Thermal, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

OASIS RANCH MANAGEMENT, INC., a California Corporation, Respondent, and UNION DE TRABAJADORES AGRICOLAS FRONTERIZOS; and MANUEL ANGEL RAMIREZ, JOSE LUIS ESTRADA, JORGE CHAVEZ, OSCAR SALAZAR, RIGOBERTO MARTINEZ JAUREGUI, and MIGUEL RODRIGUEZ, Individuals, Charging Parties.	Case Nos 90-CE-20-EC 90-CE-21-EC 90-CE-34-EC 90-CE-34-1-EC 90-CE-55-EC 90-CE-58-EC 90-CE-59-EC 90-CE-61-EC 90-CE-70-EC 90-CE-72-EC 90-CE-74-EC 90-CE-75-EC 90-CE-91-EC 90-CE-98-EC 90-CE-115-EC (18 ALRB No. 11) 20 ALRB No. 19 (December 20, 1994)

DECISION AND ORDER

On August 23, 1994, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision, in which he found that Oasis Ranch Management, Inc. (Oasis or Respondent) owed . discriminatee Vidal Lopez $18,911.00 in backpay, less standard payroll deductions, plus interest calculated in accordance with Board precedent. This compliance matter is based on the findings of the Agricultural Labor Relations Board (ALRB or Board) in *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11. In that case, which was affirmed by the 4th District Court of Appeal in an unpublished decision, the Board found, inter alia, that Oasis had discriminated against Lopez by refusing to assign him to irrigation work after a two month period when he could not do

irrigation due to lack of transportation.[1] The Board found that the record included some evidence of irrigation assignments that should have gone to Lopez and left for compliance the issue of the exact amount of irrigation work unlawfully withheld. The figure arrived at by the ALJ was based on a methodology different from both that reflected in the General Counsel's specification and that urged by Oasis.

Oasis timely filed exceptions to the ALJ's decision, alleging that the amount of back pay ordered represents an undeserved windfall. The General Counsel filed a response supporting the methodology used by the ALJ and urging that the Board adopt the ALJ's recommended decision. The Board has considered the record and the ALJ's decision in light of the exceptions and briefs filed by the parties and affirms the ALJ's findings of fact and conclusions of law, except as noted herein. However, as explained below, the Board finds it necessary to remand this matter for further hearing in order to allow Oasis the opportunity to present evidence to rebut the reasonableness of the backpay formula adopted by the ALJ.

[1] While the irrigation work paid the same hourly wage as the general labor work assigned to Lopez subsequent to the discrimination, those who are given irrigation assignments normally work more hours, thus resulting in higher pay. Historically, Lopez had been assigned a mixture of general labor work and irrigation work, and in the period prior to the discrimination, he had a regular irrigation assignment at a ranch called Indio-80.

THE SPECIFICATION

The General Counsel's specification reflects a back pay period beginning July 3, 1990, the date on which Lopez was once again available for irrigation duties,[2] and continuing as of the time of hearing, since Lopez has not been reinstated as a regular irrigator. The amount of the specification, which is calculated through May 1994 and includes interest, is $13,200.56.

The specification is based on a comparison, on a daily basis, of hours worked by irrigators with the hours worked by Lopez on the same day. The irrigator working the most hours was identified and Lopez was credited with any hours in excess of those worked by Lopez himself. Where timesheets reflected that Lopez did not work on a particular day, but no reason was noted for the absence, he was credited with the most hours worked by an irrigator on that day. General Counsel's approach was based on the theory that, due to Lopez' seniority, he would have been given the assignments providing the most hours. The General Counsel included in his calculations all irrigation work, whether flood or drip, even though Lopez had previously performed only

[2]Lopez had performed a mixture of general labor and irrigation duties until May 1990, when his car broke down. The lack of transportation limited him to general labor duties until his car was repaired in early July 1990. However, Oasis failed to assign him any regular irrigation duties thereafter. In fact, Lopez was not assigned any irrigation work until September 1992. Further, it is clear from the record herein that Lopez was assigned irrigation work only when no one else was available and, in contrast to the period before the discrimination, essentially became a five day a week, 40 hour employee.

flood irrigation.[3] The General Counsel assumed that irrigation work was denoted by "riego," "agua," "drip," "sprinkler," "irrigation," or "irrigator."[4]

Before the ALJ, Oasis disputed the accuracy of the specification for numerous reasons. Principally, Oasis argued that the Board's liability decision and the court's affirmance thereof establishes only that Lopez was unlawfully denied work in September 1990 at Crockett Ranch, which amounts to $99.00 in back pay, plus interest. Moreover, Oasis insisted that the General Counsel had the burden of independently establishing that each subsequent failure to assign irrigation work was discriminatory, and that such burden was not met because the record showed that irrigation assignments were based on legitimate business considerations, including Lopez' inability to perform drip irrigation and the Indio-80 ranch owner's request that Lopez not be the irrigator.

THE ALJ'5 DECISION

The ALJ first rejected the basic premise underlying the methodology urged by Oasis. Specifically, he concluded that it was not the General Counsel's burden to establish that each

[3] Over the years, Oasis has converted many of the ranches it manages from flood to drip irrigation. At the time of hearing, only Indio-80, Myers, Village Date, and Loma Fuerte were still flood irrigated.

[4] Some of these assumptions were ill-founded, as testimony from Oasis' ranch manager Dennis Maroney revealed that "agua" meant that there was no work due to rain, "drip" referred to Dripping Springs Ranch, and that "sprinkler" referred only to drip (or mini-sprinkler) irrigation.

irrigation assignment was denied for discriminatory reasons. Rather, it was Respondent's burden to show substantial, legitimate reasons for not reinstating Lopez, in this case, assigning him to do irrigation in the same manner as prior to the discrimination. Moreover, the ALJ observed that uncertainties in establishing amounts owed in compliance are resolved against the party whose unlawful conduct created the uncertainty. (citing Mario *Saikhon, Inc.* (1982) 8 ALRB No. 88.)

Next, the ALJ concluded that the backpay period began on July 3, 1990, the date on which Maroney told Lopez that there would be no more irrigation work for him and that he should go ask his friend Ventura (the union representative) for work. Moreover, since the record shows that Lopez was rarely assigned irrigation work thereafter, the ALJ found that the backpay period was continuing at the time of hearing.[5] The ALJ explained that the Board's finding with regard to irrigation work denied Lopez in September of 1990 was simply to show that discrimination had occurred and the exact amount of irrigation work unlawfully denied was expressly left to be resolved in a compliance proceeding.

The ALJ concluded that the General Counsel's methodology was deficient in that it was based on various

[5]As noted above, the record indicates that Lopez was essentially converted to a 40 hour a week employee and was assigned irrigation work only when no one else was available. The ALJ's finding that the backpay period is continuing necessarily rejects Respondent's assertion that Lopez is owed only for irrigation work available at Crockett Ranch in September 1990.

assumptions that were not supported by the record. Specifically, the ALJ found that the General Counsel erred in assuming that Lopez would have been assigned the most irrigation hours each day due to seniority, since the record did not support a finding that such assignments were based on seniority.[6] In addition, the ALJ concluded that drip irrigation work should not have been included in the calculations, since Lopez had not done drip prior to the discrimination and the Respondent had no obligation to train him.[7]

Having rejected both the General Counsel's and the Respondent's methodologies, the ALJ concluded that the most appropriate backpay formula is one based on Lopez' earnings for 1989, the last full year prior to the discrimination.[8] Underlying this approach was the ALJ's finding that the assignment of additional general labor duties was the appropriate way for Respondent to have satisfied its obligation to reinstate

[6]Based on this finding, the ALJ held that Respondent was under no obligation to displace irrigators from any regular assignments they had prior to the discrimination against Lopez.

