

Coachella, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HARRY CARIAN, individually, and)	
dba HARRY CARIAN SALES,)	
)	Case No. 80-CE-57-SD
Respondent,)	
)	
and)	
)	15 ALRB NO. 14
UNITED FARM WORKERS)	(10 ALRB No. 51)
OF AMERICA, AFL-CIO,)	(9 ALRB No. 13)
)	
Charging Party.)	

SUPPLEMENTAL DECISION AND ORDER

On September 13, 1988, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Supplemental Decision in this proceeding. Thereafter, Harry Carian, individually, and dba Harry Carian Sales (Respondent) timely filed exceptions to the ALJ's Supplemental Decision with a supporting brief, and General Counsel filed a brief in answer to Respondent's exceptions and brief.

The Agricultural Labor Relations Board (ALRB or Board) has considered the ALJ's Supplemental Decision and the record in light of Respondent's exceptions and the briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions, and to adopt his recommended Order.

Respondent excepts to the ALJ's failure to find that Jose Luis Godinez's use of invalid Social Security numbers when

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securing interim employment^{1/} was tantamount to a willful concealment of interim earnings requiring that he forfeit all backpay otherwise due and owing to him.

The doctrine of willful concealment upon which Respondent relies requires a clear showing that there has been an intentional nondisclosure of interim earnings for the purpose of reaping a windfall. (American Navigation Co. (1983) 268 NLRB 426 [115 LRRM 1017]; George A. Lucas & Sons (1984) 10 ALRB No. 6; Abatti Farms, Inc. (1988) 14 ALRB No. 8.) Since Respondent has not pointed to any evidence which would indicate that Godinez sought to deceive either Respondent or this Board in his use of false Social Security numbers, we are compelled by the foregoing precedents to concur in the ALJ's view that his conduct did not rise to the level of culpability which would warrant our striking the whole of his backpay award.^{2/} Our finding in that regard should not be construed as a condonation of Godinez's use of false Social Security numbers, but only as a rejection of the

^{1/} Interim employment is compensated work performed for other employers during periods when the discriminatee would have worked for the wrongdoing employer but for his or her discharge. Thus, if a dischargee worked for another employer during the backpay period, the wrongdoing employer is required to pay only the difference between what the dischargee would have made and what he or she actually made on the other job.

^{2/} The Board's Compliance Manual specifies that the Regional Director should emphasize at the outset to a backpay claimant the importance of keeping all records relating to earnings following the claimant's discharge (§ 4-2432.1). Although there is no evidence that Godinez willfully concealed interim earnings, his difficulty in recollecting interim employers and earnings could have been alleviated by a careful keeping of records during the backpay period. Since an employer bears the burden of proving interim earnings in a backpay proceeding, it is entitled to receive as accurate an accounting as possible of such earnings.

applicability of the willful concealment standard to the facts in this case.^{3/}

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Harry Carian, individually, and dba Harry Carian Sales, its officers, agents, successors, and assigns, pay to the employees listed below, who were discriminatorily discharged by Respondent in violation of the Agricultural Labor Relations Act, the amounts

^{3/} Respondent did not except to the backpay period which the ALJ established for Godinez. However, we find that it is appropriate to toll Respondent's liability for a portion of the backpay period. We are concerned that the Regional Office, which inadvertently furnished Respondent with an incorrect address for Godinez, apparently did not thereafter send to Respondent Godinez's correct address. While no evidence in the record suggests that the Regional Office withheld or failed to provide upon request any information about Godinez's address, correspondence from the Regional Office to Respondent's counsel on October 3, 1986, indicates that, at least on that date, the Regional Office was aware of the manner in which Godinez could be contacted. Therefore, on the basis of Respondent's good-faith reliance on the information provided by the Regional Office, we will toll Respondent's backpay liability from April 8, 1985, to October 17, 1985. (O. K. Machine & Tool Corp. (1986) 279 NLRB 474 [122 LRRM 1319].) These dates represent, respectively, the earliest point at which Respondent could reasonably have initiated action based on the Region's letter of March 29, 1985, and the latest point at which Respondent could reasonably have recommenced good-faith efforts to communicate an offer to Godinez. We will, therefore, deduct \$1,414.26, representing net backpay for the period tolled, from Respondent's total backpay liability. We acknowledge our dissenting colleague's concern that backpay be tolled "until such time as it became evident that Respondent could have obtained access to an available source of information from which to determine Godinez's correct address." We believe, however, that once it was clear to Respondent that Godinez had not received the initial reinstatement offer, Respondent had the burden of demonstrating to us that it thereafter made some effort to ascertain Godinez's whereabouts in order to attempt to ensure delivery of a redirected offer. Respondent made no such showing.

