Coalinga, California

STATE OF CALIFORNIA AGRICULTURAL LABOR

RELATIONS BOARD

PHILLIP D. BERTELSEN, INC.,dba COVE RANCH MANAGEMENT, Respondent, and FAUSTINO CARRILLO; and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Parties.	)	Case Nos. 84-CE-23-F 85-CE-6-F 85-CE-48-D 16 ALRB No. 11 (12 ALRB No. 27)

SUPPLEMENTAL DECISION AND ORDER

On December 11, 1986, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in 12 ALRB No. 27, the underlying liability phase of this case, in which it concluded, inter alia, that Phillip D. Bertelsen, Inc.[1/] dba Cove Ranch Management (Respondent) had violated Labor Code section 1153 (a)[2/] by discharging fourteen workers because of their protected concerted activities. Pursuant to section 1160.3, the Board ordered Respondent to reinstate and make whole the fourteen

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[1/] The Board's Order in 12 ALRB No. 27, as well as the caption of the Decision therein, inadvertently omits the incorporated status of Respondent even though the parties in their pleadings and stipulations identify Respondent as a corporation. Mr. Bertelsen himself has testified during the evidentiary hearing of this compliance matter that Respondent has been incorporated since 1977. In light of the foregoing, we find omission of Respondent's corporate identity to be a clerical error, and will henceforth refer to Respondent as "Phillip D. Bertelsen, Inc., dba Cove Ranch Management" for all purposes under this action.

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

discriminatees for all losses of pay and other economic losses they have suffered as a result of the discrimination against them. On February 3, 1989, the Board's Regional Director for the Visalia Region, acting for the General Counsel in compliance matters, issued a proposed backpay specification setting forth his computation of the amount of Respondent's monetary liability to the discriminatees. An erratum was later issued on February 9, 1989, correcting specific backpay period designations. As Respondent filed an answer in opposition to the proposed specification, the matter was set for an evidentiary hearing. On December 19, 1989, Administrative Law Judge (ALJ) James Wolpman issued the attached Supplemental Decision. General Counsel and Respondent each timely filed exceptions to the ALJ's Supplemental Decision with a brief in support of their exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALJ, to the extent consistent herewith.

Respondent, in its answer to the proposed backpay specification and now before the Board in its exceptions to the ALJ's Supplemental Decision, primarily contends that the federal Migrant and Seasonal Agricultural Workers Protection Act (MSPA), 29 U.S.C. 1801 et seq., preempts the Agricultural Labor Relations Act (ALRA or Act) insofar as the latter requires reinstatement and backpay for fourteen discriminatees who Respondent claims are aliens not lawfully admitted for permanent residence or who have not been authorized by the Attorney General to accept employment

in the United States.[3/] Alternatively, Respondent contends that because of their "unauthorized" immigration status, the discriminatees were rendered unavailable for work by 29 U.S.C. 1816(a), pursuant to the precepts of the United States Supreme Court decision in Sure-Tan, Inc. v. NLRB (1984) 467 U.S. 883 [104 S.Ct. 2803], and therefore backpay was tolled immediately upon the workers' discharge.

Depending on whether Respondent is a federal farm labor contractor as defined by 29 U.S.C. 1802(7), it may be possible for an "agricultural employer" under the ALRA to find itself subject to the MSPA's restriction on the employment of unauthorized aliens. However, we do not here find it necessary or appropriate to reach this issue due to the state of the record herein. The alleged unauthorized immigration status of the fourteen discriminatees, the basis for Respondent's unavailability argument, was never established by Respondent as required. (See Frudden Enterprises, Inc. v. ALRB (1984) 153 Cal.App.3d 262, 269 [201 Cal.Rptr. 371][once General Counsel shows gross backpay due,

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[3/] Under 29 U.S.C. 1816(a) a farm labor contractor as defined by 29 U.S.C. 1802(7) is prohibited from recruiting, hiring, employing, or using, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment in the United States. The term "unauthorized alien" shall hereafter refer to those individuals whose employment by a federal farm labor contractor is prohibited by the MSPA.

We note that 29 U.S.C. 1816(a) was repealed effective June 1, 1987, by the Immigration Reform and Control Act (IRCA), section 10Kb)(1)(C), and in its place, the provisions prohibiting the employment of aliens under IRCA (i.e., 8 U.S.C. 1324) were incorporated into the MSPA. Since the discriminatees in the instant matter were reinstated by June 1, 1987, Respondent's contentions do not arise therefore under IRCA, but rather under the now repealed prohibition provision of the MSPA.

burden shifts to Respondent to show facts that mitigate or eliminate backpay liability].) Without Respondent's establishing such status, we have no basis to conclude that these discriminatees were unauthorized aliens or otherwise legally unavailable for continued employment with Respondent.

Since we have found that Respondent has failed to prove the unavailability of these discriminatees, we need not resolve Respondent's preemption contention or such other related issues as are also premised on the alleged unauthorized immigration status of the discriminatees. That being so, we do not adopt the ALJ's resolution of Respondent's preemption argument, nor find it necessary to reach the issues set forth in the parties' exceptions to the ALJ's Supplemental Decision.[4/]

Having found that Respondent failed to establish the unauthorized immigration status of the discriminatees, we must conclude that Respondent's refusal to reinstate the workers upon their application to return to work was unwarranted. Therefore, backpay is found to have continued to accrue until such time as the discriminatees were in fact reinstated on June 1, 1987.

[4/] Nor do we reach the question of whether there was sufficient justification for preventing or estopping Respondent from invoking MSPA's policy against employment of unauthorized aliens as a means of limiting backpay, since we are without sufficient facts to indicate that the discriminatees were indeed unauthorized. The ALJ's resolution of this matter is not adopted as well.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Phillip D. Bertelsen, Inc., dba Cove Ranch Management, 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 set forth beside their respective names, plus interest thereon to be computed in accordance with established Board practice:

1.	Maximino Cerna	$ 3,680.03
2.	Jose Arias	6,330.72
3.	Faustino Carrillo	3,343.25
4.	Miguel Carrillo	3,265.21
5.	Rafael Carrillo	3,694.67
6.	Victor Enamorado	3,121.42
7.	Gloria Telma Escobar	5,267.20
8.	Jose Escobar	3,601.21
9.	Elena Lopez	6,030.93
10.	Daniel Pena	3,568.22
11.	Hector Pena	3,347.61
12.	Maria G. Perez	4,922.53

13.	Elias Rivas	4,683.64
14.	Guadalupe Rodas	5,291.39
	TOTAL	$60,148.03

DATED: August 23, 1990

BRUCE J. JANIGIAN, Chairman[5/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[5/] 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.

CASE SUMMARY

Phillip D. Bertelsen, Inc.
dba Cove Ranch Management
(UFW)

16 ALRB No. 11
Case No. 84-CE-23-F, et al,

Background

In Phillip D. Bertelsen dba Cove Ranch Management (1986) 12 ALRB No. 27, the Agricultural Labor Relations Board (Board) found that the Employer (Respondent) had discharged fourteen workers because of their protected concerted activities and ordered Respondent to reinstate and make whole the fourteen discriminatees for all losses of pay and other economic losses they have suffered as a result of the discrimination against them. The Board's Regional Director, acting for the General Counsel in compliance matters, prepared a backpay specification setting forth his computation of the amount of Respondent's monetary liability to the discriminatees. Respondent filed an answer in opposition to the proposed specification claiming that it was a federal farm labor contractor under the Migrant and Seasonal Agricultural Workers Protection Act (MSPA), 29 U.S.C. 1801 et seq., and that it was prohibited thereby from reinstating the fourteen discriminatees who Respondent claims were unauthorized aliens. Respondent argued that: 1) the Agricultural Labor Relations Act was preempted by the federal MSPA thereby prohibiting the Board from requiring reinstatement and backpay for discriminatees who are unauthorized aliens; and 2) the discriminatees were unavailable for work because of their unauthorized immigration status. The matter was set for an evidentiary hearing before an administrative law judge (ALJ).

ALJ's Supplemental Decision

The ALJ found that Respondent was an agricultural employer under the federal MSPA and was therefore exempt from the federal act's prohibition against employing unauthorized aliens. That being so, the discriminatees were entitled to the full range of Board remedies, including backpay from the date of discharge to June 1, 1987, date of reinstatement. The ALJ further concluded that even if the federal act's prohibitions were found to be applicable to Respondent, said provisions restrict only the employment of unauthorized aliens and not the payment of backpay to such aliens. Finally, whether or not the MSPA was deemed applicable to Respondent, the ALJ found that Respondent's implementation of a new policy requiring proof of citizenship or work authorization as a condition of employment was merely a legal stratagem adopted in order to deprive the discriminatees of their backpay and

reinstatement rights under an anticipated Board Order. Once that purpose was achieved, implementation and enforcement of the new policy became lax and desultory.