[7]Drip irrigators are required to travel quickly between locations on two or. three-wheeled motorcycles and to program computers that control the pumps and other equipment. Maroney claimed that Lopez was not qualified to perform drip irrigation because, in 1985 or 1986, Maroney had witnessed Lopez trying unsuccessfully to operate and control a three-wheeled motorcycle. Lopez denied ever having the opportunity to ride such a vehicle. The ALJ did not find it necessary to resolve this dispute in testimony.

[8]The ALJ observed that Lopez' earnings for the first quarter of 1990 were similar to his earnings in 1989 and, for simplicity, used the calendar year 1989 rather than portions of both years as the benchmark for gross backpay.

Lopez to a substantially equivalent position, since Lopez' former Indio-80 assignment had been lawfully given to Miguel Yepis.[9] Therefore, the ALJ concluded that Respondent should have given Lopez additional general labor work even if irrigation work was not available.[10]

The ALJ thus used 1989 quarterly wages, adjusted for wage increases, to calculate gross backpay since July 1990, and subtracted Lopez' actual earnings to compute net backpay. Based on Respondent's failure to prove that additional general labor work was not available, the ALJ found that no adjustments should be made for availability of work.

The ALJ made additional findings with regard to particular irrigation assignments, in the event that his methodology summarized above was not accepted. With regard to Indio-80, the ALJ found that Respondent failed to show any legitimate or substantial basis for not using Lopez as the backup irrigator to Yepis and for not giving Lopez the assignment on a regular basis when Yepis was removed from the assignment in July

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[9] The Board credited testimony in the underlying case that the owner of Indio-80 requested that Yepis, Lopez[1] replacement, remain as the irrigator, and the Board found that it was not discriminatory to not displace Yepis once Lopez was ready to return to irrigation duties.

[10] The ALJ noted that he could not conclude with certainty that, absent discrimination, Respondent would have given Lopez other duties to make up for irrigation hours lost due to his replacement at Indio-80 or that additional general labor hours would have been available. However, he observed that the uncertainty was created by Respondent's refusal to assign regular irrigation duties to Lopez after July 1990 and that Respondent failed to show the unavailability of additional duties.

1991. This finding was based on the ALJ's discrediting of testimony from Maroney that the owner of Indio-80 requested that Lopez not be assigned there. While bound by the Board's earlier finding that it was not discriminatory to leave Yepis in the position when Lopez was ready to return to irrigation work because the ranch owner had requested Yepis, the ALJ found that no basis was shown for favoring any other irrigator over Lopez. The ALJ also observed that there were enough irrigation hours available at Indio-80 to fully reinstate Lopez to the position he was in prior to the discrimination.

Next, the ALJ determined that Lopez should have been given the opportunity to perform flood irrigation at Myers ranch, once the regular irrigator at Myers, Juan Resendiz, was reassigned in June 1992.[11] The ALJ also found that Lopez could have been assigned to do flood irrigation at Loma Fuerte, when that ranch was added in mid-1992. The ALJ concluded that Respondent failed to carry its burden to explain why Lopez was not entitled to these assignments, rejecting Respondent's general assertion that it was more convenient to have irrigators who could do drip irrigation on nearby ranches also do the irrigation at Myers and Loma Fuerte.

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[11] By implication, the ALJ also held that Lopez should have been assigned as the backup to Resendiz prior to June 1992. This would also be true of backup irrigation at Village Date, which was regularly performed by Jesus Salazar, a foreman who lives at that ranch.

DISCUSSION

In analyzing a compliance matter such as this, it is important to remember that the calculation of backpay is by definition an estimate and absolute precision is not required nor expected. As the ALJ pointed out, the Board has broad discretion in choosing an appropriate backpay formula and it need only be a reasonable means of estimating the amount necessary to make the discriminatee whole. (O.P. *Murphy Produce Co., Inc.* (1982) 8 ALRB No. 54.) Further, uncertainties will be resolved against the wrongdoer, whose unlawful conduct created the uncertainties. (*High and Mighty Farms* (1982) 8 ALRB No. 100.)

As it was before the ALJ, Respondent's central contention in its exceptions is that it owes Lopez only for work denied him at Crockett Ranch in September 1990. This is based on the view that this was the only work that the Board found was denied Lopez and the General Counsel failed to meet its burden to demonstrate that any other failures to assign Lopez irrigation work were discriminatorily motivated.[12] Respondent cites no apposite authority to support this unusual theory.

As the ALJ properly pointed out, the Board found that Respondent unlawfully refused to assign irrigation work to Lopez after July 3, 1990. The Board's order requires Respondent to

[12]Respondent further asserts that the General Counsel was precluded from even asserting any unlawful denials of irrigation work until after the date of the underlying liability hearing. This is based on the theory that the liability decision stands as the law of the case and that the only unlawful denial found was in September 1990.

reinstate Lopez to his former position as an irrigator. In the circumstances of this case, that means that Respondent must assign irrigation work to Lopez in the same manner as it did prior to the discrimination. The record unequivocally establishes that Respondent has failed to do so. As noted above, Lopez has gone from having regular irrigation assignments prior to the discrimination to becoming the irrigator of last resort thereafter. As the ALJ cogently explained, Respondent has failed to justify this radical change in status.

As part of its burden of establishing a prima facie case of discrimination in the liability proceeding, the General Counsel showed that there was irrigation work available that could have been assigned to Lopez. The evidence as to Crockett Ranch in September 1990 satisfied that element of the case, and the Board expressly held that the issue of whether other irrigation work was available was a matter appropriate for compliance.[13] Since, in this case, the assignment of irrigation work represents reinstatement of a discriminatee to the position he held prior to the discrimination, it was Respondent's burden to show legitimate reasons why he was not reinstated. (See,

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[13] Respondent's claim that the Court of Appeal, in its unpublished order summarily denying Respondent's petition for review, found that only the denial of the Crockett Ranch work was compensable is wholly without merit. In affirming the Board's finding of a violation, the Court simply agreed with the Board that the record reflected the availability of irrigation work to which Lopez could have been assigned. There is no indication in the Court's order that it in any way disagreed with the Board's holding that the determination of how much irrigation work was available was a matter appropriate for a compliance proceeding.

e.g., *Mario Saikhon, Inc., supra, 8* ALRB No. 88; *Joyce Western Corp. and Miami Springs Properties, Inc., et al.* (1987) 286 NLRB 592, 600 [130 LRRM 1024].) Again, in the context of this case, that means that Respondent had the burden to show why Lopez was not given irrigation assignments that he was qualified to perform in the same manner as he was prior to the discrimination.

Next, Respondent argues that, if it indeed has the burden to show legitimate reasons why Lopez was not assigned more than sporadic irrigation work after the discrimination, it met that burden. However, the ALJ's rejection of Respondent's proffered justifications is soundly based and is affirmed.

Though Respondent insists that Indio-80 was not available to Lopez because the ranch owner did not want him to irrigate, the ALJ properly discredited Maroney's testimony that the ranch owner told him sometime in the summer of 1990 that he did not want Lopez doing the irrigating because Yepis worked faster and thus used less water. First, it should be noted that the Board credited Maroney's testimony in the underlying case that the ranch owner sent a letter requesting that Yepis do the irrigation at Indio-80. In the present proceeding, the letter, which is dated May 10, 1990, is in evidence. However, as the ALJ pointed out, Respondent's records do not show Yepis irrigating at Indio-80 until May 14, 1990. This, coupled with the fact that in the underlying proceeding Maroney did not mention any conversation with the ranch owner and the ranch owner was never called to testify, led the ALJ to properly discredit Maroney on

this point. Therefore, the ALJ properly concluded that, though bound by the Board's earlier finding that Respondent did not have to displace Yepis at Indio-80, there was no legitimate justification established for failing to assign Lopez to Indio-80 as the backup to Yepis or for failing to give the assignment to Lopez once Yepis was reassigned in 1991.

