

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

CERTIFIED EGG FARMS AND)	
OLSON FARMS , INC.,)	
)	
Respondent,)	Case Nos. 86-CE-86-SAL)
)	88-CE-6-SAL
and)	
)	
GENERAL TEAMSTERS, WAREHOUSE-)	19 ALRB No. 9
MEN, AND HELPERS, LOCAL 890,)	
)	(June 16, 1993)
Charging Party.)	

SUPPLEMENTAL DECISION AND ORDER

On June 15, 1990, the Agricultural Labor Relations Board (ALRB or Board) issued its Decision and Order 16 ALRB No. 7, the underlying liability phase of this case, in which it concluded, inter alia, that Certified Egg Farms and Olson Farms, Inc. (Respondent) had violated Labor Code section 1153 (e) and (a)¹ by refusing to process grievances of employees and by refusing to bargain toward a new collective bargaining agreement. Pursuant to section 1160.3, the Board ordered Respondent to pay backpay to the discriminatees named in the Board's order, and to make whole bargaining unit employees for the economic losses resulting from Respondent's refusal to bargain.

On July 13, 1992, the Board's Regional Director for the Salinas Region, acting for the General Counsel in compliance matters, issued a Backpay and Makewhole Specification and Notice

¹ All section references herein are to the California Labor Code unless otherwise indicated.

of Hearing. An Amended Backpay and Makewhole Specification and Notice of Hearing issued on January 13, 1993. The matter was heard before Administrative Law Judge (ALJ) Barbara Moore, who issued the attached Decision and Recommended Order in this matter on March 1, 1993. Respondent and General Counsel timely filed exceptions to the ALJ's Decision with supporting briefs.²

The Board has considered the record and the attached Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings, and conclusions of the ALJ, and to adopt her recommended Order,³ except as modified herein. As General Counsel argues, it appears from the record here that many employees other than the five employees whose grievances were not processed were employed in the bargaining unit during the makewhole period, and are therefore entitled to whatever makewhole amounts accrued to unit members during the dates of their employment. We shall modify the ALJ's

² Respondent contends that it was improperly denied information utilized by the Board agent in computing interim earnings, including evidence of the use of multiple social security numbers. For the reasons explained by the ALJ, some of the information was privileged and, in any event, there is no indication in the record that Respondent was prejudiced by any failure to provide information. Moreover, we note that there is no inherent conflict between an award of backpay and an employee's possible violation of the Social Security Act.

³ It is well settled under both the Agricultural Labor Relations Act and the National Labor Relations Act that a wrongdoing employer may seek to mitigate its liability for backpay by showing the interim earnings of the discriminatees. A hearing on compliance, such as the one here, provides a respondent with the opportunity to question backpay claimants about the extent of their interim earnings. Respondent cannot assign this burden to the General Counsel and now claim, by its own failure to develop mitigation, that it was prejudiced.

order to adopt her findings of the amount of makewhole due, and direct that it be distributed to all employees in accordance with their hours of work in the bargaining unit during the makewhole period.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Certified Egg Farms and Olson Farms, Inc., its officers, agents, successors and assigns, pay to the discriminatees named below the amount set out opposite their names, and pay to the employees in the bargaining unit \$42,312.25, the individual amount corresponding to each employee's hours of work during the makewhole period, plus interest until the day of payment, which interest shall be calculated in accordance with Board precedent as set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

Nieves Alvarez	\$53,675.82
Berta Calderon	21,934.95
Rosa Espinoza	28,531.64

Jaime Gamez	17,102.05
Francisco Herrera	27,550.85 ⁴

DATED: June 16, 1993

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

⁴ Due to an apparent typographical error, the ALJ's proposed order lists a figure of \$22,550.85 for Herrera. The corrected figure is listed above.

