

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MAGGIO-TOSTADO, INC.,)	
)	
Respondent,)	Case No. 75-CE-41-R
)	
and)	4 ALRB No. 36
)	
UNITED FARM WORKERS OF AMERICA,)	
AFL-CIO,)	
)	
Charging Party.)	

AMENDMENTS TO SUPPLEMENTAL DECISION AND ORDER

The Supplemental Decision and Order which issued in this matter on June 15, 1978, is hereby amended to correct omissions and typographical and mathematical errors, as follows:

1. On page 6 of the Decision and Order, change the total amounts of back pay due as follows :

- a) for Maria de la Luz Avila Iniquez, from \$409.37 to \$423.03;
- b) for Dolores Angulo, from \$409.37 to \$423.03;
- c) for Teresita Angulo, from \$1266.72 to \$1280.38;
- d) for Enrico Lara, from \$1048.49 to \$1062.15;
- e) for Osvaldo Vargas, from \$1459.70 to \$1473.36;
- f) for Armando Nieblas de la Cruz, from \$2300.77 to \$2314.43;
- g) for Aurora Castro, from \$3771.05 to \$3806.72; and
- h) for Joel Vargas, from \$3077.42 to \$3113.12.

2. Add to Appendix A, page 1, under the heading 1975 1976 Season, the following three lines:

Week Ending 11-1-75 @ \$2.535 per hour

11-1	5.39 hours	<u>\$13.66</u>
	Weekly Total	\$13.66

3. On page 7 of Appendix A, change the figures contained in the middle column for the week ending 11-14-76 to s

7.00	hours
7.26	hours
10.43	hours
7.68	hours
8.70	hours
4.95	hours

4. On page 7 of Appendix A, for the week ending 11-21-76;

a) between the dates 11-15 and 11-17, add the following line:

11-16	8.63 hours	\$22.01
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b) change the weekly total from \$73.40 to \$95.41.

5. On page 1 of Appendix B, under the name Maria de la Luz Avila Iniquez:

a) add the following line above the line beginning 11/08/75:

11/01/75	\$13.66	\$13.66
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b) change the TOTAL from \$409.37 to \$423.03.

6. On page 1 of Appendix B, under the name Delores Angulo:

a) add the following line above the line begin-

ning 11/08/75:

11/01/75	\$13.66	\$13.66
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b). change the TOTAL from \$409.3 to \$423.03.

7. On page 1 of Appendix B, under the name Teresita

Angulo:

a) add the following line above the line begin

ning 11/08/75:

11/01/75	\$13.66	\$13.66
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b), change the TOTAL on page 2 from \$1266.72 to \$1280.38.

8. On page 2 of Appendix B, under the name Enrico Lara:

a) add the following line above the line begin

ning 11/08/75:

11/01/75	\$13.66	\$13.66
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b) change the TOTAL from \$1048.49 to \$1062.15.

9. On page 3 of Appendix B, under the name Osvaldo

Vargas :

a) add the following line above the line begin-

ing 11/08/75:

11/01/75	\$13.66	\$13.66
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b) in the line beginning 11/21/76, change the amount in the second column from \$73.40 to \$95.41;

c) on page 4, change the SUB-TOTAL from \$1429.70 to \$1443.36 and the TOTAL from \$1459.70 to \$1473.36.

10. On page 4 of Appendix B, under the name Armando

Nieblas De La Cruz:

a) add the following line above the line beginning 11/08/75:

11/01/75	\$13.66	\$13.66
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b) on page 5, in the line beginning 11/21/76, change the amount in the second column from \$73.40 to \$95.41;

c) on page 5 change the TOTAL from \$2300.77 to \$2314.43.

11. On page 5 of Appendix B, under the name Aurora Castro;

a) in the line beginning Nov.-Dec. 1975, change the amount in the second column from \$880.59 to \$894.25 and the amount in the fourth column from \$617.39 to \$631.05;

b) on page 6, in the line beginning Nov. 1976, change the amount in the second column from \$277.78 to \$299.79 and the amount in the fourth column from \$118.78 to \$140.79.

c) on page 6, change the SUB-TOTAL from \$3508.55 to \$3544.22 and the TOTAL from \$3771.05 to \$3806.72.

12. On page 6 of Appendix B, under the name Joel Vargas:

a) add the following line above the line beginning 11/0.8/75

11/01/75	\$13.66	\$13.66
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b) in the line beginning 11/08/75, change the amounts in the second and fourth columns from \$94.40 to \$94.43;

c) on page 7, in the line beginning 11/21/76, change the amounts in the second and fourth columns from \$73.40 to \$95.41;

d) on page 7, change the TOTAL from \$3077.42
to \$3113.12.

DATED: September 19, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MAGGIO-TOSTADO, INC.,)	
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Respondent, and)	Case No. 75-CE-41-R
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UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	4 ALRB No. 36
)	
<u>Charging Party.</u>)	

SUPPLEMENTAL DECISION AND ORDER

On April 18, 1977, the Agricultural Labor Relations Board issued a Decision and Order in the above-captioned proceeding (3 ALRB No. 33) , finding, inter alia, that Respondent had discriminatorily discharged employees Maria de la Luz Iniquez, Joel Vargas, Osvaldo Vargas, Dolores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas de la Cruz, in violation of Section 1153 (c) and (a) of the Agricultural Labor Relations Act and directing that Respondent reinstate and reimburse the said discriminatees for any loss of pay suffered as a result of said violations.

On July 13, 14 and 15, 1977, a hearing was held before Administrative Law Officer (ALO) Alexander B. Reisman for the purpose of determining the amount of back pay due the eight discriminatees. The ALO issued his supplemental decision, attached hereto, on September 2, 1977, in which he made findings as to the amount of back pay due each discriminatee. Thereafter, Respondent, General Counsel and the Charging Party each filed

exceptions to the ALO's supplemental decision and a supporting brief. Respondent and the Charging Party also filed responses to exceptions to the ALO's supplemental decision.

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

The Board has considered the entire record and the ALO's supplemental decision in light of the exceptions and briefs and has decided to affirm the ALO's findings, conclusions and recommendations to the extent consistent with this opinion.^{1/}

A. Determining Gross Back Pay

It has been the practice of the National Labor Relations Board to determine net back pay, in general, by subtracting the amounts earned by a discriminatee in interim employment, reduced by necessary expenses incurred in obtaining and maintaining such interim employment, from the gross amount the discriminatee would have earned, absent discrimination, from the employer which unlawfully discharged him.

Respondent, the Charging Party, the General Counsel and the ALO have all proposed different formulas for determining gross back pay. We have considered each proposal in light of the

^{1/} Respondent excepts that it was not allowed to see employment records of another employer for which some of the discriminatees worked during the back-pay period and which were used by the ALO in computing the interim earnings of the discriminatees. As Respondent did not object to the procedure used for handling the records at the hearing and, as it was not prevented from going to the source and obtaining the records, and has not raised any issue regarding the accuracy of the ALO's figures, the exception is rejected.

record and find none of the proffered formulas to be appropriate in this case. ^{2/}

The National Labor Relations Board endeavors to restore the employee to the position he would have enjoyed if he had not been discriminatorily discharged. NLRB v. United States Air Conditioning Corp., 336 F. 2d 275, 277 (C.A. 6, 1964). However, in view of the large and fluctuating numbers of employees employed by Respondent after the discharge, the high turnover among these employees and the lack of a discernible seniority system in layoff and rehiring, a precise restoration of the status quo ante in this case is not possible. As we cannot determine the exact amount each employee would have earned but for the discrimination, we have turned to a method of calculation which we consider to be equitable, practicable, and in consonance with the policy of the Act.

To determine the weekly gross back-pay figures, as set forth in Appendix A, attached, we have divided the total

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^{2/}In. deciding upon an appropriate formula, the Board also has been unable to rely on traditional measures employed by the National Labor Relations Board. (See National Labor Relations Board Casehandling Manual (Part Three), Compliance Proceedings, August 1977, Sections 10534-10546.) Thus, the work history of the eight discriminatees with the Respondent is of too short a duration to base a formula for gross back pay on their working hours and/or earnings prior to the layoffs. Moreover, there is no record evidence from which we can determine the post-discrimination pay of "comparable" employees, and no basis on which we can designate as "replacements" any of the hundreds of employees who were hired after the discharges, for the purpose of attributing their earnings to the discriminatees.

number of hours worked on each day^{3/} by the number of employees then working to produce the average number of working hours per employee for that day; that figure was then multiplied by the appropriate hourly wage to produce the average daily wage for employees who worked on that day. The total of the average daily wages for each week has been applied as the gross weekly back-pay of each discriminatee, as set forth in Appendix B, attached. Each discriminatee's interim earnings^{4/} have been subtracted from the gross back-pay figure to produce the net back-pay figure. Where appropriate, allowable expenses have been added to produce an adjusted net back-pay figure.

With respect to days when fewer than eight employees worked, no back-pay will accrue to any of the discriminatees, because we consider it unlikely that they would have worked on such days. On days in which eight or more employees worked at an hourly wage and others at piece rate, we have included in the calculations only those employees who worked at an hourly wage. On 10 days of the back-pay period, fewer than eight employees worked on an hourly wage basis while other employees worked on a piece-rate basis, making the total number of employees working on those days eight or more. The gross back-pay of those days will be the average of the earnings of the hourly and piece-rate

^{3/}Obtained in part from the payroll records for Willie Vela's crew, which were received in evidence at the back-pay hearing, and in part from Vela's crew records received in evidence at the related unfair labor practice hearing.

^{4/}We have corrected minor computational errors in the calculations of interim back pay made by the ALO.

workers on that day, as determined from the formulas set forth herein. For example, the gross back-pay accrued for November 24, 1975, is \$16.41, which is the average of the three separate groups working that day: hourly wage employees (\$18.02); piece-rate employees paid 50¢ a unit (\$9.47); and piece-rate employees paid 8¢ a unit (\$21.76).

Although none of the eight discriminatees worked at piece-rate while employed by Respondent (all of Respondent's employees worked for an hourly wage at the time), we have determined the gross back pay for the days on which no one worked on an hourly basis and eight or more persons worked on a piece-rate basis by multiplying the average number of units picked per employee by the appropriate piece-rate per unit.

B. Interim Earnings

The General Counsel and Charging Party excepted to the ALO's finding that Osvaldo Vargas unjustifiably quit his interim job with one employer in the Coachella Valley to seek other interim work in Blythe. We find merit in this exception.

A discriminatee may quit interim employment without forfeiting his right to back pay if there is an acceptable reason for quitting. NLRB v. Mastro Plastics Corp., 354 F. 2d 170 (C.A. 2, 1965), 60 LRRM 2579, 2584; cert, denied, 384 U.S. 972 (1966). The record reveals that over a period of three weeks, Vargas was working less and less for his employer in the Coachella Valley. He testified that he twice went to the Blythe area to look for work. Shortly after moving, he found work, and when that job ended, he sought and obtained further

employment in the Blythe area which lasted for the greater part of the back-pay period.

We find that Vargas acted properly in seeking and obtaining employment in another area, where continuous and well-paying work was available. His actions were clearly justified in view of the fact that his earnings were decreasing substantially. Hence, we conclude that he is entitled to receive back-pay as well as allowable travel and work-seeking expenses for the period during which he was seeking work and/or working in Blythe.