set forth beside their respective names, plus interest thereon to be computed in accordance with established Board practice. Since we apply interest rate changes prospectively only (Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 at p. 7, fn. 3), the following interest rates will be in effect: seven percent (7%) until August 18, 1982 (Valley Farms and Rose J. Farms (1976) 2 ALRB No. 41), an adjustable rate based upon fluctuations in the prime interest rate until April 26, 1988 (Lu-Ette Farms, Inc., supra), and, thereafter, an adjustable rate based on the short-term federal rate (E. W. Merritt Farms (1988) 14 ALRB No. 5). The amount specified below for Jose Luis Godinez represents only the amount of his backpay which had accrued through the close of the hearing in the backpay proceeding, such backpay period to remain open, and backpay with interest to accrue until such time as the Regional Director is satisfied that Respondent has tendered to Godinez a bona fide offer of reinstatement:

Jaime Vargas:	\$581.49
Manuel Moya Perez:	\$3,426.92
Jose Luis Godinez:	\$6,927.14

Dated: September 29, 1989

GREGORY L. GONOT, Acting Chairman^{4/}

IVONNE RAMOS RICHARDSON, Member

^{4/} The signatures of Board Members in all Board Decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board Members in order of their seniority. The Board currently has two vacancies.

MEMBER ELLIS, Concurring and Dissenting: I concur with my colleagues insofar as they would toll backpay for Jose Luis Godinez, but differ from the majority as to the duration of the period to be tolled. The majority properly acknowledges Respondent's good-faith reliance on the erroneous address provided by the Regional Office for Godinez as substantial justification for tolling Respondent's liability, but falls short of remedying the Region's error when it recommenced the liability period on October 17, 1985. The stipulated record clearly establishes that the point in time at which the majority expects Respondent to recommence good faith efforts to offer reinstatement to Godinez was in fact a time at which Respondent could not so act, as it became apparent by then, that Respondent was without an available source of information from which it could determine Godinez's current address. Unless there was evidence indicating otherwise, Respondent cannot be presumed to have had other available sources of information from which it could act. (See

Burnup & Sims, Inc. (1981) 256 NLRB 965 [107 LRRM 1402].)

I would continue tolling backpay until such time as it became evident that Respondent could have obtained access to an available source of information from which to determine Godinez' correct address. Such a point in time did not arise until October 13, 1986, based on the Region's letter of October 3, 1986 I must therefore find that Respondent could not reasonably have attempted to renew its offer of reinstatement to Godinez until October 13, 1986.

Dated: September 29, 1989

JIM ELLIS, Member

CASE SUMMARY

HARRY CARIAN, individually,
and dba HARRY CARIAN SALES
(UFW)

Case No. 80-CE-57-SD

15 ALRB No. 14
(10 ALRB No. 51)
(9 ALRB No. 13)

Background

In 1983, the Agricultural Labor Relations Board (ALRB or Board) issued a decision in which it found that Jose Luis Godinez, as well as two other employees, had been unlawfully discharged by Respondent Carian in retaliation for their having engaged in protected concerted activity; namely, for having sought legal representation in regard to their complaints about the condition of housing which Respondent provided for its employees. The Board ordered Respondent to reinstate the employees and to compensate them for lost wages. In 1984, the Court of Appeal affirmed the Board's findings with regard to the violations discussed above. Thereafter, the Board's Regional Director prepared a backpay specification setting forth his account of the amount of backpay due each of the discriminatees. As Respondent filed an answer contesting the backpay specification, the matter was set for a full evidentiary hearing before an Administrative Law Judge (ALJ).

ALJ's Decision

Prior to hearing, the parties reached agreement on all aspects of the backpay specification, but did not limit Respondent's right to mitigate its overall monetary liability. In that regard, Respondent focused primarily on the discriminatee's interim earnings. Godinez admitted that he had fabricated Social Security numbers when securing interim employment, but had neither a recollection of the numbers used nor any records such as W-2 forms reflecting that employment. The ALJ found that Godinez had not used false Social Security identification in order to deceive either Respondent or the Board in order to reap a backpay windfall. On that basis, the ALJ concluded that the conduct did not rise to the level of culpability which would warrant withholding from Godinez the whole of his backpay award. The ALJ determined the monetary amounts due each of the three discriminatees and, in addition, found that Respondent's backpay liability to Godinez would continue to run until Respondent tendered to him a reinstatement offer which would serve to terminate the running of backpay.

