Carlsbad, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a general partnership; and UKEGAWA BROTHERS, INC., a corporation, Respondents and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	Case Nos. 75-CE-59-R 75-CE-59-A-R 76-CE-18-R 76-CE-18-A-R 76-CE-49-R 16 ALRB No. 18 (8 ALRB No. 90) (14 ALRB No. 15)

SUPPLEMENTAL DECISION AND ORDER

On February 26, 1990, Administrative Law Judge (ALJ) Thomas Sobel issued the attached Supplemental Decision and recommended Order in this proceeding. Thereafter, Respondent Ukegawa Brothers (Partnership) and Respondent Ukegawa Brothers, Inc. (Corporation) each timely filed exceptions to the ALJ's Decision with briefs in support of their exceptions, and General Counsel filed a brief in response to the exceptions of Respondent Corporation.

The Agricultural Labor Relations Board (ALRB or Board) has considered the ALJ's recommended Decision in light of the record and the exceptions, responses, and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and

conclusions, and to adopt his recommended Order.

The Backpay Formula

There is disagreement between General Counsel and Respondents as to the proper formula for determining the amount of backpay the discriminatees would have earned but for Respondents' conduct in violation of Labor Code section 1153(c) in response to the discriminatees' union activities.[1/]

General Counsel proposes that the appropriate formula is one which calculates backpay according to the earnings of the discriminatees in the period of their employment preceding the unfair labor practices. Respondents, on the other hand, contend that the most satisfactory formula is one which is based on the earnings of a comparable or replacement employee during the backpay period.[2/]

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

[2/] In the underlying liability phase of this proceeding, the Board found that Respondent had engaged in unfair labor practices by failing or refusing to rehire 34 former employees in retaliation for their activities on behalf of the United Farm Workers of America, AFL-CIO (UFW or Union). The Board also found that additional employees had been discriminatorily demoted or terminated for similar Union activities. (Ukegawa Brothers (1982) 8 ALRB No. 90.) Although the Board also found in that case that Respondent had engaged in independent violations of section 1153(a), those matters are not in contention in this supplemental proceeding. Virtually all of the conduct in question herein occurred in 1976 as a response to the employees' participation in the Union's organizational drive contemporaneously with the effective date of the Agricultural Labor Relations Act (ALRA or Act), and concerns a total of approximately 40 discriminatees.

The actual earnings of employees in a period prior to their discharge is the formula most often used by the National Labor Relations Board (NLRB or national board) in determining the amount of backpay due discriminatees. In Chef Nathan Sez Eat Here, Inc. (1973) 201 NLRB 343, 345 [82 LRRM 1264], the NLRB's trial examiner described that formula as "the most fair, suitable, and equitable formula to employ, and should not be departed from in the absence of special circumstances . . . ." In now seeking to discredit General Counsel's approach to backpay, and perhaps implying that the very nature of agricultural employment is such that it poses a "special circumstance" sufficient to render a prior hours formula inherently inappropriate under the ALRA, Respondents first direct us to the NLRB's Compliance Manual wherein the national board cautions against use of the formula where the operations of the wrongdoing employer are seasonal. As expressed therein, the NLRB's concern is that if the violation occurred in a season of diminished productivity, "the average of employee earnings during such period would be inordinately low and result in failure to make the discriminatee whole." (NLRB Compliance Manual, sections 10538.2(c), 10540.)

Respondents next cite our decision in Bruce Church, Inc. (1983) 9 ALRB No. 19 as indicative of this Board's preference for a comparable or replacement employee methodology in agriculture. We pointed out in Pleasant Valley Vegetable Co-Op (1990) 16 ALRB No. 12 however, that the NLRB, with judicial approval, holds that "[i]n any case, there may be several equally valid methods of computation, each yielding a somewhat different result."

(Citations omitted.) Accordingly this Board, like the NLRB, enjoys wide discretion in backpay matters. (See, e.g., Jasmine Vineyards, Inc. v. ALRB (1980) 113 Cal.App.3d 968 [170 Cal.Rptr. 510].) General Counsel was not unaware of the NLRB's caveat concerning prior hours formulas, but contends that the method Respondents advance was simply not feasible because Respondents' payroll records lacked the information which, in General Counsel's estimation, would be essential in arriving at comparable or replacement employee calculations.

We decline, furthermore, to interpret our decision in Bruce Church, supra, as representing adoption of the comparable employee formula as the standard formula under our Act. Only one employee was involved in that case. He testified that but for the discrimination against him, he would have continued to work for Respondents in the same crops, at the same task, and in the same crew throughout the backpay period. The Board simply found that under those circumstances a more appropriate measure than one predicated on the discriminatee's history of prior earnings would be the actual daily earnings of a representative employee who worked in the same crew as the discriminatee would have in subsequent seasons.

Inasmuch as we concur in the ALJ's conclusion that General Counsel's formula is reasonable, it now becomes Respondents' burden to convince us that we should adopt their proposed alternative formula in lieu of General Counsel's formula. In our view, Respondents have not met their burden of proposing a

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more satisfactory backpay methodology.[3/]

The pivotal inquiry here has its genesis in the Order in 8 ALRB No. 90 wherein the Board, invoking the standard remedies in cases of discrimination under both the ALRA and the National Labor Relations Act (NLRA), directed Respondents to offer the discriminatees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and to compensate them for all wages and other economic losses from the date of the adverse discriminatory action to the date on which they are offered reinstatement.

An employer may seek to avoid a reinstatement order and/or toll the backpay period by attempting to demonstrate that, even in the absence of discrimination, positions which the discriminatees otherwise would have occupied have been eliminated for legitimate economic reasons.[4/] While an employer need not offer reinstatement to a position which no longer exists, the employer nevertheless is required to offer reinstatement to a

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[3/] Respondents also contend that their right to mitigate liability need not arise unless and until General Counsel has established the most accurate, and thus the only appropriate, backpay formula. We disagree. The ALJ has properly allocated the respective burdens of proof in compliance matters, holding that once General Counsel has set forth a reasonable backpay formula, the burden shifts to Respondents to demonstrate that they have proposed a more appropriate alternative formula.

[4/] Such a situation could arise, for example, following an economically motivated closure of a particular phase of an employer's operation where there was no work in other areas of the employer's operation for which the discriminatees were qualified. (See, e.g., John Van Wingerden (1981) 7 ALRB No. 30.)

substantially equivalent position or to one which the discriminatee is qualified to perform. A party seeking to overcome a Board reinstatement order bears a heavy burden of proving that the discriminatees could not have been retained in their former or substantially equivalent positions.

Here, however, Respondents submit only that they altered their hiring policies insofar as they eventually eliminated female field workers and significantly reduced the number of legal male employees in order to build an employee complement of field workers drawn primarily from a pool of undocumented males. As Respondents explain, they perceived a need to protect their 1975 production levels by insulating their workforce from "raids" conducted by the United States Immigration and Naturalization Service (INS) for the purpose of apprehending illegal aliens working in California agriculture. Accordingly, Respondents hired documented employees not susceptible to INS apprehension but at a wage differential of 25 cents an hour more than would have been required at that time to attract and compensate a work force comprised of undocumented employees.[5/]

With the decline of INS raids after 1976, Respondents began to rely more heavily on the lower-paid undocumented field workers except for a short time in 1979-80 when they leased a

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[5/] During that same period, Respondents continued to hire a significant number of undocumented field workers who "resided" in Respondents' fields and did not commute to work. Both male and female field workers with work authorizations routinely crossed the Mexico-California border to plant, cultivate and harvest various farm commodities for Respondents.

parcel of land in an area of continuing INS activity. Respondents contend that, as a result of diminished INS tensions during the backpay period, and therefore for nondiscriminatory reasons, they could and did take advantage of the "economic efficiency" of an undocumented work force which allegedly performed better work for less pay than would a work force comprised of documented employees. It is on that basis that Respondents now argue that positions for the documented discriminatees would not have been available during the backpay period, and therefore it is error to adopt a prior hours formula which assumes the continued availability of substantially equivalent employment. Respondents' argument is erroneous.

The ALJ found that Respondents had clearly failed to establish that during any quarter of the backpay period the amount of work which was performed in Respondents' fields was significantly less than in the pre-discrimination period. Our own review of the relevant evidence comports with the ALJ's assessment. Thus, Respondents have failed to prove a reduction in the amount of work overall or, in particular, in the type of work which the discriminatees would have performed in the absence of the discrimination against them. Respondents continued to farm various agricultural commodities in the same locale utilizing the same employee skills and techniques as they did prior to their discrimination. Respondents do not contend that the discriminatees were not qualified or competent to perform that

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work which was available.[6/]

Given our finding that Respondents have failed to demonstrate any diminution in the availability of the type of work which the discriminatees had previously performed, or could have performed, Respondents' subsequent preference for hiring primarily undocumented workers during the backpay period because they assertedly are more efficient and less costly is irrelevant. Equally unavailing is Respondents' asserted "business justification" defense for what in reality was a decision to eliminate an entire category of employees on the basis of their immigration status alone rather than the legitimate phasing out of certain work classifications.

Alter Ego Relationship

Partnership and Corporation join in excepting to the ALJ's findings that (1) their Writ of Review challenging the

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[6/] Respondents submit that neither General Counsel nor the ALJ would have been satisfied that they offered substantially equivalent employment to a discriminatee, as required by the Board's Order, were they to have made available work in a crew comprised of undocumented field workers, "where the discriminatee would have to work alongside undocumented workers and would receive the reduced wage rate paid to undocumented fieldworkers...." (Corporation's Brief at p. 58.) Respondents' view strikes us as highly speculative. Upon receipt of a firm, clear and unconditional offer of reinstatement, a discriminatee may make a choice, including whether to accept work at a lower rate of pay than he or she received prior to the unfair labor practice or during the backpay period. (Lyman Steel Co. (1979) 246 NLRB 712 [102 LRRM 1654]; Lipman Bros. Inc. (1967) 164 NLRB 850 [65 LRRM 1177].) Moreover, Respondents would seem to cast doubt on the correctness of their argument by simultaneously urging us to remain cognizant of the mitigation doctrine whereby a discriminatee may be required to "'lower his sights' and accept employment for which he is qualified, even at a lower rate of pay than his regular job." (Corporation's Brief at p. 49.)

Board's correction of clerical error in 8 ALRB No. 90 (14 ALRB No. 15) served to invite the Court of Appeal to reach and decide whether the two entities are alter egos of each other, (2) the court decided that issue affirmatively, and (3) since the court's resolution is now the law of the case, Respondents may not treat the matter concerning their relationship as an open question. (See Ukegawa Brothers v. ALRB (1989) 212 Cal.App.3d 1314 [261 Cal.Rptr. 420].) We need not determine whether there is merit in Respondents' exception because, even assuming the correctness of their view, we fail to perceive how resolution of the question would have a material bearing on the instant proceeding.[7/] It is undisputed that the Corporation is the successor employer to the Partnership, as the parties so stipulated.[8/]

[7/] While the decision of the Court of Appeal may lend itself to varying interpretations concerning the alter ego question, we call particular attention to a passage which appears at 212 Cal.App.3d at p. 1324 wherein the court stated:

> It is clear the corporation is the alter ego of the partnership and was not denied the opportunity to obtain review of the 1982 order [of the Board in 8 ALRB No. 90]. Nothing will be gained by letting Ukegawa further delay relief to the farmworkers through this court denying relief on the basis that the Board has not explicitly stated the partnership and the corporation are the same entity.

[8/] In the stipulation itself as well as in all subsequent references to the stipulation, the parties have been careful to denote the Corporation as the "labor law" successor to Ukegawa Brothers. In Golden State Bottling Co. v. NLRB (1973) 414 U.S. 168 [84 LRRM 2839] the court distinguished the doctrine of "labor law successorship" from the doctrine of successorship under general principles of corporate or business law.

In 1973 the United States Supreme Court held that a bona fide successor who has knowledge of a predecessor's unfair labor practices, or of merely the pendency of unfair labor practice proceedings, may be held liable for remedying the predecessor's violations. (Golden State Bottling Co. v. NLRB (1973) 414 U.S. 168 [84 LRRM 2839]; see also Gourmet Harvesting and Packing Inc., and Gourmet Farms (1988) 14 ALRB No. 9.) Moreover, an entity deemed an alter ego or successor incurs significant, although different, obligations when the predecessor employer either has entered into a collective bargaining agreement with an incumbent union or has incurred a pre-contract duty to bargain. An alter ego is often defined in the federal context as a "disguised" continuance of a former employer for the purpose of enabling the former employer to evade its established duty to bargain. Generally, in those situations, there has been neither a bona fide discontinuance of the former operation nor an arm's length transaction which causes the former operation to cease to exist. Thus, because there has been no real change of ownership and there is an existing collective bargaining agreement, the alter ego "successor" must adopt and continue to honor the contract. A successor, on the other hand, that is not an alter ego assumes only a duty to bargain with the incumbent union, but need not adopt an existing agreement. (See discussion and related cases in Gourmet Harvesting, supra, 14 ALRB No. 9.)

Either of the obligations discussed above could have meaning under our Act only if the employees of the predecessor employer were represented by a certified representative for the

purposes of collective bargaining. Since no election was ever held among Respondents' employees, there can be no exclusive representative with whom Respondents would have been obligated to bargain. Thus, the only question remaining is whether the Corporation had notice of the Partnership's violations of the Act so as to be held accountable for the Partnership's conduct.

A clear indication of such notice appears in Ukegawa Brothers v. ALRB, supra, 212 Cal.App.3d at p. 1315. There the court observed that during the unfair labor practice hearing in the underlying liability phase of this proceeding the Partnership reorganized as a closely held corporation with the same counsel representing both the Partnership and the Corporation in that hearing.[9/] Moreover, the same principals continued to operate and

control both entities, thereby establishing an additional indication of the successor's knowledge. (See Memphis Truck and Trailer, Inc. (1987) 284 NLRB 900 [126 LRRM 1326].) The existence of the requisite degree of knowledge necessary to satisfy the test of Golden State Bottling, supra, having been judicially determined, the Partnership and the Corporation are to be held jointly and severally liable for the Partnership's commission of the unfair labor practices which the Board found and remedied in

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[9/] We follow the principles of Golden State Bottling, supra, and the established rule that once an employer's successorship status is demonstrated, the burden is on the successor to show that it lacked knowledge of its predecessor's unfair labor practices. The NLRB does not consider itself constrained by a successor's denial of knowledge where reasonable inferences from the record as a whole support a contrary finding. (M & J Supply Co., Inc., et al. (1990) 300 NLRB No. 45.) We therefore conclude that knowledge by the successor's attorney of the predecessor's unfair labor practices satisfied the notice factor.

8 ALRB No. 90. (See, e.g., NLRB v. South Harlan Coal Co., Inc. (6th Cir. 1988) 844 F.2d 380 [128 LRRM 2182]; Proxy Communications of Manhattan, Inc. (1988) 290 NLRB No. 68 [129 LRRM 1175].)

In light of our finding regarding the liability of both entities for the same unfair labor practices, we reject Partnership's contention that it may be held responsible only for the backpay which accrued prior to the time it ceased operations. In M & J Supply Co., Inc., supra, the successor was ordered, inter alia, to offer reinstatement with backpay to former employees of the predecessor and to be jointly and severally liable with the predecessor for making those employees whole for losses incurred both before and after the date on which the change in ownership or operation occurred. Respondents' cited authority, Memphis Truck and Trailer, Inc., supra, does not hold otherwise. The manner in which the Respondents may choose among themselves to allocate their monetary liability is not a matter of Board concern.

Mitigation of Backpay

Once General Counsel has shown the gross amount of backpay due, i.e., the amount the employee would have received but for the employer's illegal conduct, "the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." (NLRB v. Brown & Root, Inc., (8th Cir. 1963) 311 F.2d 447, 454 [52 LRRM 2115].) The employer's burden, however, must be assessed in light of the oft-stated policy that "... the backpay claimant should receive the benefit of any doubt rather than the

respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." (United Aircraft Corporation (1973) 204 NLRB 1068 [83 LRRM 1616].)

Respondents do not quarrel with the ALJ's discussion of the numerous principles and standards which govern compliance proceedings, including the very general principles set forth above. Respondents, however, do except to the ALJ's application of certain of those principles to situations involving particular discriminatees as well as to the discriminatees as a whole. We find no merit in these exceptions. Essentially, Respondents argue anew that they eventually eliminated virtually all positions which the discriminatees had occupied prior to the unfair labor practices, thereby also eliminating the continued efficacy of the reinstatement and backpay provisions of the Board's Order. While we have previously rejected Respondents' theory, albeit in the context of a substitute formula, we are now required to evaluate it in light of the ALJ's finding that the employment of undocumented field workers during the backpay period establishes an adequate number of positions for the discriminatees.

It is not sufficient that Respondents simply aver that no "positions" were available. Their claim in that regard must be supported by enough credible evidence to permit Respondents to demonstrate that the discriminatees could not have performed field work as they had in the past because, for example, the nature of the work had changed sufficiently to render them no longer qualified. To the contrary, the record persuades us that Respondents had a continuing availability of the same type of

field work that the discriminatees had previously performed.

As a separate matter, with regard to one discriminatee, Respondents believe it was error for the ALJ to add to net backpay for a particular quarter expenses incurred in seeking interim employment during that same quarter since no interim earnings were received. Respondents acknowledge that this Board, unlike the NLRB, generally does not calculate backpay on a quarterly basis and therefore will usually compute expenses over the entire backpay period. Respondent also believes, however, that where, as here, General Counsel elects to adopt a quarterly basis, it should also follow the NLRB practice with regard to expenses.

The ALJ considered Respondents' position on this issue as presented to him during the hearing and in the post-hearing brief. He found that Respondents did not except to any features of the backpay specification affecting the particular discriminatee, but claimed only that they were prejudiced by "General Counsel's technique of adding travel expenses to gross backpay, and, at that, only when the technique results in backpay due when it would not be due under the NLRB's technique."[10/] After rejecting outright Respondent's contention that this Board should follow NLRB practice in all respects, the ALJ concluded that there was no foundation for the claim of prejudice since the discriminatee had interim earnings in each of the quarters during which Respondents claim his net backpay was increased by the technique which General Counsel followed. As he explained, "[s]o long as there

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[10/]The ALJ noted that the issue asserted by Respondents has meaning with regard to three quarters between 1977 and 1979.

are interims, it makes no difference whether they [i.e., expenses] are added to gross backpay or whether they are deducted from interim earnings."

Next, Respondents believe we are mandated by our decision in George Lucas & Sons (1984) 10 ALRB No. 6 to overrule the ALJ and direct the discriminatees to honor the subpoenas duces tecum served on them by the Corporation to produce the backpay-related documents requested therein, namely W-2 forms and various tax filings. The ALJ held that in order for Respondents to prevail, they must demonstrate either that the discriminatees have no privilege against disclosure or that such a privilege exists but was improperly invoked. We affirm the ALJ's findings that the matters are privileged against disclosure.

In Brown v. Superior Court (1977) 71 Cal.App.3d 141 [139 Cal.Rptr. 327] the court held that since W-2 Forms must be attached to both state and federal income tax returns, they constitute an integral part of such returns and thereby fall within the judicially created privilege against disclosure of tax returns. In so ruling, the court rejected the defendants' claim that they were entitled to examine tax-related information because of its relevance to plaintiff's claim that her injuries had caused her to lose income. (See Rev. & Tax Code, sec. 7056, former sec. 19282; see also Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal.3d 1 [123 Cal.Rptr. 283]; Webb v. Standard Oil Co. (1957) 49 Cal.2d 509 [319 P.2d 621].) In Lucas, supra, the ALJ held that since one of the discriminatees had voluntarily relinquished tax

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returns to General Counsel, he had waived any claim of privilege he might otherwise have asserted against further disclosure, and therefore was directed to honor respondent's subpoena duces tecum by returning to the hearing at a later date with the requested documents.[11/]

Finally, Respondents contest in whole or in part the ALJ's backpay award to certain named discriminatees on various grounds.[12/] However, these exceptions consist only of

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[11/]As to another discriminatee in the same case who allegedly had fraudulently concealed income earned in self-employment during the backpay period, the ALJ granted enforcement of respondent's subpoena, but only to the extent that the ALJ would first examine the documents in camera in order to determine whether disclosure was warranted. He ultimately concluded the documents were not relevant, and therefore were not discoverable by respondent. Upon appeal to the Board, respondent's exception to the ALJ's ruling with regard to the latter discriminatee was deemed within the Board's purview on the grounds that the subpoena had been issued in accordance with the Board's regulations and no effort to quash had been made. The Board concluded that, in the circumstances of that case, respondent had been prejudiced insofar as it had been precluded from obtaining evidence material to its burden of establishing wilful concealment of earnings. To the extent that Lucas, supra, is inconsistent with Brown v. Superior Court, supra, it is hereby overruled.

[12/]First, Respondents believe that since backpay in this case is calculated on either a quarterly or seasonal basis, all earnings of six of the discriminatees during the particular backpay quarter or season should be offset from gross backpay, even if those earnings were acquired at a time when no gross backpay is claimed. Respondents would exempt only those interim earnings which General Counsel succeeds in proving were the result of "excessive" overtime or a second job, that is, work which the discriminatee would have earned outside of regular employment with the wrongdoing employer. Next, Respondents point to ten discriminatees who it asserts should be required to forfeit their backpay award for the whole of any quarter in which it is demonstrated that they failed to make a diligent search for work or left the area for personal reasons and thus would not have been available to work for the wrongdoing employer even if such work

(fn. 12 cont. on p. 17)

Respondents' statement of numerous generalized principles of mitigation, followed with a mere assertion that the ALJ failed to apply, or misapplied, those principles. Respondents have not set forth with particularity material facts which would bring into question any of the ALJ's related findings. Moreover, our review of Respondents' briefs in support of exceptions to the ALJ's Decision, in light of the positions asserted at hearing as well as in post-hearing briefs to the ALJ, persuades us that all of Respondents' present concerns were considered and addressed by the ALJ in accordance with established Board precedent. Accordingly, we deem his findings free from prejudicial error and they, together with his rulings and conclusions, should be, and they hereby are, affirmed in their entirety.

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(Fn. 16 cont.)

had been offered to them. Five additional discriminatees are singled out for reductions in their backpay awards on the grounds that they voluntarily relinquished interim employment or were discharged, thereby incurring an allegedly wilful loss of earnings.

ORDER

Pursuant to the recommended Decision of the ALJ, General Counsel's specification is accepted as modified to conform with the ALJ's findings and conclusions. Respondents shall pay to the discriminatees herein the amounts provided in the specification as modified plus additional monies accruing to the date bona fide offers of reinstatement are tendered, plus interest thereon calculated in accordance with relevant Board precedent.

DATED: December 27, 1990

BRUCE J. JANIGIAN, Chairman[13/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[13/] 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

Ukegawa Brothers (UFW)

16 ALRB No. 18
Case No. 75-CE-59-R, et al.

Background

Between November, 1975 and September, 1976, the United Farm Workers of America, AFL-CIO (UFW or Union) filed five unfair labor practice charges in which it alleged that Respondent had engaged in independent violations of Labor Code section 1153(a) of the Agricultural Labor Relations Act (ALRA or Act) by interfering with employees' section 1152 rights and, in addition, had discriminated against a group of employees in violation of section 1153(c). Although the Union conducted an organizational effort among the employees in the fall of 1975, no petition for certification was filed. In its Decision in the underlying liability proceeding, the Board described Ukegawa Brothers as a four-person partnership comprised of two Ukegawa brothers and their wives which farmed primarily tomatoes, strawberries, and vegetable row crops on owned and leased land in northern San Diego County. The Board also identified the employee complement as mainly illegal aliens who lived in "crude housing of their own making adjacent to Respondent's cultivated fields" or Mexican nationals with legal immigration status who commuted to work from the Mexico-California border communities of Tijuana and San Ysidro. (Ukegawa Brothers (1982) 8 ALRB No. 90 at pp. 1-2.) Following a 90-day evidentiary hearing held between December 7, 1977 and September 1, 1978, the ALJ found incidents of surveillance and other forms of interference with employees' section 1152 rights, as well as a form of "class" discrimination towards all of the Tijuana residents who routinely crossed the border to work in Respondent's fields by changing its established practice of hiring such employees in order to make it difficult or impossible for them to apply for work in the customary manner. Those employees had been particularly active in the Union's organizational campaign. The ALJ also found that a number of other employees had been demoted or terminated in retaliation for similar Union activities. On December 17, 1982, the Board issued its Decision in Ukegawa Brothers, supra, 8 ALRB No. 90, in which it rejected certain of the ALJ's independent 1153(a) findings but affirmed others for which it ordered the standard cease and desist remedy. The Board also rejected her "class" discrimination theory with respect to the allegations concerning Respondent's failure to hire or rehire Tijuana residents. Relying instead on the Board's traditional approach to such issues and the standard elements of proof, and further examining the alleged violations of section 1153(c) on an individual or case-by-case basis, the Board concluded that General Counsel had proved by a preponderance of the evidence that 34 of the 48 alleged discriminatees had made proper applications for work at times when work was available but had been rejected for reasons proscribed by the Act. The Board ordered that they be

offered employment with compensation for all economic and other related losses, if any, arising from the unlawful denial of work. The Board also found that Respondent had discriminatorily discharged, demoted or transferred approximately six additional employees and awarded appropriate remedies. The Regional Director of the Board's El Centro Region issued an initial backpay specification and notice of hearing followed by an amended specification. All parties participated in the subsequent 21-day hearing on compliance.

