

King City, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)	
VALLEY FARMING COMPANY,)	Case No. 93 -CE- 13 -SAL
)	
Respondent ,)	
)	
and)	
)	
HECTOR RAMIREZ,)	20 ALRB No. 4
)	April 29, 1994
Charging Party.)	
)	

DECISION AND ORDER

On December 17, 1993 Administrative Law Judge (ALJ) Douglas Gallop issued his Order Granting Motions for Default and Decision of the ALJ (ALJD) .¹ The ALJ found that Valley Farming Company (Respondent) had unlawfully discharged Hector Ramirez, the Charging Party. On January 10, General Counsel filed an exception seeking to make final the backpay amount set forth in its consolidated Complaint and Backpay Specification.

The charge in this case was personally served on Respondent on July 30 . General Counsel's October 4 Order Consolidating Complaint and Compliance Specification (Specification) were personally served on Fred Rainey (Rainey) , Respondent's principal, on October 7. Respondent filed no response. After the period to answer expired, on October 26, General Counsel filed its Motion to Make Allegations in Backpay Specification True and for Default Judgment and supporting Points

¹ All dates are in 1993 unless otherwise stated.

and Authorities. On November 11, a Board agent personally served Fred Rainey with the Motion to Make Specification True and the supporting Points and Authorities.

On November 24, the ALJ issued an Order to Show Cause re: Failure to Answer Complaint and Formal Backpay Specification, directing Respondent to file both answers to the complaint and specification and declarations showing cause for not having timely answered. The ALJ's November 24 Order to Show Cause directed General Counsel to serve General Counsel's pleadings, all supporting declarations, exhibits and memoranda of points and authorities and the Order to Show Cause on Respondent. On November 30, a Board agent personally served Rainey with these papers, together with the ALJ's November 24 Order to Show Cause.

On December 17, 1993, the ALJ granted General Counsel's Motion and issued the ALJD. The ALJD approved General Counsel's methodology for computing backpay, but did not adopt the \$800 net backpay figure stated in the specification as the correct amount of backpay. The order in the ALJD included a provision directing Respondent to furnish information and records, apparently the earnings of comparable employees from the period following Ramirez' termination, to permit the development of an exact Figure.

The ALJD was served on Respondent by certified mail, and returned to the Executive Secretary undelivered, with postal service notations on the envelope showing two notices to Respondent of attempt to deliver, and with a Return to Sender

stamp with "Refused" marked as the reason for return.

General Counsel excepted only to the ALJ's failure to adopt the \$800 backpay figure set forth in the specification. Respondent has filed neither an exception nor a reply to General Counsel's exception. Respondent was served with the exception and supporting papers by certified mail, which was returned unclaimed after two notices of attempts to deliver.

In the absence of any responsive pleadings to a complaint or a backpay specification, the Board is entitled to conclude that the allegations are true, and issue an order consistent with those findings. The Board's regulations provide for summary determination in the absence of a response both to complaints and backpay specifications. Section 20230 (Cal. Code of Regs., tit. 8, sec. 20230)² requires the respondent to file an answer within 10 days of service of the complaint and section 20232 requires a specific answer to each allegation in the complaint. Section 20232 also provides that in the absence of such a specific answer, the Board may find the allegations true. Section 20292(c) provides that in the absence of a timely response to a backpay specification, the ALJ may find the allegation of the specification to be true and issue an appropriate recommended order. In the absence of timely filed exceptions, the Board may adopt the ALJ's recommended order.

In John Gardoni (1982) 8 ALRB No. 62, no answer was

² All subsequent citations to the Board's regulations herein will appear as "section" followed by the appropriate section number.

filed until after General Counsel had moved for summary judgment, and after a further extension of time to file an answer. The Board held that in these circumstances, it could summarily find the complaint true, relying on sections 20230 and 20232. In Azteca Farms (1982) 18 ALRB No. 15, the Board held that it could grant summary judgment based on the failure to timely file an answer to an unfair labor practice complaint and backpay specification. The appropriateness of summary disposition in this case, where Respondent has chosen to file no response, is clearer than Azteca and Gardoni, where belated pleadings were filed.