Board Decision

The Board found that Respondent failed to establish the alleged unauthorized immigration status of the fourteen discriminatees, the basic premise from which its "preemption" and "unavailability" arguments were made. Finding no necessity to address Respondent's contentions upon the existing record, the Board held that Respondent's refusal to reinstate the discriminatees upon their application to return to work was unwarranted. The ALJ's finding on the amounts of backpay due was affirmed.

* * *

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

STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: PHILLIP D. BERTELSBN, dba, COVE RANCH MANAGEMENT, Respondent, and FAUSTINO CARRILLO and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Parties.	Case Nos. 84-CE-23-F 85-CE-6-F 85-CE-48-D (12 ALRB NO. 27)

Appearances:

William Marrs
Marrs & Robbins
Valencia, California
for Respondent

Juan Ramirez,
Visalia, California
for the General Counsel

Chris Schneider
Lyons, Macri-Ortiz, Schneider, Dunphy & Camacho
Keene California
for Charging Party

Before: James wolpman
Chief Administrative Law Judge

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN, Administrative Law Judge: This supplemental proceeding was heard by me on April 4 & 6 and on July 6, 1989, in visalia, California. It arises out of the Decision and Order of the Agricultural Labor Relations Board reported at 12 ALRB No. 27 (December 11, 1986), directing, inter alia, that the Respondent, Phillip D. Bertelsen, Inc. d/b/a Cove Ranch Management, make Maximino Cerna and thirteen members of the Gilberto Trevino crew whole for lost pay and other economic losses suffered when they were discharged for engaging in concerted activity protected by Section 1152 of the Agricultural Labor Relations Act. (G.C. Ex. #1.)

When the parties were unable to agree upon the amounts due, the Visalia Regional Director issued a Backpay Specification, setting forth the amount claimed for each of the discriminatees. (G.C. Ex. #2.) The Respondent answered, admitting some of the allegations in the Specification, denying others, and raising several affirmative defenses, the most significant being the question of whether, in the particular circumstances of this case, backpay could be awarded to aliens who had not received authorization to work in the United States. (G.C. Ex. #3.)

At the prehearing conference the parties were able to resolve some matters previously in dispute. (See, Prehearing Conference Order, dated March 17, 1989.) At the opening of the hearing, three written stipulations covering a wide range of issues were agreed to, executed, and admitted into evidence. (Joint Exhibits. #1, #2, & #3.) Testimony was then received and

additional documentary evidence was introduced on the remaining issues.[1]

The hearing was completed on April 6, 1989, but was reopened on July 6 to resolve a possible conflict between one of the stipulations and the evidence presented at hearing. (See Order Reopening Hearing, dated June 16, 1989.)

The Respondent, the General Counsel, and the United Farm Workers, as a Charging Party, all appeared through counsel, participated in the hearing and filed post-hearing briefs.[2] Upon the entire record, including my observation of the demeanor of the

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[1]Pursuant to an understanding reached at the hearing, the General Counsel submitted additional exhibits after its close, and the Respondent duly objected to them as irrelevant to the issues presented. For reasons which will be explained later {Section II, B), I find them relevant and therefore admit them as follows: Content Summary of John Curiel File--General Counsel Exhibit No. 17; Hector Hinojosa Crew Members Hired from April 18, 1986 through December 29, 1986--General Counsel Exhibit No. 18; Gilberto Trevino Crew Members Hired from April 4, 1986 through October 24, 1986--General Counsel Exhibit No. 19; Abraham Marroguin Crew Members Hired April 14, 1986 through August 7, 1986--General Counsel Exhibit No. 20; Master Employee List for Workers who worked for Bertelsen in 1987--General Counsel Exhibit No. 21; Hector Hinojosa Crew Members who Worked for Bertelsen in 1986, but did not work in 1987--General Counsel Exhibit No. 22; Gilberto Trevino Crew Members who Worked for Bertelsen in 1986, but did not work in 1987--General Counsel Exhibit No. 23; Abraham Marroquin Crew Members who Worked for Bertelsen in 1986, but did not work in 1987--General Counsel Exhibit No. 24; Summary of 115 Worker Files--General Counsel Exhibit No. 25; Summary of Contents of File #115--General Counsel Exhibit No. 27.

[2]The UFW was notified of the re-opened hearing on July 6, 1989, but did not attend; nor did it file a supplementary brief on the issue raised by the reopening.

witnesses, and after careful consideration of the arguments made and the briefs submitted by the parties, I make the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A.

The Respondent raises for the first time the question of whether an award of backpay can be defeated or limited because the discriminatees are aliens who have not received authorization to work in the United States, as required by Federal law. The issue does not, as one might expect, arise under the so-called employer sanctions provisions of the recent Immigration Reform and Control Act ["IRCA"], 8 U.S.C. §1324. Rather, it comes before the Board under an earlier Federal statute, the Migrant and Seasonal Worker Protection Act ["MSPA"], 29 U.S.C. §1801, et seq., which, at the time of the events in question, prohibited "Farm Labor Contractors" from employing aliens who had not been authorized by the Attorney General to accept employment in the United States. (29 U.S.C. §§ 1816 & 1802(7).)[3]

The fourteen discriminatees involved are all aliens. One, Maximino Cerna, is a Mexican national who had no documents authorizing him to reside or to work in the United States. (Stipulation No. 2, Joint Ex. #2.) The other thirteen are Salvadorans

[3]In November 1986, shortly after the events in question, Congress enacted IRCA which contains a more widespread prohibition against the employment of aliens; in doing so, it repealed the MSPA prohibition. (See IRCA, §101(b)(1)(C).)

who were entitled to remain in the United States while their applications for asylum were being processed, but who had not obtained authorization from the Immigration and Naturalization Service ["INS"] to work while they were waiting. (Jt. Ex. No. l.) On March 19, 1986, the Respondent, in order to terminate any possible backpay liability[4], offered re-employment to all fourteen, but declined to rehire the Salvadorans because they were without work authorizations. (fU 2 & 6 of Jt. Ex. No. I.)[5] Because Cerna, the Mexican national, failed to respond to the reinstatement offer (Jt. Ex. No. 2), the General Counsel makes no claim for his backpay after April 1, 1986--the deadline for acceptance of the offer.

Respondent's basic position is that, under the Supremacy Clause (U.S. Const., Art. VI. el. 2), its obligation under Federal law to refrain from employing aliens who have not been authorized to work in the United States overrides and pre-empts the reinstatement/backpay order issued by our Board in 12 ALRB No. 27.

In *Rigi Agricultural Services. Inc.* (1985) 11 ALRB No. 27, the Board considered whether its authority to award

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[4]The ALJ decision finding violations and recommending reinstatement and back pay for the 14 had just issued (February 28, 1986). The Board later adopted those findings in toto (12 ALRB No. 27, December 11, 1986.)

[5]Eventually, all 13 workers applied for and received Temporary Resident Status pursuant to §210(a)(1) of the Immigration Reform and Control Act of 1986. As a result, the Respondent made another offer of reinstatement on June 1, 1987, which all parties agree was valid and sufficient to terminate backpay. (111:2.)

reinstatement and backpay was pre-empted by the Immigration and Nationality Act of 1952 ["INA"] and found that there was no explicit or implicit pre-emptive language in that statute, that no actual conflict existed between its backpay/reinstatement order and the provisions of the INA, and that its order did not stand as an obstacle to the purposes and objectives of the Federal law. Consequently, it found no preemption.

But the INA contained no employer sanctions, and so *Rigi* did not reach the issue of whether a specific prohibition against employing aliens would pre-empt an ALRB backpay/reinstatement order by creating an actual conflict with Federal law. The decision does, however, contain dictum suggesting that it might:

> "Under Federal Law [as it then existed], employers are not prohibited from employing undocumented aliens.... Thus, an agricultural employer can comply with the ALRB order of reinstatement and backpay without violating the INA." Id. at p. 16.

Since MSPA contains just such a prohibition, this case may raise that issue.

I say "may" because there are significant threshold questions of whether the Respondent is subject to the employer sanctions provision in MSPA, and, beyond that, whether an actual conflict exists between that provision and the portion of the Board Order for which enforcement is here sought.

