Fresno, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 75-CE-21-S 7 ALRB No. 25 (3 ALRB No. 78)

SUPPLEMENTAL DECISION AND ORDER

On October 12, 1977, the Agricultural Labor Relations Board issued a Decision and Order in this proceeding (3 ALRB No. 78), finding, inter alia, that Respondent had discriminatorily discharged Vicente Hernandez, in violation of sections 1153 (a) and (c) of the Act, and directed Respondent to reinstate Vicente Hernandez and make him whole for any loss of pay suffered as a result of this discharge. The Board further found that Respondent had discriminatorily failed to transfer Salvador Hernandez to the position of harvest machine operator, and directed Respondent to pay Salvador Hernandez the difference between what he actually earned from the commencement of the harvest season until his termination and the amount he would have earned as a harvest machine operator during that period.

On November 5 and 6, 1980, a hearing was held before Administrative Law Officer (ALO) William A. Resnick for the purpose of determining the amount of backpay due Vicente Hernandez and Salvador Hernandez. The ALO issued his supplemental decision,

attached hereto, on April 3, 1981, in which he made findings as to the amount of backpay due each discriminatee. Thereafter, Respondent filed exceptions to the ALO's supplemental decision, and a supporting brief. The General Counsel filed a reply to Respondent's exceptions to the ALO's supplemental decision.

Pursuant to the provisions of section 1146 of the Labor Code, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the record and the ALO's supplemental Decision in light of the exceptions and briefs, and has decided to affirm the ALO's rulings, findings, conclusions, and recommendations as modified herein.

Respondent made numerous exceptions, excepting in general to the ALO's decision on the basis of factual findings and credibility resolutions made by the ALO, the methods used to determine back pay, improper venue, and violation of due process. These exceptions are without merit. A review of the record, the ALO decision, and parties' briefs amply supports the ALO's factual findings and credibility resolutions.

Backpay Computation

The policy of the Act reflected in a backpay order is to restore the discriminatee to the same position he or she would have enjoyed had there been no discrimination. Maggio-Tostado (June 15, 1978) 4 ALRB No. 36; NLRB v. Robert Haus Co. (6th Cir. 1968) 403 F.2d 979 [69 LRRM 2730]; NLRB v. United States Air Conditioning Corp. (6th Cir. 1964) 366 F.2d 275 [57 LRRM 2068]. Our decision in Sunnyside Nurseries, Inc. (May 20, 1977) 3 ALRB

No. 42 sets forth a formula calculating backpay on a daily basis. The Board has since authorized the calculation of backpay to be made on a weekly basis, or indeed, by any method that is practicable, equitable, and in accordance with the policy of the Act. Butte View Farms (Nov. 8, 1978) 4 ALRB No. 90 aff'd. (1979) 95 Cal.App.3d 961; Maggio-Tostado, supra, 4 ALRB No. 36. The ALRB uses the NLRB four basic formulas in computing backpay awards. See NLRB Casehandling Manual (Part Three) Compliance Proceedings, August 1977, sections 10538-10544; ALRB Casehandling Manual, Computation of Back Pay. There are many variations of these formulas and "each one of these basic formulas must usually be adjusted in details to meet the requirements of specific cases. More than one formula may be applicable to a given case." NLRB Casehandling Manual, Part III, supra, section 10536.

In the computation of Vicente Hernandez' backpay award, the ALO referred to the pay of a representative employee during the backpay period and Vicente Hernandez' hours of the preceding year. Both these methods reflect standard NLRB formulas. The ALO's adoption of these standard methods was both appropriate and reasonable in light of the evidence before the ALO.[1/]

The ALO was faced with a different factual situation with regard to the computation of Salvador Hernandez' backpay award. In Salvador Hernandez' case we are faced with a situation where the literal compliance with the Board's Order itself results

[1/]Respondent failed to meet its burden to prove mitigation of Respondent's liability for-rent after May 26, 1976.

in injustice and discrimination. The Board Order states:

> Make Salvador Hernandez whole for any losses he may have suffered as a result of Respondent's failure to transfer him to the position of harvest machine operator by payment to him of a sum of money equal to the difference between what he actually earned from the commencement of the harvest season until his termination and the amount he would have earned as a harvest machine operator during that period of employment together with interest thereon at the rate of 7% per annum. 3 ALRB No. 78 (p. 4).

The parties stipulated that the backpay period runs from September 8, 1975, to October 1, 1975. During this relevant period, Salvador Hernandez actually worked more hours, although at a lower rate of pay than did Ed Johnson, the employee transferred to the job of tomato harvest operator. Working as an irrigator, Salvador Hernandez averaged 14-18 hours per day at $2.50-$2.75 an hour. Ed Johnson averaged 10-12 hours per day at $3.75 an hour. The end result was that during this stipulated time period, Ed Johnson earned $1,018.13 while Salvador Hernandez earned $1,0009.75, for a difference of only $8.38 (see appendix A to ALOD).

