Coalinga, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PHILLIP D. BERTELSEN, INC., dba COVE RANCH MANAGEMENT, Respondent, and FAUSTINO CARRILLO; and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Parties.	)	Case Nos . 84-CE-23-F 85-CE-6-F 85-CE-48-D 18 ALRB No. 13 (18 ALRB No. 1) (16 ALRB No. 11) (12 ALRB No. 27) (December 9, 1992)

SECOND SUPPLEMENTAL DECISION AND ORDER

This case is before the Agricultural Labor Relations Board (ALRB or Board) on exceptions filed by Phillip D. Bertelsen, Inc. (Respondent) to the order issued by Administrative Law Judge (ALJ) James Wolpman on May 28, 1992.

This case presents a unique factual situation to the Board. It is the last case that can come before us in which the immigration status of discriminatees may be subject to the provisions of section 106 of the Migrant and Seasonal Workers Protection Act (MSPA) (29 U.S.C. sec. 1816 (a)). As discussed more fully below, section 106 of MSPA prohibited providers of farm labor coming within MSPA's definition of a farm labor contractor (FLC) from knowingly employing undocumented aliens. Since June 1, 1987, FLCs, like all other employers, have been subject to the provisions of the Immigration Reform and Control Act (IRCA) (8 U.S.C. sec. 1324 (a) et seq.). IRCA requires all employers to inspect and verify documentation which establishes the identity and authorization to work of new employees and

makes it unlawful to knowingly hire, recruit or refer for a fee any alien not authorized to work in the United States. Because the obligations of employees and employers under IRCA are substantially different from the obligations of agricultural employees, agricultural employers and FLCs under MSPA, the conclusions we reach in this case do not necessarily extend to cases arising under IRCA.

On August 24, 1984, Respondent discharged Maximino Cerna, and on February 1, 1985, it discharged 13 members of a crew supervised by Gilberto Trevino. In its underlying unfair labor practice decision at 12 ALRB No. 27 on December 11, 1986, the Board found that Respondent unlawfully discharged these 14 employees, and ordered their reinstatement with backpay. Respondent had offered the 14 employees reinstatement in March, 1986, but conditioned their reinstatement upon the discriminatees providing documentation specified in the MSPA regulations that would show authorization to work in the United States. Unlike IRCA, MSPA contained no requirement that any employer or contractor inspect documents before hiring. However, such an inspection could provide the employer a defense to a charge under MSPA of knowingly hiring an undocumented alien, so long as the employer did not otherwise have reason to believe that the applicant was undocumented (29 U.S.C. 1816(b); 29 C.F.R. 500.59). 1

1Prior to March, 1986, Respondent relied upon the employees' own certification as to their immigration status. In March 1986, the discriminatees presented documentation which was

Respondent again offered the discriminatees reinstatement in June, 1987, when IRCA superseded MSPA's prohibition against FLCs employing undocumented aliens. Thirteen of the 14 discriminatees had applied for citizenship under IRCA, and became eligible for employment during the pendency of their applications.

In its initial decision in the compliance proceeding, at 16 ALRB No. 11, on August 23, 1990, the Board adopted the ALJ's determination of Respondent's backpay liability to the 14 employees in the amount of $60,148.03. At the compliance hearing, Respondent argued that it owed no backpay because, as an FLC, it was prohibited from employing the 14 employees by MSPA. The Board disposed of Respondent's MSPA defense by finding that Respondent had failed to establish the unauthorized immigration status of the 14 discriminatees. As a result of this determination, the Board found it unnecessary to deal with Respondent's remaining contentions under MSPA.

In reviewing the Board's compliance decision, the Court of Appeal for the Fifth Appellate District rejected the Board's allocation to Respondent of the entire burden of proving that the discriminatees were in an unauthorized immigration status. The court agreed with the Board that Respondent had the initial burden of establishing unlawful status, but found that Respondent met that burden by the parties' stipulation that the

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lacking a stamp specifically authorizing them to work in the United States.

14 discriminatees had none of the documents described in MSPA regulations as showing authorized immigration status. The court held that the burden then shifted to the discriminatees to show their authorized immigration status. Consequently, the court declined to enforce the Board's backpay order, and remanded the case to the Board with instructions to determine the immigration status of the discriminatees in accordance with the court's direction, and to decide any other issues necessary to produce a complete decision.

