning season in the fall of 1981 because he was unable to obtain transportation.

The company handwriting expert -- Russell F. Scott[19] -- the senior document examiner of the San Diego County Sheriff's Office -- identified cash wages of 10-27-81, 10-28-81 and 10-29-81 for Araujo and Guillen issued to employee Francisco Ramirez as being signed by the same person (Francisco Salas) who signed RX 126 (Salas' UFW authorization card) and RX 128 and 129 (Abatti paychecks.) The social security numbers on the documents differ

[19]I found Mr. Scott to be a particularly compelling witness -- straightforward, precise, and cautious in judgment. He oftentimes declined to render opinions regarding documents he could not definitively analyze.

only in the first and last digit.

Salas claimed expenses[20] for his weekend trips back home to Mexicali while employed at Hyder, for which he paid $20.00 round-trip weekly with one or two exceptions per year when he would work Sunday and thus stay in Arizona the entire week. General Counsel has set forth this claim of $10.00 per week for sixty-nine weeks as the difference between Salas' transportation costs while at Hyder Ranches compared to the $7-10 per week transportation expense he incurred while at Respondent.[21]

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[20]Theses expenses have been broken down as follows (see Amendment to First Amended Backpay Specification to Conform to Proof:

1980:	5	trips	x	$10/trip	=	$50.00
1981:	17	trips	x	$10/trip	=	$170.00
1982:	27	trips	x	$10/trip	=	$270.00
1983:	20	trips	x	$10/trip	=	$200.00
	Total					$690.00

A claim for room and board has been withdrawn pursuant to Salas[1] inability to recall any monetary differential between these interim costs and his ordinary Mexicali-area expenses while employed with Abatti. (See East Texas Steel Castings Company, Inc. (1956) 116 NLRB 1336 [38 LRRM 1470].)

[21]At hearing, I took under submission Respondent's motion to strike the Salas expense claim on the basis that the First Amended Specification (GCX 1.6, which issued 20 January 1984) contained no such claim. After having reviewed the parties' positions on this matter, including the Declaration of Merrill F. Storms, Jr. in Support of Respondent's Motion to Strike the Salas Expense Claim, and General Counsel's Motion to Allow Testimony Regarding Francisco Salas' Interim Earnings, I deny Respondent's motion. There is no evidence of any intention of wrongdoing on the part of counsel or the discriminatee in the delayed presentation of this portion of the case. Mr. Salas' absence from the state adequately explains the tardy compilation of data. Respondent has known about the expense claim since 2 December 1983, and it was only during the period 20-27 January 1984 that its expectations might have been affected. In any event, full hearing on the issue has been held, and I find no prejudice to Respondent by consideration of the issue on the merits.

In January 1984 (while working at Hyder) Mr. Salas received Respondent's letter offering reinstatement (RX 26). In response, Salas went to foreman Rios' house on two occasions but the latter was not in. Salas did not personally return to Abatti to seek his former job because he did not have transportation. Salas also testified that he spoke with Clemente Fernandez about the matter, but did not accompany Fernandez to Respondent's premises as he was awaiting W-2 forms from his Hyder Ranch foreman. Fernandez spoke to foreman Rios (at least on behalf of the Fernandez family -- see R.T. Vol. XIX, p. 47) and communicated (to Salas) Rios' representation that work was finished at that time and' that there would be no work until the (spring) onions.

b. Analysis and Conclusions:

(1) Backpay Period

Respondent suggests that Mr. Salas[1] backpay should be tolled effective 23 May 1979 -- following his return to Abatti. (Respondent Post-Hearing Brief pp. 117-118.) As I understand the company's argument, payroll records reflecting Mr. Salas' reemployment on 21 and 23 May 1979 prove that the discriminatee abandoned his work following May 23 and falsified his testimony to cover up this intentional abandonment. The record does not support the inference Respondent would have me draw. No witness was presented to refute Mr. Salas' recollection that foreman Rios stated that he had no orders to take back Salas (or the Fernandezes) as described by Salas and Clemente Fernandez.

Although under the circumstances (see discussion infra), I give little weight to the testimony offered by the Fernandez family, Mr. Salas' recollection stands uncontradicted, and I believe him to be credible in this regard. I thus conclude that he was not properly reinstated on 23 May 1979.

With respect to the tolling of liability in January 1984 -- following the at-hearing offer of reinstatement mailed to the discriminatees -- General Counsel claims that Salas relied upon the Fernandezes to seek work (see General Counsel Post-Hearing Brief, p. 5), and when the latter were unsuccessful he (Salas) did not make further efforts. Salas testified that he did not personally report to Abatti because of the assertions of Fernandez that Rios' crew was not working and that they would be called when the next work occurred in the onions (in the spring). Salas testified that he went to Rios' house on two occasions, but that the foreman was not home. Thus, the discriminatee never made personal contact with any agent of the company.

I am concerned about Respondent's version of events[22] -- particularly in light of the absence of testimony of foreman Rios. The narration of the Fernandezes stands unrefuted, although Fernandez never specifically referred to speaking with

[22]It is unclear whether the lack of availability of work with the company was necessitated by the company's proposed discontinuation of operations, or was but a ploy to avoid meeting its obligation as required by the original Board order. Nor do I know what communications, if any, transpired between Mr. Salas and Abatti personnel through the date of the onion (spring) harvest. Since these matters occurred at or following the hearing, they were never fully litigated at this compliance proceeding and I make no findings thereon.

Rios on Salas' behalf in this matter, but only for his family. It thus appears that the present record is inadequate to determine whether Francisco Salas received a bona fide offer of reinstatement, timely[23] responded to such offer, and/or should be entitled to backpay for any period post-December 1983.[24] I thus recommend that this portion of the compliance case be remanded[25] to the Regional Director for investigation of the aforecited issues. I recommend that the Regional Director be further instructed to report to the Board when these matters have been fully resolved, and in any event no later than one year from

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[23]I find that Mr. Salas made reasonable efforts to timely respond to the January 1984 offer of reinstatement by going to foreman Rios' home on two occasions, and by relying upon his friend, Clemente Fernandez, for information to the effect that there was no work being offered at the time.

[24]GCX 27 reflects interim earnings (at Hyder Ranch) through January 25, 1984. It appears that such wages might well fully set off any predicted gross earnings (based on other predicted gross earnings for the previous January periods). However, I am reluctant on this record to draw such a conclusion, particularly where it appears that General Counsel has not completed the gross backpay portion of the specification following December 15, 1983. (See Amendment to First Amended Backpay Specification to Conform to Proof.)

[25]The employer would have the ultimate burden of persuasion on the issue of the validity of the offer of reinstatement. The Board has the initial obligation to produce employees to testify on their understanding of the offer, NLRB v. Consolidated Press Carriers, Inc. (2d Cir. 1982) 693 F.2d 277 [111 LRRM 3130]. Nor is the employer required to offer reinstatement on a second occasion to the discriminatee where a valid offer had been made an the employee failed to respond to such offer. See Dennis G. Maietta and Frank M. Maietta dba Maietta Contracting (1982) 265 NLRB 1279 [112 LRRM 1195], enforced NLRB v. Maietta & Maietta dba Maietta Contracting (3rd Cir. 1984) 729 F.2d 1448. Because in the instant case the offer was made during the hearing and the events which would suggest its bona fides (e.g., the cessation of operations) occurred subsequent to the major part of the proceeding, further inquiry is required.

the date of the Board's Supplemental Decision and Order. I conclude that the gross amounts owing through December 15, 1983, for Mr. Salas are fairly reflected in the Amendment to the First Amended Backpay Specification. I will discuss the net amounts owing for this period of time infra.

(2) Mitigation

Respondent suggests that Mr. Salas' backpay claim should be stricken for failure to use reasonable efforts to mitigate damages (i.e., diligently seek interim employment) during the liability period (Resp. Post-Hearing Brief pp. 110-113). I disagree. His description of 4-6 days/week efforts to seek work, contacts with labor contractors and companies, etc., reflect reasonable diligence in this regard. (See George Lucas & Sons (1984) 10 ALRB No. 6, Pet. for Rev. dismissed by Ct. App., 5th Dist., August 13, 1984.) Although his recollection was at times faulty, Mr. Salas attempted to reconstruct his efforts to seek work in a sincere manner. He was not prone to exaggeration and readily conceded that General Counsel's original contentions with respect to the expense claim were erroneously overstated. That he was unsuccessful for significant portions of time during the backpay period does not alter this conclusion.[26] I would deny Respondent's request to strike backpay owing on this basis.

[26]Witnesses called by Respondent during the (bargaining) makewhole. portion of the case described the extremely high (26-40 percent) unemployment rate in the Imperial Valley during this time period. R.T. Vol. XLIV, pp. 161-162? XLVI, pp. 92-96.

(3) Net Backpay Calculations.-- "Dailies v. Quarterlies"

Respondent contends that General Counsel's daily formula should be replaced by the NLRB's quarterly[27] formula because Mr. Salas was (1) employed at API as a steady, year-round employee, and (2) Salas was engaged in true substitute (interim) employment at Hyder Ranches.

The policy of the Act is to restore the discriminatee to the same position he/she would have enjoyed had there been no discrimination. Arnaudo Brothers (1981) 7 ALRB No. 25, rev. den., Third App. Dist., March 19, 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. U.S. 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 Gal.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, eguitable, 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, affirmed by Ct. App., 4th Dist., Div. 2, August 9,

[27] F.W. Woolworth Co., supra.

1984, hg. den. October 18, 1984, because of the sporadic seasonal nature of agriculture in California. The quarterly Woolworth 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. 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 be arbitrarily discounted because the actual days are different. Verde Produce Company, Inc. (1984) 10 ALRB No. 35.

In Abatti Farms, Inc. v. Agricultural Labor Relations Board (1986) 176 Cal.App.3d 1069, the Court of Appeal, Fourth Appellate District, Division One, rejected the Board's daily backpay calculations and remanded for recalculation on the basis of the Woolworth formula. There, the discriminatees were steady, year-round employees and the record disclosed a substantial differential in the amounts involved when the backpay was calculated under the Woolworth formula as compared to the daily formula. In the instant case, although it might be suggested that the difference in the ultimate calculations is not so

great,[28] and the nature of Mr. Salas' work with the company was described as 10-11 months per year (with the employment varying from 9-28 days per month) as opposed to the "steady year-round employment" described by the Court of Appeal in Abatti v. ALRB, supra, I note that the gross employment for Mr. Salas was identical to that of certain discriminatees in the latter case. Indeed, Mr. Salas was a member of the same (Rios) thin and weed crew as discriminatees Herlinda Avitua, Jesus Solano, and Elena Solano. Their respective backpay periods are at least partially overlapping. I thus find that the latter decision is applicable precedent for-the instant factual context requiring the Woolworth calculations, which I have attached as Appendices A and B. See CCP section 1911; County of Los Angeles v. Continental Corporation (1952) 113 Cal.App.2d 207, 219.

At the time of this writing, the final status of the Abatti v. ALRB decision remained unclear, as the period in which to request/be granted hearing from the California Supreme Court had not run. If the decision were no longer operative, I would recommend application of the daily formula as the most appropriate based on this record because Mr. Salas lost essentially "regular" work as a member of the Rios thinning crew due to Respondent's discrimination. Through daily efforts, he

[28] There is a 12% differential between the quarterly and daily calculations: Under the daily formula, the total owing is $32,324.24; under the quarterly formula, the total owing is $28,424.46: 28,424.46 divided by 32,324.24 equals 88%. Note, in both calculations, I have excluded gross earnings for the periods June 25-27, 1979, and October 27-29, 1981, as discussed supra.

found a number of irregular, short-term interim jobs to support himself and his family. Only in 1980 did he find more "regular" work at Hyder Ranches — but the latter fluctuated with the (grape) seasons, and cannot be said to truly substitute for his thinning work with API. Rather, he followed the grape season, pruning in the winter, thinning in the spring, and harvesting in the summer, working 7-9 months rather than the 11+ months he could have expected to work had he not been unlawfully laid off. The "seasonality" of the grape cultivation process is thus not comparable to or a direct replacement for the more steady thin and weed work. Unlike the situation with respect to discriminatee Maria Valdez, who returned to the same company to work the same season at the same (or higher) rate only in a" different job category, Mr. Salas found himself with the pattern of interim employment characteristic of California agriculture --which would seem to present the type of factual record consonant with daily calculations. If the status of Abatti v. A.L.R.B., supra, were changed, I would recommend that General Counsel's (daily) calculations contained in the Amendment to First Amended Backpay Specification be approved.[29]

Pursuant to applicable NLRB precedent, whether dailies

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[29]As reflected in General Counsel's Amendment to First Amended Backpay Specification to Conform to Proof, the amount owing Mr. Salas is $32,324.34 plus interest which sum includes reimbursement for expenses for weekly trips to and from Mexicali as per Mr. Salas' testimony, and excludes the three-day period of concealed interim earnings at Araujo and Guillen, as well as the three-day period in June 1979 when no gross earnings could reasonably have been expected for Mr. Salas.

or quarterlies are utilized, no credit should be given for days of interim work which would not have coincided with gross earnings based on the two-fold rationale that (1) there is no occasion for the discriminatee to attempt to minimize his/her loss of earnings during a period when no gross earnings were attributable; (2) in the "moonlighting" situation, 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 (second job) are not deductible as interim wages. See NLRB Case Handling Manual section 10600; San Juan Mercantile Corp. (1962) 135 NLRB 698, 699 [49 LRRM 1549]; Brotherhood of Painters (Spoon Tile Co.) (1957) 117 NLRB 1596, 1598 [40 LRRM 1051].[30]

5. The Fernandezes

a. Facts:

(1) Gregoria Fernandez

Mrs. Fernandez denied unavailability for work during the backpay period (13 December 1983 through 27 January 1984) due to incarceration, vacation, picketing activities, hospitalization, housekeeping duties, illness to herself or

[30] I have made an exception with respect to certain interim earnings of Mr. Salas during the periods July 1981, 1982, 1983, as General Counsel has included a request for vacation pay (paid during this month) as well as expense claims for those periods. As such, there would seem to be no reason in logic or equity to exclude the interim earnings of that month because the vacation pay was not received on a particular day that he was working, or the expenses fell on a day of no predicted gross earnings. See NLRB Case Handling Manual section 10610; High and Mighty Farms (1982) 8 ALRB No. 100, supra.

family (9 children), and she further denied leaving the Imperial Valley or ever refusing work during this time.

Mrs. Fernandez described her efforts to seek work as follows: She would look (always with her husband Clemente Fernandez) some 4-5 days per week (3-4 days per week when work was scarce) by going to the buses at the "hole" in Calexico, inquiring of various labor contractors, companies (e.g., Gourmet and Neuman Seed), and the union hiring hall for dispatch. Mrs. Fernandez stated that she turned over all of her pay stubs and work history information to General Counsel prior to the hearing. From- these records, General Counsel and Charging Party (but not the Company) stipulated to Mrs. Fernandez' interim earnings which reflected sporadic employment with the following employers:

1979	Employer
March 12	Sun West
March 17 - April 3	El Don
May 4 - June 2	Sun West

1980	Employer
February 29 - April 9	Reyes
May 1	Araujo & Guillen
May 3, 9	Reyes
May 19, 20	C.P. Martinez
June 6, 7	Horizon-Harvest
October 9 - December 19	Araujo & Guillen

1981	Employer

April 23 - June 12	Araujo & Guillen
October 14-30	Araujo & Guillen
November 12-23	Araujo & Guillen

1982	Employer
March 25	C.P Martinez
April 6-24	C.P Martinez
June 24-30	Cal Western
July 1-6	Cal Western
August 10 - September 16	C.P Martinez
November 15 - December 30	C.P Martinez

1983	Employer
January 4-17	C.P. Martinez
March 14-18	C.P. Martinez
March 26	Cal Western
March 28-30	C.P. Martinez
April 13, 20-21	C.P. Martinez
May 9-20	C.P. Martinez
August 9-21	C.P. Martinez
September 9, 22-23	C.P. Martinez
October 15-29	C.P. Martinez
November 16-19, 29-30	

(CPX 1)

Mrs. Fernandez received Respondent's recall letter on Monday, January 23, 1984 (RX 24). Mr. Fernandez went to speak to

foreman Rios on Thursday, January 26, on behalf of the three Fernandez discriminatees. (See discussion infra.)

After testifying at hearing that Jose (Delgado) was her foreman at C.P. Martinez in 1982 and 1983, Mrs. Fernandez suffered an apparent seizure and was carried out of the hearing room by stretcher. She never completed her examination by counsel -- no party choosing to call her when the hearing reconvened on September 25, 1984.[31]

Respondent produced foreman Jose Delgado who specifically (and credibly) denied that Gregoria Fernandez -- the woman who identified him at hearing — ever worked for him in 1982 or 1983. Expert document examiner Russell Scott testified that various payroll and check stubs bearing the signature of Gregoria (or Gregorio) Fernandez were not from the same hand as those from certain known semplars -- e.g., Mrs. Fernandez' signed declaration concerning her medical condition.

Based on this information, and following subsequent investigation of the relevant work history of Mrs. Fernandez, all parties stipulated that this discriminatee was unavailable for work for the period 1982 and 1983.

(2) Clemente Fernandez

Mr. Fernandez sought work with his wife and (sometimes) Francisco Salas some 3-4-5 times per week by going

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[31]The parties had spoken to one of Mrs. Fernandez' treating physicians immediately prior to the last day of hearing, but were advised that the doctor could not opine whether or not Mrs. Fernandez was well enough to testify.

down to the "hole" in Calexico and asking various labor contractors for work. He also went to the Union on occasion, filed for unemployment when not working, and asked friends who worked at companies (including Gourmet, Neuman Seed, Mario Saikhon, and Abatti). Although Mr. Fernandez could not recall any more specific efforts to seek work or more precise dates and times, he testified to looking for work whenever he was not working during the backpay period.

Mr. Fernandez denied taking any vacation, being ill (either himself or his family), or having any household duties which rendered him unavailable for work from 13 December 1978 through the date of the hearing. He further denied working under any other than his own social security number or name, but conceded that his maternal and paternal surnames (i.e., Clemente Salazar Fernandez, Clemente Fernandez Salazar) were utilized (innocently) interchangeably by employers and Social Security.

Mr. Fernandez stated that he turned over all of his pertinent wage stubs to General Counsel, except those that might have become lost. While his recollection of names, dates and type of work was particularly murky, the discriminatee recalled interim employment with the following labor contractors: Juan Chavez, El Don, Anaya, Juan Reyes, Sun West, Joe Ramirez, La Yolanda, Macario Galvan, Estrada, Mid-Cal, Araujo and Guillen, C.P. Martinez, and (perhaps) Ben Zamudio, and De Anza. Specific dates and amounts of earnings are reflected in ALJX 1, as well as RX 3, 13, 18, and 22.

Mr. Fernandez explained that he often found work where Mrs. Fernandez could not, because the contractors (e.g., Macario Galvan, Juan Reyes) did not have rest rooms for women. Or at other times, Mrs. Fernandez would seek work with her son, Jose Armando Fernandez, while he (Clemente) would be working elsewhere (i.e., Cal West in August 1982). He denied that Mrs. Fernandez was either ill or unavailable for work during various periods of her unemployment. He further denied quitting or refusing work, stating that the sporadic nature of his interim wages was due to the work being completed, or foremen having full crews.

Mr. Fernandez received Respondent's letter of reinstatement (RX 15) on Monday afternoon 23 January 1984. He did not report on 24 January as he kept an appointment with EDD. On 26 January (in the afternoon), he spoke with foreman Jose Rios on behalf of his family (Clemente Fernandez, Gregoria Fernandez, Jose Armando Fernandez); Mr. Rios told him that the lettuce thinning had been completed and that there probably would not be work for Rios' crew until the onion harvest in May. Rios stated that he would contact Fernandez at home if there was work for his crew prior to that time. (R.T. Vol. XIX, pp. 146-147.)

Respondent witness Juan Reyes testified that during the time of the hearing Mr. Fernandez approached him to request (false) confirmation that Mrs. Fernandez was not allowed work because of the lack of rest rooms. Further, following the testimony of Respondent document examiner Rxissell Scott, Mr. Fernandez positively identified check stubs drawn to S.

Fernandez, C. Hernandez, and Gregorio C. Hernandez as his own (concealed) interim earnings (see RX 205). On occasion, the social security number varied slightly from the one under which Mr. Fernandez testified he was employed. As a result, General Counsel conceded that Mr. Fernandez concealed interim earnings on some 69 different occasions[32] during the backpay period (see Appendix B, Regional Director's Findings on Allegations Concerning Concealment and Partial Striking of First Amended Specification issued 13 July 1984). Additionally, General Counsel attributed an additional 42 days of interim earnings to Mr. Fernandez which were originally represented to be those of Gregoria Fernandez. Said earnings reflected dates on which Clemente Fernandez provided no interim information, but Gregoria Fernandez did, albeit fraudulently. Mr. Fernandez did not reveal these misrepresentations to the Regional Director until after presentation by Respondent of expert testimony concerning the various names, signatures, and social security numbers of the individuals involved.

(3) <u>Jose Armando Fernandez</u>

Mr. Fernandez denied being unavailable for work due to illness to himself or family (except on two occasions — in 1980 — when he was working for Gilroy Foods in Bakersfield and obtained three-day leaves to visit his wife and children in Mexicali), vacation, jail, school, picketing or other union

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[32] The concealment involved interim earnings throughout five years within the backpay period (1979-83) and occurred in some 15 different months.

activities. He sought work 3-4-5 days per week by going to the "hole" in Calexico (arriving at 2:00 a.m.) to speak with labor contractors, or companies throughout the Imperial Valley (e.g., Gourmet, Dessert Seed, Gilroy Foods, Neuman Seed, Joe Maggio, Mario Saikhon, many ranches and feed lots, stores, factories, Jack-In-The-Box, as well as through the EDD and the union hiring hall. Mr. Fernandez would generally look for work by himself and occasionally be accompanied by Francisco Salas.