Respondent argues for a literal reading of the Board Order, requiring that Salvador Hernandez be reimbursed only for this minimal amount ($8.38). Recognizing that such a result encourages further discrimination by employers, forcing discriminatees to work longer hours in order to minimize backpay liability, the ALO stated "in this situation, since Respondent discriminatorily refused to transfer Salvador to the higher paying position, Respondent should not be allowed to escape financial liability here." (ALOD p.3.)

We agree with the ALO's conclusion. Had there been no

discrimination, Salvador Hernandez would have enjoyed the position of harvest machine operator, would have worked 271.5 hours, and would have earned $1,018.13. Instead, Salvador was forced to work additional hours, for a total of 371 hours, at a lower rate of pay earning $1,009.75. The fact that Salvador was not in the position of harvest machine operator was due only to Respondent's discriminatory refusal to transfer. The Board weeks to make Salvador Hernandez whole <u>for any losses he may have</u> suffered as a result of Respondent's discriminatory act. His change of working conditions, resulting in longer work hours is such a loss.

To compute Salvador Hernandez' backpay, the ALO used Ed Johnson's hours for each day multiplied by Salvador's actual rate of pay, giving Salvador on a daily basis the difference between the total and the daily total Ed Johnson actually received. (For example, if Ed Johnson worked eight hours one day at $1.00 per hour higher than Salvador Hernandez, then Salvador's difference of pay would be $1.00 an hour for each of the eight hours worked, or $8.00.) The additional hours worked by Salvador were treated by the ALO as an additional job[2/] which would not be used to reduce

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[2/]See National Labor Relations Board Casehandling Manual (Part Three) Compliance Proceedings, August 1977, sections 10604.3-10604.4 as authority. This authority is well settled.

> 10604.3 Overtime Employment Exceeding Available Overtime at Gross Employer Not Deductible: Under any theory of mitigation of damages the discriminatee is not obliged to work overtime to reduce the respondent's backpay obligation. Accordingly, earnings from overtime employment substantially exceeding the overtime the discriminatee would have worked at the gross employer are not

[fn. 2 cont. on p.6]

Respondent's backpay liability. The award, using this method was $279.25 plus interest compounded at the rate of seven percent per annum.

We uphold the methods adopted by the ALO in the computation of backpay awards for both Vicente Hernandez and Salvador Hernandez, and find that those methods were reasonable in light of the circumstances of each case. It is well settled that the Board has been entrusted with broad discretion in choosing an appropriate backpay formula, as warranted by the circumstances of each case. Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177, 198 [8 LRRM 439] Local 138, International Union of Operating Engineers, AFL-CIO (1965) 151 NLRB 972, 981-986 [56 LRRM 1532]; NLRB b. Brown and Root, Inc. (8th Cir. 1963) 311 F.2d 447, 452-453 [52 LRRM 2115]; Jack Burcher, d/b/a/ the Burcher Company v. NLRB (3rd Cir.

[fn. 2 cont.]

deductible.[4/]

10604.4 Interim Earnings Based on Hours in Excess of Those Available at Gross Employer Not Deductible: A corollary of 10604.2 and 10604.3 is that a discriminatee is not obliged to work additional hours over and above those which would have been worked for the gross employer to reduce discriminatee's own backpay settlement.[5/] Although such additional work normally takes the form of overtime, the rule is equally applicable whenever the discriminatee in a given quarter works hours substantially exceeding those which would have been worked for the gross employer; e.g., in a situation where gross backpay is computed on the basis of an estimated 30 hours of employment per week, interim earnings from employment averaging in excess of 30 hours per week should not be deducted.

4/ E.g., United Aircraft Corporation, 204 NLRB 1068, 1073-74.

5/ See. e.g., United Aircraft, Supra.

1968) 405 F.2d 787-790 [68 LRRM 2603].

In Brown and Root Inc., supra, at 452 the court stated:

> ... in solving the problems which arise in back pay cases the Board is vested with a wide discretion in devising procedures and methods which will effectuate the purposes of the Act...(citations omitted).
>
> Obviously, in many cases it is difficult for the Board to determine precisely the amount of back pay 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. National Labor Relations Board v. East Texas Steel Castings Co., 5 Cir., 255 F.2d 284; National Labor Relations Board v. Kartarik, Inc., 8 Cir., 227 F.2d 190; Marlin-Rockwell Corporation v. National Labor Relations Board, 2 Cir., 133 F.2d 258. We have held that with respect to the formula for arriving at back pay rates or amounts which the Board may deem necessary to devise in a particular situation, 'our inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved.' National Labor Relations Board v. Ozark Hardwood Co., 8 Cir., 282 F.2d 1, 7.

