Fillmore, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

S & F GROWERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 76-CE-6-M 76-CE-10-M 77-CE-2-V 77-CE-3-V 5 ALRB No. 50

SUPPLEMENTAL DECISION AND ORDER

On January 11, 1979, Administrative Law Officer (ALO) Kenneth Cloke issued the attached Decision in this backpay proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief, and the General Counsel filed a brief in response to Respondent's exceptions.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALO as supplemented herein and to adopt his recommended Order as modified.

In S & F Growers, 4 ALRB NO. 58, issued on August 21, 1978, we concluded that Respondent's discharge of Braulio Hurtado was in violation of Section 1153 (c) and (a) of the Act. We ordered Respondent to reinstate him and make him whole for any loss of earnings he may have suffered as a result of his discriminatory discharge. In this ancillary proceeding, Respondent asserts that Hurtado was not reasonably diligent in seeking interim employment in mitigation of Respondent's

liability for the backpay period March 7 to June 20, 1977.

We have previously acknowledged the duty of discriminatorily discharged employees to actively seek interim employment. Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977); Butte View Farms, 4 ALRB No. 90 (1978), fn. 4. This rule has its origin in the case of Phelps Dodge v. NLRB, 313 U.S. 177, 8 LRRM 439 (1941), in which the Supreme Court required the NLRB to consider losses willfully incurred by discriminatees in computing backpay awards (8 LRRM at 448). The basic principles underlying application of this rule have since been well established. Once the General Counsel has shown a loss of earnings resulting from the discrimination, the burden shifts to the Respondent to establish a reduction in the amount of the backpay award for reasons unrelated to the discrimination. NLRB v. Brown & Root, Inc., 331 F. 2d 447, 52 LRRM 2115 (8th Cir. 1963). Respondent in this case has attempted to show that Hurtado willfully incurred a loss of earnings through his failure to make reasonable efforts to seek interim employment.

The discharged employee is required only to make reasonable efforts to obtain substantially equivalent employment. Mastro Plastics Corp., 136 NLRB 1342, 50 LRRM 1006 (1962). Substantially equivalent employment is that which is suitable to the discriminatee's background and experience. NLRB v. Madison Courier, Inc., 505 F. 2d 391, 87 LRRM 2440 (D.C. Cir. 1974). In the instant case, we agree with the ALO that Respondent has failed to prove that Hurtado's efforts in seeking strawberry-picking and lemon-packing work evidenced a lack of reasonable

diligence for a worker experienced in lemon picking. A discriminatee need not limit his search to identical work. Rutter-Rex Mfg. Co., 194 NLRB 19, 78 LRRM 1640 (1971).

What constitutes a reasonable search depends upon the facts of each case, as it would be rare that such pertinent factors as occupational skill, relevant labor market, geographical setting, and the employee's personal situation would all lend themselves to direct comparison. Hickman Garment Company, 196 NLRB 428, 80 LRRM 1682 (1972). Nevertheless, we take cognizance of NLRB v. Mercy Peninsula Ambulance Service, Inc., 589 F. 2d 1014, 100 LRRM 2769 (9th Cir. 1979), cited by Respondent in support of its argument that Hurtado's contacts were quantitatively insufficient. The court in Mercy denied enforcement of a NLRB backpay award, finding that the number of work applications made by the discriminatee did not, under the circumstances presented, constitute reasonable diligence. The discriminatee in that case, searching for interim employment in the metropolitan San Francisco Bay Area, made an average of three attempts in each of the nine months he was unemployed. Many of the contacts were by telephone, and he was unable to recall the method by which others were made. While the number of applications made during the backpay period is a relevant factor, it must be evaluated under all the circumstances of each case and is not by itself dispositive of the reasonable diligence issue.

Hurtado took the affirmative steps of registering with the Employment Development Department, one of whose functions is job referral, reported to that office on a periodic basis, and

personally applied for work to at least nine employers during the three-and-one-half-month backpay period. This he did despite the fact that he lived in a rural area, did not own an automobile, and was only occasionally provided transportation by others.