With regard to Village Date, Respondent asserts that Lopez was properly denied assignment there because, as the ALJ found, it was not necessary to displace Jesus Salazar, who has had that assignment for over ten years. However, the record shows that others sometimes irrigated at Village Date and Respondent does not explain why Lopez could not have been given such backup assignments.

With regard to Myers and Loma Fuerte, Respondent asserts that operational efficiency justifies assigning Jesus Macias to that work because he also does drip irrigation on nearby ranches. The ALJ reasonably concluded that Respondent's general assertions of convenience and unspecified financial savings do not constitute substantial justifications for denying those assignments to Lopez.[14] The ALJ did find that Respondent did not have to displace Juan Resendiz, the regular irrigator at Myers, until June 21, 1992. In any event, Respondent has not

[14] The Board does affirm the ALJ's determination that Respondent had no duty to train and then assign Lopez to do drip irrigation, which he had not performed prior to the discrimination. Therefore, the backpay formula should account only for available flood irrigation work.

explained why Lopez could not have at least been used as the backup at Myers and Loma Fuerte.

In addition, Respondent asserts that Lopez was not given regular irrigation assignments because it wanted to minimize its liability for employees operating their own vehicles on public highways during work hours. However, this assertion does not hold up to scrutiny, since Respondent did not establish that no other employees drive their own vehicles from ranch to ranch, or explain why this was not a consideration prior to the discrimination when Lopez had regular irrigation assignments.

While Respondent supports the ALJ's rejection of the General Counsel's proffered methodology, it claims that the ALJ's alternative formula violates due process principles and creates a windfall for Lopez. Respondent claims that it had no notice that it had to defend based on an analysis of Lopez' 1989 wages, or that it had to show the unavailability of additional general labor hours. For example, Respondent asserts that Lopez' 1989 wages are not representative because, as discussed above, he was lawfully not assigned regular irrigation hours in later years and because all employees' earnings declined after 1989. Since the specification as well as the Board's order are based on a denial of irrigation hours, Respondent asserts that it was only on notice that it had to explain why Lopez was not assigned more irrigation hours. Therefore, Respondent claims, the ALJ's use of prior earnings and his findings that Respondent failed to show that such use was not appropriate violated principles of due

process. This, states Respondent, also is inconsistent with Board law which holds that the burden to show mitigation does not shift to the employer until after a reasonable backpay methodology is adopted.

In essence, therefore, Respondent argues that it had no notice of or opportunity to defend against the methodology adopted by the ALJ. We believe that this claim has merit. The ALJ's use of a formula based on Lopez' 1989 wages was not unreasonable on its face given the flaws in the General Counsel's methodology and the state of the record in regard to irrigation assignments. Moreover, it is reasonable to use a prior earnings formula unless changes in circumstances make such a projection unrealistic. Nevertheless, we agree with Respondent that it was given insufficient notice and opportunity to offer evidence in opposition to the use of such a formula. Therefore, as explained below, we will remand this matter for further hearing to allow Respondent to offer evidence to rebut the reasonableness of the backpay formula adopted by the ALJ.

We also agree with Respondent that, since the discrimination against Lopez involved only the assignment of irrigation work, it had no duty to provide additional general labor hours when irrigation assignments were not available. The remedy ordered in this case was the provision of irrigation assignments for which Lopez was qualified in accordance with the pattern of assignment prior to the discrimination. Particularly in light of the Board's earlier finding that Yepis did not have

to be displaced to accommodate Lopez, it is clear that for the period from July 1990 to July 1991 there would have been less irrigation work available to Lopez even in the absence of the discrimination.[15] For this period at least, backpay based upon 1989 earnings might represent a windfall.[16]

ORDER

In accordance with the discussion above, this matter is REMANDED for further hearing to allow Respondent to attempt to rebut the reasonableness of the backpay formula adopted by the ALJ in his decision of August 23, 1994. Specifically, Respondent shall have the opportunity to present evidence on the appropriateness of the use of Lopez' 1989 earnings as the basis for calculating backpay. As part of this inquiry, the parties may address the question of whether those individuals who were given the Indio-80 irrigation assignment on a regular basis after July 1991, principally Marcial Ibanez and Ramon de la Torre, may be considered comparable employees. The hearing on remand shall be confined to the issues set forth in this Order. The findings of fact and conclusions of law which the Board has made in this

[15] Due to its relative size as compared to the other ranches which are flood irrigated, Indio-80 represents a substantial amount of the available flood irrigation work.

[16] Backpay for the period from July 1990 to July 1991 could instead be based on an analysis of the availability of flood irrigation work at other ranches, as well as irrigation work at Indio-80 on days when someone other than Yepis performed the work.

decision, including those of the ALJ which have been affirmed, shall not be relitigated. DATED: December 20, 1994

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member

LINDA A. FRICK, Member

CASE SUMMARY

OASIS RANCH MANAGEMENT, INC.
(UTAF, etc.)

20 ALRB No. 19
Case Nos. 90-CE-20-EC
90-CE-21-EC
90-CE-34-EC
90-CE-34-1-EC
90-CE-55-EC
90-CE-5B-EC
90-CE-59-EC
90-CE-61-EC
90-CE-70-EC
90-CE-72-EC
90-CE-74-EC
90-CE-75-EC
90-CE-91-EC
90-CE-98-EC
90-CE-115-EC

Background

On August 23, 1994, Administrative Law Judge (ALJ) Douglas Gallop issued a decision in which he found that Oasis Ranch Management, Inc. (Oasis) owed discriminatee Vidal Lopez $18,911.00 in backpay, less standard payroll deductions, plus interest calculated in accordance with Board precedent. This compliance matter is based on the findings of the Agricultural Labor Relations Board (Board) in *Oasis Ranch Management, Inc.* (1992) 18 ALRB No. 11. In that case, which was affirmed by the 4th District Court of Appeal in an unpublished decision, the Board found, inter alia, that Oasis had discriminated against Lopez by refusing to assign him to irrigation work after a two month period when he could not do irrigation due to lack of transportation. The Board found that the record included some evidence of irrigation assignments that should have gone to Lopez and left for compliance the issue of the exact amount of irrigation work unlawfully withheld. The figure arrived at by the ALJ was based on Lopez' 1989 earnings, which is a methodology different than both that reflected in the General Counsel's specification and that urged by Oasis. Oasis timely filed exceptions to the ALJ's decision, alleging that the amount of back pay ordered represents an undeserved windfall. The General Counsel filed a response supporting the methodology used by the ALJ and urging that the Board adopt the ALJ's recommended decision.

Board Decision

The Board first affirmed the ALJ's rejection of Oasis' claim that the General Counsel had the burden of proving that each denial of an irrigation assignment was discriminatorily motivated. Instead, the Board found that, given Oasis' obligation to assign irrigation work to Lopez in the same manner as it had prior to the adjudicated discrimination, basis had the burden to show

legitimate reasons why Lopez was not given available irrigation assignments. The Board found that the record unequivocally showed that Oasis had failed to reinstate Lopez as ordered in the Board's earlier decision. The Board affirmed the ALJ's rejection of Oasis' preferred rationale for failing to assign irrigation work to Lopez, though both the ALJ and the Board found that Oasis did not have to replace irrigators who had regular assignments prior to the discrimination, nor train Lopez to do drip irrigation.

While the Board found that the ALJ's use of Lopez' 1989 earnings as the basis for calculating backpay was not unreasonable on its face, it agreed that Oasis did not have an adequate opportunity to attempt to rebut the reasonableness of the ALJ's methodology. The Board also agreed with Oasis that it had no duty to provide additional general labor hours when irrigation assignments were not available. Therefore, the Board remanded the case to allow Oasis the opportunity to present evidence to rebut the reasonableness of the backpay formula adopted by the ALJ.