Decision of the Administrative Law Judge on Compliance

In his Supplemental Decision following the Compliance proceeding, the ALJ found, inter alia, that General Counsel's methodology in measuring backpay was reasonable; Respondent failed to establish that it had reduced its work force so as to curtail the backpay period; the discriminatees' tax documents are privileged and thus are immune from discovery by Respondent; deductions or offsets for interim earnings are allowable only during those times when work would have been available to the discriminatees at the wrongdoing employer; and a two-year escrow holding period for backpay funds earmarked for missing discriminatees is reasonable in the agricultural setting.

Decision of the Agricultural Labor Relations Board

Upon review of the ALJ's Decision in light of Respondent's exceptions and General Counsel's brief in response, the Board decided to affirm the ALJ's rulings, findings and conclusions and adopt his recommended Order.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: HIROSHI UKEGAWA, MIWAKO UKEGAWA, JOSEPH UKEGAWA, and JUNE UKEGAWA, individually and doing business as UKEGAWA BROTHERS, a general partnership; and UKEGAWA BROTHERS, INC., a corporation, Respondents and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	Case Nos. 75-CE-59-R 75-CE-59-A-R 76-CE-59-R 75-CE-18-R 75-CE-18-A-R (8 ALRB No. 90) (14 ALRB No. 15) DECISION OF THE ADMINISTRATIVE LAW JUDGE

Appearances:

Stephanie Bullock
El Centro, California
for the General Counsel

Emilio Huerta and Laura Juaretche*
Keene, California
for Intervenor United Farm Workers of America, AFL-CIO

Theodore Scott, Esq.
San Diego, California
for Respondent Ukegawa Brothers, Inc.

William N. Sauer, Esq.
Carlsbad, California
for Ukegawa Brothers, Partnership**

Before: Thomas Sobel,
ADMINISTRATIVE LAW JUDGE

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* Although a representative of Charging Party - Intervenor was present during some of the hearing, Charging Party did not file a Post-Hearing Brief.

** Although the Partnership filed its own Answer to the Specification and was represented by its own Counsel on the first day of the hearing, it declined to participate further and specifically authorized the Corporation's counsel to represent the Partnership during the hearing. No brief was filed on behalf of the Partnership.

THOMAS SOBEL, Administrative Law Judge:

I.

INTRODUCTION

A. THE PARTIES

This case was heard by me on various days from November, 1988 through February, 1989. On December 15, 1982 the Agricultural Labor Relations Board ("ALRB") issued its Decision and Order in Ukegawa Brothers 8 ALRB No. 90. The Board's Order ran against Respondent Ukegawa Brothers, Inc., a corporation, even though the Board in its Decision specifically found Respondent to be "a four person partnership."

This discrepancy caused General Counsel to move for modification of the Order to run against the partnership which the Board did on November 18, 1988 when, on the grounds that the Order in 8 ALRB No. 90 was mistaken, the Order was modified to run nunc pro tunc against the partnership. See 14 ALRB No. 15. After issuance of the order in 14 ALRB No. 15, the corporation and the partnership stipulated that, if the Board's Order against the partnership was valid, then the corporation was the successor to the partnership.

The partnership took the primary position, however, and sought to stay the present proceedings, on the grounds that the Board's Order in 14 ALRB No. 15 was invalid. Unsuccessful in obtaining a stay, the partnership next sought review of the Board's Order pursuant to Labor Code section 1160.8 in the Court of Appeal.

The court affirmed the Board's Order. Ukegawa Brothers v. Agricultural Labor Relations Board (1989) 212 Cal.App.3d 1314. In doing so, however, the Court went farther than the Board, which had left the question of the relationship between the partnership and the corporation to subsequent proceedings. The Court found the partnership to be the alter ego of the corporation. By virtue of this conclusion, which was invited by the partnership's Writ of Review, and which is now law of the case, it is too late for the corporation to treat the question of the corporation's relationship to the partnership as an open one. See Post-Hearing Brief, p. 10, n. 3. The Board's order, which after 14 ALRB No. 15, ran only against the partnership, is now to be construed as running against the corporation as well. Accordingly, except where it is necessary to distinguish between claims made by the two entities, when I refer to Respondent in this case, I am referring to both entities.

B. PURPOSE OF THESE PROCEEDINGS

In its Decision, the Board found, among other things,[1] that Respondent had discriminatorily:

- discharged Francisca Roman on September 23, 1975;

- demoted Juan Rubalcava and Elias Montoya from the

[1]The recital of unfair labor practices which follows includes only those at issue in this supplemental proceeding and is not exhaustive of the unfair practices found in the underlying liability proceeding.

position of foreman to that of fieldworker;[2]

- laid off 23 members of the crew of foreman Francisco Armenta at the end of the tomato harvest in January 1976;

- refused to rehire seasonal workers from Tijuana.[3]

The purpose of the present proceeding, which is supplemental to the earlier one, is to restore the discriminatees to the position they would have enjoyed absent Respondent's discrimination, Maggio-Tostado (1978) 4 ALRB No. 36, p. 3; S.F. Growers (1979) 5 ALRB No. 50, p. 1; J. H. flutter Rex Manufacturing Company, Inc. (1971) 194 NLRB No. 19, modified (5th Cir. 1973) 473 F.2d 223, cert. den. (1973) 414 U.S. 822, which means that the discriminatees are entitled to receive what they would have earned had they not been discriminated against. Phelps-Dodge Corp. v. NLRB (1942) 313 U.S. 177, 194. This purpose being entirely compensatory, only actual losses are to be made

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[2]The Board also found that Respondent made two other discriminatory work assignments -- of Francisco Carillo and Jose Perez Serrano -- but, as General Counsel concedes these entail no monetary loss to employees, I will not address them further. Second Amended Backpay Specification, p. 8, paragraph 34 C, Category 3.

[3]Although the discriminatees in this case are all from the Tijuana-San Diego border area, the Board found that they fall into two classes, year-round workers and seasonal workers, and that the occasion of the discrimination practiced against each worker varied with the class into which he or she falls. The backpay period of the year round workers starts on either January, 19 or 21, 1976; the backpay period for each seasonal worker begins on the date discriminatory action was specifically taken against him or her.

good, and account must be taken not only of wages earned by the discriminatee during the backpay period (called "interim earnings"), but also of certain kinds of losses willfully incurred.

General Counsel has the burden of establishing what each discriminatee would have earned in Respondent's employ had he not been discriminated against. O. P. Murphy (1982) 8 ALRB No 54, p. 4. This amount, called "gross backpay", may also include bonuses, vacation pay, and other fringe benefits. A discriminatee may also recover additional expenses incurred by him as a result of having been victimized. Arnaudo Bros. (1981) 7 ALRB No. 25. For its part, Respondent has the burden of establishing facts in mitigation of its liability, such as amounts of interim earnings beyond those admitted by General Counsel, a discriminatee's lack of diligence in seeking interim employment, or a discriminatee's refusal to accept substantially equivalent employment, NLRB v. Mastro Plastics Corporation (2nd Cir. 1965) 354 F.2d 170, 174 cert. den. 384 U.S. 972. Backpay is owed until the Respondent makes a bona fide offer of reinstatement or otherwise proves that the discriminatee would have not been retained in its employ for legitimate business reasons. Since Respondent has never offered reinstatement, only the occurrence of the latter condition is at issue here.

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II.

BURDEN OF PROOF

About the preceding general principles there is little dispute and both General Counsel and Respondent rely on them in order to justify their widely divergent positions on a number of issues. The most basic dispute between the parties is over the appropriate formula for determining gross backpay; preliminary to that dispute, and therefore the matter which I shall address first, is the question of the parties' respective burdens in justifying their formulas.

General Counsel contends that her formula is reasonable, equitable and accurate and, under the familiar principle that Respondent has the burden of proving factors in mitigation of its liability, General Counsel contends that it is Respondent who must show its proposed formula to be the better one. Respondent contends that General Counsel's proposed formula is arbitrary and unreasonable, but that, in any event, General Counsel must first prove her formula to be the most accurate way of calculating backpay before the burden shifts to it to prove any factors in mitigation.[4] Withholding judgment for the moment about what the

[4]Although this is Respondent's primary argument, Respondent also argues (almost in passing) that "[nleither party is required to establish by a preponderance of the evidence that its formula is [the] 'best method." Post-Hearing Brief, p. 32. If Respondent is correct as to this, its primary argument must be false, for if nobody has the burden of proof, General Counsel cannot have it.

parties have proved, I must first consider: What standard of proof must General Counsel initially meet?

In support of its position that General Counsel must demonstrate her formula to be the "most" accurate one, see Post-Hearing Brief, p. 31, Respondent relies upon the following passages from O. P. Murphy (1983) 8 ALRB No. 54 and High and Mighty Farms (1982) 8 ALRB No. 100. In Murphy, the Board wrote:

> [A] two-pronged analysis is appropriate in backpay determinations. First, the Board must examine and, if necessary, refine the formula used by the General Counsel to compute the gross backpay amount for each discriminatee. The formula utilized by the General Counsel must not be arbitrary and must be reasonably calculated to represent the gross amount the discriminatee(s) would have earned during the backpay period, absent the discrimination. The next step is the weighing of the evidence presented by Respondent that tends to diminish or extinguish its liability and determine whether Respondent has presented a preponderance of evidence in that regard.
>
> We find that the formula chosen by the General Counsel (the use of representative workers to estimate backpay liability), as properly modified by the ALO to more exactly represent the actual discriminatees, was not arbitrary and meets the test of exactness established by applicable National Labor Relations Act (NLRA) precedent.
>
> (8 ALRB No. 54 at p. 4.)

And in High and Mighty Farms, the Board described the task of the Administrative Law Judge as being one to "consider whether General Counsel's formula is the proper one in view of all the evidence and...[to] make recommendations to the Board as to the most accurate method of determining backpay due." High and Mighty Farms, supra, at p. 2, n. 3.

While the passage from O. P. Murphy is susceptible to Respondent's interpretation, I believe that Respondent has

misconstrued it; I have no doubt at all that Respondent has misconstrued the passage from High and Mighty Farms. Since the Board's meaning is so clear in High and Mighty I will consider it first for the light it throws on what the Board might mean in O. P. Murphy.

Contrary to Respondent's reading, it is the judicial function which the Board is describing in High and Mighty Farms when it writes "[in] reviewing the evidence presented by all parties in a backpay proceeding, it is the [ALJ's] role...to make recommendations as to the most accurate method of determining backpay." (Emphasis added) 8 ALRB No. 100, p. 2, No. 3. Similarly, when the Board in O. P. Murphy speaks of refining General Counsel's formula, it is describing its own obligation; when the Board speaks of General Counsel's obligation, all that it requires is a formula which is "not arbitrary [but] reasonably calculated to represent the gross amount the discriminatees would have earned during the backpay period."[5]

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[5]Although I believe I have captured the Board's meaning in O. P. Murphy I would be remiss if I did not also recognize those parts of it which support Respondent's reading. The Board's "procedural" outline is obviously the most problematic part. After speaking of a "two pronged" analysis, the Board describes the first step as that of examining, and if necessary, refining the formula used by the General Counsel and the second step as that of weighing Respondent's evidence in mitigation or extinction of that liability. The two steps may plausibly be taken as relating to the question of the appropriate formula and this is how Respondent takes it. I believe, however, that the better reading is to take the first step as relating to the Board's selection of a formula based upon the entire record and the second step as the essentially distinct task of considering proof of deductions from gross backpay.

NLRA precedent likewise imposes only a burden of "reasonableness" upon General Counsel. Thus, in Mastell Trailer Corp. (1973) 273 NLRB 1190, 1195, the Board affirmed the following statement by the ALJ:

> The General Counsel has the burden of establishing a formula for the calculation of gross backpay due to employees, but in many cases it is difficult to ascertain the precise amount due and, therefore, a wide range of discretion is accorded the fashioning of such a formula provided it is reasonably designed to produce approximations and it is not arbitrary and unreasonable. Once the General Counsel has established a reasonable formula, the burden then falls on Respondent to establish facts which would negate or diminish the existence of liability. (Emphasis added.)

Although enmeshed in a comprehensive outline of the flow of a backpay case which is simply too detailed to be reproduced in its entirety, the same formulation appears in Big Three Industrial Gas (1982) 263 NLRB No. 27, 1194-95. With parenthetical insertions summarizing previous stages of the ALJ's outline, the pertinent parts of the opinion follow:

> The first question which confronts the Board's prosecuting arm, the Office of the General Counsel, at the "compliance" stage of unfair labor practice proceedings in which there has been a remedial order for reinstatement and backpay to wrongfully discharged employees is: "What method should be used to determine the gross earnings which would have been received by the discriminatees if they had not been wrongfully discharged?" As a matter of standard internal procedure, the General Counsel delegates this function to a "compliance officer" in the Regional Office which was responsible for the prosecution of the underlying unfair labor practice case.
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> *** * ***
>
> In arriving at the appropriate yardstick for determining how many hours discriminatees would have worked during the backpay period, the [compliance officer] has a wide range of discretion [and has only to

come up with a reasonable formula.]

* * *

> [Once such a reasonable formula has been established, it is] not sufficient for Respondent [to plead another formula and] to merely object to [the] frailty [of General Counsel's formula] and to complain that there were elements of speculation in its application. Rather, under the clear mandate of Section 102.54(f) of the Board's Rules and Regulations, it was incumbent upon Respondent to set forth with precision an alternative method of computation and to plead, and prove at the hearing, that its own alternative was more likely to be accurate and just as a measure of the gross backpay owed to the discriminatees. (Emphasis added.)

The question remains, of course, whether General Counsel's formula is "reasonable."

III.

THE CONTENDING FORMULA

A. INTRODUCTION

In general, a backpay formula has two essential elements, although to confuse matters, each of these elements is itself called a formula. The two components are: (1) selection of a measuring rod to gauge the discriminatee's lost earnings, and (2) division of the entire backpay period into appropriate intervals over which to calculate net backpay. The purpose of the first element, which I shall call the makewhole element, is self-evident, and it is about this element that the parties so strongly disagree. They do not disagree about the second, or interval, component.

With respect to this second feature, General Counsel contends that all the discriminatees had "regular" enough work

patterns so as to render inappropriate our Board's more usual technique of calculating net backpay on a daily basis. General Counsel proposes, instead, to utilize a straight quarterly approach in the case of the employees whom the Board found were "year-round," and a quarterly-combined-with-a-seasonal approach, for all the other employees.

The latter approach works the following way: only wages earned during the season in which the discriminatees would have worked at the gross employer are treated as interim earnings and net backpay calculations are made on a quarterly basis. In other words, if a discriminatee would have worked in the strawberry harvest, say from the end of January until June, only earnings within that part of January after the strawberry season commenced and in February and March would count against gross backpay accrued during the first quarter of any given year and only the earnings in April, and May and that part of June included within the strawberry season, would count against gross backpay accrued during the second quarter of any given year.

This sort of seasonal overlay upon a quarterly calculation is in accord with the NLRB's practice, California Cotton Cooperative Association, Ltd. (1954) 110 NLRB 1494, 1506. Inasmuch as neither Respondent nor Intervenor disputes either the straight quarterly (in the case of the year-round employees), or the quarterly/seasonal (in the case of the seasonal employees) methods of calculating net backpay, and inasmuch as both methods comport with NLRB precedent, I will recommend them.

Despite agreement on this issue/ the parties do not agree on what follows from it. Respondent argues that because backpay is computed on a quarterly basis "all interim earnings received by the discriminatee during the quarter or season in which backpay is to be calculated are to be considered interim earnings." This is not the case: calculation of net backpay on a quarterly basis is completely consistent with the exclusion of wages earned by discriminatees during periods of time (such as overtime, etc.) when they would not have worked for their gross employer. In arguing otherwise, Respondent has confused two distinct principles.

In San Juan Mercantile Corp., Inc. (1962) 135 NLRB 689, the NLRB explained the rationale behind excluding wages earned when the gross employer offered no work and the compatibility of this technique with the entirely different Woolworth (quarterly) technique:

> Respondents interpret Woolworth to mean--even in cases where sporadic work is involved--that all interim pay earned during a quarter is to be totaled and offset against all interim wages that replacements earned. The General Counsel, however, followed both the Woolworth formula and the formula for sporadic work, and offset--on a quarterly basis--only the interim pay earned on those days on which the Respondent Company has work available against the wages paid by the Respondent Company to others on those days. In arriving at gross pay wages earned by replacements from other companies on days when Respondent Company had no work were omitted, and correspondingly the interim pay earned by the discriminatees on those days was not offset. The Board's formula is not only the established formula for cases of this sort, but seems eminently fair. (Emphasis added.)

While San Juan Mercantile speaks of the need to distinguish the two principles in cases of sporadic work, the cases cited by

Respondent also observe the difference. Thus, in J. S. Alberici Construction Co. (1980) 249 NLRB 751, the ALJ emphasized that "only those earnings that the [discriminatee] had from other employers that he would not have had [if he had been employed by Respondent] can properly be [construed] as interim earnings," 249 NLRB at 754.[6] Similarily, in S. E. Nichols (1981) 258 NLRB 1, the ALJ noted that the

> [United States] Supreme Court [see Phelps Dodge Corp. v. NLRB 313 U.S. 177, 197-200] approved the Board's practice of limiting deductions from backpay of worker earnings following discharge to net "earnings during the hours when the worker would have been employed by the employer in question."
>
> 258 NLRB at 15.

Thus, it is not necessarily the length of the period over which backpay is computed--whether quarterly or seasonal--which determines whether earnings offset gross backpay; it depends, rather, on whether the wages were earned when the gross employer offered work.[7] Having said this, it remains to say that the

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[6]In my discussion, I am ignoring Lane Construction (1976) 226 NLRB 1035 also cited by Respondent in support of its argument, because I cannot find that it has anything to do with the present question.

[7]There is one class of case in which all interims are deducted from gross backpay no matter when they were earned. That is the case with what our Supreme Court has called "true substitute employment" Nish Noroian Farms v. Agricultural Labor Relations Board (1984) 35 Cal.3d 726. Under this concept, comparable work (no matter when performed) simply "substitutes" for work offered by the gross employer. However, as the court makes clear, unless "true substitute employment" be found, wages earned on days when a gross employer offered no work are not deducted from gross backpay. 35 Cal.3d at 744.

question whether earnings ought not to count against gross backpay only arises in connection with one discriminatee in this case. This is so because the backpay period is generally treated as continuous, that is, as a whole year or as a whole season. The one exception concerns whether Adolofo Palomares' overtime earnings should be deducted from gross backpay. Following the general rule about collateral earnings, I answer this question in the negative because there is insufficient proof that the discriminatee(s) generally worked overtime at Ukegawa. See United Aircraft Corp. (1973) 204 NLRB 1068, 1073, Lundy Packing Co. (1987) 286 NLRB No. 11, enf'd USCA 4th Cir. (1988) 856 F.2d 627.

C.

CALCULATION OF GROSS BACKPAY

It is with respect to determining how to measure the wages lost by the discriminatees that the parties' greatest differences arise. I will try to briefly describe the main features of each formula. For her part, General Counsel first divides the discriminatees into two classes: one class consists of year-round[8] workers, the other of seasonal workers. General Counsel's division is based upon the Board decision, which clearly finds one group of employees (the members of the Armenta crew) to

[8]While Respondent argues that the Board's finding of "year-round" employment did not "really" mean that the employees so designated were, in fact, employed year-round, I read the Board decision to mean what it says.

be year-round and, at least by implication, all the other employees to be seasonal.

According to Field Examiner Richard Delgado, the type of employment records kept by Respondent did not lend themselves to any of "the more commonly used formula, such as comparable employee, replacement employee, work force average....", GCX 11, because they did not show

> which employees during the backpay period performed the work that discriminatees performed while they were there. The payroll records didn't lend themselves to that. The payroll records were compiled on a daily basis. They're weekly sheets. And the foreman would write down the number of hours that are worked on each. What I'm getting at is, actually like a summary of what I was told that the records were, and also my review of them.
>
> The names of the employees are listed on a sheet and then the foreman writes down the number of hours that are worked each day. There is no other notation which indicates this employee was a strawberry harvester, a tractor driver, or anything like that.
>
> Once in a while there does appear a letter next to the number of hours worked on that day, and I was told that that letter could designate the first letter of the last name of the foreman, or it could designate the type of work that the employee was doing. So hence, an S could be S for Sanchez, or S for spring.
>
> It was also explained that the company had three major areas of operation, the Del Mar area, Carlsbad, and the San Luis Rey areas, and within each area there could be several crews working, and the employees, each crew in each area could be working in different job functions at any one time Employees from one crew could be transferred to another crew on any one day, depending on assignment by the foreman, or an employee could be transferred from one are to a different area.
>
> Although the records did show the area in which employees were working in, or most of them that I reviewed had a designation in the top right-hand corner as to which area they were working in, there was still no identifying mark indicating what the employees were

actually working at.

As a result, General Counsel resorted to the prior hours of the discriminatees themselves.

To measure the wages lost by the year-round employees, General Counsel generally multiplied the total hours worked by each discriminatee in the last year preceding the discrimination for which records are available by the wage rates[9] projected for the backpay period. Because a few employees did not show year-round work in the year preceding the unfair labor practice, Delgado came up with a technique for determining the hours they would have worked had they been employed for the whole year:

> Because the Board had made a determination that [these individuals] were year-round, then a provision had to be made for these individuals to [treat them as year round]. So what I did was I used discriminatees, the hours of discriminatees in the same category...who worked year round. I averaged their hours per quarter and I allocated that average to the individuals for whatever quarter they did not have work for in [1975]." (I:33, 47.) Second Amended Specification, paragraph 34B, Category 2.

As a rule, to establish when the seasonal employees would have worked, General Counsel used the beginning and end dates contained in the 1975 payroll records (1:37, GC 9); to measure

[9]Respondent does not really dispute the wage rates utilized by General Counsel. It does argue that General Counsel's averaging of piece rates is inappropriate, but offers no specific piece rates of its own. Rather its dispute over the wage rates is merged in its argument over the appropriate backpay formula so that, on this record, I am really left with a choice of formula.

their lost wages General Counsel then multiplied the total hours worked by each discriminatee in 1975 by the wage rates projected for the backpay period. As was the case with some of the year-round employees, the straightforward use of prior hours to compute the backpay of the seasonal employees was also subject to certain exceptions occasioned by the fact that the date upon which the employees were discriminated against in 1976 did not correspond to the date upon which he or she started work the previous year. Some discriminatees applied for work (and were discriminated against) in 1976 much earlier than the date they began work in 1975; conversely, some employees were refused rehire in 1976 on a later date than they began work in 1975.

