Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-127-D 81-CE-128-D 81-CE-135-D 81-CE-136-D 81-CE-137-D 81-CE-138-D 81-CE-140-D 81-CE-159-D 81-CE-160-D 16 ALRB No. 6 (8 ALRB No. 69)

SUPPLEMENTAL DECISION ON CASE CLOSING

Pursuant to Labor Code section 1142(b),[1/] the United Farm Workers of America, AFL-CIO (UFW or Union) filed a Request for Review by the Agricultural Labor Relations Board (ALRB or Board) of the General Counsel's determination that Respondent had complied with the Board's Order in Sam Andrews' Sons (1982) 8 ALRB No. 69 (hereafter, Andrews I) and that therefore the case should be closed.

In accordance with its discretionary authority to review such matters under the provisions of section 1142(b), the Board requested all parties to submit their positions on the question of case closure, granted the Union's Request for Review, and advised the parties of the parameters of the record on review, and, as also required by section 1142(b), now issues its decision.

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

Background

In Andrews I, the Board affirmed the Administrative Law Judge's (ALJ) finding that Francisco Larios had repeatedly applied for irrigation work with Respondent during a three month period up to and including July 8, 1981, but had been discriminatorily rejected due to his past activities in behalf of the UFW. Accordingly, the Board ordered Respondent to immediately offer Larios employment as an irrigator with backpay from the date on which the first irrigation crew opening occurred following his initial application, such date to be determined in the compliance phase of the case.[2/]

On July 9, 1981, the day following Larios' last application for work, approximately 140 of Respondent's employees engaged in an economic strike which lasted one year for approximately half of the strikers and 15 months for the remaining strikers. Larios was not in Respondent's employ at the onset of the strike.

Thereafter, on August 19, 1981, during the unfair labor practice proceeding in Andrews I, and approximately five weeks following the start of the strike, Larios testified in support of his charge that he had been discriminatorily denied hire some months before. According to his testimonial account, he last applied for work with Andrews on July 8, 1981. Early the next morning, he learned for the first time that Andrews' employees

[2/]Since Respondent did not assert a judicial challenge to the Board's Decision in Andrews I, which issued on September 28, 1982, the question of Respondent's liability for the unfair labor practices became final 30 days following the issuance of 8 ALRB No. 69.

planned to protest their working conditions by engaging in a work stoppage. Larios went to the work site. As he had observed them on the picket line, Larios was aware that some irrigators had joined the strike, thereby creating vacancies in that job classification. Respondent's counsel asked if he had "immediately" applied for such work from Respondent's personnel director or irrigation crew foremen. Larios replied "No, because I'm not a strikebreaker." Referring only to July 9, the day the strike commenced, Respondent's counsel then asked him, "were you prepared to take a job that day...cross the picket line that day?" Larios replied "no" and indicated further that he would not take a job as an irrigator with Respondent so long as the strike continued. (Sam Andrews' Sons (1982) 8 ALRB No. 69, Reporter's Transcript, Vol. IV, pp. 135, 136.)

On July 7, 1982, Respondent received four separate petitions signed by a total of 74 strikers who offered to abandon the strike and return to work.[3/] Larios name does not appear on any of the petitions. Thereafter, by letters dated October 23 and 26, 1982, the Union advised Respondent that all remaining strikers were making similar offers. No names were attached to the letters.

[3/] As explained in 12 ALRB No. 30, Respondent's personnel director had testified that Respondent has adhered to a particular seniority policy as developed in a 1975 collective bargaining agreement. Each category of work and/or crew is treated as an independent unit. Thus, each crew maintains its own seniority standings and crew supervisors have sole authority to hire, fire, layoff, and recall workers in their respective crews and are required to do so in accordance with established seniority standings. Consistent with such policy, each striker who offered to return to work signed the particular petition relating to his crew as it existed at the time the strike commenced.