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

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case Nos.
OASIS RANCH MANAGEMENT INC., a California Corporation,	90-CE-20-EC
Respondent,	90-CE-21-EC
and	90-CE-34-EC
UNION DE TRABAJADORES AGRICOLAS FRONTERIZOS; and MANUEL ANGEL RAMIREZ, JOSE LUIS ESTRADA, JORGE CHAVEZ, OSCAR SALAZAR, RIGOBERTO MARTINEZ JAUREGUI, and MIGUEL RODRIGUEZ, Individuals,	90-CE-34-1-EC
Charging Parties.	90-CE-55-EC
	90-CE-58-EC
	90-CE-59-EC
	90-CE-61-EC
	90-CE-70-EC
	90-CE-72-EC
	90-CE-74-EC
	90-CE-75-EC
	90-CE-91-EC
	90-CE-98-EC
	90-CE-115-EC
	(18 ALRB No. 11)

Appearances:

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

Eugene Cardenas
El Centro Regional Office
El Centro, California
for the General Counsel

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: This case was heard by me on June 9, 1994, in Visalia, California.

It is based on a decision and order of the Agricultural Labor Relations Board (hereinafter ALRB or Board) in Case No. 18 ALRB No. 11, which issued on November 16, 1992. The Board found, inter alia, that Oasis Ranch Management, Inc., (hereinafter Respondent) violated sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter Act) by refusing to assign irrigation work to Vidal Lopez. The decision and order found, however, that Lopez was not unlawfully denied reinstatement to his position as an irrigator at the Indio 80 worksite on July 3, 1990. The Board ordered Respondent to:

> a. Offer Vidal Lopez immediate and full reinstatement to his former position of employment as an irrigator, or if his position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges of employment.
>
> b. Make whole Vidal Lopez for all wage losses or other economic losses he has suffered as a result of Respondent's unlawful refusal to assign him irrigation work. Loss of pay is to be determined in accordance with established Board precedents. The award shall reflect any wage increase, increase in hours, or bonus given by Respondent since the unlawful suspension and discharge. The award also shall include interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

Thereafter, Respondent petitioned the California Court of Appeal, Fourth Appellate District, for a writ of review of the Board's Decision and Order, which was denied on July 22, 1993, in

Case No. E012007. The Court stated, inter alia. "... there was some testimonial evidence introduced showing that there was some irrigation work available in September 1990, to which employee Vidal Lopez should have been assigned."

General Counsel and Respondent were unable to arrive at a mutually agreeable backpay figure for Lopez, and consequently, a backpay specification issued, which was subsequently amended. Respondent has answered the specification, disputing the backpay period, methodology employed for determining backpay and the amount of backpay due. Upon the entire record, including my observations of the witnesses, and after careful consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

In the underlying unfair labor practice case, it was found that Lopez had been performing general labor and irrigation work until May 1990, when his vehicle malfunctioned, leaving him unable to perform irrigation duties. Lopez continued performing general laborer duties, and on July 3, 1990, informed Respondent his vehicle had been repaired, and he was ready to resume irrigating. In the interim, Lopez had been replaced for his irrigating duties at the Indio 80 jobsite by another employee, and the landowner expressed a preference that this employee be retained. Respondent informed Lopez there was no more irrigation work for him, but in September 1990, he observed a new employee irrigating at a

different ranch. As noted above, the refusal to reinstate Lopez to the Indio 80 location was found nondiscriminatory, but the failure to assign him to the September irrigation work was held unlawful.

At this hearing, copies of records were introduced to show the hours, job duties and work locations of Respondent's employees. Unfortunately, many of these records are illegible, or partially so, have portions cut off, and use abbreviations which were only partly explained by the witnesses. Furthermore, while some of the records identify employee job assignments and work locations, many do not. Given the condition of the underlying payroll records, at least some of the summaries and statistical contentions of both parties are necessarily suspect.

It is undisputed that irrespective of job titles, none of Respondent's employees solely perform irrigation duties, although some primarily perform this function. The timesheets further reveal that employees who primarily work as irrigators may be changed to other duties for extended periods of time, or permanently.[1] Respondent contends that seniority is a minor factor in determining who is assigned irrigation duties; rather, skills and economic feasibility are the primary factors. At the prior hearing, however, the testimony indicated Respondent uses seniority in selection for layoffs. General Counsel contends that seniority is the governing factor in irrigation assignments, as

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[1]Respondent's records, for example, show that employees Juan Resendiz and Miguel Yepis regularly performed irrigation duties, but were then reassigned.

demonstrated by Respondent's use of a seniority list, and the irrigation assignments prior to May 1990.

The parties agree that irrespective of job title, employees receive the same hourly rate whether irrigating or performing general labor duties. The exceptions to this are harvesting and packing*, which are partially or wholly paid on a piecework basis. The records show that Lopez has only rarely been assigned such duties. It is undisputed that Respondent has granted wage increases since July 1990, and that any backpay due to Lopez should be paid at the applicable wage rate. There is also no dispute that Lopez has continued to be a permanent and fulltime employee of Respondent since July 1990, and that his earnings should be deducted from the gross backpay.

Respondent uses two forms of irrigation, flood and drip. Drip irrigation is preferred, because it saves water. Prior to 1991, an unspecified number of Respondent's approximately 20 clients were serviced by flood irrigation. Respondent engaged in a conversion project, and according to Dennis Maroney, Respondent's General Manager, all had been converted to drip irrigation by early January 1991, except Indio 80, Myers and Village Date. About two years prior to this hearing, Respondent began irrigating for another client utilizing flood irrigation, the Loma Fuerte ranch.

Lopez has only performed flood irrigation work. Drip irrigation requires the programming of computers to control the

water flow,[2] and the use of three-wheeled all terrain vehicles to rapidly travel from control to control. All of Respondent's current irrigators, except Lopez, know how to operate the computers and ride the three-wheelers. Maroney claims that several years ago, Lopez attempted to drive a three-wheeler and was unable to do so, while Lopez denies the incident took place.[3] Lopez possesses a standard driver's license, and there is no evidence that a special license is required to operate the three-wheelers. There is also no evidence that Respondent ever attempted to train Lopez on the operation of the sprinklers, or to drive the all-terrain vehicles.

Maroney estimated that between 1986 and 1989, Lopez spent about one-half of his working hours performing irrigation work. Respondent's records show that in 1989, Lopez was paid for at least 2,731 regular, overtime and holiday hours, plus some piecework pay, averaging about 53.5 hours per week over a 51-week period ending December 24. In 1989, Lopez earned at least $13,073.00." In 1989, about 1,400 of Lopez' hours paid were

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[2] Maroney testified that irrigators are required to program the computers, while Lopez testified the foremen perform this function. While foremen probably-also set some sprinklers, Maroney's testimony is credited, since it appears Lopez' observations of the drip irrigation operations are limited, and it is unlikely that the foremen could be physically able to adjust all of the sprinklers for Respondent's many clients.

[3] For the purposes of this Decision, it is unnecessary to resolve the conflict in testimony.

[4] The hours worked are based on General Counsel's Exhibit 13, except for the periods, January 1 through January 8 and December 11 through December 24, 1989, which are not covered. For those periods, the underlying timesheets in Respondent's Exhibit 1

designated as for irrigation work. There is no evidence that the hours worked by Lopez in 1989 were unusually high compared to prior years.

For the period January 1 through March 25, 1990, Lopez was paid for 580.5 regular and holiday hours, averaging about 48.4 hours per week. It appears, however, that this includes most of the period in which Respondent's employees typically work the fewest hours.[5] Of the hours paid in early 1990, 306.5 were designated as for irrigation work. While it is clear that much of Lopez' irrigation work immediately prior to the May 1990 breakdown of his vehicle took place at Indio 80, Respondent's records for 1989 are not detailed enough to determine with any degree of certainty how much irrigation work he performed at other locations, before being assigned there. Prior to May 1990, Lopez regularly worked six days per week. His Saturday hours were spent performing both irrigation and non-irrigation duties.

