

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

BUTTE VIEW FARMS,)	
)	
Respondent,)	Case No. 75-CE-7-S
)	
and)	4 ALRB No. 90
)	
UNITED FARM WORKERS OF AMERICA)	
AFL-CIO)	
)	
Charging Party)	
_____)	

SUPPLEMENTAL DECISION AND ORDER

On June 22, 1977, the Agricultural Labor Relations Board issued a Decision and Order in this proceeding (3 ALRB No. 50), finding, inter alia, that Respondent had discriminatorily discharged employees Gurvinder Dhaliwal, Kulwant Dhaliwal, Bertha Avila, Manuel Avila, Raul Avila, Mohammad Aslam, and Surgit Brar, in violation of Section 1153 (c) and (a) of the Agricultural Labor Relations Act and directed that Respondent reinstate the said employees and reimburse them for any loss of pay suffered as a result of their discharges.

On December 5 and 6, 1977, a hearing was held before Administrative Law Officer (ALO) Stephen Axelrod for the purpose of determining the amount of back pay due the seven employees. The ALO issued his supplemental decision, attached hereto, on April 3, 1978, in which he made findings as to the amount of back pay due each discriminatee. Thereafter, Respondent, General Counsel, and Charging Party each filed exceptions to the ALO's supplemental decision, and a supporting

brief. Respondent and General Counsel each filed a reply brief to the other's exceptions to the ALO's supplemental decision.

Pursuant to the provisions of Labor Code Section 1160.3 and Section 20286(b), 8 Cal. Admin. Code, the Board has reviewed the evidence and applicable law in this case.

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, as modified herein.

I. The Back-Pay Formula

Respondent, the Charging Party, General Counsel, and the ALO have all proposed different formulas for determining gross back-pay. We have examined each proposal in light of the record and find the ALO's formula to be a just and reasonable method of computing the gross back-pay owed to the discriminatees herein. Maggio-Tostado, Inc., 4 ALRB No. 36 (1978).^{1/}

Respondent contends that the ALO's formula fails to reflect the full range of hours available to each crew. The evidence indicates that the number of hours worked by full-time employees in the tomato harvest fluctuated depending on

^{1/}As indicated in Maggio-Tostado, where it is impossible to determine the exact amount each employee would have earned but for the discrimination, we will utilize a method of computation we consider to be equitable, practicable, and in accordance with the policy of the Act.

the conditions in the field and the demand for tomatoes by the canneries. However, Respondent introduced no evidence indicating that the discriminatees would have worked less than the average number of hours for day-time tomato-sorters, and suggests no other formula which effectively excludes short-term employees whose working hours are clearly not representative of the hours the discriminatees would have worked.

The record indicates that the day-shift tomato-sorters usually worked eight (8) to ten (10) hours per day, six (6) days per week. Thus, we find the ALO's formula, which is based on the average weekly earnings of those employees who worked 48 hours or more ,in a week, and which effectively excludes short-term employees from the back pay calculations, to be reasonable.^{2/}

The UFW and General Counsel have excepted to the ALO's calculation of gross back-pay on a weekly basis, and argue that the Board's decision in Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977), mandates the Board to calculate gross back-pay on a daily basis. We do not agree. Although this is desirable, the appropriateness of any back-pay formula turns

^{2/} As the Court said in a related context (back-pay calculation for discharged employees):

...Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasonable conclusion. (Citations omitted.) F.W. Woolworth Co. v. NLRB, 121 F.2d 658, 8 LRRM 515 (2nd Cir. 1941); cited with approval in Bigelow, v. RKO Radio Pictures, 327 U.S. 251, 265 (1945).

on its reasonableness in light of the information that is available. Accordingly, we find the ALO's calculation of back-pay on a weekly basis warranted by the limited information contained in the record.^{3/} (See Appendix A)

II. Back-Pay Formula For Gurvinder Dhaliwal

We accept the ALO's use of Satpol Deol as a representative employee for the purpose of calculating gross back pay due Gurvinder Dhaliwal. Mr. Dhaliwal's work experience as a tractor driver/irrigator differed significantly from that of his fellow discriminatees, who were sorters. The work record and qualifications of Mr. Dhaliwal and Mr. Deol are sufficiently similar to provide a satisfactory basis for concluding that Mr. Dhaliwal would have worked for the same length of time as Mr. Deol, and would have earned the same amount in wages. Accordingly, Mr. Dhaliwal's back-pay period for 1975 will end on November 22, which was Mr. Deol's last day of employment.

Although it is impossible to know with any certainty what would have happened had Respondent not discharged Mr. Dhaliwal, Respondent did not provide a workable alternative to the use of Mr. Deol as a representative employee, and any uncertainty must be resolved against the employer who by his

^{3/}It should go without saying that parties desiring that back-pay computations be based on Sunnyside are well-advised to introduce into the record all data and information necessary for its application.

unlawful conduct made certainty impossible. NLRB v. Miami Coca-Cola Bottling Co., 360 F. 2d 569, 62 LRRM 2155 (5th Cir. 1966).

The use of a representative employee to calculate the gross back-pay due a discriminatee is a common NLRB practice, and has been approved by the courts. NLRB v. Toppino and Sons, 358 F. 2d 94, 61 LRRM 2655 (5th Cir. 1966). See also NLRB v. Carpenter Union, Local 180, 433 F. 2d 934, 75 LRRM 2560 (9th Cir. 1970), where the court upheld a back-pay award based on the date the last employee left work where a rational basis for such a back-pay formula had been established.

Although Mr. Deol was promoted to caterpillar driving at a higher wage after the discharge of Dhaliwal, an order of the Board which is predicated on a finding that an employee would have been promoted had he not been discharged, and which awards him or her back-pay based on the employee's right to the promotion, is valid as necessary to extinguish the effects of the discrimination, and does not exceed the scope of the Board's remedial powers. NLRB v. Mooney Aircraft, Inc., 375 F. 2d 402, 64 LRRM 2837 (5th Cir. 1967), cited with approval in Golden State Bottling v. NLRB, 414 U.S. 168, 84 LRRM 2839 (1973).

In view of the circumstances, we conclude that Deol's earnings in 1975 provide the proper amount of gross back-pay owed to Gurvinder Dhaliwal. (See Appendix D).

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III. Back-Pay Period For The Avilas

Discriminatees Bertha, Manual, and Raul Avila were students working for the summer who were discharged immediately prior to the beginning of the school year in 1975. The Board, has previously rejected Respondent's contention that they were discharged due to the beginning of school. Butte View Farms, 3 ALRB No. 50 (1977).

The ALO found that these three discriminatees would have worked until September 23, 1975, had they not been unlawfully discharged. Respondent has excepted to this finding on the grounds that by their return to school on September 11, 1975, they withdrew from the labor market and were therefore unavailable for work.

The NLRB has consistently held that a discriminatee who returns to school during the back-pay period is not automatically disqualified from eligibility for back-pay. J. L. Hotzendorff Detective Agency, 206 NLRB 483 (1973), Lozano Enterprises, 152 NLRB 258. 264 (1958), American Congress Warehouse, 156 NLRB 367, 273 (1975).

We find the Avilas' return to school attributable to the timing of their discharge and not to any inability or unwillingness to work. Furthermore, there is nothing in evidence to indicate that their attendance at school rendered them unavailable for employment for the two-week period in question.

In previous years the Avilas had continued working in the harvest for the first two weeks of the school year,

and had done so while in the employ of Respondent in 1974. Two of the discriminatees had informed school authorities of their intent to continue working beyond the start of school. After being discharged, they informed Respondent of their intent to work two weeks into the school year as usual. Finally, after returning to school they continued to seek employment.

We affirm the ALO's conclusion that Bertha, Manuel, and Raul Avila did not withdraw from the labor market by returning to school in 1975, and that their back-pay period for that year should extend to September 23. (See Appendix D)

IV. Consequential Damages

a. Travel expenses incurred by discriminatees while seeking interim employment.