The Board, in accordance with the court's direction, remanded the proceeding to the ALJ to take evidence on the discriminatees' immigration status. Prior to the hearing, the parties reached a joint stipulation that during the time in question, none of the 14 discriminatees was authorized by the United States Attorney General to work, and that each was an alien not lawfully admitted for permanent residence.2

Federal Regulation of Employee Immigration Status

IRCA has no application to the backpay issues in this case. IRCA became effective on June 1, 1987. The 13 discriminatees from the Trevino crew had by then applied for legalization under IRCA, and were eligible to accept employment pending the processing of their applications. Respondent immediately offered them reinstatement.

2The 13 members of the Gilbert Trevino crew were lawfully present in the United States as refugees and had valid INS forms H-94, but those documents did not contain a work authorization stamp.

Prior to the effective date of IRCA, federal immigration laws subjected employers to no prohibition or penalty for employing undocumented aliens. The Immigration and Nationality Act (INA) (8 U.S.C. sec. 1101 et seq.) prohibited the individual immigrant from being present in the United States without proper documentation. As long as the employer did not actively conceal immigrants from the Immigration and Naturalization Service (INS) ("harboring"), an employer was subject to no sanction for employing undocumented aliens.

However, persons who were FLCs as defined in MSPA were subject to criminal sanctions for knowingly employing undocumented aliens under section 106 of MSPA. Insofar as is relevant to the agricultural setting, FLCs, as defined in MSPA, were the only parties subject to penalties for employing undocumented workers. Section 106 of MSPA was superseded by the passage of IRCA. In June, 1987, when IRCA became effective, all employers, including FLCs, became subject to civil and criminal sanctions for knowingly employing undocumented aliens.

Where prohibitions against hiring undocumented aliens are not at issue, the applicable law is clear. Possession of immigration documentation authorizing employment is not a condition for reinstatement and backpay. In Rigi Agricultural Services (1985) 11 ALRB No. 27, the Board held the then-recent United States Supreme Court decision in NLRB v. Sure-Tan, Inc. (1984) 467 U.S. 883 [104 S.Ct. 2803] not to be National Labor Relations Act (NLRA) (29 U.S.C. sec. 141 et seq.) precedent

applicable to agriculture under section 1148 of the ALRA. Nevertheless, in Rigi, the Board applied a test for eligibility for backpay similar to that developed by the NLRB and the Ninth Circuit under Sure-Tan.

The Board held that California had a compelling state interest in dealing with agricultural workers equally regardless of their immigration status. The Board found that under pre-IRCA federal immigration law, employment of aliens was a matter peripheral to the central concern of the INA, i.e., the presence of aliens. The Board held that enforcement of the ALRA without regard to an individual discriminatee's immigration status did not run afoul of federal preemption considerations because it met none of the four conditions for federal preemption, i.e., no express intent by Congress to occupy the entire field, no direct conflict, no comprehensive federal regulation implying intent to occupy the whole field, and nothing in the state legislation standing as an obstacle to the federal statutory scheme. The Board concluded that it would grant every remedy of the ALRA to employees regardless of immigration documentation, unless they had been physically deported.

In Sure-Tan, supra, the Supreme Court held that the policies of the INA, primarily directed at discouraging undocumented-entry into the United States, included preventing undocumented aliens from filling positions that could be held by U.S. citizens. However, the Court agreed with the NLRB that the employer committed an unfair labor practice by reporting the

discriminatees to INS as a reprisal for the discriminatees' protected activities. Enforcement of standard NLRA discrimination remedies in favor of undocumented aliens did not conflict with the INA, since denying undocumented workers rights under the NLRA would create an incentive for employers to hire such workers. As the Court said in Sure-Tan, "If undocumented alien employees were excluded from. . .protection against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all employees and impeding effective collective bargaining, (citation omitted.) Thus, the Board's categorization of undocumented workers as protected employees furthers the purposes of the NLRA." (467 U.S. at 892.)

The only potential conflict between the NLRA remedy and the INA perceived by the Court came between the NLRB's order to Sure-Tan to reinstate the employees found to have been discriminated against and the INS[1] procedure for deporting undocumented alien employees. The aliens in Sure-Tan had signed voluntary departure forms stating that they were unlawfully in the United States and began the process of physical deportation the same day they were apprehended. The Court resolved this conflict by providing that the reinstatement and backpay remedy should be suspended until it was shown that the employees had become eligible to reenter the United States lawfully.