Fernandez testified that he turned over all pertinent wage stubs to the General Counsel, and a list of interim employers was compiled (ALJX 2) for the backpay period. Fernandez recalled that he might also have possibly worked for Joe Ramirez and Manuel Rodriguez during this time. The work history was sporadic -- as employment was not always available -- and Fernandez had a generally poor recollection of specific dates, employers, crops, and locations. He did recall working with his parents at C.P. Martinez, Araujo and Guillen, Macario Galvan, and Juan Chavez. He denied that his mother was unavailable for work during 1982 or 1983, and confirmed that Pedro Cuevas did not always have rest rooms for female employees.

Mr. Fernandez claimed expenses for transportation to Blythe from Mexicali to interview for work at Gilroy Foods ($10-15) as well as food $3.50-5.00 for his one day stay in Blythe in July 1979. As the work was about to terminate, and the lettuce machines were being sent to Bakersfield, Fernandez drove north, shared (one-half) gasoline expenses of $25-$30, and commenced

work the next day in Bakersfield. He also incurred motel expenses of $30 per week, meals ($20-$25 per week), and gas ($10 per week) for the period 13 July through 7 August 1979. When the work ended, Fernandez returned to the Imperial Valley in his car and incurred additional gasoline expense of approximately $45-$50. In 1980, Fernandez worked for Gilroy Foods in the Imperial Valley for one day in May and about two weeks in June. He then went to work- in Blythe for the same company incurring gasoline expenses of $5-$7, and motel ($25-$3Q per week) and food ($20-$25 per week) costs for some three weeks. He drove to Mexicali to see his family on weekends on three occasions, incurring expenses of $10 per trip.

Mr. Fernandez continued with Gilroy Foods in the Bakersfield harvest, driving his car with two friends ($10 for gasoline) and worked until September 1980. He claimed motel expenses of $25-30 per week, food ($25 per week), and gas ($10 per week). Fernandez also visited his family in Mexicali on three occasions (3-5 July, 17-19 July, once because his wife was ill, another time because his child was ill), incurring expenses of $90 round trip. When laid off at the end of the season, Fernandez incurred additional gasoline costs of $45 (return trip to Mexicali).

On further examination, Fernandez conceded receiving a check from Gilroy for $180.91 in November 1980, and estimated his weekly food bills in Mexicali during this time to be approximately $20 per week.

Mr. Fernandez received Respondent's recall letter on 23 January 1984, to which Clemente Fernandez responded on his son's behalf (see discussion supra).

Following the testimony of Respondent document examiner Russell Scott, Fernandez conceded to having worked under various names and social security numbers (Jose Armando Fernandez, Armando Hernandez, and S. Fernandez; one or two digit variations in Social Security numbers), which information had not been previously provided to the General Counsel. The parties thereafter agreed that Mr. Fernandez concealed interim earnings on some 82[33] days (see Appendix E, Regional Director's Findings on Allegations Concerning Concealment and Partial Striking of First Amended Specification).

b. Analysis and Conclusions:

General Counsel and Respondent contend that the backpay claims of Clemente Fernandez, Gregoria Fernandez and Jose Armando Fernandez should be stricken in their entirety for willful and knowing concealment of interim earnings, perjury at hearing, and attempt to suborn perjury from witness Juan Reyes. Charging Party suggests that backpay should be stricken only on a daily basis for those days on which actual concealment occurred.[34]

[33]The concealment involved interim earnings throughout five years of the backpay period (1979-83) and occurred in some 18 months,

[34]Said resolution, it is contended, comports with the more typical method for computing backpay on a daily basis and prevents the wrongdoing employer from receiving an unjustified windfall. (See Charging Party Post-Hearing Brief, pp. 8-9.)

In American Navigation Co. (1983) 268 NLRB 426 [115 LRRM 1017], the NLRB analyzed the policies involved in situations where a discriminatee concealed interim earnings from the Board: (1) Respondent's liability for the consequences of its unlawful conduct, and (2) the Board's administration of its compliance proceedings consistent with the public interest.

> (T)o award full backpay to a claimant who attempts to pervert an order issued in the public interest into a scheme for unjustified personal gain is to reward perfidy . . . . Ibid., p. 428.

On the other hand, to deny backpay in an amount which exceeds that which is necessary to deter deception is to provide a Respondent with an unjustified windfall and to permit it to avoid the consequences of its unlawful conduct for no useful purpose. The National Board thus denied backpay for the quarters in which concealed employment occurred[35] --limiting such orders to cases where the claimant was found to have willfully deceived the Board, and not where the claimant, through inadvertence, failed to report earnings. Backpay for two quarters was denied because of the uncertainty of determining where the concealed employment occurred — such uncertainty directly attributable to the

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[35]American Navigation specifically overruled Big Three Industrial Gas (1982) 263 NLRB 1189 [111 LRRM 1616] and Flite Chief, Inc. (1979) 246 NLRB 407 [102 LRRM 1570], enf. denied in pertinent part (9th Cir. 1981) 640 F.2d 989 [106 LRRM 2910], which awarded backpay to discriminatees who had intentionally concealed interim employment, but who had subsequently admitted the employment. In Flight Chief, the claimant disclosed the earnings to a Board representative on the day the backpay hearing commenced; in Big Three Industrial Gas, the claimant admitted the earnings while he was on the stand, undergoing questioning by the employer's counsel.

discriminatee's failure to be candid with the Board. That decision specifically left intact the Board's long-standing policy of continuing to deny all backpay to claimants whose intentionally concealed employment could be attributed to a specific quarter or quarters because of the discriminatee(s)' deception. Ibid., p. 428, fn. 6.)

In Jack C. Robinson dba Robinson Freight Lines (1960) 129 NLRB 1040 [47 LRRM 1127], the discriminatee sold liquor in violation of state law and did not report profits. All backpay was deleted because the claimant failed to come forward with a statement of profits and the Board was unable to compute the amount of backpay to which he might otherwise by entitled. In M.J. McCarthy Motor Sales Co. (1964) 147 NLRB 605 [56 LRRM 1255], the Board affirmed the trial examiner's striking of backpay where the discriminatee's testimony was so evasive and otherwise unreliable as to render it impossible to determine interim earnings. There, the claimant purchased and sold cars under various names during the backpay period. The claimant failed to reveal this information to the Regional Office, to General Counsel's trial representative, plus failed to be honest, frank, and forthright on the witness stand, thus rendering it impossible to ascertain the discriminatee's actual interim earnings with any degree of certainty. (Ibid, at pp. 617-618.)

In Great Plains Beef Company (1981) 255 NLRB 1410 [107 LRRM 1097], backpay was denied to a discriminatee who flagrantly abused the Board's processes by his "evasive testimony and

deceptive record keeping". The claimant's failure or refusal to recall what other information he failed to supply rendered the ascertainment of interim earnings impossible.

I am of the opinion that the record evidence in the instant case supports striking the Fernandezes' claims in their entirety for the following reasons:

I. The record reflects the pervasive extent of the concealment. (See R.T. Vol. LV, pp. 7-8.) From RX 205, it is apparent that at least the following interim earnings were falsified: Cal Western Agricultural Services, S. Fernandez, 6/10-11/83, 7/5/82 (Jose A. Fernandez, RX 151); Cal Western Agricultural Services, C. Hernandes(z), 12/27-28-30/82 (Clemente Fernandez, RX 153); Cal Western Agricultural Services, Clemente Hernandes(z), 1/12-13-14/83 (Clemente Fernandez, RX 154); Cal Western Agricultural Services, Gregorio (C.) Fernandes(z), 12/1/82, 1/17/83, 3/26/83 (Clemente Fernandez, RX 155); Cal Western Agricultural Services, Gregorio (C.) H(F)ernandez, 6/24-25-26-28/82, 7/1-2-3/82, 7/5-6/82 {Clemente Fernandez); Cal Western Agricultural Services, Gregorio C. Fernandes, 6/30/82 (Clemente Fernandez, RX 162); C.P. Martinez, Inc., Armando Hernandez(s), 3/9/82, 6/3/83, 6/15/83, 12/13/83 (Jose Armando Fernandez, RX 46, 47, 54, 55); Juan Chavez, Armando Hernandez, 3/24/81, 3/25/81 (Jose Armando Fernandez, RX 60); Horizon Harvest Inc., Armando Hernandes(z), 2/17-19-20-22/80 (Jose Armando Fernandez, RX 63); C.P. Martinez, Armando Hernandez, 3/9/82 (Jose

Armando Fernandez, RX 137); El Don Company, Armando Hernandez, 1/27-30/81 (Jose Armando Fernandez, RX 68); California Western Agricultural Services, S. Fernandez, 6/10-11/83, 7/5/82 (Jose Armando Fernandez, RX 151); California Western Agricultural Services, Inc., Armando Hernandes, 12/27-28-29/82 (Jose Armando Fernandez, RX 152); Sun West, Inc., Armando Hernandez, 6/11-12-13/79 (Jose Armando Fernandez, RX 65, 66, 67); Araujo & Guillen, Armando Hernandez, 12/10-12/80, 2/11/81, 8/18/80, 10/20/80, 10/27/80, 10/12-13/80 (Jose Armando Fernandez, RX 38).

Additionally, testimony which was less than candid included the following:

Clemente Fernandez: ' Clemente Fernandez and Gregoria Fernandez looked for work daily from December 1978 through the present (R.T. Vol. XVI, pp. 24, 11. 3-7); when Gregoria Fernandez looked for work, she went with Clemente Fernandez (R.T. Vol. XVII, p. 47, 11. 22-26); W-2 forms (more or less) accurately reflected earnings (R.T. Vol. XVII, p. 59, 11. 12-13); Clemente Fernandez and Gregoria Fernandez worked together (R.T. Vol. XVII, p. 78, 11. 21-24); Clemente Fernandez gave General Counsel all check stubs (R.T., Vol. XVIII, pp. 30-31); Clemente Fernandez never used another social security number (R.T. Vol. XVIII, p. 34); Clemente Fernandez knew that Gregoria Fernandez was working for C.P. Martinez in August 1982 (R.T. Vol. XVIII, p. 77); Gregoria Fernandez would accompany Clemente Fernandez to look for work in October-December 1983 — at C.P. Martinez (R.T. Vol. XIX, p. 26); Clemente Fernandez gave the State all his check stubs

(R.T. Vol. XIX, p. 34); the interchange of surnames was done innocently (R.T. Vol. XIX, pp. 49-50).

Jose Armando Fernandez: All payroll stubs were handed into General Counsel (R.T. Vol. XXI, pp. 64-65); the W-2 information for Sun West is correct (R.T. Vol. XXI, p. 82); Jose Armando Fernandez worked with Araujo & Guillen one or two days (R.T. Vol. XXI, p. 90); Jose Armando Fernandez did not work at Araujo & Guillen in 1980-81 (R.T. Vol. XXII, pp. 59, 60); the W-2 forms provided correct information regarding wages at C.P. Martinez, Cal West Agricultural Services and were provided to General Counsel (R.T. Vol. XXIII, p. 12); Gregoria Fernandez worked at C.P. Martinez in 1983 (R.T. Vol. XXIII, p. 39); Cal West (Juan Reyes/Pedro Cuevas) would not hire Gregoria Fernandez because they did not have rest rooms for ladies in October 1982 (R.T. Vol. XXIII, p. 40); Jose Armando Fernandez did not work for C.P. Martinez in December 1983 (R.T. Vol. XXIII, p. 63).

Gregoria Fernandez: Worked for C.P. Martinez in 1982-83 (R.T. Vol. XXXI, p. 11); foreman was Jose at C.P. Martinez (as pointed out in hearing room) (R.T. Vol. XXXI, p. 13); Juan Reyes/Pedro Cuevas only took men in last two years (R.T. Vol. XXXI, p. 13); sought work during entire backpay period (R.T. Vol. XXV, p. 62).

The efforts to encourage other(s) to testify in a less than candid manner were highlighted by the testimony of all three Fernandezes (R.T. Vol. XVII, p. 46; R.T. Vol. XXIII, p. 40; R.T. Vol. XXXI, p. 13) to the effect that Juan Reyes only hired men.

The latter testified at hearing that Clemente Fernandez had met with him during the hearing and asked him to corroborate said information which was not true. (See R.T. Vol. LII, pp. 44-46.)

Finally, the discriminatees provided counsel with information upon which to compile (stipulated) interim earnings on 57 dates in 1982 (covering 8 months) and 48 dates in 1983 (7 months), in addition to certain stipulated earnings and W-2 information regarding C.P. Martinez contained in RX 23, all of which information was false.

II. All parties have concurred that the concealment was intentional, rather than mere failure of recollection or inadvertence.

III. The concealment was perpetrated .on Board agents who conducted the pre-specification investigation, counsel who litigated the compliance hearing, and at the hearing itself. No admissions regarding the concealment were made by the discriminatees until the testimony of Respondent's expert witness (Dr. Russell Scott) who described the falsifications toward the latter part of the hearing. Respondent had alleged such misconduct at a much earlier point in the compliance proceeding. (R.T. Vol. XXIII, p. 2.)

I find that the cumulative effect of such conduct renders it impossible to ascertain interim earnings for any of

the Fernandezes with any reasonable degree of accuracy. Thus, I recommend that the backpay claims for these three discriminatees be stricken in their entirety. I make this recommendation only with great reluctance— keeping in mind that this is the most severe sanction that can be imposed upon the discriminatees who have been found to be victims of Respondent's discriminatory conduct and that Respondent will in fact receive a "windfall" from such result. However, in weighing the conflicting considerations recited above, I believe the instant factual record compels such a result. Any other resolution would impede the ALRB's administration of its compliance proceedings consistent with the public interest.

I reach a different result with respect to striking Mr. Salas' claim which involved only 3 days during the backpay period.[36] There is no evidence that Mr. Salas deliberately withheld this information from Board agents, counsel, or at hearing, or engaged in any extensive pattern of concealment (although Mr. Salas appeared to have worked under a different name and social security number on three dates). I have no reason to doubt Mr. Salas' credibility with respect to other interim earnings or with respect to other issues (see discussion, supra). I recommend that backpay be awarded Mr. Salas in conformance with this opinion, striking earnings only for the

[36]It is unclear whether Respondent has retained its contention that the same result (striking the entirety of the claim) should apply to Mr. Salas. It does not appear in Respondent's Post-Hearing Brief, although the reference was made during hearing. (R.T. Vol. LV, p. 16.)

three days in question.

II. THE (BARGAINING) MAKEWHOLE ISSUES

A. Period of Makewhole Liability (The Bargaining History)

The underlying Board order (Paragraph 2(e)) directs Abatti to "(m)ake whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time during the period of December 27, 1978, to the date on which Respondent commences bargaining which results in a contract or a bona fide impasse, for all loss of pay or other economic losses they have incurred as a result of Respondent's refusal to bargain in accordance with the formula set forth in Adam Dairy dba Rancho Dps Rios (April 26, 1978) 4 ALRB No. 24, plus interest computed at 7 percent per annum." (Citations omitted.) The California Supreme Court had approved a limited prospective backpay remedy in Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal.3d 848, citing Transmarine Navigation Corp. (1968) 170 NLRB 389 [67 LRRM 1419]. Said remedy was to run until the parties bargained to agreement or bona fide impasse. In Ruline Nursery Co. v. Agricultural Labor Relations Board (1985) 169 Cal.App.3d 247, the Court of Appeal, Fourth District, Division One, in interpreting a similar order of the Board, concluded that the makewhole obligation ran only until respondent began to bargain in good faith. The Board defined good faith bargaining as such bargaining as leads to either contract or bona fide impasse. Such an order did not compel the respondent to make concessions

to the union at the bargaining table. Nor would it continue the makewhole order after commencement of bargaining in good faith. The court therefore concluded that the order was not open-ended.

In John Elmore Farms (1985) 11 ALRB No. 22, a 3-2 majority of the Board affirmed similar language in its Order of Makewhole: ". . . until such time as Respondents commence good faith bargaining with the UFW which leads to a contract or to bona fide impasse." (Page 6.) There, the Board rejected a dissenting view to terminate makewhole upon mere recognition of the union by respondents. The majority found it irresponsible, impractical, and wasteful for the Board to categorically decline to review any subsequent bargaining misconduct which was consistent with the employer's previous bad faith strategy on the minimal showing that the employer had agreed to sit down at the table with the union. The decision suggests, however, that it might be appropriate to reach a different result with respect to surface bargaining subsequent to recognition in cases involving "good faith technical refusals to bargain,[37] in contrast to situations where the employer's justification for refusing to recognize is found to be a fraud or sham (fn. 9, p. 7).

In the instant case, where the underlying decision suggests that Respondent has been found to refuse to bargain with the union in "bad faith" by virtue of its illegal campaign to

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[37]The majority reasoned that the issue of when to terminate makewhole would not arise in such situations, however, because makewhole would not have been imposed in the first place. (See J.R. Norton Co., Inc. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1.

decertify the union (7 ALRB No. 36, p. 48, ALJD, p. 73),[38] something more than Respondent's mere return to the bargaining table need be shown to terminate the backpay period. Resolution of the issue of the period of makewhole liability will necessarily hinge upon a finding of good/bad faith in the negotiations which commenced in January 1982. At best, this bargaining history suggests an unsettled picture.[39]

1. Facts:

a. Background

Respondent did not bargain with the UFW from the date of the decertification election (December 1978) until the Board overturned the election in October 1981. (R.T. Vol. XI, pp. 5-7.) Representatives (attorneys) Josiah Neeper and Merrill F. Storms, Jr., agreed to meet with the company principal Ben Abatti during the first week of November 1981. A series of meetings preparatory to negotiations were held during which the UFW's positions throughout the state -- particularly in Salinas Valley, the Imperial Valley, and the Coachella Valley -- were reviewed and initial areas of concern were discussed.

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[38]As found by the ALO (ALOD p. 73), "clearly, our Act does not permit an employer to refuse to recognize and bargain with his employees' certified bargaining representative based on the employer's purported good faith doubt of that representative's majority status, when that majority status has been undermined through the unlawful conduct of the employer." (Citations omitted.)

[39]There is little factual dispute concerning this portion of the case, as the parties' chief negotiators described the course of negotiations. Where material disputes do exist, I have attempted to resolve them and explain my reasons for each such resolution.

Of primary interest to Mr. Abatti was economics (wages, benefits, etc.), as well as hiring hall (Abatti was "adamantly" opposed to such provision which was not included in the previous Abatti-UFW contract); paid union representative; COLA; grievance and arbitration; union security; hours and overtime; duration (the company was concerned about a three-year contract that included COLA and/or very high wages, but on the other hand was fearful that a 1-year contract would require immediate return to the negotiation table); utilization of family and supervisors for bargaining unit work. Abatti was also generally concerned about management rights and the ability to run his company on a day-today basis. Finally, Respondent agreed that its initial position re the asparagus harvesters would be that they were not included in the unit (they were omitted from the previous contract) as custom harvesters, but that the issue was open to negotiation and/or unit clarification. Mr. Abatti testified that he was prepared to negotiate and wanted to obtain a competitive contract "that he could live with". (See R.T. Vol. XV, pp. 47, 50; R.T. Vol. XIV, p. 49; R.T. In Camera Proceeding 30 January 1984, pp. 17-19.) He instructed his representatives to schedule bargaining sessions as soon as possible.

Neeper attempted to contact (UFW negotiator) David Martinez for these negotiations in early December 1981 (approximately 10 December) but was unable to communicate with the latter until after the Christmas-New Year period. The first session was arranged for 13 January 1982.

b. Early Negotiations (Neeper/Storms - Martinez Sessions)

(1) 13 January 1982

Martinez proposed an agenda including (1) discussion of ground rules; (2) non-economic proposals; (3) request for information; and (4) off-record discussion. With respect to the ground rules, no article would be agreed to until every section was agreed to; there would be no agreement until every article was agreed to. Final approval was subject to ratification by the union membership with review and approval by the executive committee and the UFW legal department. For the Respondent, there would be ratification by the Board of Directors, but as a practical matter, almost everything would be pre-approved by virtue of the constant communications between Ben Abatti and the attorney-negotiators.

Martinez proposed the UFW-Sun Harvest contract as a "master" which Neeper rejected. Martinez then proposed that Respondent accept those articles already accepted by Imperial Valley companies in other negotiations, e.g., Colace, Vessey, Maggio. Neeper again demurred. Martinez made a verbal proposal concerning some 30 non-economic articles, basically[40] from the then-existing UFW-Sun Harvest contract, including recognition, union security, hiring, seniority, grievance and arbitration, no strike, access, discipline and discharge, no discrimination, work

[40] Changes from the Sun Harvest contract included reporting by the 10th day of the month (union security) and seniority supplement yet to be prepared.

security, leave of absence, maintenance of standards, supervisorial bargaining unit work, health and safety, mechanization, management rights, new or changed operations, camp housing, bulletin boards, credit union withholding, subcontracting, location of operations, savings clause, and modification.[41] These items were all negotiable and not presented as a package even though they would soon be outdated as the Sun Harvest contract was due to expire in some seven months.

With respect to the information request, Martinez submitted a written document (GCX 1 6) . Neeper asked Martinez to prioritize the submission, which was accomplished with the caveat that everything requested was important. The initial three "format sheets" were first priority; the subsequent three "narrative" pages were of secondary importance.[42] The information sought was for the years 1980 and 1981, and both negotiators agreed that all the information could not be provided within the next 10 days. Neeper indicated that he would make the

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[41]See RX 174.

[42]Martinez believed that within the first priority he indicated that page 2 (Production) was most critical, with page 1 (Benefit Data) and page 3 (Employee Data) of descending importance. Mr. Martinez could not confirm this particular prioritization at hearing, however, so I am unable to conclude that this specific request was communicated to Neeper. (See R . T . Vol. XI , pp. 10-11. See also testimony of negotiator Storms who recalled that within "A" requests, Martinez sought in order the employee data (p . 3) , the benefit data (p . 1) and production data (p . 2) . R . T . Vol. XLIII, pp. 78 - 79 .) I am inclined to credit Storms' version as the latter conceded that everything in "A" was important, particularly in light of Martinez[1] testimony that prioritization was for Neeper's benefit only. The sequence in which the' information was provided is not critical to the analysis of the bargaining history in any event.

data available as reasonably rapidly as his work force could develop it.[43]

With respect to scheduling, Martinez sought weekly negotiations. Neeper indicated that the schedule was a matter of agreement, but agreed to sessions of 25 January, 1 February, 15 February and 22 February. The 25 January session was not held because it was inconvenient to Martinez.