In a subsequent Andrews' case which issued on December 22, 1986, the Board was required to determine the reinstatement rights of the employees who participated in the strike and who, as noted above, offered to return to work in either July or October of 1982. (Sam Andrews' Sons (1986) 12 ALRB No. 30 (hereafter Andrews II).) As a general rule, but with at least one exception which has particular relevance here, economic strikers who offer to abandon a strike and return to the employer, but whose positions have in the interim been filled by replacements, are not entitled to immediate reinstatement. Instead, their employer is obligated only to place their names on what is termed a "preferential rehire" list, usually according to seniority, to await recall upon the creation of a vacancy occasioned by the departure of their replacements. The National Labor Relations Board (NLRB) now holds that returning economic strikers are entitled to an immediate offer of reinstatement should their employer fail to establish that the replacements were hired as permanent employees and, further "the employer must show a mutual understanding between itself and the replacements that they are permanent." (Hansen Brothers Enterprises (1986) 279 NLRB 741 [122 LRRM 1057] enforced sub nom. Hansen Brothers Enterprises v. NLRB (D.C. Cir. 1987) 812 F.2d 1442 [125 LRRM 3063].) Andrews II followed Hansen supra, and concluded that since Respondent had not met the Hansen test, the economic strikers were entitled to an offer of immediate reinstatement when they announced their intention to resume work, requiring the employer to discharge replacements if necessary in order to

create vacancies for the returning strikers. The backpay period for returning strikers not offered immediate reinstatement would thus commence on the first date on which work became available in their respective job classifications.

Closing Letter

By letter dated December 27, 1988, General Counsel advised Respondent of its determination that it had "satisfactorily met and fully complied with" the terms and conditions set forth in the Board's Order in Andrews I and therefore the case was deemed closed as of the date of the letter.

General Counsel specified May 7, 1981 as the beginning of Larios' backpay period, that presumably being the date of the first irrigation crew opening following Respondent's discriminatory denial of Larios' application for irrigation work, and terminating two months later when the strike commenced. General Counsel relied on Larios[1] testimonial statement of August 19, 1981 to reason that even if Larios had been employed prior to the inception of the strike, he would have joined the strike and therefore his backpay period should end on the date the strike began. On that basis, General Counsel believes that Larios falls within the class of strikers who were in Respondent's employ when the strike began and whose reinstatement and backpay rights will be determined in the compliance phase of Andrews II. According to General Counsel, Larios ultimately was reinstated by Respondent on May 23, 1983, a finding which the Union does not contest.

Objections & Responses

The Union contests the case closing on three grounds:
(1) absent information from General Counsel concerning its basis for measuring the start of the backpay period, and lacking access to Respondent's payroll records, the Union cannot assess the propriety of the General Counsel's position in that regard;
(2) because of a similar lack of documentation, the Union questions General Counsel's reliance on Respondent's contention that it does not adhere to a seniority system for irrigators; and
(3) while the Union acknowledges Larios' participation in strike activities, it does not concede that he would have joined the strike had he been employed by Respondent at the inception of the strike. The Union also points to NLRB precedents it believes support its view that General Counsel erred in presuming Larios would not have returned to Respondent's employ had he been offered reinstatement prior to the end of the strike.

In response to the Union's objections, and in support of General Counsel's position on closing, Respondent asserts that since there is no dispute as to Larios' participation in the strike, there should be no uncertainty as to whether he would have joined the strike had he, in fact, been in Respondent's employ at the beginning of the strike. Respondent further asserts that the facts of this case are identical with those in Alfred M. Lewis v. NLRB (Lewis) (9th Cir. 1982) 681 F.2d 1154 [110 LRRM 3280] in which the appellate court tolled backpay during the period of strike activity when the employee testified that he would not have worked during the strike.

Analysis and Conclusions

The principal questions in this case turn on the correctness of General Counsel's dual premises that Larios' testimony in Andrews I serves to (1) prove he would have rejected a valid offer of work extended to him during the strike, thereby obviating Respondent's obligation to offer him an irrigator position as required by the Board's Order in that case and (2) toll his backpay for the duration of the strike.

Although no one doubts the pro-strike sentiments expressed by Larios, the UFW challenges the notion that his spontaneous response to a hypothetical question in the course of an evidentiary hearing should diminish the Board's remedy for Respondent's violation of the Act. We believe the Union's concern is well founded.