In 1990, Lopez' gross pay was $7,745.00; in 1991, $8,983.00;

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were used, counting New Year's holiday and piecework at eight hours per day. It appears Lopez did not work during the period January 23 through February 5, 1989, based on Respondent's Exhibit *I*. Since Respondent's Exhibit 1 does not cover the last week in 1989, and there was no testimony concerning this period, it will not be assumed that Lopez did not work that week; instead, it will be discarded from the calculations. It is unclear whether Lopez was paid for work performed in 1989, after December 10, in 1989 or 1990. The $13,073.00 figure is from the paystub for the payroll period ending December 10, 1989.

[5]The hours for 1990 come from General Counsel's Exhibit 14. In 1989, Lopez was paid for about 544 hours during the same 12 weeks.

in 1992, $10,415.00; and in 1993, $10,570.[6] The reduction in pay from 1989 is even more striking, because Respondent implemented significant wage increases during this period. A major reason Lopez' wages declined is because., upon his return on July 3, 1990, Lopez rarely worked more than five days per week. The remainder of the difference largely resulted from eight-hour work assignments, where Lopez had frequently worked nine- and ten-hour days in the past. While the number of locations where flood irrigation is used may have declined since 1989, Respondent now manages more acres of land, presumably creating more non-irrigation work.

Contrary to Respondent's contention, Lopez was not solely replaced by Miguel Yepis at Indio 80 after Lopez' vehicle malfunctioned. Rather, another irrigator, Joe Garcia irrigated at that location during the period May 22 through the week ending June 24, 1990.[7] Indeed, the sincerity of the letter from the owner of Indio 80, requesting Yepis as the irrigator is highly suspect, since it is dated May 10,' 1990, and Respondent's records do not show Yepis performing irrigation work there until May 14. Lopez irrigated at that location until May 7, and it appears another employee, Herminio Becerril, may have irrigated there the remainder of that week. It is also difficult to understand how, as Maroney contends, the owner would have known Yepis was using

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[6]These figures come from Respondent's Exhibit 5.

[7]Many of Respondent's records for this period are illegible, and it is impossible to determine whether Yepis worked elsewhere at the time.

less water than Lopez by May 10, even if Yepis did irrigate at Indio 80 on May 8, 9 and 10, 1990.

The records further reflect that Lorenzo Gallego, an employee hired after July 3, 1990, performed irrigation work for five days at Indio 80 during the week ending October 28, 1990, during which time, Yepis performed other duties at different locations. During the week ending April 21, 1991, two employees hired after July 3, 1990 (Juan Jose Estrada and Jose Ochoa) irrigated a total of five days at Indio 80, while Yepis performed other work at different locations.

For reasons not explained at the hearing, Yepis was removed from his irrigating duties on July 10, 1991, although he continued to perform other job duties for Respondent until at least September 28, 1991, after which date he was deported and lost his job. From July 10 until about November 4, 1991, the irrigation work at Indio 80 was performed by several employees, all of whom appear to have been hired after July 3, 1990, except for Garcia, who irrigated a few hours there. Respondent's Exhibit 3 shows that between July 3, 1990 and April 24, 1994 about 5,900 hours of irrigation work have been performed at Indio 80, of which about 3,500 took place after July 10, 1991.

With respect to Garcia, he died about 18 months prior to the hearing. Maroney testified that there are no current employees who could be considered comparable to Lopez, because he is the only one who can perform flood, but not drip irrigation. Moroney claims Garcia was a comparable employee, but this is questionable,

because Maroney also testified that Garcia was not being assigned irrigation work prior to his death because of his age.

In November 1991, it appears that Juan Resendiz, an experienced irrigator, but hired after Lopez,[8] assumed the irrigating duties at Indio 80, along with other ranches at which he regularly performed such duties. From December 1991 to July 1992, an employee hired after July 3, 1990, Marcial Albanez, was the primary irrigator at Indio 80. He was replaced by Juan Ramon de la Torre,[9] who has been the primary irrigator there since July 1992. Respondent lists his hire date as January 10, 1987. De la Torre, along with other duties, apparently had previously been the regular irrigator at the Crockett and Jensen locations.[10]

Respondent's records show that the first date Lopez performed any irrigation work after July 3, 1990 was on September 24, 1992. There was no testimony on this issue. Significantly, this was also the first week since prior to July 3, 1990, where Lopez worked more than 40 hours in any week. The undersigned has been able to identify a total of 237 hours of irrigation work assigned to Lopez, of which 119 hours were at Indio 80, scattered over the period September. 24, 1992 through the week ending June 6, 1993, and no irrigation work for the remainder of 1993. No records were

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[8]Lopez' hire date is listed as July 15, 1985.

[9]There are references in the timesheets to "Juan", "Juan R." and "Ramon" de la Torre in the timesheets. It is assumed that all refer to the same employee.

[10]It is assumed that the abbreviation, "JS", means Jensen, and that "Croke" stands for Crockett. These two ranches are near to each other.

produced for 1994 irrigation work by Lopez, but Maroney acknowledged he is used only as a backup irrigator. There is a correlation between Lopez' irrigation work, and weekly total hours in excess of 40.

Maroney testified that Lopez has only sporadically been returned to perform irrigation work at Indio 80, even after Yepis' departure from those duties, allegedly because the owner told him he did not want Lopez to irrigate there anymore. Said testimony, while not directly contradicted, is not credited. The letter from the owner, which itself is highly suspect, does not state that Lopez was unacceptable, but merely gives a preference. Inasmuch as Lopez had regularly been irrigating Indio 80 for several months, if his work had been truly unsatisfactory, the owner doubtless would have complained at an earlier date. Furthermore, Maroney did not mention this conversation in his testimony at the underlying hearing, which would have been expected. It is also significant that Respondent, without explanation, has not called the owner of Indio 80 as a witness at either hearing, given the importance of this issue. Finally, if the owner of Indio 80 did not want Lopez irrigating there, why was he permitted to return at all, when several other employees appear to have been capable of performing the work?

As noted above, Maroney testified that as of January 1991, only three ranches used drip irrigation, with a fourth added later. The records, however, show that Lopez performed 108 hours of irrigation work at Jensen and Polk Street, purportedly drip

irrigation ranches, between September 24, 1992 and the week ending June 6, 1993. Maroney testified that even after conversion to drip irrigation, some irrigation work other than operating the sprinklers, such as flushing out hoses and installing drippers, was still available. Such work is performed by crews of Respondent's employees. While Respondent's 1989 records show crews performing work described as "hoses," there is no indication in the records to show that Lopez' irrigation work in 1992 and 1993 at Jensen or Polk Street was of that nature, or that he worked as part of a crew. Assuming Maroney is nevertheless correct in his testimony, he did not state how many hours of this type of work was available after July 3, 1990, and it is impossible to determine this from the records.

It is undisputed that a foreman, Jesus Salazar, has for many years been the regular irrigator at the Village Date ranch. Salazar, who lives on site, was hired prior to Lopez. Again noting that Respondent's records frequently do not identify the location where irrigation work was performed by employees, it appears that Gallegos, Yepis, Ochoa, and de la Torre; and Francisco Ortiz, Jose Ugalde, Miguel Tamayo (or Tomallo), Jose Pacheco, Ruben Zuno (or Suno) and Arturo Salazar, six more employees hired after July 3, 1990 (but never Lopez) also performed irrigation work at Village Date between July 3, 1990 and November 7, 1993.[11]

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[11]This assumes the abbreviations, "VD" and "Village", refer to the Village Date location.