With respect to first sort of incongruity and for the period between the 1976 application date and the commencement of employment in 1975, General Counsel imputed to the discriminatee the average hours worked by his or her co-discriminatees who had worked the entire previous season. Delgado testified:

> "[S]ay the payroll records showed that this individual started working in 11975] in July and the Board found they were refused rehire in 1976 of April...[tlhey were [thus] refused rehire in [19761 for say a two-month period before they had actually worked the previous year. (I:65.)

Although Delgado's testimony is more descriptive than explanatory, it appears that, based upon the fact that a discriminatee applied for rehire earlier in 1976 than he or she started work in 1975, General Counsel concluded that, but for the discrimination he or she would have worked longer in 1976 than he

or she worked in 1975. Conversely, when faced with discriminatees who applied for work later in 1976 than he or she began work in 1975, General Counsel apparently concluded that given a longer 1975 season, the shorter season in 1976 was not necessarily representative of how long the employee would have worked in subsequent years. Accordingly, except for 1976, General Counsel used 1975 hours to compute backpay.[10]

Except for disputing what the Board meant by "year-round" employment, Respondent does not dispute that the Board found that some employees were "year-round" and some seasonal; rather, it generally contends that because of turnover, fluctuations in its labor needs, and a change in its employment practices, General Counsel cannot reasonably project consistent employment cycles for the discriminatees throughout the backpay period. For similar reasons, Respondent also objects to General Counsel's "exceptions" to the extent they are predictions about work a discriminatee would have had. Respondent proposes a formula to take into account not only the ordinary sorts of season-to-season and year-to-year variations in the employment cycle which generally obtain in agriculture, but also a change in

[10]I have only described Category 1, Category 2, and Category 5 exceptions. There are two other "categories"; one of them, however, is only a variant of Category 2 and another, Category 3 applies only to one employee. Respondent only objects to the utilization of the categories I have described.

its hiring practices which, it contends, resulted in fewer jobs being available to the discriminatees during the backpay period.

Respondent's formula has three distinct steps. The first step entails identification of the group of employees Respondent considers comparable to the discriminatees by virtue of the fact that they performed the kind of work the discriminatees performed in the past and the kind they would have performed had they not been unlawfully laid off. Respondent contends that two personal characteristics of the discriminatees determined in the first place, whether work would be, and, in the second place, what kind of work would have been, available to them: first, their immigration status which, as aliens legally admitted to the United States, broadly differentiated their "function" from that of Respondent's illegal workers; and second, their gender which determined their actual job duties. Respondent thus divides the discriminatees into the two classes of (1) male legal workers from Tijuana[11] and (2) female legal workers and proposes to treat, as comparable to the male discriminatees, only other male legal workers from Tijuana, and as comparable to the female discriminatees, only other female workers.

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[11]In moving from immigration status simpliciter to immigration status combined with place of residence in the case of the male discriminatees, Respondent has added added another qualification to its initial immigration and sex-based classifications for which it provides no independent evidentiary support.

According to Respondent, a second step is required to take account of turnover among the class of employees identified as performing the same jobs that the discriminatees would have performed.

> This [next] component of the formula is in accordance with the overwhelming turnover experienced by Respondents. Of the 286 [male legals] employed in 1975, only 17 were still employed in 1979; by 1987, only two were still employed. Likewise, of the 174 [female legals] employed in 1975, only 10 were employed in 1977; only one was employed in the years 1978 through 1980. Accordingly, Respondent's formula takes into account this statistically significant turnover by defining as comparable employees those employees who were employed in 1975 and [who also worked in 1976]. It is this pool of comparable employees whose wages provide the pool of wages to which the discriminatees herein are entitled.
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> Post Hearing Brief, pp. 20-21

In this step, Respondent reduces the total number of comparable employees in each of its two classes to only that number of employees within the two respective classes who worked in both 1975 and in 1976.[12] The quarterly total of wages earned by each distilled sub-class of comparable employees is then said to

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[12]Respondent merely asserts that selection of only the number of employees who worked two years in a row "makes allowances for turnover." Answer to First Amended Specification p. 15, paragraph 16. It makes no attempt to explain why it does so and it is not self-evident. Indeed, turnover is not usually determined by counting the number of employees who stay on the job, but by figuring the percentage that the number of employees who leave within a given period bears to the average number of employees employed over the same period. Roberts, Dictionary of Industrial Relations, BNA 1973: "Labor Turnover." The ratio so determined gives the number of employees who fill a given job over a given period.

represent the total amount of wages that would have been available to the discriminatees in each class (male or female) during each quarter of the backpay period. Since only the members of these two sub-classes are considered "comparable", as the size of the comparable groups diminishes, the total amount of wages said to be available to the discriminatees in any given quarter also diminishes.

Finally, Respondent proposes to account for what it contends is the non-discriminatory diminution or elimination in the number of jobs available to the discriminatees by treating the backpay owing to each individual discriminatee as a share of the steadily declining quarterly total of wages earned by each sub-class of comparable employees. Under this step, the backpay of any discriminatee in any given quarter is computed by multiplying the total amount of wages earned by the representative group in that particular quarter by a fixed ratio[13] obtained by dividing the particular discriminatee's 1975 quarterly earnings by the total 1975 quarterly earnings of the gender based group of discriminatees to which he or she belongs.

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[13]I am sure that Respondent has erroneously described this ratio in its Answer to the First Amended Backpay Specification as well as in its Supplemental Answer (filed October 28, 1988) as the total gross backpay [I believe Respondent means total quarterly earnings, not gross backpay] of all the discriminatees in each quarter of 1975 divided by the quarterly earnings of each discriminatee. Answer to First Amended Specification, paragraph 5, p. 14. Respondent's way of putting the formula yields a number greater than unity and is, therefore, not the way to obtain a proportionate share.

Obviously, the parties disagree strongly about how to measure backpay. In accordance with the burden of proof principles outlined above, I must first determine whether General Counsel's formula is reasonable. While the burden of proof framework I have sketched makes it appear that I am simply to consider the reasonableness of General Counsel's formula in isolation from Respondent's contentions concerning its alternative formula, that is not possible in this case because, as I will shortly discuss, changes in the employing unit disqualifies a prior hours formula. Since Respondent contends that "changes" in its operations did take place, in order to even discuss the "reasonableness" of General Counsel's formula, I must discuss Respondent's evidence concerning these changes. However, in dealing with the parties' respective contentions in a coordinated way, the allocation of the burden of proof will not change. General Counsel must still demonstrate that her formula is reasonable; Respondent must prove that changes took place which disqualify the prior hours formula.

1. Is General Counsel's Prior Hours Formula Reasonable?

a.

I first note that the NLRB uses three basic means to measure the losses suffered by a discriminatee: (1) the hours or earnings of the discriminatee prior to the act of discrimination, (2) the hours or earnings of a "comparable" or "similarily-situated" employee and (3), the hours or earnings of a

"replacement" employee. See, NLRB Casehandling Manual, Part III, Compliance Proceedings Section 10534.

Since Respondent does not contend that new hires replaced the discriminatees--indeed, vigorously contends otherwise--by its own reckoning, the roster of possible measures is reduced to either (1) the earnings or hours of the discriminatees themselves, or (2) the earnings or hours of "similarly situated" or "comparable" employees during the backpay period. Second, as between a prior hours technique and a comparable employee technique, it is the "prior hours" formula which is considered the more equitable and fair formula, DeLorean Cadillac (1977) 231 NLRB 329, 332; Rainbow Coaches (1986) 280 NLRB 166, 176, and one which "should not be departed from in the absence of special circumstances" Chef Nathan Sez Eat Here (1973) 201 NLRB 343, 345. Accordingly, provided only that the conditions for using it have been met, case law establishes the "reasonableness" of General Counsel's formula.[14]

The NLRB uses prior hours or earnings when there are changing rates of pay and company records are sufficiently detailed to permit determination of prior hours, Case Handling

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[14]Since General Counsel's exceptions to some extent impute hours to discriminatees, the "reasonableness" of the exceptions is not a fortiori established by the "reasonableness" of a prior hours formula. The reasonableness of these, and Respondent's objections to them, will be discussed separately.

Manual, Part III, Section 10540.2(a), (b), and General Counsel argues that these two conditions are met in this case and justify her use of the prior hours formula.

For its part, Respondent emphasizes that the Manual also specifies conditions under which use of such a formula is inappropriate, and points out that a number of these disqualifying conditions are present in this case. Thus, the Manual cautions against use of prior earnings to measure backpay when the business of the company is seasonal or when the backpay period is long, Case Handling Manual, Part III, Section 10540.3 (c), (d).

At this level of argument, Respondent is only superficially correct, for it is not the mere fact that a company has seasonal operations, or that the backpay period is long, which precludes use of a prior hours formula. These conditions disqualify the formula only if, because of them, the discriminatee's prior hours are not representative of the earnings he would have had during the backpay period. For example, since seasonal operations are often characterized by widely fluctuating earning levels, when an employee is unlawfully laid off during a period of reduced hours, his past hours will not be representative of the amount of work he would have had during peak earning periods within the backpay period. Where no changes have taken place in the employer's operations which would render the discriminatee's prior hours inappropriate as a measure of lost wages, the formula is still considered applicable. Case Handling Manual, Part III, 10540.2 and 10538.2.

Here we come to the heart of Respondent's argument for Respondent does insist that changes have affected its labor needs and, therefore, the amount of work that would have been available to the discriminatees throughout the backpay period. Although Respondent does not distinguish between them it has really identified two different kinds of changes: extrinsic factors that are not unique to the backpay period, such as crop choices and crop-cycles, weather and market conditions, and its own decision to cease utilizing male legal workers from Tijuana and female workers. Before outlining the evidence which bears on each in turn I emphasize that it is Respondent who has the burden of proving (1) that changes did take place and (2) that such changes were for valid business reasons. National Relations Board v. Cambria Clay Products (6th Cir, 1954) 215 F.2d 43. As the court wrote in NLRB v. Mastro Plastics (2nd Cir. 1965) 354 F.2d 170, 176, cert.den. 384 US. 972:

> We agree with the Board's contention that the burden of going forward with evidence of job availability at the employer's plant should be placed on the employer. In the first place, the burden of going forward normally falls on the party having knowledge of the facts involved. See United States v. New York, N. H. & H. R. R. Co., 355 U.S. 253, 156, n. 78 S.Ct. 212, 2 L.Ed.2d 247 (1957); 9 Wigmore, Evidence Section 2846, at 275 (3d ed. 1940). To establish that an employer has reduced or adjusted his business to an extent eliminating the job of a discriminatee requires careful analysis of the books and records of the employer during the back pay period. Of course, the Board has access to these records, but it is the employer who kept the records and who therefore is able to explain them and to interpret any ambiguities they may contain. We agree with the cases that have found this factor a persuasive reason for requiring the employer to come forward with proof that jobs were not available. N.L.R.B. v. Reed & Prince Mfg. Co., 130 F.2d 765 (1 Cir. 1942); Underwood

Machinery Co. 1386, 1393 (1951).

b.

Respondent farms and harvests a variety of crops in San Diego County, principally tomatoes and strawberries, but also quite a few other crops, such as cauliflower, celery, bell peppers, corn, beans, cucumbers and squash. Although Respondent's ranch manager, Joe Morrotte, testified in some detail concerning Respondent's crop cycles in strawberries and tomatoes, except for mentioning that Respondent grew the other crops I have identified, he provided no details about them.

Prior to the beginning of the backpay period, Respondent had two strawberry crops: one, planted in August and harvested towards the end of December or sometimes as late as the end of February, and the other planted in November and harvested through May or June. After either 1977 or 1978, but in any event sometime during the backpay period, Respondent discontinued its August planting so that during most of the backpay period, it had only a fall planting. This planting started as early as mid-October, or as late as mid-November, with harvest beginning from the end of January or the end of February, and continuing until May or July depending upon the crop cycle "and the other factors involved." (XVI:1365.) As a result of the switch to a single crop, Respondent had no need to hire workers to plant, cultivate, and harvest a spring strawberry crop.

Respondent's other major crop is tomatoes, which it has continued to grow throughout the backpay period in the same

cropping pattern it used prior to the backpay period. Morrotte described the tomato season in this way:

> Tomato is divided into...two crops. We consider it a spring or summer crop and then a fall crop. A spring crop planting usually will start some time around mid-February or as late as into March. That would come out, as far as harvesting, possibly middle June to maybe middle July. Fall crop, we would start planting some time in July and it could go into as far as August planting. [That] harvest would end for practical purposes...around the end of December, but it could run over into January [and] sometimes as late as February in certain instances [and thus overrun the spring planting.]
>
> (XVI:1355.)

Accepting Morrotte's uncontradicted testimony about Respondent's cropping patterns, and especially the reduction in the number of strawberry plantings, Respondent has proved nothing more about its labor needs through Morrotte's testimony than that, however many employees it hired, they would not have worked in strawberries from August until mid-October. Respondent has not established that during comparable periods prior to the unfair labor practice and during the backpay period there was any difference in the number of employees it employed. Put another way, the fact that employees did not work strawberries at certain times tells us nothing else about Respondent's overall labor needs

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during those periods.[15] Indeed, as Morrotte also testified Respondent continued to employ thousands of workers in each year of the backpay period. (XVI:1402.)

The same essential irrelevancy characterizes the rest of Morrotte's testimony about the other factors which affect its labor needs. Strawberries, for example, are grown for both the fresh and the processing market. Fresh market crops are more labor intensive because more careful picking is required for "better-looking strawberries", while berries picked for processing do not call for similar care in their harvest. Accordingly, in seasons when the processing market absorbs most of Respondent's crop, fewer people are needed to harvest the same amount of berries.

Once again, accepting Morrotte's testimony as true, Respondent has not shown from it that there were not sufficient jobs for the discriminatees to fill at any given time throughout the backpay period. And so it goes with respect to each of the

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[15]It would be nice to be able to trace the number of employees actually employed by Respondent in any given quarter throughout the backpay period in order to see if Respondent did not actually employ at least as many employees as there are discriminatees. Unfortunately, the payroll records which are in evidence do not permit one to do that throughout the backpay period because they focus on the employees Respondent contends are comparable and are not complete. To be sure, the records for 1976, 1977 and up to April 4, 1978 plainly show far more employees than discriminatees RX 22-68 Morrotte's estimate of thousands of employees employed each year plainly indicates there were many more total positions than discriminatees.

other variables (variety of crop and market conditions) which Respondent contends also affect labor needs. Respondent has presented no evidence about the extent to which the availability of jobs was actually affected by the factors it has isolated. Indeed, because of the abstract kind of evidence it has presented, it is difficult to tell what its employment patterns really were.

c.

We can trace an actual decline in the number of male Tijuana legals employed by Respondent, an end to the use of female employees, and, at least for awhile, Respondent's ceasing to pay raiteros. Morrotte testified that Respondent has historically hired two different kinds of workers, legal (documented) and illegal (undocumented) workers. The immigration status of the workers are clearly identified by the series of employee numbers which they are assigned: male documented field workers from Tijuana are assigned employee numbers in the "60,000" series, and female documented workers are assigned employee numbers in the "50,000" series.

Morrotte further testified that Respondent hired the legal workers (both male and female), not for their particular skills as workers, but only because they were legal:

> MORROTTE:
>
> A We needed the documented worker because of the INS.
>
> Well, on the ranches... lot of the ranches that we have are very accessible to immigration raids, we need the documented work force in order to conduct the everyday work.

* * *

> Yes, we used the documented worker, basically as a barrier between the Immigration Service and the undocumented workers.
>
> * * *
>
> What we did is, when INS would enter a ranch, it was usually customary for them to look for a work crew to raid, so the documented worker was usually placed, strategically through the ranch, so they were obvious, so that the immigration would hit that crew, giving the undocumented worker a chance to scatter.
>
> (XVI:1366.)

He testified similarly about the female workers, but he also implied that female workers were assigned to different jobs than male workers:

> Q (By Respondent's Counsel) Did the Ukegawa operations utilize documented female field workers, in 1985?
>
> A (Morrotte) The females were usually assigned to light menial labor. They did the work such as pruning plants, picking, the harvesting, tying string.
>
> * * *
>
> We used females because we couldn't get enough male documented workers so the next choice, the next options, was a female documented worker.
>
> The female field worker was used basically like I said, for purposes of immigration. We needed -- it wasn't so much whether they were female or not, it was whether they were legal or not.
>
> (XVI:1368)

Since Respondent's need for legal workers depended upon the extent of INS activity, as such activity diminished, so did the hiring of "legals."

Once again Morrotte:

> Q And, did -- based on your experiences at the ranch, did you notice any change in INS enforcement practices, with respect to raids at the ranch, subsequent to 1975?

A Yes, immigration raids have laxed [sic] down, considerably.

Q And, have the laxing [sic] of the immigration raids impacted on the employment practices at the ranch?

A Yes, they have.
Q And, how have they impacted -- how has that impact been felt on the ranch?

A Well, with less immigration, we have more of a undocumented labor force available for us and because of the cost difference in the labor and that, I've leaned towards hiring the undocumented workers, versus the documented.

XVI:1371.)

The female documented workers were the most expendable:

Q And, in your experience -- during the period from 1976 to 1987, has the Ukegawa operation utilized undocumented female workers?

A No, we haven't.[15]

Q And, what is the reason for that?

A The female field worker was used basically like I said, for purpose of immigration. We needed -- it wasn't so much whether they were female or not, it was whether they were legal or not.

Q And, based on your observations as ranch foreman in 1975, did you make any judgments with respect to the future utilization of women as field workers, for the Ukegawa operation?

A Yes. The female worker, since they're limited -- what I would call limited use of the field because of not being able to do some of the more strenuous work, were kept, basically just for purposes like I say -- for their legality in regards to the INS, so that would fluctuate whether -- on the intensity of INS raids.

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[16]Morrotte's answer is false. Respondent did not stop using female employees until 1981. See RX 4.

Q Okay. And, has there been an alternation in the hiring practices of the Ukegawa operations, with respect to female field workers, since 1975? Have you changed your practices with respect to hiring documented female field workers, since 1975?

A Well, there are no more documented female field workers.

(XVI:1368-1369.)

Respondent could afford to reduce its dependence upon Tijuana legals, Morrotte testified, not only because it had a reduced need for them as a buffer against immigration raids, but also because they were generally less efficient than its illegal workers.

A As a field foreman, I have set up the crews equal and balanced doing the same amount of work, usually, which would be either in something where you can count, for instance, like pounding stakes or even the harvesting, similar -- or the exact number of documented and undocumented workers and then from that I can see the production or the efficiency of the crews.

Q And, on the basis of those observations, what did you see?

A It showed me that the undocumented workers was more efficient that the -- excuse me, the undocumented worker was more efficient that the documented workers.

Q And, Mr. Morrotte, what was your opinion, with respect to the relative performance of the undocumented workers versus the documented worker crews?

A On my comparisons, the undocumented workers was more efficient than the document worker, as an overall group.

(XVI:1370.)

Finally, the Tijuana legals who rode with raiteros provided specific cause for complaint.

The raitero program limited us in a couple of ways. On the raitero program because you had the worker commuting in groups where we required -- sometimes for an individual in the group -- where we would possibly

> prefer him to work a little bit longer, or do a specific job, we couldn't because it would either mean that we would have to find work for the other workers there, which we may not have needed, or else, they would have had to wait for him to finish his job. So, usually they were given work so that everybody could leave at the same time. And then also, what was involved a lot of times, is because of the workers having to commute from Tijuana, it required the drivers a lot of time to start at about approximately two hours or so beforehand to pick up some of the workers and bring them to the ranch and also required them at night, a considerable amount of time to take them back. So, instances where we may need the people to work over, a lot of times they didn't want to because of, like I say, the long commutes involved in it.
>
> (XVI:1363-67.)

As a result of the legals having to leave the ranch with their rides, "a lot of times we would use the undocumented to...replace them to complete the job..." and Respondent has not hired any "new" raitero since 1975. (XVI:1367)

Before again picking up Respondent's argument about the decline in the use of documented and female workers, I will briefly address Respondent's proof concerning its ceasing to hire "new" raiteros. If I understand Morrotte correctly, he is contending that employees' coming to work with each other created problems for Respondent because there was sometimes pressure from them to end their work early in order to catch their rides or to give all the riders the same amount of work. If this is true, it seems to me that Respondent would have ceased hiring any employees who rode to work with other employees. Since, as the discriminatees' testimony about their interim employment makes clear, agricultural employees ride to work with each other

every-where, I find it incredible that Respondent ceased using employees who "carpooled." Morrotte cannot mean this.

But there is another aspect to the raitero system, and that is whether raiteros are paid to bring employees, so that when Morrotte speaks so ambiguously of not using any new raiteros, he may mean that Respondent ceased to pay raiteros.

In fact there are periods reflected in the payroll records in which it appears that Respondent did not pay raiteros. In considering this question, I am excluding 1976 because the Board found that Respondent continued to employ, that is to pay, at least five and possibly more raiteros in 1976, 8 ALRB No. 90, pp. 45-46. The "continued" payment of raiteros in years subsequent to 1976 is another matter.

Delgado testified that raitero pay is traceable in the "Other" column in Respondent's payroll records. See. e.g., GCX 10, 1:130. (Although the 1976 records have no "Other" column, they do have a "Misc[ellaneous]" column in which numerous entries appear so that the records do not contradict the Board's finding. See RX 23-26.) There are no "Other" entries in the Daily Earnings Reports from 1-04-77 to 7-05-77. RX 27-53 While these records are not complete and Respondent provided no testimony about its record keeping, the only evidence about raitero pay (Delgado's) indicates that, if it is paid, it will be recorded as "Other" pay. Since no such payments appear for the periods covered by RX 27-53 it seems reasonable to conclude that Respondent paid no raiteros

for that period. For the fourth quarter of 1977, however, we have only incomplete Weekly Earnings Reports which not only do not list all employees, but also do not break down earnings in any way. RX 54. Based upon these records, I can draw no conclusion about whether any employees received raitero pay.

When Daily Earnings Reports again appear in evidence for the period 1-03-78 to 4-04-78, the "Other" columns are again empty and I conclude that Respondent paid no raiteros for this period. But I can again draw no conclusion about the period from 4-05-78 to 12-31-78 because of the shift to Weekly Earnings Reports. Similarly for 1979-1987, RX 70-78, I can draw no conclusion about whether any employees received raitero pay. For at least those periods in which no "Other" pay appears, it seems to me that Respondent has proved that it did not pay any "old" raiteros and I will strike raitero pay for these periods only. However, in view of the ambiguity in Morrotte's testimony, and the shifting identity of the raiteros, 8 ALRB No. 90, pp. 45-6, I find that Respondent has not met its burden of proving that it ceased using employees as raiteros, during the rest of the backpay period.

Morrotte also testified that Respondent ceased using female undocumented workers from Tijuana completely in 1981, and has gradually reduced the number of male documented workers from Tijuana. The following chart details the decline in Respondent's use of female and male documented workers from Tijuana during the course of the backpay period:

Year	Female Workers	Males Workers from Tijuana
1975	174	286
1976	38	121
1977	38	130
1978	3	43
1979	26	82
1980	25	90
1981	0	19
1982	0	15
1983	0	11
1984	0	8
1985	0	8
1986	0	5
1987	0	s5

(RX: 4 & 6)[17]

With these figures, Respondent has shown a change in its employment practices.

However, as General Counsel points out, it is not clear that this is a change which counts. In the first place, at least part of the change in its work force which Respondent has chosen to emphasize is illusory. As should be clear from the passages I have quoted, Morrotte strongly implied that the only legal workers Respondent employed were from Tijuana, so that the decision to reduce the number of Tijuana workers meant that Respondent stopped

[17]In my rendition of the numbers of female and male legals from Tijuana, I have given the total numbers of employees employed in each class. Respondent further reduces these figures to take account of turnover. Since I reject the turnover argument, I see no need to take account of it here, infra, p. 45. Obviously, at least through 1980 there were more male legals from Tijuana than male discriminatees and, with the exception of 1978, more females workers than female discriminatees.

hiring legal workers. That is not the case. Respondent historically hired two groups of legal workers, one group to which the discriminatees belonged, was from the Tijuana-border area and another group was from the San Diego area. These latter workers, in the "40,000" series, were all males and Morrotte testified that Respondent continued to employ them over the backpay period.