In Seligman & Associates, Inc. (1983) 273 NLRB 1216 [118 LRRM 1309], enforced in relevant part sub nom. NLRB v. Seligman & Associates, Inc. (6th Cir. 1986) 808 F.2d 1155 [124 LRRM 2277], the discriminatee testified credibly that when asked by an NLRB Board agent, on behalf of her former employer, whether she would take back her job with backpay were it offered to her, replied, "No, I don't want to work there anymore." The NLRB agreed with its trial examiner's characterization of the offer as "hypothetical" and his conclusion that an "offer such as this is not a sufficient offer of reinstatement...because the employee must be given sufficient time to consider an offer made

in positive terms."[4/]

In Respondent's questioning of Larios as to why he didn't reapply for work when the strike began, we find nothing to constitute an offer of a specific position, with certainty as to wages, hours and other terms and conditions of employment, in circumstances which would afford an opportunity for consideration and response.[5/] A question put to an employee as to whether he would return to work if offered reinstatement does not represent a specific, unequivocal offer of reinstatement. (Wen Hwa Ltd. (1974) 208 NLRB 828 [85 LRRM 1524].) Respondent has failed to carry its burden of establishing that a legally sufficient offer

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[4/] Similarly, in Chromalloy American Corp., L. A. Water Treatment Div. (1982) 263 NLRB 244 [110 LRRM 1506], the NLRB restated long-established principles governing the adequacy of a valid offer of reinstatement that the offer "must be specific, unequivocal, and unconditional in order to toll the backpay period. It is the employer who carries the burden of demonstrating a good-faith effort to communicate the offer to the employees. An employer is relieved of his duty to reinstate only when a proper offer is made and unequivocally rejected by the employee." (Chromalloy, supra, 263 NLRB 244, 246; see also Verde Produce Company, Inc. (1984) 10 ALRB No. 35.)

[5/] As noted previously, the thrust of the question was why Larios had not immediately renewed his application for work with Respondent when the strike commenced. But, as alleged in the underlying unfair labor practice charge and complaint, the issue was whether Respondent had discriminatorily rejected Larios' application for irrigation work prior to the commencement of the strike. Thus, whether or why Larios declined to renew his application after the onset of the strike was of no consequence in the context of the matter set for hearing. Moreover, at the time of the testimony in question, Respondent was already under a prior order of the Board to offer Larios employment in its weed and thin crew. (Sam Andrews' Sons (1980) 6 ALRB No. 44.) The order in that case issued on August 15, 1980, one year prior to the hearing in Andrews I, and was closed on June 17, 1982, by means of a settlement agreement among all parties which granted Larios $2,000, presumably for backpay, but is silent as to that portion of the Board's Order which required Respondent to offer Larios employment in the weed and thin crew.

of reinstatement had been made to Larios.

As to General Counsel's tolling of backpay, the Union contends that any controversy as to the amount of loss suffered by a discriminatee was caused by the wrongdoer who created the uncertainty in the first instance and therefore should be resolved against the wrongdoer. The Union further contends that the NLRB has found the foregoing principle particularly suited to instances where it is not clear whether a pre-strike discriminatee would have accepted an employer's offer of reinstatement, had one been extended, during the course of an economic strike. (Winn Dixie Stores, Inc. (Winn Dixie) (1973) 206 NLRB 777 [84 LRRM 1482] enforced sub. nom. Winn Dixie Stores, Inc. v. NLRB (4th Cir. 1974) 502 F.2d 1151 [87 LRRM 2257].) We find merit in this contention.

The facts in Winn Dixie are particularly instructive. The employer in that case discriminatorily discharged three employees shortly before the commencement of an economic strike. Although two of the employees were never offered reinstatement at any time during the strike, the trial judge concluded that it was reasonable to presume that such an offer would have been futile because the employees were active members of the union who voted in favor of the strike and continued to support the strike. On that basis, he approved the tolling of their backpay period until the conclusion of the strike. The NLRB found the presumption contrary to established federal labor law policy inasmuch as,

> ...in cases involving employees who have been unlawfully discharged before an economic strike is called ...the entire duration of the strike is includable in the backpay award period because the employer's own discrimination against the claimants makes it impossible to ascertain whether such claimant would have gone out on strike in the absence of the discrimination and the resulting uncertainty must be resolved against the employer. (Winn Dixie, supra, 206 NLRB 777.)

The third discriminatee in Winn Dixie offered to return to the employ of the struck employer while the strike was still ongoing. The NLRB found in his action further support for its view, as expressed above, in that,

> This evidence shows the fallacy of presuming, as did the [trial judge], that individuals recognized as union activists will automatically refuse an offer of reinstatement in order to demonstrate their support for the union during the strike. To hold that an employer who has wrongfully discharged an employee prior to a strike may escape the consequences of his misconduct by simple inaction in failing to offer reinstatement to the employee would reward the employer for his misconduct. To require the fired employee to apply to the employer who has evinced no retreat from his unlawful conduct appears hardly reasonable, and also contrary to the well-established legal principle that a condition once established--the employer's refusal to employ the employee--is presumed to continue in the absence of evidence showing a change has occurred. (Winn Dixie, supra, 206 NLRB 777, 778.)