To evaluate the merits of those questions, it is necessary to understand the nature of Respondent's operation and to examine carefully the circumstances surrounding its refusal to reinstate the discriminatees.

B.

Phillip D. Bertelsen, Inc. is a California corporation which does business under the fictitious name of Cove Ranch Management. It provides farm management services for other farmers and for the absentee owners of farm land. As such, it contracts with them to perform some or all cultural practices on their properties--harvesting, pruning, thinning, forklifting, and so on. Its owner, Phillip Bertelsen, is a lifelong resident of the Central Valley and has been in the business since 1975, operating out of the same location since 1982.[6]

Respondent's operation is confined to the Central San Joaquin Valley--primarily Fresno County and to a lesser extent the adjoining counties of Tulare and Madera. It relies entirely on the Fresno County labor market and does not send recruiters elsewhere to obtain workers and transport them back to the Fresno area.

Besides its normal business arrangements, the Respondent manages some properties which, for one reason or another, have been placed in Court administered receivership. Mr. Bertelsen also farms 115 acres in which he has an ownership interest. Additionally, he has for some years served as a board member and the chief financial officer for Sunny Cove Citrus Association, a packing and processing operation to which a number of his management clients belong. Finally, he owns 40% of the stock in a small agricultural spraying corporation.

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[6]He incorporated in 1977.

In their interpretations of MSPA, the Department of Labor [which is charged with its enforcement] and the courts have seen fit to distinguish between those contractors who perform all farming operations on the properties they manage and those who do not, classifying the former as "agricultural employers" and the latter as "farm labor contractors".[7] (*U.S. Dept. of Labor*, Administrative Opinion WH-522 (April 23, 1984); *Mendoza v. Wight Vineyard Management* (9th Cir. 1986) 783 Fed.2d 941.)

Bertelsen's operation is a hybrid, for it performs all cultural practices for certain clients but only some for others. This can be seen in Respondent's Exhibit A which breaks down its operations by the services it provides and lists, for each, the number of clients and the acreage involved during the year in which the backpay issue arose (1986) and during the year before and the year after. For its "Management Clients" and its "Receivership Clients", Bertelsen performs all cultural practices; for its "Labor Contracting" Clients, it performs some operations but not others. (¶¶ 9-11 of Jt. Ex. No. l.)[8] The relative size of the

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[7]"Farm Labor Contracting" as defined in MSPA and as used in Respondent's Exhibit A has a considerably broader meaning than it has been given under the ALRA; it includes not only labor contracting but custom harvesting as well.

[8]Hauling and Forklifting are listed as a separate category; but, since they are merely additional operations performed for clients already listed, including them in Table I would result in "double counting".

two categories can be seen in Table I which translates into percentages the acreage figures found in Exhibit A.[9]

TABLE I: PERCENTAGE BREAKDOWN OF RESPONDENT'S OPERATION

	% of Acreage in Fiscal Year Ending 6/30/85	% of Acreage in Fiscal Year Ending 6/30/86	% of Acreage in Fiscal Year Ending 6/30/87
Manages all aspects of Operation (Management and Receivership Clients)	30.4% (32.2%)	28.0% (29.9%)	15.7% (17.8%)
Performs some but not all cultural Practices (Labor Contracting Clients)	69.6% (67.8%)	72.0% (70.1 %)	84.3% (82.2%)
Totals	1 0 0 %	1 0 0 %	1 0 0 %

Note: The figures in parentheses represent the percentages which obtain if one includes the 115 acres which Mr. Bertelsen farms as an owner.

At the time of the events in question, Respondent's largest client was Harris Ranch where it operated as a labor contractor, providing some services--primarily harvesting and hauling--but not others. It was there that the discriminatees were working when they were discharged.

Mr. Bertelsen has been registered as a Federal Labor Contractor under MSPA since 1975, and his corporation has been

[9]Because Bertelsen performed all cultural practices on the acreage of his Management and Receivership clients but only some practices on the acreage of his Labor Contracting clients, Exhibit A and Table I, based as they are on simple acreage rather than hours worked per acre, understate the actual amount of work attributable to the former.

registered since 1977.[10]

C.

Section 106 of MSPA applies to "farm labor contractors" and forbids them from hiring "any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment." (29 U.S.C. §1816(a).) It then goes on to provide that a "contractor shall be considered to have complied....if [he] demonstrates that [he] relied in good faith on documentation prescribed by the Secretary [of Labor], and...had no reason to believe the individual was an alien [not authorized to work]." (29 U.S.C. §1816(b).) Section 500.59 of the implementing regulations lists the documents upon which contractors may rely to establish the good faith defense. (48 Fed. Reg. 36750 (Aug. 19, 1983); 29 CFR §500.59 (1983); see also Resp. Ex. E.) MSPA was enacted in 1983, but in 1974 a similar prohibition [without provision for reliance on documentation] had been incorporated into its predecessor, the Farm Labor Contractor Registration Act (FLCRA).[11] (88 Stat. 1655,1656.)

From the late 1970's until March 1986, when it was faced with an ALJ decision recommending reinstatement and backpay for

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[10]Both he and his corporation have likewise been registered under California's Farm Labor Contractor Law. (Lab. Code §1682 et. seq..)

[11]Indeed, as early as 1963, there had been language in FLCRA which sought to achieve the same result. (78 Stat. 921.)

the discriminatees, the Respondent made little attempt to determine for itself whether its employees had documents authorizing them to work in the United States. Instead, it relied on "self-certification": On the date of hire, or shortly thereafter, each new employee would sign a card--Respondent's Exhibit C--certifying that s/he was "legally entitled to work in the United States." While space was provided for "Evidence of Citizenship", it was either left blank or no real effort was made to verify the existence or validity of the document(s) whose title or description the employee or his foreman had inserted. (See the first 6 pages of G.C.Ex. 4; 1:55-56, 101-102.)

There was nothing illegal about this procedure. By failing to secure documentation, the Respondent simply deprived itself of the "Good Faith" defense afforded by §106(b). Of course, if and when it actually hired someone who was not entitled to work--Maximino Cerna, for example--it did violate of §106(a). In effect, then, prior to March 1986 the Respondent chose to act at its peril in hiring workers who may or may not have been entitled to work in the United States.

Two weeks after the ALJ Decision all of this changed. Mr. Bertelsen's son, Bryan, who had just taken over operation of the business in early March when his father suffered a coronary arrest, instituted a new and different policy. Every current employee, new or old, was to be required to produce documentation establishing his or her right to work in the United States, and those documents were to be photocopied for inclusion in an employee work authorization file. Those who could not produce the

required documents were to be terminated. Similar documentation was to be required of all new hires and rehires and copies were likewise to be made and filed. Any applicant who could not substantiate his right to work was to be turned away.

Respondent's chief supervisor, John Curiel, was in charge of implementing the new policy. (II:17.) He was furnished a list of documents which were acceptable as proof of citizenship or work authorization (II:21; Ex. D to Jt. Ex. 1), and he instructed his crew bosses to inform their crews that they must come forward with the required documents by March 27 if they wished to continue working. (II:17-18.) As the documents came in, Curiel checked them against his list, saw to it that copies were made, and placed them in a file on his desk, segregated by crew. (II:21-22.) Approximately 32 employees were unable to provide the required documentation. (G.C. Ex 10.) All were terminated. (I:17,38.)

On March 19, 1986--just after initiating the new policy--Respondent, acting on advice of counsel, sent offers of reinstatement to all 14 discriminatees, giving them until April 1 to accept. (Ex. A to Joint Ex. l.) The offers made no mention of the new policy, but when the 13 discriminatees who were members of the Trevino crew reported for work on March 24, Curiel informed them of it and asked for their documents. (¶3 to Jt. Ex. No. 1.) Some of them presented letters or other documentation from the Los Angeles INS office authorizing them to remain in the United States while their requests for asylum were being processed. (Exs. B-l & B-2 to Jt. Ex. No. 1.) Since Curiel's list said nothing about such requests but did have a general category covering "any other

INS statement allowing the individual to work in Agriculture in the United States", he told the workers that he would have to check with INS and that they should return in a few days.[12] (¶5 to Jt. Ex. No. 1.)