Board Decision

Respondent excepted only to that portion of the ALJ's Decision concerning Godinez's backpay. In its exceptions brief Respondent contended that the use of false Social Security numbers precluded Respondent from using Social Security records in order to verify

Godinez's interim employment and therefore, until Godinez made such verification possible, backpay should be withheld. The Board reduced Godinez's backpay award on the basis of a different analysis. The Board found that the initial offer of reinstatement to Godinez was not received by him because Respondent relied on the Region's last known, albeit incorrect, address for him. On that basis, the Board tolled Respondent's backpay liability to Godinez from April 8, 1985, the earliest date on which Respondent could reasonably have been expected to rely on the Region's incorrect address, until October 17, 1985, the latest date at which Respondent could reasonably be expected to recommence good faith efforts to contact Godinez. Respondent failed to demonstrate that it thereafter made reasonable attempts to ascertain Godinez's whereabouts in order to redirect the offer.

Concurring and Dissenting Opinion

Member Ellis differed from the majority position only in that he would continue tolling backpay until such time as it became apparent that Respondent had access to a source of information from which to determine Godinez's correct address.

* * *

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

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
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HARRY CARIAN, individually, and) Case No. 80-CE-57-SD
d/b/a HARRY CARIAN SALES,) (10 ALRB No. 51)
) (9 ALRB No. 13)
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Respondent,)
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and)
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UNITED FARM WORKERS OF AMERICA,)
AFL-CIO,)
)
)
Charging Party.)

Appearances:

Leonard G. Strom, Esq.,
for the General Counsel

David E. Smith, Esq., for
the Respondent

Before: Matthew Goldberg, Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. Statement of the Case

In Harry Carian Sales (1983) 9 ALRB No. 13, the Agricultural Labor Relations Board declared that Harry Carian Sales (referred to hereafter as "Respondent," the "Employer," or the "Company") violated §1153(a) of the Act by, among other things, discharging Jose Luis Godinez, Jaime Vargas, and Manuel Moya Perez. The Board's decision was affirmed, in pertinent part, in Harry Carian Sales v. ALRB (1984) 154 Cal. App.3d, and remanded to the Board for modification of the notice mailing portion of the Board's Order. On December 26, 1984, the Board issued its modified Order in Harry Carian Sales 10 ALRB No. 51, directing that Respondent offer full reinstatement to the above-named discriminatees, and make them whole for all losses of pay and other economic losses they suffered as a result of Respondent's unlawful conduct.

On February 26, 1988, the El Centre Regional Director issued a Notice of Hearing and Backpay Specification. A pre-hearing conference was conducted in the matter on June 14, 1988. At the conference, the General Counsel was directed to prepare an amended backpay specification incorporating certain oral modifications made by the General Counsel at that time.

A hearing was held before me on June 28 and 29, 1988 in Indio, California. The General Counsel and the Respondent appeared through their respective representatives, and were given full opportunity to present evidence and argument. General Counsel issued a First Amended Backpay Specification on July 7, 1988, which was reissued on July 19 to correct a clerical error. General Counsel and Respondent submitted post-hearing briefs on

August 10, 1988. Based upon the entire record in the case, including my observations of the demeanor of the witnesses as they testified, and having read the briefs filed since the close of the hearing, I make the following findings and conclusions.

II. The Issues Presented

A. Stipulations of the Parties

The following facts were not in dispute, per stipulations of the General Counsel and the Respondent. The gross backpay calculations contained in the Specification for each of the discriminatees were accurate and valid. The parties agreed that the seasonal method of calculating backpay was appropriate, and that the wages earned by the members of the Castro crew were representative and an appropriate means of determining the gross backpay due to each of the discriminatees. The parties additionally agreed that the expenses claimed in the Specification were presumed to be an accurate and correct reflection of compensable expenses incurred by each of the discriminatees in each of their respective liability periods. Based on these stipulations, the General Counsel has met his burden of proof regarding the accuracy, validity and appropriateness of the gross backpay formulas, method of computation, and the calculations themselves. By stipulating to the foregoing, Respondent did not waive any affirmative defenses regarding mitigation of damages, or rebuttal of claimed expenses.¹

¹At the hearing, Respondent did not contest the validity of any of the expenses. Accordingly, they are deemed admitted.

The parties further stipulated as follows regarding the communication of reinstatement offers to each of the discriminatees, and its chronology (Jt. Exh. 2):

1. March 11, 1985: The El Centro Regional Office sends a letter to Respondent and its attorney (Smith below) requesting verification that offers of reinstatement had been communicated to the discriminatees.

2. March 26, 1985: Smith sends the letters of reinstatement to the Regional office, contained in three separate stamped envelopes, each addressed to a particular discriminatee.