(2) <u>1 February 1982</u>

The company provided a written listing of the (non-economic) articles it was proposing (GCX 37)-- which included acceptance of twenty-three (23) Sun Harvest language items. Omitted were responses- on union security, hiring, seniority, supervisors, mechanization, records and pay periods. Martinez asked Neeper if any of the information previously requested was available. Neeper indicated that the company was "working on it" and he anticipated having some of it before the next session.

Discussion was held of a disciplinary problem involving two Abatti workers who had been discharged for fighting, and of bargaining committee member complaints of "getting hassled" for attending negotiations.

The UFW economic proposal (generally based on Sun

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[43]Martinez testified that the information was important to the union to enable it to fulfill its (statutory) duties to its membership. Because of the decertification campaign which underlay the Board's decision in 7 ALRB No. 36, the Union had no contract with the company for several years and needed to refamiliarize itself with the company's operations, acreage, etc. (R.T. Vol. XI, p. 11.)

Harvest)[44] was forwarded to Neeper on or about 10 February 1982. Proposals re job descriptions, local demands, and seniority supplement were to be forthcoming.

(3) <u>15 February 1982</u>

The company presented a written proposal (GCX 42) on the outstanding language items (union security, hiring, seniority, supervisors, health and safety, mechanization, records and pay periods), and proposed Sun Harvest for articles on rest periods, bereavement pay, jury duty, reporting on payroll deductions and fringe benefits.

There was some discussion of the company's seniority proposal which was acceptable -to the UFW with the caveat that the latter would provide a supplement. Neeper also indicated that it was the company's desire to have some supervisors perform bargaining unit work (which the UFW considered sacred), and Martinez discussed the UFW's concerns about the medical plan (they feared a lapse in coverage).

Certain information[45] was also provided. The company would continue its efforts to provide the information requested

[44]See GCX 38. With respect to crops produced by Abatti which were not referred to in the Sun Harvest agreement, the Union was proposing the same percentage increase as that reflected for the lettuce piece rate. Where Abatti was already paying wages above Sun Harvest (i.e., lettuce piece rate), Martinez proposed a "reasonable increase" as well as 20 percent bonus for all piece rate workers.

[45]Martinez termed the wage and job classification and benefit information as a "partial response" (which did not include any piece rates); Neeper referred to the submission as "significant" information. (RX 173, GCX 39, 40.)

the union, and Martinez sought further response on economics indicating the UFW would provide supplements.

Discussion ensued re release time for people to attend the negotiations, and the prior-raised disciplinary issue. The UFW caucused following which it accepted the four company proposals on economics (rest period, bereavement pay, jury duty, reporting on payroll deductions and fringe benefits), and made a written proposal of a first general supplement ("local demands"), patterned after the earlier Abatti-UFW contract. (See GCX 43.)

(4) <u>22 February 1982</u>

The discussion of ground rules was reiterated between Martinez and the company's new representative, Merill F. Storms, Jr. Storms indicated that he was a litigator, with a style different from that of Neeper, but that he was prepared to negotiate (in good faith).

Martinez renewed the union desire for a complete response to the information request. Storms indicated that the company was compiling the information, but was in the process of transferring to a new computer, so there was some delay.

The company presented a written proposal on economics (GCX 44), with all wage piece rates as per the existing Abatti pay scale. The parties were as far apart as "night and day" on economics -- the company continuing with its present scale, with the UFW at Sun Harvest plus additional costs. The parties differed also on paid union representative, hiring hall, medical plan, pension plan, overtime, reporting and standby time.

The disciplinary issue was again discussed -- with Storms indicating that the company would not rescind the discharges. Martinez suggested that Abatti had changed its policy (unilaterally) which was indicative of bad faith. Storms countered that the progress at the negotiating table belied any such unlawful conduct on the part of the company. Martinez retorted that Abatti's away-from-the-table conduct --particularly an alleged statement made by Ben Abatti that "he'd be dead before signing with Cesar",[46] as well as treatment of the tractor drivers who were not being permitted paid rest periods or standby time and whose seniority was not being respected -- suggested bad faith.

Subsequent sessions were scheduled for 8 March, 15 March and 22 March. Storms informed Martinez that he would be on vacation from 6 April to 18 April. Martinez requested rescheduling of both the 8 March and 15 March meetings and the next session was held on 16 March 1982.

(5) 16 March 1982

Martinez rejected the company's "in toto" proposal and requested to negotiate item-by-item on the outstanding articles. He reiterated the union's desire for a complete response to the information request and Storms provided a stack of computer printouts approximately two feet high identifying 1981 and 1982 employees by name, social security number, date of

[46] There is no factual support on this record for attributing any such comment to Mr. Abatti.

hire, vacation, wages, etc. Storms also provided a handwritten code for the job descriptions. Martinez inquired about the cost of the company medical plan, claims experience, bonuses, holidays, corporate structure, disclosure forms, and the general cropping information (acreage, types of crops, pesticides, etc.). The parties agreed that the cropping information was still outstanding which Storms indicated that he would have to obtain from Ben Abatti or the individuals responsible for various areas. The union would provide a seniority supplement proposal at the next session, and the parties also discussed health and safety, records and pay periods, and hiring.

Union security was discussed at length. The company had problems with the ALRA good standing for "philosophical" reasons, and because of concern that the union would suspend and discharge workers who did not participate in the (1979) strike. Storms also indicated that the problems with the computer might make it difficult for the company to meet the 10th day reporting requirement proposed by the union. Storms and Martinez discussed supervisors, and the union requested specific information about the nature and extent of the bargaining unit work involved. Storms queried whether the union would abandon the negotiations as the Imperial Valley harvest wound down, and wait until standards were established in Salinas. Martinez voiced the UFW intent to arrive at a contract independent of Salinas. Both agreed to expand the time allotted for the previously-scheduled session of 22 March.

(6) 22 March 1982

The union agreed to the seniority article; Martinez provided the initial portion of the union's seniority supplement (GCX 46) with additional supplement demands and job description proposals to be forthcoming.

Martinez queried regarding the information request specifically asking who harvested the company's asparagus. Storms indicated that he did not know offhand but would provide the information, as well as the outstanding crop information still being compiled. Storms inquired about the various forms (EBS-1, D-1, D-1-S, D-2) which the union was requesting and Martinez indicated that he would explain more fully after speaking to his people at headquarters.

Supervisors were again discussed, with Martinez renewing the union's request for specific information on what bargaining unit work the company intended the supervisors should be able to do. Martinez cited two examples of situations where compromises had been reached on this issue.

Martinez inquired about the Respondent's objections to the hiring hall -- and Storms contended that it would cause the company to lose control, that they had done without it in the previous contract, and that the experience of other companies in the Imperial Valley was very negative.

A detailed discussion of outstanding[47] health and

[47]The parties had agreed to eight sections of this article from the Sun Harvest contract — A, B, C, D, F, I, K, P. See GCX 25,

safety matters ensued, specifically the issues of a committee for health and safety (Section E, which the company opposed on grounds of "cost and control"); toilet latches (Section G); potable drinking water (Section H); first aid kits (Section J); transportation of sick workers (Section L); repair of equipment (Section M); clean buses (Section N); exhaust fumes (Section 0). Martinez expressed the union's concern for the dignity and safety of the workers. Storms articulated the company's problems with excessive grievances which could potentially cost time and money.

While meeting concerning other clients on 27 March 1982, Storms provided Martinez' with a list of crops grown by Respondent in 1980 and 1981, the names of the asparagus harvesters, and the number of family members working. (GCX 47.)

(7) <u>29 March 1982</u>

Martinez asked Storms if there was any information the company decided not to provide. Storms replied that the company had not decided that there was anything they would not provide.[48] Martinez asked about the employees' addresses. Storms indicated that the company was concerned because the decertification question was still pending on appeal. Martinez insisted that the union needed direct access[49] to the workers

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[48]See R.T. Vol. XI, p. 92; R.T. Vol. XLIII, p. 111.

[49]This access was provided as requested by the union in September 1982, and in June 1983.

in the field if the address information was not provided. Martinez renewed his request for the cropping information which was initially sought 2½ months previously.

The union made a further written proposal on local demands and seniority. Storms asked for a copy of the previous UFW-Abatti contract supplement (which had not been provided).[50] The principles discussed records and pay periods (the union requested that cumulative wages be reflected in the workers' check stubs), the provision of employee discipline records to the union, hiring hall, and information regarding the medical, pension, and Martin Luther King plans proposed by the union.

Martinez and storms tentatively agreed to meet on 6 April 1982, pending telephone conference call confirmation of 2 April.[51]

However, no call was made, nor any negotiation session held. Storms sent a mailgram (GCX 49) to Martinez proposing an increase in tractor driver wages with a proposed implementation date of 23 May 1982 in connection with its earlier contract proposal. Martinez called Storms by telephone indicating that he was busy with negotiations up north, and that he would have to be out of the state because of the terminal illness of his father.

Martinez called Storms later in May and the two discussed possible meeting dates, but neither was able to commit

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[50] Stroms testified without contradiction that said information was never provided. (R.T. Vol. XLIII, p. 114.)

[51] Storms had reserved the meeting place and showed up on 6 April, but no appearance was made by any union representative.

to any sessions through June. Storms wrote Martinez on 15 July communicating his willingness to meet. Art Mendoza telephoned Storms on 21 July indicating that he would be replacing Martinez as the UFW negotiator. Storms expressed his clients'[52] dismay at the substitution and a meeting was ultimately arranged for 4 August.

c. Storms-Mendoza Sessions

(1) 4 August 1982

Mendoza and Storms generally reviewed the status of negotiations. Between 20-25 articles had been agreed upon, but the parties had major differences with respect to economics, hiring, union security, union representative, existing grievances, etc. Storms provided the cropping information previously requested by Martinez (RX 88). It had not been supplied earlier, according to Storms, because of the March-August hiatus in negotiations and the difficulty in obtaining the information which had to be gathered from various company sources. (See R.T. Vol. XLIII, pp. 124-126.)

Storms asked for information regarding funding of the union (pension, medical, and Martin Luther King) plans. Mendoza queried as to who harvested the company carrots. Each said they

[52]Storms was also negotiator for several other Imperial Valley companies -- including Colace Brothers, Maggio, Inc., and Vessey & Company, Inc. These negotiations with the UFW were often conducted immediately preceding or following the Abatti sessions.

would obtain the respective information.[53] Mendoza indicated that because it was August and the current union proposal was based on the Sun Harvest agreement which had an expiration date of 31 August 1982, he would prepare a new proposal with new duration and other changes.

The revised proposal was mailed to Storms on 16 November 1982 (GCX 3, RX 102). It sought Sun Harvest contribution levels to the Robert F. Kennedy medical plan, 21 cents per hour contribution to the Juan de la Cruz pension plan (up from 20 cents per hour), a new proposal re reporting on payroll deductions and fringe benefits, cost of living adjustment, duration through 31 August 1984, and revised (upward) wages. A subsequent session was set for 2 December 1982 (with Storms promising a further response after consultation with Ben Abatti).

(2) <u>2 December 1982</u>

Storms rejected the Union wage proposal, and proposed that duration be two years from date of signing. The company rejected the union medical plan, reproposing the (Abatti) plan currently in effect and rejected any increased contribution to the Juan de la Cruz pension plan. Storms agreed to the union proposal on reporting and payroll deductions, objecting only to the union's one-year mistake-of-fact proposal (the company proposed 2 years) and the tenth-day-of-the month due date (the company proposed the 15th). COLA was rejected. Storms stated

[53] Storms ultimately received the information he sought on 27 December 1982.

that he thought that the union, was "going backwards" -- and that the huge gap between the parties reflected the successful UFW negotiations with Sun Harvest in Salinas during the summer of 1982. Mendoza indicated that much time had passed, and that the (economics) negotiated up north was what the union sought in the Imperial Valley.

The company medical plan was discussed, and Mendoza requested a copy of the plan instrument. Storms asked for information regarding the union pension and Martin Luther King fund which he had previously requested.

(3) 8 December 1982

Storms provided additional information about the company medical plan; Mendoza turned over the information regarding the pension and Martin Luther King funds. The company submitted a wage proposal (GCX 4) which did not include lettuce piece rates, melon piece rates, or asparagus rates. Storms indicated that he would need a few days to prepare the lettuce and melon proposal, but that they were not including the asparagus harvest as part of the proposal because the company did not want that operation to be covered under the contract. There was discussion of overtime and the company sent the lettuce piece rate proposal by mailgram of 20 December 1982 (GCX 7), which reflected the "going rate" in the Imperial Valley pursuant to past practice where the rates had been set in Salinas by the majority lettuce harvesters who traveled the circuit. Although Storms indicated his availability to negotiate all items during

the next two weeks, Mendoza wired back that he was not available until the week of 10 January, with the understanding that the increase would be retroactive to the beginning of the season, assuming agreement. In the absence of objection from the union, the proposed increases in the lettuce harvest piece rates were implemented and the next session was scheduled for 13 January 1983.[54]

(4) <u>13 January 1983</u>

Storms requested that the session be tape-recorded to prevent misrepresentation; he contended that he did not have a note-taker as did the union (Mary McCartney). Mendoza refused to negotiate with the recorder on and Storms relented. Mendoza asked whether the company had a proposal for the second-year (lettuce) piece rates and the melon piece rate. Storms indicated that the company was considering a 2-cent increase in the lettuce, but that he would submit the company position shortly. Storms reiterated the company's concern that the parties were very far apart on all of the economics,[55] but agreed at the

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[54]According to Storms' uncontradicted account, he and Mary McCartney spoke on December 22 -- the day GCX 9 (mailgram announcing the company's intention to implement the proposed lettuce harvest wage rates) was sent -- to set up the next negotiation session. On 27 December, McCartney called to say that the UFW did not agree to the proposed increase, but that any increase would be considered conditional upon reaching agreement. Storms asked whether the union was rejecting implementation of the proposed increase; McCartney responded that they were only not agreeing to it.

[55]Stroms calculated that the company was at $5.80-5.90 per hour and the union at $9 per hour taking into account all retroactivity, COLA, benefits, etc.

session to call Ben Abatti re the melon piece rates. Storms returned with a melon proposal,[56] and a suggestion that the company would be willing to consider an economic reopener for the second year.

Storms queried whether all of the union's local demands had been proposed and Mendoza indicated that they had been. Mendoza asked about the asparagus rate, and Storms indicated that the company still preferred continuing the past practice of custom harvesting the crop, which had been previously agreed to by the union during the negotiations for the previous Abatti-UFW contract.

Storms told Mendoza that the parties were so far apart on economics that unless there was substantial movement by the union, the company would not be willing to consider raising their economic proposal. Mendoza said he wanted an opportunity to review the respondent's proposal and would contact storms.

By letter of 27 January 1983, Mendoza accepted the company's injury-on-the-job proposal (from February 22, 1982), agreed to accept the 15th day of the month reporting, reduced the demand to one (1) full-time paid representative, and decreased wages $.10/hour for each year, and lettuce piece rates $.015/year. (GCX 11.) Storms responded by letter of 15 February

[56]The company proposed to continue paying the same rate as in previous seasons with a 30-cent/foot increase during the second year of the contract.

1983 (GCX 12)[57] and a meeting was scheduled for 8 March.

(5) 8 March 1983

Storms presented the company's written wage proposal (GCX 15) generally reflecting increases of $.05/hour, with the exception of irrigators, and a $.05/foot increase for the melon workers in the second year.

Storms indicated that the parties had reached agreement on injury-on-the-job, and reporting on payroll deductions, but that Abatti rejected the paid union representative proposal. Mendoza asked who would be harvesting the asparagus; Storms replied that it would be Johnny Johnson (J & J). Storms indicated that the custom harvester/labor contractor issue was open to discussion, and that the company would be willing to negotiate the wages, etc., as part of the entire contract.

Mendoza and Storms reviewed article-by-article where they had reached agreement: recognition, grievance and arbitration, no strike, access, discipline and discharge, discrimination, worker security, leave of absence, maintenance of standards, management rights, union label, new or changed operations, income tax, credit union, camp housing, bulletin boards, family housing, subcontracting, grower-shipper clause, local company operations, modification, savings, successor, rest periods, bereavement pay, jury duty, seniority, injury on the job, reporting on payroll deductions. The parties discussed the

[57] Storms had initially overlooked Mendoza's letter which was sent in an envelope with materials relating to other (Maggio) negotiations.

seniority supplement which the company agreed upon (essentially the union proposal with the exception of such items as government condemnation and normal work week).

Storms accepted the union's security proposal (with reporting by the 15th) and also agreed to contribute 6 cents per hour to the Martin Luther King Fund (as per the previous Sun Harvest contract).

The parties then discussed health and safety, reaching tentative agreement in concept on a large portion of the article.

Storms asked for a copy of the new UFW-Sun Harvest contract; Mendoza indicated that the complete new agreement had not been finally drafted, but-that he would provide the memorandum of understanding of changes from the prior Sun Harvest agreement.

(6) <u>22 March 1983</u>

Storms accepted the union's proposed Paragraph U of the health and safety article (exhaust fumes). The parties agreed on vacations, supervisors, and on a majority of other local demands.

Mendoza requested information re cumulative hours and wages. Storms indicated that it had all been provided in the spring of 1982. Both agreed to check (their records) to see if all the materials had been provided,[58] and Mendoza indicated that the union owed the company a proposal.

Mendoza informed Storms that he foresaw further

[58] Subsequently, Storms confirmed by telephone that he had indeed provided all the materials to Martinez. (R.T. Vol. XLIV, p. 48.)

scheduling difficulties because of his calendar and his wife's pregnancy. Gilbert Rodriguez (UFW vegetable crop manager) and Esteban Jaramillo (Calexico field office representative) would perform negotiation duties. Storms opined that his clients would feel that the UFW was abandoning the Imperial Valley again. Mendoza replied that Rodriguez and Jaramillo would have "full authority to negotiate".

There was no further contact until 10 May when Rodriguez wrote Storms to ascertain the location of the cantaloupe fields for the upcoming harvest. The information was provided by the beginning of the season. (RX 96.)

On 19 May, Mendoza wrote Storms stating that he would be reassuming responsibility for the Abatti negotiations. Mendoza proposed negotiation dates during the weeks of May 22 and May 29 (RX 94). Storms responded by letter of 24 May proposing a negotiation session for 26 May (GCX 17, RX 103). Mendoza telephoned to suggest June 2 and/or 3, which subsequently was revised to 10 June. (RX 91.) On 7 June, Jaramillo called to cancel the session of 10 June due to a conflict in Mendoza's schedule. Mendoza subsequently proposed meeting during the week of 4 July which was set for 6 July but cancelled by Storms on the morning of the session because of an emergency situation in the north (RX 97.) The meeting was then rescheduled for 20 July, but Jaramillo cancelled on 15 July due to Mendoza's "unexpected commitments". Ultimately, the parties agreed to meet on 10

August (RX 98.)

(7) 10 August 1983

Mendoza orally agreed to the company proposal for two year mistake-of-fact on reports to the union, and proposed decreasing hourly wage rates (five cents per hour per year) and lettuce piece rates (one-half cent per carton per year).[59]

Mendoza proposed eliminating the harvest cantaloupe premium (45 cents per hour) as well as lowering piece rates (from $8.00 to $7.20 the first year and $8.24 to $8.00 for the second year),[60] as well as the Sunday rate (from $12 to $10 in the first year, and from $13 to $11 the second year). The effective date of the union proposal was changed from 15 July 1982 to 1 September 1982.

The company caucused and Storms returned to discuss some supplemental issues. Mendoza accepted the company proposal (supplement agreement) concerning which workers would get the better equipment, and indicated he would "check" on the proposal re provision of tools to tractor drivers as well as the company's request for a 90-day period to make modifications of certain equipment.

Storms proposed changes in the general field and hourly

[59]Storms testified that these new rates finally brought the union position down to the previously-negotiated Sun Harvest wages.

[60]The union proposal referred to a three-foot rate; Abatti had always picked cantaloupes on a four foot rate, thus the effective union proposal was 25 percent higher than a comparable company rate.

harvesting rates -- basically raising the company's proposed hourly wages $.05/hour, the lettuce piece rate $.01/year, and the melon piece rate $.10/foot per year — as well as a different system for triggering the overtime premium.[61] To move negotiations "off dead center", Storms also proposed 30-day retroactivity on all rates as a signing bonus and indicated that the company would consider accepting the Robert F. Kennedy medical plan at a reduced cost level.[62] Mendoza and Storms discussed the various rates for the various plan "modules"; Storms requested information on the maintenance of benefits clause which Mendoza mailed the following day. Mendoza asked if Storms would be available for "negotiations during the week of 22 August. Storms said that he would be available and Mendoza indicated he would contact Storms once he (Mendoza) had looked at his calendar. Telephone calls were exchanged and the parties ultimately agreed to meet on 28 September.[63]

(8) 28 September 1983

[61]Straight time would include Monday-Friday, up to 8 hours, with 35 cent premium up to 10 hours, and time-and-one-half after 10 hours. Saturday would be premium after 6 hours; Sunday would be time-and-one-half.

[62]i.e., the medical plan only, excluding dental and vision coverage. The company's chief concern was the uncapped future increase potential in the UFW proposal. The company had a self-insured plan based on actual experience, but the Robert F. Kennedy Plan provided that the company contribute a certain amount per man-hour worked.

[63]Storms had his secretary prepare a telephone log (RX 105) because of the difficulties he was having reaching Mendoza to schedule meetings. Thus the parties could not meet on 7, 8 and 9 September as suggested by Storms; Storms apparently could not meet on the 13th and 14th of September as proposed by Mendoza.

The parties discussed the recall of a worker to an Abatti thinning crew and Storms expressed the company's displeasure at what it perceived to be the union's efforts to file charges to build a case against it. Storms accepted the Robert F. Kennedy medical plan — limited only to the medical module. The parties engaged in off-the-record discussions for approximately 30 minutes and returned on the record. Mendoza indicated he would get back to Storms within a couple of weeks for a response to the company's on-record and off-record proposals and discussions.

There was no further communication until Storms telephoned the union office on 1 November. The two negotiators were unable to reach each other, however, and Storms drafted the 22 November 1983 letter with enclosed proposal signed by Ben Abatti. (GCX 22.)