General Counsel and the UFW have excepted to the ALO's refusal to order reimbursement of expenses incurred by discriminatees in seeking interim employment because they have not received any interim earnings since their discharge.

The NLRB has long held that in certain circumstances discriminatees are entitled to reimbursement for expenses incurred in seeking interim work after an unlawful discharge. See Crossett Lumber Company, 8 NLRB 440, 497, enfd. by consent, 102 F 2d 1003 (8th Cir. 1938). The NLRB requires that discriminatees be made whole by payment to each of the gross amount each would have earned but for the discrimination, less net interim earnings, which are the earnings remaining after deduction, from gross interim earnings, of expenses incurred

in seeking or maintaining interim employment. Since 1950, the NLRB has computed back-pay on a quarterly basis. See F. W. Woolworth, 90 NLRB 289 (1950). Thus, for any calendar quarter in which there were no interim earnings from which to deduct allowable expenses, the discriminatee is not reimbursed, under current NLRB remedial orders, for his expenses incurred in that period in connection with seeking or holding interim employment.^{4/}

In Sunnyside Nurseries, Inc., supra, we rejected the NLRB practice of calculating back-pay on a quarterly basis as inappropriate in agricultural situations. We held that in the agricultural setting back-pay entitlement should generally be calculated on a daily basis or, where that is not practicable, as in the instant case, on a weekly basis. Since earnings are not computed on a quarterly basis under ALRB procedures expenses will be computed for the entire back-pay period rather than quarterly.

Claims for expenses for travel and other job-seeking efforts are, of course, subject to the same standards of proof

^{4/} Under current NLRB practice, an employer is not held liable for job-seeking expenses incurred by a discriminatee during a particular calendar quarter if he did not have any interim earnings in that quarter. Nowhere in the NLRB decisions, so far as we have been able to ascertain, is there a reasoned explanation of the basis for this practice. As the NLRB, and this Board, require that a discriminatee actively seek interim employment in order to maintain his eligibility for back-pay. we believe the discriminatee should be entitled to recover all legitimate expenses, incurred in seeking or holding an interim job, which he would not have incurred but for the employer's unlawful action in discharging him.

as other testimony. We agree with the ALO's conclusion that certain expenses were incurred by the discriminatees in this matter in their search for work and that other claimed expenses were not proven to have been actually incurred. Accordingly, the allowable travel expenses for the eligible discriminatees are set out in Appendix C, attached hereto.

b. The Dhaliwals' moving expenses.

After being discharged by Respondent, two of the discriminatees, Gurvinder Dhaliwal and his wife, Kulwant Dhaliwal, worked sporadically at various ranches until Mr. Dhaliwal obtained a steady job in the Fresno area to which they moved. The Dhaliwals seek reimbursement by Respondent for expenses incurred in this move, but as they had substantial interim earnings during 1976, they do not seek back pay for that year.

The ALO did not allow these expenses, finding that they were not incurred as a result of the unlawful conduct of the Employer. General Counsel and the Charging Party have excepted to this finding and attempt to characterize this move as occurring within Gurvinder Dhaliwal's 1976 back pay period. This argument is not supported by the record.

The 1975 back pay period for Kulwant Dhaliwal ended on October 8. The 1975 back pay period for Gurvinder Dhaliwal ended on November 22. Jobs obtained by these discriminatees after those dates were jobs they would have had even absent the unlawful conduct of Respondent, as they were obtained during Respondent's off-season when the Dhaliwals would not have been employed there.

The record shows that the move to Fresno occurred one month before Gurvinder Dhaliwal's 1976 back-pay period would have begun, and between seasons at Respondent's operation, i.e. not during any back-pay period.^{5/} Indeed, there is no evidence of either the amount of gross back-pay or the amount of their earnings, for 1976. In these circumstances, we conclude that Respondent is not liable for these moving expenses, and they are therefore disallowed.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Butte View Farms, its officers, agents, successors, and assigns, shall pay to the employees listed below, who in our Decision and Order dated June 22, 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.

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^{5/} The ALO found that Mr. Dhaliwal's 1976 back pay period would have begun in April, and that he moved to Fresno in March.

The testimony of Mr. Dhaliwal indicates that his 1976 backpay period would have begun in May, and that he moved to Fresno in April.

This is a conflict we need not resolve as either version results in the same conclusion, i.e., that the move to Fresno occurred one month before the Respondent's back pay liability for 1976 would have begun.

Gurvinder Dhaliwal.....	\$1120.72
Kulwant Dhaliwal.....	116.41
Bertha Avila.....	1239.16
Raul Avila.....	754.90
Manual Avila	1220.91
Mohammad Aslam.....	986.96
Surgit S. Brar.....	59.06

DATED: November 8, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

HERBERT A. PERRY, Member

RONALD L. RUIZ, Member

APPENDIX A

GROSS WEEKLY WAGES OF FULL-TIME TOMATO SORTERS *

<u>Week</u> <u>Ending</u>	<u>Total</u> <u>Wages</u>	<u>Full-Time</u> <u>Sorters</u>	<u>Average</u> <u>Weekly Wage</u>
9-16-75	\$14016.22	80	\$175.20
9-23-75	9856.25	56	176.00
9-30-75	9959.89	59	168.81
10-08-75	7017.77	43	163.20
8-03-76 **	3134.33	30	104.48
8-10-76	2003.13	12	166.93
8-17-76	3070.81	17	180.64
8-24-76	3934.48	20	196.72
8-31-76	8382.91	43	194.95
9-07-76	7736.05	40	193.40
9-14-76	7282.45	41	177.62
9-21-76	7044.57	38	185.38

* Full-time tomato sorters, for the purposes of this schedule, are those who worked 48 hours or more in the particular week. In 1975, they earned \$3.00 per hour, \$144.00 or more per week. In 1976, they earned \$3.10 per hour, \$148.80 or more each week.

** In 1976, the tomato season began on July 31, and the week ending on 8-03-76 is based on a three-day week. Full-time tomato sorters worked 24 hours or more at \$3.10 per hour and earned \$74.40 or more that week.

APPENDIX B

INTERIM EARNINGS

	<u>Earnings</u>	<u>Daily Average Earnings</u> <u>(Sundays Excluded)</u>
<u>Gurvinder Dhaliwal</u>		
Herota Bros.:		
9-15-75 to 9-17-75	\$ 72.00	\$ 24.00
9-18-75 to 9-24-75	129.00	21.50
9-25-75 to 10-01-75	144.00	24.00
10-02-75	22.50	22.50
Oscar Ortega:		
10-03-75 to 10-09-75	186.00	31.00
10-10-75 to 10-16-75	138.00	23.00
Valley View Packing Co.:		
9-14-75 to 9-20-75	120.00	20.00
Newkom Ranch:		
10-21-75	20.00	20.00
McGuskie:		
10-25-75	23.75	23.75
<u>Kulwant Dhaliwal</u>		
Herota Bros.:		
9-15-75 to 9-17-75	72.00	24.00
9-18-75 to 9-24-75	129.00	21.50
9-25-75 to 10-01-75	138.00	23.00
10-02-75	22.50	22.50
Oscar Ortega:		
10-03-75 to 10-09-75	186.00	31.00

APPENDIX B
(Continued)

INTERIM EARNINGS

<u>Surgit S. Brar</u>	<u>Earnings</u>	<u>Daily Average Earnings</u> (Sundays Excluded)
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Anthony Farms, Inc.:

9-04-75 to 9-10-75	\$ 138.00	\$ 23.00
9-11-75 to 9-17-75	168.00	28.00
9-18-75 to 9-25-75	177.00 *	25.29
9-26-75 to 10-01-75	145.50 **	29.10
10-02-75 to 10-08-75	165.00	27.50