CASE SUMMARY

Certified Egg Farms and
Olson Farms, Inc. (General
Teamsters, Local 890)

19 ALRB No. 9
Case Nos. 86-CE-86-SAL
88-CE-6-SAL

Background

In its decision in the liability phase of this case, 16 ALRB No. 7, the Board found that Respondent had violated section 1153(e) and (a) by withdrawing recognition from the Union and failing to adhere to the terms of employment established by the collective bargaining agreement with the Union. These failures to adhere to the contract's terms included, inter alia, refusing to process grievances of five employees who had been laid off. The Board ordered Respondent to process their grievances and to make them whole for any losses suffered as a result of Respondent's refusal to process the grievances from 1986 through 1990. The Board further ordered Respondent to make whole the bargaining unit employees for their losses in pay resulting from the failure to negotiate a new collective bargaining agreement.

Respondent complied with the Board's order in other respects, including the processing of the grievances. This resulted in arbitration awards finding five of the six employees had been laid off in violation of the terms of the contract. The General Counsel and Respondent were unable to agree on the amount of backpay due the five discriminatees, and the amount of makewhole to be paid as a result of Respondent's failure to negotiate a new contract following the expiration of the old agreement. General Counsel issued a specification setting forth the amount of backpay it alleged the six employees were owed, and the amount of makewhole due. Respondent did not dispute the gross amounts of backpay alleged in the specification.

Administrative Law Judge's Decision

The Administrative Law Judge (ALJ) found the makewhole period alleged in the specification true, since Respondent had only generally denied it, and not provided any basis for an alternative in its answer, as required under the Board's regulations. Respondent sought to compel production of, and to introduce the claimants' tax returns and forms filed for unemployment compensation. The ALJ ruled that these documents were privileged, and that therefore, Respondent's failure to receive requested subpoenas duces tecum for the production of such records before the hearing was not prejudicial. While the evidence showed that some of the claimants had used more than one social security number before the backpay period, there was no evidence that any of them had used numbers other than those

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as to which the Board had obtained earnings reports from government agencies and which had been conceded in the specification as interim earnings. The ALJ therefore found that the net backpay alleged in the specification to be true.

The ALJ further found the makewhole formula in the specification reasonable, and awarded the resulting makewhole amount to the five claimants.

Board Decision

Respondent contended that it was prejudiced in presenting interim earnings because the Regional Office had not requested earnings reports for the claimants under other social security numbers they had used before the backpay period, and by its failure to receive subpoenas duces tecum to request production of tax returns for the backpay period. Respondent also contended that any claimant who had used more than one social security number should be barred from receiving backpay.

The Board adopted the ALJ's decision, agreeing with her that Respondent suffered no prejudice because the documentation it would have sought through the subpoena duces tecum was either produced or privileged. The Board further found that there was no evidence that the claimants had used any social security number other than those used by the Regional Office to request interim earnings reports. The Board also concluded that the employees' use of varying social security numbers prior to the backpay period was irrelevant to the computation of backpay.

* * *

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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
)	
CERTIFIED EGG FARMS AND)	Case Nos. 86-CE-86-SAL
OLSON FARMS, INC.)	86-CE-6-SAL
)	
Respondent,)	
and)	
)	
GENERAL TEAMSTERS, WAREHOUSEMEN)	
AND HELPERS, LOCAL 890)	
)	
Charging Party.)	
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Appearances:

Ed Blanco, Esq. ALRB
Headquarters Office
Sacramento, California for
the General Counsel

Norman Jones Jones, Jones &
Jones Costa Mesa, California
for the Respondent

Tony Gonzales
General Teamsters, Warehousemen
and Helpers, Local 890
Salinas, California
for the Charging Party

BARBARA D. MOORE; Administrative Law Judge: On June 15, 1990, the Agricultural Labor Relations Board ("ALRB" or Board") issued a Decision and Order in the above-captioned case finding, inter alia, that Respondent Certified Egg Farms and Olson Farms, Inc. ("Respondent" or "the Company") had refused to bargain with the General Teamsters, Warehousemen and Helpers, Local 890 ("Union"), the certified bargaining representative of Respondent's employees, thereby violating sections 1153 (e) and (a) of the Agricultural Labor Relations Act ("ALRA" or "Act"). One of the bargaining violations was Respondent's refusal to process certain grievances regarding layoffs.