Under the Board's Rigi analysis, undocumented aliens

were treated as available for employment if they had not been physically deported. In interpreting Sure-Tan, the Ninth Circuit adopted a similar approach, holding that undocumented aliens who remained physically present in the United States were entitled to the full remedy of reinstatement in cases where the remedy applied prior to the effective date of IRCA. (Garment Workers Local 512 v. NLRB ("Felbro") (9th Cir., 1986) 795 F.2d 705 [122 LRRM 3113]; NLRB v. Ashkenazy Property Management dba L'Hermitage (9th Cir., 1987) 817 F.2d 74 [125 LRRM 2587]).

MSPA, unlike INA, imposed sanctions on the employment of undocumented workers, but only on those employers falling within MSPA's definition of an FLC. Therefore, a farmer, fully knowing its worker's undocumented status, could hire the same farm laborer to do the same work on the same farm that his FLC was prohibited from hiring, solely because the contractor was an FLC within the meaning of MSPA. Unlike INA, MSPA's objectives had little to do with preserving job openings for U.S. citizens or discouraging undocumented immigration.

Congress made the ban on employing undocumented aliens applicable solely to FLCs because it found FLCs were so mobile that they could easily evade normal legal processes, while farmers could not because they were tied to the land by the very nature of the function of growing crops. The recruitment and employment of undocumented workers by FLCs was associated with frequent evasion of the obligations of an employer to pay wages and refrain from other dishonest and abusive practices.

Undocumented employees of FLCs were seen to be less likely to seek redress than other workers.

Section 521 of MSPA (29 U.S.C. sec. 1871) provides that nothing in MSPA shall be used to defeat any state legislation intended to be remedial of migrant and seasonal farm workers' problems. It reveals MSPA's purpose as one of preventing abuse of farm workers.3

Applicability of MSPA Farm Labor Contractor Obligations

Section 3(7) of MSPA defines an FLC as anyone, other than an agricultural employer (emphasis added) who provides farm labor to agricultural operations. MSPA section 3(2) defines an agricultural employer as any person "who owns or operates a farm, ranch . . . and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker." (emphasis added) (29 U.S.C. sec. 1802(2)(7)). The clear implication of this definition is that an agricultural employer, even one that furnishes agricultural labor for hire to other farmers, will not be treated as an FLC.

The U.S. Department of Labor's regulations implement Congress' intent not to treat farmers with fixed bases as FLCs.

3MSPA was passed in 1982 with strong support from farm representatives, replacing the Farm Labor Contractor Registration Act (FLCRA) (7 U.S.C. sec. 2041, et seq.). FLCRA had retired many farmers to register as FLCs, even though they did not routinely evade the legal process. The most important change MSPA made was to exempt farmers from FLC registration requirements, even if the farmer provided agricultural labor to other farmers. This exemption of farmers was clearly the inducement for the strong farm group support of MSPA. (1982 U.S. Code Cong. & Admin. News at pp. 4547-4549).

29 C.F.R. 500.1(d) provides that "Agricultural employers . . . need not obtain certificates of registration [as FLCs] in order to engage in [labor contracting activity] even if the workers they obtain are utilized by other persons or on the premises of another."

The necessary inference from this definition is that an agricultural employer who also operates as a labor contractor will be treated as an agricultural employer. If the joint operation's agricultural employer component is significant, then the employer will have the permanent tie to agricultural operations contemplated by the MSPA amendments.

General Counsel points to several facts intended to show Respondent's status as an agricultural employer who is outside MSPA's definition of an FLC. Respondent's owner has resided at the same address for 10 years as of the date of the hearing. Respondent has farmed about 15 acres of orchards which it owns, and has had full management and operation of an additional 100 acres where Phillip Bertelsen or his close relatives were whole or partial owners of the land.

In its fiscal year ending June 30, 1985, Respondent managed, as receiver or contract manager, 1,433 acres, with full responsibility to control all agricultural operations, including all agricultural practices. The same year, Respondent provided labor contractor services other than hauling and forklifting, on 3,019 other acres, and hauling and forklifting services on 1,843 acres. By June 30, 1987, the amount of fully managed land had

decreased to 706.5 acres (821.5 including the 115 acres Bertelsen wholly or partially owned), and the labor contractor and hauling and forklifting acreage increased to 3,786 and 2,375 acres, respectively. The record does not show whether the decrease of fully managed land resulted from Phillip Bertelsen's extended disability beginning in 1986, or from any shift in the direction of Respondent's business. However, while the extent of the labor contracting services increased, they remained both additional to Respondent's own farming operations and proximate to them.