Under the circumstances of this case, we conclude that Respondent has not met its burden of proving that Hurtado failed to demonstrate reasonable diligence in searching for interim employment.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent S & F Growers, its officers, agents, successors, and assigns, shall pay to Braulio Hurtado as net backpay the sum of $2,693.69, together with interest thereon, computed at seven percent per annum, less any tax withholdings required by federal or California laws.

Dated: August 6, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

S & F Growers (UFW)

5 ALRB No.50
Case Nos. 76-CE-6-M
76-CE-10-M
77-CE-2-V
77-CE-3-V

ALO DECISION

The ALO concluded in this ancillary backpay proceeding that Respondent failed to prove that Braulio Hurtado willfully incurred losses by failing to make reasonable efforts to seek interim employment in mitigation of Respondent's backpay liability. The ALO concluded that seeking work in strawberry picking and lemon packing was reasonable for an agricultural employee experienced in lemon picking and that other attempts evidenced reasonable diligence.

The ALO recommended that Respondent be ordered to pay Hurtado backpay from March 7 to June 20, 1977.

BOARD DECISION

The Board affirmed the ALO's finding that Hurtado had not willfully incurred losses by seeking work outside his previous lemon-picking experience. Considering the circumstances that Hurtado lived in a rural area, did not own an automobile, and was only occasionally provided transportation by others, Hurtado's efforts were reasonable. Hurtado registered with and reported to the Employment Development Department and personally applied for work to at least nine employers during the three-and-one-half-month backpay period.

REMEDIAL ORDER

Respondent S & P Growers was ordered to pay Braulio Hurtado backpay in the sum of $2,693.69 with interest thereon at the rate of 7% per annum, less any tax withholdings required by federal or California laws.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case Nos. 76-CE-6-M
	)	76-CE-10-M
S. & F. GROWERS,	)	77-CE-2-V
	)	77-CE-3-V
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

Robert W. Farnsworth, Esq., of Oxnard, California, for the General Counsel;

Gordon & Glade, by J. Richard Glade, Esq. of Los Angeles, California, for the Respondent;

Curt Ulman, United Farm Workers of America, AFL-CIO, for the Charging Party.

DECISION

KENNETH CLOKE, Administrative Law Officer:

Statement of the Case

This case was heard before me in Oxnard, California, on November 20 and 21, 1978. The Agricultural Labor Relations Board, hereinafter referred to as the "Board", issued an order on August 21, 1978, directing S. & F. Growers, hereinafter referred to as "Respondent", to pay the discriminated Braulio Hurtado back pay for the period March 7, 1977 to June 20, 1977. On October 19, 1978, the Regional Director for the Salinas Office issued and served by mail on Respondent, a back pay specification and notice

of hearing. On the same date, Respondent mailed a letter to the Regional Director[1/] admitting the accuracy of the sum, but declining payment, and contesting the issues of mitigation and receipt of unemployment insurance benefits by the discriminatee. No answer or other responsive pleading was filed by Respondent, and at hearing, General Counsel moved for default.

In a telephone conversation with the Executive Secretary I determined that the Board's back pay regulations, which permit entry *of* a default order where there has been a failure to answer,[2/] had not yet become effective. In order to preserve the record and permit time to research the question, I reserved decision on the motion and preceded with the hearing. All parties agreed orally that the sole issue in contest was that of mitigation,[3/] and evidentiary ruling were conformed to that purpose.

All parties were given full opportunity to participate in the hearing, to call and examine witnesses, examine and present documentary evidence, and argue their positions, and following the close of hearing, all parties submitted briefs in support of their respective positions.

Upon the entire record, including exhibits, briefs, judicial notice, testimony, and my personal observation of the

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1/This letter was subsequently admitted into evidence as Respondent's Exhibit 1.

2/See ALRB Regulation Section 20290 (C) (3). This regulation is contained in "Proposed Changes in Regulations of the Agricultural Labor Relations Board", p.2, May 22, 1978, and Notice of the same date.

3/Transcript (hereinafter, Tr.), Vol. I, p. 19, lines 14-19.

demeanor of the witnesses, and after careful consideration of the briefs filed by the parties and independent research and reflection, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The discriminatee, Braulio Hurtado, is 22 years old, and in monolingual in Spanish. He has worked for Respondent since 1971, and except for a brief period of a week or less, has known no other employer. During the back pay period, he lived in Cabrillo Village, a farm labor camp of approximately 90 houses servicing Respondents' employees, and did not possess a car. No other companies picked up workers or provided bus service from Cabrillo Village. Hurtado's brother occasionally provided him with transportation, and no other family members lived in the Oxnard area.