Thus there is no doubt that the Board has the power to fashion an appropriate remedy in order to effectuate the purposes of the Act.

Unemployment Insurance Compensation

Respondent argues that it was denied due process by what it characterizes as the ALO's ruling on the Employment Development Department of the State of California's (EDD) petition to revoke Respondent's subpoena duces tecum. Respondent argues it was prejudiced by the failure of EDD to comply with the subpoena. These arguments are without merit. Respondent further argues that its backpay liability should be reduced by the amount of unemployment insurance benefits received by Vicente, if any. Respondent attempted to subpoena records from the Custodian of Records of EDD in an effort to introduce evidence of the payment

of unemployment insurance benefits to Vicente Hernandez. EDD moved to revoke this subpoena. Respondent attempted to present a copy of EDD's petition to revoke Respondent's subpoena but the ALO, contrary to Respondent's characterization, declined to rule on that petition to revoke since he had not been served with a copy. The ALO did indicate that if pressed to rule, he would rule in favor of the motion to revoke due to the confidentiality of EDD records. Despite the fact that EDD did not comply with the subpoena,. Respondent made no effort to present any evidence at the hearing as to whether Vicente Hernandez received any unemployment insurance benefits. Though no evidence was presented we find that Respondent was not prejudiced thereby. While the ALO's discussion as to the deductibility of unemployment insurance compensation was not necessary to the resolution of this case, we note that it is well settled under NLRB precedent that unemployment insurance compensation benefits are not interim earnings and are not deductible from backpay awards, Marshall Field & Co. v. NLRB (1943) 318 U.S. 253 [12 LRRM 519]; NLRB v. Gullett Gin (1951) 350 U.S. 361 [27 LRRM 2230]; Yama Woodcraft, Inc. (1975) 221 NLRB No. 216 [91 LRRM 1059]; Southern Household Products Co., Inc. (1973) 203 NLRB 138 [83 LRRM 1247]; Rockwood Stove Works (1945) 63 NLRB 1297 [17 LRRM 68].

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Arnaudo Brothers, its officers, agents, successors, and assigns, shall pay to the employees listed below, who in our Decision and Order dated

October 12, 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.

Salvador Hernandez	$ 279.25
Vicente Hernandez	$5,952.90

Dated: August 31, 1981

RONALD L. RUIZ, Board Member

ALFRED H. SONG, Board Member

JEROME R. WALDIE, Board Member

CASE SUMMARY

Arnaudo Brothers	7 ALRB No. 25
(UFW)	Case No. 75-CE-21-S

ALO DECISION

In Arnaudo Brothers, 3 ALRB No. 78 (1977), the Board directed Respondent to reinstate and make whole discriminatee Vicente Hernandez, to make whole Javier Ramirez' crew, and to make Salvador Hernandez whole for any losses suffered by Respondent's failure to transfer him to the position of harvest machine operator. A back pay hearing was held on November 5 and 6, 1980 to determine the back pay awards of discriminatees Vicente Hernandez and Salvador Hernandez.

A. Vicente Hernandez

The parties stiuplated that the back pay liability period ran from October 19, 1975 to May 26, 1976. The ALO computed Vicente Hernandez' back pay award using a representative employee for the period of October 19, 1975 to December 31, 1975. The ALO used Vicente's 1975 hours for the remaining back pay period ending on May 26, 1976. The back pay award included Respondent's liability for rent and electricity through October 1977 when Respondent's liability was tolled by an unconditional offer of reinstatement. Expenses to seek employment and moving expenses were also included in the award. The award also included mitigation in the form of interim earnings. Though no evidence was adduced at the hearing as to whether or not Vicente Hernandez received unemployment compensation benefits, the ALO held that under both U. S. Supreme Court and NLRB precedent unemployment compensation benefits are not deductible from back pay awards.

B. Salvador Hernandez

The parties stipulated that the back pay liability period ran from September 8, 1975 to October 1, 1975. During this time period Salvador Hernandez actually worked more hours (371 hrs), although at a lower rate of pay, then did Ed Johnson (271.5 hrs) , the individual who was transferred to the job of tomato harvest operator. In order to avoid a result that would encourage further discrimination by employers forcing employees to work longer hours in order to minimize back pay liability, the ALO used Ed Johnson's hours for each day multiplied by Salvador Hernandez' actual rate of pay, giving Salvador Hernandez on a daily basis the difference between that total and the daily total Ed Johnson actually received. Salvador's extra hours were treated as an additional job which would not be used to reduce Respondent's back pay obligation.

BOARD DECISION

The Board affirmed the ALO's decision finding that the back pay awards and methods of computation used by the ALO were reasonable in light of the circumstances of each case and affirmed

the Board's discretion and power to choose an appropriate back pay formula or method as warranted by the circumstances of each case to fashion an appropriate remedy to effectuate the purpose of the Act.

