

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC.)	
)	
Respondent,)	Case No. 86-CE-47-EC
)	(16 ALRB No. 1)
and,)	
)	
UNITED FARM WORKERS OF)	17 ALRB No. 13
AMERICA, AFL-CIO,)	November 21, 1991)
)	
Charging Party.)	
)	

Supplemental Decision and Order

On March 9, 1991, the Agricultural Labor Relations Board (ALRB or Board) issued its initial Decision in the above matter in which it found that Respondent Mario Saikhon, Inc. (Respondent) had discriminatorily discharged and denied reinstatement based upon seniority to agricultural employee Andres Reyes because of his protected, concerted, and union conduct on behalf of Charging Party United Farm Workers of America, AFL-CIO (UFW or Union). In its Order issued simultaneously with its Decision in the above matter, the Board ordered Respondent to cease and desist from its illegal conduct and to make Reyes whole for all economic losses suffered as a result of Respondent's illegal discrimination. The parties subsequently being unable to agree on the amount of compensation owed Reyes, a compliance hearing on General Counsel's backpay specification was held before Chief Administrative Law Judge James Wolpman on August 20, 1991

in El Centro, California. In his recommended Decision following upon the hearing, the Chief Administrative Law Judge (ALJ) found Respondent liable to Reyes in the amount of \$1927.20, and ordered Respondent to pay that amount plus interest. Respondent filed timely exceptions to the ALJ's Decision.

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached ALJ's Decision in light of the exceptions and briefs of the parties, and has decided to affirm the rulings, findings, and conclusions of the ALJ and to adopt his recommended order.^{1/}

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent Mario Saikhon, Inc., its officers, agents, successors, and assigns to

^{1/}we note that the ALJ's rationale at hearing for admitting, as proof of the date of the commencement of the backpay period, a document containing the weekly summary of earnings provided by Respondent was erroneous. As Respondent points out, the foundational requirements for admission under the business records exception to the hearsay rule were clearly not established. However, we find, in agreement with an alternative basis for admissibility suggested by the ALJ in his recommended decision, that the document is admissible under the party admissions exception. We conclude that this proof together with the testimony of Louis Curiel as to the commencement of Respondent's melon harvest season outweighs any contrary inference that may be drawn from the parties' stipulation concerning earnings not reflected in the backpay specification. Respondent argues that the parties implicitly agreed to an earlier start to the season by stipulating to additional "interim earnings." However, the meaning of the stipulation, which was originally presented by Respondent as concerning "earnings," is at best ambiguous.

pay to Andres Reyes the amount of \$1927.20 plus interest until the day of payment calculated in accordance with the Board's Decision in E. W. Merritt Farms (1988) 14 ALRB No. 5.

DATED: November 21,1991

BRUCE J. JANIGIAN, Chairman

JIM ELLIS, Member

JIM NIELSEN, Member

CASE SUMMARY

Mario Saikhon, Inc.
(UFW)

17 ALRB No. 13
Case No. 86-CE-47-EC
(16 ALRB No. 1)

BACKGROUND

In Mario Saikhon, Inc. (1990) 16 ALRB No. 1 the Agricultural Labor Relations Board (ALRB or Board) found that Respondent Mario Saikhon, Inc. (Respondent) had violated sections 1153(a) and (c) of the Agricultural Labor Relations Act (ALRA or Act) by first discharging and subsequently refusing to rehire in proper seniority order Andres Reyes because of his protected, concerted, and union activities on behalf of Charging Party United Farm Workers of America, AFL-CIO (UFW or Union). The Board ordered Respondent, its officers, agents, successors, and assigns to reinstate and make Reyes whole for all economic losses suffered as a result of its illegal discrimination. When the parties were unable to agree on the amount of compensation owing to Reyes, General Counsel issued a backpay specification in the amount of \$1963.61 and a hearing was held thereon.

ALJ's DECISION

The ALJ found that Respondent failed to prove that Reyes had willfully failed to mitigate damages, lost or concealed interim earnings, or removed himself from the relevant job market. The ALJ did find that, as a result of Reyes's own testimony, additional interim wages were deductible from gross backpay, resulting in net backpay of \$1927.20. The ALJ also allowed General Counsel to introduce a hearsay document as a business record establishing Respondent's backpay period as consistent with the amounts calculated under the specification. Respondent excepted to the failure of the ALJ to find that Reyes failed to mitigate damages, the ALJ's findings of Reyes's credibility, and the admission of the hearsay document.