In its decision in Mendoza v. Wight Vineyard Management (9th Cir., 1986) 783 F.2d 941, the court held that vineyard managers who did not own or lease land but who were responsible for year round management of all aspects of growing and harvesting, were agricultural employers rather than FLCs. The court found that the year-round responsibility for all growing and maintenance operations as well as harvest gave the land manager a stable tie to the land, the characteristic distinguishing an agricultural employer from a FLC for the purposes of MSPA.

Thus, although Respondent functioned in fact as both an agricultural employer and an FLC, Respondent did not fall within MSPA's definition of an FLC nor was it subject to MSPA penalties associated with the hiring of unauthorized aliens.

Respondent relies on a United States Department of Labor Administrative Opinion, WH 522. Respondent argues that

WH 522 is the only expression of position by the Secretary of Labor on the issue of MSPA's applicability to entities that both manage farms and provide agricultural labor for hire. WH 522 provides that managers who were year-round grove contractors on some land but on other land performed less than all preharvest services would be subject to MSPA's FLC obligations.

The ALJ sets out an extensive discussion of authorities construing administrative statements like WH 522 as merely advisory and to be given weight only to the extent they are consistent with the intent of Congress underlying the legislation being implemented.

The ALJ pointed out that WH 522 cites only the Farm Labor Contractors Registration Act's (FLCRA's) (7 U.S.C. 2041, et seq.) legislative history for its position. FLCRA clearly intended to sweep in all providers of agricultural labor for hire, including farmers. MSPA's main departure from FLCRA, besides providing more protection for farm workers, was to exclude any employers with stable ties in an area from FLC regulations. In Mendoza, the Ninth Circuit held that WH 522 did not apply to the vineyard managers because of their stable ties resulting from their year round management of the crop, even though they did not even have a leasehold or other ownership interest in the land.

Respondent, unlike the vineyard managers in Mendoza, operates like a labor contractor on much of the acreage with which it is involved. The ALJ found this difference

insignificant. To the extent that WH 522 takes the position that grove managers become subject to the FLC obligations of MSPA, the ALJ found that the Secretary's position reflected the policies of FLORA, not MSPA, noting that the only authority cited in WH 522 was FLORA'S legislative history. The Ninth Circuit in Mendoza took a similar view of WH 522, observing that WH 522 reflected the policies of FLORA rather than MSPA. The Ninth Circuit, in rejecting arguments that the policies of FLORA continued under MSPA, held that the two statutes were so different that it could not interpret MSPA to reach vineyard management companies who would have been subject to FLORA, when one of the major purposes of MSPA was to exempt stable growers with a fixed base of operations.

Respondent cannot argue that even if it is found to be an agricultural employer, it may have subjected itself to MSPA by having registered as an FLC. It is well established under MSPA that the possession of a license does not subject the licensee to the criminal and civil sanctions of MSPA if the licensee does not fall within MSPA's definition of FLC. An FLC license serves other valuable business purposes for both Respondent and its clients. Many state labor laws are enforceable only against a labor contractor and not the land owner who is utilizing the management and labor contracting services of the licensee.

In the underlying unfair labor practice proceeding, Respondent stipulated that it was the agricultural employer for

all purposes. In this case, Respondent's reliance on MSPA appears exclusively to excuse it from complying with the ordered reinstatement of its own workers. Respondent did not question the status of the discriminatees until it was directed to remedy its unfair labor practices.

Nor is there evidence of other instances of Respondent's practice of reviewing worker documentation and refusing to reinstate undocumented workers. Shortly after the discriminatees had been refused reinstatement, Respondent discontinued questioning the status of its employees. Other workers discharged for lack of immigration documentation in March 1986 were reinstated shortly thereafter. They were put back to work without any inquiry into their documentation.4 If MSPA were of concern to Respondent, it appears to be only as a tool to frustrate enforcement of the ALRA.

Given the Ninth Circuit's decision in Mendoza and the definitions of agricultural employer and farm labor contractor set forth in section 3 (2) and (7) of MSPA, it appears there is no basis, apart from WH 522, for the Department of Labor to have sought to impose either criminal or civil sanctions on Respondent. In the only cited test of the enforceability of WH 522 against a grower who also provided farm labor to other growers, Lawrence Peters dba Fresno Farm Services, Case

4 Nevertheless, we do not adopt the ALJ's view that Respondent is estopped from asserting its MSPA defense. Our decision instead turns on our affirmance of the ALJ's cogent analysis finding MSPA's FLC requirements not to be applicable to Respondent.