Herota Bros.:

10-08-75	25.50	25.50
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Mohammad Aslam

NONE

Manual Avila

Pat Rice:

8-15-76 to 8-21-76	78.25	13.04
8-28-76	24.22	24.22

Saunders and Sons:

8-18-76 to 8-24-76	75.00	12.50
8-25-76 to 8-31-76	75.00	12.50

Barandas Farm, Inc.:

9-07-76 to 9-13-76	82.30	13.72
9-14-76 to 9-22-76	191.42 ***	23.93
9-23-76	25.15	25.15

* 8 days
** 6 days
*** 9 days

APPENDIX B
(Continued)

INTERIM EARNINGS

	<u>Earnings</u>	<u>Daily Average Earnings (Sundays Excluded)</u>
<u>Bertha Avila</u>		
Pat Rice:		
8-08-76 to 8-14-76	\$ 102.70	\$ 17.12
8-21-76	9.44	9.44
		13.72
Barandas Farm, Inc.:		18.34
9-07-76 to 9-13-76	82.30	
9-14-76 to 9-22-76	146.71 ***	
Saunders & Sons:		
8-18-76 to 8-24-76	75.00	12.50
8-25-76 to 8-31-76	75.00	12.50
<u>Raul Avila</u>		
Pat Rice:		
8-08-76 to 8-14-76	137.03	22.84
8-15-76 to 8-21-76	95.01	15.84
8-22-76 to 8-28-76	43.74	7.29
Saunders & Sons:		
8-18-76 to 8-24-76	75.00	12.50
8-25-76 to 8-31-76	75.00	12.50

*** 9 days

APPENDIX C

REIMBURSABLE JOB-SEEKING/TRAVEL EXPENSES

Gurvinder Dhaliwal

1975: 200 miles at \$.15/mile \$30.00

Mohammed Aslam

1975: 200 miles at \$.15/mile: \$30.00

Bertha Avila

500 miles at \$.15/mile: \$75.00

1975: 100 miles at \$.15/mile \$15.00

Manuel Avila

1975: 100 miles at \$.15/mile: \$15.00

Raul Avila

1975: 100 miles at \$.15/mile \$15.00

APPENDIX D

NET BACK PAY

Respondent Pay Period	Gross Back Pay	<u>Interim Earnings</u>	Net Back Pay
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Gurvinder Dhaliwal

9-13-75	to	9-16-75	\$ 90.00	\$ 88.00	\$ 2.00
9-16-75	to	9-23-75	188.50	211.50	--
9-24-75	to	9-30-75	198.25	141.50	56.75
10-01-75	to	10-08-75	174.68	201.50	18.93
10-09-75	to	10-15-75	164.93	146.00	214.56
10-16-75	to	10-22-75	257.56	43.00	203.75
10-23-75	to	10-29-75	227.50	23.75	158.43
10-30-75	to	11-05-75	158.43	--	229.12
11-06-75	to	11-12-75	229.12	--	138.12
11-13-75	to	11-19-75	138.12	--	69.06
11-20-75	to	11-22-75	69.06	--	

Sub-total-	1090.72
Travel Expenses-	<u>30.00</u>
Total Net Back Pay Due-	<u><u>\$1120.72</u></u>

Kulwant Dhaliwal

9-13-75	to	9-16-75	\$ 87.60	\$ 48.00	\$ 39.60
9-25-75	to	9-23-75	176.00	131.50	44.50
9-24-75	to	9-30-75	168.81	136.50	32.31
10-01-75	to	10-08-75	163.20	200.50	

Total Net Back Pay Due-	<u><u>\$116.41</u></u>
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Surgit S. Brar

9-08-75	to	9-09-75	\$92.48	\$ 69.00	\$ 23.48
9-10-75	to	9-16-75	175.20	163.00	12.20
9-17-75	to	9-23-75	176.00	154.45	21.55
9-24-75	to	9-30-75	168.81	166.98	1.83
10-01-75	to	10-08-75	163.20	219.16	

Total Net Back Pay Due-	<u><u>\$ 59.06</u></u>
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APPENDIX D
(Continued)

<u>Respondent</u> <u>Pay Period</u>	<u>Gross</u> <u>Back pay</u>	<u>Interim</u> <u>Earnings</u>	<u>Net</u> <u>Back Pay</u>
	<u>Mohammad Aslam</u>		
9-04-75 to 9-09-75	\$138.75	\$ --	\$138.75
9-10-75 to 9-16-75	175.20	--	175.20
9-17-75 to 9-23-75	176.00	--	176.00
9-24-75 to 9-30-75	168.81	--	168.81
10-01-75 to 10-08-75	163.20	--	<u>163.20</u>
		Sub-Total -	821.96
		Travel Expenses -	75.00
		Total Net Back Pay Due -	<u>\$896.96</u>
	<u>Manuel Avila</u>		
9-11-75 to 9-16-75	\$146.00	\$ --	\$146.00
9-17-75 to 9-23-75	176.00	--	176.00
7-31-76 to 8-03-76	104.48	--	104.48
8-04-76 to 8-10-76	166.93	--	166.93
8-11-76 to 5-17-76	180.64	26.08	154.56
8-18-76 to 8-24-76	196.72	127.16	69.56
8-20-76 to 8-31-76	194.95	99.22	95.73
9-01-76 to 9-07-76	193.40	13.72	179.68
9-08-76 to 9-14-76	177.62	72.53	85.09
9-15-76 to 9-18-76	123.60	95.72	27.88
		Sub-Total -	<u>1205.91</u>
		Travel Expenses -	15.00
		Total Net Back Pay Due -	<u>\$1220.91</u>
	<u>Bertha Avila</u>		
9-11-75 to 9-16-75	\$146.00	\$ --	\$146.00
9-17-75 to 9-23-75	176.00	--	176.00
7-31-76 to 8-03-76	104.48	--	104.48
8-04-76 to 8-10-76	166.93	34.24	132.69
8-11-76 to 8-17-76	180.64	68.48	112.16
8-18-76 to 8-24-76	196.72	84.44	112.28
8-25-76 to 8-31-76	194.95	75.00	119.95
9-01-76 to 9-07-76	193.40	13.72	179.68
9-08-76 to 9-14-76	177.62	86.94	90.68
9-15-76 to 9-18-76	123.60	73.36	50.24
		Sub-Total -	<u>1224.16</u>
		Travel Expenses -	15.00
		Total Net Back Pay Due -	<u>\$1239.16</u>

APPENDIX D
(Continued)

<u>Respondent</u> <u>Pay Period</u>	<u>Gross</u> <u>Back Pay</u>	<u>Interim</u> <u>Earnings</u>	<u>Net</u> <u>Back Pay</u>
<u>Raul Avila</u>			
9-11-75 to 9-16-75	\$146.00	\$ --	\$146.00
9-17-75 to 9-23-75	176.00	--	176.00
7-31-76 to 8-03-76	104.48	--	104.48
8-04-76 to 8-10-76	166.93	45.68	121.25
8-11-76 to 8-17-76	180.64	123.04	57.60
8-18-76 to 8-24-76	196.72	152.94	43.78
8-25-76 to 8-31-76	194.95	104.16	90.79
		Sub-Total -	<u>739.90</u>
		Travel Expenses -	15.00
		Total Net Back Pay Due -	<u><u>754.90</u></u>

CASE SUMMARY

Butte View Farms (UFW)

75-CE-7-S

4 ALRB No. 90

ALO DECISION

The ALO noted that in Butte View Farms, 3 ALRB No. 50 (1977), the Board directed Respondent to make whole seven discriminatees. Notwithstanding the Board's indication in Sunnyside Nurseries, Inc., 3 ALRB No. 42, that in the agricultural context back-pay should be calculated on a daily basis, the ALO found that in the instant case back-pay should be calculated on a weekly basis because of the limited information contained in the Employer's weekly record book.