Maroney testified that Juan Resendiz was the regular irrigator at Myers Ranch, until he was replaced by Jesus Macias. Respondent's records do not generally identify Resendiz' irrigation work locations, but since there are no other employees identified as regularly irrigating at Myers prior to July 3, 1990, it will be assumed he performed such duties as of that date. It is noted, however, that Lopez and Garcia also performed irrigation work there prior to July 3. Between July 3, 1990 and June 15, 1992, other employees, including Garcia and Becerril (but never Lopez) occasionally irrigated at Myers.

Macias, who was hired after July 3, 1990, first appears on the timesheets as an irrigator during the week ending June 21, 1992. Respondent's Exhibit 2 shows that between July 3, 1990 and April 24, 1994, almost 3,000 irrigating hours of work have been performed at Myers, of which about 1,000 took place after Macias became the regular irrigator.

Maroney testified that Macias has been the regular irrigator at Loma Fuerte during the approximately two years Respondent has managed that location. In addition, Macias performs drip irrigation work at other locations. According to Maroney, it is economically convenient for Macias to irrigate at both Myers and Loma Fuerte, rather than at only one of those locations. Loma Fuerte is about one-half the size of Myers, so one might assume that it requires about one-half the irrigator work hours. The only irrigation work indicated at Loma Fuerte, other than by Macias, as of November 7, 1993, was one day by Lopez.

As noted above, Maroney testified that as of early January 1991, the other locations had all been converted to drip irrigation. Other than a reference by Maroney to the Crockett ranch having a flood irrigation system in the fall of 1990, it is impossible to determine which other locations, if any, had flood irrigation systems between July 3, 1990 and early January 1991, or who performed such irrigation duties. Maroney's testimony on this subject was vague and uncertain. It is clear, however, that as of July 3, 1990, Resendiz, de la Torre and Pedro Lugo, also hired after Lopez, were Respondent's regular non-supervisory irrigators (other than Lopez).

In the underlying case, it was found that by assigning Lorenzo Gallegos irrigation work at Crockett in September 1990, Respondent discriminated against Lopez. Several of the timesheets, or portions thereof, for September 1990 are illegible. The records do identify 120 hours of irrigation work performed by Gallegos between September and December 1990, including 43 hours at Crockett in early October. His remaining irrigation hours were performed at Village Date and Indio 80.

CONTENTIONS OF THE PARTIES

The parties agree that since Lopez has at all material times been a permanent, fulltime employee, his net backpay should be calculated on a quarterly basis. General Counsel contends Lopez' backpay period should begin on July 3, 1990, the date he was told he would not be assigned any more irrigation work, while

Respondent contends that under the orders of the Board and Court of Appeal, and the allegations in the underlying complaint, the backpay period does not commence until September 1990, when the discriminatory conduct was found to have occurred. General Counsel contends the backpay period continues to date, because Lopez has yet to be properly reinstated. Respondent contends the backpay period has ended, because Lopez has been assigned irrigation work in accordance with Respondent's legitimate operational needs, and Lopez' qualifications.

General Counsel contends that Lopez' gross backpay should be determined by examining, on a daily basis, whether any employee of Respondent performed irrigation duties, and if Lopez worked that day, crediting him with any additional hours worked by the irrigator. If Lopez did not work on a day irrigation work was performed, he should be credited with the total hours worked by the irrigator, since he presumably would have worked as an irrigator on the day in question, absent Respondent's discrimination. If more than one irrigator worked on a given day, the irrigator working the most hours should be selected, since presumably, Lopez would have been assigned the irrigation job with the most hours on any given date.

General Counsel also contends that the irrigation hours worked by the regular irrigators as of July 3, 1990 should be counted, as well as Salazar's Village Date hours, since Respondent was allegedly obliged to displace these employees due to Lopez' classification seniority as an irrigator. It is also contended

that drip irrigation work should be included, because it is substantially equivalent employment for which Lopez could have easily been trained. Alternatively, General Counsel contends that Lopez' gross backpay should consist of the irrigation hours worked by employees hired since July 3, 1990.

Respondent contends that Lopez' gross backpay should consist only of those irrigation hours worked by de la Torre at the Crockett ranch in September 1990, for a total of $99.00, plus interest. It only concedes this amount to be due because it is the "law of the case." Respondent argues it is General Counsel's burden to prove each subsequent failure to assign irrigation work to Lopez was discriminatory, in order to award additional backpay. Respondent also argues it was not obligated to displace existing irrigation employees, or Yepis, who was found to be a legitimate replacement. It contends the subsequent assignments of flood irrigation work were based on legitimate business considerations, and that Lopez is not qualified to perform drip irrigation work.

ANALYSIS AND CONCLUSIONS

The purpose of a reinstatement and backpay order is to place the employee in the same position as the employee would have been absent the discrimination. The Board enjoys wide discretion in choosing the appropriate backpay formula, as warranted by the circumstances presented in each case. Arnaudo Brothers (1981) 7 ALRB No. 25; M.B. Zaninovich. Inc. v. ALRB (1981) 114 Cal.App.3d 665. The National Labor Relations Board most

frequently calculates gross backpay based on the employee's prior earnings history. Due to the seasonal nature of many agricultural employees' work, however, the ALRB often uses the wages of a comparable or replacement employee to establish gross backpay. Where the discriminatee is a permanent, fulltime employee, and it would be difficult to calculate what -a comparable or replacement employee would have earned, it is appropriate to use the discriminatee's prior wages to determine gross backpay. Ukegawa Brothers, et al., (1990) 16 ALRB No. 18.

If the discriminatee's prior position of employment no longer exists, the discriminatee must be offered substantially similar employment. What constitutes substantially equivalent employment is determined on a case-by-case basis, considering such factors as wages, hours, job duties, work location and fringe benefits. Abatti Farms. Inc., (1983) 9 ALRB No. 59. Furthermore, if there exists no substantially equivalent position, the ALRB requires the employer to offer work which the discriminatee is qualified to perform. Ukegawa Brothers, et al., supra. Also, see Louis Rassey and Lapeer Foundry & Machine. Inc. (1984) 272 NLRB 566 [117 LRRM 1316] .

The employer has the burden of proof in establishing factors which negate or reduce its reinstatement and backpay obligations. Mario Saikhon. Inc. (1982) 8 ALRB No. 88. It is not General Counsel's burden to establish that each job assignment was denied for discriminatory reasons; rather, it is Respondent's burden to establish substantial, legitimate reasons for not reinstating the

discriminates. Joyce Western Corporation and Miami Springs Properties. Inc., et al. (1987) 286 NLRB 592, 599-600 [130 LRRM 1024]; Rockwood & Company, et al., (1986) 281 NLRB 862 [124 LRRM 1154]. Whenever uncertainties exist concerning a make whole remedy, they will be resolved against the employer, whose unlawful conduct created the uncertainty. Mario Saikhon. Inc., supra.

At the outset, it is concluded that Lopez' backpay period commences on July 3, 1990. The Board's decision and order did not order backpay to commence in September, but generally ordered Respondent to make Lopez whole for his economic losses. Similarly, the brief reference to the September 1990 irrigation work by the Court of Appeal was made to support the Board's order, and nowhere established a different backpay period. It is clear that once continuing discriminatory conduct is found, the extent thereof may be determined in compliance proceedings, and is not limited to the specific example leading to the finding in the underlying case. This is particularly appropriate here, since Respondent announced its intention to deny irrigation work to Lopez on July 3, 1990. With respect to the allegation in the underlying complaint, although the discrimination was placed in September 1990, the issue has been fully litigated, establishing July 3, 1990 as the appropriate commencement date.

It is also concluded that Respondent has yet to reinstate Lopez to his former, or substantially equivalent employment, and thus, unless Respondent shows substantial and legitimate justifications, the backpay period continues to date. The

evidence fails to show any reinstatement to such employment until September 24, 1992, more than two years after Respondent announced its intentions, and only sporadic reinstatement thereafter.