The Board found that the ALO's conclusions as to the deductibility of unemployment insurance compensation benefits were unnecessary to the resolution of the case since there was no evidence in the record as to whether Vicente Hernandez received unemployment insurance compensation benefits. The Board did note however, that it is well settled that unemployment insurance compensation benefits are not interim earnings and are not deductible to reduce back pay liability.

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of ARNAUDO BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	CASE No. 75-CE-21-S 3 ALRB No. 78

APPEARANCES:

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Nomelli & Grilli
235 East Weber Avenue
Stockton, California 95201
On Behalf of Respondent

Manuel Melgoza, Esquire
627 Main Street
Delano, California 93215
On Behalf of the General Counsel

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM A. RESNECK, Administrative Law Officer:

On October 12, 1977, the Agricultural Labor Relations Board issued a Decision and Order in the above-captioned proceeding (3 ALRB No. 78), finding, inter alia, that respondent had discriminatorily discharged certain of its employees, including Salvador and Vicente Hernandez, in violation of Section 1153(a) and (c) of the

Agricultural Labor Relations Act and directing that respondent reinstate and reimburse these employees for any loss of pay suffered as a result of these violations.

The parties were unable to agree on the amount of backpay due Salvador and Vicente Hernandez, and on March 27, 1980, the Regional Director of the ALRB issued a backpay specification. The respondent filed an answer on April 3, 1980. On April 8, 1980, the Regional Director filed a clarification of backpay specification.

A hearing was held before me in Fresno, California on November 5 and 6, 1980. All parties were given a full opportunity to participate in the hearing, and the general counsel and respondent were all represented at the hearing. After the close of the hearing, the general counsel and the respondent filed briefs.

Upon the entire record, including my observation of the demeaner of the witnesses, and after full consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. SALVADOR HERNANDEZ: Of the two discriminatees, Salvador's case is less complex. It is stipulated that the backpay period runs from September 8, 1975 to October 1, 1975. Moreover, the discrimination is clear: failure to transfer Salvador to the position of harvest machine operator. Thus, the Board's order states the following affirmative action is to be taken:

> Make Salvador Hernandez whole for any losses he may have suffered as a result of Respondent's failure to transfer him to the position of harvest machine operator by

> payment to him of a sum of money equal to the difference between what he actually earned from the commencement of the harvest season until his termination and the amount he would have earned as a harvest machine operator during that period of employment together with interest thereon at the rate of 7% per annum.
>
> 3 ALRB No. 78(p.4)

However, Salvador during this relevant period actually worked more hours, although at a lower rate of pay, than Ed Johnson, who was transferred to the job of tomato harvest operator. Salvador continued to work as an irrigator, averaging 14 to 18 hours a day, at $2.50 to $2.75 an hour. Ed Johnson averaged 10 to 12 hours a day during this period, but at a rate of $3.75 an hour. (Jt. Ex.1). Thus, during this period Ed Johnson earned a total of $1,018.13, while Salvador earned $1,009.75, for a difference of only $8.38. (Jt. Ex.1).

Although respondent urges that a literal reading of the Board's order requires that Salvador be reimbursed only for this minimal difference, general counsel persuasively argues that such a result would encourage further discrimination by employers to force such workers to work longer hours in order to minimize backpay liability. In this situation, since respondent discrimenatorily refused to transfer Salvador to the higher paying position, respondent should not be allowed to escape financial liability here.

Two solutions present themselves:

1) Use Salvador's actual hours worked, but give him the difference between the rate of pay he actually received[1]

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1. Salvador earned $2.50 an hour on September 8, 9 and 10; and thereafter was paid $2.75 an hour.

and the $3.75 an hour paid to Ed Johnson. Thus, assume that Salvador actually worked 10 hours one day at $2.75/hour; while Ed Johnson worked 8 hours that day at $3.75/hour. Salvador's loss of pay would then be $1.00 an hour for each of the 10 hours worked, or a total of $10.00

2) Use Ed Johnson's hours for each day multiplied by Salvador's actual rate of pay, and give Salvador on a daily basis the difference between that total and the daily total Ed Johnson actually received. Thus, assuming again that Ed Johnson worked eight hours one day, at a $1.00/hour higher than Salvador, then Salvador's less of pay would be $1.00 an hour for each of the eight hours .worked, or $8.00.

Salvador worked 371 hours during the period in question; 42 hours at $2.50 an hour, and 329 hours at $2.75 an hour. Ed Johnson worked 271.5 hours during this period, all at a rate of $3.75 an hour.

Using the first alternative would mean that Salvador should receive an additional $1.25/hour for 42 hours, and an additional $1.00/hour for 329 hours, or a total of $331.50. Using the second alternative would mean that Salvador should receive an additional $271.50 for the $1.00 an hour differential, plus an additional $7.75 during the period there was a $1.25 an hour differential, or a total of $279.25.