Morrotte's testimony about the number of San Diego legals employed by Respondent is confusing, but through the confusion he twice affirms that "thousands" of San Diego males were employed by Respondent throughout the backpay period. Thus, he is first asked, how many male documented workers were employed in 1976? He answers, I don't know. He is then asked, how many female documented workers were employed? He answers, I don't know. Then the following question and answer appear:

(By the General Counsel)

> Q Do you know in any year since 1977, to 1987 the number of male documented workers that would be employed at Ukegawa Brothers?
>
> A Well, like I said from that period it could range anywhere from about four to six thousand...but like I said, I would need the exact records to clarify that.
>
> (XVI:1408-1409)

When his own Counsel attempts to clarify whether Morrotte was here referring to the total number of all workers (which "like he said," he had previously estimated to be in the 4000-6000 range as well) or the "total number of documented workers," the following exchange took place

(By Respondent's Counsel)

Q And just to clarify one point, I believe Ms. Bullock

> may have asked you a question about the number of documented workers that were employed by Ukegawa Brothers during the period from approximately 1981 and 1987....Is that -- is that four to six thousand represent the total number of field workers or documented field workers employed by Respondent.
>
> A That would be total number of workers - probably documented - everybody involved.
>
> (XVI.-1413)

Given the importance of the distinction between undocumented and documented in this case, it is hard to believe that Morrotte was confused by the questions into giving the total number of field workers when asked about the total number of documented workers, especially since he uses the word "documented" in his final answer.

Nevertheless, even if he did misspeak as to the approximate number of "40,000" workers, Respondent's records confirm that Respondent continued to use legals. For at least the period from March 31, 1976 - June 28, 1977 Respondent has introduced records which permit one to count some of the "40,000" employees employed in each week of the payroll period. (RX 23-53.) During the quarter ending March 31, 1976 Respondent employed 24 San Diego legals, during the period ending June 30, 1976, Respondent employed 32 San Diego legals. I can be reasonably confident that these numbers represent the total number of "40,000" workers employed during the respective periods because the employee numbers run sequentially. However, as soon as I look at RX 25, the first "40,000" employee listed (Felix Dias) is number 40102 (on p. 39 of the Payroll YTD ledger). Accordingly, prior

pages may have contained up to 108 additional employees in the 40,000 series. (See also RX 26 period ending December 31, 1976 beginning on ledger p. 41 beginning with San Diego legal No. 40015 which leaves open the possibility that up to 14 more San Diego legals were listed on previous pages of the ledger.) However, it is clear from the records in evidence that through July 5, 1978, Respondent employed "a lot" of "San Diego" legals.

What can we tell about the period after July 5, 1978 when the nature of the records which are in evidence changes? It is clear from the numbering system employed on the various pages in evidence that Respondent's payroll records not only list the employees in each class in numerical sequence, but also list the classes in numerical order. Thus RX 24 lists the 30,000 series followed by the 40,000 series etc.; RX 25 lists the 40,000 series followed by the 50,000 series etc.; RX 31 lists the 10,000 series followed by the 20,000 series, the 30,000 series, the 40,000 series etc.; RX 35 lists the 7-9000 series followed by the 20,000 series, the 30,000 series, the 40,000 series etc.; RX 54 lists the 40,000 series followed by the 50,000 series etc. Accordingly, to the extent the "40,000" employees appear at all in records presented by Respondent, they do so only because they are on the same payroll page as the employees whom Respondent has chosen to track. As a result, I conclude that the number of "40,000" employees listed for the fourth quarter of 1977 (five) is not necessarily reflective of the number of "40,000" employees employed during

that quarter. Once again, from the numerical sequence alone it is possible Respondent had another 121 San Diego legals in its employ in that period. And it follows that (1) the absence of any "40,000" employees at all in RX 69 (the weekly report for the whole year of 1978) does not mean that no San Diego legals were employed and (2) the presence of only 10 San Diego legals in RX 70 does not mean that only 10 were employed in 1979. Indeed, since the numerical sequence in 1979 starts at 40113, it is possible that 112 San Diego legals were employed throughout the year.

Accordingly, while the records do not definitely permit a determination about whether Morrotte misspoke in his estimate of the number of San Diego legals, through every year of the backpay period, they either corroborate or are consistent with the employment of San Diego legals. Finally, through the last two years of the backpay period, Respondent employed another group of male workers who were assigned numbers in the 50,000 series, thus indicating they were not illegal. Once again, due to the incompleteness of the records Respondent has chosen to put in evidence, the exact number of these employees employed by Respondent is not determinable.

Since Morrotte testified, and the records indicate that these other groups of legals continued to be employed, their exact number is not nearly so important as the fact that they were employed at all. For if legal workers were only hired to prevent INS raids from disrupting Respondent's operations, then

Respondent's continued use of the "San Diego" and other legals during the backpay period means that Morrotte's testimony about the decrease in INS raids is false. On the other hand, if Morrotte testified truthfully that the frequency of INS raids diminished over the backpay period, then the fact that Respondent apparently continued to hire legals means that his testimony about legals being hired only as a barrier to the INS is false. Finally, the fact that Respondent apparently continued to hire legals indicates that inefficiency could not have been the reason it ceased to hire the Tijuana legals. Thus, Respondent has not persuaded me that it had any bona fide business reason to cease hiring male legal workers from Tijuana.

Moreover, it is not clear to me that Respondent's attempt to "functionally" differentiate between its legal and its illegal workers by where they worked is relevant. Indeed, to treat this kind of differentiation as decisive about whether work continued to be available to the discriminatees would be to eliminate the concept of substantially equivalent employment according to which, as long as Respondent had work which the discriminatees could perform, they were entitled to be offered it -- whether it be in the interior of its fields or at their edges.[18]

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[18]Indeed, even if Respondent had proved that it only hired illegal workers during the backpay period, so long as these workers continued to do work the discriminatees could perform, the discriminatees were entitled to reinstatement, though probably at the wage levels paid to Respondent's illegal workers. But this is not Respondent's defense.

For example, in Frost Lumber Industries, Inc. (1951) 93 NLRB 1586, Respondent was ordered to reinstate two discriminatees to its sawmill 35 miles away from the camp where they previously worked. The Board noted:

> In view of the fact that Respondent has since June 1949 hired 69 new employees in its plant and an undetermined additional number in construction work on the premises, it cannot now be heard to say that no jobs were available. There is no merit in its contention that Cornelius Reed and Henry Davis were not qualified by training, experience, or education to perform any work for the Respondent. For a long period of years both of these men demonstrated their ability in a variety of jobs throughout the system. Their availability for reemployment is clearly established by the persistent efforts of the Union and themselves for a period of several months following the layoff in June 1949 to persuade the Respondent to offer them employment.
>
> 93 NLRB at 1595

And in Morris Steinberg (1948) 78 NLRB 211, 213 the Board ordered reinstatement of two discriminatorily discharged fur trappers to whereever furs could be found:

> We shall direct the Respondents, at the customary time before the opening of the muskrat trapping season, to offer the above-named trappers reemployment on the land formerly trapped by them, unless they had been promised better land by the Respondent's agents. In the latter event, we shall require the Respondents to fulfuill their promises ass they would have done were it not for their illegal discrimination. With respect to the remaining trappers, who were discriminatorily refused reemployment on better parcels which are not identifiable, and the trapper (Favre) who was discriminatorily denied employment as a new employee, we shall require the Respondents to offer them employment on parcels of average productive capacity under the jurisdiction of the Agent who actually effected the discrimination, or his successor. In view of the fact that the parcels, to which reinstatement is ordered herein, might in the meantime have become depopulated of muskrats, or for a valid reason have become unavailable as trapping lands, we shall provide that in such event the trappers be restored to substantially equivalent parcels. The reinstatement ordered herein shall be

> without prejudice to the trappers' seniority or other rights or privileges.

And in Lake County, Indiana Carpenters (1970) 182 NLRB 233, the Board ordered construction workers reinstated to whatever work Respondent had available, and not just to the specific jobs they lost as a result of the discrimination practiced against them. For these reasons, I reject Respondent's contention that there was any change in the amount of work available to the male discriminatees.[19]

To the extent Respondent's business justification for ceasing to use females differs from its justification for ceasing to use males, I must consider it separately. The whole of it consists of the contention that, because female employees did more limited kinds of work than male employees, as Respondent cut down on its use of "legal" labor, females were the first to go. The claim is ostensibly supported by Morrotte's testimony that (1) females "usually were assigned to light menial labor" and (2)

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[19]Since the passage of the Immigration Reform and Control Act, 8 USC Section 1324, with its employer sanctions, it is an open question whether a Respondent who had demonstrated that it hired only illegal workers could defeat the reinstatement rights of legal workers under a Board order. See Sure-Tan, Inc. v. NLRB (1984) 467 U.S. 883, Rigi Agricultural Services, Inc. (1985) 11 ALRB No. 27 (pre-IRCA) If the policy of the Immigration and Naturalization Act to deter unauthorized immigration is a limit to the Board's authority to order reinstatement of illegal workers, might it not equally contravene that policy for the Board to countenance the use of illegal workers to defeat the reinstatement rights of legal workers? Fortunately, I have no need to address this question.

females could not do some of the "more strenuous work."[20]

So far as the argument is premised on Respondent's proof of a decline in the use of legal labor, I must reject it for the reasons discussed previously, but I do not believe Respondent has proved much by the rest of it. Morrotte's testimony that females were "usually" assigned to a certain kind of work says nothing at all about what else they could, and sometimes did, do. In Flora and Argus Construction Company (1964) 149 NLRB 149 NLRB 583, 585 the NLRB rejected a similar argument, though phrased in terms of incompetence as opposed to incapacity:

> However, Respondent also argues that because of the alleged incompetence of the discriminatees, they would not have been retained even absent discrimination, since they did not have the capability for performing the jobs which had to be filled at the Respondent's construction projects. Thus, the Respondent asserts that a single job classification such as laborer or millwright covers a multitude of skills and that the discriminatees, although they may have been capable of performing the simpler aspects of such jobs, were not capable of fulfilling the more skilled requirements included within the same general job description. The answer to this argument is simply that there is now no way to verify

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[20]Before considering what Respondent has actually proved, I note that while this Board's exclusive charter is to remedy unfair labor practices, it is also obligated "to take into account equally important" legislative objectives, Sure Tan Inc. v. NLRB, supra, such as, anti-discrimination laws: as the Supreme Court concluded, since "national labor policy embodies the principles of non-discrimination as a matter of highest priority [cite],...it is a commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part." Emporium Capwell Co. v. Western Addition Community Organization (1975) 420 U.S. 50, 66. Because Respondent's defense smacks of sex discrimination which is specifically prohibited by state law, see, Govenment Code Section 12940, Respondent might have to prove that sex was a bona fide occupational qualification under those laws.

> its truth or accuracy. The seven discriminatees were hired and were paid to carry out the duties assigned to them, and were terminated, not for failure to perform satisfactorily, but for discriminatory reasons. Except for McCaslin, Respondent made no attempt to test its asserted reason that the discriminatees did not have the capability for working out satisfactorily on the remaining work at the project. It is true that the Act imposes no obligation on an employer to retain an inefficient employee or one who is incapable of carrying out assigned duties. But where, as here, an employer has unlawfully discharged employees, foreclosing the opportunity its discharged employees would otherwise have had to demonstrate their fitness for future tasks and thereby precluding a reliable determination of their future suitability, the employer is scarcely in a position to assert that it would not have continued to utilize such employees on jobs within their classification even in the absence of discrimination.

Equally important, because the discriminatees testified that men and women performed the same jobs, Morrotte's testimony that he stopped hiring only women seems entirely arbitrary. Thus, Olivia Margarita Ruelas testified she picked strawberries and "did everything that had to do with tomatoes" (II:150); Santiago Moreno Garnica testified he did all "the general work having to do with tomatoes and strawberries" (II:238); Francisco Carrillo Gutierrez said he only picked tomatoes which, Morrotte testified, the women also did. Finally, even if it were true that the women only did light work, Respondent has not shown that the kind of "light" work they were capable of doing was no longer available. Since Respondent has not shown by persuasive evidence (1) that females could only do certain kinds of work, (2) that they did a different kind of work than some of the men did, and (3) that whatever kind of work they did was no longer available, it has not demonstrated a legitimate business reason to cease hiring females.

Respondent's attempt to analogize its decision not to hire male legals from Tijuana or females to situations in which employers have closed down certain operations or reduced their work force is misplaced: Respondent has simply not shown that it eliminated any jobs or that it reduced its work force. It has merely proved that it changed the qualifications of the people whom it would hire to perform the same kind of work it historically offered. On the record as a whole, including the fact that the purported changes focused on the groups to which the discriminatees belonged, the failure of Respondent to prove that it ceased hiring legals, and the insubstantiality of the evidence concerning the reason for ceasing to hire females, I conclude that the changes were designed to avoid Respondent's obligations under the Board's order. This case is thus distinguishable from that of Fibreboard Paper Products (1969) 180 NLRB 142 and Holiday Radio Inc. dba KSLM-AM and KSD-FM (1985) 275 NLRB 1342 cited by Respondent, in which certain functions were actually eliminated or the case of Florsheim Shoe Store Co. v. NLRB (2nd Cir. 1977) 565 F.2d 1240 in which the Board was ordered to craft a remedy to take into account the existence of legitimate business reasons for

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eliminating part-time work.[21]

It remains to discuss "turnover". As noted previously, Respondent's "proof" of turnover consists of defining the group of "steady" employees as only those who worked in both 1975 and 1976 and who worked thereafter. On the basis of their decline in numbers Respondent claims to have demonstrated turnover. While I am sure there was turnover, as I have previously indicated, I do not think Respondent has measured it correctly; in either event, it is irrelevant. Thus, our Board:

> Respondent's efforts to direct attention to the work histories or turnover ratios of other Kawano workers or other agricultural workers generally is based on sheer conjecture and is rejected. There is simply no plausible, logical, statistical or common sense basis for doing so particularly in view of having available the precise work histories of the individual discriminatees in question.
>
> Kawano Inc. (1983) 9 ALRB No. 62 ALJD. p.38

The NLRB:

> Respondent contends that because of its high turnover rate, many of the discriminatees would not have remained for a period of 3-1/2 years but would have left, voluntarily, perhaps within 6 months. This is sheer

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[21]This case is also distinguishable from NLRB v. Fort Vancouver Plywood Co. (9th Cir. 1979) 604 F.2d 596 the only case Respondent has cited and I have been able to find, which arguably deals with "kinds of employees" as opposed to the availability of jobs. However, in that case, the Board acknowledged the existence of legitimate business reasons for ceasing to use certain kinds of employees. Here Respondent has not persuaded me that (1) it generally ceased to hire male workers or (2) that female workers could not do work that it continued to offer. See Baker Mfg. Co. v. NLRB (5th Cir. 1977) 9 F.2d 1219, 1224 (while a Respondent may show that legitimate business reasons motivated it to eliminate certain kinds of employees, it still had an obligation to offer substantially equivalent employment.)

> conjecture which I categorically reject. To say the least, this is another "uncertainty" which must be resolved against the Respondent.
>
> Midwest Hanger Co. (1975) 221 NLRB 911, 917

Accordingly, I not only reject Respondent's contention that any changes have taken place which would render use of General Counsel's prior hours formula unreasonable, but since I have already considered and rejected the elements of Respondent's "substitute formula" in the context of the appropriateness of General Counsel's prior hours formula, I also reject it as a "substitute formula."

d.

This does not entirely settle the question of the propriety of the Specification for, as noted, General Counsel has not consistently used a true prior hours formula. It remains, then, to discuss the "reasonableness" of the "exceptions" to the strict use of prior hours. Respondent specifically objects to (1) the use of average hours of the year round (hourly) employees to compute the prior hours of the (three) year round employees who were initially hired in 1975 and who, therefore, did not have a full year's employment history; and (2) the establishment of the "liability" period for the seasonal employees. I will discuss each in turn.

1.

In the underlying decision, the ALJ found that the members of the Armenta crew would not have been laid off during Respondent's slack season in January but for Respondent's union

animus. She made this determination based upon a detailed examination of the work histories of its members:

> The respondent's operations regularly reach their lowest level in January, between the end of the fall tomato harvest and the beginning of the harvests of cauliflower and August strawberries, and most workers, documented and undocumented, are laid off. The uncharacteristic feature of the January 1976 lay-off was the inclusion of Tijuana workers who had previously worked year-round. Nine of the twenty-three employees had worked at Ukegawa Brothers for at least seven years and, except for occasional voluntary vacations, had worked year-round for at least the last five years. Five more were long-term employees who had worked through the slack seasons of 1974 and 1975. Six were hired more recently, mostly in 1974, but had worked through the 1975 slack season. Only three, first hired in 1975, had no prior history of year-round work.

The final three employees the ALJ was referring to are: Moises Ramirez Santana, Remigio Hernandez and Esteban Avila Ortiz. Because these three had no previous history of year-round employment, the ALJ declined to conclude that they were discriminatorily laid off in 1976. The Board reversed the Law Judge and found that the three employees would have continued in Respondent's employ throughout the year. 8 ALRB No. 90, p. 31 n, 12. It is in light of this specific finding that I view Respondent's objection that:

> General Counsel takes it upon herself to decide that these persons should have been so employed, and assigns gross backpay to them on a 52-week per year basis throughout the backpay period. Furthermore, Delgado admitted that [this] averaging method...assumed there was sufficient work available for those who had not worked the full quarter in 1975.
>
> Post Hearing Brief, p. 43

Given the Board's finding, it does not seem appropriate to characterize Delgado’s treatment of these employees as

year-round as resting upon an assumption. But I reject the argument for another reason: if Respondent produced automobiles year-round and had unlawfully fired a worker on the assembly line in, say, June and the record showed that it continued to offer work year round in subsequent years (as this record plainly indicates that Respondent did, at least for some employees, RX 23-78), it could not be heard to argue that, because the discriminatee only began to work in May that it was impermissible to "assume" he would have had work prior to his hire date. Rather, to make its argument good, Respondent would have to show either that there was no work at all from January to May, or that, because of other non-discriminatory criteria, the discriminatee would not have worked during his pre-hire period. Respondent has not given a complete enough picture of its employment patterns for me to conclude that General Counsel's formula is not a reasonable predictor of the amount of work that would have been available to the year-round employees. Accordingly, while it is true that use of one's fellow discriminatee's average prior hours is not a true prior hours formula, on the record before me, I cannot say General Counsel's technique is unreasonable.

With respect to the seasonal employees, Respondent makes a similar objection:

> Where seasonal employees made application for reinstatement in 1976 prior to the date on which they began working for Respondent in 1975, General Counsel uses the earlier date to establish the beginning of the backpay liability period in each subsequent year, without regard to when Respondent's season started in those years. T, 66. However, for those seasonal employees who made application for work in 1976 at a

> date later than they first began working for Respondent Partnership in 1975, General Counsel only uses the 1976 date of application to fix the beginning of the liability period for 1976. For all subsequent years during the backpay period, General Counsel reverts to the date on which the discriminatee began employment in 1975 to fix the backpay liability beginning date in those subsequent years -- again, this methodology is used without regard to whether there was actually work available for the discriminatees on the earlier dates in subsequent years.
>
> Post Hearing Brief, p. 44

To the extent Respondent is objecting to the beginning dates for liability, I do not see how General Counsel had much choice: she followed the dates established by either the Board of the ALJ. To the extent Respondent is arguing that when an employee started work in 1975 does not necessarily determine when he or she would have started work in subsequent seasons, Respondent is undoubtedly correct; but it has not thereby proved that an average of the past hours worked by similarly situated employees is not a fair indicator of how much work would have been available to the employee. That General Counsel systematically chooses the longer of two possible periods of employment is no cause for complaint since, as between a longer and a shorter period, uncertainties are to be resolved against Respondent as the wrongdoer.

Once again, in view of Respondent's failure to show that in any quarter of the backpay period, it did not offer amounts of employment comparable to what General Counsel claims the discriminatees would have worked, and the impossibility of determining any other suitable measure of the amount of work available from the abbreviated payroll records in evidence, General Counsel's approach seems reasonable.

General Counsel's formula is accepted.

IV.

MISCELLANEOUS ARGUMENTS

A. How To Treat Travel Expenses

The parties agree that a discriminatee may recover expenses incurred in seeking or maintaining interim employment, except that if the discriminatee would have had similar expenses at the gross employer, he can recover only expenses in excess of the amounts he would have incurred at the gross employer. East Texas Steel Castings Company, Inc. (1956) 116 NLRB 1336, 1341 enf'd (8th Cir. 1958) 255 F.2d 284 and (5th Cir. 1960) 281 F.2d 686, see also, Matlock Truck Body and Trailer Corp. (1980) 248 NLRB 461, 479. "Recoverable" expenses are not confined to those which, like the cost of commuting, are directly work-related; they may also include increased costs of living associated with obtaining and maintaining interim employment:

> In setting forth the payments which the respondent is to make to employees for losses of pay suffered by reason of the respondent's discriminatory discharges and refusals to reinstate, we have stated that such payments shall be less the net earnings of said employees during the respective periods of discrimination, remaining after deduction of expenses. It is to be noted in this connection that many of the employees against whom the respondent discriminated found it necessary, in view of the limited employment opportunities at Crossett and its immediate vicinity, to seek work in California, Arizona, Louisiana, or other places. Some of the employees maintained homes in Crossett or its immediate vicinity, where they lived with their families, and in going to other places to work, they incurred expenses such as for transportation, room, and board, which they would not have incurred had they continued to work for the respondent and not been forced, by virtue of the respondent's unfair labor practices, to leave their homes. Moreover, many of the said employees were

> forced, by virtue of the respondent's unfair labor practices, to give up respondent-owned houses, and thereby incurred expenses which they would not have incurred except for the said unfair labor practices. It is this sort of extra expense to which reference is to made in determining the net earnings of the employees. To the extent that all such expenses diminished the earnings of the employees whom we have found were discriminated against during the respective periods of discrimination, such earnings shall not be deducted in computing the loss of pay the said employees may have suffered.
>
> Crossett Lumber Company (1938)
> 8 NLRB 440, 497-98

Although the parties agree that General Counsel has the burden of proving expenses such as these, they do not agree on how to apply this principle to particular questions. As a result, a number of recurring disagreements have arisen in connection with expenses; to the extent these turn on evidentiary disputes, they are discussed in connection with the claims of specific discriminatees. But there is one broad methodological dispute that is better dealt with at the beginning, namely, whether to follow the NLRB practice of deducting search for work expenses from interim earnings (which means, of course, that such expenses are deducted only when an employee had interim earnings), or to follow the ALRB practice of adding such expenses to gross backpay even when a discriminatee had no interim earnings.

Section 10610 of the NLRB's Case Handling Manual (Part Three), Compliance Proceedings, states that:

> Allowable expenses of the discriminatee during the backpay period are deducted from interim earnings, never added to gross backpay.

* * *

Expenses become irrelevant to any change in monetary

> return if, during the calendar quarter in which they are incurred, there are no interim earnings....

Since Butte View Farms (1978) 4 ALRB No. 90, enf'd 95 Cal. App.3d 96, our Board has followed a different rule. The dispute between the parties centers on the reason for our Board's departure from the NLRB practice, and if that reason any longer obtains.

Respondent contends that the Board's rule is tied to the Board's use of a daily formula, so that the justification for departing from NLRB practice disappears with the use of "dailies." General Counsel contends that it is rooted in a policy decision unrelated to selection of an interval for calculating net backpay.

Both parties rely on the same cases in support of their arguments. In Butte View Farms, the Board wrote:

> Under the current NLRB's practice, an employer is not held liable for job-seeking expenses incurred by a discriminatee during a particular calendar quarter if he did not have any interim earnings in that quarter. Nowhere in the NLRB decisions, so far as we have been able to ascertain, is there a reasoned explanation of the basis for this practice. As the NLRB, and this Board, require that a discriminatee actively seek interim employment in order to maintain his eligibility for back-pay, we believe the discriminatee should be entitled to recover all legitimate expenses, incurred in seeking or holding an interim job, which he would not have incurred but for the employer's unlawful action in discharging him.
>
> 4 ALRB No. 90, fn. 1

It seems to me that the Board is here treating the methodology for recovering expenses as unrelated to use of the daily formula, and if the matter depended only upon a reading of Butte View, I would agree with General Counsel.