After discussing the situation with Bryan Bertelsen, telephone calls were made to the INS offices in both Fresno and Los Angeles, and it was learned that the letters, as they stood, were insufficient. They required an additional notation that the bearer was authorized to work while his request was pending. (I:86-87; III:83.) After explaining this to Bryan, the Los Angeles INS representative went on the advise him that the workers should return to the Los Angeles office and request permission to work, which would then be decided by an INS Examiner. (I:87; G.C. Ex. 5.) This was later confirmed in writing. (Resp. Ex. F-l.) Meanwhile, the members of the crew who had not already requested asylum did so and obtained letters or documents similar to those which the others had presented to Curiel on March 24th. (¶5 of Jt. Ex. NO. 1; III:22-24.)

Bryan testified that on the morning of March 29, when the thirteen returned, he took Curiel aside and instructed him to

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[12]Curiel testified that he told the workers on the 24th that their letters needed work authorization stamps (III:82,90), but he also testified that he first learned of that requirement when he spoke with the INS after the 24th. (III:91.) While the contradiction was never acknowledged or explained, it appears to me that he confused his two meetings with the crew and that on the 24th he did no more than indicate that they should check back with him. This comports with the stipulation. (¶5 to Jt. Ex. No. 1.)

tell the crew that, in their present form, the letters were not acceptable but, "[w]e would like to hire [them] and make it known that all they need do is have a stamp on the letters." (III:42.)

Curiel has no recollection of those instructions (III:93); he remembers only the general description which Bryan had given him of the new policy (III:92-93) and the advice which he himself had received from the Fresno INS representative. (II:83-84,87.) And that is what informed his comments to the workers: "Based on the policy we set for every employee in the company, based on the information I got from the INS, that's what I talked to the people [about]." (III:93.) He reiterated the company's policy: No work authorization, no work. And he told the group what the INS representative had told him, "These papers were not acceptable unless they had a stamp." (III:90.) Whether he went on to explain that they would be given additional time to obtain the necessary stamp is uncertain. Two workers--Hector Pena and Rafael Carrillo--testified that they were simply told their letters were no good without a stamp and that nothing was said about allowing time to correct the situation. (III:51, 71-72.) Faustino Carrillo, the spokesperson for the group, at first agreed that Curiel said nothing about additional time but, a few moments later, reversed himself:

> Q. [by counsel for the Respondent] On March 29th, did Mr. Curiel tell you you would get your jobs back if you got your papers stamped?
> A. If they turned out all right, he said yes.
> Q. So if they got stamped you'd get your job back?
> A. Yes. (III:28.)

Then, on redirect examination, Carrillo reverted to his original

testimony. (III:32-33.)[13]

Curiel's own testimony is equally unsatisfactory. Even a cursory reading of the critical portions of his examination and cross-examination makes it obvious that--whatever his other virtues as a supervisor--he has difficulty in speaking clearly and making himself understood. (See III:85-94.) It was only after he had gone over and over, in a very confusing way, his comments to the crew about the company's policy and what he had been told by the INS agent, that he finally got around to testifying that he told the crew:

> A. It was all in regards to that; there wasn't any other about working, if they had that letter with a stamp theycould go to work the next day, and everybody was to do the same thing regardless of what kind of papers they had....
> Q. And that's what you told the workers?
> A. That's what I told everybody, not just them, another 80 or 90 people. (III:88.)[14]

Taking his testimony as a whole and paying due attention to his difficulty in explaining himself, what appears to have

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[13]In its supplementary brief, the Respondent argues that Carrillo repeatedly testified that additional time would be given. That is incorrect. He repeatedly testified that Curiel said the crew could not work "because" their letters were not properly stamped. (111:26,27,32,33-34.) The use of "because" carries no implication, one way or the other, as to whether the crew would be given an. opportunity to correct the situation. In his final bit of testimony, Carrillo made this explicit:

> Q. (by the ALJ) . . .Did he [Curiel] also say to you that if you went out now and got the stamp that he would hire you back?
> A. All he said was that it was lacking, (III: 34.)

[14]He came close to saying something similar earlier in his testimony, but it was in answer to a leading question. (III:86.) The question was objected to and the answer was stricken. (III:87.)

happened is that after repeatedly and disjointedly reiterating the need for documentation and the evenhandedness of the company in imposing the requirement, Curiel--briefly and in passing--left open the possibility of obtaining work authorization stamps on the letters. What he certainly did not do was to pass on the sound advice which the Los Angeles INS representative had given to Bryan —and which Bryan had told him to tell the group (III:42-43)-- namely, that the "person[s] should come back into [the Los Angeles] office and request permission to work..." (Resp. Ex. F-l.)

For their part, the workers did not accept Curiel's explanation. And their reaction is reasonable and understandable. His preemptory attitude and his failure to explain what needed to be done convinced them that, in rejecting their letters, he was simply continuing the pattern of discrimination which had earlier been practiced against them. (III:14, 60, 69.) That is why they left without questioning him further; for, in their view, to do so would have be futile. And that is why they took their grievance back to the ALRB, and not to the INS. (III: 13-14, 52-53; G.C. Ex. 26.) After all, they had no independent knowledge of the requirements of MSPA or of the inadequacy of asylum letters without stamps. (III:29, 61.) They spoke no English, had little formal education, and knew only what little they had been told by the person they paid to file their papers. (III:11-12, 15-16, 51-52, 54-55, 67-68.)

D.

The Respondent maintains that, once initiated, its new policy of requiring documentation remained in full force and effect throughout the alleged backpay period. The General Counsel and the Union dispute this, arguing that, having rid itself of the discriminatees, the Respondent quickly reverted to its old ways.

To evaluate those contentions, it is necessary to say something of the evolution of the record keeping system which the Respondent adopted in conjunction with its new policy.

Curiel explained that, in the beginning, after he examined the documents presented by employees and applicants and checked them against his approved list, photocopies were made and placed in a file on his desk, arranged by crews. (II:21-22.) This is the so-called "Curiel File". It was maintained from March 1986 until January 1987, when Roxanne Leyva was hired and assigned the task of creating a better system, one in which each employee and new hire had a separate folder listing his or her social security number and containing the photocopies Leyva had removed from the file on Curiel's desk or, in the case of new employees, copied from documents provided when they were hired. (II:39-40, 42.) The new filing system extended only to employees then working or subsequently hired. (II:40,42.) Documents provided by workers who had left Respondent's employ before January 1987, remained undisturbed in the Curiel File.

One measure, therefore, of Bertelsen's adherence to its documentation policy is to ascertain the names of those who worked between April and December 1986, but not thereafter, and then see

whether the Curiel File contains their required documents. And that is exactly what the General Counsel did: Its Exhibits 18, 19 and 20 list all of the workers hired into its three principal crews between April and December 1986. Its Exhibit 21 is a master list of all employees who worked in 1987. By subtracting the 1987 names from the three 1986 crew lists, the General Counsel was able to generate--in Exhibits 22, 23 and 24--lists of employees in each of the three crews who worked for Bertelsen between April and December 1986, but not in 1987. If, as Bertelsen contends, its document policy remained in full force and effect throughout the backpay period, one would expect the Curiel File to yield copies of documents for each of those employees. But it does not. It contains documents for only 34 employees[15], compared with the 282 employees listed in Exhibits 22, 23 and 24 for whom there should have been documentation. This is a huge discrepancy and one for which the Respondent offered no explanation.

There is, however, one gap in the General Counsel's methodology. The new filing system continued in effect until November or December 1988. (II:59,63-64.) That means employees who worked in 1986 and then returned in 1988 after a year's absence would also have had their documents removed from the Curiel File and placed in a new folder. Ideally, therefore, the General Counsel should have taken into account not only the 1987

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[15]And many of those documents are not acceptable proof of citizenship or the right to work in the United States. (29 CFR §500.59 (1983); Ex. D to Jt. Ex. No. 1.)

work complement {G.C.Ex. 21), but the 1988 work force as well.[16] That weakens, but still does not dispel, the inference that the "new policy" had been ignored; the discrepancy is still too large. Then, too, had the 1988 employment data sufficed to explain away the discrepancy, it would have been easy enough for the Respondent--who does, after all, have the burden of proof on the issue--to offer it.

An examination of the new filing system should also be helpful in disclosing Respondent's adherence—or lack of adherence--to its documentation policy--Unfortunately, that system is incomplete because in December 1988, the "new" filing system was once again revised; this time to comply with the employer record keeping provisions of the newly enacted Immigration Reform and Control Act. (II:49, 58, 63.) During this second revision, the contents of many of the existing files were discarded so that the folders could be re—titled and re-used. The Respondent did, however, provide 115 files which survived the revision. While they constitute only 9½% of the 1987 work force, they provide a large enough sample to give some indication of what was going on. Each of the 115 files should have contained photocopies of one or more of the required documents. In fact, less

[16]That the Respondent made valid offers of reinstatement to the discriminatees on June l, 1987, does not obviate the problem created by the gap. Because the removal of documents continued on until late 1988, the integrity of the Curiel file must be judged by its condition when its contents were no longer being disturbed.

than half of them have acceptable documentation. (G.C. Exs. 25 and 27.) Again, Respondent offered no explanation for the discrepancy.