(1) The Back-Pay Formula

The ALO calculated gross weekly back-pay based on record evidence that employees usually worked 48 hours or more per week. Weekly back-pay figures were arrived at by taking the sum of all wages paid to employees who worked 48 hours or more in a week, and dividing that figure by the total number of employees who worked that number of hours in that week. As discriminatee Gurvinder Dhaliwal had a work history differing from the other discriminatees, the ALO, citing NLRB v. Carpenter Union, Local 180, 433 F. 2d 934, 75 LRRM 2560 (9th Cir. 1970), found the use of a representative employee appropriate for computing the back wages owed this discriminatee.

(2) The Back-Pay Period

The ALO determined the back-pay period for 1975 to be that portion of the tomato harvest season remaining after each discharge. The 1975 back-pay period for Gurvinder Dhaliwal, however, extended beyond the end of the tomato harvest, based on the use of a representative employee. The ALO further determined, citing J. L. Holtzendorff Detective Agency, Inc., 206 NLRB 483 (1973), Lozano Enterprises, 152 NLRB 258, 264 (1965), and American Compress Warehouse, 156 NLRB 267, 275 (1965), that discriminatees Bertha, Manuel, and Raul Avila, who were discharged on September 10, 1975, did not withdraw from the labor market by returning to school on September 11, 1975, and that their back-pay period for 1975 should extend to September 23, two weeks into the school year. As the Avilas were the only discriminatees seeking back-pay for 1976, the ALO determined the appropriate back-pay period to run from the beginning of the tomato harvest on July 31, until they were no longer available for employment.

(3) Interim Earnings

Where the discriminatees' interim earnings were for a weekly period which differed from Respondent's payroll period, the ALO calculated an average daily interim wage and allocated it to the appropriate weekly payroll period of the Respondent.

(4) Travel Expenses Incurred While Seeking Interim Employment

Travel expenses incurred by the discriminatees in unsuccessful efforts to obtain interim employment were not allowed by the ALO in light of NLRB practice reimbursing such expenses only where the employee has interim employment producing income in excess of such expenses during the same quarter. Herman Brothers Pet Supply, Inc., 150 NLRB 1419 (1965).

BOARD DECISION

The Board affirmed, in general, the findings and conclusions of the ALO but held that the ALO's disallowance of travel expenses incurred by the discriminatees in unsuccessful efforts to obtain interim earnings was not appropriate. The Board reasoned that as discriminatees are required to actively seek interim employment in order to maintain eligibility for back-pay, the discriminatee should be able to recover all legitimate expenses, subject to proof, which were incurred in seeking or holding an interim job, and which would not have been incurred but for the Employer's unlawful action in discharging him.

* * *

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of) Case No. 73-CE-7-S
)
BUTTS VIEW FARMS,)
)
)
Respondent,)
)
and)
)
UNITED FARM WORKERS OF)
)
AMERICA, AFL-CIO,)
)
Charging party.)
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SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEPHEN AXELRAD, Administrative Law Officer: A hearing was held before me on December 5 and 6, 1977 in Yuba City, California to determine the amount of back pay owed by the Respondent to Mohammad Asian, Bertha Avila, Raul Avila, Manuel Avila, Gurvinder Dhaliwal, Kulwant Dhaliwal and Surgit S. Brar. The Agricultural Labor Relations Board ("Board") previously issued a decision (3 ALRB No. 50) on June 22, 1977 finding unfair labor practices and an accompanying order requiring Butte View Farms, the Respondent herein, to offer full reinstatement of these seven employees to their former positions and back pay with seven percent interest. The parties were unable to agree on the amount of back pay due these discriminates and on November 9, 1977 the Regional Director issued back pay specifications and a notice of hearing, to which the Respondent filed a responsive pleading on November 22, 1977.

The record was left open at the close of the hearing on December 6, 1977 for further consideration of a subpoena enforcement request which was subsequently denied. The record was closed, and briefs were received from the General Counsel and the Respondent.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the briefs submitted by the parties, I make the following:

FINDINGS OF FACTS

I. The Back Pay Period

The purpose of the back pay remedy is to make the discriminatee whole for financial loss incurred by reason of the discriminatory discharge from the date of such discharge until the date an offer of reinstatement is made. N.L.R.B. v. Brown & Root, Inc., 311 F.2d 447, 450 (3th Cir. 1963).

The back pay specifications allege that the back pay period for the discriminatees covers that portion of the 1975 tomato harvest season remaining after each discharge and, in addition, the entire 1976 tomato harvest season. The specifications further allege that the back pay period for Gurvinder Dhaliwal extends for a period of time beyond the end of the tomato harvest in 1975. No back pay is alleged to be owed in 1976 to Gurvinder Dhaliwal, Kulwant Dhaliwal, Mohammad Aslam or Surgit S. Brar. This was due to interim earnings in 1976 which exceeded gross back pay due for these discriminatees.

The parties have stipulated that the tomato harvest for 1976 began on July 31, 1976 and ended on September 28, 1976. This is the back pay period for Bertha Avila, Raul Avila, and Manuel Avila, the three discriminatees for whom back pay is requested in that year.

The parties stipulated that the last day of the tomato harvest in 1975 was October 8, 1975, which is the last day of the back pay period for that year for all employees except Kulwant Dhaliwal. The back pay period for Kulwant Dhaliwal was calculated in the back pay specifications on the basis of the length of employment of a comparable employee, Satpal Singh Deol, who worked until November 22, 1975. Respondent contests the validity of the use of Deol as a comparable employee, which I have dealt with *infra*, in discussing the validity of the formula for computing back pay.

The discriminatees were discharged on different days in 1973, and the back pay period for each of them begins on the day following their last day of work. The back pay period for Gurvinder Dhaliwal and Kulwant Dhaliwal begins on September 13, 1975, and the back pay period for Surgit S. Brar begins on September 6, 1975. The basis for these dates is a stipulation between the parties that the last day of work for Gurvinder Dhaliwal and Kulwant Dhaliwal

was September 12, 1975, and the last day of work for Surgit S. Brar was September 5, 1975.

Manual Avila, Bertha Avila, and Raul Avila were part of a work crew that was laid off because of a temporary lack of work. The Respondent notified them on September 10, 1975 that they were terminated and could not return when the rest of the crew resumed work the next day. The back pay period for the three Avilas therefore begins on September 11, 1975.

II. The Back Pay Formula

Once the Board has made a finding that discharges were discriminatory and constituted unfair labor practices, some back pay is presumptively owed to the discriminatees. The Board has a great deal of discretion in ascertaining the amount of damages. There must be sufficient flexibility in determining a back pay award 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." N.L.R.B. v. Kartarik, 227 F.2d 190, 193 (8th Cir. 1955).

The appropriate formula for determining back pay must turn on the type of information that is available. The parties both rely on the information contained in the Respondent's weekly record book for calculating back pay. This record book gives the name of each employee, the job description (irrigator, tomato sorter, tractor driver, etc.), and the total amount earned by the employee during the weekly period. While the weekly pay and hours worked can be determined for each employee, the daily wages and hours worked by each employee cannot be determined.

A satisfactory copy of the weekly record book could not be made, which further limited its usefulness. While the record book was brought to the hearing, the information in it was introduced, by agreement of the parties, through paper tapes made on an adding machine which set forth the amount earned by each tomato sorter during the weakly period, but which does not identify' any of them by name.