However, General Counsel's position becomes dubious in light of the Board's later decision in High and Mighty Farms, supra, which does appear to base the departure from NLRB practice upon use of a daily method to calculate net backpay:

> The NLRB computes backpay on a quarterly basis (F.M. Woolworth Co. (195)0) 90 NLRB 289 [26 LRRM 1185]; NLRB v. Seven-Up Bottling Co. of Miami, Inc. (1952) 344 131 LRRM 2237]), while this Board, in order to fully and fairly compensate discriminatees calculate backpay on a daily or weekly basis, or by any method that is reasonable in light of the information available, equitable, and in accordance with the policy of the Act. (Frudden Produce, Inc. (Mar. 29, 1982) 8 ALRB No. 26.)
>
> In Butte View Farms, supra, 4 ALRB No. 90, we noted that earnings are not computed on a quarterly basis under ALRB procedures, and determined that we would compute expenses for the entire backpay period rather than quarterly. We therefore allow a discriminatee to deduct expenses incurred seeking or working at interim employment at any time during the backpay period from interim earnings accumulated during the entire backpay period.
>
> 8 ALRB No. 54, p. 6

If the matter depended upon High and Mighty Farms, I would agree with Respondent.

The question becomes unsettled again in light of the Board's adoption of the ALJ's decision in Kawano, Inc., 9 ALRB No, 62, decided after High and Mighty Farms. The ALJ wrote:

> The great bulk of job search expenses set forth by General Counsel in the Backpay Spec relate to gas costs required to search for interim employment.
>
> * * *
>
> The amounts sought are quite reasonable. Indeed, Respondent does not contend otherwise. Rather, respondent asserts that the NLRB policy of deducting interim expenses only in quarters that interim income exist should be followed by the ALRB.
>
> However, the ALRB has found inapplicable to the

> agricultural setting the interim expense rule applied by the NLRB to the industrial setting. Butte View Farms (1978) 4 ALRB No. 80; enf'd 95 Cal.App.3d 96. The rationale is readily apparent. Both the ALRB and NLRB require workers to mitigate their damages by making reasonable good faith efforts to secure interim employment. However, in the agricultural setting, where most employers have very informal application procedures, a worker's ability to obtain employment is directly related to his or her ability to make frequent trips to the border or ranch asking the raiteros or foremen if there is any work available at that time. Particularly, for seasonal workers who generally applied during the two-week period prior to the season starting, the application of the NLRB rule would be totally contrary to effectuating the purposes of the Act. Application of the NLRB rule is patently inequitable and arbitrary. The more equitable and realistic rule set forth by the Board in Butte View is followed here.

Since I am unable to understand any necessary connection between the interval over which backpay is calculated and the selection of a method for treating expenses, I will adhere to the cases which base the Board's treatment of expenses upon the importance of travel in finding agricultural employment. Accordingly, I will recommend adopting General Counsel's technique of adding expenses to gross backpay.

B. The Effect of Receiving Unemployment Benefits and of Failure to Find Work

Respondent contends that "[tlhere is a presumption that a discriminatee who receives unemployment benefits may lack the incentive to make a diligent search for work while receiving those benefits." Post Hearing Brief p. 49. Since a presumption is defined as "an assumption of fact that the law requires to be made from another fact or group of facts" Evidence Code Section 600(a), if there were truly a presumption about the significance of

receiving unemployment benefits, it would do more than permit me to infer lack of diligence: it would require me to do so. In fact, there is no such presumption.

Indeed, to the extent there ever was a presumption concerning the receipt of unemployment benefits, it used to operate as conclusive evidence that a discriminatee made a reasonable search for work. Ohio Public Service Company (1943) 52 NLRB 725, Harvest Queen Mill and Elevator Company (1950) 90 NLRB 320. However, since Southern Silk Mills, Inc. (1956) 116 NLRB 769, enf. on other grounds (6th Cir. 19) 242 F.2d 697, cert, den. 355 US 821, the Board no longer treats registration for, and receipt of unemployment benefits, as conclusive evidence of diligence, but only as "a factor to be given more or less weight depending upon all the circumstances..." 116 NLRB 769; Rogers Furniture Sales Inc. (1974) 213 NLRB 834, Laredo Packing Company (1982) 264 NLRB 245.

Respondent also contends that if a discriminatee is unable to find work over an extended period of time, it is proper to view with suspicion his diligence in seeking work, citing Blue Hills Cemetery (1979) 240 NLRB 735 for this proposition. Blue Hills does stand for this proposition, but it stands for more: for the Board goes on to state that whatever suspicions might be aroused by the failure to find work do not substitute for Respondent's meeting its burden of proving lack of diligence. 240 NLRB at 736.

C. The Confidentiality of Income Tax Returns and W-2 Statements

At the hearing, I ruled that the discriminatees had a privilege to refuse to turn over their tax returns or their W-2 forms and that Respondent could not subpoena copies of their W-2 forms from their interim employers. Respondent excepted to this ruling. It now argues that my refusal to require production of the tax returns, or to permit introduction of W-2 forms turned over by interim employers pursuant to subpoena, "deprived Respondent of a valuable tool necessary to meet its burden to mitigate liability and therefore deprived Respondent of due process." Post-Hearing Brief pp. 67-68.

If Respondent is correct that a litigant is deprived of due process when a witness refuses to turn over information, or when he is instructed not to provide information relating to someone else who has an enforceable interest in preventing its disclosure, then the right to due process being supreme, there are no privileges. Since this is not the case, Respondent's argument proves too much and is wrong. Respondent had to show either that there is no privilege at all, or that it was improperly invoked.

The privilege I relied upon in my rulings derives from Revenue and Taxation Code section 19282, which makes it a criminal offense for "the Franchise Tax Board or any member thereof, or any deputy, agent, clerk, or employee of the State" to disclose information as to the amount of income or any particulars set forth or disclosed in "returns, reports or documents" required to be filed by the Revenue and Taxation Code.

For over thirty years, this section has been construed as evincing an intent "to preserve the secrecy of [income tax returns] except in the few instances" in which disclosure is expressly authorized, none of which is applicable here. Webb v. Standard Oil Company (1957) 49 C.2d 509, 512: "The effect of the statutory prohibition is to render the returns privileged, and the privilege should not be nullified by permitting third parties to obtain the information by adopting the indirect procedure of demanding copies of tax returns." 49 Cal.2d 513. Thus, a taxpayer is privileged to refuse to turn over his tax returns. See also Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal.3d 1.

Although it is a separate question whether W-2 forms, as opposed to the returns themselves, are privileged, this question, too, has been answered against Respondent's claim for compelled disclosure. In Brown v. Superior Court (1977) 71 Cal. App.3d 141, the court held that "W-2 forms, which are required to be attached to a taxpayer's state and federal income tax returns, constitute an integral part of the return" and are privileged. 71 Cal. App.3d 141, 144. Finally, Respondent's contention that it should at least have been allowed to put in the information contained in the W-2 forms, if it were not permitted to put in the forms themselves, has also been rejected. In Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal.3d l, the Supreme Court upheld a party's refusal to answer an interrogatory seeking information contained in a party's tax return. The Court wrote:

> "...[I]n Webb [v. Standard Oil], we made it clear that attempts to avoid application of the privilege by indirect means could not be tolerated. Real party in interest's interrogatory...appears to be such an attempt. While not asking either for the return itself or a copy, the question does seek specific information concerning specific information in the return. To require petitioner to respond to such an inquiry would render meaningless the privilege [we have recognized.]" 15 C.3d 1, 7.

It is clear (1) from Webb, that there is a privilege against disclosing tax returns; (2) from Brown that there is a privilege against disclosing W-2 forms; and (3) from Sav-On that there is a privilege against disclosing the information contained within either of the forms; thus, with respect to every class of information sought by Respondent, case law confirms the existence of a privilege.

The next consideration is whether the privileges were properly invoked. There were two circumstances in which the question of the discoverability of tax information came up: (1) during examination of the discriminatees themselves; and (2) in the connection with the enforcement of subpoenas. I will deal with the discovery issue in the subpoena context first. Prior to the hearing, Respondent caused subpoenas to be served on a number of interim employers which called for, among other things, W-2 forms of discriminatees who were employed by them during the backpay period.

Under Code of Civil Procedure section 1987.1 which deals with the service and quashing of subpoenas, and which by regulation guides our own subpoena practice,

> When a subpoena requires...the production of books, documents or other things, before a court, or at the trial of an issue therein, upon motion reasonably made by the party, the witness,...or upon the court's own motion...may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare. In addition, the court may make any other order as may be appropriate to protect...the witness...from unreasonable or oppressive demands including unreasonable violations of a witness's...right of privacy.

Since the existence of a privilege means "the protection of confidentiality is [considered] more important than the need for evidence," Witkin, Evidence 3rd Ed. Section 1068, there can be no question that, to the extent the subpoenas aimed at obtaining privileged information, albeit indirectly, they represented what the Legislature and the courts have already determined constitute unreasonable violations of the discriminatee's right to privacy. Moreover, when, in the absence of the discriminatees, I instructed employers not to turn over the W-2 form of discriminatees, I was acting pursuant to my obligation to protect the privilege under Evidence Code section 116(a):

> a presiding officer, on his own motion...shall exclude information that is subject to a claim of privilege if there is no one present to claim it.[22]

[22]I should add that I advised discriminatees of the existence of the privilege in order that any waiver of it be made knowingly. I did so because the right to privacy of financial records is of constitutional provenance. California Constitution, Art. I, Section 1; Burrows v. Superior Court, (1974) 13 C.3d 238; Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 52.

D. The Effect of the Specification

At a number of points in its Post-Hearing Brief, Respondent corporation contends that General Counsel's attribution of earnings to particular employers does not serve as proof that the discriminatee actually had earnings at that particular employer. The matter becomes of some moment when, although a discriminatee cannot remember working at a particular employer from whom the Specification shows earnings, General Counsel seeks reimbursement for union dues deducted by that employer based upon the earnings attributed to the employer and proof that a contract containing a union security provision was in effect between that employer and a union during the period in which the Specification attributes such earnings.[23]

Respondent is correct that a pleading is ordinarily not evidence of the matters asserted by the party whose burden it is to prove such matters; but General Counsel does not have the burden of proving interim earnings. Rather, it is Respondent who bears the burden of establishing "facts which would negative the

[23]Although I reject the corporation's argument for other reasons, I believe it is moot since, in its Answer, the partnership did not contest the identity of the interim employers. Since, having filed a separate Answer, the partnership cannot rely on the Answer of the corporation to dispute the General Counsel's attribution of interim earnings, Kirk v. Santa Barbara Ice Co. (1910) 157 C. 591, 594), and since the partnership and the corporation have been held to be alter egos, any liability assessed against the partnership runs against the corporation.

existence of liability to a given employee or which would mitigate that liability," NLRB v. Brown Root, Inc., et al. (8th Cir. 1963) 311 F.2d 447, 454; the inclusion of interims in the specification represents only "credits which the Board was prepared to concede." Ibid. When General Counsel pleads that a discriminatee had interim earnings at a certain employer during the backpay period, that pleading is an admission which removes the issue of those earnings from the case. Witkin, Pleading 3rd Ed. Section 408. When Respondent chooses to contest such matters, the burden returns to it to prove otherwise than as General Counsel contends. See 8 Cal. Administrative Code Section 20290(d)(2). It follows, then, that when Respondent fails to present evidence on questions it has itself raised, General Counsel's admission stands.

E. What to do About the Missing Discriminatees

A number of discriminatees have not been located. In accordance with established practice, General Counsel asks that the amounts claimed in the Specification be placed in escrow with the Regional Director, subject to the Respondent's right to examine the discriminatees if they be located. Respondent disputes only the length of the period proposed by General Counsel who, in accordance with ALRB practice, has proposed a two year escrow period. Respondent urges adoption of the NLRB period of one year.

Our Board has adopted the two year escrow period, because of "the highly mobile nature of agricultural workers and the

attendant difficulty in locating discriminatees," Mario Saikhon (1984) 10 ALRB No. 36, p. 3. Respondent contends that because the discriminatees in this case are a "particularly stable group," that the two year escrow period is unnecessary. The purpose behind the escrow period is to balance the interests of the discriminatees in receiving the backpay to which they are presumptively entitled against the need to someday bring a close to these proceedings. Whether one year or two years is better suited to achieve that balance is a moot point since a period of either length seems reasonable. In view of this, I do not feel it appropriate for me to re-think the wisdom of the present two-year escrow rule.

V.

THE INDIVIDUAL CLAIMS

1. JOSE AGUIRRE

Respondent initially contends that Aquirre's backpay claim should be stricken for the first and second quarters of 1977, the fourth quarter of 1984 through the second quarter of 1985, and all of 1987 on a number of related grounds all of which add up to the conclusion that Aguirre failed to make an adequate search for work. Among the reasons advanced by Respondent for drawing this conclusion is the contention, which I have previously discussed, that because Aguirre collected unemployment benefits during this period I must infer that he was less than diligent. Having rejected the argument previously, I will not treat it further here.

However, Respondent makes a companion argument that Aguirre himself admitted he was less than diligent while receiving unemployment benefits when he testified that he began to look "harder" for work after his unemployment benefits ran out. (XVI:938) I reject the argument for two reasons. In the first place, Aguirre also testified that he continued to look for work while he collected unemployment. (IX:937.) In the second place, I believe Respondent has unfairly interpreted the use of the comparative in Aguirre's testimony: one would hardly take a runner's description of his having to work "harder" because he was pressed at the end of a race as implying that he did not work hard throughout it. Respondent has failed to prove Aguirre was less than diligent during these quarters and I decline to strike backpay.

The Specification shows nearly continuous earnings at Double D/Cattle Ranch from 1977 through 1984, except for a period of unemployment during the first quarter of 1978, and a period of low earnings during the third quarter of 1983. With respect to the 1978 period. Respondent contends that "average" interim earnings should be attributed to Aguirre for the first quarter of 1978 because he could not recall being laid off for more than a month at Double D. I decline to do so. The period in question is more than a decade ago; under the circumstances, I cannot treat his inability to recall whether he was laid off for a period as short as the one in question as equivalent to an admission that he never was.

Aguirre had a number of quarters of relatively low earnings at Double D. Respondent makes no issue about the amounts of interims earned during three of these quarters, but does contend that the earnings in one of them are so uncharacteristically low that Aguirre must have had greater earnings than are reflected in the Specification. Respondent suggests that I impute additional interims to Aguirre in the amount of interims earned by another discriminatee, Reymundo Mejorado, on the basis of Aguirre's testimony that he worked year-round at Double D and that he and Mejorado worked "the approximate same amount of days." Respondent would take Aguirre's testimony that he and Mejorado worked "approximately" the same amount of time as meaning that he and Mejorado worked "exactly" the same amount of time.

That Aguirre could be correct about working "approximately" the same amount as Mejorado, and that the Specification could also be correct in showing a great disparity in the wages of the two men during certain periods, can be easily demonstrated by comparing the total interims of the two men at Double D over the same period. Aguirre had approximately $39,040 in reported wages at Double D from the fourth quarter of 1978 until the third quarter of 1984 while Mejorado had about $39,437 in earnings during the same period. It simply does not follow from the evidence relied upon by Respondent that it is more likely than not that Aguirre had greater earnings than are reported in the Specification.

2. FRANCISCO ARMENIA

In addition to net backpay, General Counsel claims raitero pay for Armenta. Respondent objects to the raitero amounts claimed on the grounds that General Counsel failed to reduce then for some quarters by Armenta's expenses as a raitero. Armenta did testify that he spent about $10.00 on gas every day (which amounts to $780.00 a quarter) when he drove to Ukegawa and Respondent seeks a credit for these amounts in the third and fourth quarter of 1976, the first quarter of 1982, and the second quarter of 1986.

Delgado testified that, generally speaking, he did reduce the discriminatees' claims for raitero pay by their raitero expenses, but that he did not do so with respect to Armenta's claim because:

> He informed me that his expenses--Well, he informed me that he continued being a raitero for his interim employers, although the circumstances had kind of changed. The interim employer did not provide him with money to take employees, but he did receive a sum of money from the actual employees themselves, so he felt he had been compensated for the amount of work he did for the raitero about the same.
>
> In reviewing his specification it was apparent that although during the times he was employed he did have raitero pay paid to him, he had not worked as much at interim employers as he had with Ukegawa, so for his spec a formula was devised and applied whereby the amount of raitero pay was reduced by proportionately the same ratio as interim mitigated his gross. So if his interim was half of what his gross was, then only half of the raitero gross was claimed.
>
> (I:45.)

For obvious reasons, Respondent does not object to General Counsel's reducing the amount of gross backpay in this

fashion, but seeks an additional reduction for Armenta's raitero expenses. Although not saying so directly, General Counsel apparently contends that such a reduction is built into its ratio for determining the amount of raitero pay included as gross backpay. I am not sure that it is.

Assuming that roughly equal wages reflect similar wage rates, employment and commute patterns at Ukegawa and at Armenta's interim employers, it seems to me reasonable to impute the amount of raitero pay "received" by Armenta at his interim employment by multiplying the raitero pay he received at Ukegawa by the ratio that his interim wages bear to his gross backpay. However, whatever expenses he had as a raitero at either Ukegawa or at his interim employers are a matter for separate proof and depend upon an entirely different set of variables such as the kind of car he drove, the cost of gasoline, and his mileage. Once again, assuming the consistency of these variables at both Ukegawa and at Armenta's interim employers, I could impute Armenta's raitero "expenses" at his interim employers by multiplying his Ukegawa expenses by the same ratio used to obtain his raitero pay at his interim employers, but it seems to me I would still have to subtract expenses from both sides of the equation: I cannot simply ignore them in the computation of a proportional "raitero wage."

Since Armenta himself conceded that his interim raitero benefits offset the raitero benefits he was likely to have

received from Respondent, and, further, since there is no evidence to make the previously described assumptions under which I could impute raitero expenses to Armenta at his interim employment, it seems to me more appropriate to strike the raitero claims in their entirety.

Armenta admitted that he took a month's vacation in Mexico every other year throughout the backpay period. Generally, he took his vacations in January and February because "there was no work available" for him in those months. (XI:1047.) Respondent contends that the Specification should be adjusted to take these periods of vacation into account. I agree. Since there is no evidence that Armenta took a vacation while employed by Respondents,[24] gross backpay should not accrue during the period of his unavailability for work.

However, in the absence of precise evidence as to when the biennial cycle of vacations began, the question is: beginning in which year should first quarter backpay be discounted, 1977 or 1978? Since (1) all uncertainties are to be resolved against the Respondent and (2) Armenta was unable to find work throughout the remainder of 1976, which makes it unlikely that he needed, or took, a vacation in 1977, I will reduce his backpay starting from

[24]Had there been proof that Armenta took a month long vacation while in Respondent's employ there would be no tolling of backpay for an equivalent period of vacation at interim employment. Rainbow Coaches (1986) 280 NLRB 166, 183.

1978 in each of the first quarters throughout the backpay period by one third (one month's vacation being one-third of a quarter.)

Armenta began working for Harry Singh in 1977 and the Specification shows that, from 1977 until 1987, he worked regularly for Singh before starting to work full-time for San Clemente in 1987. (See also XI:1037.) From around 1980, he worked for both Singh and San Clemente. On the basis of Armenta's testimony that, when there was no work for him at Singh or San Clemente, he would wait to be recalled by them, Respondent urges me to strike backpay for the periods of time when the Specification shows periods of either no, or minimal, interim employment at either place.

Armenta's description of his work history is quite confusing. He clearly testified there was "generally" no work available at Singh in the first quarter of the year, that the season at Singh ran from June to December, and that he would not look for work elsewhere while waiting to be recalled by Singh. He also testified that he only worked for Singh and San Clemente throughout the backpay period. Combining all these elements of his testimony, one would expect to see a pattern of no earnings during the first and second quarters of the backpay period.

In fact, since 1977, when he first started working at Singh, in only two years (1980 and 1982) are there no earnings reported for the first quarter, and for all the years of his employment at Singh, his earnings for the first two quarters

fluctuate from a low of less than $200 to a high of over $4300, and his average earnings during this period (in which Respondent argues he did not search for work) are about $1400. I simply cannot conclude from the record as a whole that Armenta was regularly unavailable for work during these periods.

Moreover, it does not appear that the principle under which Respondent urges me to strike all backpay even exists. According to Respondent, all of Armenta's gross backpay should be stricken for any quarter in which Armenta had no, or minimal, interim earnings on the grounds that "where a discriminatee did not make adequate search for work during a particular [period within] a quarter, [he] is not entitled to any backpay for that quarter." Post-Hearing Brief, p. 51. However, none of the cases from which Respondent purports to obtain its rule stands for it; rather, in each of the cases in which there is any discussion at all relating to a discriminatee's lack of availability for work, the rule adhered to is that gross backpay is stricken only for the period of the discriminatee's removal from the job market. See generally the discussion concerning temporary removal from the job market, Rainbow Coaches (1986) 280 NLRB 166, at 193, 199; Carter's of California (1980) 250 NLRB 344, 349.

Nevertheless, the existence of these periods of low earnings, combined with Armenta's clear testimony that he waited to be recalled after his layoffs, reasonably implies that for at least part of the first and second quarters, he should be

considered to have removed himself from the job market, and that his gross backpay should be reduced accordingly. The problem is, what is a fair basis upon which to do that? It seems to me fairest to compute an average wage for Armenta's periods of Singh and San Clemente employment,[25] and then to reduce his gross backpay for any period of below average wages in the proportion that the below average wages bears to the average wage. I will except from this technique the last quarter of 1976, when Armenta first went to work at Singh, on the grounds that he testified he actively sought work elsewhere before finding it at Singh, and the years 1977 and 1978, when the appearance of multiple employers in the Specification leads me to conclude that Armenta was actively seeking work.

3. ESTEBAN AVILA ORTIZ

Respondent does not except to any features of Avila's specification, but only to General Counsel's technique of adding

[25]There is another problem. When did his San Clemente employment begin? Armenta testified he worked at San Clemente through labor contractors, but it is not clear which of the other employers listed in the Specification are contractors and, if they are, which "contractors" listed in the Specification signal the onset of San Clemente employment. Because he testified he started at San Clemente in 1980, I will treat Horizon Harvest as a San Clemente contractor. However, I will not include his 1979 Horizon Harvest "employment" as San Clemente employment because, if Horizon is a contractor (as I am finding on the basis of Armenta's testimony about when he started at San Clemente), in the absence of proof that San Clemente was its only client, there is no necessity that Armenta's Horizon Harvest employment was coterminous with his San Clemente employment.

travel expenses to gross backpay, and, at that, only when the technique results in backpay due when it would not be due under the NLRB's technique. Respondent lists the second and third quarters of 1977 and 1979, and the second quarter of 1984, as quarters in which it has been prejudiced by General Counsel's technique.

I have already rejected Respondents general argument about whether expenses may be added to gross backpay. It remains only to point out that, because Ortiz had interim earnings in each of the quarters during which Respondent contends his net backpay was increased by General Counsel's technique, Respondent's claim of prejudice is unfounded. So long as there are interims, it makes no difference whether they are added to gross backpay or whether they are deducted from interim earnings.

4. FRANCISCO CARILLO GUITERREZ

Respondent primarily attacks General Counsel's claim for expenses. While at Ukegawa, Guiterrez lived in Tijuana and rode to work with Rafael Ochoa. Although he did not pay Ochoa for the ride, he did pay $1.00 a day to taxi to the border where he met Ochoa. It seems to this $1.00 per day is a work-related expense. (He also took a bus home from the border when Ochoa dropped him off, but because he could not recall how much the fare was, I will not take this into account.) Respondent contends that the $1.00 per day he spent at Ukegawa should be offset against travel costs incurred during his stints at Orange County Nursery and TMY and

SKF. I agree; Guiterrez is only entitled to expenses incurred at interim employment in excess of the same expenses he would have incurred had he continued on Respondent's employ.