Hurtado's efforts to mitigate damages and search for alternative employment began the day of his discharge or the day thereafter. Over the course of the lemon harvest he visited at least nine employers in the Oxnard area, looking for comparable work. In March, he visited Campo Norte, Coastal Growers and a company which harvested strawberries, whose name he could not recall. In April, he applied for work at Bob Jones Ranch, Food Grains, Buenaventura, and Sunkist Lemon (a packing house). In May he sought employment at Ventura Pacific, Rancho del Oro, and Seaboard Lemon. In June, he applied again at Ventura Pacific. These were all the employers he could recall while testifying, but he thought there might have been more, which he had listed

with the Oxnard Employment Development Department while receiving unemployment compensation.[4/]

These efforts of Hurtado's were generally uncontradicted and were corraborated by two witnesses who either drove with him or were present during the interview and denial of employment. Respondent produced a witness who had authority over hiring, at one of the companies claimed to have been visited by the discriminatee, who had no recollection of his application for employment, and whose records ought to have reflected such application, but didn't. Respondent failed to prove, however, that normal business practices or standardized questions, which would have challenged the credibility of the discriminatee, had been used in this case. In rebuttal, General Counsel called the discriminatee's brother, whose demeanor evidenced honesty both in detail and manner of expression, and who testified to having been present at the time the application was made, and to an absence of normal business procedure.

All the rest of Respondent's witnesses were limited to establishing the availability of specific opportunities with comparable employers in the Oxnard area. Respondent failed to prove, however, that Hurtado knew of the existence of any other alternatives, or that comparable employers had contacted the Employment Development Department, or posted public notices. While the local Spanish language radio station had carried announcements from one employer near the Santa Barbara area,

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4/Unfortunately these records had been destroyed by the date of" the back-pay hearing.

Hurtado had never heard the announcements. Respondent presented several witnesses who testified they "gate-hired" during the lemon harvest, which coincided roughly with the back pay period, and that jobs were often secured by word of mouth. Yet again, it failed to prove that Hurtado had access to such information. Indeed, the insular character of Cabrillo Village, Hurtado's youth and inexperience, his lack of a car, language limitations, and other factors, make it unlikely that he would have been aware of the existence of such alternatives. I therefore reach the following conclusions of law.

CONCLUSIONS OF LAW

1. Failure to file an answer: The ALRB has no currently valid regulations on this subject, as does the NLRB. See, e.g., 29 CFR 102.54; NLRB v. International Union of Operating Engineers, 380 F. 2d 244 (CA 2, 1967). The closest pronouncement on procedures in back-pay hearings came in Maggio-Tostado, Inc., 3 ALRB No. 33, where the Board stated:

> "If it appears that there exists a controversy between the Board and the Respondent concerning the amount of back pay due which cannot be resolved without a formal preceding the regional director shall issue a notice of hearing containing a brief statement of the matter in controversy. The hearing shall be conducted pursuant to the provisions of Section 20370 of the regulations, 8 California Administrative Code Section 20370."

Nowhere does this language or that of the regulation cited refer to responsive pleadings, although, as General Counsel points out in its Brief, Section 1148 of the Agricultural Labor Relations Act mandates the Board to follow applicable NLRB precedent, and that precedent clearly provides for default in the

event of a failure to answer. See 29 CFR 102.54(c); Parker Masonry Inc., 235 NLRB No. 121 (1978). At the same time, General Counsel has not shown any prejudice or lack of actual notice. Since Respondent was permitted by the Administrative Law Officer to introduce evidence on the merits and has failed to establish its non-liability for the amount in question, I do not find it necessary to resolve this issue.