The General Counsel and Charging Party excepted to the ALO's finding that Armando Nieblas de la Cruz went to Mexico during the week ending January 10, 1976, and was consequently unavailable for work during that week. As the record does not reveal any evidence that Nieblas was in Mexico that week, and as the General Counsel's interim wage specifications show that he earned \$132.00 for that week, we find that Nieblas is entitled to receive the difference between the gross back-pay due and his interim earnings for that period.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Maggio-Tostado, Inc., its officers, agents, successors, and assigns, shall pay to the employees listed below, who, in our Decision and Order dated on April 8, 1977, were found to have been discriminated against by Respondent, the amounts set forth below beside their respective names, plus interest thereon

compounded at the rate of seven percent per annum:

Maria de la Luz Avila Iniguez.....	\$ 409.37
Dolores Angulo.....	\$ 409.3 7
Teresita Angulo.....	\$1,266.72
Enrico Lara.....	\$1,048.49
Oswaldo Vargas.....	\$1,459.70
Armando Nieblas de la Cruz.....	\$2,300.77
Aurora Castro.....	\$3,771.05
Joel Vargas.....	\$3,077.42

Dated: June 15, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

JOHN P. MCCARTHY, Member

APPENDIX A

1975 - 1976 Season

Week Ending 11-8-75 @ \$2.535 per hour

11-3		
11-4	7.36 hours	\$ 18.65
11-5	6.70 hours	16.98
11-6	5.64 hours	14.29
11-7	6.00 hours	15.21
11-8	6.06 hours	15.36
	5.50 hours	13.94
	Weekly Total	\$ 94.43

Week Ending 11-15-75 (@ \$2.535 per hour)

11-10	5.00 hours	\$ 12.67
11-11	6.50 hours	16.47
11-12	7.26 hours	18.40
11-13	6.57 hours	16.65
11-14	6.25 hours	15.84
11-15	5.00 hours	12.67
	Weekly Total	\$ 92.70

Week Ending 11-22-75 @ \$2.535 per hour

11-17	6.00 hours	15.21
11-18	6.00 hours	15.21
11-19	7.50 hours	19.01
11-20	8.25 hours	\$ 20.91
	145.88 boxes @ .08	11.67
	Sub-Total	\$ 32.58
	$\$32.58 \times \frac{1}{2} = \16.29	\$ 16.29
11-21	8.25 hours	\$ 20.91
	258.5 boxes @ .08	20.68
	Sub-Total	\$ 41.59
	$\$41.59 \times \frac{1}{2} = \20.79	\$ 20.79
11-22	8.25 hours	\$ 20.91
	324.14 boxes @ .08	25.93
	Sub-Total	\$ 46.84
	$\$46.84 \times \frac{1}{2} = \23.42	\$ 23.42
	Weekly Total	\$109.93

Week Ending 11-29-75 @ \$2.535 per hour

11-23	7.16 hours	\$ 18.15
	395.72 boxes @ .08	31.65
	67.5 boxes @ .50	33.75
	Sub-Total	\$ 83.55
	$\$83.55 \times \frac{1}{3} = \27.84	

\$ 27.84

APPENDIX A

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11-24	7.11 hours	\$18.02	
	18.95 boxes @ .50	9.47	
	272.05 boxes @ .08	21.76	
	Sub-Total	\$49.52	
	\$49.25 x 1/3 =	\$16.41	\$16.41
11-25	7.64 hours		\$19.36
11-26	6.07 hours		15.38
11-28	6.63 hours		16.80
11-29	6.52 hours		16.52
	Weekly Total		\$112.31

Week Ending 12-6-75 @ \$1.76 per box

12-1	7.70 boxes		\$ 13.55
12-2	7.11 boxes		12.51
12-3	5.55 boxes		9.76
12-4	10.66 boxes		18.76
12-5	9.88 boxes		17.38
12-6	9.25 boxes		16.28
	Weekly Total	\$	88.24

Week Ending 12-13-75 @ \$2.535 per hour and @ \$1.76 per box

12-7	7.14 hours	\$ 18.09	
	15.42 boxes	27.13	
	Sub-Total	\$ 45.22	
	\$45.22 x 1/2 =	\$22.61	\$ 22.61
12-8	6.57 hours	\$ 16.65	
	5.3 boxes	9.32	
	Sub-Total	\$ 25.97	
	\$25.97 x 1/2 =	\$12.98	\$ 12.98
12-9	7.16 hours	\$ 18.15	
	7.5 boxes	13.20	
	Sub-Total	\$ 31.35	
	\$31.35 x 1/2 =	\$15.67	\$ 15.67
12-10	6.33 hours		\$ 16.04
12-11	8.00 hours	\$ 20.28	
	12 boxes	21.12	
	Sub-Total	\$ 41.40	
	\$41.40 x 1/2 =		\$
12-12	9.37 hours		\$ 23.75
12-13	6.55 hours		\$ 16.60
	Weekly Total		\$128.35

Week Ending 12-20-75 @ \$2.535 per hour

12-14	7.30 hours		\$ 18.50
12-15	7.71 hours		19.54

APPENDIX A

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12-16	8.26 hours	\$ 20.93
12-17	8.71 hours	22.07
12-18	8.16 hours	20.68
12-19	6.78 hours	17.18
12-20	6.90 hours	17.49
		<u>17.49</u>
	Weekly Total	\$136.39

Week Ending 12-27-75 @ \$1.76 per box

12-21	11.12 boxes	\$ 19.57
12-22	12.77 boxes	22.47
12-23	10.55 boxes	18.56
12-24	14.25 boxes	25.08
12-26	18.50 boxes	32.56
		<u>32.56</u>

Weekly Total \$118.24

Week Ending 1-3-76 @ \$2.535 per hour

12-28	7.44 hours	\$ 18.86
12-29	9.00 hours	22.81
12-30	6.85 hours	17.36
12-31	7.90 hours	20.02
1-1	6.43 hours	16.30
1-2	6.80 hours	17.23
1-3	6.05 hours	15.33
		<u>15.33</u>

Weekly Total \$127.91

Week Ending 1-10-76 @ \$2.535 per hour

1-4	6.87 hours	\$ 17.41
1-5	6.25 hours	15.84
1-6	5.72 hours	14.50
1-7	7.50 hours	19.01
1-8	7.75 hours	19.64
1-9	9.16 hours	23.22
1-10	9.07 hours	22.99
		<u>22.99</u>

Weekly Total \$132.61

Week Ending 1-17-76 (@ \$2.535 per hour)

1-11	8.37 hours	\$ 21.21
1-12	8.55 hours	21.67
1-13	7.72 hours	19.57
1-14	9.11 hours	23.09
1-15	9.54 hours	24.18
1-16	7.62 hours	19.31
1-17	6.86 hours	17.39
		<u>17.39</u>

Weekly Total \$146.42

Week Ending 1-24-76 @ \$2.535 per hour

1-18	6.54 hours	\$ 16.57
1-19	7.90 hours	20.02
1-20	7.25 hours	18.37
1-21	7.90 hours	20.02
1-22	8.36 hours	21.19
1-23	8.58 hours	21.75
1-24	7.33 hours	18.58
		<u>18.58</u>

Weekly Total \$ 136.50

APPENDIX A

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Week Ending 1-31-76 @ \$2.535 per hour

1-25	6.12 hours	\$ 15.51
1-26	6.00 hours	15.21
1-27	6.09 hours	15.43
1-28	7.15 hours	18.12
1-29	7.58 hours	19.21
1-30	7.42 hours	18.80
1-31	5.84 hours	<u>14.80</u>
	Weekly Total	\$117.08

Week Ending 2-7-76 @ \$2.535 per hour

2-1	4.95 hours	\$ 12.54
2-2	5.45 hours	13.81
2-3	7.08 hours	17.94
2-4	8.20 hours	20.78
2-5	7.63 hours	19.34
	Weekly Total	\$ 84.41

Week Ending 2-14-76 @ \$2.535 per hour and @ \$1.76 per box

2-9	7.50 hours	\$19.01
	13.0 boxes	22.88
	Sub-Total	\$41.89
	$\$41.89 \times \frac{1}{2} = \20.94	\$ 20.94

2-10	7.77 hours	\$ 19.69
2-11	8.20 hours	20.78
2-12	7.92 hours	20.07
2-13	8.07 hours	20.45
2-14	6.20 hours	<u>15.71</u>
	Weekly Total	\$117.64

Week Ending 2-21-76 @ \$2.535 per hour

2-15	6.30 hours	\$ 15.97
2-16	6.42 hours	16.27
2-17	7.35 hours	18.70
2-18	9.15 hours	23.19
2-19	8.93 hours	22.63
2-20	8.13 hours	20.60
2-21	5.62 hours	14.24
	Weekly Total	\$131.60

Week Ending 2-28-76 @ \$2.535 per hour

2-22	5.28 hours	\$ 13.38
2-23	5.93 hours	15.03
2-23	4.66 hours	11.81
2-26	5.61 hours	14.22
2-27	5.00 hours	<u>12.67</u>
	Weekly Total	\$ 67.11

APPENDIX A

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Week Ending 3-6-76 @ \$2.535 per hour

3-1	6.30 hours	\$ 15.97
3-2	4.72 hours	11.96
3-3	5.58 hours	14.14
3-4	4.88 hours	12.16
3-5	6.15 hours	<u>15.59</u>
	Weekly Total	\$ 69.82

Week Ending 3-13-76 @ \$2.535 per hour

3-7	4.33 hours	\$ 10.97
3-8	4.81 hours	12.19
3-10	5.13 hours	13.00
3-11	6.12 hours	15.51
3-12	5.95 hours	<u>15.08</u>
	Weekly Total	\$ 66.75

Week Ending 3-20-76 @ \$2.535 per hour

3-14	4.80 hours	\$ 12.16
3-15	4.70 hours	11.91
3-17	5.70 hours	14.44
3-18	4.22 hours	10.69
3-19	7.50 hours	<u>19.01</u>
	Weekly Total	\$ 68.21

Week Ending 3-27-76 @ \$2.535 per hour

3-21	5.00 hours	\$ 12.67
	Weekly Total	\$ 12.67

1976 - 1977 Season

Week Ending 9-19-76 (3 \$2.55 per hour)

9-14	5.00 hours	\$ 12.75
9-15	5.00 hours	12.75
9-16	5.00 hours	12.75
9-17	5.00 hours	12.75
9-18	5.00 hours	<u>12.75</u>
	Weekly Total	\$ 63.75

Week Ending 9-26-76 @ \$2.55 per hour

9-20	5.50 hours	\$ 14.02
9-21	5.00 hours	12.75
9-22	5.02 hours	12.80
9-23	5.04 hours	<u>12.85</u>
	Weekly Total	\$ 52.42

APPENDIX A

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Week Ending 10-3-76 @ \$2.55 per hour

9-27	7.50 hours	\$ 19.12
9-28	5.87 hours	14.96
9-29	5.58 hours	14.22
9-30	4.21 hours	10.73
10-1	5.50 hours	14.02
10-2	5.50 hours	<u>14.02</u>
	Weekly Total	\$ 87.07

Week Ending 10-10-76 @ \$2.55 per hour

10-4	5.00 hours	\$ 12.75
10-5	6.00 hours	15.30
10-6	5.00 hours	12.75
10-7	5.20 hours	13.26
10-8	5.00 hours	12.75
10-9	5.50 hours	<u>14.02</u>
	Weekly Total	\$ 80.83

Weekly Ending 10-17-76 @ \$2.55 per hour

10-11	7.50 hours	\$ 19.12
10-12	7.50 hours	19.12
10-13	6.50 hours	16.57
10-14	6.30 hours	16.06
10-15	3.00 hours	7.65
10-16	6.00 hours	<u>15.30</u>
	Weekly Total	\$ 93.82

Week Ending 10-24-76 @ \$2.55 per hour

10-18	6.50 hours	\$ 16.57
10-19	6.76 hours	17.23
10-20	7.12 hours	18.15
10-21	7.00 hours	17.85
10-22	7.00 hours	17.85
10-23	6.00 hours	<u>15.30</u>
	Weekly Total	\$102.95

Week Ending 10-31-76 @ \$2.55 per hour

10-25	7.75 hours	\$ 19.76
10-26	7.68 hours	19.58
10-27	7.75 hours	19.76
10-28	7.87 hours	20.06
10-29	7.80 hours	19.89
10-30	6.37 hours	<u>16.24</u>
	Weekly Total	\$115.29

APPENDIX A

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Week Ending 11-7-76 @ \$2.55 per hour

11-1	8.00 hours	\$ 20.40
11-2	8.00 hours	20.40
11-3	8.00 hours	20.40
11-4	7.14 hours	18.20
11-5	3.00 hours	<u>7.65</u>
		Weekly Total \$ 87.05