After TMY, the Specification shows that Guiterrez worked for International Decoratives, Tech Builders, North County Growers, and Bauer. Because Guiterrez did not testify about any commute to work expenses when he worked for these employers, Respondent urges that his claim for expenses in connection with his employment there be stricken. I agree.

The final contention regarding commute to work expenses arises in connection with the expenses claimed for the fourth quarter of 1984, which are out of line with the amounts claimed for any other period of Guiterrez's KOA employment. Guiterrez testified he paid about $13.00 a week commuting to KOA which, after deducting the $l/day which he paid to ride to his border pickup at Ukegawa, gives him additional expenses of $7/week incurred at his interim employment. To translate this weekly expense into quarterly figures for the purpose of the Specification, we need to know the number of weeks Guiterrez worked in each quarter. RX 81 provides the answers and General Counsel is directed to include expenses for those weeks in accordance with the periods of KOA employment contained therein.

Respondent also objects to the claim for union dues at SKF after July 30, 1982 since the only evidence of a contract requiring dues deductions at SKF indicates that the contract expired on July 31, 1982. I agree.

Finally, Respondent claims that the absence of earnings in the Specification for the last quarter of 1983 means that Guitierrez failed to search for work. That is not the law; Respondent must affirmatively prove lack of diligence.

5. PEDRO CHAIREZ

With the exception of the first quarter of 1976 and the first quarter of 1977, Chairez shows continuous interim employment throughout the backpay period. The only period in the Specification about which Respondent complains is the third quarter of 1980 when the Specification shows only $260.95 in interim earnings. Respondent argues that Chairez quit his job at Double-D in order to take the job at Penasquito. Since the Specification shows considerably reduced earnings for the quarter following his Double-D employment, Respondent argues Chairez's quitting was unjustifiable. Chairez did imply that he quit Double-D, but when pressed by Respondent's Counsel to clarify exactly what happened he repeatedly insisted that he was "terminated" or "laid off":

> BY MR. SCOTT:
>
> Q Mr. Chairez, why did you stop working at the ranch in Jamul? [Double-D]
>
> A Because, I got a job where I work now.
>
> Q Okay. And where is that, sir?
>
> BY MR. SCOTT:
>
> Q And, sir, how much time passed between when you stopped working at the ranch in Jamul and you began working where you work now?
>
> A I don't remember.

Q Sir, isn't it true that you just stopped reporting for work at the ranch in Jamul?

a Because they fired me.

Q They fired you from the ranch in Jamul, sir?

A Yes.

Q And why did they fire you, sir?

A I don't know. We were just laid off, that's all.

Q Sir, what was the name of your supervisor at the ranch in Jamul?

A Federico. F-e-d-e-r-i-c-o.

Q And was Federico the one who told you that there was no more work for you at the Jamul Ranch?

A Yes.

Q Sir, isn't it true that you just stopped going to the Jamul Ranch because it was to far away?

A No.

Q Isn't it true that the was still work for you to do at the Jamul Ranch, but, you chose not to report for work any longer?

A Because, I got a job over here.

Q Sir, did get that job over there before you stopped working at the ranch in Jamul?

A No, when they laid me off.[26]

---

[26]Respondent makes another argument with respect to this period to the effect that General Counsel cannot use the earnings listed in the Specification at Yamate Farms to prove that Chairez actually looked for work during the period in question because the Specification is not evidence. Although I have previously addressed this argument, I should add that in this context, I am not sure it matters where Chairez worked; since Respondent accepts that he had interim earnings during the period following his Double D employment, it cannot at the same time argue that he failed to search for work.

Respondent has failed to prove that Chairez unjustifiably quit interim employment.

6. JOSE DE JESUS PEREZ

The Specification indicates, and Perez confirmed, that the first place he worked after his layoff at Ukegawa was Artimex Iron. He began working there in the third quarter of 1976. At the time, the company was located in Chula Vista and he was living in Tijuana. He continued to commute to Artimex from Tijuana in his own car until the third quarter of 1980, when he left Artimex's employ to work for Orange County Nursery.

During 1976 and 1977, his commute to Chula Vista from Tijuana cost about $2.00 per day. In 1978, the cost of commuting went up to $3.00. In mid-1978, the company moved to El Cajon, but his commuting costs stayed constant until 1979 when they rose to $4.00 per day where they remained until 1980 when he left Artimex.

Respondent contends that this testimony about his commuting expenses is "too incredible to be believed." Respondent draws this conclusion from the "contradiction" between Perez's testimony that he always drove alone to Artimex, and that of his brother, who also worked at Artimex, and who testified that he sometimes gave Jose de Jesus a lift. The complete testimony of his brother follows:

Q Sir, when you were working at Artimex how did you get to work?

A In a car, my car.

Q And did anyone else drive with you to work at Artimex?

A Sometimes my brother would.

Q And when your brother would get a ride with you to work at Artimex, would he give any money for giving him a ride?

A No.

Q Did you ever get a ride with your brother to Artimex?

A Yes, sometimes.

Q And, sir, would you drive to work at Artimex yourself more often than you would get a ride with your brother?

A by myself?

Q Okay. Let me ask a different question.

A Yes.

Q Would you take your car to work at Artimex more often than you would ride in your brother's car?

A Yes.

(XIII:1107)

Respondent gives too much significance to the word "sometimes." Granted, the brother's testimony that he "sometimes" gave Jose de Jesus a lift contradicts Jose de Jesus' testimony that he "never" got a ride with anyone else, but "sometimes" may mean only two or three times, which is an insignificant discrepancy between the testimony of the two men. Respondent has not proven by this conflict that Jose de Jesus' testimony is false as opposed to that of his brother, let alone that it is so false as to reflect a deliberate effort to use these proceedings for private gain. At the most, Respondent has identified a formal

contradiction that is as explicable on the basis of a lapse in memory as it is by an intent to deceive. On this record, I decline to take the extravagant steps of either striking all backpay or all expense claims.

As noted, Perez left work at Artimex in 1980. He did so, he testified, because he "just got tired of working there—and left." (XV:1316) He was without work for a month or two (presumably in the fourth quarter of 1980) before finding work at Orange County Nursery. He was laid off at Orange County in the third quarter of 1981, after which he returned to Artimex. Respondent argues that in the quarter after Perez's layoff at Orange County, when he returned to Artimex and had uncharacteristically low earnings, his average Artimex earnings should be imputed to him on the grounds that he had unjustifiably quit in the first place. I agree.

It seems clear that, in the circumstances described by Jose de Jesus, the "quit" was unjustifiable. He just "got tired" and, it is reasonable to conclude from the fact that he was without work for two months, quit Artimex without immediate prospects for employment. Under the rule of Knickerbocker Plastic Co. (1961) 132 NLRB 1206, 1215, he is deemed to have earned for the remainder of the backpay period the wage he was last earning at the interim employment which he quit. Because his wages varied so much at Artimex, I will average the last three quarters' earnings there, which comes to $1550. Since he

generally earned in excess of that amount, I will impute these earnings for the third quarters of 1980 and 1981 only. General Counsel is ordered to adjust the Specification accordingly.

Respondent also correctly points out that Jose de Jesus' travel expenses for the period after his layoff from Orange County Nursery, and before his re-call by Artimex, should be reduced. Since de Jesus admitted that he did not look for work until he was recalled by Artimex, the only expense he could have had would be those incurred after he resumed work. There is no justification for awarding him the expenses of full time employment.[27] Finally, Respondent urges, and I agree, that gross backpay be stricken for the "month and a half" that de Jesus did not look for work after his layoff from Orange County. I agree. NLRB v. Midwest Hanger Co. (8th Cir. 1977) 550 F.2d 1101, cert. den. 434 US 830.

7. APOLONIO ESTRADA

Estrada first found work at Livacich and Uchimura about a month and a half to two months after his layoff. The Specification duly shows earnings of $451.56 at Livacich. Respondent, however, contends that Estrada should be credited with additional interim earnings on the basis of testimony in which he recalled working six days per week at $2.90 per hour at

[27]I will reduce these claims in the proportion that his earnings for the third quarter of 1981 (when he was recalled by Artimex) bears to his fourth quarter's earnings at Artimex.

Livacich. In the first place, I cannot project additional wages without knowing how many hours a day Estrada worked; that difficulty aside, Respondent has failed to consider the entire record which shows that this purported testimony about "Uchimura" was the result of confusion:

> Q When you were working at Uchimura do you recall how much per day you would make?[28]
>
> A By the hour.
>
> Q Well, do you recall how much you made by the hour, sir?
>
> A Yes.
>
> Q And how much was that, sir?
>
> A Two dollars and 90 cents.
>
> Q And how many hours in a day would you work at Uchimura, sir?
>
> A With Southland?
>
> Q No sir, with Uchimura.
>
> A That was in the contract.
>
> Q And do you recall how much per hour you made when you were working at Uchimura?
>
> A It's been so long. No, I don't remember.
>
> Q Do you remember approximately how much you made per day when you were working at Uchimura?
>
> A It's hard, because it's been too long.
>
> (VIII:865-866)

I decline to find that Estrada had additional earnings.

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[28]This question about Uchimura comes on the heels of questions about another employer. Compare VII:865 lines 3-21.

After Livacich, Estrada worked at Southland Produce for the last half of 1976 and the first quarter of 1977. While at Southland he incurred about $10.00 per week in commuting expenses and General Counsel claims $130.00 per quarter in expenses for the last two quarters of 1976. Respondent objects to a full thirteen weeks of travel expenses during the third quarter of 1977, on the grounds that Estrada's earnings during the third quarter were only about two thirds of what they were in the fourth quarter, and this means that he worked less at Southland in the third quarter than in the fourth quarter. Since the difference in magnitude seems so great as to be more likely due to a difference in how long Estrella worked than to a difference in wage rates, I will award expenses for the third quarter only in the proportion that his interims for the third quarter bears to his interims for the fourth quarter.

Respondent's final difficulty concerns General Counsel's allocation of $220.00 for commute to work expenses at Orange County Nursery in the first quarter of 1977. It correctly points out that General Counsel should have multiplied the number of weeks of Orange County work by the claimed weekly expenses ($20.00). Since Estrada began work in the second week of February, he is only entitled to the number of weeks between February 7 and March 31, 1977. Estrada's expense claim for the first quarter of 1977 should be reduced accordingly.

8. SILVESTRE GONZALES

Respondent initially contends that Gonzales was a particularly evasive witness, except when it came to recalling his expenses. To the extent Respondent means that Gonzales was attempting to inflate his backpay claim, I did not find that to be the case, although as I will shortly discuss, I do conclude that General Counsel has not met her burden of proving expenses for certain periods. That Gonzales testified generally about his expenses while being unable to recall the names of specific employers at various times does not strike me as at all unusual. I have a similar sense of what it must have cost me to drive my car during various periods, though I cannot recall where I might have driven it. Further, in view of the fact that the Specification lists over thirty different employers during the backpay period, I do not find Gonzales' failure to summon the names of some of them as signs of evasion.

Respondent's next argument concerns whether Gonzales is entitled to recover the amount of money that it stipulated was "forwarded" to the United Farmworkers Union as dues by Egger and Ghio during the periods of Gonzales' employment there (Joint 1). Despite its Stipulation, Respondent contends that dues for any period other than the third quarter of 1977 should not be included as expenses on the grounds that there is no proof that "they were deducted from Gonzales' pay." I take the word "forwarded" to mean precisely that. I further conclude that there was a contract in

effect based upon the letter of February 22, 1989 from Egger and Ghio's President to Respondent's Counsel, advising Counsel that Egger and Ghio sent monthly reports to UFW. RX 95 See Verde Produce 10 ALRB No. 35, ALJD, p. 8 (in the absence of evidence to the contrary, ALJ infers the existence of a union security agreement in a contract from proof that dues were actually deducted.)

While working at Egger and Ghio, Gonzales spent about $5.00 per day to travel from home to work and he worked six days per week. General Counsel claims expenses for each of Gonzales' periods of employment at Egger and Ghio in varying amounts. A range of commute expenses is to be expected considering the wide range in his Egger and Ghio earnings which is likely related to the amount of time he worked. The difficulty I have in reviewing the claimed expenses is the lack of some reliable factor for converting earnings into time worked; as a result, I do not see how I can reasonably apportion expenses to quarters. Still in view of the fact that he worked at Egger and Ghio, and that he testified he had expenses there, it seems unfair not to award him anything at all. I will, therefore, award him a minimal amount of expenses (1 week) for every quarter he was employed at Egger and Ghio, with the exception of the second quarter of 1978 when he only earned $52.00. The Specification shall be adjusted accordingly.

After his initial period of employment at Egger and Ghio, Gonzales thought he picked tomatoes for a Japanese grower. The

Specification shows interims at Sonoda Brothers, which I take to be the Japanese grower, in the third and fourth quarter of 1976. While at Sonoda, Gonzales testified he had $5.00 per day in commuting expenses.

Respondent argues that no evidence supports Gonzales' claim for expenses at Sonoda because he did not testify how many days a week he worked at Sonoda. General Counsel seeks $70.00 in commuting expenses for the third and fourth quarter of 1976 which at $5.00/day, means a little over two weeks' work. Since he earned $500.00 he obviously incurred some expenses but, once again, it would be entirely arbitrary to say over what period he earned the $500. In accordance with my ruling above, I will provide a minimal award (1 week's expenses) for this period as well.

The Specification also claims search for work expenses for the period of 1976 when he was not working at Sonoda in the amounts of $100.00 for the third quarter and $112.50 for the fourth quarter. I cannot find any particular testimony concerning these expenses and I order them stricken.

During 1977-79, the Specification shows interim earnings at Egger and Ghio only. Gonzales recalled looking for work "all over San Diego" (IV:399) when he did not work at Egger and Ghio. He also testified he looked two or three times a week, spending an average of $6.00 or $7.00, but it is not clear if the $6 or $7 was for each trip or for each week. It is also not clear how many

weeks he looked for work. Based upon this testimony, General Counsel seeks varying amounts of search for work expenses during each of the quarters. Since I cannot find any reliable basis for computing expenses during this period, I will strike the search for work expenses in the years 1977, 1978, 1979.

In 1982, Gonzales moved to Fresno after having difficulty finding work in San Diego. Once in Fresno, he found work with a series of labor contractors. Although he testified that he paid $2.00 - $3.00/day for a ride to work or $5.00/day when he took his car, because he could not say how frequently he either drove or rode, I cannot determine the amount of any Fresno commute expenses on this record. They will be stricken.

As a result of losing his job at Ghio, he lost his house in Tijuana for which he had been paying $20.00 - $30.00 a month. When he first moved to Fresno (in 1980) he paid $200 a month rent (for a net increase of between $170 or 180 a month in housing costs which I will take to be $175.00.) Sometime in 1982, his rent went to $250.00, where it remained until 1987 when it rose to $450.00 for three months, as a result of which he moved to a house where he again paid $250.00.

The Specification has to be adjusted in accordance with these findings. The increase to $250.00 a month should be attributed to 1982 and the increase to $450.00 should be attributed to 1987 (not 1986), but only for a single quarter (as the Specification reflects, albeit in the wrong year.) Besides

these details, Respondent argues that Gonzales' failure to produce rent receipts, and his general uncertainty about his rental expenses, means that I must view his claims with suspicion. I believe I can take judicial notice that his rental claims are consistent with the cost of rental housing during the periods in question and on that basis I reject Respondent's argument.

9. REMIGIO HERNANDEZ

Hernandez is a missing discriminatee. The Specification is accepted as written; in accordance with Board practice, the amount of gross backpay claimed is to be placed in escrow for a period of two years.

10. LUIS LOPEZ AGUILA

The parties stipulated that Aguila died on September 23, 1986. The Backpay Specification is accepted as written. Respondent is ordered to pay such amounts to the estate of Lopez Aguila. See NLRB Case Handling Manual Part III (Compliance) Section 10548.3.

11. JESUS LUPERCIO MORALES

Morales recalled that his first job after his layoff was at Cozza Farms where he worked in a variety of crops throughout the year, being recalled as needed. The Specification shows that he worked at Cozza in every quarter of 1976. He testified that he paid $1.00 or $1.50 a day for a ride to work and that he worked 6 days a week. On the basis of this rate, General Counsel claims travel expenses for 1976 which roughly translate into five weeks

of work during the first quarter, 8 weeks of work during the second quarter, 13 weeks of work during the third quarter, and 4 weeks of work during the fourth quarter. Respondent disputes these amounts, claiming that no evidence supports how many weeks he worked in each quarter. I agree. Since he obviously worked for some time at Cozza and he testified that he also had commute to work expenses, I will again award him a minimum of one week's commute expenses in each quarter.

In the first and second quarter of 1977, the Specification shows employment at two other employers, NC Farms and Harry Singh, for both of which General Counsel claims commute expenses and for one of which, Harry Singh, General Counsel claims dues. Since no testimony was adduced relating to his commute expenses at either NC Farms or at Singh (Morales did not recall working at either), I will strike these claims. Respondent also contends the dues expenses should be stricken because there is no evidence that he worked at Singh. Since I can't find any evidence that a union contract was in effect at Singh, I will strike these claims on that basis.

General Counsel also seeks reimbursement for union dues at Cozza Farms. The claim for dues is supported by Stipulations that during various pay periods certain amounts were actually deducted. (XVIII:1465-66.) Despite stipulating that these amounts were actually deducted, Respondent contends that a discriminatee nay receive a credit for payment of union dues only if General Counsel establishes that

> "a fully executed contract containing a valid union security clause was in effect during the period of time for which union dues expenses are claimed: (2) the discriminatee was employed by the employer during [that] time, and...(3) the discriminatee actually paid the dues required by the collective bargaining agreement...." Post Hearing Brief, p. 63.

Respondent has not cited any case that stands for this proposition.[29] in fact, as noted previously our Board has permitted an inference that a union security clause was in effect from the fact that dues were deducted from an employee's wages.

> Essential to a claim for reimbursement for union dues is evidence of the existence of a union security clause in a collective bargaining agreement between the interim employer and the UFW. Only under such a circumstance can membership be said to be a condition of employment. That proof is supplied with respect to Vargas by stipulation. With respect to Ramirez, the proof is supplied by inferring from the fact that payroll stubs indicate payment of dues, that membership was mandatory while working at Hubbard. I am prepared to draw that inference in the absence of any evidence to the contrary. (Emphasis added)
>
> Verde Farms, 10 ALRB No. 35, ALJD. p. 8

Accordingly, dues will be allowed pursuant to the amounts set out in the Stipulation. Respondent is correct, however, that there are variances between the Stipulation and the claims for dues in the first, third and fourth quarter of 1980; the fourth quarter of 1981, and the first quarter of 1982. These claims must be modified to conform to the Stipulation.

---

[29]Obviously, the showing urged by Respondent would be sufficient to support a claim for dues. The argument made by Respondent is that such a showing is necessary: it is this argument that is not supported by any authority.

The Specification shows interim earnings at Double D and General Counsel claims commute to work expenses in connection with his period of employment there. Because Morales could not recall what his commute expenses were during his employment at Double D, I will strike General Counsel's claims for them.

The remaining dispute between the parties is over when Morales retired. Respondent contends the evidence shows that he retired in 1982; General Counsel is willing to admit he retired in 1985, and further contends that Respondent failed to prove that he retired earlier.

Morales' testimony is not easy to understand. He did recall that he last worked at Double-D (or Jamul), but he was not sure if that was "one year before or two years before." He also testified he retired around "8 years ago," (the hearing was in 1988), but the specification shows interim earnings as late 1982. When asked specifically if he retired in 1983, he could not remember. When asked, "After you worked at the Jamul Ranch you no longer looked for work," he answered "Very little," and explained, "well it was because of that thing with the [Chavez] union. They didn't give work anymore." (VI:632, 635.) "There wasn't any work. They didn't give us any. And if there had been work I would have worked up to a certain point." (VI:636) After this he again testified (1) that he looked at many ranches after Jamul and (2) that he looked "very little" because they "wouldn't give one" any. In view of his lack of earnings after 1982 and, the admission that

he looked very little, I find it more reasonable than not that he retired after his last season at Jamul. The Specification must be adjusted accordingly.

12. JUAN MANUEL ESTRELLA

Estrella testified that he looked for work after his layoff and had difficulty finding it. Before he found his first job, he "went to all the companies...the nurseries" in Encenitas, perhaps two days a week, paying $5.00 or $6.00 per day twice a week for a ride on 4 or 5 occasions, and $2.00 or $3.00 a ride on other occasions. Because I have no basis for determining how many times he spent $2.00 or $3.00 a ride, I will not credit him with any expenses on that basis; however, based upon his testimony that he paid $5.00 or $6.00 a day twice a week, on 4 or 5 "occasions," I will credit him with four weeks (occasions) expenses at $11.00 per week ($5.50 per trip x 2 trips per week.) All other search for work expenses for the first and second quarter of 1976 will be stricken. Estrella finally found work "in the strawberries" in Santa Ana for about two weeks (12 days) earning about $18.00 per day. Respondent contends it should be credited with an extra $216 in either the first or second quarter of 1976. Although I cannot understand how he could remember this, given the clarity of his recollection, I will credit him with such earnings in the second quarter.

After his work at the unnamed employer in the strawberries, he again sought work in Encenitas before finding it

at Chula Vista in the third quarter of 1977. About this period of looking, he testified more definitely: he looked once or twice a week for about two months; every time he went out, it cost him $5.00 or $6.00 a day. Accordingly, in the third quarter of 1976, I will credit him with two month's travel expenses at $11.00/week.

He worked at Chula Vista until he was laid off when he again sought work, spending between $4.00 - $6.00 a day, two to three days a week for two months. In view of his $4.00 - $6.00 range, I will credit him with $5.00 in daily expenses, $12.50 in weekly expenses, and $162.50 in total expenses for the fourth quarter of 1976. The question of expenses is complicated by Estrella's further testimony that, after he stopped working at Chula Vista, he was out of work for about two months before he began to work at Orange County Nursery. Since the Specification shows no earnings at Orange County until the second quarter of 1977, and only about $600.00 in earnings in the final quarter of 1976, it seems more likely than not that Estrella had a longer period of unemployment than the two months he could recall. However, since I cannot reasonably determine anything about his expenses over this "longer" period of time, I believe that in giving him credit for two months of search-for-work expenses in 1976, I have credited him with all the expenses that are supported by his testimony. Accordingly, I strike all expenses in the first quarter of 1977.

While at Orange County Nursery, he rode to work with Francisco Perez, paying him $1.50 per day, six days a week for one

year. This amounts to $117 per quarter. The expenses claimed for the second, third and fourth quarters of 1977 should be reduced to $117.00/quarter.

After he was laid off at Orange County, he was without work for about two months prior to getting work at San Clemente. General Counsel claims expenses for this period (the first quarter of 1978) when no interims are shown, but no testimony supports the claim that he sought work during that period. The claim for the first quarter of 1978 will be stricken.

Respondent also objects to the claimed commute to work expenses for Estrella's initial period of employment at Sun West/San Clemente. Estrella did testify that he rode to work with a contractor and that the cost was deducted from his check, but he did not recall any specific amounts. The commute expenses for his period of Sun West employment will be stricken.

Similarly, no specific testimony supports any of the expense claims during his employment at Singh, Sun West or Horizon Harvest in 1979. The Specification also shows a brief period of re-employment at Orange County but, as it is not clear how many days he worked, I will award him expenses according to the following rule: I will multiply his 1977 quarterly commute expenses ($117) by the ratio that his interim wages at Orange County Nursery for that quarter ($367) bears to the highest quarter's wages in 1977 ($2312).

In 1980 the San Clemente ranch flooded and, knowing work would no longer be available there, Estrella left southern

California, moving first to San Francisco for several weeks where he was unsuccessful in finding work, and thence to Delano. The Specification reflects this sequence. In 1980, it shows Estrella working at Horizon Harvest and for a couple of labor contractors (Eugene - Nal and Renteria Labor), before starting to work at Anton Caratan in the last quarter of 1980. He worked for Renteria for 3 weeks, picking grapes, paying $2.60 a day, seven days a week, for a ride which comes to $52.50 for the three weeks. (VII:759) General Counsel properly claims these expenses. His rent in Delano was $350.00 per month, $270.00 per month more than his rent in Tijuana. He paid this amount "until" the last half of 1982. He also paid $15.00 week for a ride when he worked at Caratan.