While it has not been shown here that Respondent physically received the ALJD and General Counsel's exception, Respondent had been personally served with sufficient pleadings prior to the ALJD to be able to understand the violation it is alleged to have committed, the basis and extent of backpay it is alleged to be liable for, and the need to file responsive pleadings. The Complaint and Specification were sufficiently detailed to enable Respondent to attempt to controvert them. Additionally, Respondent was served with the Board's Fact Sheet, explaining in detail the effect of the absence of a response and the issuance of the ALJD and the Board's exceptions procedure.

Well established National Labor Relations Board precedent holds that service is perfected when a respondent is notified of and refuses certified mail. (e.g., Powell & Hunt Coal Co. (1990) 293 NLRB 842 [131 LRRM 1279], fn. 1.) California

law is similar where service by mail is allowed, as the ALRA specifically authorizes in section 1151.4(a): "Where a statute provides for service by registered or certified mail, the addressee cannot assert failure of service when he wilfully disregards a notice of certified mail delivered to his address under circumstances where it can reasonably be inferred that the addressee was aware of the nature of the correspondence." (Witkin, Cal. Proc., sec. 765(c), quoting from Hankla v. Governing Board (1975) 46 Cal.App.3d 644, 655 [120 Cal.Rptr. 827] .)

Respondent's wilful refusal to respond is even more clearly established here than in cases like Powell & Hunt and Hunt. Respondent has intentionally failed and refused to accept service statutorily authorized or to answer when served, and has established a pattern of consciously ignoring the Board proceeding. Therefore, the Board can properly issue an order against Respondent based on the Specification.

The ALJD withheld adoption of the backpay figure alleged in the Specification to allow Respondent to provide the fuller information available to it, contemplating that Respondent would present further evidence, and General Counsel's exception seeks to have the amount alleged in the backpay specification found to be true.

In view of Respondent's conscious choice not to dispute gross earnings and not to come forward with interim earnings information, and the clear authority in our regulations to find

the allegations of an unanswered backpay specification to be true, the Board sustains General Counsel's exception. For the Board to continue to defer final determination of backpay and interim earnings until Respondent comes forward with its information would make Respondent's conscious choice to ignore the proceeding an absolute roadblock to issuing an enforceable order.

The Specification states that it will be based on records of comparable employees during the backpay period, and concludes that, based on information already obtained by the Region, the net backpay, after deduction of interim earnings, is \$800. Since the record indicates that Respondent has provided no records, any information relied on by the Regional Director necessarily was furnished by the Charging Party.

While Respondent's records of the earnings of comparable employees might contribute to greater accuracy in calculating a gross backpay figure, the lack of such records is not an insuperable obstacle to determining backpay. Backpay computations are necessarily approximations, and reasonable approximations may properly be used where the circumstances make more exact calculations difficult or impossible. (Heavy and Highway Construction Workers. Local Union 158 (Constructors Association of Eastern Pennsylvania) (1990) 301 NLRB 35, 36 [137 LRRM 1223].) Gross backpay can properly be determined based on the discriminatee's own past earnings. (Honda of Mineola (1990) 303 NLRB 676, 677 [138 LRRM 1205].) The Regional Director

therefore properly calculated the amount of backpay stated in the Specification, in the absence of additional records from Respondent.

Unlike the practice of the NLRB, section 20290 (b) of this Board's regulations allows the Board to consolidate unfair labor practice liability and backpay proceedings even though the entire period of accrual has not closed. This may result in a further period of backpay accrual not included in the first Board order because the discriminatee has not yet been reinstated or waived reinstatement. (Anthony Harvesting (1992) 18 ALRB No. 7.) This necessarily implies that further specifications may issue to cover any accrual of backpay that may occur following October 4, 1993, the date of issuance of the Specification before the Board in this case.