General counsel has suggested that the second solution be adopted, which benefits respondent by $102.25. The rationale is to treat the extra hours worked by Salvador as an additional job,

which would not be used to reduce respondent's backpay obligation. See National Labor Relations Board Casehandling Manual (Part Three), Compliance Proceedings, August 1977, Sections 10604.3 - 10604.4.

Such a suggestion is reasonable, and I accordingly find that respondent's backpay obligation to Salvador is $279.25, plus interest compounded at the rate of 7% per annum. The computations are set forth on a daily basis in Appendix A, following this opinion.

II. VICENTE HERNANDEZ: The issues involving Vicente involve not only liability for backpay but also the respondent's liability for rent, electricity, moving expenses, expenses of seeking employment, interim earnings and mitigation efforts. Each of these will be discussed in turn.

BACK - PAY

It is stipulated that the total period of backpay liability runs from October 19, 1975 to May 26, 1976. However, there are disputes whether Vicente would have worked this complete period, and the appropriate method of calculating his back-pay. Accordingly, this period will be divided into several parts for purposes of analysis.

A. October 19 to December 31, 1975: It is undisputed that work was available during this period and it is also agreed that Gerardo Ochoa was the "representative employee" for this period. Preliminarily, a "representative employee" is a method to calculate loss of earnings by using the still-employed representative's earnings as a yardstick. The ALRB has followed the NLRB'S practice of

identifying such an employee and using that representative's earnings as a method of determining lost earnings. Butte View Farms v. ALRB (1979) 95 Cal.App.3d 961,969. During this period Mr. Ochoa earned $1,247.50.

Respondent urges two defenses: (1) Vicente should have migrated to El Rosa, California to seek work; and (2) Vicente worked for the Union during this period and was unavailable for work. Both defenses are unsupported by the evidence and the applicable governing authorities.

For a discharged employee to collect backpay, he must make reasonable efforts to obtain interim employment. The employer must show as an affirmative defense that the employee "willfully" refused to accept suitable interim employment. The burden is on the employer to prove this defense. Maggio - Tostado, Inc. (1.978) 4 ALRB No. 36.

Vicente had worked for the employer since 1967. During the early years of his employment, he would migrate with members of his family to El Rosa after the winter harvest and not return until spring. However, beginning in 1973 Vicente became a year-round employee of respondent until discharged on October 19, 1975. The earlier ALRB decision establishing the employer's liability here makes this clear.

> Prior to the 1973 harvest, Vicente was laid off each year at the end of the harvest. After the harvest in 19/3 Vicente was retained throughout the winter of 73-74 to tend Respondent's cows. From his commencement of work in April, 1973 Vicente was a year-round employee until his termination in October, 1975.
> Arnaudo Brothers (1977) ALRB No. 78, ALO Decision, pp. 21-22.

Thus, not only had Vicente become a year-round employee since 1973, he had not worked in the El Rosa area since 1972. Moreover, El Rosa was approximately 190 miles away, and no authority has been cited, nor discovered which would require an employee to seek work and relocate his family for that great a distance. See Madison Courier, Inc. (1973) 202 NLRB 808 upholding the right of a discharged employee not to seek work more than 50 miles away.

Respondent's second contention is that Vicente worked for the Union and thus was unavailable for work, relying on East Texas Steel Casting Co. (1956) 116 NLRB No. 81. There, the Trial Examiner deducted two weeks pay from one of the discharged workers, R.H. Jones, since he found that Jones was president of the local union and thus there was a period of time, "not definitely ascertainable' where Jones was not seeking employment. 116 NLRB at 1376.

Unlike that situation, Vicente was an unpaid volunteer for the Union, averaging about 10 to 20 hours a month. During the four to eight month period he volunteered for the Union, he was seeking work and had no definite comittment to the Union which would have precluded him from accepting work. Accordingly, I do not find that Vicente was unavailable for work due to his Union volunteer work.

B. December 31, 1975 to January 14, 1976: No backpay is claimed nor awarded for this period, since Vicente customarily took two weeks leave of absence.

C. January 15 to March 17, 1976: During this period there is no representative employee, since Ochoa no longer worked

for the respondent. General Counsel suggests that Vicente's hours of the year before (1975) be used to calculate backpay Respondent counters by stating that no work was available, or, assuming that work was available, Vicente's 1974 hours be used.

Preliminarily, I find that there was work available for Vicente during this period, consistent with the earlier Board decision, supra, that Vicente was a year-round employee. In the past Vicente 8 had fed the cattle, mended fences and performed shop and mechanic work. Thus, although Stephen Arnaudo, respondent's owner, contended there was no need to repair fences in 1976 (11:143-144); that testimony was directly contradicted by Glen Gilmore, respondent's ranch foreman, who stated that fences were repaired during this period (11:160-161).