General Counsel's primary and alternative gross backpay formulas are unusual, which in itself does not disqualify them, because this is factually a somewhat unusual case, and if appropriate, a formula tailored to those facts would be acceptable. In certain respects, as will be discussed below at pages 24-25, the formulas credit Lopez with irrigation hours based on questionable legal principles and facts not well established by the record. To calculate backpay based on either of General Counsel's formulas requires information difficult to ascertain due to the state of the records. Also, General Counsel's formulas appear to calculate Lopez' gross and net backpay on a daily basis, when the parties agree a quarterly period is appropriate. Furthermore, they ignore a substantial source of employment which should be considered when determining the availability of work for Lopez.

Respondent, on the other hand, seeks a finding which would resolve every variable in its favor. Thus, Respondent would have the Board assume that because Lopez lost his position at Indio 80, he necessarily would have been essentially converted to a 40-hour per week employee, performing no irrigation work for over two years. Respondent apparently also contends that once conditions existed where Lopez was not eligible for irrigation work, further reinstatement and make whole provisions were tolled, even if those

conditions later changed. Respondent seeks a ruling that whenever it was economically favorable or operationally convenient for it to assign another employee, even a recent hire, to perform flood irrigation work, instead of Lopez, this was permissible.

It is concluded that the most appropriate, and perhaps the only appropriate gross backpay formula is to use Lopez' prior earnings as the basis. The record fails to show a comparable employee. Given the multi-faceted nature of Lopez' employment, basing his backpay on irrigation hours alone is unlikely to produce an accurate result, and at any rate, creates practical difficulties, given the state of the documentary record. It is also noted that if only Lopez' 1989 hours as an irrigator were used to calculate his gross backpay, it would be appropriate to only deduct his post-1989 irrigator hours as interim earnings. Since Lopez worked few irrigation hours after 1989, but substantial general laborer hours, his net backpay using only irrigation hours would result in substantially higher earnings than he received in 1989, in effect, a windfall. Accordingly, Lopez' gross backpay will be based on his total 1989 gross earnings.[12]

It now becomes Respondent's burden to show that Lopez'

[12] Lopez' earnings from April 1, 1989 through March 31, 1990 could also be used, to be more proximate to the time he encountered mechanical difficulties with his vehicle. May and June 1990 would be inappropriate to include, since Lopez' transportation problems affected his availability for irrigation work. Since the calculations are easier to make using the calendar year, and since there was little difference in Lopez' earnings during the first three months of 1989 and 1990, the 1989 calendar year has been selected.

earnings from July 3, 1990 would have decreased because his former position did not exist, and there was no substantially equivalent employment. As of July 3, 1990, Lopez' former position as an irrigator at Indio 80 did not exist for him, because it has been found that his replacement was not unlawful. Nevertheless, Lopez was qualified for, and had previously performed many other job duties for Respondent, at the same rate of pay. There is scant evidence showing the differences between Lopez' work as an irrigator, and the many other tasks he performed. As a multifunction employee with substantial prior experience, it is concluded that general labor duties constitute substantially equivalent employment to which Respondent was obligated to assign him, absent the availability of irrigation work.

Respondent has not shown that such work was unavailable, and given the many possible job locations, the heavy workload as of July 1990, the increasing acreage managed by Respondent, Lopez' experience, and the turnover in Respondent's workforce, it is probable that such work could have been made available. Indeed, if Respondent had merely assigned Lopez general labor duties on Saturdays, a major portion of the lost hours would have been replaced.

Granted, it cannot be said, with certainty, that Respondent would have assigned Lopez other duties to make up the hours he lost at Indio 80. Nevertheless, this uncertainty was created by Respondent's refusal to assign Lopez any irrigation duties for over two years, and should be resolved against it. Furthermore, a

review of Lopez' work history indicates that prior to July 1990, Respondent appeared to make every effort to assign him more than 40 hours per week of work, except during the winter months. The records show that if no irrigation work was available, Lopez was consistently assigned other duties. What does not appear likely is that Lopez, absent the discrimination he suffered, would have suddenly been converted to essentially a 40-hour per week employee. Accordingly, on the basis of the apparent availability of non-irrigation work, which Respondent has not disproved, or even disputed, it is concluded there should be no deductions from Lopez' gross backpay, based on unavailability of work.

If the above determination is not sustained, the following additional conclusions are made. With respect to the Indio 80 irrigation work, it is concluded that Respondent has failed to show legitimate or substantial grounds why Lopez could not have been assigned backup irrigation duties at that location until July 10, 1991, the date Yepis was removed, and thereafter, why Lopez could not have been reinstated as the regular irrigator. The-credited evidence establishes that the Indio 80 owner may have expressed a preference for Yepis, but did not, in fact, reject Lopez. In light of this, when Yepis was not irrigating at that location, and once he permanently ceased doing so, the business justification which may have otherwise existed ceased. Since there were clearly enough irrigation hours at Indio 80 after July 10, 1991 to fully reinstate Lopez, he would be entitled to full gross backpay based on his 1989 hours from that date.

To the extent that such a finding is necessary, it is also concluded that Respondent has failed to establish legitimate and substantial reasons for not assigning Lopez as the regular irrigator at Myers and later at Loma Fuerte, commencing June 21, 1992, the date Macias replaced Resendiz as the regular irrigator at Myers. It may have been convenient for Respondent and Macias to have him perform this work, and to an extent, the arrangement may have resulted in some financial savings. Convenience and unspecified financial advantages do not, however, constitute substantial justifications to deny reinstatement to a discriminatee, in favor of a replacement employee. The irrigation hours at Myers can be calculated through April 1994 by using Respondent's Exhibit 2, and Loma Fuerte, based on its size, could be calculated at one-half the number at Myers, beginning two years prior to the hearing date.

To the extent a ruling is necessary on the "backup" flood irrigation assignments, it is clear from the Board's Decision and Order that the use of employees hired after July 3, 1990, father than Lopez, to perform such work, other than at Indio 80, is prima facie evidence of gross backpay due to Lopez, which Respondent must rebut. With respect to these hours, Respondent has not explained why Lopez could not have been given the assignments. In the absence of such explanation, and remembering that uncertainties are to be resolved in favor of the discriminatee, it is concluded that Respondent was obligated to assign all such work to Lopez, except where more than one newer hire irrigated on the

same date, in which case Lopez should be credited with the average number of irrigating hours worked by such employees on that date. Since Respondent has not established which fields irrigated by post-July 3, 1990 hires used drip irrigation until early January 1991, all such hours should be counted as flood irrigation hours until January 15, 1991, after which, only Indio 80, Village Date, Myers and Loma.Fuerte should be so considered.

On the other hand, under the facts presented in this case, it would not be appropriate to credit Lopez with hours which would have required the displacement of irrigators from their positions as of July 3, 1990. An employer is required to displace employees hired to replace those discharged or not reinstated for discriminatory reasons. This most often takes place in the case of invalid striker replacements, and those hired to fill a position made vacant by removal of the discriminatee. Louis Rassey and Lapeer Foundry & Machine. Inc., supra,• Pace Oldsmobile, Inc. (1981) 256 NLRB 1001, fn. 4 [107 LRRM 1414]; Rockwood & Company, et al.. supra. It could also be argued that where the discriminatee's position has been eliminated, and seniority is followed in layoffs, the discriminatee is entitled to reinstatement, even if it means laying off a less senior employee who was employed prior to the discrimination, since the discriminatee would have been entitled to bump into the other position under the established rules.