Finally, the General Counsel called two witnesses--Antonio Molina and Jose Guardado--who were hired in August 1986. (II:120, 127.) Each testified that he was hired after providing the Respondent with a California Identification Card and a Social Security Card, but nothing more. (II:121, 127-128.) Neither of those documents are acceptable evidence of citizenship or the right to work in the United States, and neither was on Curiel's approved list.[18] Respondent did not challenge their testimony or offer any specific evidence to contradict their claims.

E.

That the Respondent, after years of indifference to the risks inherent in employing aliens, announced and implemented its new policy two weeks after an ALJ Order recommending backpay and reinstatement for a group of aliens leads me to conclude that the policy was a legal stratagem adopted in order to deprive the discriminatees of their backpay and reinstatement rights under an anticipated Board Order. This conclusion is borne out by the evidence that, once that purpose had been achieved, implementation and enforcement of the new policy became lax and desultory.

Respondent, for its part, did not bother to deny that the policy had been created with an eye to an anticipated Board

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[17]See 29 CFR §500.59 (1983); Ex. D to Jt. Ex. No. 1.

Order.[18] Instead, it argued that its motivation for complying with MSPA was irrelevant: It did what it was legally obligated to do, and--whatever its motivation—it cannot be faulted for that.

Whether its argument is correct turns upon the interpretation of certain provisions in MSPA which will be considered later in this decision. (Section II, B & C, *infra*.)

II. ANALYSIS, FURTHER FINDINGS AND CONCLUSIONS OF LAW

A.

MSPA is a broad statute aimed at protecting the health and welfare of migrant and seasonal agricultural workers. It contains registration, record keeping, and disclosure requirements, and it has provisions dealing with wage payments and deductions, worker housing, and motor vehicle safety. Some portions of the statute apply only to "farm labor contractors", while others have a wider reach and include "agricultural employers" and "agricultural associations" as well. The prohibition against hiring illegal aliens is found in Subchapter I, which is confined to labor contractors and is primarily concerned with their registration obligations. Agricultural employers are exempt from the obligations and prohibitions of that Subchapter.

[18]Respondent's counsel, in an *amicus curia* brief on behalf of his law firm in *Rigi Agricultural Services*, *supra*, a year before the events here in question, advised the Board of his position that MSPA could be utilized to defeat an ALRB backpay/reinstatement order directed at a labor contractor. (Brief of Gordon & Marrs as *amicus curiae*, dated January 22, 1985, p. 6, fn. 8.) It would appear that the same advice was given to the Respondent. (See, III:11, 21, 32.)

MSPA defines an "farm labor contractor" as:

> "...any person, *other than an agricultural employer*, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contacting activity." (*emphasis supplied*) (29 U.S.C. §1802(7).)

Farm labor contracting activity includes "...recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker." (29 U.S.C. §1802(6).)

An "agricultural employer" is:

> "...any person who owns or *operates* a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires employs, furnishes, or transports any migrant or seasonal agricultural worker." (*emphasis supplied*) (29 U.S.C. §1802(2).)

The words "or operates" have been interpreted to include agricultural management companies who do not own the properties they farm but who do, pursuant to contracts with owners, perform all cultural operations on those properties. (*Mendoza v. Wight Vineyard Management* (9th Cir. 1986) 783 Fed.2d 941.)

How is one to classify a hybrid like Bertelsen? For some clients he performs all cultural practices and therefore qualifies, under *Mendoza*, as an "agricultural employer"; for others, he performs only some cultural operations and thus presumably acts as a "labor contractor".

There are three possibilities: (1) he is an agricultural employer for all purposes; (2) he is a labor contractor for some purposes and an employer for others; or (3) he is a labor contractor for all purposes. The wording of the statutory

definitions suggests the first possibility--that he is an agricultural employer for all purposes. The qualification that a contractor be someone "other than an agricultural employer" indicates that one cannot be a contractor once he is found to be an employer and, further, that one cannot be both a contractor and an employer--the two being mutually exclusive.

That is not, however, the position of the Department of Labor. In Administrative Opinion WH-522 (April 23, 1984), the Department addressed the status of grove care contractors who perform farming operations for fruit grove owners, and, anticipating *Mendoza*, advised that those who perform all farming operations prior to harvest would be considered "agricultural employers". The Opinion then goes on to say:

> "However, if such a grove care contractor engages in harvesting operations in any grove where he did not perform all the farming operations required prior to harvest he will be considered a farm labor contractor and must comply with the registration requirements under MSPA."

The only support cited for that interpretation was the Senate's Report on the earlier Farm Labor Contractor Registration Act (FLCRA), which had accepted the Department's position that grove care contractors who perform all farming operations prior to harvest are farmers and not labor contractors. (Senate Report 93-1235, *2nd Session*, p. 7, *reprinted* in 1974 U.S.Code Cong. & Admin. News, at pp. 6441, 6447.) The Report says nothing about the status of dual capacity operators, like Bertelsen.

Nor has the Secretary of Labor's position that they are to be considered labor contractors gone unchallenged. In the

matter of *Lawrence Peters d/b/a Fresno Ag Services*. Case No. 87-MSP-00016 (September 21, 1988) (*In evidence as G.C.Ex. 14*), a Department of Labor Administrative Law Judge held that a farmer who derived 67.5 percent of his income from labor contracting activities was nevertheless an "agricultural employer" because he also farmed an 80 acre vineyard/orchard of his own. In reaching this conclusion, the ALJ relied on the definitions, described above, the legislative history of MSPA, described below, and the reasoning of the Court in *Mendoza v. Wight Vineyard Management*, supra.

In determining the weight to be given to the Department's Administrative Opinion, it must be remembered that an interpretation by the administering agency is helpful, but not necessarily controlling. As the 9th Circuit explained in *Brock v. Writers Guild of America. West, Inc.* (1985) 762 Fed.2d 1349, 1353 & 1357:

> "In construing a statute in a case of first impression, we look to the traditional signposts of statutory construction: first, the language of the statute itself (see *North Dakota v. United States,* 460 U.S. 300, 312 (1983); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)); second, its legislative history (see *Heckler v. Turner,* 470 U.S. 184, 194 -95 (1985)), and as an aid in interpreting Congress' intent, the interpretation given to it by its administering agency (see *Heckler v. Turner*, supra; *Winterrowd v. David Freedman & Co.. Inc.,* 724 F6d.2d 823, 825 (9th Cir. 1984).
>
> "....
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> "....We consider the Secretary's regulations as an aid in interpreting Congress' intent, but they are not binding on us. *Donoyaji v. Sailors' Union of the Pacific*, 739 Fed.2d 1426, 1429 (9th Cir. 1984), cert. denied, 471 U.S. 1004 (1985). The Secretary's administrative regulations will not remedy a lack of statutory authority for his claim. As the Supreme Court

> has observed: 'The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the Statute.' *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)." (See also: *Bresgal v. Brock* (9th Cir. 1987) 833 Fed.2d 763, 766-67.)

And, as the Supreme Court explained in *Skidmore v. Swift* (1944) 323 U.S., 134, 140:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

It is also true that advisory opinions are probably not entitled to as much weight as formal regulations. (See: O'Reilly, Administrative Rule Making (1987) §17.04, pp. 339-341.)

The legislative history of MSPA is helpful in chosing between the interpretation suggested by its statutory definitions and that offered by the Secretary of Labor. One of Congress[1] specific concerns was a problem which had been created by the expansive definitional structure of its predecessor, the Farm Labor Contractor Reporting Act. Under FLCRA, a farm labor contractor was broadly defined as:

> "...any person who, for a fee, either for himself or on behalf on another person, recruits, solicits, hires, furnishes, or transports migrant workers...for agricultural employment. (78 Stat. 920(b).)

An exception was then made for:

> "...any farmer, processor, earner, ginner, packing shed operator or nurseryman who personally engaged in any such activity for the purpose of supplying migrant workers *solely for his own operation." (emphasis supplied*) (78 Stat. 920(b)(2).)