Respondent herein interprets Winn Dixie to have meaning only where it is not possible to determine whether a discriminatee would have withheld labor in support of a strike which commenced after the employer's violation of the Act. But where, as Respondent believes to be the case here, Larios' own testimony removes any doubt as to his intentions had an offer been extended to him during the strike, his situation falls outside the Winn Dixie line of cases. Respondent believes the controlling precedent in this instance is that of Alfred M.

Lewis v. NLRB, supra, wherein the court, although approving of the general rule that "employees wrongfully discharged before an economic strike are entitled to backpay accruing during the strike," ultimately held that the rule lacks validity where, as in that case, the discriminatee testified "unequivocally" that he would have joined the strike had he been employed at the time. Accordingly, Respondent supports General Counsel's severance of Larios' backpay period as of the July 9, 1981 date on which the strike commenced.

Four years following the court's decision in Lewis, the NLRB rejected an employer's proposal that it look to strike activities of a pre-strike dischargee to conclude that he would not have accepted an offer of reinstatement had one been proffered during the strike. (Northwest Metal Products, Inc. (Northwest) (1986) 281 NLRB 1162 [123 LRRM 1174].) There, both shortly before and immediately after the discharge, the employer mailed letters to all unit employees encouraging them to resume work.[6/] The discriminatee did not respond to any of the letters but testified later that he voted to strike, picketed his struck employer, refused to cross the picket line and continued to support the union as well as use its services. Notwithstanding the discriminatee's admission of support for the strike, the NLRB affirmed the finding of its Administrative Law Judge that the employer had not established that the discriminatee would have refused a valid offer of reinstatement had one been tendered

[6/] The ALJ deemed the letters too general to be considered a valid offer of reinstatement to an employee who had recently been discriminatorily discharged from his employment.

during the course of the strike. The ALJ reasoned that although the discriminatee continued to actively participate in the strike following his discharge, that fact would not conclusively determine whether he might have returned to work had a valid offer of reinstatement been made.

For support of her finding in Northwest, the ALJ looked to Abilities and Goodwill, Inc. (1979) 241 NLRB 27, 28 [100 LRRM 1470] wherein the NLRB stated as follows:

> When discharged strikers withhold their services after the date of the unlawful discharge, one cannot really be certain whether their continuing refusal to work is voluntary, i.e., a result of the strike, or whether the reason for not making application for reinstatement is that the employer, by discharging the employees, has unmistakenly impressed on them the futility of making such an application. Thus, 'it becomes difficult, if not impossible, to determine whether the employees would have continued to strike and, if so, for how long, had the opportunity to return to work been available.' [Footnote omitted.] ...[B]ecause the uncertainty is caused by the employer's unlawful conduct, we will not indulge in the presumption that the discharge itself played no part in keeping the employees out of work. Rather, it seems to us more equitable to resolve the ambiguity against the wrongdoer and presume, absent indications to the contrary, that the discharged strikers would have made the necessary application were it not for the fact that the discharge itself seemingly made such application a futility. (Northwest, supra, 281 NLRB 1160, 1161.)

In a supplemental hearing in Northwest, the discriminatee explained that he might indeed have ultimately crossed the picket line to accept employment had it been offered because he "had a house payment to make...I had a car payment, insurance, I would have had to gone back to work...sooner or later." (Northwest, supra, 281 NLRB 1160, 1162.) But the ALJ eventually concluded that such testimony as is quoted directly

above may not serve to supplant the failure of the employer to issue a valid offer of reinstatement, and therefore it cannot be established that the discriminatee would in fact have refused a valid offer if one had been made during the course of the strike.