In this case, although Respondent follows seniority in layoffs, it is not established that seniority is used in

irrigation assignments, although the Board's Order found that Lopez' seniority entitled him to irrigation work in preference to new hires, such as Gallegos. It is also not established that under normal circumstances, Lopez would have had bumping rights for such positions. Therefore, it is concluded that Respondent was not obligated to displace Juan Resendiz, Juan Ramon de la Torre, Jesus Salazar or Joe Garcia (to the extent he was still being assigned irrigation work), for those locations they had been irrigating prior to July 3, 1990.

Respondent was not obligated to displace Miguel Yepis from his irrigation duties at Indio 80, because the Board and Court of Appeal found that replacement was not unlawful. Accordingly, the use of those hours to credit backpay for Lopez is inappropriate. With respect to the assignments of Resendiz and de la Torre to Indio 80, after Yepis was removed, however, inasmuch as Lopez should have been reinstated to Indio 80 at that time, those hours would in any event belong to him. While no conclusion need be reached on the issue, General Counsel's inclusion of hours .where drip irrigation was performed in Lopez' gross backpay is very questionable, since he was not qualified to perform such work, and it is also questionable whether Respondent was obligated to train him.[13]

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[13]The issue is all the more complex, since some of the drip irrigation systems existed prior to July 3, 1990, and Lopez had not performed irrigating duties at those locations. With respect to those systems which were converted from flood to drip irrigation after July 3, 1990, automation of the discriminatee's former position is a justified ground to argue the tolling of backpay and reinstatement obligations. Holiday Radio. Inc., et

To summarize, if the initial conclusions herein are rejected, there should still be no deductions from Lopez' gross backpay, commencing July 11, 1991, based on unavailability of work, due to the opening at Indio 80. For the period July 3, 1990 through January 15, 1991, Lopez' gross backpay should at least consist of irrigation hours worked at any location by post-July 3, 1990 hires, on a quarterly basis. For the period January 16, 1991 through July 10, 1991, the gross backpay should at least include all irrigation hours worked at Indio 80, Myers or Village Date by post-July 3, 1990 hires, on a quarterly basis. Lopez' interim earnings for the period July 3, 1990 through July 10, 1991 would be zero, because he worked no irrigation hours; thereafter, since the gross backpay formula presumes a full 1989 employment level, Lopez' interim earnings would include all of his earnings with Respondent commencing on July 11, 1991.

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a1(l985)275~NLRB~1342 [120 LRRM 1013]. Where the former employee's position has been automated, the employer may have a duty to train, or at least give the discriminatee a trial period. See ALRB Compliance Manual section 4-1743, page 1-58. Although the evidence fails to establish that with training, Lopez could not have performed drip irrigation work, the fact remains he was not qualified as of July 3, and had not performed such work before. As a practical matter, it would be exceedingly difficult to segregate out those drip irrigation hours assigned to employees performing that function as of July 3, and to further segregate out irrigation systems converted to drip irrigation thereafter, since drip irrigation locations are not identified on the timesheets, (in addition to, in many instances, work locations generally) and other than the Crockett ranch, the record does not identify the locations which were converted.

ORDER

In accordance with the findings and conclusions herein, and the calculations contained in the Appendix,[14] attached hereto, Respondent's obligation to make Vidal Lopez whole, as of March 31, 1994, will be discharged by paying him the sum of $18,911.00, less standard payroll deductions, plus interest as calculated in accordance with applicable Board precedent.[15]

Dated: August 23, 1994.

DOUGLAS GALLOP
Administrative Law Judge

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[14] 1989 earnings were calculated using General Counsel's Exhibit 13, while Respondent's Exhibit 5 was used to calculate interim earnings. Respondent's Exhibit 5 appears to base earnings on the date paid, while General Counsel's Exhibit 13 does not indicate when the wages were paid. Therefore, there may be a one week difference in the quarterly periods. Dollar amounts are rounded off. Due to the payroll periods utilized, quarterly starting and ending dates are sometimes slightly before or after the actual calendar dates, as indicated in the Appendix, but the annual amounts listed conform with Respondent's records.

General Counsel requests that Respondent be ordered to reinstate Lopez to his former position, or to substantially equivalent employment if it no longer exists. Although it has been found that Respondent has not reinstated Lopez, his reinstatement has already been ordered by the Board and judicially enforced. The appropriate procedure, at this point, for a violation of the Court of Appeal's Order is to institute contempt proceedings.

[15] Backpay is calculated to March 31, 1994, because the record does not contain any evidence containing Lopez' interim earnings after that date. General Counsel may seek additional backpay commencing April 1, 1994 and, if the parties are unable to agree, issue another backpay specification.

APPENDIX

Vidal Lopez, Backpay
July 3, 1990 through July 31, 1994

1990

Third Quarter: (7/3 - 9/30)
$ 265.00 - 1989 wages 7/3 - 7/9
$3,031.00 - add 7/10 - 10/1
$ 194.00 - add for $.25 wage increase
$3,490.00 - gross backpay
$2.358.00 - less interim earnings
$1,132.00 - net backpay

Fourth Quarter:
$2,586.00 - 1989 wages 10/2 - 12/31
$ 152.00 - add for $.25 wage increase
$2,738.00 - gross backpay
$2.340.00 - less interim earnings
$ 398.00 - net backpay

First Quarter:
$3,756.00 - 1989 wages 1/1 - 4/2
$ 221.00 - add for $.25 wage increase
$3,977.00 - gross backpay
$2.124.00 - less interim earnings
$1,853.00 - net backpay

Second Quarter:
$3,171.00 - 1989 wages 4/3 - 6/25
$ 187.00 - add for $.25 wage increase
$3,358.00 - gross backpay
$2.227.00 - less interim earnings
$1,131.00 - gross backpay

Third Quarter:
$3,561.00 - 1989 wages 6/26 - 10/1
$ 209.00 - add for $.25 wage increase
$ 161.00 - add for $.50 wage incr. eff. 8/26/91
$3,931.00 - total gross backpay
$2,384.00 - less interim earnings
$1,547.00 - net backpay

Fourth Quarter:
$2,586.00 - 1989 wages 10/2 - end
$ 456.00 - add for $.75 wage increase
$3,042.00 - gross backpay
$2.247.00 - less interim earnings
$ 795.00 - net backpay

Vidal Lopez, Backpay (continued)

1992

First Quarter:
$3,756.00 - 1989 wages
$ 663.00 - add for $.75 wage increase
$4,419.00 - gross backpay
$2.297.00 - less interim earnings
$2,122.00 - net backpay

Second Quarter:
$3,171.00 - 1989 wages
$ 560.00 - add for $.75 wage increase
$3,731.00 - gross backpay
S2.567.00 - less interim earnings
$1,164.00 - net backpay

Third Quarter:
$3,561.00 - 1989 wages
$ 628.00 - add for $.75 wage increase
$4,189.00 - gross backpay
$2.660.00 - less interim earnings
$1,529.00 - net backpay

Fourth Quarter:
$3,042.00 - gross backpay incl. $.75 increase
$2.890.00 - interim earnings
$ 152.00 - net backpay

1993

First Quarter:
$4,419.00 - gross backpay incl. $.75 increase
$2.175.00 - less interim earnings
$2,244.00 - net backpay

Second Quarter:
$3,731.00 - gross backpay incl. $.75 increase
$2.775.00 - less interim earnings
$ 956.00 - net backpay

Third Quarter:
$4,189.00 - gross backpay incl.$.75 increase
$2.800.00 - less interim earnings
$1,389.00 - net backpay

Fourth Quarter:
$3,042.00 - gross backpay incl. $.75 increase
$2.820.00 - less interim earnings
$ 222.00 - net backpay

Vidal Lopez, Backpay (continued)

<u>1994</u>

First Quarter:
$4,419.00 - gross backpay incl. $.75 increase
$2.142.00 - interim earnings
$2,277.00 - net backpay

Total Net backpay, without interest, as of
March 31, 1994 = $18,911.00