3. March 29, 1985: Region returns reinstatement envelopes to Smith because the addresses thereon conflicted with those the Region had on file for the discriminatees.²

4. May 8, 1985: Smith mails offers of reinstatement to the discriminatees.

5. October 7, 1985: Region advises Smith there was a mix-up in reinstatement letters.³

6. December 13, 1985: Smith advises Region that Respondent had "offered reinstatement to the three discriminatees."

7. December 13, 1985: Smith sends Vargas an offer of reinstatement.

8. December 14, 1985: Region requests verification that offers of reinstatement were made.

²In the letter from the Region, the Regional Director sent the "last known addresses" that the Region had on file for the discriminatees. Godinez' address was in Tijuana, while those for Moya and Vargas were in Mexicali.

³Specifically, the offer of reinstatement to Godinez was sent to Vargas' address.

9. July 30, 1986: Region acknowledges that Vargas received an offer of reinstatement but advises Respondent that it needs verification of the reinstatement offers to the remaining two discriminatees.

10. September 8, 1986: Region acknowledges that Moya and Vargas received offers of reinstatement, but no verification of the Godinez offer has been provided.

11. October 3, 1986: Region advises Respondent that Moya and Vargas received reinstatement offers on May 9, 1985, and December 18, 1985, respectively; however, no verification has been provided for the Godinez offer.

12. September 18, 1987: Region advises Smith of its position that no offer of reinstatement has been given to Godinez and that backpay continues to accrue.

13. August 28, 1987: Smith advises Region that Respondent's backpay liability was tolled upon delivery of the reinstatement offers to the ALRB for mailing.

B. The Liability Period

1. The Evidence

The parties agreed that the backpay period for each of the discriminatees began to run on June 16, 1980.

There is no dispute as to the applicable liability period for discriminatee Vargas, or as to the amount of net back pay which he is owed. General Counsel was granted summary judgement for his backpay claim at the pre-hearing conference.

Respondent contends that the liability period for Moya and

Godinez was tolled when it forwarded reinstatement offers to the Region in late March, 1985. Correspondence between the Region and the Respondent, admitted pursuant to stipulation, shows that on March 11, 1985, the Region requested "verification of the reinstatement offers to the discriminatees" and "verification of the mailing requirement" in the Board's Order.

Regarding the latter, Respondent was asked to address postage paid envelopes containing the notice to the employees, and to submit these envelopes to the Region. (Exh. I⁴.) Respondent apparently interpreted the reinstatement verification to be of the same nature, and accordingly submitted, on March 26, three envelopes containing the reinstatement offers, addressed to the discriminatees. The letters, dated March 19, were addressed, respectively, to Godinez at "00758 Monroe, Thermal," and to Moya at "48-300 S. Jackson St., Indio." (Exh. 2.)

On March 29, the Region wrote Respondent's attorney that the last known address it had on file for Godinez was "Blv Las Fuentes...Tijuana, B.C., Mexico," and for Moya, "Ave. R. Arispe #720, Col. Pro Hogar, Mexicali...." Accordingly, it was returning the reinstatement offers without mailing them. (Exh. 3.)

On May 8, 1985, Respondent's attorney mailed the reinstatement offers to the addresses, apparently, which the Region had supplied. (Exh. 4.) Moya received his offer on May 9, 1985. However, Godinez did not receive his. The Region wrote Respondent on October 7 that one of the discriminatees had received a

⁴These Exhibits, so labeled, were attached to Joint Stipulation 2 (Jt. Exh. 2), and admitted pursuant to that stipulation.

reinstatement letter "with someone else's name." (Exh. 5.)

By letter of December 13, Respondent's attorney stated his position to the Region that reinstatement had been offered all three discriminatees. (Exh. 6.) On that same date, the attorney wrote discriminatee Vargas informing him that a letter addressed to Godinez had been sent to him, and that he, Vargas, had been offered full reinstatement. (Exh. 7.) However, despite the representation by Respondent's counsel that reinstatement had been offered to all three discriminatees, there was no evidence that the Godinez offer, inadvertently sent to Vargas, was re-mailed to Godinez himself.

On December 14, the Region again wrote the Respondent requesting verification that the reinstatement letters had been sent. (Exh. 8.) By letter of July 30, 1986, the Region informed Respondent that the offer to Vargas had been received on December 14, 1985, but that it had no verification that the letters to Godinez or Moya had been sent. (Exh. 9.)

In a letter to Respondent dated October 3, 1986, the Region acknowledged that reinstatement offers had been received on May 9, 1985 by Moya, and on December 18, 1985 by Vargas, but that Godinez had advised the Region that he still had not received his offer. (Exh. 11.)