The parties are in agreement that back pay should be computed on a weekly basis. The formula announced by the National Labor Relations Board ("N.L.R.B.") in F. W. Woolworth, 90 NLRB 289 (1950), requires the determination of back pay on a quarterly basis. Net back pay in each quarter is determined by

reducing gross back pay by the interim earnings of the discriminatee in each quarter. The Board ("A.L.R.B.") indicated in Sunnyside Nurseries, Inc., 3 ALRB No. 43 (1977), that in the Agricultural context back pay should be calculated on a daily basis. I find that back pay should be calculated on a weekly basis rather than a daily one by necessity of the limited information contained in the Respondent's weekly record book. The parties are in agreement with regard to all the discriminates except for Kulwant Dhaliwal that their back wages should be computed by reference to the average amount earned by the tomato sorters who continued to work after the discharges. The parties have stipulated that the tomato sorters earned \$3.00/hour in 1975 and \$3.10/hour in 1976.

The parties vigorously dispute, however, the manner by which the average earnings of the tomato sorters should be determined. The General Counsel relies on the calculations of the compliance officer, Nirmal Saini, who selected a wage each week which he felt represented the earnings of the full time tomato sorters. The Respondent contends that Saini's approach of selecting a wage from the top earners among the tomato sorters unduly inflates the proper amount due, and that the wages of all the tomato sorters during each weekly period should be averaged.

A. The General Counsel's Back Pay Formula

The back pay specifications state that back pay for the tomato sorters was calculated as the average earnings of the top four or five tomato sorters in each weekly payroll period.

The validity of this approach rests on the strength of the testimony of Nirmal Saini, a compliance officer for the Board who made the calculations. His testimony reveals that he sought a method for determining the average income of the full-time tomato sorters. He sought to exclude the earnings of the tomato sorters who worked less than a full six-day week.

Saini examined the earnings of the tomato sorters for each weekly period, and selected a figure from among the top earners which he felt represented the average earnings of the full time tomato sorters. He initially testified that he looked at the top four or five wage earners in each weekly period, and selected a representative employee among them. However, on the basis of all his testimony, I find that his methodology was to find an amount each week which represented a group of top earners rather than an individual employee.

He selected, for instance, the amount of \$174.00 for the payroll period ending on September 23, 1975. The weekly wages of the 74 tomato sorters employed that week varied from \$23.25 to \$216.00. More than half of these employees earned at least \$174.00, and approximately 20 employees received precisely that amount.

3. The Respondent's Back Pay Formula

The Respondent's proposal is to average the earnings by dividing the total wages for all the tomato sorters in each weekly period by the number of sorters for that week. While this formula has the virtue of its simplicity, it fails to exclude the part-time employees, no matter how few their hours. For instance, in the period ending on October 9, 1975, the weekly records indicate that one employee worked less than five hours and 19 other employees worked less than 20 hours. The number of tomato sorters varied widely from one week to another, and a substantial number did not work for the entire week.

C. The Appropriate Formula

The discriminatees should be reimbursed for the amount they would have earned had they not been unlawfully discharged. The precise amount of back pay that would have been earned is not always subject to precise determination. In such circumstances, the Board may use a formula reasonably designed to produce as close an approximation as possible. N.L.R.B. v. Carpenter Union, Local 180, 433 F.2d 934 (9th Cir. 1970).

If the General Counsel is asserting that the discriminatees had seniority and would have worked the number of hours of the top earners, his approach is contradicted by the evidence. I credit the testimony of Charles Nakatani, one of the owners of Butte View Farms, that the number of hours worked by full-time employees was based not on seniority but on the amount of work available in the field to which the employee's crew was assigned. The number of hours fluctuated depending on the conditions in the field and the demand for tomatoes from the canneries. The use of the top earners as comparative employees in each weekly period could result in a windfall to the discriminatees since it is unlikely that any employee earned the top wages every week. A representative employee formula must allow for fluctuations in the hours of employment that may occur and must accurately approximate the wages that the discriminatees would have earned had they not been wrongfully discharged. N.L.R.B. v. Iron Workers, Local 378, 532 F.2d 1241 (9th, Cir. 1976).

If the General Counsel is seeking to average the earnings of all the full-time employees each week, the methodology utilized by the compliance officer is not a rational way to achieve this end. Saini's estimate of the average earnings of the full-time employees was entirely subjective, and does not conform to N.L.R.B. precedent which favors the use of an objective formula to generate the average earnings. Cf. N.L.R.B. v. Brown & Root, 311 F.2d 447 (8th Cir. 1963).

The Respondent's proposed formula of averaging the wages of all the tomato sorters is unsatisfactory for the reason that it makes no provision for excluding employees who worked only a few hours during the week.

I find that the most appropriate formula is to average the earnings of the full-time employees. The testimony of Charles Nakatani, the information in the weekly record book, and other evidence in the record supports the inference that the tomato sorters usually worked eight to ten hours a day, six days a week. While full-time employees may on occasion have worked less than eight hours or five rather than six days, full-time employees usually worked at least 48 hours a week and few part-time employees did so. The weekly record book shows that most employees worked either far more than 48 hours or considerably less, and very few employees actually worked that amount. This provides a logical demarcation line between the part-time and the full-time employees. The Respondent has not introduced evidence to show that the discriminatees worked less than the average full-time tomato sorters, and the exclusion of part-time employees from the formula is warranted. See International Trailer Company, Inc., 150 NLRB 1205 (1965).

In calculating the average weekly wages for the full-time tomato sorters, as set forth in Appendix A, I have excluded all tomato sorters who did not work 48 hours or more that week. The full-time tomato sorters earned \$144.00 or more (at \$3.00/hour) in 1975 and \$148.30 or more (at \$3.10/hour) in 1976. The average earnings such week for the full-time tomato sorters was determined by dividing their total wages each week by the number of full-time sorters for the same week.

D. Back Pay Formula for Gurvinda Dhaliwal

The average weekly earnings of the tomato sorters cannot be used to calculate the earnings of Gurvinder Dhaliwal who had an employment history that differed from the other discriminatees. He began working at Butte View Farms in April, 1975 as an irrigator before

the commencement of the tomato harvest. During the harvest, he frequently drove a tractor rather than sorting tomatoes.

The back pay specifications rely on the earnings of Satpal S. Deol as a comparable employee. The parties stipulated that the gross earnings for Gurvinder Dhaliwal in the specifications actually represent the earnings of Deol.

I find that the use of Deol as a representative employee provides an appropriate standard for computing the back wages of Gurvinder Dhaliwal. The record shows remarkable similarity in the work that they did and strongly suggests that Gurvinder Dhaliwal would have earned at least as much if not more than Deol. Gurvinder began work for Butte View Farms before Deol and helped him to secure his job. They both were working as irrigators. In a week the parties selected at random, they both worked as irrigators exactly the same number of hours. After the irrigation season, Dhaliwal began driving a tractor several days before Deol began operating one.

The Respondent contends that Gurvinder Dhaliwal would not have worked beyond the end of the tomato harvest on October 8, 1975 and disputes the compliance officer's determination that Gurvinder would have continued to work until November 22, 1975 which was Deol's last day of employment. The Respondent's position is that Deol was selected to operate a caterpillar tractor with which he had prior experience, and that Gurvinder Dhaliwal had not previously driven this kind of tractor. As an operator of this vehicle, Deol received a wage increase from \$3.00/hour to \$3.25/hour.

It is, of course, impossible to predict with any degree of certainty what would have happened had the Respondent not unlawfully discharged Dhaliwal. "When an employer's unlawful discrimination makes it impossible to determine whether a discharged employee would have earned back pay in the absence of discrimination, the uncertainty should be resolved against the employer." *The Rogers Mfg. Co.*, 164 NLRB 234, 285 (1967). Gurvinder Dhaliwal was in as good a position as Deol to obtain any work that was available. Deol and Dhaliwal both had similar prior experience in driving a caterpillar tractor. The work record and qualifications of Dhaliwal and Deol are sufficiently similar to provide a satisfactory basis for concluding that Dhaliwal would have worked for the same length of time as Deol and would have earned the same amount, and I so find.