The Board ordered Respondent to make whole its employees for its refusal to bargain about their wages, hours and working conditions, and, upon request of the Union, to process the grievances to arbitration and to pay backpay to the grievants for any economic losses they suffered because of Respondent's refusal to process the grievances.¹

When the parties were unable to agree on the amount of makewhole and backpay due, the Board's Salinas Regional Director issued a Formal Backpay and Makewhole Specification and Notice of Hearing ("Specification") setting forth the amounts due in order to satisfy the Board's order and the methodology used to ascertain such amounts. Respondent filed an answer thereto on September 18, 1992, admitting the allegations of the

¹The Board also ordered Respondent to reimburse the Union for dues which Respondent refused to withhold and transmit in accordance with the parties' contract. General Counsel indicated that order was complied with.

Specification as to the status of the named discriminatees (except for Mr. Camarino Trejo), the backpay period, the backpay methodology and the makewhole methodology.

At the Prehearing Conference herein, I granted General Counsel's motion to deem the makewhole period set forth in the Specification (April 1986 until April 1991) true since Respondent's mere assertion that it disagreed with the period did not meet the specificity requirements of the Board's regulations (Cal. Code Regs., tit. 8, §20292). Thereafter, on January 13, 1993, the General Counsel issued an Amended Formal Backpay and Makewhole Specification and Notice of Hearing (Amended Specification).² The matter proceeded to hearing on the Amended Specification before the undersigned Administrative Law Judge in Salinas, California, on January 19, 1993.

All parties were represented at the hearing. The General Counsel and Respondent filed post-hearing briefs. Upon the entire record,³ including my observation of the witnesses, and after careful consideration of the parties' arguments and the briefs submitted, I make the following findings of fact and conclusions of law.

1. PRELIMINARY MATTERS

The status of Mr. Trejo and the amounts, if any, of backpay and makewhole due him were severed over Respondent's

²General Counsel's Exhibit 1. Respondent's exhibits will be identified as "RX number."

³The official hearing transcript consists of one volume; all citations thereto will be denoted "I: page number."

objections. The Union representative was informed by Mr. Trejo's wife that Mr. Trejo had already left for vacation in Mexico when the instant hearing date was set and became ill there and was not expected to return until some two weeks after the hearing.

Further, there are issues unique to Mr. Trejo.

The Board's decision dealt with Respondent's refusal to process the layoff grievances only as a bargaining violation; there was no allegation that the layoffs were discriminatory or otherwise unlawful. Consequently, the Board's order directed only that Respondent process the grievances. Respondent did so and asserted that Trejo was fired for cause rather than laid off. The arbitrator found Trejo was legitimately discharged.

Thus, there is an issue whether in view of its order the Board should simply defer to the arbitrator's decision or whether it should do so only if the usual standards for deferral are met. Only Mr. Trejo is affected by this issue, it is an unusual twist on the question of deferral, and this Board has had little occasion to consider the issue of deferral at all. Resolution of his case would unreasonably delay a decision as to the other discriminatees in what is a very straightforward case. Consequently, severance is more appropriate than continuing the entire case until the matters involving him can be heard.

2. THE DISCRIMINATEES

At hearing, Respondent stipulated that the woman identified in the Amended Specification as Nieves Alvarez is the same person who worked for Respondent under the name Alicia Ruiz

Garcia.⁴ Consequently, she is properly included as a discriminatee.

Respondent admitted in its answer that Ms. Berta Calderon, Ms. Rosa Espinoza, Mr. Jaime Gamez and Mr. Francisco Herrera are also discriminatees, and I so find.⁵

3. IMMIGRATION STATUS

Respondent sought to subpoena⁶ documents relating to the discriminatees' immigration status during the backpay and makewhole periods. Based on this Board's decisions in Rigi

⁴ Mrs. Garcia testified that Nieves Alvarez Garcia is her legal name, and she has used it consistently since she received her immigration papers in 1987. (I:86-87.)