BOARD DECISION

The Board adopted the rulings, findings, and conclusions of the ALJ, and ordered Respondent, its officers, agents, successors, and assigns to pay Reyes \$1927.20 plus interest calculated according to Board precedent. The Board noted that the document admitted by the ALJ under the business records exception to the hearsay rule was properly admitted under the party admissions exception, and that the record evidence in favor of the backpay period commencement date relied on by the General Counsel in the specification outweighed the proof provided for an earlier date by the parties' ambiguous stipulation at hearing.

* * *

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

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
)
MARIO SAIKHON, INC.,)
)
Respondent,)
)
and)
)
UNITED FARM WORKERS OF AMERICA,)
AFL-CIO)
)
Charging Party.)
_____)

Case No. 86-CE-47-EC
(16 ALRB No. 1)

Appearances:

Theodore R. Scott
Littler, Mendelson, Fastiff & Tichy
San Diego, California
for the Respondent

Darra Lepkowsky
El Centro Regional Office
El Centro, California
for the General Counsel

Mary Mecartney
Law Office of Marcos Camacho
Keene, California
for the Charging Party

September 24, 1991

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN: This supplemental proceeding was heard by me in El Centro, California on August 20, 1991. It arises out of the Decision and Order of the Agricultural Labor Relations Board reported at 16 ALRB No. 1 (March 9, 1990), directing, inter alia, that the Respondent, Mario Saikhon, Inc. make whole Andres Reyes for lost pay and other economic losses suffered when he was discharged for union and other concerted activity in violation of sections 1153(a) and (c) of the Agricultural Labor Relations Act.

When the parties were unable to agree upon the amounts due, the El Centro Regional Director issued a Backpay Specification setting forth methodology, figures and calculations utilized in computing the gross backpay figure of \$2128.60. The Regional Director reduced this amount by \$252.43 in interim earnings, leaving Net Backpay of \$1876.17. To this was added \$87.44 in accrued vacation benefits, bringing the total backpay due to \$1963.61.

The Respondent answered, accepting the Regional Director's methodology, figures, and calculations in computing gross backpay and vacation benefits. With respect to interim earnings, the Respondent accepted those alleged, but asserted that there were additional, undisclosed earnings; Respondent also asserted that the discriminatee failed to seek interim employment, removed himself from the job market, and willfully failed to disclose his interim earnings.

The United Farm Workers appeared at the Pre-Hearing Conference and was allowed to intervene. However, it did not

appear at the hearing; nor did it file a post hearing brief. Both the General Counsel and the Respondent did appear and both filed briefs.

Upon the entire record, including ray observation of the witnesses, and after careful consideration of the arguments and briefs submitted, I make the following findings of fact and conclusions of law.

I

The finding of an unlawful discharge is presumptive proof that the discriminatee is owed some amount of backpay. (Abatti Farms, Inc., (1983) 9 ALRB No. 59, p. 2; NLRB v. Mastro Plastics Corp. (2nd Cir. 1965) 354 Fed.2d 170.) Once the General Counsel has established gross earnings, the burden of proof shifts to the Respondent to prove, by a preponderance of the evidence, any mitigation of its liability, including interim earnings, withdrawal from the labor market, or failure to seek interim employment. (O.P. Murphy Produce Co., Inc. (1982) 8 ALRB No. 54, p. 3; NLRB v. Brown & Root, Inc. (8th Cir. 1963) 311 Fed.2d 447.) Uncertainties, conflicts, and doubts are to be resolved in favor of the discriminatee. (J.R. Norton Company, Inc. (1984) 10 ALRB No. 42, p. 18; Kawano, Inc. (1978) 4 ALRB No. 104, p. 19; United Aircraft Corporation (1973) 204 NLRB 1068.)

II

Here, the Respondent offered no independent proof of additional interim earnings, failure to seek interim employment, or withdrawal from the labor market, but sought to establish

those factors by calling the discriminatee as an adverse witness. Respondent questioned Mr. Reyes carefully and at length about his availability for work and his attempts to obtain employment, but was unable to overcome his testimony describing the reasonable efforts he had made to seek and secure interim employment at the end of the melon harvest season in 1986 and throughout the melon harvest season in 1987.¹ Nor was the Respondent able to establish that Mr. Reyes had earnings other than those received from either Kevin Long or C.P. Martinez.²

There is, however, a dispute over the portion of those earnings which should be charged against gross back pay. What happened is that when the Regional Director requested -- in accordance with paragraph 2(b) of the Board Order in the underlying liability decision -- he payroll records for the 1987 Spring melon season so that he could prepare the specification, he was told that they had been seized by the Federal Government. In their place, the Respondent prepared and provided the Regional Director with a one page, handwritten document indicating that the discriminatee would have earned \$2099.82 if he had worked from May 20 to June 26, 1987. (General Counsel Ex. 2.) The

¹I find no merit whatsoever in Respondent's claim that the Discriminatee failed to mitigate his damages on the day he was discharged--June 27, 1986--because he went directly to the union office, instead of going immediately to look for work. It is absurd to argue that a worker should be deprived of backpay because he acted diligently in consulting with his collective bargaining representative after being illegally terminated.