Week Ending 11-14-76 @ \$2.55 per hour

11-8	8.06 hours	\$ 17.85
11-9	4.23 hours	18.51
11-11	5.50 hours	26.59
11-12	5.80 hours	19.58
11-13	5.20 hours	22.18
11-14		<u>12.62</u>
		Weekly Total \$117.33

Week Ending 11-21-76 @ \$2.55 per hour

11-15	8.06 hours	\$ 20.55
11-17	4.23 hours	10.78
11-18	5.50 hours	14.02
11-19	5.80 hours	14.79
11-20	5.20 hours	<u>13.26</u>
		Weekly Total \$ 73.40

Week Ending 12-31-76 @ \$2.55 per hour

12-27	6.77 hours	\$ 17.26
12-28	8.33 hours	21.24
12-29	8.80 hours	22.44
12-30	7.90 hours	<u>20.14</u>
		Weekly Total \$ 81.08

Week Ending 1-8-77 @ \$2.55 per hour

1-5	7.70 hours	\$19.63
1-7	7.45 hours	18.99
1-8	7.50 hours	<u>19.12</u>
		Weekly Total \$ 57.74

Week Ending 1-16-77 @ \$2.55 per hour

1-9	7.33 hours	\$ 18.69
1-10	7.11 hours	18.13
1-11	7.88 hours	20.09
1-12	7.66 hours	19.53
1-13	7.20 hours	18.36
1-14	6.60 hours	<u>16.83</u>
		Weekly Total \$111.63

APPENDIX A

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Week Ending 1-23-77 @ \$2.55 per hour

1-18	7.77 hours	\$ 19.81
1-19	8.37 hours	21.34
1-20	7.20 hours	18.36
1-21	4.25 hours	10.83
		Weekly Total \$ 70.34

Week Ending 1-30-77 @ \$2.55 per hour

1-24	6.88 hours	\$ 17.54
1-25	8.12 hours	20.70
1-26	8.70 hours	22.18
1-27	5.00 hours	12.75
		Weekly Total \$ 73.17

Week Ending 2-6-77 @ \$2.55 per hour

2-1	3.33 hours	\$ 8.49
2-2	7.50 hours	19.12
2-3	8.00 hours	20.40
2-4	7.00 hours	17.85
		Weekly Total \$ 65.86

Week Ending 2-13-77 @ \$2.55 per hour

2-7	7.25 hours	\$ 18.48
2-8	7.37 hours	18.79
2-9	8.00 hours	20.40
		Weekly Total \$ 57.67

APPENDIX B

WEEK ENDING	GROSS PAYBACK	INTERIM EARNINGS	NET BACKPAY
<u>Maria De La Luz Avila Iniquez</u>			
11/08/75	\$ 94.43	-	\$ 94.43
11/15/75	92.70	-	92.70
11/22/75	109.93	-	109.93
11/29/75	112.31	-	112.31
<hr/>			
TOTAL \$ 409.37			
<u>Delores Angulo</u>			
11/08/75	\$ 94.43	-	\$ 94.43
11/15/75	92.70	-	92.70
11/22/75	109.93	-	109.93
11/29/75	112.31	-	112.31
<hr/>			
TOTAL \$ 409.3			
<u>Teresita Angulo</u>			
11/08/75	\$ 94.43	-	\$ 94.43
11/15/75	92.70	-	92.70
11/22/75	109.93	-	109.93
11/29/75	112.31	-	112.31
<hr/>			
12/06/75	88.24		
12/06/75	128.35	100.00	28.35
12/13/75	136.39	100.00	36.39
12/20/75	118.24	100.00	18.24
12/27/75		100.00	
<hr/>			
01/03/76	127.91	62.40	65.51
01/10/76	132.61	114.40	18.21
01/17/76	146.42	114.40	32.92
01/24/76	136.50	114.40	22.10
01/31/76	117.08	114.40	2.68
<hr/>			
02/07/76	84.41	114.40	-
02/14/76	117.64	114.40	3.24
02/21/76	131.60	114.40	17.20
02/28/76	67.11	114.40	-
<hr/>			
03/06/76	69.82	114.40	
03/13/76	66.75	114.40	-
03/20/76	68.21	114.40	-
<hr/>			
09/19/76	63.75	-	63.75
09/26/76	52.42	-	52.42

APPENDIX B

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<u>WEEK ENDING</u>	<u>GROSS BACKPAY</u>	<u>INTERIM EARNINGS</u>	<u>NET BACKPAY</u>
<u>Teresita Angulo cont.</u>			
cont.			
10/03/76	\$ 87.07	-	\$ 87.07
10/10/76	80.83	-	80.83
10/17/76	93.82	-	93.82
10/24/76	102.95	-	102.95
10/31/76	115.29	-	115.29
12/05/76	68.85	\$114.40	-
12/12/76	79.05	114.40	-
12/19/76	130.05	114.40	-
12/26/76	114.75	114.40	15.65
12/31/76	81.08	114.40	-
01/08/77	57.74	110.00	-
01/16/77	111.63	110.00	1.63
01/23/77	70.34	110.00	-
01/30/77	73.17	110.00	-
02/06/77	65.86	110.00	-
02/13/77	57.67	110.00	-
<hr/> TOTAL \$1266. 72 <hr/>			
<u>Enrico Lara</u>			
11/08/75	\$ 94.43	28.12	\$ 66.31
11/15/75	92.70	14.00	78.70
11/22/75	109.93	-	109.93
11/29/75	112.31	-	112.31
12/06/75	88.24	83.20	5.04
12/13/75	128.35	79.95	48.40
12/20/75	136.39	82.55	53.84
12/27/75	118.24	11.70	106.54
01/03/76	127.91	97.50	30.41
01/10/76	132.61	102.70	29.91
01/17/76	146.42	104.00	42.42
01/24/76	136.50	89.05	47.45
01/31/76	117.08	34.45	82.63
02/07/76	84.41	-	84.41
02/14/76	117.64	-	117.64
02/21/76	131.60	124.20	7.40
02/28/76	67.11	128.25	-
03/06/76	69.82	72.80	-
03/13/76	66.75	41.60	25.15
03/20/76	68.21	87.10	-
03/27/76	12.67	91.00	-
<hr/> TOTAL \$1048.49 <hr/>			

APPENDIX B

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WEEK ENDING	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
<u>Oswaldo Vargas</u>			
11/08/75	\$ 94.43	\$ 30.36	\$ 64.07
11/15/75	92.70	-	92.70
11/22/75	109.93	-	109.93
11/29/75	112.31	-	112.31
12/06/75	88.24	-	88.24
12/13/75	128.35	101.25	27.10
12/20/75	136.39	43.20	93.19
12/27/75	118.24	17.55	100.69
01/03/76	127.91	-	127.91
01/10/76	132.61	-	132.61
01/17/76	146.42	-	146.42
01/24/76	136.50	-	-
01/31/76	117.08	248.40	117.08
02/07/76	84.41	-	84.41
1/14/76	117.64	-	117.64
/21/76	131.60	130.00	1.60
/28/76	67.11	130.00	-
/06/76	69.82	130.00	-
/13/76	66.75	130.00	-
/20/76	68.21	130.00	-
/27/76	12.67	130.00	-
/19/76	63.75	73.27	-
09/26/76	52.42	73.27	-
10/03/76	87.07	73.27	13.80
10/10/76	80.83	130.00	-
10/17/76	93.82	130.00	-
10/24/76	102.95	130.00	-
10/31/76	115.29	130.00	-
11/07/76	87.05	130.00	-
11/14/76	117.33	130.00	-
11/21/76	73.40	130.00	-
11/28/76	-	170.00	-
12/05/76	68.85	170.00	-
12/12/76	79.05	170.00	-
12/19/76	130.05	206.00	-
12/26/76	114.75	206.00	-
12/31/76	81.08	206.00	-
01/08/77	57.74	206.00	-
01/16/77	111.63	206.00	-
01/23/77	70.34	206.00	-
01/30/77	73.17	206.00	-

APPENDIX B

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WEEK ENDING	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
<u>Oswaldo vargas</u>			
cont.			
02/06/77	\$ 65.86	\$206.00	-
02/13/77	57.67	206.00	-
SUB-TOTAL - \$1429.70			
ALLOWABLE EXPENSES - 30.00*/			
TOTAL - 1459.70			
<u>Armando Nieblas De La Cruz</u>			
11/08/75	\$ 94.43	\$ -	\$ 94.43
11/15/75	92.70	-	92.70
11/22/75	109.93	-	109.93
11/29/75	112.31	-	112.31
12/06/75	88.24	-	88.24
12/13/75	128.35	-	128.35
12/20/75	136.24	-	136.39
12/27/75	118.24	35.10	83.14
01/03/76	127.91	27.00	100.91
01/10/76	132.61	132.00	.61
01/17/76	146.42	79.65	66.77
01/24/76	136.50	98.55	37.95
01/31/76	117.08	108.00	9.08
02/07/76	84.41	94.00	-
02/14/76	117.64	94.00	23.64
02/21/76	131.60	94.00	37.60
02/28/76	67.11	80.00	-
03/06/76	69.82	-	69.82
03/13/76	66.75	-	66.75
03/20/76	68.21	-	68.21
03/27/76	12.67	-	12.67
09/19/76	63.75	-	63.75
09/26/76	52.42	-	52.42
10/03/76	87.07	-	87.07
10/10/76	80.83	105.00	-
10/17/76	93.82	144.75	-
10/24/76	102.95	150.00	-
10/31/76	115.29	115.50	-

*/ One round trip to Blythe - 200 miles x . 15C = \$30.00

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WEEK ENDING	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
Armando Nieblas De La Cruz <u>cont.</u>			
11/07/76	\$ 87.05	\$ -	\$ 87.05
11/14/76	117.33	21.60	95.73
11/21/76	73.40	108.00	-
11/28/76	-	97.20	-
12/05/76	68.85	85.73	-
12/12/76	79.05	28.35	50.70
12/19/76	130.05	60.00	70.05
12/26/76	114.75	60.00	54.75
12/31/76	81.08	60.00	21.08
01/08/77	57.74	60.00	-
01/16/77	111.63	-	111.63
01/23/77	70.34	-	70.34
01/30/77	73.17	-	73.17
02/06/77	65.86	-	65.86
02/13/77	57.67	-	57.67
TOTAL \$2300.77			

Aurora Castro

Nov.-Dec. 1975	\$880.59	\$263.20	\$617.39
01/03/76	127.91	-	127.91
01/10/76	132.61	-	132.61
01/17/76	146.42	-	146.42
01/24/76	136.50	-	136.50
01/31/76	117.08	-	117.08
02/07/76	84.41	-	84.41
02/14/76	117.64	-	117.64
02/21/76	131.60	-	131.60
02/28/76	67.11	-	67.11
03/06/76	69.82	-	69.82
03/13/75	66.75	-	66.75
03/20/76	68.21	-	68.21
03/27/76	12.67	120.15	-
09/19/76	63.75	-	63.75
09/26/76	52.42	-	52.42
10/03/76	87.07	-	87.07
10/10/76	80.83	-	80.83
10/17/76	93.82	-	93.82
10/24/76	102.95	-	102.95
10/31/76	115.29	-	115.29

APPENDIX B

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WEEK ENDING	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
Aurora Castro <u>cont.</u>			
Nov. 1976	\$277.78	\$159.00	\$118.78
12/05/76	68.85	-	68.85
12/12/76	79.05	-	79.05
12/19/76	130.05	-	130.05
12/26/76	114.75	-	114.75
12/31/76	81.08	-	81.08
01/08/77	57.74	-	57.74
01/16/77	111.63	-	111.63
01/23/77	70.34	-	70.34
01/30/77	73.17	-	73.17
02/06/77	65.86	-	65.86
02/13/77	57.67	-	57.67
SUB-TOTAL - \$3508.55			
ALLOWABLE EXPENSES - 262.50			
TOTAL - \$3771.05			
Joel Vargas			
11/08/75	\$ 94.40	\$ -	\$ 94.40
11/15/75	92.70	-	92.70
11/22/75	109.93	-	109.93
11/29/75	112.31	-	112.31
Dec. 1975	471.22	501.99	-
01/03/76	127.91	-	127.91
01/10/76	132.61	64.80	67.81
01/17/76	146.42	-	146.42
01/24/76	136.50	35.10	101.40
01/31/76	117.08	10.12	106.96
02/07/76	84.41	-	84.41
02/14/76	117.64	-	117.64
02/21/76	131.60	-	131.60
02/28/76	67.11	-	67.11
03/06/76	69.82	-	69.82
03/13/76	66.75	43.20	23.55
03/20/76	68.21	68.85	-
03/27/76	12.67	105.30	-
09/19/76	63.75	-	63.75
09/26/76	52.42	-	52.42