Godinez testified that he has lived at "58007 Monroe, Thermal" since 1978. (RT 12.)⁵

2. Analysis and Conclusions

As noted, it is Respondent's position that its backpay

⁵Transcript references are cited by page number,

liability was tolled when it delivered offers of reinstatement to the Region for mailing. As a general proposition, a letter offering reinstatement to a discriminatee, whether received by him or not, will serve to toll the running of the backpay period if the offer was made in good faith. Abatti Farms. Inc. (1981) 9 ALRB No. 59; Marlene Industries (1978) 234 NLRB 285; Jay Company. Inc. (1953) 103 NLRB 1645, enf'd (9th Cir. 1954) 227 F.2d 416. The Respondent has the burden of establishing that a valid, good faith offer has been made. Rafaire Refrigeration Corp. (1973) 207 NLRB 523.

Under ordinary circumstances, mailing a reinstatement offer to a discriminatee's last known address serves to demonstrate that the offer was bona fide. Knickerbocker Plastic Co.. Inc. (1961) 132 NLRB 1209; Rental Uniform Service (1967) 167 NLRB 190. However, it has also been held that such an act, if an employee has moved and the offer is not received, does not establish that the offer was made in good faith where the Respondent, upon learning that the address is not current, does not make reasonable efforts, using other sources of information at its disposal, to ascertain the correct address. Abatti Farms, supra; Monroe Feed Store (1959) 122 NLRB 1479; Gladwin Industries (1970) 183 NLRB 280; Marlene Industries, supra; Jay Company. Inc., supra.

It is somewhat of a mystery why Respondent did not, as is common in such situations, initially mail the offers directly to the discriminatees, and use a return receipt to attempt to verify that the offers had been made. The March 11 letter from the Region was obviously misconstrued. It did not request verification of the

reinstatement offers by their delivery to the Region for forwarding to the discriminatees; rather, it requested such verification for compliance with the order's requirement for mailing the Notice to Employees. At all events, at no time did the Region accept responsibility for receiving and communicating the reinstatement offers, or indicate in any manner that it was somehow acting as the agent of the discriminatees for purpose of service of the offers.

An employer who has unlawfully discharged employees has the obligation to remedy the violation of the Act by seeking out the discriminatees and offering them reinstatement. Southern Greyhound Lines (1960) 169 NLRB 627; Hickory's Best (1983) 267 NLRB 1274. Respondent must make some attempt, even if unsuccessful, to communicate with its former employees. The Region may provide assistance, at least in terms of supplying what it believes to be correct addresses. Supplying this assistance, however, does not operate to relieve the Respondent of its obligation to actually try to reach the discriminatees. "Notification is an integral part of [this obligation] and [Respondent] is not discharged of its duty...when it is fully aware that the discriminatees were never notified of its reinstatement offer." Hickory's Best. supra. p. 1275. In that case, the respondent made an offer to reinstate to the General Counsel, but was informed that the offer was not communicated because it was not coupled with backpay. The National Board held that such an offer could not serve to toll backpay liability.

Respondent argues that once the board "actively takes

control of the manner in which an offer of reinstatement may be submitted," and fails to provide information in its possession relating to correct addresses, it would be unconscionable, in effect, to allow the Board to withhold information that would have enabled Respondent to terminate the extent of its backpay obligation. This argument is based on several faulty premises, and finds no support in the record. The Region or the Board did not "take control of the manner in which an offer may be submitted": Respondent's mailing the offers to the Region, rather than to the discriminatees, was based on its own misinterpretation of compliance correspondence. The Region did not "fail to provide" address information. To the contrary, in March, 1985, it furnished Respondent with the last known addresses it had on file for the discriminatees.⁶ Nor is there any evidence that the Region, at any time, "withheld" information from the Respondent or its counsel. Finally, this contention loses sight of the fact that it is Respondent who engaged in the unlawful conduct, and it is Respondent's obligation to remedy it by tendering the backpay offer.

In regard to the Godinez offer, Respondent contends that had the Region not misinformed it regarding Godinez' address, and had that offer been mailed, it probably would have reached Godinez notwithstanding the transposed numbers, since Godinez has

⁶ Godinez contacted the Region prior to October 3, 1986, informing it that he had yet to receive a reinstatement offer. Arguably, at least from that point, the Board was aware where Godinez might be reached. However, despite Respondent's knowledge of this fact, there is no evidence that it made any effort to obtain the address information from the Region at that time, and attempt to communicate with the discriminates.

maintained the same residence since 1978. Even if the offer were returned to Respondent after mailing, that would at least have put it on notice that there was a problem, and it could have done some further checking to ascertain the source of the mistake. Apart from the speculative nature of this contention, it remains that "between the employer whose unlawful conduct gave rise to the problem in the first place, and the employee-victim of this wrongdoing, the employer rather than the employee should bear the consequences of the unlawful conduct." Marlene Industries. supra; Abatti Farms. Inc., supra. Again, Respondent itself should have mailed its offer to Godinez, rather than expecting the Region to do so. More importantly, after learning at least by October, 1985 that there was a mix-up in the reinstatement letters, there was no evidence that the letter to Godinez was ever re-mailed.