The proposal was unacceptable to the union because the wage rates reflected increases of only 5 cents per hour[64] over the previous company position (a total increase of some 30 cents/hour in the general field, hourly harvest, thin and hoe, and tractor driver rates -- 7% and 6% respectively over the original company proposal) with no increases for irrigators. Mendoza perceived the document as a "typed-out" version of what the parties had previously agreed to plus the company's last

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[64]Two-year duration was proposed with an economic reopener after one year.

proposals. Further, Mendoza considered Storms' letter to constitute a "take-it-or-leave-it" package[65] which was patently unacceptable to the union — because it excluded the asparagus harvesters, as well as included wage rates which were still being negotiated. (R.T. Vol. I, pp. 129-130.)

According to Storms, the proposal was prompted by the union's failure to respond to the latest company position. The

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[65]The critical language of Storms' cover letter provided:

" . . . In view of the fact that we have been negotiating with the UFW for approximately 22 months and have fully and thoroughly discussed each and every issue and article raised by both sides, and considering your failure to respond to our last proposal or to our numerous inquiries regarding possible overall settlement, my client and I have reached the conclusion that further "give and take" at the bargaining table would not resolve the outstanding issues or be beneficial to the Company. It appears to us that the UFW is simply stalling and relying upon the ALRB to hammer Abatti Produce into submission. Therefore, our client has decided to make further movement in certain economic and language areas and to present to you its "bottom line" proposal.

Enclosed you will find a complete proposal, signed by the president of Abatti Produce, Inc., incorporating all of our prior tentative agreements and setting forth the Company's final position on those articles and issues on which there has not been prior agreement. In order to accept this proposal and convert it into a binding contract, all you need to do is to have Mr. Chavez fill in the date in the duration clause and sign the agreement.

Considering the length of time we have been bargaining, the thorough discussions which have occurred, and the many delays that we have experienced, we must insist that you either sign the proposal or provide us with a response within two weeks of this letter. Although we believe our proposal is clear and that each of the articles and items has been fully and adequately discussed, we are, naturally, prepared to promptly clarify or elaborate upon any matter which you do not fully understand. If you wish to set up such a meeting, please telephone me as soon as possible.

We look forward to your prompt response. We hope you will look upon our proposal favorably. . . . " (GCX 22)

company principles were of the opinion that the UFW had no real intention of negotiating to obtain a contract. The company's "bottom line" did not refer to any absolute position, but only to the fact that the company would not move further in the face of perceived union intransigence. Major changes from any previous company proposal included $.05/hour raises in the general field rates; $.05/hour raises on premium rates; $.015/carton raises'in the lettuce piece rate; $.01 raises in the rapini piece rate; second year wage reopener; and Robert F. Kennedy medical plan with a ten-percent cap.

Storms and Mendoza met on 30 November and 1 December 1983 for off-the-record discussions in Storms' office.

On 13 December 1983,[66] the company made a two-part proposal -- offering either a collective bargaining agreement containing Colace[67] wages and language to be effective immediately, or alternatively, the Colace contract with a cash settlement of all outstanding charges. (See RX 106.) The proposal reflected the company's off-record position of 12 December and was the culmination of extensive off-the-record discussions between 1 December and 14 December.

Storms viewed the company proposal as full acceptance of all the (Sun Harvest) terms the UFW had been proposing, plus Colace-negotiated wages. It involved full acceptance of the

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[66]After commencement of the compliance hearing.

[67]The UFW-Colace Brothers signed a contract on 11/24/82 reflecting wages particular to Colace's operations and general Sun Harvest language. (See discussion, infra, GCX 33.)

medical and pension plan; 60 cent per hour jump in the hourly general field base rate; asparagus rates; paid union representative; duration through 31 August 1984 (concurrent with the UFW-Sun Harvest contract). According to Storms, the proposal was a "last-ditch effort to try to make the company float" (R.T. Vol. XLIV, p. 113), even though Respondent's financial advisors believed the company might not survive the proposed duration date.

Mendoza responded on the evening of December 14 or the morning of 15 December that the union was not interested. The company Board of Directors met on the afternoon of 15 December and resolved to terminate all agricultural operations by 30 June 1984. Mendoza was informed of the decision by telephone call on the evening of 15 December and confirming letter of 16 December (RX 100.) "Effects bargaining" commenced subsequently and were still in process during the latter part of the compliance proceeding.

In retrospect, Storms opined that the parties were at impasse from the fall of 1982 when the union increased its wage proposals to reflect the recently negotiated Sun Harvest rates. By January-February 1983, the company was insisting upon significant movement from the union. By November 1983, after the company had suggested the Robert F. Kennedy medical plan and the wage reopener, there was no doubt (from the company point of view) that there would be no real movement from the union. Storms had become convinced that the union was "surface

bargaining" -- and "counting on the ALRB to give them money" for the period in question. (R.T. Vol. XLIV, p. 123.)

2. Analysis and Conclusions;

a. The Burden of Proof

In McFarland Rose Production (1985) 11 ALRB No. 34, the Board recently suggested in such situations that General Counsel would be required to make a prima facie showing that the Respondent has not complied with the Board's order to bargain in good faith. The more closely post-hearing conduct resembled the pre-hearing conduct found to have constituted bad faith bargaining, the more quickly the burden of producing evidence would shift to the Respondent, and the more difficult it would be for the latter to show that it was no longer operating in bad faith. As in any compliance case, Respondent would bear its own burden of proving any affirmative defense to non-compliance — such as impasse or bad faith bargaining by the union and, the post-hearing conduct, like any other bargaining segment, would have to be reviewed in the context of the totality of the bargaining. Evidence of post-hearing bargaining introduced at the compliance phase could inevitably be colored by the Board's previous findings. (Ibid, p. 10, citing As-H-Ne Farms (1980) 6 ALRB No. 9, rev. den. by Ct. App., 5th Dist., October 16, 1980, hg. den. November 12, 1980.)

b. The Parties' Positions

General Counsel and Respondent[68] have contended that the company terminated its unlawful conduct (refusing to recognize and bargain with the UFW) at least as of 10 December 1981 when negotiator Josiah Neeper requested that collective bargaining negotiations be scheduled. (R.T. Vol. XLVII, p. 27.) The first session was scheduled for 13 January 1982, the parties met on over 15 occasions during the next two years, and bona fide impasse was reached no later than 13 December 1983 when Respondent announced its intention to cease operations. (General Counsel Post-Hearing Brief, pp. 14-15.)

Charging Party, on the other hand, argues that

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[68]At hearing, General Counsel urged that makewhole liability continued at least through December 1983.

[67]Respondent alternatively suggests that the backpay makewhole period should commence running on 28 October 1981 (the date of issuance of the Board order in 7 ALRB No. 36.) I reject such theory on the basis of Peter D. Solomon and Joseph R. Solomon dba Cattle Valley Farms/Transco Land and Cattle Co. (1983) 9 ALRB No. 65 (Employer cannot rely on its good faith doubt of the union's majority status, where the Employer itself created the doubt). See also F & P Growers Association (1983) 9 ALRB No. 28, affirmed F & P Growers Association v. Agricultural Labor Relations Bd. (1985) 168 Cal.App.3d 667; Nish Noroian Farms (1982) 8 ALRB No. 25, affirmed in Nish Noroian Farms v. Agricultural Labor Relations Bd. (1984) 35 Cal.3d 726.

I also reject Respondent's second alternative theory regarding the makewhole liability period which would terminate liability after a "reasonable" period because the union never sought negotiations following the Respondent's formal refusal to bargain in 1979. There is no evidence on the record that such request, if made, would have been other than futile in light of the company's conceded unwillingness to bargain through the date of issuance of the Board's decision. See R.T. Vol. XI, pp. 5-7. Nor is there legal support for Respondent's position that liability terminated upon Abatti's decision (albeit unarticulated) to recognize the union in November 1981. See Respondent Post-Hearing Brief, pp. 7-16.

Respondent has not been negotiating in good faith at any time since the sessions commenced in January 1982. It contends that the following indicia of bad faith compel a finding that the makewhole period should still be running: Respondent has failed to completely and timely respond to the union information requests; Respondent has taken adamant and inflexible positions without reason with respect to various work-related issues; Respondent has enacted various unilateral changes during the pendency of negotiations. I shall discuss each category of alleged misconduct seriatim.[70]

(1) Alleged Failure to Respond to Information Requests

Bad faith may be demonstrated by the employer's refusal to furnish information relevant and reasonably necessary to the union's ability to carry out negotiations or administration of a collective bargaining agreement. (Kawano, Inc. (1981) 7 ALRB No. 16; Detroit Edison Company v. N.L.R.B. (1979) 440 U.S. 301, 303 [99 S.Ct. 1123, 1125; 59 L.Ed.2d 333].) Information must be provided reasonably promptly to satisfy the employer's obligation. B..F. Diamond Construction Company (1967) 163 NLRB 161 [64 LRRM 1333], enf'd (5th Cir. 1969) 410 F.2d 462 [71 LRRM 2112]..

The adequacy and timeliness of Abatti's response to the UFW information requests centers upon the materials submitted in response to the union's 13 January 1982 request (GCX 16; RX 101.) Respondent (and General Counsel) contend that complete

[70] See Charging Party Post-Hearing Brief, pp. 4-7.

information was provided as promptly as reasonably possible given the extent and nature of the request. The union, on the other hand, suggests that the information was deficient in the following regards: (1) the company's refusal to provide employee addresses; (2) presentation of information in an undecipherable manner; (3) failure to provide complete information, particularly information on carrots and other crops. (Charging Party Post-Hearing Brief, p. 6.)

The record, however, reflects that the company did not provide the employee addresses as requested, but instead provided the union with timely information regarding access which was the specified reason why the union requested the address information. This apparently was satisfactory to the union and served its purposes, and was not further raised during the negotiations. I see no indicia of bad faith by the company's efforts in this regard.

While some of the "print out" material (GCX 45) was indeed impossible to read without a code, Respondent negotiator Merrill Storms provided the code to the union negotiator upon request, and responded to all queries made of him. Thus, I see little merit to the union's contention in this regard.

Finally, while it is true that not all of the cropping information was provided in the original time frame requested by the union (e.g., the major portion of the cropping information was not provided until the 4 August 1982 negotiation session (RX 88). I find that the Respondent made reasonable efforts to

provide these materials in a timely fashion and did not fail to give the matter the proper attention it deserved. Nor did the delays — partly occasioned by the April-July hiatus in negotiations — significantly impact upon the bargaining process. A.H. Belo Corporation (WFAA-TV) (1968) 170 NLRB 1558 [69 LRRM 1239]; modified (5th Cir. 1969) 411 F.2d 959 [71 LRRM 2437]; J.R. Norton Co., Inc. (1982) 8 ALRB No. 89, rev. den. by Ct. App., 1st Dist., Div. 1, September 16, 1983, hg. den. October 26, 1983. Additional information provided in December 1982 stemmed from the parties' exchange of inquiries regarding their respective proposed medical plans, rather than from the withholding of any information by the company. I thus find insufficient evidence of bad faith with respect to this alleged category of employer misconduct as suggested by charging party.

(2) Alleged Unilateral Changes

Unilateral changes in working conditions during bargaining evidence bad faith since they constitute a refusal to negotiate or bargain in fact. N.L.R.B. v. Katz (1962) 369 U.S. 736, 743 [50 LRRM 2177]. No party has suggested what potential unilateral changes were made during the relevant period by Respondent, and my review of the record does not reveal any facts which would support such allegation. The evidence concerning the notice given regarding the raise in tractor driver wages which occurred in May 1981 is unclear, as Respondent's telegram apparently went unnoticed by union negotiator Martine2 during time of personal family illness. The lettuce harvest wage

increases in December 1982 may also seem somewhat preemptive; however, there is evidence that Respondent made repeated and apparently unsuccessful efforts to communicate with the union prior to the implementation decision. As I find no other indicia of unilateral changes on this record, I would decline to infer bad faith from any such aspect of Respondent's conduct in this regard.

(3) Alleged Adamant and Inflexible Positions Without Reasons

Outright rejection of union proposals without any real attempt to explain or minimize differences evidences bad faith because it is inconsistent with a bona fide desire to reach agreement. As-H-Ne Farms (1980) 6 ALRB No. 9, supra, citing Akron Novelty Mfg. Co. (1976) 224 NLRB 998 [93 LRRM 1106]. I do not find support for Charging Party's position, however, with respect to any of the issues referred to in its Post-Hearing Brief. With respect to each,[71] Respondent ultimately agreed to the union's position at least by its last proposal of December 1983 (RX 100) and with respect to some -- e.g., good standing, grievance/arbitration — much earlier in the negotiation process. Earlier rejection of these proposals was accompanied by explanations, including good standing (philosophical differences/concern regarding workers who did not participate in the 1979 strike), hiring hall (management control plus experience of other Imperial Valley companies), union representative

[71] Good standing; hiring hall; union representative; medical plan; grievance/arbitration.

(cost/philosophical considerations), Robert F. Kennedy medical plan (costs and belief that the company plan provided superior coverage), and grievance and arbitration (costs/control). That the union did not agree with each of the employer's reasons for its positions, or that each was not accepted in its entirety, does not suggest bad faith on the part of either party. See Carl Joseph Maggio v. ALRB (1984) 154 Cal.App.3d 40; N.L.R.B. v. Herman Sausage Co. (I960) 275 F.2d 229, 231 [45 LRRM 3072].

While no party has suggested any other potential factors suggestive of bad faith negotiations, I have reviewed the entire record in that regard and find that the evidence fails to sustain a prima facie case that the bargaining which commenced in January 1982 reflected a mere continuation of the Respondent's original bad faith refusal to bargain.[72]

Perhaps, as in any situation of hard bargaining, there are some instances of a certain heavy-handedness on the part of the company, e.g., the ultimatum of November 1983; the 24-hour deadline suggested in the last proposal in December 1983; the lack of a specific wage proposal concerning the asparagus harvesters until a very late date. I cannot conclude on this record, however, that such indicators establish bad faith bargaining in the instant context where the parties met on over 15 occasions, where the Respondent was reasonably well-prepared and attended to the negotiations with the highest degree of

[72]Conversely, I would find that the parties reached bona fide impasse by the date (15 December 1983) of the company's announcement to terminate agricultural operations.

responsibility, where cancellations and delays were, if any, the responsibility of the union, and where there was significant give-and-take on all major issues during the period of negotiations. The "toughness" of Respondent's negotiating stance did not belie the hard but real bargaining that the parties engaged in. See Allbritton Communications, Inc. (1984) 271 NLRB 207 [116 LRRM 1428]. Because of such conclusion, I make no specific finding with respect to Respondent's contention that the union's own surface bargaining should toll the makewhole liability (See Respondent's Post-Hearing Brief, pp. 45-51.)

I thus recommend that the makewhole liability period end with the arrangement of bargaining in January 1982. See O.E. Mayou & Sons (1985) 11 ALRB No. 25, pp. 9, II.[73]

B. Employees Entitled to Makewhole Relief 1.

Payroll Employees

Through the cooperation of counsel, the parties have agreed to the total hours/units of work per job category includable in the makewhole order.[74] Because of the complexity of the case, and the magnitude and extent of the calculations, however, there has been no itemized breakdown of the makewhole due each individual discriminatee. I recommend that such computations be remanded to the Regional Director (subject to the

[73] Res.pondent refers to this termination date as a possible alternative. See Respondent Post-Hearing Brief, p. 16, fn. 5.

[74] See GCX 1.7, 1.8.

verification of all parties) following final supplemental order[75] in this matter. Although there is no specific reference to such procedure in the Board's regulations, I do note that 8 Cal. Admin, section 20290(c) provides for (backpay)[76] specifications showing in detail net backpay amounts owing for each employee, or alternatively, notice of hearing without specification containing only a brief statement of the matters in controversy. In the instant case, this phase of the compliance proceeding will determine the extent of liability, and the category of employees entitled to share in the makewhole award. There can be no prejudice by this procedure as all parties will be able to verify the individuals named in the final computations. Additionally, this methodology would hasten[77] the resolution of protracted litigation — involving conduct which occurred over 7 years ago. I recommend that final individual calculations await supplemental order. 2. Asparagus Harvesters

The only remaining issue with respect to the employees entitled to makewhole relief is with respect to the

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[75] I recommend that the Regional Director be further instructed to report to the Board when these matters have been finally resolved and in any event no later than one year from the date of the Board's supplemental decision and order.

[76] As yet, the Board has issued no regulation concerning procedures in (bargaining) makewhole cases.

[77] It would not seem expedient at this point (prior to final determination of the formula and total amounts owing) to remand for compilation of a list of the specific individual employees entitled to relief.

status of the company's asparagus harvesters. General Counsel and Charging Party have contended that these workers were supplied by labor contractors and are therefore agricultural employees of Respondent under section 1140.4(b) of the Act entitled to makewhole relief. Respondent contends that the asparagus is custom harvested, thus rendering the workers harvesting employees of the various custom harvesters, rather than of Respondent.[78]

a. Facts;

Respondent's asparagus crop (involving 2-4 crews and some 200-360 acres) has been harvested by licensed labor contractors, El Don Farm Labor Contracting Co., Inc., Juan Chavez, and J & J Company, since 1978. The harvest would occur from early January through late March, and was accomplished by oral agreement between Abatti and the respective contractors. Respondent's packing shed manager (Robert DeVoy) normally contacted the labor contractor at the end of December to indicate when the harvest would commence, the identity and location of the fields, and the fee arrangement. The workers were paid hourly and piece rate,[79] depending upon the nature of the particular field, and the contractor was paid a flat percentage (e . g . , 31%) of the total payroll. The contractor had control over the

[78]Although not specifically referred to in Respondent's Post-Hearing Brief, the matter was fully litigated, and, I believe, ripe for written decision.

[79]The hourly rate has varied from year-to-year between approximately $3.70 per hour and $4.50 per hour, with the piece rate varying from $2.08 per box to $2.35 per box.

harvesting operation and made out all payroll checks, charging the total cost plus 31% to Abatti. Workers arrived in their own cars normally. When busses were utilized, however, they were provided by the contractor who also provided field instruments (asparagus knives and "burros" or open wheelbarrows); pick boxes were provided by Respondent to transport the asparagus to the shed.[80]

Devoy's duties were to insure that the asparagus fields were properly harvested. As such, he was a "general supervisor" who watched the crews each day and kept in close contact with the contractors. If the job was not being done properly, DeVoy would inform the contractor or one of the crew foremen.

Respondent did not hire any of the harvesters, nor did it fire people on an individual basis. DeVoy could recommend discipline but had never done so previously. Respondent did not provide meals or lodging for the workers, and the harvesting crews' contact with the crop ceased as the latter was transported to the packing shed. Thus, packing, marketing, etc., remained in the company domain. No reference to the asparagus crop was contained in the previous UFW-Abatti contract. (GCX 23). During the 1982-83 negotiations, Respondent took the position that the crop was custom harvested, but that it was prepared to negotiate over wages, working conditions, etc. Ultimately, a rate of pay

[80]The workers walk down the rows cutting the asparagus. The cut crop is placed on top of the bed and the person running behind the burro picks up the cut asparagus and places it in boxes. The filled boxes are then placed at the end of the field and transported in flatbed trucks to the packing shed.

was included in its 13 December 1983 proposal to the union.

b. Analysis and Conclusions;

General Counsel has included the asparagus harvesters in its makewhole calculations,[81] and I find that the factual record supports inclusion of this category of workers among Respondent's agricultural employees. As in Paul W. Bertuccio (1984) 10 ALRB No, 16, the company in the instant case is in complete control of the harvest and responsible for all operations before and after the harvest. The employees have existing, permanent ties to the company which sets wage rates, and pays a flat fee commission to the labor provider. See also Exeter Packers, Inc. (1983) 9 ALRB No. 76; s & J Ranch, Inc. (1984) 10 ALRB No. 26. The equipment (knives and wheelbarrows) provided by the "contractors" was not of the same magnitude as the trucks and tractors which were deemed not sufficiently costly nor specialized to suggest a custom harvester relationship in Jordan Brothers (1983) 9 ALRB No. 41, and I would find the Tony Lomanto[82] thirteen-factor analysis to be inapplicable under the circumstances. See also Sutti Farms (1982) 8 ALRB No. 63; Gourmet Harvesting and Packing (1978) 4 ALRB No. 14; Napa Valley Vineyards Co. (1977) 3 ALRB No. 22; Jack Stowells, Jr. (1977) 3 ALRB No. 93.

Nor is the absence of reference to this job function in the 1978 Abatti-UFW contract critical. The latter was of a

[81] See General Counsel Post-Hearing Brief, p. 24.

[82] (1982) 8 ALRB No. 44.

duration which would not apply to the asparagus harvest season. Similarly unhelpful to the analysis is the "custom harvest" reference to the Respondent's 1975-76 asparagus crop in Abatti Farms, Inc. and Abatti Produce. Inc. (1977) 3 ALRB No. 83, IHED p. 13. No specific finding concerning the asparagus harvest operation was made in that decision. Thus, the reference to-"custom harvester" there suggests no more than the utilization in the instant case of the term "labor contractor" to describe the entities which were hired by Abatti to harvest the asparagus crop. I recommend including the asparagus harvesters among the company's agricultural employees entitled to the makewhole remedy.

C. Comparable Contracts/Wage Rates 1.

Facts;

General Counsel initially surveyed all of the UFW vegetable contracts that were signed with Imperial Valley-based companies or with companies who had operations in the Imperial Valley at any time from January, 1979, to the date of issuance of the First Amended Specification (13 February 1984). The contracts included Sun Harvest, Inc., Growers Exchange, Admiral Packing, Salinas Marketing, Oshita, Inc., and California Coastal Farms, Inc. (Salinas-based companies with operations in the Imperial Valley), as well as Hubbard, John J. Elmore and Colace Brothers (Imperial Valley-based companies). The expired 1978 UFW-Abatti contract was compared to the contracts reviewed

and certain similarities emerged:

(1) Nine of the job classifications contained in the 1978 Abatti contract appeared in the other contracts (general field and harvesting, thin & hoe, irrigator, tractor driver A, tractor driver B, lettuce conventional ground pack "2 dozen", lettuce conventional ground pack "2½ dozen", waterperson and windrower.