A more difficult problem arises in calculating the loss of wages. Since there were no crews during this winter period, the crew averaging method approved by the Board in Maggio-Tostado, Inc., supra, is not available. There were employees on the payroll during this period, but respondent's records (Resp. Ex.2) demonstrate that these employees were earning either $2.75 or $3.00 an hour, which is more than the $2.50 an hour claimed on Vicente's behalf by General Counsel. Moreover, the hours worked by these employees are comparable to the hours worked by Vicente during the year before.

Accordingly, I adopt General Counsel's suggestion that back-pay for this period be at the rate of $2.50 an hour utilizing Vicente's hours for the year before. Respondent's contention that

Vicente's hours of two years prior be used is inappropriate, since Vicente took an emergency leave of absence of two and one-half months then. Thus, respondent's contention that the previous year' work history be ignored in favor of the work history of two years prior when Vicente was gone due to unusual circumstances is illogical. Accordingly, backpay for the period totals $1,217.50.

D. March 18 to May 26, 1976: General Counsel contends that Nicholas Rosas should be the representative employee for this period, since they worked comparable hours in 1975 and both were qualified to drive the caterpillar tractor. However, during 1976, Rosas was not only paid for his work as a caterpillar driver, but was paid an additional 4 hours a night to do one hour's work of irrigation. Thus, Rosas had hours far in excess of any other employee during this period, and there is no evidence demonstrating that Vicente would have done this additional work in 1976.

Respondent contends that Vicente's hours of the year before be used, and I find that suggestion appropriate and consistent with our earlier determinations. However, it is inappropriate to use the $2.50 an hour wage of the year before, since Stephen Arnaudo testified that in March 1976 the rate was raised to $2.75 an hour (11:150). A discriminatee is entitled to any wage increases granted since his discharge. Sunnyside Nurseries, Inc. (1977) 3 ALRB No. 42. Accordingly, backpay for this period totals $2,032.26.

Finally, respondent contends that backpay liability should have terminated in mid-February, 1976, when Glen Gilmore, respondent's

ranch foreman, made a telephone call to one of the Hernandez family for them to return to work. However, Gilmore admitted that he simply left a message to that effect with some unknown person who answered the phone, and, in fact, did not even know where he telephoned. Instead, he assumed that it was in the Fresno area. No response was received to this call.

In Reeves Rubber, Inc. (1980) 252 NLRB No. 26, the NLRB affirmed the trial examiner' s finding that a one-time telephone call which did not reach the discrimantee did not satisfy the showing of a good-faith recall effort. On a similar set of facts, I reach the same finding in this case and find that backpay liability was not terminated by this phone call.

After May 26, 1976, Vicente obtained a higher-paying job with another employer, and no further loss of wages is -claimed. However, the backpay period runs until October 31, 1977, since that was the effective date of respondent's written offer of reinstatement. The additional expenses claimed for this period will now be discussed.

RENT

While employed by respondent, Vicente lived on company housing and paid no rent, electricity or water, all of which were furnished by respondent. When Vicente was discharged, he was forced to leave this housing and moved temporarily to Ortega Brothers labor camp. He paid $70 a month for rent and electricity and lived there with his family from November, 1975 to March 1976, when they all moved

into a public housing project. He continued to live in this housing project for the remainder of the backpay period, that is through October, 1977. His rent there fluctuated between $60 and $100, depending on his and his wife's income.

Since his discharge caused him to incur these extra housing expenses, the established rule is that the employer is liable for these additional expenses. Further, this amount is not subject to deduction by interim earnings. See NLRB, Principles of Computation, Section 10552.2 and cases cited therein.

Respondent contends that since May 26, 1976, Vicente was earning a greater amount than he would have working for respondent, and all liability for rent and utility expenses should cease in the absence of any proof that the amount Vicente .earned did not exceed the amount he would have earned from respondent, plus any rent or utility expenses. The record, however, is silent on the amount Vicente earned after May 26, 1976.

Thus, it is impossible to determine whether Vicente's new job paid him enough to compensate not only for his loss of earnings but his additional expenses.

The law is well-settled that once the general counsel meets his burden of establishing the gross backpay due a discriminatee, respondent has the burden of proving any mitigation of the back-pay liability, including the employee's interim earnings. NLRB v. Brown & Root, Inc. (8th Cir. 1963) 311 F.2d 447. Respondent had ample notice of general counsel's contentions through service of the Backpay Specification on March 27, 1980, some six and one-half

months prior to the hearing. (G.C. Ex 1-B). Accordingly, respondent by failing to introduce any evidence of Vicente's earnings after May 26, 1976, has failed to meet its burden to reduce its backpay liability here. The total due here is $1,823.