As this record does not reflect that any offer of reinstatement has ever been formally received by Godinez despite Respondent's knowledge of his whereabouts, Respondent's backpay obligation to him is continuing. Under the authorities cited above, Respondent has failed to demonstrate the bona fide nature of that offer, since it did not use reasonable efforts to communicate with him after it became aware that the offer had not been received.

The offer to Moya, as noted, was received by him on May 9, 1985. General Counsel correctly points out that following receipt, a discriminatee is permitted a reasonable period in which to consider reinstatement. The backpay period is otherwise tolled upon the actual date of reinstatement, the date the offer

is rejected, or, where there is no reply to the offer, the date, if stated, when the discriminatee is given the last opportunity to accept the offer. C-F Air Freight. Inc. (1985) 276 NLRB No. 62. Here, as there was no reply to the reinstatement offer, and there was no stated date for response, Moya is to be allowed a reasonable period to consider the reinstatement offer, after which time the liability period ends.

General Counsel asserts that this "reasonable period" should encompass about two weeks, or until May 22, 1985. However, General Counsel presents no argument or authority in support of this proposition. Moya was in the area at the time. He had just secured employment which, though for less pay, would be for a longer term than the seasonal work with Respondent. Under these circumstances, I find that a period of one week was a reasonable one for this discriminatee to decide whether or not he wanted to resume working for the Respondent. I therefore conclude that the backpay period for him ends on May 16, 1985.

C. Interim Earnings

1. Jose Luis Godinez

Godinez stated that he has been working under his own Social Security Number only recently. Over the last ten years he has used about three different numbers, which he does not remember. One of these numbers he used under the name of Israel Ramirez while working in May, 1984.⁷ Other numbers he simply made up.

⁷ Godinez produced the W-2 form for the earnings under Ramirez1 name. Respondent did not seek its admission. (RT: 66.)

(RT: 13-25.)

Godinez' testimony regarding his interim earnings was confused and contradictory.⁸ Given this, and the fact that Social Security numbers were not made available to the Respondent to enable it to trace Godinez's interim earnings, Respondent argues that the backpay specification be dismissed as to him, or that the proceeding be continued pending his production of the necessary information. It contends that where an individual "intentionally gives false information ... to employers on so many occasions that he cannot recall," where he fails to produce information as promised, where he works under another person's Social Security number, and "refuses"⁹ to identify his recent employers, the generally accepted allocation of the burden of proof in compliance proceedings should give way to broad-based due process considerations.

Respondent concedes that under ordinary circumstances, it has the burden of proving facts which would mitigate its backpay liability. Abatti Farms, Inc., supra. However, where a discriminatee has willfully concealed interim earnings to such an extent that it makes it impossible to determine the net backpay

⁸ I will refrain from detailing the many instances where these problems arose. Suffice it to say that I so find. A number of inconsistencies are indicated in the chart below summarizing his testimony.

⁷ Godinez testified that he worked for M-C Development Company in the years 1985 through 1987. (RT: 23, 67, 69, 75, 76.) Respondent's counsel is an officer in that corporation. He testified that the payroll records from M-C revealed that Godinez worked only in 1987 for that concern. Respondent interprets the contradiction between records and testimony as an effort to conceal interim employment and earnings.

due, this Board, following the NLRB rule, has declared that a backpay claim may be denied in its entirety. Abatti Farms. Inc. (1988) 14 ALRB No. 8; see also Jack C. Robinson d/b/a Robinson Freight Lines (1960) 129 NLRB 1040; American Navigation Co. (1983) 267 NLRB No. 62. In the aforementioned Abatti case, certain discriminatees engaged in a pervasive scheme designed to disguise the true nature and extent of interim earnings. Conduct included false statements to Board agents during the compliance investigation; false statements at the backpay hearing; purposeful withholding of pertinent information and documentation; and an attempt to suborn perjury. In addition, testimony by an expert witness conclusively proved the falsity of much of the claims of these discriminatees. The element of willfulness was firmly established in the record. However, the ALJ in that case specifically noted that "the concealment was intentional, rather than the mere failure of recollection or inadvertence." (Abatti. op. cit.. ALJD, p. 40.)