Before considering Respondent's detailed objections to any of these claimed expenses, I will first consider its broad brush attempt to strike expenses for all quarters in which no net backpay is due on the First Amended Specification, namely, the first and second quarters of 1982; the second and third quarters of 1983; the first, second and third quarters of 1984 and 1985; and the entire years of 1986 and 1987. Respondent's for contesting these claims is that General Counsel waived them at the hearing. What Respondent is referring to is the following:

> MS. BULLOCK: May I draw your attention and counsel's attention to the fact that the specification for Mr. Estrella for 1982 forward indicates many quarters when there is no net due. I know Mr. Scott has had some concerns that at some later point General Counsel will change these specifications in that regard to show amounts due when there is nothing shown due.

As I have said before, I have no evidence to present at this hearing to change that specification, and it would be in the most extraordinary circumstances, and through very rigorous procedures, that it could be changed later.

Under the circumstances, and considering Mr. Estrella's physical condition, I am not going to question him on any quarter where there is no net due, and perhaps Mr. Scott could take that into consideration also

JUDGE SOBEL: Okay. That means we're eliminating '87. We're eliminating '86. We're eliminating '85 one through three, eliminating '84 one through three, eliminating '83 two and three, and eliminating '82 one and two.

MS. BULLOCK: Your Honor, I may have to ask a few questions about those quarters as preliminary, leading into the later quarters, but --

JUDGE SOBEL: I understand, but there's no claim for net backpay.

MS. BULLOCK: -- but it's not going to be extensive questioning on any of those quarters.

JUDGE SOBEL: Okay. And also, there's no net backpay claimed for '77 two through four. Okay.

Well, under the circumstances we're going to take the witness. We'll swear the witness. Certainly, Mr. Scott, when you have a chance to examine your notes, I hope during the lunch hour or sometime today, if you've got any specific information that's not included here in the General Counsel's spec, in the interims, that you bring it to General Counsel's attention, and maybe we can work something out from there. Okay?

MR. SCOTT: Yes. One thing, Your Honor -- and I appreciate what Ms. Bullock has said with respect to the quarters in which there is no net due claimed at this time -- my concern if, if we have evidence of expenses that happened in the quarters preceding those quarters and in the quarters after those quarters, it is not inconceivable that someone might at some point find that those expenses continued through those quarters.

I really don't think that I can exclude questioning on those quarters unless the General Counsel --

JUDGE SOBEL: Well, you can. You can, because that's

not your burden preliminarily. You examine him on interims. If you make no examination and uncover nothing during those periods of time, and Ms. Bullock has no claim with respect to them, then there's no -- I mean, at a certain point if it becomes an issue it will be raised only in Ms. Bullock's examination, but it's not going to necessarily be raised in your examination, Mr. Scott.

MR. SCOTT: Oh definitely, definitely, Your Honor.

(VII:728-30)

General Counsel contends that when she re-computed gross backpay on the basis of Respondent's 1975 payroll records, she discovered that her earlier assessment of no net backpay owing was in error and contends, therefore, that she is now justified in claiming expenses. While I appreciate General Counsel's dilemma, and while there is a probability that there was no change in expenses during the periods under discussion so that the record is probably already complete, the problem is whether or not Respondent was given the opportunity it deserves to examine the discriminatee about any possible mitigation of the expense claims. In the absence of any motion to re-open the record, these claims are stricken.

I now return to Respondent's specific objections to Estrella's housing expenses. Respondent contends that General Counsel did not prove any rent expenses subsequent to the third quarter of 1980. Since I have stricken any expense claims in the quarters specified above, it remains only to discuss the fourth quarter of 1980, all of 1981, two quarters in 1982 and 1983 and one quarter in 1984 and 1985. Estrella testified that he paid

$350 in Delano through 1981 (a net increase of $270 per month over his Tijuana housing expenses); that at least from July 1982 until 1984 he paid $400 per month (a net increase of $320.00 per month above his Tijuana housing costs); and that at least since the last quarter of 1985, he paid $100.00 a month on a trailer (a net increase of $20.00 per month above his Tijuana housing costs). Expenses in these amounts will be allowed.

13. REYMUNDO MEJORADO

With the exception of the first and second quarter of 1976, Mejorado shows interim earnings during every single quarter of the backpay period. The only features of the Specification disputed by Respondent are the amounts claimed for raitero pay, and the basis of one of Respondent's objections is simply a mathematical error. Since Mejorado testified that he received $6.00 per day from Respondent, Respondent claims it is entitled to a credit during each quarter in the amount of $268.00 (representing $6.00 per day x 6 days week x 13 weeks in a quarter). However, as General Counsel points_out, Respondent's calculations are wrong: the adjustment should be $468.00 and it was made. (Compare First and Second Amended Backpay Specification.)

In view of Mejorado's testimony that his van was out of commission between October 1978 and April 1979, Respondent next contends that he is not entitled to raitero pay from Ukegawa during the period when his van was not serviceable. Although

Respondent cites no law on the propriety of discontinuing raitero benefits, it seems to me that having an accident should be treated the same way as becoming disabled is treated: if the accident occurred in commuting to interim employment, raitero pay would continue just as backpay continues, when a disability arises from interim employment, See Central Freight Lines (1984) 266 NLRB 182. However, I have occasion to face this question: since there is no information about the circumstances under which the accident occurred, and it is General Counsel's burden to prove expenses, I agree with Respondent that Mejorado is not entitled to raitero pay for the period of time his van was out of commission. On the other hand, Mejorado would be entitled to commute to work expenses for the period of time when his van was unserviceable, if only they had been proved: since I agree with Respondent that these expenses were not established with sufficient precision, the expenses claimed for the fourth quarter of 1978 and the first quarter of 1979 will be stricken.

14. ELIAS MONTOYA

Montoya is a missing discriminatee. The Specification is accepted as written; in accordance with Board practice, the amount of gross backpay is to be placed in escrow for a period of two years.

15. SANTIAGO MORENO GARNICA

Moreno had interim earnings in excess of gross backpay throughout most of the backpay period. Respondent argues that

Moreno was terminated for misconduct (drinking on the job) from Orange County Nursery on July 20, 1983, and that as a result Orange County interim earnings must be imputed to him throughout the remainder of the backpay period. Although it is not clear to me whether Moreno quit to avoid being fired, simply quit, or was fired, even if he quit under the circumstances described by his employer, his loss of earnings can be considered willful. Accordingly, I will impute to Moreno his average quarterly earnings at Orange County Nursery from the fourth quarter of 1983 forward.

16. AURELIO MUNOZ GALVAN

Munoz's death certificate shows he died December 25, 1983. Respondent does not contest any feature of the backpay Specification which is accepted as written. Respondent is ordered to pay such amounts to the estate of Munoz Galvan.

17. ADOLFO PALOMARES

Palomares had almost continuous interim employment throughout the backpay period, with the exception of the first two quarters of 1976. Respondent disputes only a few elements of his claim.

It first contests General Counsel's failure to reduce the raitero claim in the Specification by the $7.00 per day in gas expenses which Palomares testified he incurred (V:492). A comparison between the First and Second Amended Backpay Specification indicates no reduction was made in accordance with

his testimony. I will order Palomares' claim reduced by $546 per quarter ($7.00 per day x 6 days per week x 13 weeks).

Respondent also contends that Palomares "was making up [his expense] numbers as he was going along." To the extent that this argument reflects a judgment about Palomares credibility, I reject it; I had no sense that Palomares was seeking to deceive the Board. More importantly, it does not seem to me 'that Palomares' expense claims are out of line. For example, he testified that when he drove from Tijuana to Escondido to work at Livacich and Uchimura in 1976, it cost him about $7.00 per day; when he worked at the Penny Lodge he drove from Tijuana to mid-San Diego at a cost of about $5.00 per day; when he worked at North County Growers he paid a raitero $5.00 per day; when he worked at Valley Crest Landscaping from 1978 to 1983 he lived in La Puente and drove to Santa Ana at a cost of $10.00 per day in 1978, $40.00 a week in 1979, perhaps $45.00 a week in 1980, and around $35.00 - $36.00 a week since 1982.

Respondent has not provided any information by which to measure these costs.[30] Based upon the total lack of information in the record, I can only determine if the testimony about these

[30]Respondent did offer RX 85, a compilation of gas prices; however, the list was not offered or accepted for the truth of the prices contained therein, but only to demonstrate that gas fluctuated in price. Since I believed I could take notice of such a proposition, I accepted the chart.

expenses is totally violative of common sense. Since the round trip from Palomares' home in Tijuana to Livacich and Uchimura in Escondido was about 100 miles a day, even at 20 miles per gallon (which seems to me quite generous for a 1967 station wagon), the trip would require 5 gallons of gas a day. Accordingly, if the price of gas were about $1.00 per gallon, it would cost $5.00 per day. Since I have no way of knowing what mileage Palomares got, or what the cost of gas was, and further since even a 25 percent decrease in his mileage (to 15 mpg) would increase his costs by more than $1.00 per day, I cannot say that $7.00 per day is inherently improbable. Skipping to his claimed expenses for Valley Crest, which also entailed a 100 mile daily commute from his home, I again cannot say that $35.00 - $40.00 per week is inconceivable. Respondent has simply failed to present the evidence necessary to support its claim about exaggeration. However, inasmuch as Palomares testified he traveled further to Ukegawa than to Penny Lodge (V:495), his commute expenses will be stricken for the period of his employment at Penny Lodge.

Respondent also contends that Palomares' testimony about his rental expenses is "unreliable given his inability to remember any of the addresses of the different places he lived or the names of his landlords. This factor, along with his failure to produce rent receipts, prevents Respondent from making an independent investigation of his rent claims...." In the first place, Respondent failed to establish that Palomares had any rent

receipts, so that his failure to produce any cannot be held against him. Secondly, nothing prevented Respondent from producing evidence of the fair rental value of homes in the geographic areas described by Palomares.

Respondent is correct, however, that Palomares testified inconsistently about his rent expenses, saying at one time they went up $25.00 per year from a base rent of $200.00 in 1978 (so that it was $225.00 in 1979) and another time that it jumped from $200.00 per month in 1978 to $300.00 per month in 1979. I will award the lower figure: since even his earlier figures reflected a $25.00 per year increase, it seems reasonable to conclude that the large jump from $200.00 to $300.00 a year was incorrect.

Respondent is also correct, that the commute to work figures in 1982 'are erroneous in that the second quarter of 1982 shows $552.50 per quarter when he testified he only had $35.00 week in expenses. The amount should be $445.

Respondent also disputes General Counsel's claim for union dues for periods within the effective date of the contract, but prior to the date the contract was executed. Under NLRA precedent, the obligation to pay dues begins on the date of execution of a contract, as opposed to the date from which the contract is made effective. Typographical Union (Plain Dealer Publishing Co.) (1976) 225 NLRB 1281. Dues must be stricken for the period between the effective date of the contract and the

execution date.[31]

Respondent's final contention is that the Specification erroneously fails to include overtime pay earned by Palomares. In support of its contention that Palomares's overtime wages should be included as interim earnings, Respondent cites the testimony of his brother, Ernesto, that "sometimes" he worked 10 hours at Ukegawa. This testimony is not sufficient to meet Respondent's burden of proving that Palomares had overtime at Ukegawa.[32]

18. ERNESTO PALOMARES

Ernesto Palomares, too, shows nearly continuous employment throughout the backpay period in amounts either close to, or in excess of, gross backpay. In these circumstances, net backpay is largely generated by expenses and Respondent disputes these vigorously.

Initially, Respondent argues that because Palomares testified it cost him $40.00 week to commute to Ukegawa, his claims for commuting expenses should be offset by this amount throughout the backpay period. General Counsel responds that

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[31]This result is not inconsistent with my previous treatment of claims for dues. In previous cases, no evidence contradicted the inferences that an executed contract was in effect which could be drawn from the actual deduction of dues.

[32]In his testimony, Morrotte strongly implied that the Tijuana legals typically had to leave work early in order to catch their rides. Such testimony appears inconsistent with Respondent's present contention about "overtime" at Ukegawa.

Palomares did not "really" incur these expenses because he also testified he was reimbursed by the company for taking people.[33] I agree with General Counsel, but since Palomares also testified that he only took people from August through January, he must have had unreimbursed expenses of $40.00/week from February through July. At a minimum, these must be taken into account in figuring his net backpay, and I will order the Specification to be modified accordingly.

Respondent next contends that no evidence supports any claim for expenses in connection with Palomares' seeking, and then commuting to a job, at the un-named nursery in Terra Bella. Although I cannot find any testimony to justify expenses in connection with his finding work at Terra Bella, Palomares did testify that he paid $8.00 or $9.00 a week to commute to his job at a nursery there for approximately one and one-half months. I will award him $8.50 a week for 6 weeks in the fourth quarter of 1976.

Respondent's challenge to the claim for housing expenses can only be determined by establishing a chronology for Palomares'

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[33]In connection with this dispute, there is also the further question whether, in view of the Board's failure to find that Ernesto Palomares was a raitero in the underlying case, General Counsel is now barred from claiming that he received raitero pay for the limited purpose for which the claim is made (to prove that he had no expenses at Ukegawa). Since I cannot find that the issue of Palomares' being a raitero was ever litigated, I cannot conclude that General Counsel is bared from putting on the sort of proof she did. Witkin, Cal. Procedure, Vol. 1, Judgments, Section 254.

various moves. According to Palomares, he remained in Tijuana for four of five months after his layoff from Ukegawa, looking for work primarily in San Diego. When he couldn't find any, he went to Los Angeles where he found his Terra Bella job. Though he kept his house in Tijuana, he lived in Terra Bella for the brief period (one and one-half months) of his employment at the nursery. Accordingly, he is entitled to Terra Bella housing expenses.

He testified that he paid $25.00 a week to share a house for one and one-half months in the fourth quarter. General Counsel claims $465.00 in housing expenses for this period, probably because she is also including rental expenses for his period of employment at North County Growers. This claim does not square with the best chronology I can reconstruct for Palomares. After his layoff from Terra Bella, he started work at North County around December 1976 and worked there until July or August 1977, living in Tijuana the whole time. Accordingly, the $465 housing expense in the last quarter of 1976 will be stricken in its entirety and Palomares credited only with his $25.00 week Terra Bella expenses.

Because Palomares paid for a ride to North County Growers, he is entitled to commuting costs in excess of any he incurred at Ukegawa. Since his testimony is uncontradicted that he essentially had no expenses at Ukegawa in December (when he would have been reimbursed by the company), he is entitled to a credit of $1.50/day, 5 days a week, for that month only.

However, at $7.50 week, his expenses do not exceed his expenses at Ukegawa when he was not being reimbursed; and so from January to July his claim for expenses must be stricken. Moreover, the $210 month housing claim must also be stricken because Palomares was still living in Tijuana.

He left North County Growers because work was drying up (as the Specification shows). Out of work for about four months, he next found work at American Casters where he worked for perhaps a month (or at the most 5 weeks) before starting at Douglas Furniture on December 5, 1977. It was when he started to work for American Casters in Los Angeles that he moved to Southgate and I can date the start of his $210.00 month increase in housing expenses ($250 month - $40 per month cost of Tijuana housing.) Accordingly, he is entitled to approximately two months rent at that rate in the fourth quarter of 1977 (he started work at Douglas in December 1977 and worked at American Casters for approximately one month before that.) Because he paid between $10-11/week to commute to American Casters from his house, he is entitled to $10.50 per week for five weeks in the fourth quarter of 1977.

Palomares lived in Southgate from December 1977 until March or April 1979. While living in Southgate he paid $12-13/week to commute by car to work. Since these expenses are less than the $40.00 week he would have incurred at Ukegawa from January 1978 through July, he is not entitled to any commute

expenses for these months; however, he is entitled to these expenses for the months of August 1978 forward, I will credit him with $12.50/week in expenses. The Specification must be adjusted accordingly.

In spring of 1979, he moved to East Los Angeles where he now paid $300 per month for rent and $13.00-$14.00 week to commute. Once again, he is only entitled to commute expenses to the extent they exceed what he would have incurred at Ukegawa; thus, for the months of February through July I will strike all commuting expenses, but for the months of August through January (when he had no out-of-pocket expenses at Ukegawa) he is entitled to receive $13.50 a week. He is also entitled to housing costs in excess of the $40.00 he paid in Tijuana or $260 per month from April of 1979. (This expense remained constant through March, 1987 when he moved to another house.)

His commute expenses rose to $20.00 week in 1980 and he will be awarded expenses at that rate for January, 1980 and August - December 1980. In 1981, his commute expenses rose to between $20 - $25 dollars a week where they remained throughout 1982 - 86. (Though he testified they might have gone up $2.00 - $3.00 per week, he also testified he "imagined" them to be the "same.") Expenses in the amount of $22.50 well be awarded for 1981 - 1986, but only for those months when he had no expenses at Ukegawa.

Finally, Respondent urges that no credit for dues be allowed until 30 days from the date of execution of the collective

bargaining agreement between the union and Douglas Furniture because the union security clause was not effective until 30 days from the date of execution of the contract. (XIX;1557.) I agree.

19. FRANCISCO PEREZ

Francisco Perez is another discriminatee whose interim earnings exceed his gross backpay for most of the backpay period, excepting 1976, when he had no interim earnings. Respondent objects to General Counsel's claim for 1976 search for work expenses, contending they should be reduced to zero because "when he would look for work other people who came with him would pay money." I will strike them, but for a different reason: I cannot find any testimony about them.

20. ROSALIO PEREZ

Respondent contends that because Perez testified he did not look for work for more than two months after he was fired backpay should be tolled for the first quarter of 1976. I agree. See Bruce Church, 9 ALRB No. 19, ALJD, pp. 6-12.

Respondent also contends that Perez retired in 1978 instead of, as General Counsel contends, 1980. Perez was an old man with a poor memory. His testimony is not easy to follow and the flavor of it is best given by a few excerpts:

A I worked up till I got laid off.

Q Do you recall being laid off in January of 1976?

A Yes.

* * *

Q And sir, when did you begin look for another job after you realized you were fired from Ukegawa

A I hardly work at all any more, because I can't really recall but, hardly any, at all.

Q And sir, do you recall looking for work after you were fired from Ukegawa?

A Well --

(XIV:1226.)

* * *

MR. SCOTT: * * * [d]o you recall when it was that you began looking for work at the other ranches?

THE WITNESS: Well, it was over there at a place called Hindhu.

BY MR. SCOTT:

Q And sir, how long was it between when you last worked at Ukegawa and you went to look for work with The Hindhu?

A Well, with that gentleman, Hindhu, I don't recall his name, but that's what we used to call him. We worked for him and he would only give us five dollars.

Q Now sir, how long was it between when you were fired from Ukegawa and when you went to look for another job?

A Right there. That's the only place I went to look for a job -- with Hindhu -- because he trusted us. He had confidence in us. And he's the only one that would give us any.

Q Well, what I am asking you sir, is how much time passed between you were fired from Ukegawa and when you went to look for work with The Hindhu?

A I don't recall very well, Miss, because my head, you know, it's just not working. I just can't remember any more.

Q Was it more than two months, sir?

A Yes.

(XIV:1227.)

Despite this, Perez did testify that he "retired" in 1978:

Q Thank you, sir. Now, after you worked for the last time did you retire, sir?

A Yes. I have that. I have a pension. I don't work. I just can't do it. I got sick.

Q And when was it -- do you recall what year it was that you got sick, sir?

A It hasn't been that long. It's only been ten or eleven months when I got really sick.

Q How long has it been since you last worked, sir?

A Those months that I just told you because I couldn't work any more because I am very sick.

Q Sir, do you recall working anywhere in 1978?

A No. No, I don't recall. No, I just don't remember anything.

Q Sir, did you stop looking for work, in 1978?

A Yeah, Because after I got sick, I didn't work any more. I didn't work.

Q And was it in 1978, that you got sick, sir?

A Yes.

Q Do you recall what month in 1978, you got sick, sir?

A No. No. I don't recall well.

Q Do you recall if it was in the summer or in the winter?

A Well, it was in -- well, I don't remember since I got sick, my -- it just doesn't work right.

Q And how old are you, sir?

A Seventy-three.

Q And do you recall how old you were when you got sick, sir?

A Well, it hasn't been that long since I've been since. It's been about ten months that I really got sick.

Q Sir, you have not worked since 1978, is that correct?

A No, you mean since I worked. No, I can't work. No, because I can't, any more—because I smother. I can't work because I feel like I'm smothering. I can't -- I don't have any strength. I can't use any force, at all.

(XIV:1230-31)

Respondent contends that this evidence supports the conclusion that he retired in 1978. Against this, General Counsel counterpoises Perez's obviously fading memory. I agree with Respondent that there is sufficient evidence to conclude Perez retired in 1978. Backpay is terminated from 1978 forward.

21. MOISES RAMIREZ SANTANA

Ramirez is another discriminatee with a nearly continuous record of interim employment, and once again Respondent largely disputes the expenses claimed by General Counsel on his behalf. Respondent contends that, because Ramirez had $3.00 per day commute to work expenses at Ukegawa, he should not be credited with search for work expenses in February and March 1976 unless they exceed $3.00 per day. I disagree. It seems to me that the two categories, "search for work" and "commute to work" expenses, are separate and do not offset each other. (See UFW/Sun Harvest (1986) 12 ALRB No. 26 in which the Board refused to offset increased rent against commute to work expenses.) However, where Ramirez had the same sort of expense at interim employment as he had at Ukegawa, such expenses do offset each other, as in his 1979 employment at S & K when he drove a 1965 Chevy and incurred commute expenses of about $15.00 per week. Since these expenses do not exceed his Ukegawa expenses they must be stricken.

Respondent also correctly contends that no evidence supports the claim for search for work expenses after March 1976. These amounts will be stricken.

Respondent's final point is that Ramirez testified he had earnings at S & K Greenhouse of approximately $125.00-$135.00 week in 1981, and that this amount is not reflected in the Second Amended Specification which shows only $222.00 in interims. The full text of Ramirez's testimony on this point follows:

> Q Okay. The records of the ALRB also show that during April, May and June of 1982 you only made $222.00 when you were working at S & K.
>
> A I was not there at that time.
>
> Q In 1981 you didn't work at S & K Greenhouse during those three months?
>
> A No. No.
>
> Q Where were you sir?
>
> A At National Growers.
>
> Q And what were you doing at National Growers, sir?
>
> A Well, it was the same. We planted. I watered. That's where I was taught to drive a tractor.
>
> Q And after you worked at National Growers did you go back to S & K Greenhouse?
>
> A No.
>
> Q Well Mr. Ramirez, I must admit that I'm a little confused here. I understood that you worked at S & K Greenhouse up until sometime in 1985.
>
> A Yes, until '85.
>
> Q Okay. But as I understand it, you just told me that in 1981 you worked at National.
>
> A Yes.

Q Did you work at National while you were also working at S & K Greenhouse?

A No.

A In '77.

Q Okay, in 1977. And you continued to work at S & K Greenhouse until 1985?

A That's correct.

Q But you are telling me that in 1981 you also worked at National?

A But it's not the same. When, in '81? Not in '81, no. In '71.

Q Oh, okay. Thank you. Okay. In April, May and June of 1981 were you still working at S & K Greenhouse?

A Yes. Yes.

Q And during that three-month period did you earn approximately what you earned during every three-month period that you were at S & K Greenhouse?

A. Yes.

(I:113-4)

* * *

BY MR. SCOTT:

Q Okay Mr. Ramirez, during April, May and June of 1981 how much, approximately, would you say you earned at S & K Greenhouse?

A Well, I was earning $125 or $130 per week, and you can add it up.

(I:115.)

On the record, I am not persuaded that the witness accurately recalled that period of time. I will deduct only the amounts conceded by General Counsel.