No. 87-MSPA-00016, the Department of Labor's ALJ summarily dismissed the Solicitor of Labor's administrative enforcement proceeding predicated on WH 522. The ALJ relied on Mendoza and on MSPA's legislative history.5

We find that the discriminatees herein are entitled to reinstatement and backpay under the law prevailing throughout the backpay period. We perceive no direct conflict with the then applicable requirements and objectives of the INA, as interpreted by the federal appeals court in whose jurisdiction this case arose. The arguments for denying the discriminatees a remedy come not from the immigration law and policies embodied in the INA during the backpay period, but from MSPA, a statute intended to protect seasonal farm workers, such as the discriminatees herein, and which specifically continues in effect remedies provided to them by state laws.6

CONCLUSION

Because Respondent is not an FLC within the meaning of MSPA, prior to the effective date of IRCA, it was under no obligation to refrain from hiring aliens. The discriminatees

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5 The Department of Labor ALJ's ruling would have the effect under the procedural regulations of reversing WH 522 and establishing departmental policy. While an appeal to the ALJ's grant of motion for summary judgment had been pending since May, 1989 before the Secretary of Labor, no action had been taken on the decision in Peters as of the issuance of our decision herein.

6 The 13 discriminatees from the Trevino crew held letters of asylum, lacking only a "work authorized" stamp to fully satisfy the requirements of MSPA. Under 8 CFR 208.4, the work authorized stamp is to be granted unless it is shown the asylum applications are frivolous.

were at no time during the backpay period ineligible for employment with Respondent under MSPA because of their immigration status, and Respondent's offer of reinstatement in March, 1986, conditioned upon the presentation of immigration documents demonstrating authorization to work in the United States, was ineffective to terminate the accrual of backpay.7

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent Phillip M. Bertelsen, Inc. dba Cove Ranch Management, its officers, agents, successors, and assigns to pay to the employees named in Appendix A, attached hereto, the amounts set forth opposite their respective names plus interest until the

7 Even if MSPA's restrictions against FLCs knowingly employing undocumented aliens does apply to Respondent, Respondent would not have been barred from employing the discriminatees until March 24, 1986, when they were unable to produce documents showing that they were authorized to work in the United States. Therefore, MSPA could not be the basis for a defense to back pay accrued prior to that date.

day of payment calculated in accordance with the Board's decision in E.W. Merritt Farms (1988) 14 ALRB No. 5.

DATED: December 9, 1992

BRUCE J. JANIGIAN, Chairman 8

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

8 The signature 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.

APPENDIX A

1.	Maximino Cerna	$ 3,680.03
2.	Jose Arias	6,330.72
3.	Faustino Carrillo	3,343.25
4.	Miguel Carrillo	3,265.21
5.	Rafael Carrillo	3,694.67
6.	Victor Enamorado	3,121.42
7.	Gloria Telma Escobar	5,267.20
8.	Jose Escobar	3,601.21
9.	Elena Lopez	6,030.93
10.	Daniel Pena	3,568.22
11.	Hector Pena	3,347.61
12.	Maria G. Perez	4,922.53
13.	Elias Rivas	4,683.64
14.	Guadalupe Rodas	5,291.39
		$60,148.03

CASE SUMMARY

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

18 ALRB No. 13
Case Nos. 84-CE-23-F
85-CE-6-F
85-CE-48-D

Background

In its decision at 16 ALRB No. 11, the Board found that Respondent failed to establish that the discriminatees were unauthorized aliens and for that reason, the Board found it unnecessary to reach Respondent's defense that as a farm labor contractor (FLC) under the federal Migrant and Seasonal Worker Protection Act (MSPA), it was prohibited from employing undocumented aliens not authorized to be employed in the United States. The Court of Appeal reversed, finding that the parties' stipulation that the discriminatees had none of the documents listed in the MSPA regulations that would show authorized status met Respondent's initial burden of establishing that the discriminatees were unauthorized aliens. The Court remanded the case to the Board to make findings as to the discriminatees' immigration status and to resolve all other questions necessary for final disposition of the case.

The Board remanded the case for hearing on the issues. The parties stipulated that during the backpay period, the discriminatees were aliens not authorized to work in the United States. Thirteen of the 14 discriminatees applied for citizenship when the Immigration Reform and Control Act (IRCA) superseded KSPA's ban on FLCs employing undocumented aliens. At that time, the discriminatees were offered reinstatement by Respondent, ending the backpay period.