In Inland Empire Meat Company (Inland) (1981) 255 NLRB 1306 [107 LRRM 1114], the NLRB found that an employee had been unlawfully discharged on November 15, 1976 and ordered that he be reinstated with backpay. A strike commenced exactly four weeks later. The discriminatee did not participate in the strike vote but was active on the picket line, both at the work site as well as at various of the employer's away-from-the-plant delivery points, until picketing ceased in April of 1977. He subsequently rejected the employer's September 1978 offer of reinstatement because he had entered business for himself some nine months before. Respondent sought to mitigate its backpay liability on the grounds that the employee's support of the strike established that he would not have worked for Respondent during the strike and therefore backpay should be tolled for the duration of the strike. Rejecting Respondent's argument, the NLRB concluded that the failure to offer reinstatement during the strike "only makes it more uncertain whether [the discriminatee] would have joined the strike and that the uncertainty must be resolved against the employer,"[7/] quoting from NLRB v. Rogers

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[7/]Thereafter, on September 16, 1982, one year following its decision in Lewis, the Ninth Circuit summarily enforced the

(fn. 7 continued on p. 14)

Manufacturing Co. (6th Cir. 1969) 406 F.2d 1106, 1109 [70 LRRM 2559]. (Inland, supra, 255 NLRB 1306, 1307.)

From the cases discussed above, we perceive a distinction drawn by the NLRB which turns not on whether statements and/or conduct in support of a strike will support an inference that a pre-strike discriminatee would have declined a valid offer of reinstatement during the course of the strike had one been made, but rather, whether the discriminatee had an opportunity in fact to accept or reject such an offer. Lewis does not hold otherwise.[8/]

Our construction here not only is supported by a plain reading of the cases involved, but also is wholly consistent with the policy of the NLRB that whenever it finds an unfair labor practice based on a discriminatory discharge, it is standard policy to require that the discriminatee be offered reinstatement

(fn. 7 cont.)

NLRB's decision in Inland, including the national board's affirmation of the trial judge's observation that Winn Dixie "placed major emphasis upon the absence of an offer of reinstatement by the respondent therein" because such an offer was necessary in order that "the discriminatee's resulting decision to accept or reject the offer would have resolved any lingering uncertainty as to whether he would have initially participated in the strike." (NLRB v. Inland Empire Meat Co. (9th Cir. 1982) 692 F.2d 764 [111 LRRM 2650].)

[8/] The question before the court in that case was simply whether the likelihood that a discriminatee would have participated in a post-discharge strike should serve to reduce his backpay award. As discussed previously, the court answered that question in the affirmative, but did not hold that such mitigation is available absent a finite backpay period whose termination is dependent upon a reinstatement offer. Indeed, in Lewis, the General Counsel had established a fixed monetary sum which, presumably, had its genesis in a closed-end backpay period determined by *a* reinstatement offer.

and be made whole. So intrinsic is that remedy to the whole of the NLRB's remedial scheme that it is required even where the respondent and the General Counsel have agreed to settle unfair labor practices that have only been alleged. (Lyman Steel Co. (1979) 246 NLRB 712, 714 [102 LRRM 1654].) It follows, therefore, that since,

> Reinstatement is basic to our remedy... Respondent's offer of reinstatement was required to comply with our order to remedy its discrimination by demonstrating to employees that their rights will be vindicated. To toll Respondent's backpay obligation prior to its offer [of reinstatement] would eliminate the practical incentive for compliance with our order... [Thus, a statement made prior to an offer of reinstatement] could not manifest'an unequivocal resolve not to accept reinstatement.' Both in order to preserve the public interest in Respondent's meaningful compliance with our order and to safeguard a discriminatee's rights, we consistently have discounted statements, prior to a good-faith offer of reinstatement, indicating unwillingness to accept reinstatement. (Heinrich Motors, Inc. (1967) 166 NLRB 783, 785 [65 LRRM 1668]; enforced (2d Cir. 1968) 403 F.2d 145 [69 LRRM 2613]; accord Murbro Parking, Inc. (1985) 276 NLRB 52, 55 [120 LRRM 1067].)

With the foregoing principles and authorities in mind, we find no indication that Respondent tendered a bona fide offer of reinstatement in accordance with our Order in Andrews I. At least in the absence of such a showing, General Counsel erred in relying on Larios' testimonial statement for the proposition that he had removed himself from the labor market and in effect waived reinstatement or, alternatively, that he forfeited his right to backpay for the whole of the strike period. Thus, in view of all the circumstances, we find no support for General Counsel's conclusion that Respondent has complied with the Board's Order in Andrews I to offer Larios employment with backpay.