(2) Where the same job classifications appeared both in the 1978 Abatti contract and in the other contracts surveyed, the contract rates for those job classifications were identical in each of the contracts surveyed.

(3) Where there were no comparable Abatti job classifications[83] in the group of contracts surveyed, the General Counsel originally extrapolated a percentage increase to these classifications by computing the yearly percentage in the general field and harvesting job classification in the group of contracts, including cost of living increases of 25 cents in 1980 and .4475 cents in 1981. Thus, because the "Sun Harvest" increase in the general field and harvesting job classification was 35 percent (from $3.70 per hour to $5.00 per hour) upon agreement in September 1979, the percentage increase applied to these classifications in the Abatti contracts was similarly 35 percent in 1979, 13 percent in 1980, 8.8 percent in 1981, 8 percent in 1982, 5.2 percent in 1983.

[83] Cantaloupe harvest (hourly, pickers and sorters); watermelon (cut and pitch); onions; rapini; and asparagus.

Following the hearing, General Counsel suggested[84] that the differences in agricultural operations and economics between the Salinas Valley and the Imperial Valley, and the split in wage rates post-1979 stemming from those differences compelled the conclusion that the Sun Harvest group of contracts was not the proper measure of Abatti's makewhole liability, except for lettuce harvest rates. It concluded that there were no comparable contracts during the API makewhole period on which the Board could rely. General Counsel reviewed API's past wage patterns and those of its competitors in the Imperial Valley by commodity, general surveys of wages in the Imperial and Salinas Valleys, and the negotiation postures of the parties during negotiations, and concluded that a wage increase of 10 percent per year was the most reasonable approximation of the rates Respondent's agricultural employees (non-lettuce harvest) could have expected in the absence of the company's bad faith refusal to bargain.

Respondent argues that Imperial Valley-based or Southern California-based grower/shippers, not Salinas-based multi-regional lettuce shippers were comparable to API, including Colace Brothers, Maggio, Vessey and Company, Mario Saikhon, Cattle Valley, and the San Diego county companies including Egger & Ghio, Koichi Yamamoto, SKF Farms, George Yamamoto, and Piper Ranch. Respondent further contends that the 10 percent per year predicted increase was unrealistically high, urging the Board to

[84] General Counsel Post-Hearing Brief, pp. 23-24.

substitute a 6% increase to the General Counsel's proposed formula.

On the other hand, Charging Party suggests that the Sun Harvest contract was a comparable contract because both entities were large agricultural entities involved in the growing, packing and shipping of vegetables, including iceberg lettuce; both were involved in the growing of flat crops, including cotton, sugar beets, alfalfa and wheat; both employed large agricultural work forces involving general laborers, thin and weed personnel, irrigators, and tractor drivers, and drew their labor force from Imperial Valley/Mexicali; both operated under the same (industry-wide) Interharvest contract in 1978. (See Charging Party Brief, pp. 2-3.)

Because of this disparity of views, presentation of evidence of the operations and applicable wage rates of the arguably comparable entities encompassed a major portion of the hearing.

As described by witnesses Mendoza, Abatti, Church, McKinsey, Puffer, Barsamian, Gega, Storms, et al., and as summarized in appendices F-l through F-20, the pertinent characteristics of the operations appear as follows:

Abatti;[85] A California corporation with general purpose of farming and specific purpose of harvesting, shipping

[85] I have relied principally upon the testimony of company president Ben Abatti, as well as that of UFW negotiator Arturo Mendoza for this information. See R.T. Vol. XIV, pp. 3-19; Vol. XV, pp. 1-103; Vol. XLVII, pp. 51-78; Vol. II, pp. 3-21; Vol. V, pp. 106-142; Appendix F-l.

and packing, it has been in existence since 1967. Abatti Farms, Inc. merged in 1981 with Abatti Produce, Inc. During the relevant time frame (1979-81) it operated exclusively in the Imperial Valley, with no out-of-state operations. It has been a producer, harvester, and shipper of the following lettuce acreages (which were not owned or leased by the company, but rather custom harvested, packed and shipped): In 1979, 1,400 acres were planted and all fields were harvested (approximately 500-550 cartons); in 1980 (1980-81) all fields were harvested including approximately 600-700 additional acres (600 cartons); for 1981 (1981-82), all fields were harvested plus some 500 additional acres (500 cartons). The lettuce is normally grown in September to February and harvested from December to March. For the entire period, three piece rate crews of approximately 45 persons per crew worked the harvest.

Approximately 380-450 acres of watermelons were harvested in 1979; 400 acres in 1980; 450 acres in 1981. The watermelons are generally grown from February through March and harvested in June (by 3-4 cut and pitch crews of approximately 7 per crew — approximately 40-45 harvesters).

In 1979 and 1980, approximately 900 acres of spring cantaloupes were harvested by 5-6 crews. In 1981, 10 crews harvested some 1,300 to 1,500 acres. Respondent did not own or lease these fields but provided harvesting services for a variety of Imperial Valley growers. Cantaloupes are generally planted in mid-January through March, and harvested in June-July. The

harvesters are composed of 13 member crews. Approximately 900 acres of fall melons were harvested by 6 crews in 1979; 9-10 crews harvested 1,200 acres in 1980, and 2,500 acres in 1981. These crops are planted in July-August and harvested in October-November. All fields were harvested in 1979, but not in 1980 because of the poor crop and lack of market. 1981 was a "disaster year" because of white fly manifestation.

Approximately 700 acres of mixed melons (honeydews and cranshaws) were harvested in 1979 and 1980; 900 acres in 1981. Two to three crews (some 22-24 persons) did the harvesting which occurred in October through November (planted in July through August).

One hundred twenty acres of rapini were harvested in 1979 and 1980; 140 acres in 1981. It is usually planted in September/October and harvested by crews of approximately 40-100 people in December-February (with a total harvest work force ranging from 100-180). (R.T. Vol. XV, p. 12.)

Three harvest crews (25-50 workers per crew) harvested 250 acres of dry (bulk) onions in 1979; 250-280 acres in 1980 and 1981. The onions are planted in October and harvested in April through May. All fields were harvested in 1979 and 1980; approximately 80 percent in 1981.

In the asparagus, two harvesting crews (20-30 per crew) harvested 200 acres in 1979 and 1980. Three crews harvested 200 acres in 1981. It is planted in February through March and harvested during the same period.

Two hundred to four hundred acres of carrots were grown (September-October) in 1979 and 1980 and harvested by Mike Yurosek in January-May. Some 200-300 acres of broccoli were also grown in 1979 (September-October) and harvested (December-February) by Mike Yurosek. (R.T. Vol. XIV, pp. 77-118.)

Ben Abatti defined flat crops as stable, low profit, non-labor intensive crops (which may or may not grow in rows for purposes of irrigation), including cotton, sugar beets, wheat, alfalfa, and sudan. Four hundred to five hundred acres of cotton were harvested in 1979; eight hundred to one thousand in 1980. It is harvested mechanically by 2-4 tractor drivers. One thousand four hundred acres of sugar beets were planted and harvested in 1979; one thousand seven hundred acres in 1980; one thousand nine hundred acres in 1981. They were (custom) harvested mechanically. Four thousand five hundred acres of wheat were harvested in 1979 and 1980; four thousand to four thousand five hundred in 1981. It is grown December through February and (custom) harvested by machine May through June. Approximately 3,600-4,000 acres of alfalfa were grown and harvested in 1979; 4,200 in 1980; 4,000-4,500 in 1981. Some 6-8 tractor drivers harvested this crop (March-September) which is normally planted September through October. Sudan (grass) hay of unknown acreage was planted and harvested in 1979. It is grown May through August and harvested July through August by tractor drivers. Ben Abatti could not recall precise acreages or if the crop were grown/harvested at all during the relevant period.

(R.T. Vol. V, p. 124, 130-134.)

Abatti lettuce is shipped all over the United States; watermelons to the western states; cantaloupes to two-thirds of the United States and Canada; fall melons throughout the United States and elsewhere; onions to the East Coast and West; asparagus all over; sugar beets, sudan, alfalfa, in California, and wheat to Southwest Marketing Corporation (all over the world); cotton was handled by Cal Cotton. (R.T. Vol. XLVII, pp. 52, 53.)

The total Abatti work force approximated 2,000 per year during the relevant period, between 90-95% of which were engaged in agricultural operations. (R.T. Vol. XV, p. 24.) For the period 1979-31, approximately 75-80 percent of the labor force of Respondent's growing operation was involved in flat crops. With respect to the harvesting operation, in 1979 and 1980, approximately 75% of the labor force was in vegetable crops and 25% in flat crops (75-80% in vegetable crops in 1981).

With respect to acreage, approximately 75-80% of the land was involved in flat crops for the period 1979-81. Lettuce and cantaloupe were the most labor intensive vegetable crops; broccoli and carrots the least labor intensive.

Approximately 35-40 tractor drivers were employed for the period 1979-81, with duties in caterpillar, wheel, hay cutters, rakers, graders, bailers, hay haulers, mulch and plant (wheat and alfalfa). Some 80% of the tractor drivers spent their time in flat crops as opposed to vegetable crops on an average

during the five year period 1979-84 (with the percentage increasing from 75% in 1979 to approximately 85-95% through date of hearing). Approximately 35-40 irrigators worked during the same period irrigating on 24-hour shifts, setting taps in the rows and making sure the water ran evenly, as well as opening up valves/checking ditches in the flat crops, etc. In 1979, approximately 75% of their time was spent in irrigating flat crops which percentage has risen over the years because of the increase of the flat crop acreage.[86]

Thin and hoe crews ranged from 40-75 people (two crews) in 1979-81. Some 140-190 lettuce harvesters; 200-300 (plus or minus 50) cantaloupe harvesters; 40-45 watermelon harvesters; 300 onion harvesters; 100-180 rapini harvesters all worked during the relevant period. The company also commercially packed (for 4-5 other growers) in its packing shed during the makewhole period. The lettuce harvest in the Imperial Valley lasts some 90-120 days with a labor force drawn from Calexico with large numbers living in Mexicali. Some employees work more than one crop, and others work year round (e.g., tractor drivers, irrigators, and shovelers). The harvesters work seasonally; thin and weed crews worked 10-11 months per year with July and August off (normally).

[86]Mr. Abatti explained the time allocation by virtue of the fact that flat crops are irrigated more frequently and over longer periods of time, e.g., hay is irrigated some 2 times per month for a 12-month period, wheat 9 times over a 5-6 month period, while lettuce/melons are irrigated only about 5 times for the whole season.

Sun Harvest:[87] During the relevant time frame, Sun Harvest maintained its principal office in Salinas. It grew crops in Salinas (lettuce, celery, cauliflower, broccoli, strawberries, carrots, sugar beets), Huron (lettuce), Oxnard (celery), Tacna-Wilton-Yuma (Arizona) -- lettuce, cotton, sugar beets, wheat), Brentwood (1979 only) as well as in the Imperial Valley. The Salinas work force consisted of approximately 1,000 agricultural employees — 700 lettuce harvesters; 130-150 other crop harvesters. In Tacna, Sun Harvest employed approximately 500-600 agricultural employees, the vast majority of whom were lettuce harvesters with a very small percentage of tractor drivers and irrigators.

Sun Harvest had been in the Imperial Valley since approximately 1968-69 — growing, harvesting, and shipping iceberg lettuce, cotton, alfalfa, wheat, sugar beets. In 1979, a typical Imperial Valley work force included 12-15 lettuce machine crews (32 workers per machine); 6-9 ground crews (naked pack, 30-plus workers/crew); 5 thin and hoe crews (30 per crew); irrigators; tractor drivers; sprinkler workers; miscellaneous heavy equipment workers; water truck drivers; and subforemen: (a total of some 700-800 agricultural employees approximately 600 of whom were lettuce harvesters). In 1980, the Imperial Valley workforce was nearly identical, decreasing approximately 10-20%

[87] I have relied upon the testimony of Sun Harvest counsel Andrew Church as well as UFW negotiator Art Mendoza for this information. See R.T. Vol. XXXVIII, pp. 21-36; Vol. II, pp. 2-21; Vol. Ill, pp. 69-146; RX 48-53; Appendix F-12.

in 1981. Tractor drivers and irrigators primarily came from the Imperial Valley and Mexicali, as did the thin and hoe crews with some workers from Salinas. The vast majority of the lettuce wrap machine crews came from Mexicali, with one wrap crew from the Yuma/San Luis area. For the lettuce ground crew, one group came from the San Luis area, and a small (15%) percentage resided in Salinas. A majority of the ground crew were from the Imperial Valley and would travel to the Yuma-Tacna operations by bus. They stayed in company housing as well in Salinas and Huron, but in Salinas, approximately 10 percent also resided in the area.

Sun Harvest utilized one seniority list for all areas with a liberal leave of absence policy -- e.g., an employee could miss an area and not lose his/her seniority. A slightly smaller percentage of employees would follow the wrap machine circuit -- approximately 50 percent of the Huron machine wrap workers lived in Huron; in Salinas these crews were essentially from the Imperial Valley with a small percentage living in Salinas. The lettuce operation was year-round (following the Imperial Valley-Arizona-Huron-Salinas circuit) with its principal 'market in New York.

The name change (Inter-Harvest to Sun Harvest) occurred in 1980. It is a corporation with original stockholders in Sun World International and United Brand. At some point in time, Sun Harvest bought out United Brand. There have been 5 UFW contracts with Sun Harvest with effective dates commencing respectively in 1970, 1972, 1975, 1979, 1982. The 1979 Sun Harvest contract was

used as a model[88] for approximately 20 Imperial Valley and Salinas companies who signed similar contracts (with nearly identical wage rates) — including three Imperial Valley companies — Colace, Hubbard, and John Elmore, and other Salinas-based companies with Imperial Valley operations -- Growers Exchange, Cal Coastal, Admiral Packing, Green Valley Produce, and Oshita. The threat of a boycott of Chiquita bananas (a subsidiary of United Brand), as well as the boycott of Hormel meats and A & W Rootbeer Stands, plus the boycott of Sun Harvest lettuce, strawberries and cauliflower, were all factors in the signing of the 1979-82 agreement. There was a threatened boycott in 1970, as well as a strike, but the boycott threat was not a factor in the 1975 or 1982 contracts.

Sun Harvest terminated Imperial Valley operations following the 1982-83 lettuce season. Attorney Andrew Church attributed the cessation to "profitability problems" throughout the southern area (Imperial Valley/Arizona). Specifically, the company was encountering problems with lengthy leases, utilization of the land, labor costs,[89] costs of water,

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[88]The 1979 Sun Harvest contract was not the first "standard" vegetable contract. It was also the model for contracts signed for the period 1975-78 with the exception of Bruce Church which paid higher wages. As such, UFW contracts with vegetable companies throughout the state contained nearly identical language provisions and similar wage levels, differing only with respect to articles relating to local issues.

[89]Mr. Church distinguished the "philosophy of lettuce" between the Salinas Valley and the Imperial Valley as follows: In Salinas, lettuce is the primary crop, around which the entire agricultural operation revolved. In the Imperial Valley, the emphasis is more on cotton, wheat, milo (flat crops) and lettuce

equipment, and pesticides. (R.T. Vol. XXXVIII, pp. 33-37.)

California Coastal Farms, Inc.:[90] The company operated in the Imperial Valley, Salinas Valley, and Blythe (harvesting lettuce) in 1979. The operations were identical in 1980 and 1981 with the addition of a Huron lettuce harvest. The 1979-81 crops included iceberg lettuce, cauliflower, alfalfa (Imperial Valley), cotton, wheat, sugar beets, and asparagus (1981 only).[91] The work force ranged from 300-400. The 1979-81 Imperial Valley work force included approximately 250-280 agricultural employees who grew, harvested and packed the various crops which were sold under the Cal Coastal label. Additionally, a broker also sold lettuce. Approximately 3-4 ground crews harvested lettuce (35 workers per crew or approximately 120 lettuce harvesters); with 20-25 irrigators, 25 tractor drivers, and 2 thinning and hoeing crews (30 per crew). Job categories included lettuce cutters/packers/loaders/closers/waterpersons; irrigators; tractor drivers, general laborers, sprinkler workers, thin and hoe crews, and irrigator subforemen. Acreage was well

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becomes a rotation crop — only harvested for three months/year, Lettuce is also a "higher risk crop" as its market will be volatile from day to day, while the flat crops are more stable, thus affording the Southern area grower fewer opportunities to overcome spiraling expenses.

[90] Testimony of Andrew Church, Art Mendoza. R.T. Vol. XXXVIII, pp. 1-132; Vol. II, pp. 47-72; Vol. V, pp. 19-35; Appendix F-13.

[91] Imperial Valley crops included iceberg lettuce, cotton, sugar beets, and alfalfa.

in excess of 1000. (R.T. Vol. II, p. 55.) Lettuce was harvested year round from Salinas (principal place of business) to the Imperial Valley to Blythe to Huron. During the 1979 strike, replacements were brought in from the Yuma-Somerton area (approximately 50% of peak) but the normal work force resided in Imperial Valley/Mexicali and to a lesser degree (15%) Salinas. Farm employees were from the Imperial Valley/Mexicali and did not travel the circuit.

The current UFW contract was negotiated in March 1981 and was due to expire on 31 August 1982. It continues on a day-to-day basis. The Imperial Valley operations ceased in 1982. Attorney Church opined that the' termination was due to "competition" in the Imperial Valley, specifically a very short, expensive lettuce season, with the balance of the year in flat crops and wages which were not competitive with other (non-union) Imperial Valley companies. (R.T. Vol. XXXVIII, pp. 93-94.)

Growers Exchange:[92]

A California corporation with operations in Salinas (principal), Oxnard, Blythe, the Imperial Valley (through 1981-82) and Huron. Iceberg lettuce was harvested in Imperial Valley (Holtville Farms did the growing) by approximately 330-350 employees, 70 of whom did thin and hoe work, 140 naked lettuce, and the remainder machine wrap. The labor pool (which remained

[92] Testimony of Ron Barsamian, Art Mendoza. (R.T. Vol. XLV, pp. 82-91; Vol. II, pp. 94-100; Vol. IV, pp. 124-146; Appendix F-14.

steady except for a decline in the thin and hoe crews because of better preseason planting) was primarily from the Imperial Valley and Mexicali with very few residing in Salinas (5%). It did no growing in the Imperial Valley — only preharvest work (thin and weed) as well as the actual harvesting, packing, shipping and selling of iceberg lettuce. Lettuce was also harvested in all other locations, as well as celery in Salinas and Oxnard (exclusively). The same number of crews worked in the Imperial Valley, Salinas, Huron and Blythe. Attorney Barsamian suggested that the cessation related to "long litigation with the ALRB" as well as high labor costs and loss of control under the UFW contract. (R.T. Vol. XLV, pp. 87-91.)

Admiral Packing:[93] From 1978-81, this company was a lettuce harvester/shipper, but not grower, in the Imperial Valley. Other operations included Salinas (principal), Blythe, and Poston (Arizona). In Poston and Blythe, iceberg lettuce was harvested. During the relevant period, approximately 3-4 ground crews harvested lettuce in the Imperial Valley (130 employees), and approximately 80% of the work force lived in the Imperial Valley and Mexicali; 20% were from Salinas.

In Salinas, the company also had a farming operation where lettuce, cauliflower, broccoli, and green onions were

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[93]Testimony of Lyle McKinsey, Art Mendoza. R.T. Vol. XIX, pp. 62-97; Vol. II, pp. 100-104; Vol. IV, pp. 146-157; Appendix F-15.

grown/harvested. Broccoli and cauliflower[94] were planted beginning January through raid-November and harvested from February to the end of November. Green onions were planted in February to mid-August, and harvested from May through June to November. Lettuce was planted in January-July; the Salinas lettuce harvest season would run from April/early May to mid-October. Thus, in the Salinas Valley, vegetables were harvested throughout the year except for the period approximately mid-November through mid-January. (R.T. Vol. XIX, p. 71.)

Oshita, Inc.:[95] A California corporation with operations in the Imperial Valley and Salinas. In Salinas Valley, it grew/shipped/packed mixed lettuce, green onions, bok choy, napa, Chinese/Japanese vegetables. Iceberg lettuce was grown but not harvested in Salinas. It did not grow vegetables in the Imperial Valley from 1979-81, but did harvest, pack, ship, and sell Romaine and mixed lettuce -- employing approximately 35 lettuce harvesters (cutters/packers/closers/loaders). Approximately 95% of the company's (Imperial Valley) workers were from the Imperial Valley with very few from Salinas. The first UFW contract was signed in September 1979. The Sun Harvest

[94]Broccoli/cauliflower are "over winter" crops in the Salinas Valley. Planting in September should hopefully yield harvest in late November. October/November plantings will be harvested in spring. Thus, broccoli is growing (although not being harvested) 12 months per year. R.T. Vol. XIX, p. 69.

[95]Testimony of Art Mendoza. R.T. Vol. II, pp. 88-94; Vol. V, pp. 14-20? Appendix F-16.

"model" agreement (GCX 28) was the second contract and was renegotiated in March 1983.

Green Valley Produce Cooperative[96] A cooperation of individual growers formed for the purpose of harvesting and shipping. In 1979 it harvested in the Salinas Valley only — harvesting lettuce and celery. The only Imperial Valley operation was in 1980-81 (and not thereafter) which involved approximately 70-80 lettuce harvesters (2 crews). The labor force primarily came from the Imperial Valley/Mexicali and to a lesser extent Salinas (30-35%). The first contract was signed in the fall of 1979.

Hubbard Company:[97] With a principal operation located in the Imperial Valley, the company also had some harvesting operations in Salinas, Blythe, and Las Cruces, New Mexico. It did not grow crops but was a harvester/shipper/seller of iceberg lettuce. In the Imperial Valley, it employed two large piece rate crews (45-50 per crew) including cutters/packers/loaders/closers/windrowers/box boys/ waterboys. The labor pool was from Mexicali/Imperial Valley. The Hubbard (Sun Harvest "model") contract (GCX 27) was the second with the UFW — the first was signed in early 1978 and expired on 31 December 1978. The Salinas Valley operations

[96]Testimony of Art Mendoza. R.T. Vol. II, pp. 109-113; Vol. V, pp. 48-57; Appendix F-17.