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WEEK ENDING	GROSS BACKPAY	Joel Vargas <u>Cont.</u>	INTERIM EARNINGS	NET BACKPAY
10/03/76	\$ 87.07		-	\$ 87.07
10/10/76	80.83		54.00	26.83
10/17/76	93.82		-	93.82
10/24/76	102.95		-	102.95
10/31/76	115.29		-	115.29
11/07/76	87.05		-	87.05
11/14/76	117.33		-	117.33
11/21/76	73.40		-	73.40
11/28/76	-		-	-
12/05/76	68.85		-	68.85
12/12/76	79.05		20.25	58.80
12/19/76	130.05		86.40	43.65
12/26/76	114.75		-	114.75
12/31/76	81.08		-	81.08
01/08/77	57.74		-	57.74
01/16/77	111.63		-	111.63
01/23/77	70.34		-	70.34
01/30/77	73.17		-	73.17
02/06/77	65.86		-	65.86
02/13/77	57.67		-	57.67
TOTAL \$3077.42				

CASE SUMMARY

4 ALRB No. 36

MAGGIO-TOSTADO INC.
(UFW)

Case No. 75-CE-41-R

ALO DECISION

In Maggio-Tostado Inc., 3 ALRB No. 33 (1977), the Board directed Respondent to make whole eight discriminatees. After a backpay hearing, the ALO determined the backpay periods to be November 1, 1975 through March 27, 1976, and September 14, 1976 through February 13, 1977.

The ALO further concluded that, as under the National Labor Relations Act:

- (1) After the General Counsel meets his burden of establishing the gross backpay due the discriminatees, Respondent has the burden of proving any diminution or mitigation of the backpay liability, including facts concerning the employee's interim earnings. N.L.R.B. v. Brown & Root, Inc., 311 F.2d 447 (8th Cir., 1963), N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (1972).
- (2) A discriminatee's right to backpay is not affected by his leaving the area to look for work elsewhere as long as he continues to exercise due diligence in his efforts to obtain interim employment. N.L.R.B. v. Robert Haws Co., 403 F.2d 979, 981 (6th Cir., 1968).

The ALO found that the discriminatees made a reasonable good faith effort to gain interim employment, but his formula for calculating the amount of backpay due was rejected by the Board. (See discussion below.)

BOARD DECISION

The Board affirmed, in general, the findings and conclusions of the ALO but held that because of the fluctuating number of employees, the high employee turnover rate, and the lack of any discernible seniority system in layoff and hiring, the backpay formula proposed by the ALO was not appropriate.

The Board calculated the gross weekly backpay by first multiplying the average number of hours worked per employee for each day, by the hourly rate to obtain the average daily wage. This wage taken over a week's time yielded the gross weekly backpay due. Net weekly backpay was then found by subtracting any interim weekly earnings from the corresponding gross weekly backpay due.

As the number of employees working on any given day varied, and there were eight discriminatees, the Board also made the following findings:

- (1) On days when fewer than eight employees worked, no backpay accrued to discriminatees.
- (2) On days when eight or more employees worked at an hourly rate, the hourly rate computation applied even though there were other employees working at piece rate.
- (3) On days when fewer than eight employees worked at the hourly rate and other employees worked at a piece rate, the average dally wage was computed by averaging the earnings as determined by the formula herein.
- (4) On days when no employees worked at the hourly rate, and eight or more employees worked at the piece rate, the average daily wage was derived by multiplying the average number of units picked by the piece rate per unit.

The Board rejected the ALO's finding that one employee unjustifiably quit an interim job to seek other interim employment. Noting that the dis-criminatee's earnings from interim employment were decreasing substantially, the Board held that the employee was justified in quitting the interim job to seek and obtain another and is entitled to backpay and reimbursement of his expenses incurred in seeking other interim employment.

* * *

THIS CASE SUMMARY IS FURNISHED FOR INFORMATION ONLY AND IS NOT AN OFFICIAL STATEMENT OF THE CASE, OR OF THE ALRB.

* * *

BEFORE THE
AGRICULTURE LABOR RELATIONS BOARD
STATE OF CALIFORNIA



In the Matter of:] Case No.: 75-CE-41-R
]]
MAGGIO-TOSTADO, INC. ,]
] Respondent,]
]]
and]
]]
]]
UNITED FARM WORKERS OF AMERICA,]
AFL-CIO, _____ Charging Party.]

RECOMMENDED SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ALEXANDER B. REISMAN, Administrative Law Officer: On April 18, 1977, the Agricultural Labor Relations Board issued its Decision and Order (3ALRB No. 33) directing Maggio-Tostado Inc., herein called Respondent, to make whole certain employees for their losses resulting from the unfair labor practices found to have been committed by the Respondent. The parties being unable to agree on the amount of backpay due under the terms of the Board's Order, the Acting Regional Director for the San Diego Region issued a backpay specification dated June 23, 1977. The Respondent filed an answer thereto on July 11, 1977.

A hearing was held before me at Coachella, California on July 13 through 15, 1977. On July 13, 1977, the Acting Regional Director filed amended backpay specifications. On July 14, 1977, Respondent filed an Amended Answer to Backpay Specifications. Briefs, which have been carefully considered have been received from General Counsel, Respondent and United Farm Workers of America, AFL-CIO, the Charging Party herein.

Upon the entire record in this case and on my observation of the witnesses, I make the following:

FINDING OF FACTS

I. The Backpay Period

The Board's Order provided for the reinstatement of eight employees and directed the Respondent to make them whole for any loss of earnings they may have sustained by reason of his or her termination.¹ Prior to the hearing, General Counsel obtained Respondent's records with regard to Willie Vela's crew for the 1975-1976 season. These records reflect that Vela's crew worked on a weekly basis from the week ending August 30, 1975 through the week ending March 27, 1976.²

During the hearing Respondent provided General Counsel with records for Vela's crew for the 1976-1977 season. Respondent's attorney represented that these records were unavailable prior to the hearing because essential parts had been taken from his office during a burglary, and had to be re-compiled from voluminous reports. These show that in 1976-77 Vela's crew worked only from 3 September 14, 1976 through February 13, 1977.³ Respondent stated this was all the work done by Vela's crew that season.

It is undisputed that the backpay period begins on October 31, 1975, the date the discriminatees were fired. General Counsel contends that with certain individual exceptions,⁴ the general backpay period should include the months of November and December, 1975, January, February, March, September, October, November, December, 1976, and January, February and March, 1977.⁵

General Counsel has the burden of proof to establish the gross amount of backpay due the discriminatees in question. That accomplished, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee. ⁶ It is uncontroverted that for the first season, the backpay period is November 1, 1975 through March 27, 1976.

¹The eight employees are Maria de la Luz Iniquez, Joel Vargas, Osvaldo Vargas, Delores Angulo, Teresita Angulo, Enrico Lara, Aurora Castro and Armando Nieblas de la Cruz.

²General Counsel Exhibit 2(a)(GCX2(a))

³GCX2(b)

⁴These refer to period of unavailability for certain workers not relevant to this discussion.

⁵It is conceded that the employees would not have been employed by Respondent during the months of April through August, 1976.

⁶N.L.R.B. v. Brown & Root, Inc., 311F.2d 447, 454 (8th Cir. 1963)
N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (1972)

General Counsel contends the 1976-1977 backpay period is September, 1976 through March, 1977. However, the records reflect the actual work lasted from September 14, 1976 through February 13, 1977. (GCX2(b)) Thus, I find the backpay period to be November 1, 1975 through March 27, 1976 and September 14, 1976 through February 13, 1977.

The Charging Party argues that General Counsel and the UFW were prejudiced because Respondent failed to make the 1976-1977 records available until the second day of the hearing, and concludes that the 1975-76 season should be the appropriate measure of the 1976-77 season.

I find that there was good cause for the Respondent's delay in providing the records for 1976-1977. In addition, Charging Party fails to demonstrate the asserted prejudice, and did not seek a continuance to examine the records more thoroughly or produce rebuttal evidence.

Respondent contends that they made an offer of reinstatement to the employees during contract negotiations in September, 1976. Respondent argues this should terminate its backpay liability as of that time. Aurora Castro gave the only testimony relevant to this point. She stated that she recalled discussions of seniority during the negotiations, but could not recollect any discussion of re-hiring the terminated employees.

A reinstatement offer must be made clearly and unconditionally to terminate Respondent's backpay liability.⁷ I find that Respondent failed to sustain its burden to prove such an offer was made.

II. THE METHOD OF COMPUTATION

A discriminatee is entitled to receive as backpay what (s)he would have earned had (s)he remained in the Company's employ less his(her) interim earnings. Midwest Hanger Co., 221 NLRB 911. Two questions must be addressed: (1) in what time frame should the backpay be computed? and, (2) by what formula should the amount of back pay be calculated?

A. The Appropriate Time Frame

Until 1950, NLRB backpay awards reflected the employees lost earnings for the entire backpay period less the employee's interim earnings for the whole period,

⁷ Midwest Hanger Co., 221 NLRB 911.

In F. W. Woolworth, 90 NLRB 289, the NLRB stated that the purpose of such awards was "a restoration of the situation as nearly as possible, to that which would have obtained but for the illegal discrimination," and concluded that computation of backpay and interim earnings on a quarterly basis was necessary to effectuate the basic purposes and policies of the act.

In Sunnyside Nurseries, Inc., 3 ALRB No. 42, the ALRB examined the Woolworth principal in the agricultural setting concluding that it was appropriate to calculate the net backpay on a daily basis. Here, the General Counsel propounds that net backpay be figured on a weekly basis. Thus interim earnings in any single weekly period would only be set off against gross backpay for that week not carried forward against gross backpay in the subsequent weeks. I agree that weekly a computations are appropriate to effectuate the policies of the ALRA in this case ⁸ with one exception. In periods where employee interim earnings are only available on a monthly basis, net backpay calculations must also be computed on a monthly, basis.⁹

B. The Formula for Calculating the Amount of Backpay for the Weekly Periods

While "the finding of an unfair labor practice and discriminatory discharge is presumptive proof that some backpay is owed by the employer," (N.L.R.B. v. Madison Courier, 472 F.2d 1307, 1316) determining how much is owed is often somewhat problematical. There are some general guidelines applicable to the instant case. In N.L.R.B. v. Kartarik Inc., 227 F.2d 190 (1955) the Court stated:

"Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion. These principals are, of course, intended to permit a solution of the problem of amount to be made upon any range of facts circumstances or reasonable inferences which afford a rational basis for a conclusion." (Ibid, at 193)

In N.L.R.B. v. Brown & Root Inc., 311 F.2d 447 (8 Cir., 1963), the Court noted that the purpose of backpay awards is to make the employees whole for losses suffered as the result of the Respondent's discrimination, and went on to state:

"In solving the problems which arise in backpay cases the Board is vested with wide discretion in devising procedures and methods which will effectuate the purposes of the act.

⁸N.L.R.B. v. Golay and Co., Inc., 447 F.2d 290.

⁹ e.g., Appendix II, Joel Vargas, for December, 1975

Obviously, in many cases it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations. (Ibid, at 452.)

Here all the calculations of gross backpay are based on the weekly payroll records of Willie Vela's crew for the backpay period. Respondent contends that the appropriate measure of gross backpay is the weekly average earnings of a member of Willie Vela's crew.

The Vela payroll records reflect that in any given week, there were full time workers and part time workers. Some worked only one or two days per week. If the discriminatees were full time workers, it would unfairly reduce their award to compute it on an average that included part-time workers.