ALJ Decision

Based on his previous finding that the Respondent was an agricultural employer and not an FLC for purposes of MSPA, the ALJ affirmed his earlier decision at 16 ALRB No. 11, awarding backpay.

Board Decision

The Board concurred with the ALJ in finding that Respondent had not established that it was an FLC as defined in MSPA. MSPA's statutory definition of FLC excludes agricultural employers, and its definition of agricultural employer includes farmers who provide agricultural laborers to other farmers. The principal distinction between MSPA and its predecessor, the Farm Labor Contractor Registration Act (FLCRA) was that FLCRA covered agricultural employers as well as FLCs. In MSPA, Congress recognized the main reason for a federal statute regulating FLCs was their extreme mobility, which made them not amenable to

normal legal processes. This concern did not exist for agricultural employers, who were forced by their responsibility for growing crops to maintain a stable presence in the area of their operations. The Ninth Circuit has held land managers like Respondent to be agricultural employers within the meaning of MSPA. The Board held that Respondent's land management functions were significant enough that Respondent was an agricultural employer and not an FLC under MSPA. The Board found that a contrary advisory opinion attempted to continue the policy of treating all providers of farm labor as FLCs, but that MSPA itself was controlling. The Board also looked to section 521 of MSPA, which directed that it shall not be used to defeat any State legislation intended to be remedial of migrant and seasonal farm workers' problems. The Board therefore rejected Respondent's defense, and directed that the backpay and interest be paid.

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CASE DIGEST

Phillip D. Bertelsen, Inc.
dba Cove Ranch Management

18 ALRB No. 13
Case Nos. 84-CE-23-F
85-CE--6-F
85-CE-48-D

459.015 Respondent land management company was an agricultural employer as defined by Migrant and Seasonal Workers Protection Act (MSPA), and therefore not a farm labor contractor under MSPA, which excludes agricultural employers from its definition of farm labor contractors. Respondent failed to show that it had farm labor contractor status, and therefore was not required to refrain from employing aliens not authorized to accept employment in the United States. PHILLIP D. BERTELSEN. INC., 18 ALRB No. 13

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: PHILLIP D. BERTELSEN, INC., dba COVE RANCH MANAGEMENT Respondent, and FAUSTINO CARRILLO; and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Parties.	Case Nos. 84-CE-23-F 84-CE-6-F 84-CE-48-D (18 ALRB No. 1) (16 ALRB No. 11) (12 ALRB No. 27) ORDER TRANSFERRING CASE TO BOARD FOR DECISION

In its Supplemental D n and Order on Remand (18 ALRB No.1) the Board directed that this matt remanded to me "for the taking of any further evidence concerning the discriminatees' authorization to work during the times in question."

The parties were notified of the Order and afforded an opportunity to present additional evidence. They agreed that the matter could be handled by stipulation, without the necessity of further hearing. Attached to this Order is the Stipulation which they have submitted and which I have approved. The Stipulation reaffirms the finding of fact contained in my original Supplemental Decision in this matter; to wit: that each discriminatee was, at all material times, an alien not authorized by the Attorney General to accept employment in the United States. (Supplemental Decision, dated December 19, 1989, pages 3 and 4.)

In view of that fact, I have no reason to modify my previous recommendations or my reasoning in making those recommendations. I therefore transfer the matter directly to the Board for such further action as it deems necessary.

Dated: May 28, 1992.

James Wolpman
Chief Administrative Law Judge

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 915 Capitol Mall, 3rd Floor, Sacramento, California 95814.

On May 28, 1992. I served the within ORDER TRANSFERRING CASE TO BOARD FOR DECISION on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as follow:

CERTIFICATE OF MAILING

William S. Marrs
Marrs & Robbins
25060 West Avenue Stanford
Suite 222
Valencia, CA 91355-3446

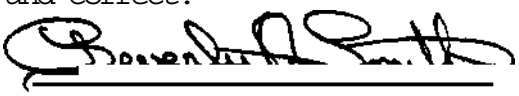
Marcos Camacho
A Law Corporation
Legal Division
P.O. Box 310
Keene, CA 93531

Stephanie Bullock
Visalia ALRB Regional Office
711 North Court Street, Suite A
Visalia, CA 93291

HAND DELIVERED

General Counsel (2)

Executed on May 28, 1992 at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.