ELECTRICITY

While Vicente lived in respondent's housing, as noted above, he incurred no charges for either rent or electricity. When he moved to the Ortega camp, his rent charges also included his electricity. Thus, he incurred no separate elctrical expenses until March, 1976, when he moved into public housing. His expenses for electricity, as evidenced by his P.G. & E. bills total $126.36. (G.C. Ex.3).

MOVING EXPENSES, EXPENSES OF SEEKING EMPLOYMENT

and INTERIM EARNINGS

General counsel contends that expenses incurred by Vicente in moving from company housing to the Ortega labor camp and ultimately to the housing project are recoverable as part of gross backpay. The expenses claimed here total $18.36. Similarly, general counsel contends that expenses incurred in seeking employment after Vicente's discharge are also recoverable as part of the gross backpay. The expenses here total $280. Respondent does not discus either of these contentions.

These expenses are not allowable as part of the gross backpay due Vicente. See NLRB, Principles of Computation, Section 10610,

and cases cited therein. Instead, these expenses are deducted from interim earnings. Vicente's gross interim earnings during this period consisted of $717.75 from Rodriguez, $57.00 from Dixon Brothers, and $119.00 from Thomas Silva, for a total gross figure of $893.75.

General counsel contends that Vicente's net interim earnings after deductions total approximately $792.00. Respondent submitted no computations. Accordingly, the moving expense and expenses of seeking employment total $298.36, and subtracting that figure from Vicente's net interim earnings, gives a total of $493.64, which will be deducted from the backpay due Vicente.

UNEMPLOYEMENT COMPENSATION

Respondent contends that its backpay liability should be reduced by the amount of unemployment compensation benefits paid to Vicente. Unemployment compensation benefits have been ruled not deductible from backpay by the United States Supreme Court in NLRB v. Gullett Gin Co. (1951) 340 U.S. 361. However, respondent notes that state workmen's compensation benefits have been held to be deductible. NLRB v. Moss Planning Mill Co. (4th Cir. 1955) 224 F.2d 702. Respondent argues that the distinction between the two decisions is not the nature of the payments, but the type of compensation scheme. In Moss Planning, decided under Louisiana law, the Court noted that employers contributed to workmen's compensation insurance. Respondent concludes that since employers in California contribute to unemployment insurance based on actual

wages, Moss Planning should control.

Respondent, however, has ignored the recent decision of Yama Woodcraft, Inc. (1975) 221 NLRB No. 216. This decision involved a California corporation with the hearing held in Los Angeles. There, the NLRB affirmed the administrative law judge's decision and remedy where the respondent's sole exception was that it was not permitted to deduct state unemployment compensation benefits from the sums due the discriminatees. The NLRB rejected this contention noting that the law was "well settled" that state unemployment compensation benefits are not deductible, citing NLRB v. Gullett Gin, supra.

Accordingly, I recommend that unemployment compensation benefits paid to Vicente not be deducted from his backpay award.

MITIGATION EFFORTS

Respondent's final contention is that Vicente failed to make reasonable efforts to find new employment during the backpay period As previously discussed, -willful loss of earnings is an affirmative defense and the burden is on respondent to establish that defense. Maggio-Tostado, Inc., supra.

Respondent's contention that Vicente should have relocated in El Rosa, California has been previously discussed. No authority has been cited that would require Vicente to relocate to an area approximately 200 miles away to seek employment. Further, there was ample evidence to support Vicente's contention that he did actively seek employment.

Immediately after his discharge, Vicente was able to obtain employment at Dixon Brothers. After being laid off, he moved to the Ortega labor camp, which put him in contact with any jobs that might open up. He was registered with the state employment service and went to their offices in both Stockton and Tracy. He also asked his friends about work.

He also made applications at a Heinz plant, at a sugar factory in Tracy and at a glass plant. In addition, he contacted several employers, including the Kennedys, Alvarez Brothers and Yamada. He was able to obtain interim work at Dixon Brothers and at Thomas Silva.

In fact, the record amply supports Vicente's efforts to find work. There is not a shred of evidence that he either withdrew himself from the labor market or refused any offer of employment. The employer has not met its burden to establish willful loss of earnings here.

THE REMEDY

For the reasons described above, I find that respondent's obligations to the discriminatees will be discharged by the payment to them of the respective sums as set forth in the Appendices. 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 Appendices, and continuing until the date this decision is complied with, minus any tax withholding

required by federal and state laws.