[97]Testimony of Ron Barsamian, Art Mendoza. R.T. Vol. XLV, pp. 91-98; Vol. II, pp. 72-80; Vol. V, pp. 3-14; Appendix F-18.

ceased in 1983 and the company did not return to the Imperial Valley during the 1983-84 season. High labor costs as well as a very high Teamster contract were cited as factors in the termination decision by Hubbard lawyer Ronald Barsamian. (R.T. Vol. XLV, pp. 92-97.)

John J. Elmore:[98] In 1979, the company operated only in the Imperial Valley, growing iceberg lettuce, cotton, alfalfa, sugar beets, and cantaloupes '(on approximately 7000 acres). It had some 75 employees at peak including tractor drivers (10), irrigators, sprinkler workers, thin and hoe crew (40-45). The labor force was from the Imperial Valley/Mexicali and involved in the year round operations, except for the thin and hoe crew which worked particularly during the lettuce, cantaloupe, and cotton. In 1980, it had the same operations with fewer employees: 8-9 tractor drivers, 10 irrigators, and 40 thin and weed people. In 1981 no lettuce was grown and there have been no growing operations since. A three-year contract was signed in the fall of 1978 with an economic reopener which was agreed upon in December 1979 (and signed in March 1980). Notice regarding termination of operations was given to the union in July 1980. Attorney Barsamian listed the reasons for the cessation as "personal" and "high cost of farming in general" -- e.g., labor costs, water costs, costs of land, debt services, pesticide

[98]Testimony of Ron Barsamian and Art Mendoza. R.T. Vol. XLV, pp. 71-82; Vol. II, pp. 104-109; Vol. V, pp. 35-48; Appendix F-19.

costs. (R.T. Vol. XLV, pp. 76-77.)

<u>Colace Brothers:</u>[99] The company operated only in the Imperial Valley growing/harvesting cantaloupes and iceberg lettuce. It had approximately 75-130 harvesting employees (seasonal) and a few tractor drivers and irrigators (year round). The labor force was primarily from the Imperial Valley and Mexicali area. GCX 33 was the UFW contract signed in November 1982 — in the context of the company principal's intention of terminating operations following the upcoming (June) melon harvest. All outstanding litigation was resolved and the parties agreed to the Sun Harvest contract with the exception of wages and medical plan. The union accepted lower wages to resolve the litigation and because Respondent was going out of business. The company was also desirous of ending the litigation, but wished to keep harvest costs down and "acceded to the union's position with respect to farm employee wages" (see R.T. Vol. II, pp. 117-122; R.T. Vol. XLIV, pp. 153-159). Thus, the general hourly rate negotiated was $6.20 for tractor drivers, $130.80 for (24-hour) irrigators, $5.45 for general labor -- wages which were lower than then-existing Sun Harvest rates, but significantly higher than those paid by other (non-contract) Imperial Valley companies.

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[99] RX 195, testimony of Art Mendoza. R.T. Vol. II, pp. 114-122; Appendix F-2Q.

IMPERIAL COUNTY - MONTEREY COUNTY DIFFERENCES From 1979-83, there were no UFW contracts with Imperial Valley-based growers/shippers with only Imperial Valley locations except for Colace Brothers which terminated its Imperial Valley operations in June 1983. The only contracts during the relevant period — Elmore and Hubbard — involved only a growing or harvesting operation. Both have since terminated businesses (Elmore in 1980; Hubbard in 1983; in part due to labor costs). The last contracts with Imperial Valley based grower/shippers were in 1978. The industry-wide negotiations of 1979 were marked by a general strike[100] during the Imperial Valley lettuce harvest and the break off of negotiations on 28 February 1979 as discussed in Carl Joseph Maggio v. ALRB (1984) 154 Cal.App.3d 40, overruling 7 ALRB No. 43. The Meyer Company (tomato harvester/packer in King City) was the first California vegetable company to sign a contract with the UFW thereafter (in early August-Labor Day 1979); Sun Harvest signed its contract on 4 September 1979. Other companies followed suit — all with Salinas-based operations — including Associated Produce, Veg-Pak, Arrow Lettuce, Mann Packing, Valley Harvest, West Coast, Sakata, Harden Farms, Cal Coastal, Green Valley, Salinas Marketing Co-op, Hubbard, Senini, Huntington, Oshita, Hibino, Growers Exchange, Giannini & Del Chiaro. Of those engaged in the

[100]Indeed, the intensity with which the parties litigated this compliance proceeding may be viewed as an outgrowth of the violent, tragic events which occurred during the 1978-79 Imperial Valley lettuce harvest.

original industry negotiations, the following — all Imperial Valley entities — did not sign contracts: Maggio, Inc., Colace Brothers (until 1982), Maria Saikhon, Lu-Ette Farms, Inc., Vessey and Company, Inc., and Martori Brothers Distributors.

Undisputed testimony of expert witness Philip Martin (agricultural economist), as corroborated by various growers, representatives, and local, county, and State agricultural personnel suggests[101] that Imperial Valley agricultural wages have trailed Monterey wages — e.g., an average of 51% lower in 1982. These wage differentials have occurred across all commodities, but mostly at the top end of the wage range (117% differential). Since 1979, Monterey wages have increased by 44% across the board; Imperial Valley wages rose 15% at the bottom and 33 1/3 percent at the top. Imperial Valley wages did not increase after 1980 for most commodities and tasks. These differences have arisen because Imperial County specializes in lower wage livestock and field crops; Monterey agricultural sales are 70% high-wage vegetables[102] Imperial Valley has a larger supply of workers to draw from during its January peak period because of the border city of Calexico and the Mexicali area, and there are fewer higher-wage non-farm jobs available in Imperial County (see RX 197).

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[101] See e.g., R.T. Vol. XLII, pp. 58-64, 74-80; Vol. XLIII, pp. 2-11? Vol. XLVII, pp. 94-96; RX 72 A-F, 73 A-E, 74 A-E. 75 A-E, 76 A-F, 77 A-F, 78 A-F, 79 A-F, 80, 81, 165-171.

[102] Livestock and/or field crop wages tend to be lower because the work is easier, of higher status, and often offers longer employment on one farm.

These differences contributed to the termination of the Imperial Valley operations of Salinas-based companies which agreed to the Sun Harvest contract in 1979: Sun Harvest and Cal Coastal ceased operations because they could not remain competitive with respect to row crops and the $1.30 per hour field rate increase which the new signatory companies did not have to pay. Growers Exchange ceased operations in 1981-82, triggered in part by higher labor costs incurred under the new UFW (Sun Harvest) contract. Hubbard Company ceased operations in 1983 in the Salinas Valley and did not return to the Imperial Valley for the 1983-84 season. The reasons for the termination were high labor costs and a very expensive Teamster contract. John J. Elmore ceased operations in September 1980 because of personal reasons (of the company principals) and the high cost of farming in general, e.g., labor costs, water costs, costs of land, cost of land preparation, debt service, pesticide costs. Thus, of the "comparable contracts", only those with solely harvesting operations (and therefore having no costs associated with farming) remained in the Imperial Valley at the time of the hearing[103] — Oshita, Admiral Packing, and Green Valley Produce Company.[104]

Because of these differences in the wage levels between

[103]As discussed, Colace Brothers also ceased operations in June 1983, and the Respondent itself announced in December 1983 -- during the hearing -- that it would be terminating its agricultural operations.

[104]The latter had no Imperial Valley operations post-1981.

the two areas, Dr. Martin suggested the importance of considering wages within a particular geographical area (e.g., Southern California), as well as wages for that particular commodity (in a given area). R.T. Vol. LI, p. 114. If there was no ideal "model" — another company in the same county with a contract and similar product mix — the next best alternative would be to look for a company at least in the same (Southern California) region. Ibid, pp. 117-118. The record thus includes information concerning seven (seven) Southern California vegetable companies with operations during at least some portion of the makewhole period and under contract with the UFW.

Other Southern California Contracts

Cattle Valley Farms:[105] An agricultural operation approximately 20 miles from the Imperial County line in Thermal (Coachella Valley), California, involved in vegetables and row crops as well as a feed lot for cattle. In 1979, the following flat crops (but no vegetables) were grown and harvested: cotton (1,000 acres); alfalfa (300-400 acres); wheat (300 acres); milo (300 acres); sudan (300 acres); oat hay (50 acres). In 1980 or 1981, the company was involved in a joint venture in cannery tomatoes (350 acres) and in 1981 or 1982 was under contract for approximately 100 acres of carrots. The following year the operation was a little more into vegetables, and the same acreage

[105] Testimony of Peter Solomon. R.T. Vol. XLVIII, pp. 1-33; Appendix F-5.

of flat crops. Onions (dehydrator) as well as bulb (fresh market), lettuce,[106] broccoli, cauliflower, asparagus (80 acres), spinach, squash, bell peppers, dehydrated garlic and melons (cantaloupes, casabas, cranshaws, and honeydews) were grown from 1982-84. In 1983, the vegetable acreage was approximately-200-700; the acreage of flat crops began to decline correspondingly. The labor force included approximately 10 tractor drivers per year, 15-16 irrigators (during busy season) and 4-5 during low points paid hourly for 8-10 hours per day, with 2-3 employees working at night. The following general field laborers, including weed and thin people, have worked for the company in the following years: 1979 - 10; 1980 - 15-20; 1981 - 15-20; 1982 - 30; 1983 - 100-150 at peak; 1984 - 200-400 including harvesting people at peak. The labor source is local, as well as the Imperial Valley/Mexicali area. The cattle portion of the business is not labor intensive, employing only some 4-5 employees (plus the owner) per year. RX 176 is the UFW contract of duration August 1981-August 1982. The wage rates reflected in the contract reflected raises of approximately $.21 per job category in comparison to pre-contract wages.

Harry Singh & Sons, Inc.:[107] The company grew and shipped pole (fresh market) tomatoes during the relevant period

[106]One acre of iceberg, the rest romaine, endive, escarole and leaf items.

[107]Testimony of Thomas Puffer. R.T. Vol. XLVII, pp. 3-22; Appendix F-6.

on approximately 300 acres of land leased from the United States Government near Camp Pendleton in Oceanside, San Diego County, approximately 30 miles north of San Diego. Employees included tractor drivers, sprayers, irrigators (regular) and hourly harvest employees (seasonal) with a peak of 250-300 for fall tomatoes. The labor source was from the San Ysidro/Tijuana area and local San Diego County. A contract with the UFW was reached on 9 June 1981, but the written agreement was not signed until October 1982 (RX 172). General labor wages rose from approximately $3.35 per hour to $3.67 per hour upon signing with corresponding, proportional increases in the four other classifications.

Egger & Ghio Co., Inc.:[108] This agricultural employer located in the Otay-Mesa area of south San Diego County produced celery (170 acres, 195 acres) and tomatoes (285 acres, 250 acres] in 1979 and 1980, employing approximately 140 and 120 employees respectively during the peak harvest season, including 6 truck drivers, 5 tractor drivers and 6 irrigators. In 1981, celery (185 acres), cucumbers (85 acres), and tomatoes (250 acres) were grown and harvested by 120 employees. In 1982 Romaine (70 acres), celery (205 acres), cucumbers (145 acres); and bell peppers were grown and harvested by 85 employees. In 1983, 80 employees grew and harvested 295 acres Gega. R.T. Vol. XLVIII, pp of celery and 15 acres of

[108]Testimony of Geoffrey. 34-49; RX 177A; Appendix F-7.

cucumbers. The UFW contracts (RX 181, 182) covered the period 6-77 through 6-82. The latest union proposal (as of the date of the hearing) would increase wages an additional 25 cents per hour for general laborers/irrigators/tractor drivers during the first year (approximately 6% raises); an additional 25 cents per hour during the second year; and an additional 15 cents per hour during the third year.

Koichi Yamamoto Farms:[109] Tomatoes were grown and harvested by 32 employees on 15 acres in South San Diego County in 1979. Cucumbers were produced on 12 acres from 1980-82, 14 acres in 1983, and 7 acres in 1984 by 12-15 employees. Contracts with the UFW were effective from 6-77 through 7-82 (RX 184, 187). The latest union proposal (as of the date of the hearing) requested $4.65 per hour for general field harvesters and $4.80 per hour-during the second year (increases of 45 cents or 10 percent). There were no changes with respect to tractor driver/irrigator wages.

SKF Farms:[110] From 1979 through March 1982 when this South San Diego company ceased agricultural operations, the following crops were grown and harvested: beans (30 acres); leaf items — green leaf/red leaf/romaine lettuce (350 acres); bell

[109] Testimony of Geoffrey Gega. R.T. Vol. XLVIII, pp. 34-49; RX 177B; Appendix F-8.

[110] Testimony of Geoffrey Gega. R.T. Vol. XLVIII, pp. 34-49; RX 177C; Appendix F-9.

peppers (50 acres); zucchini (40 acres); cucumbers (40 acres, 1981-82 only). Approximately 55-80 employees were hired at peak with an average work force of 45, including 5 irrigators and 5 tractor drivers. Two contracts were in effect for the period 6-78 through 7-82 (RX 178, 185).

George Yamamoto Farm:[111] Cucumbers and tomatoes were grown and harvested in this South San Diego County agricultural operation during the period 1979-84. Respective acreages were: 1979 - 12, 10; 1980 - 20, 11; 1981 - 20, 11; 1982 - 15, 11; 1983 - 14, 10.5; 1984 - 11, 9.5. The number of employees varied from 22-33. Two UFW contracts were in effect during the period 4-25-79 through 7-31-82 (RX 179, 180.) The latest union proposal included general field harvesters' wages of $4.65 per hour retroactive to 1 July 1983 (an increase of 7 percent); $4.80 per hour as of 1 July 1984; $4.95 per hour as of 1 July 1985. The irrigators wages were an additional 10 cents per hour "across the board"; tractor drivers were an additional 20 cents "across the board".

Piper Ranch:[112] cabbage was grown and harvested – 1979–80 (40, 50 acres); barley has been produced from 1979–82 (1,400 acres). The work force declined from 35 (1979) to 2-4

[111]Testimony of Geoffrey Gega. R.T. Vol. XLVIII, pp. 34-49; RX 177D; Appendix F-ll.

[112]Testimony of Geoffrey Gega. R.T. Vol. XLVIII, pp. 34-49; RX 177E; Appendix F-10.

(1981-82). The company has not been certified with the UFW since 1982. Two contracts were in effect during the period 6-77 through 7-82 (RX 183, 186).

Other Imperial Valley Vegetable Growers/Harvesters (Non-Contract)

Ben Abatti identified his principle competition in vegetable/flat crops as Mario Saikhon, Inc., Maggio, Inc., Vessey and Co., Inc., Lu-Ette Farms, Inc., Lindy Farms, Imperial Valley Vegetable Farmers Association, Let-Us-Pak, Badlands, Green Valley Farms, Signal Produce, Sam Andrews' Sons, and La Brucherie Farms, as well as other companies that competed in flat crops alone. [113] Respondent introduced evidence 'of the operations of some of these non-union contract Imperial Valley-based companies.

Maggio, Inc.:[114] Maggio, Inc. grew/harvested 1,000 acres of lettuce, 2,800 acres of carrots,[115] 1,200 acres of broccoli, 165 acres of sudan, 250 acres of wheat, and 440 acres of milo, and grew 800 acres of alfalfa in 1979. In 1980, it grew/harvested 2,200 acres of carrots, 675 acres of broccoli, 30 acres of miscellaneous vegetables, 800 acres of wheat, 400 acres of milo, and grew 1,200 acres of alfalfa. In 1981, it grew/harvested 1,800 acres of carrots, 900 acres of broccoli, 250 acres of miscellaneous vegetables, 1,475 acres of wheat, and 500

[113] R.T. Vol. XLVII, pp. 59-62.

[114] RX 195.

[115] Four hundred acres of carrots were grown/harvested each year; the balance were grown only.

acres of sweet corn as well as grew 1,565 acres of alfalfa. The 1979 work force included 17 tractor drivers, 17 irrigators (24-hour shift), 30 sprinklers, 48 weed/thin persons, 112 lettuce harvesters, 170 carrot harvesters, and 44 other harvest personnel. In 1980, it employed 14 tractor drivers, 20 irrigators, 30 sprinkler workers, 40 weed and thin employees, 150 carrot harvesters and 50 harvesters in the miscellaneous vegetable operations. In 1981, 13 tractor drivers, 20 irrigators, 25 sprinkler workers, 40 weed and thin, 140 carrot harvesters, and 110 miscellaneous vegetable harvesters were employed. The respective wage rates are contained in Appendix F-2.

Mario Saikhon, Inc.:[116] This company produced the following crops in 1979: lettuce (1,900 acres grown and harvested), alfalfa (750 acres grown and harvested), carrots (400 acres grown, 500 acres harvested), watermelons (500 acres grown, 700 acres harvested), cotton (700 acres grown and harvested), wheat (2,700 acres grown and harvested). In 1980, 1,950 acres of lettuce were grown and harvested, 900 acres of alfalfa, 500 acres of spring cantaloupes, 750 acres of cotton and 2,900 acres of wheat. Additionally, 400 acres of carrots were grown and 500 were harvested; 500 acres of watermelons were grown, 800 were harvested; 400 acres of fall cantaloupes were harvested. In 1981, 2,000 acres of lettuce were grown and harvested, 900 acres

[116] RX 195.

of alfalfa, 500 acres of spring cantaloupes, 750 acres of cotton, and 2,900 acres of wheat. 350 acres of carrots were grown, 400 were harvested; 500 acres of watermelon were grown, 800 were harvested; 400 acres of fall cantaloupes were harvested, as were 400 acres of broccoli. The typical work force consisted of (1979) 13 tractor drivers, 13 irrigators (24-hour shift), 8 shovelers, 15 sprinkler workers, 50 weed and thin, 160 lettuce harvesters, and 40 watermelon harvesters. In 1980 the work force remained constant, with the exception of 40 additional lettuce harvesters, 160 cantaloupe harvesters, and an additional 18 watermelon harvesters. These latter figures were identical in 1981 with an additional 77 broccoli harvesters. Respective wage rates are reflected in Appendix F-3.

Vessey & Co., Inc.:[117] In 1979, the following crops were grown and harvested: 985 acres of lettuce, 70 acres of bulb onions, 90 acres of broccoli and 100 acres of garlic. 820 acres of alfalfa, 225 acres of sugar beets, 265 acres of carrots, and 275 acres of wheat were grown. In 1980, 800 acres of lettuce, 60 acres of bulb onions, and 115 acres of garlic were grown and harvested, 990 acres of alfalfa, 225 acres of sugar beets, 110 acres of carrots, 165 acres of cotton and 1,250 acres of wheat were grown. In 1981, 120 acres of bulb onions were grown and harvested; 995 acres of alfalfa, 295 acres of cotton, and 965 acres of wheat were grown. The work force included (1979) 7

[117] RX 195.

tractor drivers, 10 irrigators (24-hour shift), 46 weed and thin employees, and 105 lettuce harvesters. In 1980, 3 tractor drivers, 6 irrigators, and 11 weed and thin employees. In 1981, there were only 5 tractor drivers and 12 irrigators. The respective wage rates are contained in Appendix F-4.

2. Analysis and Conclusions;

In its initial makewhole decision (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24, rev. den. by Ct. App., 2nd Dist., Div. 3, March 17, 1980), the Board reviewed 37 collective bargaining agreements which were negotiated between the charging party (UFW) and employers in the state to determine if a basic wage rate was established during the same time period in which respondent and the UFW should have been bargaining in good faith. The average of the contracts was $3.13 per hour (general field rate) for the first year -- the lowest negotiated rate of all job classifications. Employees who worked in more specialized jobs and who were more highly paid (e.g., tractor drivers, mechanics) were awarded a differential above the base wage calculated in proportional (percentage) increments. In Perry Farms (1978) 4 ALRB No. 25, vacated in Perry Farms v. Agricultural Labor Relations Bd. (1978) 86 Cal.App.3d 448, the Board set UFW contract rates at $4.00 per hour for 1976 and $4.17 per hour for 1977 (including all fringe benefits).

In J. R. Norton Co. (1978) 4 ALRB No. 39, remanded in J.R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, the Board directed the Regional Director to investigate

and determine a new basic makewhole wage based on a survey of more recently negotiated UFW contracts (since the certification issued substantially after the certification in Adam Dairy). Guidelines were established for the Regional Director's survey: (1) the time frame within which the contracts were concluded; (2) the size of the work force; (3) type of industries; and (4) geographical location.

No particular quantification of these factors has been mandated by the Board. In Robert H. Hickam (1984) 9 ALRB No. 6, and Kawano Co., Inc. (1984) 10 ALRB No. 17, the Board averaged the wages reflected in a group of contracts covering similar crops in the same geographical area. In Kyutoku Nursery (1982) 8 ALRB No. 73, the Regional Director's selection of one contract was approved despite the fact that two of the criteria -- size of work force and type of industry[118] — were not fulfilled. Rather, geographical area from which the labor pool was drawn as well as timing of the "comparable" contract were found to be determinative considerations.

The rule enunciated in Kyutoku, supra, is that the Regional Director's formula and calculations will be adopted when the latter established at hearing that the makewhole amounts were

[118]The Board therein found comparability in a contract which involved different crops (strawberries as opposed to carnations), and different-sized work forces (400 employees as compared to Respondent's 15). The comparable contract was signed during the same period in which Respondent would have bargained absent the unfair labor practice, and the workers at each entity were drawn from the same basic labor market (Salinas Valley). 8 ALRB No. 73, supra, pp. 4-6, 11-12.

calculated in a manner that was reasonable and conformed to the standards set forth in the ALRB decisions. The focal paint for making such determinations should be contracts achieved by the union in bargaining with employees similarly situated. A detailed showing of contract comparability has not been required, but rather the Board has found it generally sufficient for General Counsel to present contracts negotiated by the same union and governing operations in at least some of the same commodities and location(s) as that of the Respondent and in effect during the makewhole period. Where, however, Respondent proves that the Regional Director's methodology is arbitrary, unreasonable, or inconsistent with Board precedent, or that some other method of determining the makewhole amount is appropriate, the Regional Director's formula may be modified and rejected. Ultimately, the Board must determine whether the Regional Director's formula is the proper one in view of all the facts adduced by the parties. See Labor Code section 1160.3; Kyutoku, supra, pp. 10-11; cf. Miranda Mushroom Farm, Inc. (1982) 8 ALRB No. 75, rev. den. by Ct. App., 1st Dist., Div. 3, February 2, 1984.