The Godinez situation is far different. His inability to recollect interim employers and earnings, or even his repeated use of fabricated Social Security numbers, does not supply the requisite degree of willfulness essential to support Respondent's position on this particular issue.¹⁰ That he might not remember certain circumstances, or that he might not have kept records, does not amount to a conscious effort on his part to conceal his income in order to reap a windfall. Accordingly, unless otherwise

¹⁰ It has not been shown that the use of Social Security numbers other than his own was for the purpose of disguising his true earnings.

shown by Godinez' testimony or by the Specification, Respondent has not met its burden of proving mitigation via interim earnings,

The following chart summarizes Godinez's testimony regarding his interim earnings during backpay period years, though not necessarily within the period itself.¹¹

<u>Year</u>	<u>Period</u>	<u>Employer</u>	<u>Wage</u>	<u>Remarks</u>
1980			None	Per Spec.
1981	Feb- June	G. Diaz	\$25/day, day/wk	1 RT: 73, 74
1982	July-Sept; 2 wks May	J. Hernandez	\$5/hrs; 4-5 hrs/day; 4-5 days/wk	Roofing con- tractor RT: 26, 72, 73
1982	June, July	G. Diaz	\$100/wk	RT: 78
1983	Mar-June	G. Diaz		Picking okra and tomatoes RT: 25
1983	May	G. Diaz	\$3.45/hr, 5 hrs, 1 day/wk	Discing RT: 72
1983	June, July	G. Diaz	\$25/day	RT: 71, 72
1984	Feb.-May 2	Bradley Constr.		RT: 24
1985	weeks	William John		Trash coll. RT: 23

¹¹The contradictions appearing in the chart, and the transcript references indicating that the testimony was offered at different points in Godinez's recitation, underscore the confusion the witness displayed.

1985	2 weeks	M.C. Development		Grapes RT: 23
1985	One week	M.C. Development		Grapes RT: 67
1986	One week	M.C. Development		RT: 23 RT:
1986	3 weeks June	M.C. Development	6-7 hrs, 4 days/wk	68, 78
1986	?	"Own work"		Planting RT: 22
1987	Before (after?) June	Bradley Constr.		RT: 19-21
1987	6/12-7/10	M.C. Development	\$763.28	RT: 83

Thus, interim earnings were established for the years 1981 (\$100), 1982 (\$500)¹², 1983 (\$317.25)¹³, and 1987 (\$184.07)¹⁴. Insubstantial proof was adduced for the remaining years, despite counsel's questioning as to employers and periods worked. The amount due for Godinez' net back pay, without interest, is summarized and calculated below:

¹²General counsel incorrectly states in his brief that there were four work weeks in the 1982 season, which ran from May 31 through July 2. There were five such weeks, during which Godinez earned \$100 per week.

¹³The 1983 season for Carian ran from May 23 to June 25. Godinez stated that he earned \$25 a day, 3 days a week, in each of the four weeks of June, for a total of \$300. He testified that during May he worked one day a week, 5 hours per day for \$3.45 an hour, thus earning \$17.25 a day. The Carian season included only one week in May.

¹⁴General Counsel argues that since Respondent had access to the records at M.C., but only chose to produce a figure for the total earned by Godinez during the year, it should not be credited with any offset. In other words, Respondent could have shown what was earned week by week. Only one of the weeks at M.C. came within the Carian season, which ran from May 4 to June 17. However, I find that it is more reasonable and fair to divide the total M.C. earnings by four and derive a projected weekly amount of interim pay.

<u>Year;</u>	<u>Gross Backpay:</u>	<u>Interim Earn</u>	<u>Expenses:</u>	<u>Total:</u>
1980:	\$ 701.49	\$ 0.00	\$76.00	\$ 777.49
1981:	934.55	100.00	10.00	844.55
1982:	992.75	500.00	80.00	572.75
1983:	987.83	317.25	15.00	685.58
1984:	1387.32	0.00	0.00	1387.32
1985:	1414.26	0.00	0.00	1414.26
1986:	1414.26	0.00	0.00	1414.26
1987:	<u>1414.26</u>	<u>184.07</u>	<u>15.00</u>	<u>1245.19</u>
Totals:	\$9,246.72	\$1,101.32	\$196.00	\$8,341.40

2. Manuel Moya Perez

Perez worked under the same Social Security Number since 1966. (RT: 33.) Thus, Respondent could arguably have traced Moya's interim earnings, and arrived at a more exact compilation. It chose not to do so. The chart below summarizes his testimony regarding employment and wages during the backpay period.