The Respondent has not provided a workable alternative to the use of Deol as a comparative employee. The suggestion that Dhaliwal's back pay should be determined in the same manner as the other tomato sorters fails to take into consideration the work he was doing or the time when he began working for the Respondent. The Respondent's contention that Dhaliwal would have terminated his employment at the same time as the other tomato sorters is not supported by the record. Cf. N.L.R.B. v. Dodson's Market, Inc., 553 F.2d 617 (9th Cir. 1977)., wherein the court held that the Respondent had the burden to establish how much less an employee would have worked due to the seasonable nature of the Respondent's business. See also N.L.R.B. v. Carpenter Union, Local 180, 433 F.2d 934 (9th Cir. 1970), where a back pay award was upheld based on the date the last employee left work where a rational basis for such a back pay formula had been established. I conclude that Deal's earnings in 1975 provide the proper amount of gross back pay owed to Gurvinder Dhaliwal.

III. The Duty to Mitigate Damages

In the course of the hearing, the Respondent made the contention that certain discriminatees were unavailable for employment or had not met their obligation to mitigate damages by making a reasonable search for employment in the back pay period.

The General Counsel claims that under N.L.R.B. precedent the affirmative defenses relating to the duty to mitigate damages are waived unless timely raised in an answer to the back pay specifications. The Respondent did reply to the back pay specifications with a pleading entitled, "Response to Backpay Specification," but which failed to raise these defenses. The Respondent's position is that this response was entirely voluntary and not binding on it due to the fact that the Board, unlike the N.L.R.B. has not promulgated regulations setting forth a procedure for filing an answer to the back pay specifications. Cf. 29 CFR 102.54. See N.L.R.B. v. International Union of Operating Engineers, 330 F.2d 244 (2nd Cir.1367).The General Counsel did not show any prejudice in the manner the defenses were raised.

The Respondent, having been permitted to introduce evidence on the merits of the affirmative defenses, has failed on the facts I find to establish their validity, and I therefore do not find it necessary to resolve the procedural issue.

The Respondent's burden, once the General Counsel has established the gross amount of back pay due, is "...to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability". N.L.R.B. v. Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963) cited in N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.D.C. 1972). The discriminatees have the duty to mitigate damages by remaining on the labor market, and making a reasonable effort to seek employment; an affirmative defense can be established by showing that the discriminatee voluntarily withdrew from the labor market or willfully remained idle. See Madison Courier, Inc., supra at 1318-1319.

I find that each discriminatee did all that was required to mitigate damages on the basis of the following facts and conclusions:

Gurvinder Dhaliwal and Kulwant Dhaliwal found employment the day after they were discharged. Kulwant Dhaliwal continued to be employed throughout the entire back pay period. Gurvinder Dhaliwal- had interim earnings for all of September and the greater part of October. In November, 1975, he made several automobile trips in search of employment but was unable to find any work. In 1976, they both moved to Fresno and found work there, and back pay is not requested for that year. I find that they were either working or making a reasonable effort to find work during the back pay period.

Surgit S. Brar also obtained employment the day after his discharge, and had interim earnings throughout the back pay period in 1975. The request for back pay for him does not include the 1976 tomato sorting season.

Mohammad Aslam's search for employment was less successful than that of some of the other discriminatees, but I find that he made a reasonable effort to find work. After his discharge he remained at home for four days due to his belief that the Respondent would recall him to work. After that, he made numerous trips to areas where he hoped he might be able to find work and went to the employment office for the Woodland area. He did not look in the immediate vicinity of Yuba City where he lived because he did not believe he could find work there. I find that he made a reasonable effort to find work in 1975, and no back pay is requested for the following year.

The ability of Manuel Avila, Bertha Avila, and Raul Avila to find interim employment in 1975 was complicated by the fact that they were students working for the summer and they were discharged immediately prior

to the beginning of the school year. The Board has previously rejected the Respondent's contention that they were discharged due to the beginning of school. See 3 ALRB No. 50 (1977). The record shows that they had previously worked in the harvest for several weeks after school began, that they had done so while in the employ of the Respondent in 1974, and that the schools would usually give them permission to miss the first: few weeks. Bertha, who was attending Yuba City High School., and received such permission a year earlier. Manuel was beginning a High School Equivalency Program in Oregon and had informed the program just prior to his discharge from work of his intention to arrive several weeks late. Raul was beginning Yuba City College.

I find that Manuel, Bertha and Raul would have worked, until September 23, 1975 had they not been wrongful] discharged, that they made a reasonable search for employment and were available and willing to work, and that they returned to school after they reasonably concluded that no work was available. After their discharge on September 10, 1975, they made several trips looking for work and reasonably concluded that employers would not hire students who would soon leave. Manuel left the next Sunday, September 14, 1975, while Bertha and Haul continued to look for work that weekend.

In determining whether they did all that was required to mitigate damages, the totality of the circumstances must be taken into consideration. See *N.L.R.B. v. Madison Courier, Inc.*, 472 F.2d 1307, 1313 (D.D.C 1972). Cf. *Murray Ohio Mfg. Co.*, 151 NLRB 1430 (1965) [held, failure to return to interim employment justified in part due to discriminatee's obligation to take care of his ill mother]. The discriminatee's age and the labor conditions in the surrounding area may be taken into account. *N.L.R.B. v. Pugh and Barr, Inc.*, 231 F.2d 558 (4th Cir. 1956). I find that Manuel, Bertha, and Raul's failure to find work and their return to school is attributable to the timing of their discharges and was not the result of their own unwillingness to work.

This finding is also supported by public policy which would not be served by requiring high school students to stay away from school to look for work when none was available. The duty to mitigate damages is firmly bedded in public policy. The rationale for this rule, as developed by *Phelps Dodge Corp. v N.L.R.B.*, 313 U.S. 177, is set forth in *N.L.R.B. v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.D.C. 1972):

Although the Phelps Dodge Court recognized the appropriateness of its newly enunciated doctrine in light of the private rights vindication objective of the make-whole remedy, the major focus of its analysis was upon the need to further public policy. The Court had "in mind not so much the minimization of damages as the healthy policy of promoting Production and employment." 313 U.S. at 200, 61 S.Ct. at 855. It noted that in formulating back pay orders, the N.L.R.B. must heed "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." 313 U.S. at 198, 61 S.Ct. at 854.

There are no "socially desirable factors" that would be served under the public policy of the State of California, considered in the agricultural context, that would require Manuel, Bertha, and Raul Avila to stay out of school under the circumstances. They all lived at home with their family as a single economic unit and undoubtedly felt a moral duty to their family to search for employment. However, neither the family unit nor public policy would be served by requiring them to stay out of high school when they had reasonably found that work was not available to them. This conclusion is less compelling with regard to Raul who was beginning his first year in college, but nevertheless I find that it is also applicable to him.

I find that Manuel, Bertha, and Raul were available for work until the date of September 23, 1975 and that they made a reasonable search for employment. The fact that a discriminatee returns to school during the back pay period does not automatically disqualify the person from eligibility for backpay. See J. L. Holtzendorff Detective Agency, Inc., 206 NLRB 483 (1973), Lozano Enterprises, 152 NLRB 258, 264 (1965), American Compress Warehouse, 156 NLRB 267, 275 (1965).

In 1976, Manuel, Bertha, and Raul worked for Pat Rice picking and sorting peaches, at Saunders & Sons picking prunes, and Manuel and Bertha thereafter harvested tomatoes at Barnadas Farms. Raul moved to Sacramento- to begin school at Sacramento City College and is not eligible for back pay after August 31, 1976. Manuel and Bertha were available for work until September 13, 1976 (see Appendix B.) I find that they all worked or made reasonable efforts to find work during the back pay period applicable to them.

IV. Interim Earnings

Net back pay for each week is determined by reducing the gross back pay by the interim earnings for that week. This creates some problems which are not often

encountered under the N.L.R.B. practice of determining back pay on a quarterly basis. The precise amount of interim earnings in any week is not always evident. The weekly payroll period for the interim employers rarely coincides with the Respondent's weekly payroll period. The earnings from the interim employers cannot always be given precise dates as, for instance, when a check for employment was received several days after the ending of the payroll period.