⁵ Respondent sought to elicit evidence that some of the discriminatees used other names. For example, that Ms. Calderon used the names Jilberta and Gilbertha and that her social security card listed the name Perez, and that Ms. Espinoza's driver's license lists her name as "Rosa Espinoza Quintanar." None of the evidence was persuasive. Ms. Espinoza was asked only if she worked under the name Quintanar, not whether she had ever used it for any purpose. There is no evidence she ever used that name when working. Further, the license is dated 1983, several years prior to the events at issue herein. Ms. Calderon's name is "Calderon Perez," and the two spellings of her first name are simply variant spellings. Respondent adduced no evidence these two women or any of the other discriminatees had interim earnings under any name other than those identified at hearing.

⁶ At the Prehearing Conference, Respondent's representative stated he had not received blank subpoenas despite having requested them from the agency. I directed the General Counsel to provide them forthwith. At hearing, Respondent complained of not receiving them. General Counsel represented that the Salinas regional office sent them by courier service the very day of the prehearing and produced them along with a form from the courier service indicating it had been unable to deliver the package. Respondent verified that the address was correct. Neither General Counsel nor the Regional office was responsible for the failure to deliver the subpoenas. Although it is unfortunate they did not arrive, I find Respondent suffered no prejudice. The discriminatees were all present at the hearing to testify, and the documents Respondent had wanted to subpoena were provided unless they did not exist or unless General Counsel's oral motion to revoke was granted.

Agricultural Services (1985) 11 ALRB No. 27 and Phillip D. Bertelsen, Inc. (1991) 13 ALRB No. 13 and the decision of the National Labor Relations Board ("NLRB" or "national board") in Del Ray Tortilleria, Inc. (1991) 302 NLRB No. 45, I ruled that the only document which might result in the discriminatees not being entitled to the remedial relief ordered by this Board was a formal order of deportation from the Immigration and Naturalization Service.

General Counsel and the Union represented that, to their knowledge, no such documents existed. Respondent did not ask any of the discriminatees during their testimony if they were subject to such an order; consequently, I find no impediment to their entitlement to backpay and bargaining makewhole.

4. BARGAINING MAKEWHOLE

The makewhole formula was admitted by Respondent and the makewhole period was deemed admitted. Therefore, I find the five discriminatees are entitled to the amounts set forth in the Amended Specification, plus interest computed in accordance with Board precedent, until the date Respondent makes payment.

5. GROSS BACKPAY

The methodology for computing gross backpay and the gross backpay period (July 1, 1986 to October 24, 1990) were both admitted by Respondent. Thus, the amount of net backpay owing is the only issue.

6. EXPENSES

The only discriminatee for whom expenses are

claimed is Mr. Francisco Herrera.⁷ He incurred transportation expenses both as a result of his successful search for interim employment and his increased commute to his interim job at Larson Pro. Board agent Shirley Trevino testified to the methodology she used to calculate the expenses, whereupon Respondent stipulated to the amounts claimed in the Amended Specification. (I:52.) I find Mr. Herrera is entitled to the amounts claimed which have been properly included in the net backpay column in the Amended Specification.

7. INTERIM EARNINGS

Board Agent Shirley Trevino testified that she interviewed each discriminatee about interim employment and requested they provide her with any evidence of earnings such as check stubs, etc. She also obtained from them the social security number (or numbers)⁸ they used during the backpay period and then checked with both the state Employment Development Department and the Social Security Administration for

⁷The Amended Specification shows expenses of \$130.00 for Jaime Gamez in the third and fourth quarters of 1986; however, he had no interim earnings during those quarters. Pursuant to this Board's decision in Mario Saikhon, Inc. (hereafter "Saikhon") (1991) 17 ALRB No. 6, none of the costs incurred by a discriminatee in trying to find a job will be reimbursed if the individual was not successful in finding work during the time the expenses were incurred. Consequently, I granted General Counsel's oral motion to delete the expenses. No change is necessary to the total backpay claimed for Mr. Gamez in the Amended Specification because the expenses were not included in net backpay amounts set forth therein.