<u>Year</u>	<u>Period</u>	<u>Employer</u>	<u>Wage</u>	<u>Remarks</u>
1981	May , June	Anaya; Don Co.	\$3.75/hr, 7-8 hrs. 2-4 days/wk	Field work RT : 40, 41
1982	May-July	Various	\$3.75/hr, 24 hrs/wk	Field work RT: 43, 44
1982	June 19-Sept	La Quinta	\$150/wk	Construction RT: 59, 60
1983	May -July	Self	\$80/wk, 3 wks/mo .	Welding RT: 45, 46, 59, 60
1984	2 wks end of June	Mario Saikhon	\$4.00/hr, 7-8 hrs, 7 days/wk	Melons RT: 61-63

1985 5/85-1/86 B. Worth C.C. \$3.50/hr, RT: 35, 36
40 hrs/wk

I find Moya's interim earnings were as follows. In 1981, Respondent's season ran from June 1 through July 3, encompassing all four weeks in June. Moya estimated that in this period he made \$3.75 per hour, for between seven and eight hours, on an average of three days per week. Thus his earnings were approximately \$337.50, or $\$3.75 \times 7.5 \times 3 \times 4$. General Counsel contends that as Moya was unsure how much money he made in this period, or how many days he may have worked, Respondent has not adequately proven interim earnings, and none should therefore be found. Moya, on the other hand, forthrightly stated that as he has a family to support, he had to have been working at the time. (RT: 42.) I find his estimate to be a reasonably reliable indication of what his earnings were in this period.

Respondent calculates Moya's interim earnings for 1981 and for each of the remaining years by estimating his daily wage in each year, as per his testimony, and multiplying that by the number of days in the Respondent's season.¹⁵ However, Respondent stipulated that the appropriate method for calculating backpay was a seasonal, rather than a daily method. Accordingly, I find that interim earnings are proven only to the extent they may be calculated on a seasonal basis.

¹⁵ For example, Respondent contends that during 1981 Moya worked at least seven hours per day at \$3.75 per hour, making a daily wage of \$26.75. Since the backpay period encompasses 15 working days (it actually includes 16 days during June), Moya's estimated earnings were \$392.25.

In 1982, Moya remembered on the second day of the hearing that he worked in construction during the backpay period, rather than doing field work, as he initially stated. As I found, generally, that Moya was a credible witness, I accept the correction in his testimony that he made regarding 1982 employment. Accordingly, he stated that he made \$150 per week during the last two weeks of the 1982 Carian season,¹⁶ for interim earnings totalling \$300.

In 1983, the Carian season ran from May 23 to June 27. I find that Moya earned \$80 during the May portion of the season, and \$240 for the three of the four weeks he worked during June. Interim earnings for 1983 therefore total \$320.

For 1984, Moya stated that he worked the last two weeks of June in the melons. However, the Carian season lasted only until June 17. Therefore, for June 15, 16, and 17, Moya earned \$4 per hour on an average of 7.5 hours per day, for a total of \$90 in interim earnings.

In 1985, I found that Respondent's backpay liability for Moya ended on May 17, or two weeks after the season began. Moya earned \$140 per work in each of these weeks, for an interim earnings total of \$280.

The chart below summarizes the backpay amount due discriminatee Moya:

¹⁶That season ran from May 31 to July 2.

Year:	<u>Gross Backpay:</u>	<u>Interim Earnings:</u>	<u>Expenses:</u>	<u>Total:</u>
1980:	\$ 701.49	\$ 0.00	\$ 0.00	\$ 701.49
1981:	934.55	337.50	10.00	607.05
1982:	992.75	300.00	80.00	772.75
1983:	987.83	320.00	0.00	667.83
1984:	618.77	90.00	0.00	528.77
1985:	<u>396.03</u>	<u>280.00</u>	<u>33.00</u>	<u>149.03</u>
Totals:	\$4,631.42	\$1,327.50	\$123.00	\$3,426.92

III. Order


Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondents Harry Carian, individually and doing business as Harry Carian Sales, its officers agents, successors and assigns, shall pay to each of the discriminatees, whose names are listed below, the backpay amount listed next to his name, plus interest at the rate and according to the formula expressed in E.W. Merritt Farms (1988) 14 ALRB No. 5.

1. Jaime Vargas: \$ 581.49
2. Jose Luis Godinez: \$8,341.40
3. Manuel Moya Perez: \$3,426.92

As Respondent has yet to make a bona fide offer of reinstatement to Jose Luis Godinez, its backpay obligation to him is continuing. Further amounts due and owing Mr. Godinez, including makewhole relief for loss of pay and other economic losses in the 1988 season, and for any seasons to follow until such time as a good faith offer of reinstatement is made, shall

be determined in a

Dated: September 13, 1988



MATTHEW GOIZBERG
Administrative Law Judge