The evidence on this point is inconclusive but what there is all suggests that the discriminatees were full-time employees for Maggio-Tostado. Seven discriminatees appear on the payroll records for the week ending October 25, 1975, and four appear on the records for November 1, 1975. These records indicate that each was working full-time. In addition, Lara testified that he worked full time for Respondent.

Further, Respondent produced no evidence that any of the discriminatees was ever a part-time employee. This is significant in view of the burden upon the employer to establish facts which would negative the existence of liability to a given employee.¹² Accordingly I find that the discriminatees were full-time employees of Respondent, and reject Respondent's suggestion to compute the gross backpay by averaging together the full and part-time workers.

General Counsel used the adjusted mean formula in computing he backpay¹³ specifications. This method is unfair to Respondent because it is based solely

¹⁰GCX2(a), GCX2(b)

¹¹Apparently the Vela crew payroll records provided by Respondent are incomplete.

¹²Further, any uncertainty must be resolved against Respondent. Southern Household Products, 203 NLRB 881. N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F.2d 569 (5 Cir., 1966).

¹³The adjusted mean formula is as follows: The highest and lowest wage earned by the worker working the maximum number of hours is added together and divided by two and the result is the mean wage earned that week. The mean wage earned is then multiplied by the hourly wage and the result is the adjusted mean wage for that particular week.

on the employee working the maximum number of hours in a given week. Here there were eight discriminatees. Even though they were full time workers, it is irrational to assume that for purposes of computing gross backpay, each would have worked the maximum hours worked by any worker in a given week. The basis of the computation must encompass all full time workers, not just the ones working maximum hours.

I find that the most rational formula for computing the gross backpay in any given week is to take the median number of hours worked by all employees working the maximum number of days in that week, and multiply by the applicable hourly wage. This places the weekly base number of hours in the middle range of all those, who, like the discriminatees, were full-time employees. For weeks when less than eight workers worked the maximum of days in a week, I used the average of the hours worked by the workers working the fourth and fifth most hours in a given week, and multiplied that figure by the applicable hourly wage.¹⁴

In weeks where workers were paid by the number of boxes filled instead of by hour, I applied the same computations to the number of boxes.

III. RESPONDENT'S CONTENTIONS APPLICABLE TO MORE THAN ONE CLAIMANT

- A. THAT DUE TO THE AGRICULTURAL CONTEXT OF THIS CASE, THE EMPLOYEES SHOULD HAVE THE BURDEN OF ESTABLISHING INTERIM EMPLOYMENT AS A PREREQUISITE TO A VALID BACKPAY CLAIM.

Respondent contends that due to the agricultural context of this case, the employees must have the affirmative burden of clearly establishing all interim employment (or lack thereof) as a prerequisite to a valid back pay claim. Under the NLRA, the Respondent has the burden to establish facts which would mitigate backpay liability, including the facts concerning the employees interim employment.¹⁵ However, Respondent argues that since agricultural workers frequently change employers, and seldom file tax returns or keep accurate records of their work, this burden must shift to the employees. "To adopt any other rule," Respondent argues in its Post-hearing Brief, "would turn the backpay proceeding from a compensatory proceeding to a punitive proceeding and would completely destroy the purpose of the Agricultural Labor Relations Act."

¹⁴Appendix A

¹⁵N.L.R.B. v. Brown & Root, Inc., 311 F.2d 447 (8 Cir., 1963)
N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (1972)

While it is true that the discontinuous nature of agricultural employment makes it difficult for employees to keep accurate records or consistently testify with specificity regarding interim employment, it does not follow that the resulting burden of this situation must shift to the employee. The employee does not create the nature of agricultural employment any more than the employer does.

The NLRB has placed this burden on the employer because the genesis of the backpay proceeding is in the illegal conduct of the Respondent.¹⁶ While the Board must take into account every "socially desirable factor in the final judgment,"¹⁷ it must be kept in mind that an important purpose of backpay awards" is to deter unfair labor practices."¹⁸ This is equally true in the agricultural setting, and I find that the burden of proof to show mitigation remains with the Respondent.

Collaterally, Respondent argues that employee's lack of specific records and/or recollection regarding interim employment manifests a lack of good faith which must defeat their claim for backpay. This contention has been made in the context of the NLRA. In N.L.R.B. v. Arduini Mfg. Corp., 394 F.2d 420 (C.A. 1, 1968) the Court considered whether the employee's inconsistent testimony and faulty record-keeping should defeat his claim for backpay. The Court held:

Although we can understand how these considerations would persuade the trial examiner, we think that the Board in reaching an opposite [and favorable] conclusion as to Cassanelli [the employee] is supported by substantial evidence. The unsatisfactory character of the record book is not surprising when we consider that Cassanelli was used to working for a wage. For the most part record keeping to him meant collecting W-2 forms. He freely admitted he was a 'bad bookkeeper.' Generally, however, he seemed co-operative about providing whatever information he could recall or divine from his meager records (Ibid, at 422)

In Southern Household Products, 203 NLRB 881, Respondent argued that Harris should not be given backpay because his testimony regarding interim employment was so confusing and lacking in clarity that it couldn't form the basis on an accurate decision. The Board disagreed with this conclusion noting:

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¹⁶N.L.R.B. v. Ellis and Watts Products, Inc., 334 F.2d 67,69.

¹⁷N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344, 346.

¹⁸N.L.R.B. v. Mooney Aircraft, 366 F.2d 809, 811 (1966).

"As shown by his social security records covering the period from January 1, 1968 to September 30, 1970, Harris worked for 12 different employers during that period. It is therefore understandable that he was confused in placing the correct dates and even sequence of his employment at those various places." (Ibid, at 885)

What emerges from the foregoing is that absent a showing of bad faith or lack of co-operation on the part of an employee, the Respondent must bear the burden of the employees' incomplete recollection and records regarding interim employment.

While many of the discriminatees in the instant case had, to a lesser or greater extent, difficulty in presenting a full and accurate picture of their interim employment, this is certainly understandable given the difficulties inherent in the agricultural context. I find that each discriminatee made a good faith effort to co-operate in establishing their interim earnings at the ¹⁹ hearing, and that their incomplete records and memories regarding interim earnings do not defeat their claims for backpay.

B. THAT THE DISCRIMINATEES DID NOT MAKE A
REASONABLE EFFORT TO OBTAIN INTERIM EMPLOYMENT
AFTER THEIR DISCHARGE BY RESPONDENT.

Respondent argues that the discriminatees' testimony reflected a lack of desire to seek or obtain interim employment and therefore all backpay claims of the discriminatees should be denied.

The law in this area is well-established. To be entitled to backpay, an employee must make reasonable efforts to find new employment, suitable to a person of his background and experience.²⁰ Willful loss of earnings is an affirmative defense and the burden is on the employer to prove the defense.²¹

¹⁹Bearing in mind that the Respondent has the burden to establish facts of mitigation in backpay procedures, it is significant that through documents produced at the hearing by discriminatees and by piecing together the employees recollections, virtually complete interim earning records were reconstructed for six of the eight discriminatees: Castro, Lara, Osvaldo Vargas, Delores Angulo, Teresita Angulo and Iniquez. For the remaining two the following interim earnings were established:

a. Joel Vargas, for 13 of the 43 weeks in his backpay period.
b. de la Cruz, for 23 of the 43 weeks in his backpay period. It was also clear that J. Vargas and de la Cruz were each without work for a substantial amount of the remaining portion of the relevant backpay period.

²⁰N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5 Cir., 1966); Gary Aircraft Corp., 210 NLRB 555.

²¹N.L.R.B. v. Reynolds, 369 F.2d 668 (6 Cir., 1968)

The employee's efforts are measured against a standard of reasonableness, rather than by the highest standards of diligence.²² Further, "the principles of mitigation of damages does not require success, it only requires an honest good faith effort." N.L.R.B. v. Cashman Auto Co., 223 F.2d 832, 836 (1955).

In this context, Respondent argues that discriminatees who worked only portions of the time when interim work was available at David Freedman Co., were not exercising reasonable diligence to obtain interim employment. From the evidence this could conceivably apply to Castro, de la Cruz and J. Vargus only.

However, Castro credibly testified that she tried to get work at Freedman's and at times, they wouldn't hire her. De la Cruz and Vargus credibly stated that with the exception of brief temporary absences,²³ each worked at Freedman's whenever work was available to them.

Respondent's contention is based on speculation not evidence, and I find that it has failed to meet its burden in this regard.

Respondents's other argument is that the employees' testimony establishes a lack of due diligence to obtain interim employment on the part of each one. I find that the contrary is true. In this regard it is necessary to consider the record as to each employee.²⁵

1. AURORA CASTRO

Castro credibly testified that during the backpay period, she looked for work 2-4 times per week. She sought employment in packing sheds and in the fields. When she wasn't employed she applied for and received unemployment benefits. Castro did not seek work outside the Coachella Valley, but since the valley was her home she was under no obligation to do so.²⁶ Castro also testified that in seeking work she traveled fifty to sixty miles every week she was unemployed.

2. ENRICO LARA

He testified that he looked for work while unemployed, although he could not recall the places or times. Lara produced evidence which showed that he obtained employment during 17 of the 21 weeks of his backpay period.

²²N.L.R.B. v. Arduini Mfg. Co., 394 F.2d 420, 422-423 (C.A. 1, 1968)

²³ See Sections C3 below.

²⁴ N.L.R.B. v. Robert Haws Co., 403 F.2d 979, 981 (6 Cir. 1968)

²⁵N.L.R.B. v. Rice Lake Creamery Co., 365 F.2d 888, 894 (U.S. App. D.C., 1966)

²⁶American Bottling Co., 116 NLRB 1303

3. DELORES ANGULO

For reasons set forth below. Delores Angulo's backpay period is limited to 27 November, 1975.²⁷ During this period of time she credibly related that she looked for work two times per day, every day until she obtained packing shed work at Maggio-Tostado.

4. MARIA INIQUEZ

She credibly testified that after she was fired she looked for work every day until she found work. However, when her job was to start she was unavailable because of her daughter's illness.

5. OSVALDO VARGUS

Oswaldo Vargus credibly testified that after he was fired, he looked for work every day both in the fields and the packing sheds. He found pruning work at Freedman's and worked there for a month, quitting his job to move his family to Blythe.²⁸ In Blythe, he obtained work almost immediately, and except for a two week period, he was continuously employed at various jobs throughout the balance of the backpay period.

6. TERESITA ANGULO

Teresita Angulo credibly testified that after she was fired from Maggio-Tostado, she looked for work twice a day until she found a packing job at the Maggio-Tostado shed. She had applied for field jobs as well as packing. She worked at the shed job until the season was over in June, 1976.

In September and October, 1976 she was in Sacramento.²⁹ During this period she was looking for work on a daily basis. In November 1976, she was in Mexico with a sick relative, and unavailable for work.³⁰ Thereafter she was employed at the Maggio-Tostado packing shed for the balance of the backpay period.

7. JOEL VARGUS

He testified that after he was fired from Maggio-Tostado, he continuously looked for work, in the fields, in the sheds and through the unemployment office.

²⁷See page 12 below.

²⁸See page 15 for the effect of this voluntary departure on Mr. Vargus' backpay computations.

²⁹See page 13 for the effect of going to Sacramento on T. Angulo's backpay claim.

³⁰See page 12 for the effect of T. Angulo's trip to Mexico on her backpay claim.

What followed was a pattern of intermittent employment. Vargus credibly testified that during the gaps in his employment, he was always looking for work. At one point he went north to find work, but was unable to work because of a cannery strike. While Vargus was largely unsuccessful in his efforts to obtain work, mitigation requires a good faith effort, not success.

8. ARMANDO NIEBLAS DE LA CRUZ

De la Cruz credibly testified that after he was fired by Respondent, he looked for work on almost a daily basis. He sought work at packing sheds, restaurants, motels and in the fields. He credibly related that he had various jobs and when he wasn't employed he looked for work almost daily.

After being fired by the Respondent, De la Cruz worked in the fields, in restaurants and at a store, manifesting his willingness to accept almost any kind of available employment. He also went to Yuba City in October 1976 to work tomatoes when there wasn't work in the Coachella Valley.