2. Mitigation of back pay losses: Once the amount of back pay has been agreed upon, the burden is on Respondent to "establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." NLRB v. Brown & Root, Inc., 311 F.2d 445, 454 (CA 8, 1963); NLRB v. Madison Courier, Inc., 472 F,2d 1307, 1318 (D.C., 1972). The discriminatee has a duty to mitigate damages by remaining on the labor market and make a reasonable effort to seek employment, and voluntary idleness is an affirmative defense to the obligation to pay back wages. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

In deciding whether the discriminatee did all that was required to mitigate damages, the totality of the circumstances must be taken into consideration. See NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.D.C. 1972); Murray Ohio Mfg. Co., 151 NLRB 1430 (1965). The discriminatee's age and labor conditions in the surrounding area may be taken into account, NLRB v. Pugh and Barr, Inc., 231 F.2d 558 (4th Cir. 1956), and the issue of whether an employee has acted reasonably or not in seeking employment is a question of fact for the trial examiner.

Florence Printing Company v. NLRB, 376 F.2d 216 (CA 4, 1967), cert. den., 389 U.S. 840 (1967). See also, Southern Silk Mills, 38 LRRM 1317 (1956); Note, 43 Fordham L. Rev. 889 (1975).

In NLRB v. Ardunini Manufacturing Corporation, 394 F.2d 420, 422-3, (CA 1, 1968), it was stated that although an employee must make "reasonable efforts to mitigate his loss of income, he is held only to reasonable exertions in this regard, not the highest standard of diligence." An employee in that case was held to have made reasonable efforts in mitigation, even though he did not believe in reading "help wanted" ads, and though skilled in carpentry and related fields, did not visit places where construction skills were in short supply. Id.

In NLRB v. Cashman Auto Co., 223 F.2d 832 (CA 1, 1955), it was established that "...the principle of mitigation of damages does not require success; it only requires an honest good faith effort..." See also, Oil Chemical & Atomic Workers v. NLRB, 547 F.2d 598 (1976). This principle was ratified in NLRB v. NHE/Freeway, Inc., 79 LC 11, 757 (1976), where two discriminatees were held entitled to back pay awards from their former employer, where one of the parties had sought work at sixteen different establishments and the other at twelve, and they had registered with an employment service. In Deloran Cadillac, Inc. & Stanley Loch, Robert Rice, 231 NLRB No. 62 (1977), the fact that an illegally discharged automobile salesman did not utilize newspaper ads in his search for employment was held immaterial to his back pay claim, since he had made an otherwise reasonable search for employment, by personal application to various dealers. The Board held

there was no requirement that a discharged employee must exhaust all possibilities in seeking interim employment. Nor is the fact that an employee has remained unemployed while jobs were available, sufficient to create a presumption that he failed to diligently search for work or willfully incurred a loss of earnings. NLRB v. Miami Coca Cola Bottling Co., 360 F.2d 569, 575-6 (CA 5, 1966).See also, Lozano Enterprises, 152 NLRB 258, enfd. 53 LC 11, 053 (CA 9, 1966); Maestro Plastics Corp., 50 LRRM 1006 (1962), supp., 55 LRRM 1232 (1964).

Respondent is incorrect in arguing that applications for employment in strawberries cannot be considered as mitigation. The NLRB does not require an employee to show application for precisely the same type of work as that held previously, Ambassador Venetian Blind Worker's Union Local No. 2565, 110 NLRB 780 (1954), and Respondent offered no evidence of wage differentials for strawberry and lemon pickers.

Respondent's reliance on Swaby v. California Unemployment Insurance Appeals Board, 149 Cal. Rptr. 336 (1978) , to prove a duty to apply for work near Santa Barbara is misplaced, not only for reasons cited by General Counsel in its Brief, but because Respondent has not proven a failure to mitigate in the Oxnard area.

There is here, on the record as a whole, no clearly unjustifiable refusal to accept employment, no willful failure to reasonably search for interim work, no intentional idleness. While Hurtado might have secured employment from one of Respondent's witnesses had he applied, Respondent failed to prove he knew of the existence of such opportunities, or reasonably ought to

have known. Respondent has thus failed to meet its burden of proof. I therefore issue the following order.

ORDER

It is hereby ordered that Respondent pay to Braulio Hurtado the full amount of back pay specified by the Regional Director for the Salinas Regional office in its Notice and Specification dated October 19, 1978, at 7% interest per annum, calculated to the date of payment.

DATED: 1/11/79

KENNETH CLOKE
Administrative Law Officer