We also take issue with General Counsel's reconunendation that a determination of Larios' ultimate reinstatement rights be deferred to further proceedings in Andrews II. An economic striker may be defined as an employee who withholds labor in order to press a demand for changes in wages, hours, or other terms and conditions of employment. (See, e.g., Royal Packing Co. (1982) 8 ALRB No. 16.) Inasmuch as Larios was not in Respondent's employ when the strike began, he cannot be equated with those employees who actually were working for Respondent, who relinquished their employment in order to effectuate their economic demands, and who ultimately, albeit at different times, made unconditional offers to reclaim their former positions. As those employees voluntarily left available work, they cannot claim an entitlement to backpay until after they unconditionally offer to abandon the strike and resume work and then only under the limited circumstances adopted by the Board in its decision in Andrews II. But, as Andrews II governs primarily the reinstatement rights of employees who, by their actual departure at the onset of the strike, created vacancies which Respondent filled with replacement employees, that case would not prove useful in determining Larios' backpay award.

In order to define the backpay period, we are compelled to remand this matter for further proceedings, consistent with this opinion, that will determine whether and when Respondent actually complied with the Board's Order in Andrews I to unconditionally offer Larios an irrigator position and compute backpay accordingly.

Pursuant to the authority of Labor Code section 1142(b), the Agricultural Labor Relations Board hereby directs the General Counsel to serve on the parties his redetermination as to whether Respondent has complied with the Board's final Decision and Order in Sam Andrews' Sons (1982) 8 ALRB No. 69, with a detailed statement of facts in support of such redetermination, as well as the basis for the General Counsel's initial determination as to the commencement of Larios' backpay period.[9/]

DATED: June 1, 1990

BRUCE J. JANIGIAN, Chairman[10/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

[9/] In Andrews II, the Board relied on Respondent's own testimony in that case to find that irrigation crew seniority followed a pattern established in 1975. But, in accordance with Andrews I, Larios' seniority would commence contemporaneously with the first irrigation crew opening Respondent failed to offer him following his initial application for such work. The Board notes that, as a practical matter, seniority should not be a factor in evaluating Respondent's compliance with Andrews I.

[10/] 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

Sam Andrews' Sons
(UFW)

16 ALRB No. 6
Case Nos. 81-CE-127-D,
et al.
(8 ALRB No. 69)

General Counsel's Decision on Compliance

Pursuant to Labor Code section 1142(b), the United Farm Workers of America, AFL-CIO (UFW or Union) appealed to the Agricultural Labor Relations Board (ALRB or Board) from the General Counsel's conclusion that Sam Andrews' Sons (Respondent) had complied with the Board's Order in Sam Andrews' Sons (1982) 8 ALRB No. 69 to offer an irrigator position to Francisco Larios and to compensate him for all losses resulting from Respondent's discriminatory refusal to honor his application for work in the spring of 1981. Shortly after the discriminatory failure to hire Larios, Respondent's employees engaged in an economic strike. Five weeks after the onset of the strike, Larios indicated in his testimony in an ALRB hearing that he had not reapplied for work because he is not a strikebreaker. On that basis, General Counsel concluded that Larios probably would not have accepted an offer of employment had one been tendered at any time during the entire course of the strike and therefore his backpay should be tolled for the duration of the strike. Although the strike continued until at least July of 1982, Larios was not employed by Respondent until May of 1983. It was not clear whether Respondent ever offered Larios employment or the circumstances by which he ultimately commenced working for Respondent.

Board Decision

Relying on NLRB precedents which hold that the employer had the burden of demonstrating a good faith effort to extend a valid offer of reinstatement - that is, an offer of a specific position, with certainty as to the terms and conditions of employment, in circumstances which would afford an opportunity for consideration and response - the Board concluded that Larios spontaneous response to a hypothetical question posed to him during the course of a hearing did not constitute a bona fide offer of reinstatement sufficient to either waive Respondent's obligation to offer him employment or to toll his backpay. In these circumstances, the Board followed the NLRB rule that any controversy as to the amount of loss suffered by a discriminatee was caused by the wrongdoer who created the uncertainty in the first instance and therefore should be resolved against the wrongdoer. On that basis, the Board remanded the matter to the General Counsel for a redetermination as to whether, and when, Respondent complied with the Board's Order in 8 ALRB No. 69 to offer Larios employment in its irrigation crew and to compute his backpay accordingly.

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