Except as explained above, the Board adopts the findings, conclusions and rulings of the ALJ.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Valley Farming Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unlawfully discharging any agricultural employee because he/she has engaged in activity protected by section 1152 of the Act;

(b) In any like or related manner interfering

with, restraining or coercing agricultural employees in the exercise of their rights guaranteed by section 1152 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Hector Ramirez immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights or privileges of employment.

(b) Make whole Hector Ramirez for all wages or other economic losses he suffered as a result of Respondent's unlawful discharge from the date of said discharge until October 4, 1993, as set forth in the Backpay Order below, and for any future periods of economic loss resulting from Respondent's unlawful discharge of Hector Ramirez, the makewhole amount to be computed in accordance with established Board precedents, plus interest thereon to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

(c) Preserve and, upon request, make available to the Board and its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and any amounts of backpay due under the terms of this Order remaining to be determined.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of the Order, to all agricultural employees employed by Respondent at any time during the period from March 15, 1993 to March 15, 1994.

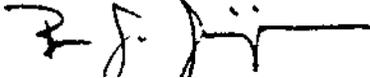
(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) to be determined by the Regional Director and exercise due care to replace notices which have been altered, defaced, covered, or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages to all of its agricultural employees on company time at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for work time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

BACKPAY ORDER

Respondent, its officers, agents, successors and assigns shall pay \$800 to Hector Ramirez, plus interest to the date of payment calculated in accordance with the Board's order in E.W. Merritt Farms (1988) 14 ALRB No. 5. DATED: April 29, 1994



BRUCE J. JANIGIAN, Chairman



IVONNE RAMOS RICHARDSON, Member



LINDA A. FRICK, Member

CASE SUMMARY

VALLEY FARMING COMPANY
(Hector Ramirez)

20 ALRB No. 4
Case No. 93-CE-13-SAL

ALJ's Decision

ALJ granted summary judgment based on General Counsel's motion and showing that Respondent had never answered the Complaint and Backpay Specification. General Counsel's moving papers showed that the charge, complaint and backpay specification had all been personally served on Respondent. The ALJ specifically approved General Counsel's methodology for computing backpay, but did not adopt the backpay figure alleged to represent the approximate amount of backpay in the specification, which was to be based on comparable employees, and on Charging Party's own earnings and information the Region had obtained on Charging Party's interim earnings.

Board Decision

General Counsel excepted only to the ALJ's failure to adopt the backpay figure stated in the Specification as a reasonable approximation of backpay.

The Board held that under California law, where service by mail is authorized, where a party has been served by certified mail and the paper is returned with entries by the postal service showing that notice of attempts to deliver have been made, and where the document is not delivered because it is either refused or unclaimed, sufficient service has been shown to allow the Board to proceed. The Board noted that NLRB procedural precedent is to the same effect.

The Board sustained the General Counsel's exception, finding that the Specification recited sufficient facts to show that a reasonable determination had been made even in the absence of Respondent's records to show earnings of comparable employees. The Board noted that otherwise, Respondent's established pattern of wilfully ignoring the Board's proceeding would become a roadblock to arriving at an enforceable backpay order. The Board adopted the backpay figure stated in the Specification to cover the period from the date of discharge to the date of issuance of the specification. The Board noted that further specifications may be required to liquidate any amount of backpay that may accrue after the end of the backpay period covered by the specification herein.

* * *

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

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Salinas Regional Office of the Agricultural Labor Relations Board by Hector Ramirez, the General Counsel of the ALRB issued a complaint which alleged that we, Valley Farming Company, had violated the law. The Board subsequently determined that we did violate the law by discharging Hector Ramirez on March 15, 1993, for engaging in protected concerted activity, namely, protesting certain terms of his employment.

The ALRB has directed us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation,
4. To bargain with your employer about your wages and working conditions through a bargaining representative chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge or otherwise discriminate against employees because they protest about wages or other terms and conditions of their employment.