22. GREGORIO REYES

Respondent objects only to commute to work expenses. It contends that Reyes was not able to testify to "the number of months weeks or days he was employed at Cozza Farms;" "or even the amount of money he paid" for his ride to Cozza. Post-Hearing Brief, p. 93. Reyes did recall paying either $1.50 or $3.00 per day to commute to Cozza in 1976 (XIII:1159),[34] but there was no testimony about how many days in a month he worked. Once again, since the Specification shows about $3600 in interim earnings during Reyes' stint at Cozza, it would be unfair to deny him any expenses. On the other hand, in the absence of some factor by which I could convert wages into days, it would be entirely arbitrary to award him expenses in "some" proportion to his wages. Accordingly, I again steer a mid-course and award him only a minimal amount of one week's expenses.

In 1977, Reyes worked for Cozza for about 5 months and paid $3.50 each day to commute to work there. The Specification shows roughly $3000.00 in earnings for that period and General Counsel claims about $250.00 in expenses. In 1978, he worked for Cozza for about 6 months and spent either $2.50 or $3.50 to commute to work. The Specification shows roughly $7000.00 in earnings during that time and General Counsel claims about $350.00

[34]Las Terrones is Cozza Farms.

in commute expenses. About 1979, he testified he paid $2.50 or $3.50 to ride to Cozza, but he only worked one and a half months. The Specification shows about $5000 in earnings at Cozza and General Counsel claims about $37.00 in expenses. Once again, for each of these years, though I believe there is sufficient proof that he had commuting expenses, there is no reliable way to convert wages into days; once again I will grant a minimal award of one week's expenses for every quarter in which earnings are shown.

I agree with Respondent, however, that Reyes' testimony about commute to work expenses at Double-D (he didn't remember "anymore" how; much "we used to pay to get there") is insufficient to support a claim for expenses. Respondent also excepts to any claim for union dues deducted from his pay at Cozza prior to the execution of a contract on October 19, 1980. For the reason stated earlier, I will strike all credit for dues claimed between June 3, 1980 (when the old contract expired) and October 19, 1980 (when the new contract was executed.)

23. IDELFONSO GOMEZ RODRIGUEZ

Respondent contends that gross backpay should be stricken for the first quarter of 1976 in light of Gomez's testimony that he (1) only recalled looking work at Livacich and Uchimura after his discriminatory layoff; (2) that he was immediately hired when he asked for work and (3) the Specification indicates that he did not start working Livacich and Uchimura until the second quarter.

persons of the discriminatee's skill and experience, he may "justifiably" quit them. See also, United Farmworkers of America (Odis Scarborough) 1986, 12 ALRB No. 23, p. 5, citing Knickerbocker Plastic Company Inc. (1961) 132 NLRB 1209, 1214, 15.

Respondent contends that since "there is no evidence to suggest [Gomez's] quit at Encenitas Floral was attributable to anything other than [his] personal desires," the burden was on General Counsel to prove that Gomez had a legally cognizable justification for quitting. On the contrary, it seems to me that Campbell's testimony that Gomez disqualified himself from "heavy" plastic work is a sufficient indication that Gomez's leaving was "due to the nature of the departed interim employment." The burden thus shifts to Respondent to prove that his quitting was not justified. (See KSLM-AM & KSD-FM (1985) 275 NLRB 1342, 1343, at n. 13 where the Board indicates that only in the absence of any evidence whatsoever that the quitting was attributable to reasons other than obscure personal desires of the claimant, does the Respondent not have the burden of proving that the nature of the employment was not the reason for quitting.) Respondent has not made such a showing.

24. JESUS ANSALDO CARRILLO

The parties stipulated that Ansaldo Carillo died on November 18, 1986. The backpay specification is accepted as written. Respondent is ordered to pay the estate of Ansaldo Carillo the amounts claimed in the Specification.

25. EFREN FLORES

Respondent objects only to General Counsel's claim for commute to work expenses at Ocean View on the grounds that Flores testified that he got money for taking riders. General Counsel claims only $3.00 in commute expenses for the first quarter of every year from 1980-1987. Flores testified he generally received enough money to cover his expenses, that sometimes it is enough, sometimes more than enough, but "within this last year" he has not been able to cover his costs. On this record, I cannot determine that he is entitled to any commute to work expenses. They will be stricken.

26. FRANCISCA MIRANDA

Respondent contests only the credit for dues payments during Miranda's period of employment at Cozza Farms, SKF Farms and Seabreeze. The first two are disputed on the grounds that Miranda could not recall that she worked at either place.

I have already said that I believe that the effect of General Counsel's admission that a discriminatee had interims of certain amounts and at certain places removes those particular issues from the case; to the extent that Respondent chooses to contest either point, it has the burden of proving other than what General Counsel is willing to concede.

Accordingly, in the absence of Respondent's carrying that burden, I take it as established by the pleadings that Miranda worked at Cozza and SKF. Since all I know is that contracts with

XIV:1236.) General Counsel contends that the Specification is not necessarily accurate as to when Gomez began to work at Livacich. While that is true, the inference Respondent would have me draw seems the more reasonable one on the record as a whole.

In light of Gomez's testimony that he worked 6 or 7 months a year at North County and would "rest" for the remainder of the year, Respondent further contends that no search for work expenses should be allowed when he wasn't working at North County. In the first place, Gomez testified that he searched for work when "resting," which indicates he used the word as a synonym for being unemployed;[35] equally important, the Specification indicates that during the very periods of "rest" which Respondent seeks to define as withdrawals from the job market, Gomez had interims from other employers.

Respondent contends that Gomez did not testify about any commute to work expenses at North County Growers. On the contrary, he testified that he paid $1.50 each day, 5 days a week to commute. (XIV, p. 1255.) He also testified that he worked at

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[35](By Respondent's Counsel)

Q Okay. Sir, when you rested -- when there was no work for you at the Orange County (sic) -- at the North County Growers, is it true that you would look for work while you were resting?

A I always looked for work. I also worked in Oxnard With a contractor whose name was Cuevas or something like that.

least six months at North County every year he worked there until his final year and the Specification duly indicates at least two quarters of earnings at North County in 1977, 1979, 1980, 1981, 1982, 1983. (XIV:1268.) Accordingly, I will award him $7.50 a week for 13 weeks in every quarter in which his earnings equal or exceed his average at North County Growers; in quarters in which his earnings are less than this average, I will award him the normal quarterly expenses multiplied by the ratio of his actual quarterly earnings to his average quarterly earnings.

Finally, Respondent contends that Gomez's quitting work at Encenitas Floral in 1981 was unjustifiable and that, as a result, the earnings of the employee who replaced him at Encenitas Floral earnings should be imputed to him throughout the backpay period. Gomez himself only worked at Floral for one week and earned $221.00. (XIX:1517.)

All we know (from Encenitas Floral's personnel director, Dora Campbell) is that Gomez "voluntarily quit," see XIX:1517, because he disqualified himself from plastic work, and that the man who replaced him was assigned to the same kind of "heavy tasks." (XIX:1513.) The general rule is that having obtained substantially equivalent employment, backpay claimants cannot abandon it without justifiable cause, without also incurring a willful loss of earnings. Ozark Hardwood Company (1957) 119 NLRB 1130, 1136, 1139. But where the jobs are more burdensome than those the discriminatee held with Respondent, or unsuited to

union security clauses were in effect at Cozza and SKF during the periods in question, I will permit the claim for dues remitted under them. (XVII:1444.) However, I also know that the Seabreeze contract, was not executed until December 23, 1982. In line with my previous treatment of dues claims where there is specific proof of the execution date of a contract, I will only award dues after that date. Since the claim for dues in the fourth quarter of 1982 is only $1.45, I see no reason to proportionalize it. The entire claim will be stricken.

27. ANGEL ORTIZ MUNOZ

The parties stipulated that Ortiz Munoz died on October 27, 1987. (Joint 1). The Specification is accepted as written. The amount of backpay claimed is payable to his estate.

28. ESPERANZA RAMOS

Respondent initially claims that Ramos' backpay should be offset by additional earnings not contained in the Specification, on the basis of her testimony that she worked for two or three months (10 or 11 weeks around August 1976, picking peppers and squash, earning $19/day, 6 days a week ($114/week). Although I have some doubts about anybody's ability to recall these sorts of details, her recollection was too precise to ignore: an additional $1140 in interims will be attributed to the third quarter of 1976.

Respondent also contests the expenses claimed for Ramos on the grounds that her testimony was too vague to support any

claims. She did testify that she would look for work sometimes all week, sometimes less (3 or 4 times), depending on the money she had. She originally thought she paid $4.00 a ride; then she testified that she actually paid the raitero less than $4.00, but that the cost of the bus ride to the border where she met the raitero, brought her total expense to $4.00 per outing. When asked how frequently she had the money to look for work, she could only answer "more times than not," and it may have been two out of three times between July 1976 and December 1976, that she did not have the money. The same percentage obtained in 1977. Once again, constrained by the need to be fair to the discriminatee without providing a windfall to her, I will award only one week's ($4.00/day x 3 days) search for work expenses during each quarter of the backpay period.

29. JOSE LEONIDAS RUELAS RODRIGUEZ

On the basis of testimony from both Ruelas' wife and his daughter that Ruelas died, General Counsel contends that she has established that Ruelas is deceased. Respondent argues that, because it notified General Counsel that it would only accept a death certificate as proof that a discriminatee was dead, testimonial proof is insufficient to establish death. Respondent cites absolutely no authority for its implied premise that death is only provable by death certificate.

It is true that owing to a presumption of "continuing life," General Counsel had the burden of proving that

Ruelas is deceased, but that is no warrant for the proposition that testimonial evidence will not suffice for this purpose. To the contrary, it is said that "the most satisfactory proof of death is by the direct testimony of a witness to the fact, but death may also be established by indirect evidence, such as the wearing of mourning by the family, or the testimony of relatives." Death, 22 Am. Jur. 2d §544.

30. MARIA ESTHER RUELAS SALDANA

Maria Esther Ruelas was killed in the same accident as Jose Ruelas. (Respondent does not dispute the fact of her death.) The Specification contains commute to work expenses and claims for payment of dues at interim employers. Respondent contends that both must be stricken. I agree as to the commute expenses which, in the absence of her testimony, have not been established. However, the claim for dues deducted from her check at Egger during periods in which the parties stipulated that a contract containing a union security provision was in effect, will be allowed. Dues claims will be disallowed after April 6, 1980, the last effective date of the contract. With these modifications, the Specification is accepted and Respondent is ordered to pay the amounts claimed to the estate of Maria Esther Ruelas Saldana.

31. MARIA ROSARIO RUELAS

Respondent argues that because Rosario had $12.00 per week commute to work expenses at Ukegawa, her search for work expenses should be disallowed in the second quarter of 1976. As

discussed previously, I will not deduct search for work expenses from commute to work expenses. However, I do not believe General Counsel has proven enough to justify more than a minimal award. Rosario testified she paid $1.00/day to go to the border, four times a week, but she did not specify how many weeks she looked. I will award one week's expenses.

Respondent also argues that I ought to strike the claim for $20.00 per week which Ruelas paid the friend with whom she lived in Los Angeles (from the third quarter of 1978 to the end of 1979) because her friend did not require her to pay rent. There is no contention that she did not actually pay $20.00 per week. Since even a "contractual" rent is voluntary in the sense that agreement to the contract is not compelled, I see no reason to distinguish between reasonable expenses incurred through "moral" obligations as opposed to expenses incurred through legal obligations.

Since Ruelas' earnings at Beatrice Window are considerably lower for the fourth quarter of 1978 than they are for any other quarter, Respondent seeks to have me credit her with her average earnings at Beatrice for that quarter on the basis of her testimony that she was never laid off from Beatrice. I decline to do so. The diminution of earnings could be attributable to a diminution of work for a variety of reasons; it does not necessarily indicate a lack of reported earnings.

32. OLIVIA MARGARITA RUELAS

With the exception of a brief period of employment at Livacich and Uchimura in 1976, Ruelas worked only at Egger and Ghio from 1976-1984. She ceased working there when the company shut down. Respondent contends that the fact that she would not look for other work during her periods of layoff from Egger and Ghio, coupled with the fact that in a number of quarters she had "relatively" low earnings, means that she removed herself from the job market during those periods.

Although I believe a fair reading of Ruelas' testimony leads to the conclusion that Ruelas did wait to be recalled by Egger and Ghio, I do not believe this means she took herself out of the job market by doing so. Since she was only a seasonal employee at Ukegawa, it seems to me that waiting to be recalled for other seasonal employment should not be considered a withdrawal from the job market. Kawano Inc. (1983) 9 ALRB No. 62, ALJD p. 40. Indeed, as Respondent admits, while working at Ghio, Ruelas earned approximately the same amount as she earned at Respondent.

Respondent also objects to the commute to work expenses claimed by General Counsel. Ruelas testified that she paid $10.00 per week for a ride to Ukegawa, and that she paid $15.00 per week from 1976-81, and $20.00 from 1981-1984, to commute to Ghio. There is thus a $5.00 week differential during the earlier period and a $10.00 week differential during the latter period. The

Specification awards expenses in odd amounts which I suspect are proportional to her earnings, but it is not at all clear to me upon what base the proportions are figured. Once again, because it is clear Ruelas had some expenses, but there is not enough evidence concerning how many weeks she incurred such expenses, I will provide a minimal award of one week's expenses during each quarter.

Finally, Respondent contends there is no evidence that she ever made any dues payments to union. However, GCX 14, (her check stubs from Egger and Ghio) indicate that dues were deducted. In view of Respondent's further admission that there was a collective bargaining agreement between Egger and Ghio and the UFW at least through April 6, 1980, I will allow the claimed expenses through that date.

33. ANTONIA RUIZ

Respondent objects to two features of Ruiz's backpay claim, the most important of which is its duration. General Counsel claims backpay through the end of 1980, but because no interims appear after 1978, Respondent contends that Ruiz's backpay should end after 1978.

Ruiz was an elderly witness. She remembers looking for work in 1977 and being told she was too old even then. The last year she recalled working was 1979 when she looked "at times" but "then" got sick and had high blood pressure and "couldn't" work anymore. She also admitted she was too sick to respond to a July

31, 1979 recall notice. On the record as a whole, I agree with Respondent: backpay will be stricken after 1979.

Although Respondent contends that no evidence supports General Counsel's claim for commute to work expenses, Ruiz said she worked only Fridays and paid $2.00 per day for a ride. I will award her $2.00 for every Friday in each quarter of her backpay period.

34. JOSE PEREZ SERRANO

The Specification for Serrano shows no interims until the fourth quarter of 1976, and only sporadic earnings up through the third quarter of 1977 when he started work at Artimex Iron. He worked at Artimex until the second quarter of 1979 when he left Artimex "to find a better job."

Respondent contends that Perez Serrano’s quitting his job at Artimex for the reason given represents a willful abandonment of employment. However, if one looks carefully at the Specification, it is not clear that when he quit Artimex, it was paying wages anywhere comparable to what he would have received in Respondent's employ. In the first quarter of 1978, he only earned slightly more than $28.00 and while his earnings rose during the second quarter to $1400, they dropped to nothing in the third

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quarter.[36] In the face of evidence that during three of the eight quarters spanned by his employment at Artimex, he had practically no earnings, I decline to conclude that his work at Artimex was comparable to that of Respondent. Accordingly, quitting to find a "better job" is justifiable.

Respondent also objects to the commute to work expenses claimed for his period of Artimex employment. Since Serrano didn't remember how much it cost to go Artimex, these claims will be stricken. A similar lack of specificity attends the commute expenses claimed for 1979, 1981 and 1982. They, too, will be stricken.

Respondent also objects to the rental expenses claimed on behalf of Perez Serrano, claiming that his testimony was confused. General Counsel concedes that, except for his rental expenses at the beginning of his move to Riverside ($150.00 per month), his testimony was "uncertain." Serrano recalled living in Riverside for a year when his rent went up once or twice by $20.00 or $25.00. Thus, in 1980 it would have been $175.00 per month at

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[36]While Respondent contends that this fall-off must be due to his taking a long honeymoon, neither he nor his brother recalled his taking any time off during that period. Moreover, in view of the fact that in first quarters of 1978, and of 1979 he had less than $75.00 total earnings from Artimex, it is at least as likely that the explanation for lack of earnings in any other quarter is that there was simply no work available to him as it is that he was honeymooning. Indeed, to my mind, lack of availability of work is even more likely since a three month honeymoon appears excessive in the face of these earnings.

which point it went up another $20.00 per month. Indeed, Serrano recalled paying about $190.00 "the third time," where it remained until it went up to $230.00 in March 1985. At another point, however, he testified the 1985 increase was to $320.00. Since Serrano recalled "four increases," the first two of which took him to about $190, I find that he was paying $210.00 in 1984 since, I believe he was more likely to accurately remember the progression in, rather than the amounts he paid.

35. MATILDA de AREVALO

Respondent attacks three elements of the Specification. First, it contends that gross backpay should terminate as of the third quarter of 1976 when no earnings are shown on the grounds that Arevalo testified she could not work because she had an operation. Arevalo's testimony was quite confused as to the dates of her operations, but she clearly testified that she had one in 1976, as a result of which she couldn't work. Since the Specification shows earnings in the second and third quarter, and ostensible earnings only in the fourth quarter of 1976, it seems more likely than not that she had the operation in the fourth quarter. Backpay will be stricken for that quarter.

However, I reject the argument that because she testified that traveling became too difficult after her operation and she had to cease work again, that backpay should be tolled because it would have been too difficult for her to work at Ukegawa. Since (1) it is extremely difficult to follow her chronology and (2) she

insisted she did not abandon the job market and (3) since the Specification clearly shows interim earnings from 1977-83, I decline to find that she could not commute to work.

Respondent also contends that Arevalo's commute to work claims are unsupported by the record, except for her stint at Yascoches when she paid a boy $15.00 a week for a ride. Respondent points out there is no testimony about how many weeks she worked at "Yascoches." Since Arevalo distinguished Yascoches from Livacich and Uchimura (X:1011), and since the name of the employer does not otherwise appear on the Specification, I agree with Respondent that the $15.00/week figure cannot be utilized anywhere. General Counsel argues that de Arevalo is entitled to half the commute to work expenses her husband incurred because she rode to work with him to Livacich and Uchimura and Siempre Viva Farms. Even if, based upon community property laws, that would be the case, I cannot find any testimony about her husband's expenses from which I could calculate hers.

Finally, because Arevalo testified that, during her years at Siempre Viva, she worked only when they called her, Respondent urges that during those quarters of no earnings at Siempre Viva gross backpay should not accrue. I disagree. Since there is no evidence that she refused work at Siempre Viva Farms, it seems to me that she simply substituted one seasonal job for another and waiting to be recalled for it should not be treated as a withdrawal from the job market. See Kawano Inc. (1983) 9 ALRB No. 62, ALJD p. 40.

36. ESPERANZA DIAZ

Respondent argues that all backpay should be stricken for Diaz after August 20, 1980 when she failed to respond to an offer for a full-time position at Encenitas Floral. The difficulty with the argument is that I cannot find any proof that Diaz received such an offer.[37] According to her, she was laid off in due course and that was that.

Respondent also contests the claim for commute to work expenses for the second quarter of 1976 on the grounds that no testimony supports it. I agree; the claim for that quarter will be stricken.

Respondent further contends that no testimony at all supports the claim for commute expenses at SKF Farms and Kenji Iguchi. I would agree except that it is not clear to me that commute expenses are being claimed for SKF. During the period for which expenses are claimed (the fourth quarter of 1982,) Diaz also worked for Seabreeze and she testified she paid $2.50 day/6 days a week ($15.00) to commute there. The only element missing for computing an award is the number of weeks she worked. Since there was obviously employment there, and since she is entitled to the

[37]Had Respondent introduced evidence as to how the recall notice was sent to Diaz, it might have relied upon the presumption that a letter mailed to an addressee was received, but it offered no evidence sufficient to raise the presumption.

difference between her commute expenses at Seabreeze and her commute expenses at Ukegawa, I find myself again having to choose between denying any claim and arbitrarily fixing one. In accord with my practice of providing only a minimal award when it is clear that there were expenses, but not clear how much, I will award her only one week's expenses.

She also testified she had $15.00/week expenses at Frazee (at $2.50/day x 6 days week), but once again she did not testify how many weeks she worked. Since she earned at least $1400 each quarter of her employment there, I will again provide a minimal award of one week for each quarter. The same considerations apply to her employment at Sobay Farms where she testified she had net commute expenses of $7.50/week: I will again credit her with one week's expenses for each quarter.

Respondent's final contention concerns the amounts claimed for dues. Since the SKF contract was only effective between 1980-1982, the dues claim for the fourth quarter of 1979 is stricken. Since the Seabreeze contract expired April 6, 1982, the dues claim will be stricken for the third and fourth quarter of 1982. (XVII: 1445.) Finally, the dues claimed for the second quarter of 1982 should be reduced to conform to the stipulation (IX:913-14.)

37. MARIA GARCIA

Garcia is a missing discriminatee. The backpay Specification is accepted as written. Respondent is ordered to

pay the amounts claimed to an escrow account to be held for two years.

39. ANITA PALOMINO

Respondent contends that because it did not stipulate to union dues for the fourth quarter of 1978, the first quarter of 1979, and the third and fourth quarter of 1983, no evidence supports them. I agree. (See Stipulation XIX:1539-40.)

40. FRANCISCA ROMAN

Respondent argues, first, that backpay should be tolled for the period of time Roman was unable to work because she had a hernia operation. However, Roman also testified that the operation was necessary because of an injury suffered at Ukegawa. Disability suffered from the gross employer does not toll backpay, C-Mart Corp. (1979) 244 NLRB 547; Moss Planning Mill Co. (1953) 103 NLRB 414.

Dora Campbell of Encenitas Floral testified they recalled Roman in August of 1981, but that she did not respond. Although Roman herself was not sure of the date, it appears she abandoned the job market in 1981 to go to Mexico to care for her mother. Although I believe her trip to Mexico constitutes removal from the job market, and thus tolls backpay for that period, I do not see any need to correct the Specification to take the trip to Mexico into account. There is no gross backpay claimed for the ostensible period of her removal.

Finally, Respondent objects to the dues claimed for the third and fourth quarters of 1978, 1979 and 1980, and the third

quarter of 1982. Since the parties stipulated that there was an executed contract in effect at Seabreeze from March 20, 1979 until April 6, 1980, dues will be allowed for two thirds of the third and fourth quarters of 1979, and for half of the fourth quarter of 1980. All other claims at Seabreeze will be stricken.

Because the parties stipulated that a contract with a union security clause was executed sometime in May 1978 between the UFW and SKF Farms and the contract expired on April 6, 1980, Roman is only entitled to be reimbursed for dues for one week during the third quarter of 1980. She is again entitled for dues from November 1, 1980 based upon the parties' stipulation that a new contract with a union security clause was executed on that date. Since the only information in the record about the contract between the UFW and Encenitas Floral, and between the UFW and Cozza Farms, indicates that contracts with a union security clauses were in effect during the entire period of her employment at both places, dues claims will be allowed for the third quarters of 1978 and 1983.

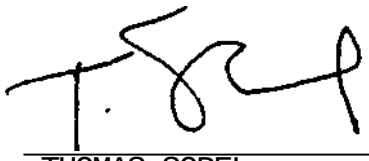
41. JUAN RUBALCABA

Respondent does not contest any element of the Specification respecting Rubalcaba. Although he is not listed as a missing discriminatee, I cannot find that he testified. The Specification is accepted as written; the amount to be placed in escrow for two years.

RECOMMENDED ORDER

I recommend that General Counsel's formula be accepted; that the beginning and end dates of the liability periods be accepted; that the Specification be modified to the extent necessary to conform to this Decision, that backpay be recalculated within 30 days of the date of issuance of this Decision; and that Respondent's obligation to make whole its employees be discharged by paying the amounts so calculated plus additional monies accruing to the date bona fide offers of reinstatement are tendered by Respondent, plus interest calculated in accordance with the Board's decision in Lu-Ette Farms, Inc. (1985) 8 ALRB No. 55.

DATED: February 26, 1990



THOMAS SOBEL
Administrative Law Judge