Respondent contends that de la Cruz' admitted refusal to accept a job picking eggplants reflects his lack of good faith effort to obtain interim employment. De la Cruz credibly testified that he refused the job because the employers were pushing and shouting at the workers. While a wrongfully discharged employee cannot recover for losses, which, in the exercise of due diligence, he could have avoided, "he may refuse to accept other employment which is distasteful." Florence Printing Company v. N.L.R.B. 376 F.2d 216, 221 (4 dr., 1967) Furthermore, "in appraising discriminatees conduct in this regard, any doubt is to be resolved to the discriminatee's not the wrongdoer's benefit." (Fire Alert Co., 223 NLRB 129, 136) I find that his refusal to accept the job in eggplants was reasonable under the circumstances.

De la Cruz also testified that he left the field work at Freedman for a week to go to Mexico.

This negates de la Cruz' claim for backpay during that week,³¹ but does not defeat his claim for the balance of the backpay period.³²

Based on the foregoing, and all the evidence adduced at the hearing, I find that each discriminatee made a reasonable and good faith effort to obtain interim employment throughout his backpay period.

³¹ See page 15 below

³² East Texas Steel Casting Company, Inc., 116 NLRB 1336, 1347-1348.

C. THAT DISCRIMINATEES WOULD NOT HAVE BEEN
AVAILABLE TO WORK WITH RESPONDENT

1. THOSE WHO DID SHED WORK REMOVED THEMSELVES
FROM THE AGRICULTURAL FIELD LABOR MARKET

Respondent contends that the discriminatees who did shed work had removed themselves from the agricultural labor market terminating their right to backpay. Only the Angulo sisters and Castro did shed work. Both T. Angulo and Castro testified that they were available for field work at Maggio-Tostado and would have accepted such a job had it been offered to them.

Furthermore, these workers had an obligation to accept shed work pursuant to their duty to mitigate losses during the backpay period. I find that these workers did not lose their right to backpay by virtue of accepting work in the packing sheds.

A more complicated problem is presented by the fact that the Angulo sisters had applied for packing shed jobs, before being fired by Respondent. Generally, a discriminatee's application prior to discharge, for other employment which he subsequently accepts, does not defeat his award for backpay.³³ This is because it would be "contrary to the purposes of the act to penalize the discriminatee by reducing the amount of backpay to which he otherwise would be entitled merely because of the speculative possibility" that had he not been discriminatorily discharged he would have voluntarily quit."³⁴

Accordingly, I find that T. Angulo's packing shed application did not terminate her right to back pay.

However, D. Angulo candidly stated that she was planning to quit her field job when she got her packing shed job. This goes beyond a mere "speculative possibility" to a strong probability that had she not been discriminatorily discharged, she would have voluntarily quit.³⁵ In view of D. Angulo's unequivocal statement of intention I find that Respondent met it's burden to prove that D. Angulo would have been unavailable for field work after she begun work in the packing shed, and that her backpay period terminates as of December 1, 1975.

³³N.L.R.B. v. Robert Haws Co., 403 F.2d 979 (6 Cir., 1968).

³⁴Robert Haws Co., 116 NLRB No. 22

³⁵While there remains some uncertainty as to whether D. Angulo would have quit her job, and uncertainties are usually resolved in favor of discriminatees (Southern Household Products, 203 NLRB 881) I find the uncertainty here too slight to accord D. Angulo the benefit of the doubt.

³⁶N.L.R.B. v. Robert Haws Co., 403 F.2d 979, 981 (6 Cir., 1968).

2. DISCRIMINATEES WOULD HAVE RETURNED TO
WORK AT FREEDMAN

Respondent contends that several of the discriminatees were long-time Freedman employees and would have quit Respondent to return to Freedman in November or December, 1975. Respondent concludes that therefore, its backpay liability should terminate as of that time. Only Lara, de la Cruz and both Vargus brothers worked for Freedman.

The only evidence on this point is contrary to Respondent's contention. Lara testified that had he not been fired, he would have continued working with Respondent. Respondent's argument rests on speculation alone, and not on evidence. Accordingly, I find against Respondent.^{37, 38}

3. DISCRIMINATEES REMOVED THEMSELVES FROM THE LABOR MARKET
BY CHANGING THEIR RESIDENCES AND TEMPORARILY MOVING TO
OTHER LOCATIONS.

Respondent argues that the discriminatees in some instances removed themselves from the labor market by changing their residences and by moving to other locations temporarily. Respondent concludes that these moves should terminate its backpay liability to these mobile employees. This contention has relivance to Osvaldo Vargas, Joel Vargas, Teresita Angulo, and de la Cruz.

T. Angulo testified that she was in the Sacramento area in September and October, 1976. She stated credibly that she was looking for work throughout this time. A discriminatee's right to backpay is not affected by his leaving the area to look for work elsewhere as long as he continues to exercise due dilligence in his efforts to obtain interim employment.³⁹ Accordingly, I find that T. Angulo is entitled to backpay for these months.

She also went to Mexico for November, 1976 but she was unavailable for work. Thus she is not entitled to backpay for that month. Her right to backpay resumed when she re-entered the labor market by seeking and obtaining work in the Coachella Valley in December, 1976.⁴⁰

Osvaldo Vargas quit a job at Freedman to move his family to Blythe. Once in Blythe, Vargas found work almost immediately and maintained almost continuous

³⁷N.L.R.B. v. Robert Haws Co., 403 F.2d 979 (6 Cir., 1968)

³⁸Robert Haws Co., 116 NLRB No. 22

³⁹N.L.R.B. v. Robert Haws Co., 403 F.2d 979, 981 (6 Cir., 1968)

⁴⁰East Texas Steel Casting Company, Inc., 116 NLRB 1336, 1348

employment. While Vargas' backpay is reduced during the period he would have been employed at Freedman had he not quit,⁴¹ his move to Blythe did not terminate his right to backpay.

Joel Vargas testified that he went north during the summer, 1976 to look for work. He returned to the Coachella Valley by mid September. Thus, he was not absent from the area during the period of Respondent's backpay liability.

Armando de la Cruz testified that he went to Yuba City to work tomatoes for the month of October, 1976. Thus his absence from the valley does not terminate his backpay claim. He also left the Valley for a week in January, 1976 to go to Mexico. This negated de la Cruz' backpay claim for that week, but did-not affect Respondents backpay liability to him thereafter.

4. DISCRIMINATEES REFUSED INTERIM WORK OR QUIT INTERIM JOBS WITHOUT GOOD CAUSE.

Finally, Respondent contends that several of the discriminatees are not entitled to backpay because they refused interim work or quit interim jobs without good cause. From the evidence, this argument could conceivably apply to Lara, O. Vargas and de la Cruz.

Refusing an interim job without just cause, does not, per se, defeat a discriminatees claim for backpay. It is, however, some evidence of whether the employee exercised due dilligence to obtain alternative employment during the backpay period. However, in this case, the only evidence that a discriminatee refused a job was that regarding de la Cruz and the eggplant picking job. As stated above, I find that de la Cruz had good cause to refuse this job. Thus, this refusal does not affect his right to backpay.⁴²

There were however, several instances of employees quitting interim jobs during the backpay period Even if the discriminatee voluntarily leaves substantially equivalent interim employment, the Respondent's backpay liability does not fully terminate as of that time.

"It is well established that when a claimant unjustifiably quits an interim job...there is an offset for the remainder of the backpay period of. the amount he would have earned had he retained his interim employment." Gary Aircraft Corp., 211 NLRB 554, 557⁴³

⁴¹See page 15 , below.

⁴²See page 11, above.

⁴³And Respondent's backpay liability resumes when the employee re-enters the employment market. East Texas Castings Company, Inc., 116 NLRB 1336; Knickerbocker Plastic Co., Inc., 132 NLRB 1209.

It is in this context that the incidents of quitting must be examined.

Lara testified that in November, 1975 he obtained work picking lemons with Coachella Growers. He was paid by the number of lemons he picked. He credibly stated that since the crop was bad and the orchard was far from home, it was costing him more than he could make to get there. After two days or so, Lara quit. Under the circumstances, I find that Lara was justified in leaving this job, and thus his quitting does not affect his claim to backpay.⁴⁴

Oswaldo Vargas quit work at Freedman in the midst of the 1975-76 pruning season and moved to Blythe.⁴⁵ His leaving this job was unjustified in the context of backpay hearings. Thus Respondent is entitled to a set off for what O. Vargas would have earned had he remained on the job for the whole pruning season. It is impossible to determine precisely what O. Vargas would have earned in the rest of the season. However, the Freedman payroll records for December, 1975, (GCX7(g)) reflect that while O. Vargas was employed there, he was working approximately the same number of hours as Gonzales (Lara).

Lara testified that he worked the entire pruning season (through January 31, 1976). Lara and O. Vargas worked such similar hours in December, 1975 it is fair and appropriate to use Gonzales' (Lara's) January, 1976 earnings to ascertain what O. Vargas would have earned had he not unjustifiably left in the middle of the season.⁴⁶

De la Cruz apparently left three jobs during the backpay period. He stated that during the 1975-76 pruning season, he took a week off to go to Mexico. Freedman's January records introduced at the hearing reveal that this was the week ending January 10, 1976. In view of the fact that de la Cruz voluntarily removed himself from the labor market, he is not entitled to any backpay for that week. However, Respondent's backpay liability resumed the next week when de la Cruz re-entered the labor market, by going back to work.⁴⁷

⁴⁴N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170 (2 dr., 1965) American Bottling Co., 116 NLRB 1303, N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (1972).

⁴⁵In his Post Hearing Brief, General Counsel states: "After the pruning season, O. Vargas testified that he looked for work again, and after a few days, left for Blythe to look for a job." This misstates the record.

⁴⁶In many cases, it is difficult to determine precisely the amount of backpay which should be awarded to an employee. In such circumstances the Board may use as close approximations as are possible, and may adopt formulas reasonably designed to produce such approximations. N.L.R.B. v. Brown & Root Inc., 311 F.2d 447 (8 Cir., 1963)

⁴⁷N.L.R.B. v. Mastro Plastic Corp., 354 F.2d 170 (2 Cir., 1965); N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (1972)

De la Cruz also testified that he quit Freedman during the pruning season 1975-1976 to take another job. While it is not clear which job that was, from all the evidence it appears that he quit to work at a restaurant named Los Nortenos.

From the Freedman records of November and December 1976, (GCX7(e) & (f)) it appears that de la Cruz worked the entire pruning season except the last week (the week ending December 18, 1976). De la Cruz made more money in the three weeks at Los Nortenos (\$180.00) than he would have had he finished the season at Freedman. Thus, Respondent actually benefitted from de la Cruz' changing jobs.

Finally, de la Cruz credibly testified that he also quit a restaurant job on Highway 111 because the owner wanted him to work a double shift. Since a double shift does not constitute employment "substantially equivalent" to the single shift at Maggio-Tostado, de la Cruz was justified in refusing continued employment under those circumstances.⁴⁸

IV. THE INDIVIDUAL CLAIMS Preliminary

The following is an analysis of each individual claim for backpay. Each is based on the facts presented in the discriminatees credible testimony, documents produced and the applicable law as set forth hereinabove.

A. MARIA DE LA LUZ AVILA INIQUEZ

Iniquez was fired by Respondent on October 30 or 31, 1975. After she was fired she exercised reasonable dilligence to obtain interim employment throughout November, 1975 until she found a job at Y-K Packing which was to begin on December, 1975.⁴⁹ Iniquez was unable to begin working on that date because of her daughter's illness and a broken car. Since Iniquez has voluntarily removed herself from the labor market since December 1, 1975 and is entitled to no backpay after that date.

Accordingly, I find Iniquez is entitled to \$311.80 backpay for the month of November, 1975 (See Appendices A & B)

⁴⁸N.L.R.B. v. B. Mastro Plastic Corp. 354 F.2d 170 (2 Cir., 1965); N.L.R.B. v. Madison Courier, Inc. , 472 F.2d 1307 (1972).

⁴⁹See page 10, below.