Accordingly, I hereby issue the following recommended:

ORDER

Respondent Arnaudo Brothers shall pay to the employees listed below the amount set forth by their names together with interest at the rate of 7 percent per annum minus tax withholding required by federal and state laws:

Salvador Hernandez	$279.25
Vicente Hernandez	$5,952.98

Dated: April 3, 1981

WILLIAM A. RESNECK
Administrative Law Officer

APPENDIX A

SALVADOR HERNANDEZ

Date	Ed Johnson's hrs. & rate of pay	Salvador's hrs. & rate of pay	Backpay Due
Sept. 8, 1975	9 x $3.75 = $33.75	9 x $2.50 = $22.50	$ 11.25
9	10 x 3.75 = 37.50	10 x 2.50 = 25.00	12.50
10	12 x 3.75 = 45.00	12 x 2.50 = 30.00	15.00
11	10 1/2 x 3.75 = 39.38	10 1/2 x 2.75 = 28.88	10.50
12	13 x 3.75 = 48.75	13 x 2.75 = 35.75	13.00
13	-------	--------	---
14	13 x 3.75 = 48.75	13 x 2.75 = 35.75	13.00
15	13 x 3.75 = 48.75	13 x 2.75 = 35.75	13.00
16	13 x 3.75 = 48.75	13 x 2.75 = 35.75	13.00
17	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
18	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
19	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
20	10 x 3.75 = 37.50	10 x 2.75 = 27.50	10.00
21	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
22	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
23	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
24	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
25	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
26	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
27	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
28	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
29	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
30	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
Oct. 1, 1975	12 x 3.75 = 45.00	12 x 2.75 = 33.00	12.00
		Total Backpay Due	$279.25

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APPENDIX B

VICENTE HERNANDEZ

(Week Ending)	(Gerardo Ochoa)	(Winter Rate)		
Oct. 29, 1975	57 hours	$ 2.50/hour	=	$ 142.50
Nov. 5,	64 "	"	=	160.00
12	68 "	"	=	170.00
19	64 "	"	=	160.00
26	52 "	"	=	130.00
Dec. 3	46 "	"	=	115.00
10	54 "	"	=	135.00
17	46 "	"	=	115.00
24	40 "	"	=	100.00
31	8 "	"	=	20.00
Jan. 7, 1976	----------	----------	=	----------
14	---------- 27 hours	Taken off Vicente's 1975 records		----------
21				67.50
28	54 "	2.50/hour	=	135.00
Feb. 4	45 "	"	=	112.50
11	54 "	"	=	135.00
18	57 "	"	=	142.50
25	60 "	"	=	150.00
Mar. 3	74 "	"	=	185.00
10	56 "	"	=	140.00
17	60 "	"	=	150.00
24	50 "	2.75/hour	=	137.50
31	62 "	"	=	170.50
Apr. 7	66 "	"	=	181.50
15	84 "			231.50
21	87.5 "	"	=	240.63
28	90.5 "	"	=	248.88
May 5	91 "	"	=	250.25
12	91 "			250.25
19	91 "	"	=	250.25
23	26 "	"	=	71.50
			Total	$4,497.26

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RENT

1975	November	$ 70.00
	December	70.00
1976	January	70.00
	February	70.00
	March	69.00
	April	69.00
	May	69.00
	June	69.00
	July	69.00
	August	69.00
	September	69.00
	October	60.00
	November	60.00
	December	60.00
1977	January	60.00
	February	60.00
	March	60.00
	April	100.00
	May	100.00
	June	100.00
	July	100.00
	August	100.00
	September	100.00
	October	100.00
	Total	$1,823.00

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ELECTRICITY

Account No . HXV-17-33505

MONTH	ELECTRIC ENERGY IN KW	BILL
March 15		$
April 8, 1976	85	3.81
May 10	138	5.71
June 9	161	6.38
July 9	246	8.75
August 9	265	9.29
September 9	198	7.37
October 8	174	6.69
November 9	156	6.17
December 10	252	8.97
January 10, 1977	181	6.88
February 8	129	5.39
March 10	106	4.74
April 8	89	4.25
May 9	113	4.93
June 6	167	6.43
July 11	250	9.03
August 9	241	8.60
September 8	184	6.96
October 7	149	5.96
	Total	$126.36

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SUMMARY

Total Lost Wages		$4,497.26
Plus Rent		1,823.00
Electricity		126.36
	Subtotal	$6,446.62

INTERIM

Rodriguez		$ 717.75
Dixon Brothers		57.00
Thomas Silva		119.00
	Gross	$ 893.75
	Net	$ 792.00

LESS EXPENSES TO SEEK EMPLOYMENT

October 1975 to May 1976

Approximately 7 months
Approximately $10.00 per week
-$40.00 per month
7 x $40.00 — $ 280.00

MOVING EXPENSES

Arnaudo to Ortega

5 trips, 10 miles one way for total
of 90 miles at $.17 per mile — $ 15.30

Ortega to Housing Project

5 trips, 2 miles one way for total
of 18 miles at $.17 per mile — 3.06

Total	$ 298.36
Net Interim Earnings after Expenses	$ 493.64
TOTAL DUE	$5,952.98

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