Confronted with that language, the Department of Labor and the Courts invoked the rule that an exception to a remedial statute is to be narrowly construed and held that farmers who occasionally or incidentally used their employees to assist other farmers were required to register as labor contractors, even though they had none of the transient, "fly-by-night" traits which had led to the abuses at which the statute was aimed. The House Report on MSPA explains the problem:

> "Through the definitional structure of FLCRA, agricultural employers and associations who engage in certain statutorily described activities have been held to be farm labor contractors unless they have been specifically exempt under that Act. This structure of coverage and its attendant consequences has been the source of strong employer objections and constant litigation, and coupled with certain ambiguous terms has caused numerous anomalous situations....The uncertainty created by this structure, as to what liabilities attach to which growers, and when, has produced fustration and resentment in the grower community. Once a grower or association has been found to be covered under the Act some of the liabilities which attach as a result of such coverage are ones which were originally designed with the characteristic of the transient crewleader in mind, and which, when applied to a stationary employer produce needless paperwork and added administrative expense unnecessary for the effective and purposeful enforcement of the Act." (House Report No. 97-885, 2nd *Session*, p. 3, *reprinted* in 1982 U.S.Code Cong. & Admin. News, at pp. 4547, 4549.)

In order to correct the situation and, at the same time, address "the historical pattern of abuse and exploitation of migrant and seasonal farm workers" (*Id*. at p. 4549), Congress did two things:

First, it narrowed the registration requirement--and, along with it, the restriction on the employment of aliens--by making it clear "that neither an agricultural employer nor his employees nor an agricultural association nor its employees are to be considered as farm labor contractors for any purposes under this Act" (*Id*. at p. 4554.), thus excusing "stationary employers" from the "needless paperwork and added administrative expense" which had been "designed with the characteristic of the transient crewleader in mind." (*Id*. at p. 4549.) Second, it expanded the coverage of the Act by adding provisions for worker protection (sanitary housing, vehicle safety, disclosure, etc.) and by making them applicable not only to labor contractors but also to agricultural employers and associations.[19] So it was that a Farm Labor Contractor Registration Act became a Migrant and Seasonal Worker Protection Act.

The legislative history thus points to an interpretation of MSPA which takes into account the desire of Congress to exempt from registration those farmers whose operations are stationary

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[19]This fundamental change in statutory coverage disposes of Respondent's argument that MSPA's definition of an "agricultural employer" should be read narrowly because exclusions from remedial statutes are to be strictly construed. (Resp. Post Hearing Bf., pp. 7-8.) Agricultural employers are not excluded from MSPA [as they had been from FLCRA]; they are simply covered by separate Sub-chapters of the same legislation. (*See*; Subchapters II, III & IV of MSPA, 29 U.S.C. §§ 1821-1822, 1831–1832, 1841–1844.) Therefore, since this is not a situation involving exclusion from statutory regulation, the rule of interpretation relied upon by the Respondent is inapposite.

and stable. That intent is best realized by an interpretation which recognizes that those who farm their own property or perform all cultural practices for others have achieved agricultural employer status and are not to be deprived of that status simply because, in addition, they act as labor contractors.

The Secretary of Labor's Administrative Opinion to the contrary relies on an earlier statute (FLCRA) with which Congress had grown dissatisfied and whose legislative history did not actually address the status of dual capacity operators like Bertelsen. And it has been repudiated by one of the Department's own Administrative Law Judges. (*Lawrence Peters d/b/a Fresno Ag Services*., supra.) As such, it lacks the thorough consideration, persuasive reasoning, and intra-departmental unanimity about which the Supreme Court spoke in *Skidmore v. Swift*, supra, when it described the circumstances in which deference should be accorded the interpretations of an administering agency.

The Administrative Law Judge who rejected the Department's interpretation and accepted the one described above also rejected its "fall-back" argument that a farmer's status as a labor contractor or an agricultural employer should turn on whichever activity predominates. He observed that there was nothing in the legislative history to support such a test and that it would, in fact, run contrary to Congress' desire to exempt farmers who had stationary locations and stable contacts within

the community.[20] He also considered the argument, which Bertelsen makes, that holding a contractor's license establishes one as a labor contractor, pointing out that, to protect himself, a farmer

> "...might very well register...whether or not he was significantly engaged in farm labor contracting activity ....Therefore, mere registration can be accorded no particular significance. Moreover, the fact that the defendant registered as a farm labor contractor does not alter the fact that he is 'an agricultural employer' within the "meaning of the Act." (*Lawrence Peters d/b/a fresno ACT Servi ces*., *supra*. p. 4 .)

Bertelsen, who farms land of his own, who performs all agricultural operations on 15%-30% of the acreage he services, who has been in business for many years at the same location, and who has extensive and stable contacts in the San Joaquin Valley agricultural community, is not the sort of farmer Congress intended to include in Subchapter I of MSPA. A reading of the definition of "agricultural employer" to include dual capacity operators like him is therefore more consistent with Congressional intent. AS an agricultural employer, he may not "be considered as [a] farm labor contractor...for any purposes under the Act." (H.R. 97-885, supra, 1982 U.S. Code Cong. & Admin. News, at p. 4554.) He was therefore exempt from the prohibition against employing aliens not entitled to work in the United States. That being so, the discrim-inatees are in exactly the same position as any other undocumented workers. Under *Rigi Agricultural Services. Inc. supra*, they are

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[20]He did indicate, however, that a farmer whose "employer" operations were insignificant or de minimus could properly be required to register as a "farm labor contractor".

entitled to the full range of Board remedies, including backpay.[21]

B.

Respondent's assertion that Federal law overrides and pre-empts the Board's Order in 12 ALRB No. 27 must also be tested against section 521 of MSPA which provides:

> "This chapter [MSPA] is intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." (29 U.S.C. §1871.)

This provision applies to all "persons" covered by the statute, and would therefore come into play even if--contrary to the conclusion reached in the preceding section--Respondent were considered to be an "agricultural labor contractor" and not an "agricultural employer".

The purpose and function of section 521 is to ensure--to the extent possible--that State law and regulation be allowed to co-exist with Federal law. (See, *California Federal Savings and Loan Association v. Guerra* (1987) 479 U.S. 272, 107 S.Ct. 683, 690-91.)

But is co-existence here possible? Or is this a situation where State regulation must yield because it is in actual conflict with Federal law either because "...compliance with both Federal law and state regulations is a physical impossibility," (*Florida Lime and Avacado Growers. Inc. v. Paul* (1963) 373 U.S.

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[21]Indeed, since 13 of the 14 discriminatees were legally present in the United States because of their pending requests of asylum, they would probably be entitled to backpay even under a *Sure-Tan* analysis. (*Sure - Tan. Inc. v. NLRB* (1984) 467 U.S. 883.)

132, 14.2-43; *Fidelity Federal Savings & Loan v de la Cuesta*. (1982) 458 U.S. 141, 153), or because State law stands "...as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Hines v. Davidowitz* (1941) 312 U.S. 52, 67; see, *Michigan Canners & Freezers Assn.. Inc. v. Agricultural Marketing and Bargaining Bd*. (1984) 467 U.S. 461, 478.)

To the Respondent, the conflict is obvious and irreconcilable: To reinstate crew members not authorized to work in the United States is to violate section 106(a) of MSPA. To the General Counsel, on the other hand, there is no actual conflict because the portion of the Board's Order for which enforcement is sought concerns backpay, not reinstatement. The Respondent is merely being required to make crew members whole for their financial losses; there is no attempt to compel their re-employment.[22]

Neither side has it quite right. Reinstatement is an issue, but not in the way the Respondent characterizes it. What is at stake is the well established doctrine that an employer may limit the backpay it owes by making an unconditional offer of reinstatement to the workers it has discriminated against. (*Abatti Farms. Inc*. (1983) 9 ALRB No. 59, pp. 7, 15.) If an employer were deprived of the right to avail itself of that doctrine, the result would be the continuing accrual of backpay. If, on the other

[22]Indeed, if reinstatement were being sought, the proper forum would be the Superior Court under Lab. Code §1160.8, not a supplementary backpay proceeding under section 20290 of the Board's Regulations.

hand, the General Counsel were seeking to enforce a reinstatement order against the employer, the result would be quite different. There would be a return to work, not a continuing accrual of backpay. The difference in result is crucial in determining whether there is an actual conflict between the relief here sought and the provisions of Federal law. Section 106 of MSPA makes it illegal to employ aliens who are not authorized to work in the United States, but it says nothing about their backpay. Therefore, while the enforcement of a reinstatement order might well conflict with section 106, no such conflict is presented by the continuation of backpay liability which results when an employer is denied the right to offer reinstatement to aliens it has discriminated against. Under those circumstances, Federal preemption does not come into play because it is possible to award backpay without violating MSPA's hiring requirements (*Florida Lime aqd Avacado Growers. Inc. v. Paul, supra*), and because a backpay award stands as no obstacle to the enforcement of MSPA's hiring requirements (*Hines v. Davidowitz. supra*); rather, the award serves to reinforce those requirements by refusing to excuse labor contractors who have violated MSPA from their liabilities under State law. (See, *Local 512 Warehouse and Office Workers' Union v. NLRB* (9th Cir. 1986) 795 Fed.2d 705, 720.)