B. DELORES ANGULO

Delores Angulo was fired by Respondent on October 30 or 31, 1975. Throughout November, 1975 she exercised reasonable dilligence to obtain interim employment until she found work at Maggio-Tostado Packing Shed, commencing December 1, 1975.⁵⁰ After that date, she was no longer entitled to backpay because she was voluntarily unabilable for field work with Respondent.⁵¹

Accordingly, I find D. Angulo is entitled to \$311.80 backpay for the month of November, 1975. (See Appendices A & B)

C. TERESITA ANGULO

T. Angulo was fired by Respondent on October 30, or 31, 1975. Throughout November, 1975 she exercised reasonable dilligence to obtain interim employment until she found work at Maggio-Tostado packing shed commencing December 1, 1975.²⁵

T. Angulo worked in the packing shed until June, 1976. In September and October, 1976, she was in the Sacramento area. During this time she exercised reasonable dilligence to obtain interim employment, but was unable to do so.⁵³

In November, 1976, T. Angulo was unavailable for work and not eligible for backpay during this month.

She returned to the labor market in December, 1976, obtaining employment at Maggio-Tostado packing shed on December 1, 1976.

I find that T. Angulo is entitled to the gross backpay for the month of November, 1975. From December 1975 through March, 1976, she is entitled to net backpay computed by subtracting interim earnings from gross backpay on a weekly basis.⁵⁴

I find that T. Angulo is entitled to gross backpay for September and October, 1976 and no backpay whatsoever for November, 1976. Thereafter, she is entitled to net backpay, computed on a weekly basis through the balance of the backpay period.

⁵⁰See page 10, above

⁵¹See page 12, above

⁵²See page 10, above

⁵⁴ Angulo' s testimony was that she earned approximately \$100.00 per week. General Counsel provided more precise figures in his Second Amended Backpay Specification. I have used these figures in determining T. Angulo 's interim earnings and net backpay.

⁵³See page ¹⁰, above

Accordingly, I find that T. Angulo is entitled to a total of \$1,224.76 in net backpay. (See Appendices A & B)

D. ENRICO LARA

Lara was fired by Respondent on October 30 or 31, 1975. Throughout his backpay period, while unemployed, he exercised reasonable diligence to obtain interim employment.⁵³ During the week ending November 8, 1975, Lara worked for Burrell growers. He earned \$28.12 which is set off against his gross backpay that week. Lara credibly testified that he was fired from Burrell because he was a "Chavista."

During the week ending November 15, 1975, Lara worked picking lemons for Coachella Grower. He worked for two days and justifiably left the work because it was economically infeasible.⁵⁵ During that week he earned \$14.00 which is set off against gross backpay.

Lara remained unemployed until the week ending December 6, 1975 when he found work pruning at Freedman. He worked the whole season and his interim earnings are set off against net backpay on a weekly basis.⁵⁷

After the pruning season, Lara was again unemployed until the thinning season when he was re-hired by Freedman. He worked at Freedman from week ending February 21, 1976 through the end of the backpay period.

In June 1976, Lara had an accident which left him disabled and disqualified for any further backpay from Respondent.

Accordingly, I find that Lara is entitled to net backpay in the amount of \$993.60.(See Appendices A & B)

General Counsel contends that Lara is also entitled to consequential damages in the amount of \$540.00 for expenses incurred while unemployed and looking for work. However, Lara could not remember how many miles he drove looking for work or any of the places he went. I find there is not sufficient evidence to Lara's claim.

E. OSVALDO VARGAS

O. Vargas was fired by Respondent on October 30 or 31, 1975. Throughout his backpay period he exercised reasonable diligence to obtain interim employment whenever he was out of work.

⁵⁵See page 9 , above

⁵⁷Freedman earnings are computed by multiplying the hours worked in a given week (as determined from General Counsel's exhibits) by the hourly wage rate (\$2.70).

⁵⁶See page ¹⁵, above

⁵⁸See page ¹⁰, above

During the week ending November 8, 1975, he worked for D & B for 1 and 1/2 days, earning \$30.36 which is set off against his gross backpay.

O. Vargas next found work during the week ending December 13, 1975 doing pruning for Freedman. He unjustifiably quit that job on December 27, 1975 to move to Blythe, and the amounts he would have earned for the balance of the pruning season are set off against his gross backpay on a weekly basis.

O. Vargas next found work at LYN-DE Farms and was employed throughout the balance of the backpay period. He worked at LYN-DE from February 15, 1976 through March 27, 1976 earning \$130.00 per week which is set off against gross backpay on a weekly basis.

O. Vargas next relevant employment was with Triego Corp., from September 11, 1976 through October 1, 1976. During this period he earned \$219.82, or \$73.27 per week which is set off against his gross backpay during this time.

Vargas then worked for LYN-DE and Delta through November 22, 1976, earning \$130.00. There followed three weeks employment at Bruce church at \$170.00 per week. Finally, O. Vargas was employed by Riverview from December 9, 1976 through the balance of the backpay period, at a weekly rate of \$206.00

Accordingly, I find that O. Vargas is entitled to \$1,064.43 in net backpay as computed and set forth in Appendices A & B.

General Counsel also contends that O. Vargas is entitled to consequential damages which he incurred in going to Blythe to look for work. However, I find the expenses were incurred during the time just after he unjustifiably quit working for Freedman, and O. Vargas is not entitled to reimbursement.

F. ARMANDO NIEBLAS de la CRUZ

De la Cruz was fired by Respondent on October 30, or 31, 1975. During his backpay period he exercised due diligence to obtain a job during all the time he was unemployed.

De la Cruz¹ testimony and records regarding interim employment were the most incomplete and sketchy. From all the testimony and documents introduced, I find the following to be the most accurate possible reconstruction of de la Cruz' interim employment during the backpay period.

De la Cruz first obtained interim work doing pruning at Freedman during the week ending December 27, 1975. He worked there for two weeks. Then during the

⁵⁹See page 15, above

⁶⁰See page 11, above

week ending January 10, 1976, de la Cruz withdrew from the labor market by taking a trip to Mexico. He is entitled to no back pay for that week.⁶¹

The following week, de la Cruz returned to Freedman, working the balance of the pruning season. Thereafter, between February 1, 1976 and February 21, 1976, he worked at a Circle K earning \$94.00 per week. He lost that job when the regular employee returned to work.

The next week he worked for Rod Wilson earning \$80.00. He was fired because he was a Chavista.

De la Cruz' next relevant employment was working tomatoes for Joe and Ellen Chan in Yuba City for four weeks in October, 1976. He then returned to the Coachella Valley, and after being employed for one week, he commenced working for Freedman during the week ending November 14, 1976.

De la Cruz worked at Freedman through the week ending December 12, 1976. He then quit to take a job at Los Nortenos restaurant. He worked there for three weeks, earning \$60.00 per week. He lost that job when the owner's son returned from vacation.

De la Cruz worked one more week during the backpay period. This was a job at a restaurant on Highway 111. I have arbitrarily placed this work during the week ending January 8, 1977. De la Cruz earned \$60.00 and justifiably quit when the owner tried to make him work two shifts.⁶²

According, I find de la Cruz is entitled to \$2,293.70 for net backpay. (See Appendices A and B)

General Counsel contends that de la Cruz is entitled to consequential damages for auto expenses in looking for interim employment, and interest on unpaid hospital bills. I find the evidence presented too speculative to support either of these contentions.

G. AURORA CASTRO

Aurora Castro was fired by Respondent on October 30 or 31, 1975. She exercised reasonable dilligence to obtain interim employment at all times she was out of work that are relevant hereto.⁶³

During November and December, 1975, she worked in the packing shed at Desert Date. She worked five weeks, 20 hours per week at \$2.65 per hour. She left the

⁶¹See page 11 , above

⁶²See page 16 , above

⁶³See page 9 , above

work because it was over. In this period she earned \$265.00 which is set off against the gross backpay she would have earned during those months.⁶⁴

She next worked at Freedman during the week ending March 27, 1976. Her earnings of \$120.15 are set off against her gross backpay that week.

In November, 1976, Castro worked for Redi-Date at the packing shed. She worked for 3 weeks, 20 hours per week, at \$2.65 per hour. These interim earnings are set off against the gross backpay she would have earned during this month. She was then laid off from this job.

Castro was unable to find further employment during the backpay period.

Castro also testified that while unemployed, she drove a minimum of 50 miles per week looking for a job.

I find Castro is entitled to \$3,706.08 as net backpay. (See Appendices A and B) In addition I find that Castro is entitled to an additional \$262.50 as a set off against her interim earnings for expenses incurred in seeking interim employment.⁶⁵

H. JOEL VARGAS

Joel Vargas was fired by Respondent on October 30 or 31, 1975. He exercised reasonable dilligence to obtain interim employment when unemployed.⁶⁶

He first found work at D & B. He worked there during December, 1975 earning \$501.99 which is set off against his gross backpay for that month.

Vargas' next job was pruning for Freedman during January, 1976, and thereafter, thinning for Freedman during March, 1976.

Vargas worked for a week at Rutherford during October 1976. He made \$54.00 and left when the work was over. The only other work which J. Vargas could recall was pruning at Freedman. The records show that J. Vargas worked there for two weeks in December, 1976.

I find that Joel Vargas is entitled to \$3,215.97 as net backpay (See Appendices A and B.

General Counsel also contends that J. Vargas is entitled to consequential damages for auto expenses incurred while looking for interim employment J.

⁶⁴See page 9 , above

⁶⁵Computed as follows 35 weeks of unemployment x 50 miles per week x .150 per mile. See Deena Artware Inc., 112 NLRB 371; Crossett Lumber Company, 8 NLRB 440; East Texas Steel Castings Company, Inc., 116 NLRB 1336.

⁶⁶See page 10, above

Vargas testified that he drove "50-60 miles per week or less" looking for work. I find the evidence too speculative to support a claim for consequential damages.

V. THE REMEDY

For the reason described above, I find that Respondent's obligations to the discriminatees herein will be discharged by the payment to them of the respective sums set forth above. Such amounts shall be payable plus interest at the rate of 7 percent per annum to accrue commencing with the last day of each week of the backpay period on the amount due and owing for each such week as set forth in the Appendix, and continuing until the date this decision is complied with, minus any tax withholding required by Federal and state laws.

Upon the basis of the foregoing findings and conclusions, and upon the entire record of this proceeding, I hereby issue the following recommended:

ORDER

Respondent, Maggio-Tostado, Inc. shall make the employees involved in this proceeding whole by payment to them of the following amounts together with interest at the rate of 7 percent per annum, in the manner set forth in the section of this Decision entitled "The Remedy" and continuing until the amounts are paid in full, but minus tax withholding required by Federal and state laws:

MARIA DE LA LUZ AVILAINIQUEZ	\$ 311.80
DELORES ANGULO	311.80
TERESITA ANGULO	1,224.76
ENRICO LARA	993.60
OSVALDO VARGAS	1,064.43
ARMANDO NIEBLAS DE LA CRUZ	2,293.70
AURORA CASTRO	3,968.58
JOEL VARGAS	3,215.97

ALEXANDER B. REISMAN
Administrative Law Officer

DATED: September 2, 1977

APPENDIX A

Week-Ending	Hours (boxes)	Rate/Hour	Gross Weekly Backpay
11/08/75	38	2.535	96.33
11/15/75	38	2.535	96.33
11/22/75	19.5	2.535	49.43
11/29/75	27.5	2.535	69.71
12/06/75	66.5	1.76	117.04
12/13/75	51	2.535	129.29
12/20/75	59.5	2.535	150.83
12/27/75	34.25	1.76	60.28
01/03/76	54	2.535	136.89
01/10/76	51	2.535	129.29
01/07/76	59	2.535	149.57
01/24/76	53	2.535	134.36
01/31/76	44.5	2.535	112.81
02/07/76	36.5	2.535	92.52
02/14/76	48	2.535	121.68
02/21/76	61	2.535	154.64
02/28/76	27	2.535	68.45
03/06/76	28	2.535	70.98
03/13/76	33.5	2.535	84.92
03/20/76	27.5	2.535	69.71
03/27/76	27	2.535	68.44
09/19/76	25	2.55	63.79
09/26/76	20.5	2.55	52.28
10/03/76	34	2.55	86.70
10/10/76	32	2.55	81.60
10/17/76	37	2.55	94.35
10/24/76	41	2.55	104.55
10/31/76	47	2.55	119.85
11/07/76	35	2.55	89.25
11/14/76	40.5	2.55	103.27
11/21/76	36	2.55	91.80
11/28/76	16	2.55	40.80
12/05/76	27	2.55	68.85
12/12/76	31	2.55	79.05
12/19/76	51	2.55	130.05
12/26/76	45	2.55	114.75
12/31/76	36	2.55	91.80
01/08/77	33	2.55	84.15
01/16/77	45	2.55	114.75
01/23/77	28	2.55	71.40
01/29/77	38	2.55	96.90
02/06/77	31	2.55	79.05
02/13/77	34.5	2.55	87.98