WE WILL restore Hector Ramirez to his former position and we will reimburse him with interest for the loss in pay or other economic losses which the Board has and may determine he suffered as a result of our unlawful acts.

DATED:

VALLEY FARMING COMPANY

By: _____

Representative

Title

If you have questions about your rights as a farm worker or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907-1899. The telephone number is (408) 443-3161.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:)
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VALLEY FARMING COMPANY,) Case No. 93-CE-13-SAL
)
Respondent,)
)
and)
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HECTOR RAMIREZ,)
)
Charging Party.)
_____)

Appearances:

Marvin Brenner
Salinas ALRB Regional Office
112 Boronda Road
Salinas, California 93907-1899

Before: Douglas Gallop
Administrative Law Judge

ORDER GRANTING MOTIONS FOR DEFAULT AND
DECISION OF THE ADMINISTRATIVE LAW JUDGE

Statement of the Case and Order Granting

Motions for Default Judgment

This action alleges that Respondent, a sole proprietorship owned by Fred Rainey, violated section 1153(a) of the Agricultural Labor Relations Act (hereinafter Act). A complaint issued on June 11, 1993, and it was served that same date on Respondent by certified mail. On July 30, 1993, a duplicate copy of the complaint was again served on Respondent, by leaving a copy thereof in Respondent's mailbox at its business address. When Respondent failed to answer the Complaint, a Motion to Make Allegations in Complaint True and For Default Judgment issued, on September 3, 1993.

On October 4, 1993, a Notice of Hearing and Backpay Specification issued. That same date, an Order Consolidating Complaint and Compliance Specification issued. On October 7, 1993, the Motion for Default Judgment on Complaint, the Backpay Specification and the Order Consolidating Complaint were served on Respondent, by personally serving Fred Rainey.

On October 26, 1993, a Motion to Make Allegations in Backpay Specification True and for Default Judgment issued. This Motion was served on Respondent, by personally serving Fred Rainey, on November 11, 1993. To date, Respondent has failed to answer either the Complaint or the Backpay Specification.

On November 24, 1993, the undersigned issued an Order to Show Cause re: Failure to Answer Complaint and Formal Backpay Specification, which was served on Respondent, first by certified mail on that date, and then personally on Fred Rainey, on November

30, 1993. The Order to Show Cause directed Respondent, by no later than the close of business on December 6, 1993, to file proposed answers to the Complaint and Backpay Specification, together with sworn declarations establishing good cause for Respondent's failure to file timely answers, as set forth in sections 20230 and 20292(a) of the California Code of Regulations. To date, Respondent has failed to respond to the Order to Show Cause.

Inasmuch as Respondent has been properly served with the Complaint, Backpay Specification, Motions for Default and Order to Show Cause, and has still failed to file any responses or answers thereto, the motions are hereby GRANTED, pursuant to sections 20232 and 20292(c) of the Regulations. Based on the entire record of these proceedings, including the motions, declarations and pleadings filed herein, I make the following:

Findings of Fact and Conclusions of Law

1. A true and correct copy of the original charge was served on Respondent on March 30, 1993 and filed by the Charging Party on March 31, 1993.
2. Respondent is now, and has been at all times material herein, owned by Fred Rainey, a sole proprietorship doing business as and trading under the name of Valley Farming, with an office and principal place of business located in King City, California, where it is engaged in the growing and cultivation of row crops.
3. By virtue of the facts set forth in Paragraph 2 above, Respondent is now, and has been at all times material

herein, an agricultural employer engaged in agriculture within the meaning of Section 1140.4, subsections (a) and (c) of the Act.

4. At all times material herein, the Charging Party has been an agricultural employee within the meaning of Section 1140.4(b) of the Act.

5. At all times material herein, the following persons occupied the positions set forth opposite their respective names and have been, and are now, agents of Respondent, acting on its behalf and supervisors within the meaning of Section 1140.4(j) of the Act:

Fred Rainey.....General Manager
Julio _____ (last name unknown) ...Foreman

6. On or about March 15, 1993, Respondent through its agents discriminatorily discharged Hector Ramirez because of his protected concerted activities.