That is not to suggest that an employer's right to limit backpay by offering reinstatement is lightly to be dispensed with. It has been part and parcel of labor law since the early days of the Wagner Act (see, *Hopwood Retinning Company. Inc.* (1938) 4 NLRB 922, 941), and it is based on the fundamental notion that civil

damages should terminate once the wrongdoer has undertaken to restore the victim to the status he or she formerly occupied. My point is only that the withdrawal of that right does not run afoul the Supremacy Clause.

That being so, it is permissible to ask whether, given the unusual circumstances of this case, there is sufficient justification for preventing--or, as the General Counsel puts it, estopping--the Respondent from exercising its normal right to terminate the accrual of backpay by offering reinstatement.

The conclusions reached in Section E of the Findings of Fact (pp. 20-21, *supra*), which are based on the detailed findings in Sections C and D (pp. 10-20, *supra*), persuade me that the Respondent's conduct does warrant the restriction of its right to invoke MSPA's policy against the employment of unauthorized aliens as a means of limiting backpay. There is, first of all, the fact that its new documentation requirement, coming as it did after years of indifference to the requirements of MSPA and on the heels of an ALJ order recommending backpay, was adopted for the obvious purpose of defeating an anticipated backpay award. Secondly, as soon as the Respondent felt it had rid itself of liability to the discriminatees, it ignored its new requirement and reverted to its former practice of hiring and rehiring workers without bothering to find out whether they were authorized to work in the United States.

To permit the Respondent to terminate backpay under those circumstances would, in the first instance, sanction the deliberate use of one farmworker protection statute—MSPA--to

defeat another--the ALRA--and thereby contravene the requirement of section 521 that MSPA be construed in *pari* materia with State statutes so as "not [to] excuse any person from compliance with appropriate State law and regulation." (29 U.S.C. §1871.)

As for the second factor--disregard of the new requirement and reversion to former practice--it resulted in the discriminatees receiving nothing, while later applicants with the same legal debilities[23] received all the emoluments of employment. The consequence of treating the discriminatees one way and applicants who followed them another was a disparity based solely on the discriminatees' involvement in concerted activity and their participation in Board proceedings. To permit that disparity to stand would offend a core policy of the ALRA guaranteeing employees "the right...to engage in...concerted activities for the purpose of...mutual aid and protection" (Lab. Code §1152), and it would run contrary to the policies expressed in section 1153 (a) and (d) making it an unfair labor practice to violate section 1152 and forbidding discrimination against workers who participate in Board proceedings. The only way to avoid such a result and ameliorate the disparity in treatment without violating MSPA is to restrict Bertelsen's right to invoke the doctrine that backpay terminates when reinstatement is offered.

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[23]Indeed, it is likely that some of the applicants who were later hired without having their documents checked were not even authorized to be in the United States, let alone to work here.

There are circumstances where it would be improper to permit the continuing accrual of back pay because the amount awarded would be speculative (*Sure-Tan. Inc. v. NLRB* (1984) 467 U.S. 883, 905), or because it would be punitive or unrelated to to the purposes of the Act. (See, *Republic Steel Corp. v. NLRB* (1940) 311 U.S. 7, 9-12; *NLRB v. Seven-Up Bottling Co.* (1953) 344 U.S. 344, 348-49; *Laflin & Laflin v. ALRB* (1985) 166 Cal.App.3d 368, 380.) But that is not a problem here. The amount of backpay is not speculative because there is no difficulty in ascertaining when the discriminatees would have worked and what they would have earned during 1986 and 1987. As for the date on which backpay terminates, there is nothing speculative about it. All parties agree that backpay properly terminated June 1, 1987, when the crew members qualified for Temporary Resident Status under the new Immigration Act (IRCA) and received a reinstatement offer which they were then able to accept, (III:2.)

Nor is such an award punitive or unrelated to the purposes of the ALRA. Depriving Bertelsen of its right to cut off backpay by offering reinstatement is, as pointed out above, the only way to eliminate the disparate treatment of the discriminatees bcised on their involvement in protected concerted activity and their participation in Board proceedings. As such, it is a measured and appropriate means of effectuating the polices expressed in § 1152 and §§ 1153(a) and (d).

Because the circumstances of this case are unique, it is a proper situation for the exercise by the Board of its well recognized discretion to modify its normal remedial rules "...as a

means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge." (*Sure-Tan v. NLRB supra*, 467 U.S. at 902; see, *Carian v. ALRB* (1984) 36 Cal.3d 654, 673-74; *NLRB v. J.H. Rutter-Rex Mfg. Co*. (1969) 396 U.S. 258, 262-63; *Nathansnn v. NLRB* (1952) 344 U.S. 25, 29-30.) Restricting Bertelsen's use of the doctrine which permits an employer to terminate backpay by offering reinstatement does just that. And it does it without creating a conflict between State and Federal regulation.

C.

During the prehearing and hearing phases of the case, the Respondent relied primarily on the inability of the discriminatees legally to accept the reinstatement offer which it made on March 19, 1986, as the basis for terminating backpay. In so doing, it left open the question of backpay for the period prior to the offer. In its post hearing brief the Respondent all but abandoned its earlier theory and, instead, argued that the discriminatees were, from the beginning, disqualified from employment. It was not their legal inability to accept reinstatement which terminated backpay, but their unauthorized status when they were originally terminated.

While that approach would eliminate every bit of backpay and while it is probably more consistent with the Respondent's analysis of MSPA, it renders any argument for pre-emption even more attenuated because it places Respondent in the position of claiming that a pure backpay order--one which has nothing to do with reinstatement or with the doctrine that an offer of

reinstatement can be used to cut off backpay--is pre-empted.

It has already been pointed out that there is no actual conflict: between an award of backpay to aliens not authorized to work in the United States and a prohibition against their employment. (Supra, Section B, pp. 31-33.) Receiving money and receiving a job are two different things. That distinction is even clearer where there is no offer of reinstatement to cloud the issue.

Respondent seems to be arguing that the payment of backpay to aliens would subvert the purpose of MSPA's prohibition against employing them. (*Resp. Post Hearing Brief*, p.11.) It forgets that section 106 is directed at employers, not employees. Its aim is to forbid, and thereby deter, "fly-by-night" labor contractors from exploiting undocumented workers. To say that that purpose would be achieved by excusing the offending contractors from liability under State law makes no sense. They are far better deterred if they know that their misconduct under Federal law cannot be used to excuse their obligations under State law. (See, *Local 512 Warehouse and Office Workers' Union v. NLRB. supra*, 795 Fed.2d at 720.)

Thus, it is fitting and appropriate that all of the discriminatees be awarded backpay, as the Board ordered, from the date of their original discharge. At that time, the Respondent was hiring workers without making any effort to determine whether they were authorized to work in the United States. To deny backpay at that point would therefore create the same disparity based on their involvement in protected concerted activity which

recurred later on when Bertelsen began ignoring its new documentation policy. (*Supra*, Section B, pp. 34-35.)

D.

Even if the Respondent were able to overcome all of the obstacles described in the preceding sections, there would still be a serious problem with its claim to have acted properly when it refused to reinstate the members of the Trevino crew who failed to present proof that they were authorized to work in the United States.

The Respondent has the burden of proving not only that its offer of reinstatement was clear and unequivocal, but also that it acted reasonably when it denied reinstatement. And any uncertainty is to be resolved against it. (*Maggio-Tost ado. Inc.* (1978) 4 ALRB No. 36, ALJD p. 3; *O.P Murphy Produce Co.. Inc.* (1982) 8 ALRB No. 54; *NLRB v. Flite Chief. Inc.* (9th Cir. 1981) 640 Fed.2d 989; *J.H. Rutter Rex Manufacturing Co*. (1971) 194 NLRB 19.) What is reasonable depends on the circumstances of each case. (*Abatti Farms. Inc.. supra*.) For example, it is unreasonable for an employer to refuse to reinstate a discriminatee who needs some additional time to recover from an illness or an injury. (*Murray Products, Inc*. (1977) 228 NLRB 268, fn.8, enforced, 584 Fed.2d 934 (9th Cir. 1978); *Greyhound Taxi Co.* (1985) 274 NLRB 459, 470; see generally, *Fredeman's Caleasieu Locks Shipyard* (1974) 208 NLRB 839.)