When the interim earnings are for a weekly period that differs from the Respondent's payroll period, I have calculated the average daily earnings for that week, so that the earnings can be credited to the appropriate weekly payroll period of the Respondent. The interim earnings have been allocated to the weekly period when they were most likely to have been earned.

V. Consequential Damages

The General Counsel seeks to add travel and moving expenses incurred by the discriminatees while seeking interim employment to the amount of back pay due even though interim employment was not actually obtained. This request flies in the face of clearly established N.L.R.B. precedent allowing consequential damages only as an offset against interim earnings rather than as an addition to gross wages. This offset is allowed only where the travel and moving expenses led to interim earnings. See Hermon Brothers Pet Supply, Inc., 150 NLRB 1413 (1965).

I find on the basis of the following facts that the General Counsel has not met his burden of proving that any of the discriminatees suffered consequential damages:

In 1975, travel expenses are requested for Gurvinder Dhaliwal after he finished interim employment in an unsuccessful effort to find more work. There are no interim earnings against which to credit these expenses, and they must be disallowed.

In March, 1976, Gurvinder Dhaliwal and Kulwant Dhaliwal moved to Fresno where they found work; the General Counsel requests their moving expenses on the assumption that the work they secured in Fresno benefitted the Respondent by eliminating the back pay obligation for that year. However, no back pay was requested for 1976 and the amount of interim earnings are not in evidence. There are, therefore, no interim

earnings to be reduced by the compensatory damages. The move to Fresno came long after the back pay period in 1975, and was not shown to have been related to the unlawful discharges.

In 1975, Manual Avila, Bertha Avila, and Raul Avila incurred expenses in their unsuccessful effort to find work, but they cannot be considered consequential damages since they had no interim earnings in that year.

In 1976, the General Counsel contends that Manual, Bertha, and Raul Avila each incurred travel expenses in the amount of \$7.50. They made several trips in search of employment with the family car. However, other members of the Avila family also were looking for work and benefitted from this travel, and the evidence is insufficient to establish that the expenses were actually incurred by the discriminatees in their search for work.

In 1975, travel expenses are requested for Mohammad Aslam when he went in search of employment. Since his efforts did not yield interim earnings, they cannot be allowed.

No compensatory damages were requested for Surgit S. Brar.

VI. The Individual Claims

Gurvinder Dhaliwal and Kulwant Dhaliwal

The back pay period for Gurvinder Dhaliwal and Kulwant Dhaliwal begins on September 13, 1975. The back pay period for Gurvinder Dhaliwal is based on the earnings of a comparable employee, Satpal Sing Deol and extends to and includes November 22, 1975. The back pay period for Kulwant Dhaliwal ends on October 8, 1975.

Gurvinder Dhaliwal was employed by Herota Bros., within a few days of his discharge and worked there until about October 2, 1975. He obtained employment the following day at Oscar Ortega's, where he worked until October 16, 1975.

Kulwant Dhaliwal worked at Herota Bros. and Oscar Ortega's throughout the back pay period.

During the remainder of the back pay period, Gurvinder Dhaliwal made a reasonable search for work. Gurvinder Dhaliwal is entitled to back pay in the amount of \$1,092.72.

Kulwant Dhaliwal, who had interim earnings during most of the back pay period, is entitled to a total of \$116.31 in back pay, which represents the difference between the gross back pay and her interim earnings.

Surgit S. Brar

Surgit S. Brar is owed back pay for the period from September 6, 1976 until October 8, 1975. The parties are in agreement that the gross back pay due for the week ending September 9, 1975 is \$92.48, and the gross back pay due for the remainder of his back pay period is based on the average earnings of the full-time tomato sorters. He worked during the entire back pay period for Anthony Farms, Inc., which is managed by Herota Bros., and the net back pay due to him is \$35.51.

Mohammad Aslam

The back pay period for Mohammad Aslam runs from September 4, 1975 through October 8, 1975. The parties agree that the gross back pay for the week ending on September 9, 1975 is \$138.75, and I have rejected the Respondent's contention that this discriminatee is not entitled to back pay during the first four days of the back pay period, while he waited at home hoping to be called back to work.

He looked unsuccessfully for employment in Colas, Woodland, Davis and Bobbins. He made a reasonable search for employment but was unable to find any work.

Since he did not have any interim earnings in 1975, the back pay due is based on the gross back pay, in the amount of \$823.26.

Manuel Avila, Bertha Avila and Raul Avila

The back pay period for Manuel Avila, Bertha Avila and Raul Avila is from September 11, 1976 through September 23, 1975 and from July 31, 1976 to September 13, 1976; Saul Avila moved to Sacramento in 1976 to begin school and he is not entitled to back pay after August 31, 1976 because he was no longer available for work.

In 1975 the three of them were unable to obtain work after the discharges and they returned to school. They made reasonable efforts to find employment, including several trips to the Sutter bypass area.

In 1976, Manuel, Bertha, and Raul worked for Pat Rice for more than a week in August. Manuel and Raul picked peaches and Bertha sorted them. During the last several weeks in August, they picked prunes at Saunders & Sons for about nine days. The entire Avila family, which had nine members, helped to pick the prunes and received a joint check for \$1,000.00. The parties stipulated that Manuel, Bertha, and Raul each earned \$150.00 of this amount. In early September, Manuel and Bertha began sorting tomatoes for Barandas Farm, while Raul left for Sacramento.

Manuel Avila is owed back pay in the amount of \$1,204.38. Bertha Avila is owed \$1,223.43, and Raul Avila is owed \$739.90.

Raul Avila, unlike the other discriminatees, did not testify at the hearing due to illness; however, the General Counsel made every reasonable effort to assist the Respondent in obtaining the testimony of the discriminatees, and the Respondent was not prejudiced by the unavailability of Raul Avila as a witness in that his brother Manuel and his sister Bertha did testify concerning Raul's interim earnings and efforts to find interim employment with which they were very familiar.

VII. The Remedy

The Respondent's obligation to make the discriminatees whole will be discharged by payment of the net back pay due them as set forth in Appendix C plus interest at the rate of 7 percent per annum to accrue commencing with the last day of each week of the back pay period when such sum became due and owed to the discriminatees until the date this decision is complied with, minus any tax withholding required by Federal and State laws.

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

ORDER

The Respondent, Butts View Farms shall make the discriminatees in this proceeding whole by payment to them of the following amounts together with interest at the rate of 7 percent per annum as more fully described above:

GURVINDER DKALIWAL	\$1,090.72
KULWANT DHALIWAL	116.31
SDHGIT S. BRAR	35.51

APPENDIX A

Gross Weekly Wages of Full Time Tomato Sorters *

<u>Week</u> <u>Ending</u>	<u>Total</u> <u>Wages</u>	<u>Full-Time</u> <u>Sorters</u>		<u>Average</u> <u>Wage</u>
9-16-75	\$14,016.22	80	\$	175.00
9-23-75	9,856.25	56		175.20
9-30-75	9,959.89	59		168.31
10-08-75	7,017.77	43		164.50
8-03-76 **	3,134.33	30		104.48
8-10-76	2,003.13	12		166.93
8-17-76	3,070.81	17		180.64
8-24-76	3,934.48	20		196.72
8-31-76	8,382.91	43		194.95
9-07-76	8,342.09	40		193.40
9-14-76	7,429.65	42		176.90
9-21-76	7,044.57	38		185.33

* Full-time tomato sorters worked 48 hours or more each week. In 1975, they made \$3.00 per hour and earned \$144.00 or more, In 1967, they made \$3.10 per hour and earned \$148.80 or more.