7. By the acts and conduct described in Paragraph 6 above, and for the reasons set forth therein, Respondent did interfere with, restrain and coerce its agricultural employees in the exercise of the rights guaranteed in Section 1152 of the Act, and Respondent did thereby engage in an unfair labor practice within the meaning of Section 1153 (a) of the Act.

8. The backpay period commences on March 15, 1993, and will continue until Respondent offers Hector Ramirez reinstatement to his former position of employment, or if his position no longer exists, to a substantially equivalent position, unless good cause exists to terminate Respondent's backpay liability on some other date.

9. The information and methodology utilized by the General Counsel and explained on page two of the Specification is a reasonable and proper means of ascertaining the amount of gross earnings for Hector Ramirez.

10. It is appropriate that interest be added to the backpay, from March 15, 1993, and that the interim earnings of Hector Ramirez be deducted from the gross backpay.

Recommended Order

Upon the basis of the entire record, the foregoing findings of fact and conclusions of law, and pursuant to section 1160.3 of the Act, Respondent Valley Farming Company, its owner(s), agents, successors and assigns are ordered to:

1. Cease and desist from:

a.) Unlawfully discharging any agricultural employee because he/she has engaged in activity protected by Section 1152 of the Act;

b.) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of their rights guaranteed by Section 1152 of the Act;

2. Take the following affirmative action designed to effectuate the policies of the Act;

a.) Rescind the discharge of Hector Ramirez;

b.) Offer Hector Ramirez immediate and full reinstatement to his former position of employment, or if his former position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges of employment;

c.) Make whole Hector Ramirez for all wages or other economic losses he suffered as a result of Respondent's unlawful discharge. 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 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;

d.) Preserve and, upon request, make available to the Board and its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary for a determination, by the Regional Director, of the economic losses due under the Board's order;

e.) Sign the attached Notice to Agricultural Employees and after translation by a Board agent into all appropriate languages, reproduce sufficient copies of each language for the purposes set forth in the Board's order;

f.) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Board's Order, to all agricultural employees employed by Respondent at any time from March 15, 1993 until the date of the mailing of this Notice;

g.) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by

the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed;

h.) Arrange for a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period;

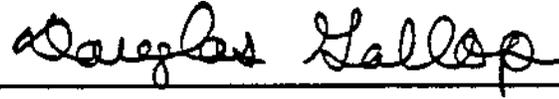
i.) Provide a copy of the Notice to each agricultural employee hired to work by Respondent for one year following the issuance of the final order in this matter; and,

j.) Notify the Regional Director in writing, within 30 days after the date of the issuance of this order, of the steps Respondent has taken to comply with its terms and continue to report periodically thereafter, at the Regional • Director's request, until full compliance has been achieved.

3. Cooperate with the General Counsel in providing the information necessary to determine Hector Ramirez' daily backpay rate, and if applicable, dates of seasonal employment, based on the methodology set forth in the Backpay Specification. Should Respondent fail to provide such information within 14 days of a request therefor, the General Counsel may file a motion for a

supplemental order, said motion to set forth the specific daily rate of backpay and if applicable, dates of seasonal employment, together with the basis for such determinations.

DATED: December 17, 1993

A handwritten signature in cursive script that reads "Douglas Gallop". The signature is written in black ink and is positioned above a solid horizontal line.

DOUGLAS GALLOP
Administrative Law Judge

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3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
4. To bargain with your employer about your wages and working conditions through a bargaining representative chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT discharge or otherwise discriminate against employees because they protest about wages or other terms and conditions of their employment.

WE WILL restore Hector Ramirez to his former position and we will reimburse him with interest for the loss in pay or other economic losses which the Board has and may determine he suffered as a result of our unlawful acts.

DATED:

VALLEY FARMING COMPANY

By: _____
Representative Title

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