Here, there is no difficulty with the terms of the written offer; it was clear and unconditional. The issue is

whether supervisor John Curiel acted reasonably when he turned the discriminatees away. The circumstances leading to their rejection and the manner in which it was accomplished have already been considered. (Findings of Fact, *supra*, pp. 11-16.) The critical findings are that an INS representative had advised Bryan Bertelsen that the crew members should return to the Los Angeles INS Office and request permission to work. But Curiel did not convey that information to them; instead, he refused them re-instatement while leaving open the possibility that employment would be available if they eventually obtained work authorizations. He did not go on to tell them how to go about it, even though Bertelsen knew what needed to be done.[24]

In its Post Hearing Brief and in questioning the discriminatees at the hearing, the Respondent took care to point out that they did not follow through and "take their documents to the INS to get them stamped." (*Resp. Post Hearing Brief*, p.10.) Had the Respondent not been told by the INS what they needed to do, its point would be well taken. Here, however, it possessed information which would materially assist the workers it had discriminated against in meeting the conditions for reinstatement it had just imposed. Under those circumstances, it is reasonable and appropriate to require that it disclose that information to them.

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[24]That Curiel himself may have misunderstood or been ignorant of the import of the advice given Bryan by the INS is irrelevant; it is Respondent's awareness which is controlling.

Had Curiel told them that a representative of the INS had advised that they return to its Los Angeles Office and had he encouraged them to do so by carrying out Bryan's instructions to let them know that "[W]e want to hire [them] and make it known that all they need do is have a stamp on their letters" (III:42), it is much less likely that they would abandon their efforts, as they did, based upon the justifiable impression that his comments were nothing more than a cover for the continuation of the discrimination which had earlier been practiced against them. (Findings of Fact, *supra*, pp.15-16.) Furthermore, there is every reason to believe that, had they returned to the Los Angeles INS Office, the needed authorizations would have been forthcoming. The INS Regulations then in effect provided that "...any alien who has filed a non-frivolous application for asylum...may be granted permission to be employed for the period of time necessary to decide the case." (*Emphasis supplied*) (8 C.F.R. §109.l(b)(2) (1981), 46 Fed.Reg. 25,081 (May 5, 1981); see also 8 C.F.R. §208.4.)[25] That is not a demanding standard[26]; and, in applying it, the Courts have in most instances upheld the right of aliens to work while their applications are pending. (*Diaz v. INS* (E.D.Cal. 1986) 648 F.Supp. 638; see, *Alfaro-Orellana v. Ilchert*

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[25]The current regulations are to be found at 8 C.F.R. §§274a.l2(c)(8) and 274a.13.

[26]According to the INS, a "frivolous" application is one "with little weight or importance, not worth noting, slight, given to trifling, marked with unbecoming brevity, [or] patently without substance." (Interpreter Releases, p. 522 (June 29, 1984).)

(N.D.Cal. Aug. 18, 1989) 720 F.Supp. 792 (decided under current regulations, but relying on *Diaz*); but see, *John Doe I v. Meese* (S.D.Texas 1988) 690 F. Supp. 1572 (more restrictive interpretation of the current regulations.); see generally, *INS v. Ca.r6.oza-Fonseca* (1987) 480 U.S. 434.)

There is, of course, always an element of uncertainty in knowing what would have happened if one had taken the road not chosen. But where, as here, those uncertainties were created by the conduct of the Respondent, it is the Respondent against whom they will be resolved. (*Abatti Farms. Inc., supra*; *Kyutoku Nursery. Inc*. (1982) 8 ALRB No. 73; *Robert H. Hickam* (1983) 9 ALRB No. 6.) That being so, Bertelsen's failure to disclose material information to the discriminatees who attempted to accept its reinstatement offer taints that offer, invalidating it as a means of terminating the accrual of backpay.

E.

Based on the Conclusions of Law reached in Sections A, B, C and D above, the 13 discriminatees who were entitled to remain in the United States while their applications for asylum were being processed, but who were without authorization to work while they were waiting, are all entitled to backpay from the date they were discharged, January 31, 1985, until June 1, 1987, when they qualified for Temporary Resident Status under the Immigration Reform and Control Act of 1986 and received reinstatement offers which they were able to accept.

The parties stipulated that the amounts alleged in the

Specification accurately reflect the net backpay due those discriminatees. (I:5.) I therefore recommend that the Board direct that the Respondent, Phillip D. Bertelsen, its officers, agents, successors, and assigns, pay to each of them the amounts set forth opposite their names below, plus interest until the date of payment calculated in accordance with the Board Decision in *E. W. Merri11 Farms* (1988) 14 ALRB No.5:

1. Jose Arias	$6,330.72
2. Faustino Carrillo	$3,343.25
3. Miguel Carrillo	$3,265.21
4. Rafael Carrillo	$3,694.67
5. victor Enamorando	$3,121.42
6. Gloria Telma Escobar	$5,267.20
7. Jose Escobar	$3,601.21
8. Elena Lopez	$6,030.93
9. Daniel Pena	$3,568.22
10. Hector Pena	$3,347.61
11. Maria G. Perez	$4,922.53
12. Elias Rivas	$4,683.64
13. Guadalupe Rodas	$5,291.39

The one remaining discriminatee, Maximino Cerna, did not attempt to respond to the reinstatement offer which was made by the Respondent on March 19, 1986, and so the General Counsel properly terminated his backpay on April 1, 1986, the deadline for acceptance of that offer. His entitlement to backpay, therefore, rests on the Conclusions of Law reached in Sections A and C above--conclusions which are not bound up with the Respondent's conduct toward the discriminatees who did attempt to accept the offer. Cerna's status also differs from the other discriminatees in that he was not authorized to remain in the United States [although, like the others, he subsequently applied for and received Temporary Resident status under IRCA]. While that difference

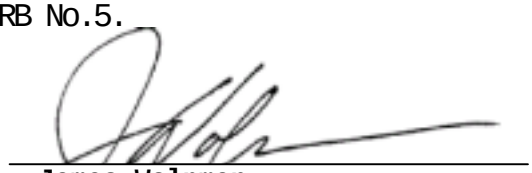
might well be significant if the Supreme Court's holding in *Sur-Tan v. NLRB. supra,* were to apply, it makes no difference under the Boards decision in *Rigi Agricultural Services, Inc., supra*, which does apply to his situation. He is therefore entitled to backpay from the date he was discharged, August 24, 1984, until April 1, 1986.

In its Answer, the Respondent challenged the amount alleged as owing to him (G.C.Ex. 2, 2nd *Affirmative Defense*), and indicated at the Prehearing Conference that it would introduce evidence at the hearing to establish that he would not have worked during the orange harvests included in the Specification. (See, Prehearing Conference Order, p. 9.) In accordance with *Giumarra Vineyards* (1977) 3 ALRB No. 21, I directed the parties to provide each other prior to hearing with copies of all exhibits upon which they intended to rely at hearing (Prehearing Conference Order, ¶11); at the same time they were put on notice that failure to comply would be grounds for excluding such evidence under section 20240(e) of the Board's Regulations. (Prehearing Conference Order, ¶20.) In spite of this and without a showing of good cause, the Respondent failed to provide the General Counsel with copies of the payroll records upon which it planned to base its contention that Cerna would not have worked during the orange harvests. (II:6-9.)

Because Respondent's failure to provide those records prior to hearing interfered with the orderly progress of the hearing and impaired the right of the General Counsel to rebut those records, I excluded them from evidence. (11:9, 72-74;

Ukegawa Brothers (1982) 8 ALRB No. 90, pp. 6-7.) Based on the General Counsel's *prima* facie showing that backpay was due Cerna in the amount alleged in the Specification (11:117-118), I therefore recommend that the Board direct that the Respondent Phillip D. Bertelsen, its officers, agents, successors, and assigns, pay to Maximino Cerna the amount of $3680.03, plus interest until the date of payment, calculated in accordance with the Board Decision in *E.W. Merritt Farms* (1988) 14 ALRB No.5.

Dated: December 19, 1989.



James Wolpman
Chief Administrative Law Judge