** In 1976, the season for tomato sorting began on July 31, and the week ending on August 3 is based on a three-day week. Full-time tomato sorters worked 24 hours or more that week at \$3.10 per hour and earned \$74.40 or more.

MOHAMMAD ASLAM	\$ 823.26
MANUEL AVILA	1,204.38
BERTHA AVILA	1,223.43
RAUL AVILA	739.90


STEPHEN AXELRAD
Administrative Law Officer

DATED: April 3, 1978

APPENDIX B

Interim Earnings

	<u>Earnings</u>	<u>Daily Average Earning; (Sundays Excluded)</u>
<u>Gurvinder Dhaliwal</u>		
Herota Bros.:		
9-15-75 to 9-17-75	\$ 72.00	\$ 24.00
9-18-75 to 9-24-75	129.00	21.50
9-25-75 to 10-01-75	144.00	24.00
10-02-75	22.50	22.50
Oscar Ortega:		
10-03-75 to 10-09-75	186.00	31.00
10-10-75 to 10-16-75	138.00	23.00
Valley View Packing Co.:		
9-14-75 to 9-20-75	120.00	20.00
Newkom Ranch:		
10-21-75	20.00	20.00
McGuskie:		
10-25-75	23.75	23.75
<u>Kulwant Dhaliwal</u>		
Herota Bros.:		
9-15-75 to 9-17-75	72.00	24.00
9-18-75 to 9-24-75	129.00	21.50
9-25-75 to 10-01-75	138.00	23.00
10-02-75	22.50	22.50
Oscar Ortega:		
10-03-75 to 10-09-75	186.00	31.00

APPENDIX B
(Continued)

Interim Earnings

	<u>Earnings</u>	<u>Daily Average Earnings (Sundays Excluded)</u>
<u>Surgit S. Brar</u>		
Anthony Farms, Inc.:		
9-04-75 to 9-10-75	\$ 138.00	\$ 23.00
9-11-75 to 9-17-75	168.00	28.00
9-18-75 to 9-25-75	177.00 *	25.29
9-26-75 to 10-01-75	145.00 **	29.10
10-02-75 to 10-08-75	165.00	27.50
 <u>Mohammad Aslam</u>		
NONE		
 <u>Manuel Avila</u>		
Pat Rice:		
8-15-75 to 8-21-76	78.25	13.04
8-28-76	24.22	24.22
 Saunders and Sons		
8-18-76 to 8-24-76	75.00	12.50
8-25-76 to 8-31-76	75.00	12.50
 Barandas Farm, Inc.:		
9-07-76 to 9-13-76	82.30	13.72
9-14-76 to 9-22-76	191.42 ***	23.93
9-23-76	25.15	25.15

* 8 days
** 6 days
*** 9 days

APPENDIX B
(Continued)

Interim Earnings

	<u>Earnings</u>	<u>Daily Average Earnings (Sundays Excluded)</u>
<u>Bertha Avila</u>		
Pat Rice:		
8-08-76 to 8-14-76	102.70	77.12
8-21-76	9.44	9.44
Barandas Farm, Inc.:		
9-07-76 to 9-13-76	82.30	13.72
9-14-76 to 9-22-76	146.71 ***	18.34
Saunders & Sons		
8-18-76 to 8-24-76	75.00	12.50
8-25-76 to 8-31-76	75.00	12.50
<u>Raul Avila</u>		
Pat Rice:		
8-08-76 to 8-14-76	\$ 137.03	\$ 22.84
8-15-76 to 8-21-76	95.01	15.84
8-22-76 to 8-28-76	43.74	7.29
Saunders & Sons		
8-18-76 to 8-24-76	75.00	12.50
8-25-76 to 8-31-76	75.00	12.50

APPENDIX C

Net Earnings

	<u>Gross</u>	<u>Interim</u>	<u>Net</u>
<u>Gurvinder Dhaliwal</u>			
9-13-75 to 9-16-75	\$ 90.00	\$ 88.00	\$ 2.00
9-17-75 to 9-23-75	188.50	211.50	-
9-24-75 to 9-30-75	198.25	141.50	56.75
10-01-75 to 10-08-75	174.68	201.50	-
10-09-75 to 10-15-75	164.93	146.00	18.93
10-16-75 to 10-22-75	257.56	43.00	214.56
10-23-75 to 10-29-75	227.50	23.75	203.75
10-30-75 to 11-05-75	158.43	-	158.43
11-06-75 to 11-12-75	229.12	-	229.12
11-13-75 to 11-19-75	138.12	-	138.12
11-20-75 to 11-22-75	69.06	-	69.06
		Total Net Back Pay Due	<u>\$1,090.72</u>

Kulwant Dhaliwal

9-13-75 to 9-16-75	\$ 87.60	\$ 48.00	\$ 39.60
9-17-75 to 9-23-75	176.00	131.50	14.50
9-24-75 to 9-30-75	168.71	136.50	32.21
10-01-75 to 10-08-75	164.50	200.50	-
		Total Net Back Pay Due	<u>\$ 116.31</u>

Surgit S. Brar

9-06-75 to 9-09-75	\$ 92.48	\$ 115.00	\$ -
9-10-75 to 9-16-75	175.20	163.00	12.20
9-17-75 to 9-23-75	176.00	154.45	21.55
9-24-75 to 9-30-75	168.71	166.95	1.76
10-01-75 to 10-08-75	164.50	219.60	-
		Total Net Back Pay Due	<u>\$ 35.51</u>

Mohammad Aslam

9-04-75 to 9-09-75	\$ 138.75	\$ -	\$ 138.75
9-10-75 to 9-16-75	175.20	-	175.20
9-17-75 to 9-23-75	176.00	-	176.00
9-24-75 to 9-30-75	168.81	-	168.81
10-01-75 to 10-08-75	164.50	-	164.50
		Total Net Back Pay Due	<u>\$ 823.26</u>

APPENDIX C
(Continued)

Net Earnings

		Gross	Interim	Net
<u>Manuel Avila</u>				
9-11-75 to	9-16-75	\$ 146.00	\$ -	\$ 146.00
9-17-75 to	9-23-75	176.00	-	176.00
7-31-76 to	8-03-76	104.48	-	104.48
8-04-76 to	8-16-76	166.93	-	166.93
8-11-76 to	8-17-76	180.64	26.08	154.66
8-18-76 to	8-24-76	196.72	127.16	69.56
8-25-76 to	8-31-76	194.95	99.22	95.73
9-01-76 to	9-07-76	193.40	13.72	179.68
9-08-76 to	9-14-76	176.90	93.32	83.57
9-15-76 to	9-18-76	123.59	95.72	27.87
Total Net Back Pay Due				\$1,204.38

Bertha Avila

9-11-75 to	9-16-75	\$ 146.00	-	\$ 146.00
9-17-75 to	9-23-75	176.00	-	176.00
7-31-76 to	8-03-76	104.48	-	104.48
8-04-76 to	8-10-76	166.93	34.24	132.69
8-11-76 to	8-17-76	180.64	68.48	112.16
8-18-76 to	8-24-76	196.72	84.44	112.28
8-25-76 to	8-31-76	194.95	75.00	119.95
9-01-76 to	9-07-76	193.40	13.72	179.68
9-08-76 to	9-14-76	176.90	86.94	89.96
9-15-76 to	9-18-76	123.59	73.36	50.23
Total Net Back Pay Due				\$1,223.43

Raul Avila

9-11-75 to	9-16-75	\$ 146.00	-	\$ 146.00
9-17-75 to	9-23-75	176.00	-	176.00
7-31-76 to	8-03-76	104.48	-	104.48
8-04-76 to	8-10-76	166.93	45.68	121.25
8-11-76 to	8-17-76	180.64	123.04	57.60
8-18-76 to	8-24-76	196.72	152.94	43.78
8-25-76 to	8-31-76	194.95	104.16	90.79
Total Net Back Pay Due				\$ 739.90