⁸It is not uncommon in agriculture that workers will use different social security numbers.

earnings under those numbers.⁹ After comparing the information from all these sources, she included the discriminatees' interim earnings in the Amended Specification. (I:47-48, 56-57)

Respondent questioned the discriminatees about use of more than one social security number but elicited no evidence that any of them, except perhaps Mr. Gamez, used a number during the backpay period which had not been checked by the regional office.¹⁰ Mr. Gamez testified he worked under three different numbers at various times. One number he began using in 1987 and used consistently after that time. (I:154, 160.) He was not sure when he used the other two. (I:152, 154, 159.)

Although he did not provide all three numbers to Ms. Trevino, he worked for only one company throughout the entire backpay period, and he provided her with his tax returns. (Id.) The Amended Specification shows substantial interim earnings in every quarter beginning in 1987.

I find it is probable that there are no interim earnings for Mr. Gamez beyond those set forth therein. In any event, it is Respondent's burden to produce evidence of interim earnings (Saikhon), and it has failed to adduce evidence of any

⁹ Ms. Trevino did not submit the numbers used by them at Respondent's unless the discriminatees told her they used them during the backpay period as well. (I:54, 67.)

¹⁰ Mr. Herrera used the same number since 1985 which predates the unfair labor practices. (I:77-80.) No evidence was elicited on this issue regarding Ms. Alvarez. Ms. Espinosa gave Board Agent Trevino both numbers she used during the backpay period. (I:127.) Ms. Calderon used only one number. (I:134, 139-140.)

earnings beyond the amounts in the Amended Specification.¹¹

Respondent also failed to establish any other facts which would reduce its liability as to any of the discriminatees (e.g. unavailability for work). I find the only interim earnings to be deducted from gross backpay for the discriminatees are the amounts set forth in -the Amended Specification.

8. CONCLUSIONS

Based on the findings and conclusions set forth above, I find the discriminatees are entitled to the makewhole amounts and the net backpay as claimed in the Amended Specification, plus appropriate interest.¹² Pursuant to Labor Code section 1160.3, I hereby issue the following recommended :

ORDER

Respondents Certified Egg Farms and Olson Farms, Inc., their officers, agents, successors and assigns shall make

¹¹The Amended Specification includes interim earnings of discriminatee Nieves Alvarez at Respondent's in the third and fourth quarters of 1886 and the first quarter of 1987. At hearing, Respondent stipulated these amounts were correct.

¹²In its brief, Respondent requested reopening the record. There is no need to do so. Respondent had full opportunity to participate in the hearing and to present evidence at that time. Its answer failed to meet the specificity requirements of the Board's regulations which resulted in several issues being deemed admitted in accordance with longstanding ALRB and NLRB practice. Much of the documentary evidence proffered by Respondent was irrelevant, illegible, not authenticated, privileged, or not in compliance with the Prehearing Conference Order despite my cautioning the parties several times during the Conference that failure to abide by the Order would result in sanctions absent good cause for the noncompliance. The legal standards for reopening the hearing are not present, and to do so would unnecessarily prolong effectuating the Board's order.

Nieves Alvarez, Berta Calderon, Rosa Espinoza, Jaime Gamez and Francisco Herrera whole by paying them the following amounts of makewhole¹³ and backpay due to them as set forth in the Amended Specification, plus interest until the day of payment which interest shall be calculated in accordance with Board precedent as set forth in E.W.Merritt Farms (1988) 14 ALRB No. 5.

	<u>BACKPAY</u>	<u>MAKEWHOLE</u>	<u>TOTAL</u>
Nieves Alvarez	53,675.82	8,462.45	62,138.32
Berta Calderon	21,934.95	8,462.45	30,397.40
Rosa Espinoza	28,531.64	8,462.45	36,994.09
Jaime Gamez	17,102.05	8,462.45	25,564.50
Francisco Herrera	22,550.85	8,462.45	36,013.30

DATED : March 1,1993



BARBARA D. MOORE
Administrative Law Judge

¹³I determined the makewhole amount due each discriminatee by dividing the total due (\$50,744.68) by the 6 discriminatees and rounding up which increases the total by two cents.