In two recent cases involving Imperial Valley vegetable operations, the Board held Sun Harvest to be the comparable contract. In Holtville Farms (1984) 10 ALRB No. 13, the Board indicated that the number (1) of contracts used was not a determinative factor. The Sun Harvest-UFW contract was found to be reasonably comparable because it was executed approximately when the makewhole period began, and because Sun Harvest grew the

same crop (lettuce) in the same geographical area as Holtville, the Sun Harvest contract included job classifications similar to job classifications in Respondent's work force, and Respondent twice unilaterally raised its employees' wage rates to reflect the Sun harvest rates. In J.R. Norton Co. (1984) 10 ALRB No. 42, the Board approved the Regional Director's selection of eight[119] contracts which the UFW had negotiated with companies of varying sizes, all of which grew or harvested lettuce in the Salinas and Imperial Valleys or in the Blythe area. As respondent in those cases paid its lettuce harvest wages equivalent to those they would have received under comparable contracts,[120] the only makewhole due the employees would have been compensation for fringe benefit loss. For Respondent's non-harvest employees, the Regional Director averaged the highest wage paid to employees in

[119] Abatti Farms, Inc. and Abatti Produce, Inc.; Vessey and Company, Inc.; Mario Saikhon, Inc.; Lu-Ette Farms; Growers Exchange, Inc.; Interharvest, Inc.; Nish Noroian Farms; and Admiral Packing, all were lettuce growers with operations in the same area as Respondent. These comparable contracts were presumed to have been a result of good faith bargaining and were therefore a fair and equitable measure of what the affected agricultural employees of Respondent would have earned had the Respondent bargained in good faith. Uniform wage rates had been established from 1977-79 in 30-35 collective bargaining agreements between the UFW and the vegetable industry in Salinas, Imperial Valley and Blythe. All eight of the companies had contracts which covered at least parts of the makewhole period. All grew and/or harvested lettuce in the Salinas Valley/Imperial Valley and/or Blythe. Many also had other farming operations in the Imperial Valley as did the Respondent. Nish Noroian operated only in Blythe growing lettuce and flat crops. The number of employees ranged from somewhat smaller to the same size or larger. J.R. Norton, 10 ALRB No. 42, ALJD pp. 10-13.

[120] The makewhole period in the Norton decision was from 4 October 1977 to 28 December 1979 (see 10 ALRB No. 42, supra, ALJD, p. 7).

all of the five[121] standard non-harvest labor classifications contained in the UFW contracts and arrived at a single general non-harvest basic makewhole wage rate.

In Norton, the Respondent's operation was a large farming operation in the Salinas Valley, Imperial Valley and Blythe. Lettuce represented a large portion of the operation, producing between 2 3/4 and 3 1/4 million boxes per year. The lettuce operation began in Blythe in mid-November and ran until mid-late December. The lettuce was then harvested in the Imperial Valley in late December through early March, then back to Blythe for the spring harvest throughout March and to the Salinas Valley from April 15 through October 1. The operations moved to New Mexico and Arizona in October and November. Company equipment, supervisors, and ground crew workers followed the harvest. In the Imperial Valley, the company also grew flat crops, such as cotton, alfalfa, and wheat, maintained a citrus operation, employing about 15 year-round workers and at times some 40 thin and weed personnel. In Blythe, some 75 non-harvesters and 25 thin and weed people were employed as necessary.

The contracts presented by the Respondent in Norton were rejected because they involved dissimilar crops, covered farming operations in geographical areas in which Respondent did no farming, or involved unique financial and economic

[121] Tractor Driver A, Tractor Driver B, thin and hoe, general farming, irrigator.

circumtaces

The Court of Appeal (4th Dist., Div. 1) approved the Board's reliance on the Sun Harvest contract in Holtville Farms, Inc. v. Agricultural Labor Relations Board (1985) 168 Cal.App.3d 388, noting that a substantial portion of the business of both entities was the growing of lettuce in the Imperial Valley, the wage rates utilized were for the same classifications for the same crop, the Sun Harvest contract was signed one month after the Holtville Farms makewhole period commenced to run, and Holtville Farms twice unilaterally raised the wages of its employees to match those of the Sun Harvest contract. (Emphasis added.) (Ibid, at 393.)

In an unpublished decision, the Court of Appeal, Fourth District, Second Division, partially annulled the Board's order in J.R. Norton (1984) 10 ALRB No. 42. General Counsel was directed to submit revised calculations to the other parties, and, at the request of the parties, to reopen the record (for an ALJ) to take evidence de novo on any and all issues relevant to determining the makewhole formula. The Court therein specified that "all parties would have the right to question both the theory utilized by the Board as well as the right to introduce any and all relevant, admissible evidence to support such challenge." (J.R. Norton Company, Inc. v. Agricultural Labor Relations Board (Nov. 26, 1985) #E001505, p. 11.)

At first blush, there is significant record evidence suggesting the comparability of General Counsel's (initially)

selected contracts: All uniformly reflected the wages of the Sun Harvest "model", all included vegetable growers and/or harvesters with operations in the Imperial Valley; all companies were involved in one way or another with the lettuce production in the Imperial Valley. Additionally, Respondent was part of a group of Imperial Valley companies (along with other vegetable growers/harvesters) throughout the state that agreed to the Interharvest economic package in 1978. Comparable companies — Admiral Packing and Growers Exchange were also among the group of Imperial Valley companies which had agreed to the Interharvest (Sun Harvest) rates as found by the Board in the Norton decision.

Indeed, there is little real dispute regarding the comparability of the Sun Harvest "model" with respect to lettuce harvest wages during the makewhole period. Respondent president Ben Abatti conceded that the lettuce harvest wages that he paid were competitive with the wage rates which were normally set in Salinas by the union contract companies. (R.T. In Camera hearing, January 30, 1984, pp. 11-12.) Respondent witness Andrew Church suggested that the lettuce piece rate varied little by company and was fairly uniform from area to area (generally set in Salinas -- the lettuce capital of the state which enticed the premium lettuce harvesters).[122] other decisions of the Board have indicated that the Sun Harvest contracts set a standard for (harvest) wages in the lettuce industry in 1979; when the lettuce harvest moved from Salinas Valley to the Imperial Valley in

[122] R.T. Vol. XXXVIII, pp. 36-41, 113-114.

December 1979, many Imperial Valley growers paid their employees the Sun Harvest rates, since those were considered the prevailing wage rates in the industry. (See Joe Maggio, Inc., et al. (1982) 8 ALRB No. 72, remanded by Ct. App., 4th Dist., Div. 1, July 17, 1984; Martori Brothers (1982) 8 ALRB No. 23.

Respondent expert Philip Martin suggested the theoretical bases for this phenomenon: Unionization has had a profound — albeit focused impact — upon wage rates in particular commodities, e.g., lettuce and mushrooms where the labor force was more highly specialized, and/or demonstrated great mobility around the state. See R.T. Vol. LI, pp. 108-111, RX 198, CPX 3. Thus, lettuce harvest wages in the Imperial Valley have tended to track those rates set in Salinas. Minimum guarantees negotiated in Monterey County serve as indicators of Imperial Valley wages, and thus suggest what rate Respondent would have paid had there been a contract during the makewhole period. I find the Sun Harvest lettuce contract wages to be the predicted rates for Abatti's lettuce harvesters in the instant case. Since the Board has held that the (lettuce harvest) wage rates in the lettuce industry contracts which expired in December 1978 - January 1979 are comparable wages for the period between January and September 1979 (21 September 1979, the date of execution of the Sun Harvest/UFW contract), makewhole computations for the 1978-79 harvest should be adjusted

accordingly.[123] As Respondent has paid at or above the Sun Harvest rate for the relevant period, I would award no wage makewhole to Respondent's lettuce harvesting employees. (For calculations of fringe benefits owing this category of employees, see discussion <u>infra</u>.)

The "comparability" of the farm employee wage rates initially selected by General Counsel, and derivatively, the wage rates for the onion harvesters, cantaloupe harvesters, watermelon harvesters, asparagus harvesters, and rapini harvesters is much more problematical. On the one hand, Charging Party suggests that the percentage differential reflected in the general labor wage rate increases provided in the Sun Harvest contract should be applicable across the board to the other agricultural employee categories in the Abatti work force. But the record is replete with evidence suggesting real differences in Imperial Valley and Salinas Valley economics. As suggested by Dr. Martin, average Imperial County wages are lower than Monterey County wages due to differences in farm specialization (lower wage livestock and field/flat crops versus higher wage vegetables); the timing of peak labor needs (January during the statewide lull versus June

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[123]The Board has reasoned that the failure to make retroactive the terms of the new Sun Harvest contract was sufficient evidence of the UFW's bargaining power during the hiatus in the lettuce vegetable industry contractual relations, See J.R. Norton, supra, pp. 26, 28. Only the John Elmore contract contained retroactivity (to June 1979), but as the lettuce season did not commence in the Imperial Valley until December, there was no practical effect of such provision. Dr, Martin has suggested the inelasticity of demand for lettuce as one possible explanation for the union's relative lack of effectiveness during the 1979 strike. (See CPX 3, p. 29.)

near the statewide peak for farm labor); and the existence of fewer non-farm employment options offering higher wages in Imperial County. (RX 198, p. 2.) Such findings were amply supported by the testimony of Messrs. Church, Hull, Kloth, Finnel, et al., and are not reasonably in dispute.

General Counsel has thus withdrawn its suggestion that the Sun Harvest contract is comparable "across-the-board", recommending instead that non-lettuce harvest wage rates be adjusted by a 10 percent/year figure to reflect predicted wages had the Respondent bargained in good faith. (See General Counsel's Post-Hearing Brief, pp. 23-26.)

I would agree with General Counsel's conclusion that no one contract or group of contracts is "comparable" for purposes of predicting wage rates for Abatti non-lettuce harvest personnel. Each entity on record differs significantly from Respondent's operations and/or cannot be considered comparable in the following respects:

Sun Harvest: Discrepancy in farm wage patterns (and proportionately-calculated harvesting wages not included in the Abatti contract); cessation of operations due to labor costs.

All derivative Sun Harvest contracts with principle Salinas Valley locations: California Coastal Farms, Inc. (Imperial Valley operations discontinued); Growers Exchange (operations ceased 1981); Admiral Packing (harvesting only in the Imperial Valley); Oshita (harvesting only in the Imperial Valley); Green Valley (harvesting only in the Imperial Valley

[1980]).

Imperial Valley companies: Hubbard - harvesting only, no farm employees, operation ceased 1983-84 in part due to labor costs; John Elmore - grower only, operation ceased 1980 in part due to labor costs; Colace Brothers - operation ceased June 1983, contract resolved outstanding makewhole case, signed outside makewhole/backpay period; Cattle Valley Farms - dissimilar operations during makewhole period.

San Diego County operations: Wage rates lower throughout makewhole period, crops dissimilar.

Maggio, Saikhon, Vessey: No contract.

Where I depart from General Counsel's approach, however, is the latter's reliance upon the company principal's opinion that he would have incurred approximately 10 percent additional wage increases upon signing a contract. (See R.T., In Camera Hearing, Jan. 30, 1984, pp. 11-12.) This Board has already rejected such self-serving testimony in Kvutoku Nursery (supra).[124] In Adam Dairy, supra, the Board defined its duty to fashion a makewhole remedy "which is minimally intrusive into the bargaining process and which encourages the resumption of that process." (Adam Dairy, supra, at p. 11.) The Board therein was

[124] In its Post-Hearing Brief Respondent suggests that the 10 percent figure was a total for the entire makewhole period. I have reread the transcript and find no support for such position. It seemed apparent at the time that Mr. Abatti was talking about 10 percent per year, and the actual at-the-table proposals by the company would reflect such interpretation of the testimony. (See GCX 44, 4, RX 106; R.T., In Camera Proceeding, January 30, 1984, pp. 11-12; R.T. Vol. XLIII, pp. 63-64.)

concerned that the "wealth of available data would give rise to extensive and detailed offers and counter-offers of proof, and will result in protracted litigation at the compliance stages." (Ibid, at p. 12.) Thus, the Board has historically refused to become a part of the negotiations, and has rejected evidence as to why an employer would or would not have agreed to this or that term as part of a contract.[125] See Kyutoku Nursery, Inc., supra; Robert H. Hickam, supra.

As suggested by the Court of Appeals in Holtville Farms v. ALRB (1985) 168 Cal.App.3d 388, 397:

> If the ALRB was to attempt to determine the amount needed to compensate employees for a refusal to bargain by their employer by looking to the company's profits and losses, its costs and expenses and the necessity or desirability of each, it would find itself in direct center stage of negotiations. It is well settled that this is the job of negotiators and any resolution of disputes or disagreements in this area must be resolved through economic forces and the give and take of negotiations, unless it is determined that the free enterprise system enjoyed in the United States must be discarded in favor of specifics determined appropriate by the government.

I have reviewed the various contracts submitted — both in Monterey County (which reflected companies with operations as well in Imperial Valley), Imperial Valley, the Coachella Valley, and San Diego County, all of which share at least some factors of comparability set forth by the Board in J.R. Norton (4 ALRB No. 39, supra). Although no one is precisely comparable, the changes in wages occasioned from bargaining (i.e., from first to second

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[125]To rule otherwise would defer to the wrongdoer the decision of the remedy to be imposed for its unlawful conduct. I do not believe the Act contemplates such a procedure.

contract, or from non-contract to first contract) may shed some light on the best approximation of what wages Respondent would have paid had it bargained in good faith during the backpay period.

Additionally, I give some weight to certain non-contractual competitors of Respondent particulary, Saikhon, Vessey, Inc., and Maggio, Inc. Although I am aware of Board precedent discounting such evidence (see J.R. Norton, supra, 10 ALRB No. 42), this record reflects that there is some basis for relying upon existing wage levels in a given geographical area for particular crops (see testimony of Philip Martin, R.T. Vol. LI, pp. 114-118.) The reversal' of the Board's decision in Admiral Packing (1981) 7 ALRB No. 43,[126] I believe, permits one to draw the inference that non-union wages in a particular commodity and geographical area may accurately reflect what workers would have received if Respondent had bargained in good faith (but reach bona fide impasse) with the certified bargaining representative as suggested by the Board in cf. J.R. Norton, supra, 10 ALRB No. 42, p. 18. I recognize, however, that the wage rates for non-contract companies are of limited usefulness to the analysis because, as conceded by Dr. Martin, they do not isolate the issue of the union's impact on economics -- which is ultimately the measure of makewhole relief.[127] (R.T. Vol. LI, p.

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[126] 154 Cal.App.3d 40 (1984).

[127] Thus, the differential in wage structures between Monterey and Imperial counties may be a result of the absence of union contracts, as well as merely reflective of

146.)

In reviewing Appendices G-l through G-4 and H-l through H-4, I note the following:[128] Average yearly increases for farm employees (tractor drivers, irrigators, and general laborers) were generally in the 10-11% range or higher. These wage rate increases varied by company grouping (Abatti plus the non-contract Imperial Valley companies increased 4-6% per year; the Southern California union contract companies increased some 9-10% per year; Sun Harvest and derivative companies increased some 10-16% per year. The Colace contract reflected no such increase during the makewhole period, but percentage increments of 32-33% in November 1982 following the UFW contract.

These projections are similar to the tabulations of Dr. Martin (which reflected increases in the 12-13 percent per year range) for farm employees during the makewhole period (see CPX 3, Appendix K),[129]

The harvesting categories were even more problematical,

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geographical/labor force factors.

[128]I have relied upon this data with a view to most nearly approximate Abatti wage rates during the makewhole period had the company not unlawfully refused to bargain. As I have found no one entity or group of entities to be comparable, I have reviewed the information not merely to "average" wages (or wage increases), but to consider whether or not certain wage patterns may be reasonably predicted as a result of collective bargaining.

129I reach my conclusions in this case independent of the findings in CPX 3 because of the latter's status as an unfinished product, and because it is not clear for what purpose the parties introduced the document. See R.T. Vol. LI, pp. 147-164. Thus, Dr. Martin was not examined regarding his methodology, and/or accuracy of the findings of the wage increases. I have included the information for illustration purposes only.

varying from 14% per year increases[130] (Sun Harvest and derivative company lettuce harvest piece rates, Abatti lettuce harvest piece rate) to 4% per year (Abatti non-lettuce harvest increases) and 32% (hourly) with 10% increases in 1982 for Colace piece rates (cantaloupe harvest wages).

Keeping in mind the wage trends reflected on this record, the various contracts negotiated by the UFW during this period, the economic differences between the Imperial Valley and Salinas Valley, as well as the wage increases actually paid by Respondent (without bargaining), I recommend that the makewhole wage rates be set at 10% over and above the actual Abatti rate per year for each of the non-lettuce harvest job categories. I find that said figure represents the best approximation of what Abatti would have paid its employees absent its refusal to bargain for the following reasons:

Said increase, although considerably below the projected Sun Harvest wages (as applied to the derivative non-lettuce harvesting categories) is also considerably higher that the wages paid by non-contract companies in the Imperial Valley during the makewhole period. Moreover, these wage increases would represent significantly more (approximately 10 percent) than the Colace "wage package" were the latter to be applied "retroactively" to the makewhole period.[131] (See Appendices I,

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[130]Nineteen percent per year, including COLA.

[131]The Sun Harvest increases totaled 56.8% for the 3-year period; Colace 32-42% depending upon job category; my recommendation would provide increases of 42-48% (which includes

J.) While this makewhole wage would thus exceed the 10% per year total increase (as suggested by General Counsel), I note that the amount owed would be a lesser (8%) percentage of Respondent's payroll for each year of the makewhole period.[132] (see Appendices D, E-l through E-13.) Nor do I see any reason to diverge from this formula with respect to the non-lettuce harvesting categories -- e.g., by application of the Sun Harvest lettuce harvest piece rate increases to these job descriptions. There is no evidence on this record which would suggest that non-lettuce harvest piece rate wages in the Imperial Valley were related in any manner to the lettuce harvest rates set in Salinas.[133] Because of the difficulty in equating Abatti job classifications with those in other contracts, the 10% figure would seem to represent the same type of approach envisioned by the proportional/increase calculations suggested in Adam Dairy, supra, and Robert H. Hickam, supra..

Concededly, the formula I have suggested is an approximation. I find that it most aptly reflects the record evidence in the case, and has the virtue of relatively uncomplex

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the raises provided by Abatti).

[132]This result occurs because of the finding that Respondent was already paying comparable lettuce harvest (piece rate) wages.

[133]Said increases (approximately 42% plus COLA over 3 years) would in any event be within the range of increases suggested by my recommendation.

application.[134] Mathematical precision historically has never been required in determining backpay and/or makewhole awards. (Cf. Maggio-Tostado, Inc. (1978) 4 ALRB No. 36.) The net amount owing is always a mere approximation of the actual loss because there has been no bargaining in fact (or no employment relationship by virtue of discharge/layoff, etc.). Since there is no certain way of assessing what would have happened had the parties met in good faith, I conclude that this formula would most accurately reflect the wage losses suffered by Abatti's agricultural employees as a result of the company's refusal to bargain.

D. Fringe Benefits

In J.R. Norton Co., Inc. (1984) 10 ALRB No. 42,[135] the Board modified the Adam Dairy[136] (standard wage -- fringe

[134]In a sense, the Sun Harvest rates represent the optimum wages the union could have hoped to negotiate. The actual Abatti rates reflect wages in the absence of all bargaining. My recommended formula attempts to predict what the wages would have been had the company negotiated during the makewhole period given the economic considerations heretofore referred.

[135]As discussed, the Court of Appeal has remanded this decision to the Board in J.R. Norton Co. v. Agricultural Labor Relations Board, unpublished decision #£001505, Court of Appeal, Fourth District, Division One, dated 26 November 1985.

[136]Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24, supra. In that case, the Board adopted a formula for calculating fringe benefits based on a Bureau of Labor Statistics report for non-manufacturing industries which in 1974 found that fringe benefits represented 22 percent of an employee's total wage. Therefore, the makewhole wage was assigned a value of 78 percent (.78). That formula was approved, and an individual quantification approach rejected "in order to avoid lengthy post-decisional proceedings to provide an effective redress for

benefit ratio) makewhole formula by adding to the makewhole wage award the dollar value of fringe benefits which would have been available under comparable contracts. The Board decided to exclude mandatory fringe benefits and calculated voluntary fringes on a case by case basis, just as the makewhole wage was calculated -- that is, based on comparable contracts. Those contracts that were utilized to establish the prevailing wage rates were also to be utilized in calculating the fringe benefit factor. The new formula was specifically made applicable to all cases which had not yet gone to hearing before an ALJ as of the date of issuance (5 October 1984). In those cases in which an administrative hearing had been held, but in which the ALJ's decision had not yet been transferred to the Board, it was left to the ALJ's discretion to reopen the record and/or reorder calculation in accordance with the Norton decision.

In Holtville Farms v. A.L.R.B., supra, the Court of Appeal (4th Dist., Div. 2) affirmed the Board (and ALJ's) decision not to recalculate the recommended Adam Dairy formula following issuance of the Board's later Norton edict as one which rested within the "sound discretion of the ALJ". In the underlying Holtville Farms decision (10 ALRB No. 13), the Board

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employee losses, and to promote the course of good faith negotiations between the parties in the future." (Robert H. Hickam (1983) 9 ALRB No. 6, pp. 10-11.) In Hickam, the Board assumed that mandatory fringe benefits (Workers' Compensation, Unemployment, and Federal Insurance Contribution Act [Social Security or FICA]), comprised 6.3 percent of the total makewhole rate and thus reduced the makewhole due the employees by that amount where there was proof that the employer paid such benefits.

approved utilization of the Adam Dairy calculations and declined to remand for recalculation pursuant to Norton,[137] because of the amount of time and expense that would be involved with new proceedings. Where the hearing had already been closed, but the ALJ's decision had not yet issued (as in this compliance proceeding), the ALJ was afforded discretion to reopen the record, upon a party's request, and order recalculations in accordance with the Norton decision. (Holtville Farms, supra, p. 5, fn. 4.)