BEVERLY A. SMITH

ALRB 64 (Rev. 5/80)

STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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

Appearances:

William Marrs Marrs
& Robbins Valencia, California
for Respondent

Juan Ramirez,
Visalia, California
for the General Counsel

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

Before: James Wolpman
Chief Administrative Law Judge

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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

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

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

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

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

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

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

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

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

I. FINDINGS OF FACT

A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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[6]He incorporated in 1977.

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

Bertelsen's operation is a hybrid, for it performs all cultural practices for certain clients but only some for others. This can be seen in Respondent's Exhibit A which breaks down its operations by the services it provides and lists, for each, the number of clients and the acreage involved during the year in which the backpay issue arose (1986) and during the year before and the year after. For its "Management Clients" and its "Receivership Clients", Bertelsen performs all cultural practices; for its "Labor Contracting" Clients, it performs some operations but not others. (¶¶ 9-11 of Jt. Ex. No. 1.)[8] The relative size of the

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

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

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

TABLE I: PERCENTAGE BREAKDOWN OF RESPONDENT'S OPERATION

	% of Acreage in Fiscal Year Ending 6/30/65	% of Acreage in Fiscal Year Ending 6/30/86	% of Acreage in Fiscal Year Ending 6/30/87
Manages all aspects of Operation (Management and Receivership Clients)	30.4% (32.2%)	28.0% (29.9%)	15.7% (17.8%)
Performs some but not all cultural Practices (Labor Contracting clients)	69.6% (67.8%)	72.0% (70.1%)	84.3% (82.2%)
Totals	100 %	100 %	100 %

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

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

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

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

registered since 1977.[10]

c.

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

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

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

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

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

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

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

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

Respondent's chief supervisor, John Curiel, was in charge of implementing the new policy. (II:17.) He was furnished a list of documents which were acceptable as proof of citizenship or work authorization (II:2l; Ex. D to Jt. Ex. l) , and he instructed his crew bosses to inform their crews that they must come forward with the required documents by March 27 if they wished to continue working. (II:17-18.) As the documents came in, Curiel checked them against his list, saw to it that copies were made, and placed them in a file on his desk, segregated by crew. (II:21-22.) Approximately 32 employees were unable to provide the required documentation. (G.C. Ex 10.) All were terminated. (I:17,38.)

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

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

After discussing the situation with Bryan Bertelsen, telephone calls were made to the INS offices in both Fresno and Los Angeles, and it was learned that the letters, as they stood, were insufficient. They required an additional notation that the bearer was authorized to work while his request was pending. (I:86-87; 111:83.) After explaining this to Bryan, the Los Angeles INS representative went on the advise him that the workers should return to the Los Angeles office and request permission to work, which would then be decided by an INS Examiner. (I:87; G.C. Ex. 5.) This was later confirmed in writing. (Resp. Ex. F-1.) Meanwhile, the members of the crew who had not already requested asylum did so and obtained letters or documents similar to those which the others had presented to Curiel on March 24th. (15 of Jt. Ex. No. 1; III:22-24.)

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

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[12]Curiel testified that he told the workers on the 24th that their letters needed work authorization stamps (III:62,90), but he also testified that he first learned of that requirement when he spoke with the INS after the 24th. (III:91.) While the contradiction was never acknowledged or explained, it appears to me that he confused his two meetings with the crew and that on the 24th he did no more than indicate that they should check back with him. This comports with the stipulation. (¶5 to Jt. Ex. No. 1.)

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

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

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

Then, on redirect examination, Carrillo reverted to his original

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

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

> A. It was all in regards to that; there wasn't any other about working, if they had that letter with a stamp theycould go to work the next day, and everybody was to do the same thing regardless of what kind of papers they had....
> Q. And that's what you told the workers?
> A. That's what I told everybody, not just them, another 60 or 90 people. (III:88.)[14]

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

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

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

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

happened is that after repeatedly and disjointedly reiterating the need for documentation and the evenhandedness of the company in imposing the requirement, Curiel--briefly and in passing--left open the possibility of obtaining work authorization stamps on the letters, what he certainly did not do was to pass on the sound advice which the Los Angeles INS representative had given to Bryan--and which Bryan had told him to tell the group (III:42-43)--namely, that the "person[s] should come back into [the Los Angeles] office and request permission to work..." (Resp. Ex. F-1.)

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

D.