²I found Mr. Reyes to be a credible witness who held up well and showed considerable restraint throughout an aggressive and, at times, hostile cross-examination.

Regional Director quite properly relied on that document in preparing the specification. (See Attachment "A" to General Counsel Ex. 1.)

At the Pre-Hearing Conference the Respondent said that it had no objection to the Regional Director's methodology, figures or calculations in computing gross back pay on a seasonal basis..." (Pre-Hearing Conference Order, paragraph 4.) But, at the hearing, it argued that I should deduct the discriminatee's interim earnings at C.P. Martinez prior to May 20, 1987,³ because the General Counsel had failed to prove when it was that the season began.

This argument is not only at odds with the admission made by the Respondent in the Pre-Hearing Conference, but it ignores the fact that the Respondent itself provided the documentation which indicated that, so far as it knew, the Spring Season had begun on May 20, 1987. (General Counsel Ex. 2; Tr. 33.) Absent clear evidence to the contrary—which was not forthcoming—the General Counsel was entitled to rely on that document as defining the season for the purpose of its back pay specification.⁴ I

³It was stipulated that Mr. Reyes had the following earnings at C.P. Martinez: May 4, 1987 - \$32.00; May 5, 1987 - \$32; May 6, 1987 - \$32; May 7, 1987 - \$26; May 8, 1987 - \$28; June 2, 1987 - \$32; June 3, 1987 - \$34; June 4, 1987 - 33.30; June 5, 1987 - \$34.04; and June 6, 1987 - \$55.50. So, he earned \$150 before May 20 and \$188.84 after.

⁴From an evidentiary point of view, the document can be viewed either as an implicit admission by the Respondent that the Season began on May 20th because that was the date it furnished when requested to provide seasonal information; in which case, it is admissible under the admissions exception to the hearsay rule for the truth it impliedly asserted. Or, as the General Counsel

therefore refuse to reduce the discriminatee's pay by the amount he earned while working for C.P. Martinez prior to May 20, 1987.

With respect to Kevin Long, when the discriminatee was asked if he was employed there during May 1987, he admitted working 4 or 5 days and earning between \$22 to \$30 a day; but the Respondent made no attempt to ascertain -- either by further questioning or by subpoenaing Long's records--whether some or all of those earnings came on or after May 20th. Since the Respondent failed to satisfy its burden of proving that those earnings fell within the backpay period, I decline to consider them as "interim earnings".

The discriminatee did admit to working 4 or 5 days in June 1987 for Long at \$25 to \$30 dollars a day. The Specification lists earnings of only \$63.50 for that period. While it may be that Mr. Reyes simply had difficulty in remembering the precise amount he earned, there is nothing in the record to establish that or to refute the figures he testified to. I therefore find that there were some additional earnings. Since the burden of proof as to their size is on the Respondent, I shall use the minimum amounts testified to--4 days at \$25 a day. Reyes' back pay is therefore to be reduced by \$100, rather than by the \$63.59 found in the Specification.

(Footnote 4, Cont.) argues, it may be received, not for the truth it asserts, but because it constitutes the basis for the Regional Director's decision to issue a specification only for the time period indicated; the justification for that decision being that the Respondent itself furnished the information. Either way, the document is admissible.

III

I therefore conclude that Andres Reyes would have earned \$2128.60 in wages and \$87.44 in vacation benefits if he had not been illegally discharged by the Respondent and that he had interim earnings of \$188.84 from C.P. Martinez and \$100 from Kevin Long. He is therefore entitled to net back pay in the amount of \$1927.20.

I hereby recommend that the Board direct that the Respondent Mario Saikhon, Inc., its officers, agents, successors and assigns pay to Andres Reyes the amount of \$1927.20, plus interest until the day of payment, calculated in accordance with the Board Decision in E.W. Merritt Farms (1988) 14 ALRB No. 5.

DATED: September 24, 1991.

A handwritten signature in black ink, appearing to read 'J. Wolpman', is written over a horizontal line.

JAMES WOLPMAN
Chief Administrative Law Judge