WEEK-ENDING	GROSSBACKPAY	INTERIM EARNING	NET BACKPAY
	Maria De La Luz Avila Iniquez		
11/08/75	96.33	-	96.33
11/15/75	96.33	-	96.33
11/22/75	49.43	-	49.43
11/29/75	69.71	-	69.71
	TOTAL \$311.80		
	<u>Delores Angulo</u>		
11/08/75	96.33	-	96.33
11/15/75	96.33	-	96.33
11/22/75	49.43	-	49.43
11/29/75	69.71	-	69.71
	TOTAL \$311.80		
	<u>Teresita Angulo</u>		
11/08/75	96.33	-	96.33
11/15/75	96.33	-	96.33
11/22/75	49.43	-	49.43
11/29/75	69.71	-	69.71
12/06/75	117.04	100.00	17.04
12/13/75	129.29	100.00	29.29
12/20/75	150.83	100.00	50.83
12/27/75	60.28	100.00	-
01/03/76	139.89	62.40	74.49
01/10/76	129.29	114.40	14.89
01/17/76	149.57	114.40	35.17
01/24/76	134.36	114.40	19.96
01/31/76	112.81	114.40	-
02/07/76	92.52	114.40	-
02/14/76	21.68	114.40	7.28
02/21/76	154.64	114.40	40.24
02/28/76	68.45	114.40	-
03/06/76	70.98	114.40	-
03/13/76	84.92	114.40	-
03/20/76	69.71	114.40	-
03/27/76	68.44	114.40	-
09/19/76	63.79	-	63.79
09/26/76	52.28	-	52.28

APPENDIX B

Continued

WEEK ENDING	GROSS BACKPAY	INTERIM EARNINGS	NET BACKPAY
<u>Teresita Angulo</u>			
<u>Continued</u>			
10/03/76	86.70	-	86.70
10/10/76	81.60	-	81.60
10/17/76	94.35	-	94.35
10/24/76	104.55	-	104.55
10/31/76	119.85	-	119.85
NO BACKPAY, VOLUNTARILY WITHDREW FROM LABOR MARKET			
12/05/76	68.85	114.40	-
12/12/76	79.05	114.40	15.65
12/19/76	130.05	114.40	.35
12/26/76	114.75	114.40	-
12/31/76	91.80	114.40	-
01/06/77	84.15	110.00	-
01/16/77	114.75	110.00	4.75
01/23/77	71.40	110.00	-
01/29/77	96.90	110.00	-
02/06/77	79.05	110.00	-
02/13/77	87.98	110.00	-
TOTAL \$1,224.76			
<u>Enrico Lara</u>			
11/08/75	96.33	28.12	68.21
11/15/75	96.33	14.00	82.33
11/22/75	49.43	-	49.43
11/29/75	69.71	-	69.71
12/06/75	117.04	83.20	33.84
12/13/75	129.29	79.25	50.04
12/20/75	150.83	82.55	68.28
12/27/75	60.28	11.70	48.58
01/03/76	136.89	97.50	39.39
01/10/76	129.29	102.70	26.59
01/17/76	149.57	104.00	45.57
01/24/76	134.36	89.05	45.31
01/31/76	112.81	34.45	78.36
02/07/76	92.52	-	92.52
02/14/76	121.68	-	121.68
02/21/76	154.64	124.20	30.44
02/28/76	68.45	128.25	-

APPENDIX B
Continued

WEEK-ENDING	GROSS BACKPAY	INTERIM EARNING	NET BACKPAY
<u>Enrico Lara</u>			
03/06/76	70.98	72.80	-
03/13/76	84.92	41.60	43.32
03/20/76	69.71	87.10	-
03/27/76	68.44	91.00	-
TOTAL \$993.60			
<u>OSVALDO VARGAS</u>			
11/08/75	96.33	30.36	65.97
11/15/75	96.33	-	96.33
11/22/75	49.43	-	49.43
11/29/75	69.71	-	69.71
12/06/75	117.04	-	117.04
12/13/75	129.29	101.25	28.04
12/20/75	150.83	43.20	107.63
12/27/75	60.28	17.55	42.73
01/03/76	136.89	97.50	39.39
01/10/76	129.29	102.70	26.59
01/17/76	149.57	104.00	45.57
01/24/76	136.36	89.05	45.31
01/31/76	112.81	34.45	78.36
02/07/76	92.58	-	92.58
02/14/76	121.68	-	121.68
02/21/76	154.64	130.00	24.64
02/28/76	68.45	130.00	-
03/06/76	70.98	130.00	-
03/13/76	84.92	130.00	-
03/20/76	69.71	130.00	-
03/27/76	68.44	130.00	-
09/19/76	63.79	73.27	-
09/26/76	52.28	73.27	-
10/03/76	86.70	73.27	13.43
10/10/76	81.60	130.00	-
10/17/76	94.35	130.00	-
10/24/76	104.55	130.00	-
10/31/76	119.85	130.00	-
11/07/76	89.25	130.00	-
11/14/76	103.27	130.00	-
11/21/76	91.80	130.00	-
11/28/76	40.80	170.00	-

APPENDIX B

Continued

WEEK-ENDING	GROSS BACKPAY	INTERIM EARNING	NET BACKPAY
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OSVALDO VARGAS

12/05/76	68.85	170.00	-
12/12/76	79.05	170.00	-
12/19/76	130.05	206.00	-
12/26/76	114.74	206.00	-
12/31/76	91.80	206.00	-
01/06/77	84.15	206.00	-
01/16/77	114.75	206.00	-
01/23/77	71.40	206.00	-
01/29/77	96.90	206.00	-
02/06/77	79.05	206.00	-
02/13/77	87.98	206.00	-

TOTAL \$1,064.43

ARMANDO NIEBLAS DE LA CRUZ

11/08/75	96.33	-	96.33
11/15/75	96.33	-	96.33
11/22/75	49.43	-	49.43
11/29/75	69.71	-	69.71
12/06/75	117.04	-	117.04
12/13/75	129.29	-	129.29
12/20/75	150.83	-	150.83
12/27/75	60.28	35.10	25.18
01/03/76	136.89	27.00	109.89
01/10/76	129.29	NOT AVAILABLE	-
01/17/76	149.57	79.65	69.92
01/24/76	134.36	98.35	36.01
01/31/76	112.81	108.00	4.81
02/07/76	92.52	94.00	-
02/14/76	121.68	94.00	28.68
02/21/76	154.64	94.00	58.64
02/28/76	68.45	80.00	-
03/06/76	70.98	-	70.98
03/13/76	84.92	-	84.92
03/20/76	69.71	-	69.71
03/27/76	68.44	-	68.44
09/19/76	63.78	-	63.78
09/26/76	52.28	-	52.28

APPENDIX B

Continued

WEEK-ENDING	GROSS BACKPAY	INTERIM EARNING	NET BACKPAY
<u>ARMANDO NIEBLAS DE LA CRUZ</u>			
10/03/76	86.70	-	86.70
10/10/76	81.60	105.00	-
10/17/76	94.35	144.75	-
10/24/76	104.55	150.00	-4.35
10/31/76	119.85	115.50	
11/07/76	89.25	-	89.25
11/14/76	103.27	21.60	81.67
11/21/76	91.80	108.00	-
11/28/76	40.80	97.20	-
12/05/76	68.85	87.73	-
12/12/76	79.05	28.35	50.70
12/19/76	130.05	60.00	70.05
12/26/76	114.75	60.00	54.75
12/31/76	91.80	60.00	31.80
01/08/77	84.15	60.00	24.15
01/15/77	114.75	-	114.75
01/23/77	71.40	-	71.40
01/29/77	96.90	-	96.90
02/06/77	79.05	-	79.05
02/13/77	87.98	-	87.98
TOTAL \$2,293.70			
<u>AURORA CASTRO</u>			
Nov-Dec. 1975	855.43	263.20	592.23
01/03/76	136.89	-	136.89
01/10/76	129.29	-	129.29
01/17/76	149.57	-	149.57
01/24/76	134.36	-	134.36
01/31/76	112.81	-	112.81
02/07/76	92.52	-	92.52
02/14/76	121.68	-	121.68
02/21/76	154.64	-	154.64
02/28/76	68.45	-	68.45
03/06/76	70.98	-	70.98
03/13/76	84.92	-	84.92
03/20/76	69.71	120.15	69.71
03/27/76	68.44	-	-

APPENDIX B

Continued

<u>WEEK-ENDING</u>	<u>GROSS BACKPAY</u>	<u>INTERIM EARNING</u>	<u>NET BACKPAY</u>
<u>AURORA CASTRO</u>			
09/19/76	63.79	-	63.79
09/26/76	52.28	-	52.28
10/03/76	86.70	-	86.70
10/10/76	81.60	-	81.60
10/17/76	94.35	-	94.35
10/24/76	104.55	-	104.55
10/31/76	119.85	-	119.85
Nov. 1976	352.12	159.00	166.12
12/05/76	68.85	-	68.85
12/12/76	79.05	-	79.05
12/19/76	130.05	-	130.05
12/26/76	114.75	-	114.75
12/31/76	91.80	-	91.80
01/08/77	84.15	-	84.15
01/16/77	114.75	-	114.75
01/23/77	71.40	-	71.40
01/29/77	96.90	-	96.90
02/06/77	79.05	-	79.05
02/13/77	87.98	-	87.98
TOTAL \$3,707.02			
<u>JOEL VARGAS</u>			
11/08/75	96.33	-	96.33
11/15/75	96.33	-	96.33
11/22/75	49.43	-	49.43
11/29/75	69.71	-	69.71
Dec. 1975	457.44	501.99	-
01/03/76	136.89	-	136.89
01/10/76	129.29	64.80	64.49
01/17/76	149.57	-	149.57
01/24/76	134.36	35.10	99.26
01/31/76	112.81	10.12	102.69
02/07/76	92.52	-	92.52
02/14/76	121.68	-	121.68
02/21/76	154.64	-	154.64
02/28/76	68.45	-	68.45
03/06/76	70.98	-	70.98
03/13/76	84.92	43.20	41.76
03/20/76	69.71	60.75	8.96
03/27/76	64.88	105.30	-

APPENDIX B
Continued

WEEK-ENDING	GROSS BACKPAY	INTERIM EARNING	NET BACKPAY
JOEL VARGAS			
09/19/76	63.79	-	63.79
09/26/76	52.28	-	52.28
10/03/76	86.70	-	86.70
10/10/76	81.60	54.00	27.60
10/17/76	94.35	-	94.35
10/24/76	104.55	-	104.55
10/31/76	119.85	-	119.85
11/07/76	89.25	-	89.25
11/14/76	103.27	-	103.27
11/21/76	91.80	-	91.80
11/28/76	40.80	-	40.80
12/05/76	68.85	-	68.85
12/12/76	79.05	20.25	58.80
12/19/76	130.05	86.40	49.65
12/26/76	114.75	-	114.75
12/31/76	91.80	-	91.80
01/08/77	84.15	-	84.15
01/16/77	114.75	-	114.75
01/23/77	71.40	-	71.40
01/29/77	96.90	-	96.90
02/06/77	79.05	-	79.05
02/13/77	87.98	-	87.98
TOTAL		\$3,215.97	