In the instant case, I note that significant time (over 2 years) has elapsed from the commencement of the compliance hearing to the writing of this decision. The Norton decision issued following the close of the hearing. Since that time all parties have had ample opportunity to recalculate the makewhole owing based on the new Board formula. General Counsel has done so in post-hearing briefs, and Charging Party has had an opportunity to verify for mathematical accuracy.[138] Since that time also, the Court of Appeal, Fourth District, Second Division, annulled the Board's order in 10 ALRB No. 42, effectively reopening that compliance proceeding to permit revised calculations and de novo litigation of all issues relevant to determining makewhole (p. 19). J.R. Norton Company v. A.L.R.B. (#E001505). And the Board has subsequently held that there would

[137]The original J.R. Norton Co., Inc. decision (10 ALRB No. 12) was vacated on 24 July 1984.

[138]Noparty has challenged the accuracy of General Counsel's revised calculations by way of reply brief.

be no retroactive application of Norton where the employer had not shown that the Regional Director's application of Adam Dairy/Hickam to be arbitrary or unreasonable, and it would be impracticable to remand a nine-year-old case to permit recalculation. (See McFarland Rose Production (1985) 11 ALRB No. 34.)

In the instant case, I recommend utilization of the Board's Adam Dairy/Hickam formula for calculating fringe benefits for the following reasons:

1. I disagree with General Counsel's reliance upon the Colace fringe package as an accurate predictor of what benefits Respondent's employees would have enjoyed had the company not refused to bargain, for the very reasons that I found the Colace contract not to be an appropriate measure of comparable wages — e.g., the peculiar circumstances of its signing, the time frame, and settlement of outstanding litigation. Indeed, the Board has consistently declined to use a contract negotiated after years of bad faith bargaining to limit a Respondent's bargaining makewhole liability. (See McFarland Rose Production, supra, citing J.R. Norton (1984) 10 ALRB No. 42.

2. The record evidence reflects that no contract or group of contracts is "comparable" under the Adam Dairy/Norton standard. As such, there is no one contract or group of contracts to look at in calculating (item-by-item) predicted fringe benefits as envisioned by Norton.

3. The task of averaging the various fringe packages

provided by the entities for which such information is available on this record (e . g . , Sun Harvest and the eight derivative contracts, the six San Diego County contracts, and Cattle Valley. is Herculean at best, and an administrative nightmare at worst.[139] Clearly, item-by-item review of the fringe benefits

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[139]The complexity of these potential calculations is perhaps best illustrated by reference to the Norton formula:

> (T) he fringe benefit portion of a makewhole award shall be calculated as follows: The comparable contracts used to calculate the basic makewhole wage shall be surveyed to determine which benefits they provide which should be included in the makewhole award. The value of contract fringe benefits which are paid on an hourly basis, e . g . , medical benefit plans, pension plans,, and the Martin Luther King Fund, shall be computed from the hours the employee worked by multiplying the amount contributed per hour in the comparable contracts by the number of hours worked. The value of vacation benefits shall be calculated by multiplying the number of weeks of vacation provided for under the comparable contracts by the employees' basic weekly makewhole wage. Each holiday in the comparable contracts shall represent .32 percent of an employee's annual earnings so that the 5 holidays in the instant comparable contracts add 1 . 6 percent to each employee's gross makewhole wage. Rest periods shall be calculated as a percentage of the gross makewhole wage by determining the amount by which the rest periods provided for by comparable contracts exceed the rest periods actually provided for by the respondent during the makewhole period. For example, if the respondent's practice was to provide rest periods of ten minutes for every four hours worked and the comparable contracts provide for fifteen minutes for every four hours, the five minutes in excess of the respondent's practice is equal to approximately 2 percent of an employee's hourly wage (5 minutes divided by 60 minutes = 8 . 3 % and 8 . 3 % divided by 4 hours = 2.07% per hour) . The makewhole remedy for overtime shall be calculated in the following manner: First, we determine the number of hours worked attributable to overtime. If a respondent's records do not lend themselves to a more precise calculation, we shall first calculate the average number of hours worked per day by an employee by dividing the number of hours worked per day by the number of days worked in that week. If this average exceeds the number of hours per day considered straight time, under the contract(s) , the difference shall be multiplied by

provided by some 16 entities and revised calculations would only serve to prolong this proceeding.[140]

4. In reviewing the record evidence, I note that Respondent (without contract) paid fringe benefits which amounted to 17%[141] percent of the total yearly payroll for the makewhole period (18% in 1979, 16% in 1980, 18% in 1981).[142] Corresponding percentages under the Colace contract (General Counsel's recommendation) reflect fringes of 15.9%, 15.8%, 15.3%, respectively for each of the years in the makewhole period. If Sun Harvest rates were to be utilized, the figures would be increased somewhat (7-8% differential with respect to medical, pension, Martin Luther King benefits). As the actual fringe

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the overtime premium, whether expressed as a fixed dollar add-on or as time and a half, to determine that amount of overtime owing for each day worked in that week. Additional entitlement to overtime or premium pay for Saturday, Sunday and night shift work should also be proven if feasible, especially if Respondent seeks credit for such voluntary benefits. Of course any overtime actually paid by a respondent under order of the Industrial Welfare Commission, or pursuant to a respondent's own policy, will be credited against the gross makewhole amount. (J.R. Norton Co., Inc., supra, 10 ALRB No. 42, pp. 20-22.)

[140]For the reasons discussed, I am of the opinion that such a review would not lead to a more precise approximation of the fringe benefits lost by virtue of the company's refusal to bargain.

[141]See Appendices L, M, N, 0.

[142]These benefits include overtime pay (see Holtville Farms, supra, 10 ALRB No. 13; Adam Dairy Farms, , 4 ALRB No. 24), as well as bonuses paid to Abatti lettuce /cantaloupe harvesters. The latter payments were made in lieu of fringe benefits (vacation, pension, holidays, sick leave, etc.). See R.T. Vol. XLI, pp. 48-54; General Counsel Post-Hearing Brief, Appendices C, D, E, P; RX 70-A, B, C; RX 71.

benefits paid by Abatti as well as those negotiated by the Colace and Sun Harvest models are well within the range predicted in Adam Dairy, I recommend the utilization of the latter formula to compute fringe benefits, crediting all such benefits paid by Abatti.

5. Respondent's contentions that any or all benefit awards are preempted by ERISA is without merit. In Martori Brothers Distributors v. Agricultural Labor Relations Board (9th Cir. 1986) __ F.2d ___,[143] the United States Court of Appeals affirmed the District Court's granting of the Board's motion for summary judgment, holding that ERISA[144] does not prevent the Board from including in "makewhole" awards an amount designed to reflect the fringe benefit component of employees' lost pay. The court therein rejected the employer's arguments that (1) portions of the ALRB's "makewhole" awards calculated by examining fringe benefits in comparable contracts altered the terms of the employer's already existing ERISA plans; (2) created a new ERISA plan; (3) related to any employee plan, or (4) purported to regulate an ERISA plan. The Court found that there was no impairment of the employer's ERISA plans and no violation of the contract clause[145] or taking of assets in violation of the just compensation clause of the Fifth Amendment by virtue of the

[143] D.C. No. CV-83-1933-EBG, dated 30 January 1986.

[144] Federal Employee Retirement Income and Security Act of 1974.

[145] U.S. Constitution Article 1, Section 10, Clause 1.

Board's makewhole award which included a "fringe benefit" component. Respondent's preemption argument[146] must therefore be rejected in the instant case.

6. Nor am I persuaded by Respondent's suggestion that medical benefits be limited to out-of-pocket losses. Unlike the two situations[147] referred to in Respondent's Post-Hearing Brief (p. 106), no order of double payment is contemplated, since the contribution levels are to be paid directly to the agricultural employees. There is no windfall to the employees as Respondent will be given full credit for any and all out-of-pocket expenses reimbursed during the makewhole period.

7. Finally, Respondent's contentions that the benefit payments sought by General Counsel are unreasonable, and excessive, are not supportable by this record. Indeed, the Abatti "voluntary" benefit level was very nearly that of the Adam Dairy/Hickam formula which I 'have suggested in the instant case. The total amount owing by utilization of this formula (see Appendices C, D), will represent roughly 13 percent of Respondent's payroll during the makewhole period, reflecting increases in the area of 12-14 percent per year. As such, this approach renders the best approximation of the losses suffered by Respondent's agricultural employees. The remedy sought and recommended relates only to API's refusal to recognize and

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[146]Respondent Post-Hearing Brief, pp. 90-103.

[147]Hassett Maintenance Corporation (1982) 260 NLRB 1211 [109 LRRM 1273]; Turnbull Enterprises, Inc. (1982) 259 NLRB 934 [109 LRRM 106].

bargain with the Union; Abatti employees have lost far more than out-of-pocket expenses as a result of this unlawful conduct, including, loss of wage increases and loss of benefit coverage, as well as other benefits (e . g . , grievance/seniority) which are difficult to evaluate in monetary terms. See Robert H. Hickam (9 ALRB No. 6 .) I therefore conclude on this record, that reliance upon the Adam Dairy formula is the most appropriate measure of fringe benefits, with the caveat that Respondent be given full credit for all voluntarily benefits provided.

III. COMPUTATIONS

Appendices E-l through E-13 reflect total payroll data for Abatti's agricultural employees by category for the makewhole period in question. I have computed the percentage -- wage increases, and applied the Adam Dairy benefit formula,[148] offsetting said sums by the amount of voluntary fringe benefits paid by Respondent during the time period. (See Appendices C, 0 .) The total amount owing (for Abatti's bargaining makewhole liability) is thus $1,229,027, plus interest.

IV. INTEREST RATE

Although the underlying decision orders Respondent to

[148] I have further facilitated the computations by multiplying the makewhole gross wage (actual earnings multiplied by the differential factor) by 1.20 (1.201282051), which number represents the ratio derived by the Adam Dairy factor and the Hickam credit for mandatory contributions. See Kawano, Inc. (1984) 10 ALRB No. 17, ALJD, p. 23, fn. 35; Martori Brothers (1985) 11 ALRB No. 26, Attachment 1, Bart 1.

pay interest on the amounts due at the rate of seven percent (7%) per annum,[149] the Board has subsequently decided to follow NLRB precedent and adopt the adjustable interest rate charged by the Internal Revenue Service on overpaid and delinquent taxes. Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, citing Florida Steel Corporation (1972) 231 NLRB 66 [96 LRRM 1070]. The Board has thus modified interest rates on pre-Lu-Ette decisions (1) where a court remand has reinvested jurisdiction with the Board (McAnally Enterprises, Inc. (1985) 11 ALRB No. 2, Vessey & Co. (1985) 11 ALRB No. 3, and (2) where the Court of Appeal has summarily denied review of the Board's original decision and order. Verde Produce (1984) 10 ALRB No. 35. Recent Board precedent has suggested that the Lu-Ette interest rate be applied prospectively from the date of the Board supplemental decision, where the Board's original order specified seven percent per annum. Martori Brothers (1985) 11 ALRB No. 26; Bruce Church, Inc. (1983) 9 ALRB No. 19, rev. den. by Ct. App., 5th Dist., September 21, 1984. Here, review was denied summarily by the Court of Appeal, Fourth District, Division One, and by the California Supreme Court. I therefore recommend prospective application of the Lu-Ette interest rate formula from the date of the Board's supplemental decision in this matter. In all other respects, the interest rate ordered originally by the Board should remain unchanged.

Pursuant to Labor Code section 1160.3, I hereby issue

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[149] 7 ALRB No. 36, supra, p. 16.

the following recommended:[150]

ORDER

Respondent, Abatti Produce, Inc., its officers, agents, successors and assigns, shall pay:

A. To the following employees the amounts set forth therein beside their respective names, plus interest thereon compounded at the rate of seven percent (7%) per annum to the date of the Board's supplemental decision and thereafter in accordance with the formula set forth in <u>Lu-Ette Farms, Inc.</u> (1982) 8 ALRB No. 55.

Rosa Briseno	$' '53.65
Maria Valdez	$ 51.93
Maria de la Luz Torres	$ 1,348.27
Francisco Salas	$28,424.46

B. The issue of whether Francisco Salas is entitled to any additional backpay post-December 15, 1983, is remanded for investigation by the Regional Director. Specifically to be determined are: (1) whether or not a <u>bona fide</u> offer of reinstatement was ever made to Francisco Salas; (2) whether or not Francisco Salas timely responded to any such offer (post-January 1984); and (3) the amount of any gross and net backpay owing Mr. Salas post-December 15, 1983.

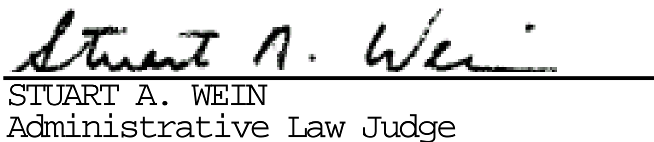
C. The Respondent, Abatti Produce, Inc., its officers,

[150] As I am not in custody of original exhibits RX 201-204 at the time of this writing, I hereby transmit to the Board copies of those documents. Any objection to such procedure may be raised by way of exception.

agents, successors, and assigns, shall further pay the sum of $1,229,027 as reflected in Appendix C as and for (bargaining) makewhole for Respondent's agricultural employees, plus interest thereon compounded at the rate of seven percent (7%) per annum to the date of the Board's supplemental decision and thereafter in accordance with the formula set forth in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

D. The determination of the identity of the individual employees entitled to the distribution of the sums referred to in Paragraph C shall be made by the Regional Director, subject to verification of all parties pursuant to the terms of this decision.

Dated: March 18, 1986



STUART A. WEIN
Administrative Law Judge

FRANCISCO SALAS

Quarter	(Quarterly Year	Total Owing Calculations Recapitulated) Net Owing	Yearly Total
4th Qtr.	1978	$ 224.50	$ 224.50
1st Qtr.	1979	$1,392.57	
2nd Qtr.	1979	$1,087.13	
3rd Qtr.	1979	$ 963.26	
4th Qtr.	1979	$2,544.89	$5,987.85
1st Qtr.	1980	$1,953.02	
2nd Qtr.	1980	$2,040.32	
3rd Qtr.	1980	$1,581.02	
4th Qtr.	1980	$1,648.52	$ 7,222.88
1st Qtr.	1981	$1,318.88	
2nd Qtr.	1981	$ 898.64	
3rd Qtr.	1981	$1,238.82	
4th Qtr.	1981	$2,517.55	$5,973.89
1st Qtr.	1982	$1,573.64	
2nd Qtr.	1982	$ 850.82	
3rd Qtr.	1982	$1,014.75	
4th Qtr.	1982	$1,714.46	$5,153.67
1st Qtr.	1983	$ 743.35	
2nd Qtr.	1983	$ 694.66	
3rd Qtr.	1983	$1,015.35	
4th Qtr.	1983	$1,408.31	$3,861.67
		TOTAL OWING	$28,424.46

Appendix A

FRANCISCO SALAS

Calculations by Quarterly (Woolworth) Formula

Quarter Year	Gross Backpay	Credited Interim Earning	Holiday/ Vacation Pay	Expenses	Net Owing
4th Qtr. 1978					
December	$ 200.17	-0-	$ 24.33	-0-	$ 224.50
1st Qtr. 1979					
January	$ 508.14	-0-	$ 25.01	-0-	
February	$ 426.45	-0-	-0-	-0-	
March	$ 432.97	-0-	-0-	-0-	
	$1,367.56	-0-	$ 25.01	-0-	$1,392.57
2nd Qtr. 1979					
April	$ 471.85	-0-	-0-	-0-	
May	$ 517.41	$ 62.40	-0-	-0-	
June	$ 382.87	$ 222.60	-0-	-0-	
	$1,372.13	$ 285.00	-0-	-0-	$1,087.13
3rd Qtr. 1979					
July	-0-	-0-	$ 107.63	-0-	
August	$ 540.71	-0-	-0-	-0-	
September	$ 287.22	-0-	$ 27.70	-0-	
	$ 827.93	-0-	$ 135.33	-0-	$ 963.26
4th Qtr. 1979					
October	$ 892.48	-0-	-0-	-0-	
November	$ 784.61	-0-	$ 34.52	-0-	
December	$ 799.84	-0-	$ 33.44	-0-	
	$2,476.93	-0-	$ 67.96	-0-	$2,544.89

Appendix B-1

FRANCISCO SALAS

Calculations by Quarterly (Woolworth) Formula

Quarter Year	Gross Backpay	Credited Interim Earning	Holiday/ Vacation Pay	Expenses	Net Owing
1st Qtr. 1980					
January	$ 743.53	-0-	$ 33.20	-0-	
February	$ 623.74	-0-	-0-	-0-	
March	$ 502.55	-0-	-0-	-0-	
	$1,919.82	-0-	$ 33.20	-0-	$1,953.02
2nd Qtr. 1980					
April	$ 645.87	-0-	-0-	-0-	
May	$ 748.44	-0-	-0-	-0-	
June	$ 646.01	-0-	-0-	-0-	
	$2,040.32	$ 285.00	-0-	-0-	$2,040.32
3rd Qtr. 1980					
July	$ 391.18	-0-	$ 145.30	-0-	
August	$ 672.95	-0-	-0-	-0-	
September	$ 339.12	-0-	$ 32.46	-0-	
	$1,403.26	-0-	$ 176.76	-0-	$1,581.02
4th Qtr. 1980					
October	$ 939.25	$ 176.80	-0-	-0-	
November	$ 822.17	$ 295.21	$ 33.87	$ 30.00	
December	$ 847.29	$ 603.85	$ 31.79	$ 20.00	
	$2,608.71	$1,075.85	$ 65.66	$ 50.00	$1,648.52

FRANCISCO SALAS

Calculations by Quarterly (Woolworth) Formula

Quarter Year	Gross Backpay	Credited Interim Earning	Holiday/ Vacation Pay	Expenses	Net Owing
1st Qtr. 1981					
January	$ 619.08	$ 547.85	$ 29.85	$ 40.00	
February	$ 479.73	-0-	-0-	$ 20.00	
March	$ 711.12	$ 43.05	-0-	$ 10.00	
	$1,809.93	$ 590.90	$ 29.85	$ 70.00	$1,318.88
2nd Qtr. 1981					
April	$ 788.70	$ 563.63	-0-	$ 40.00	
May	$ 790.37	$ 296.59	-0-	$ 20.00	
June	$ 270.63	$ 179.34	-0-	$ 30.00	
	$1,849.70	$1,041.06	-0-	$ 90.00	$ 890.64
3rd Qtr. 1981					
July	$ -0-	$ 288.37	$ 306.44	$ 10.00	
August	$ 584.34	-0-	-0-	-0-	
September	$ 593.62	-0-	$ 32.79	-0-	
	$1,077.96	$ 288.37	$ 339.23	$ 10.00	$1,238.82
4th Qtr. 1981					
October	$ 773.88	-0-	-0-	-0-	
November	$ 778.78	-0-	$ 36.88	-0-	
December	$ 891.12	-0-	$ 36.89	-0-	
	$2,443.78	-0-	$ 73.77	-0-	$2,517.55

FRANCISCO SALAS

Calculations by Quarterly (Woolworth) Formula

Quarter Year	Gross Backpay	Credited Interim Earning	Holiday/ Vacation Pay	Expenses	Net Owing
1st Qtr. 1982					
January	$ 846.93	$ 84.60	$ 31.55	$ 30.00	
February	$ 597.83	$ 339.37	-0-	$ 30.00	
March	$ 636.15	$ 204.85	-0-	$ 30.00	
	$2,080.91	$ 628.82	$ 31.55	$ 90.00	$1,573.64
2nd Qtr. 1982					
April	$ 678.62	$ 272.58	-0-	$ 30.00	
May	$ 952.90	$ 629.82	-0-	$ 40.00	
June	$ 387.13	$ 365.43	-0-	$ 30.00	
	$2,018.65	$1,267.83	-0-	$ 100.00	$ 850.82
3rd Qtr. 1982					
July	$ -0-	$ 646.28	$ 313.26	$ 30.00	
August	$ 826.27	-0-	-0-	-0-	
September	$ 466.43	-0-	$ 25.07	-0-	
	$1,292.70	$ 646.28	$ 338.33	$ 30.00	$1,014.75
4th Qtr. 1982					
October	$ 983.96	-0-	-0-	-0-	
November	$ 868.19	$ 200.49	$ 34.48	$ 10.00	
December	$ 783.27	$ 839.40	$ 34.45	$ 40.00	
	$2,635.42	$1,039.89	$ 68.93	$ 50.00	$1,714.46

FRANCISCO SALAS

Calculations by Quarterly (Woolworth) Formula

Quarter Year	Gross Backpay	Credited Interim Earning	Holiday/ Vacation Pay	Expenses	Net Owing
1st Qtr. 1983					
January	$ 771.94	$ 887.83	$ 30.89	$ 30.00	
February	$ 508.11	-0-	-0-	-0-	
March	$ 694.64	$ 434.40	-0-	$ 30.00	
	$1,974.69	$1,322.23	$ 30.89	$ 60.00	$ 743.35
2nd Qtr. 1983					
April	$ 556.42	$ 180.24	-0-	$ 20.00	
May	$ 561.03	$ 603.60	-0-	$ 30.00	
June	$ 940.90	$ 659.85	-0-	$ 30.00	
	$2,058.35	$1,443.69	-0-	$ 80.00	$ 694.66
3rd Qtr. 1983					
July	$ -0-	$ 475.38	$ 321.06	$ 20.00	
August	$ 637.54	-0-	-0-	-0-	
September	$ 477.75	-0-	$ 34.38	-0-	
	$1,115.29	$ 447.38	$ 355.44	$ 20.00	$1,015.35
4th Qtr. 1983					
October	$ 909.88	$ -0-	-0-	-0-	
November	$ 908.82	$ 157.14	$ 33.15	$ 10.00	
December	$ 429.93	$ 788.67	$ 32.34	$ 30.00	
	$2,248.63	$ 945.81	$ 65.49	$ 40.00	$1,408.31