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

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

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

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

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

There is, however, one gap in the General Counsel's methodology. The new filing system continued in effect until November or December 1988. (II:59,63-64.) That means employees who worked in 1966 and then returned in 1988 after a year's absence would also have had their documents removed from the Curiel File and placed in a new folder. Ideally, therefore, the General Counsel should have taken into account not only the 1987

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

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

An examination of the new filing system should also be helpful in disclosing Respondent's adherence--or lack of adherence--to its documentation policy. Unfortunately, that system is incomplete because in December 1988, the "new" filing system was once again revised; this time to comply with the employer record keeping provisions of the newly enacted Immigration Reform and Control Act. (II:49, 58, 63.) During this second revision, the contents of many of the existing files were discarded so that the folders could be re-titled and re-used. The Respondent did, however, provide 115 files which survived the revision. While they constitute only 9¼ of the 1987 work force, they provide a large enough sample to give some indication of what was going on. Each of the 115 files should have contained photocopies of one or more of the required documents. In fact, less

[16]That the Respondent made valid offers of reinstatement to the discriminatees on June 1, 1987, does not obviate the problem created by the gap. Because the removal of documents continued on until late 1988, the integrity of the Curiel file must be judged by its condition when its contents were no longer being disturbed.

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

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

E.

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

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

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

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

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

II. ANALYSIS, FURTHER FINDINGS AND CONCLUSIONS OF LAW

A.

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

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

MSPA defines an "farm labor contractor" as:

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

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

An "agricultural employer" is:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An exception was then made for:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

132, 142-43; *Fidelity Federal Savings & Loan v de la Cuesta* (1982) 458 U.S. 141, 153), or because State law stands "...as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Mines v. Davidowitz* (1941) 312 U.S. 52, 67; see, *Michigan Canners & Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd.* (1984) 467 U.S. 461, 478.)

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

Neither side has it quite right. Reinstatement is an issue, but not in the way the Respondent characterizes it. What is at stake is the well established doctrine that an employer may limit the backpay it owes by making an unconditional offer of reinstatement to the workers it has discriminated against. (*Abatti farms. Inc.* (1983) 9 ALRB No. 59, pp. 1, 15.) If an employer were deprived of the right to avail itself of that doctrine, the result would be the continuing accrual of backpay. If, on the other

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c.

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

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

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

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

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

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

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

D.

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

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

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

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

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

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

Had Curiel told them that a representative of the INS had advised that they return to its Los Angeles Office and had he encouraged them to do so by carrying out Bryan's instructions to let them know that " [W] e want to hire [them] and make it known that all they need do is have a stamp on their letters" (III:42), it is much less likely that they would abandon their efforts, as they did, based upon the justifiable impression that his comments were nothing more than a cover for the continuation of the discrimination which had earlier been practiced against them. (Findings of Fact, *supra*, pp.15-16.) Furthermore, there is every reason to believe that, had they returned to the Los Angeles INS Office, the needed authorizations would have been forthcoming. The INS Regulations then in effect provided that "...any alien who has filed a *non-frivolous application* for asylum...may be granted permission to be employed for the period of time necessary to decide the case." (*Emphasis supplied*) (8 C.F.R. §109.1(b)(2) (1981), 46 Fed. Reg. 25,081 (May 5, 1981); see also 8 C.F.R. §208.4.)[25] That is not a demanding standard[26]; and, in applying it, the Courts have in most instances upheld the right of aliens to work while their applications are pending, (*Diaz v. INS* (E.D.Cal. 1986) 648 F.Supp. 638; see, *Alfaro-Orellana v. Ilchert*

[25]The current regulations are to be found at 8 C.F.R. §§274a.12(c)(8) and 274a.13.

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

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

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

B.

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

The parties stipulated that the amounts alleged in the

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

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

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

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

In its Answer, the Respondent challenged the amount alleged as owing to him (G.C.Ex. 2, *2nd Affirmative Defense*), and indicated at the Prehearing Conference that it would introduce evidence at the hearing to establish that he would not have worked during the orange harvests included in the Specification. (See, Pre hearing Conference Order, p. 9.) In accordance with *Giumarra vineyards* (1977) 3 ALRB No. 21, I directed the parties to provide each other prior to hearing with copies of all exhibits upon which they intended to rely at hearing (Prehearing Conference Order, ¶11); at the same time they were put on notice that failure to comply would be grounds for excluding such evidence under section 20240(e) of the Board's Regulations. (Prehearing Conference Order, 120.) In spite of this and without a showing of good cause, the Respondent failed to provide the General Counsel with copies of the payroll records upon which it planned to base its contention that Cerna would not have worked during the orange harvests. (II:6-9.)

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

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

Dated: December 1989.

James Wolpman
Chief Administrative Law Judge