

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

JOHN VAN WINGERDEN, et al.,	)	
	)	
Respondent,	)	Case Nos. 75-CE-211-M
	)	75-CE-2-V
and	)	
	)	
UNITED FARM WORKERS	)	3 ALRB No. 80
OF AMERICA, AFL-CIO,	)	7 ALRB No. 30
	)	
Charging Party	)	

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SUPPLEMENTAL DECISION AND ORDER

On October 27, 1977, the Agricultural Labor Relations Board (the Board) issued an Order requiring Respondent to reinstate Jesus Gutierrez to his former or an equivalent job and make him whole for any money losses he suffered as a result of Respondent's discriminatory acts. John Van Wingerden, et al. (Oct. 27, 1977) 3 ALRB No. 80.

On December 2, 1980, a hearing was held before Administrative Law Officer (ALO) Robert L. Burkett for the purpose of determining the amount of backpay due Jesus Gutierrez. On February 17, 1981, the ALO issued the attached Decision in this matter, indicating the amounts due Gutierrez. Thereafter, Respondent filed timely exceptions and supporting brief.

Pursuant to Labor Code section 1146, the Board has delegated its authority to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the ALO's rulings, findings, and conclusions, and to adopt his recommendations.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondents John Van Wingerden, Hank Van Wingerden/ Bill Van Wingerden, and Case Van Wingerden, dba Dutch Brothers and Successor Companies, Max-I-Mum and Valley Flowers, their officers, agents, successors, and assigns, shall pay to Jesus Gutierrez the amount of \$8699.13 (principal and interest on backpay to the date of this Order), plus .0001944 percent simple interest per day on the principal backpay amount of \$6932.52 until the date Jesus Gutierrez actually receives payment thereof.

Dated: October 8, 1981.

HERBERT A. PERRY, Acting Chairman

JOHN P. MCCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

John Van Wingerden, et al. (UFW)

3 ALRB No. 80  
7 ALRB No. 30  
Case No. 75-CE-211-M

ALO DECISION

This matter was heard by an ALO to determine the amount of backpay owed to an employee discharged for engaging in protected activity in November, 1975. 3 ALRB No. 80. The ALO upheld the modified backpay specification (to which the parties stipulated) which accounted for interim earnings between November 1975 and November 1979. The ALO rejected as speculative Respondent's argument that the employee would have been laid off in May 1976, as the evidence shewed that the other work was available after May 1976.

BOARD DECISION

The Board adopted the ALO Decision in its entirety and ordered Respondent to immediately pay Jesus Gutierrez backpay as describe in the stipulated specification plus seven percent interest re tr. date of payment.

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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  
AGRICULTURAL LABOR RELATIONS BOARD



In the matter of :

JOHN VAN WINGERDEN, et al.,

Respondent,

and

UNITED FARM WORKERS OF AMERICA  
AFL-CIO

Charging Party

Case Nos. 75-CE-211-M  
75-CE-2-V

(ALRB No. 80)

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Robert Farnsworth, for General Counsel

George L. Wittenburg, for the Respondent

DECISION

Statement of the Case

Robert L. Burkett, Administrative Law Officer: This case was heard before me on December 2, 1980 in Oxnard, California; all parties were represented by counsel. This matter was a backpay hearing pursuant to Section 20290 (a) of the Cal. Admin. Code.

The Agricultural Labor Relations Board, thereafter called the Board, having issued its order on October 27, 1977, and the Court of Appeal having denied the Petition for Review on August 8, 1979, directed John Van Wingerden, et al, hereafter called Respondents to do the following:

"a. immediately offer employees, Pedro Reyes, Luis Campos and Jesus Gutierrez reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make each of them whole for any losses he may have suffered as a result of this termination.

The Board also directed that the backpay awards be computed in accordance with the formula adopted in *Sunnywide Nurseries, Inc.*, 3 ALRB No. 42 (1977).

## Findings of Fact

### I. Introduction

The taking of evidence concerning the backpay specifications for Luis Campos and for Pedro Reyes were bifurcated from this action; the Campos bifurcation was stipulated to, while the Reyes bifurcation was objected to by Respondent. It was stipulated by all parties that the findings of fact and conclusions of law decided at this hearing would be binding on any of the future bifurcated hearings. The only issue left to be determined would be the amount of backpay owed Mr. Campos and Mr. Reyes.

### II. The Facts

Counsel for Respondent argues that Luis Campos and Jesus Gutierrez would have been laid off in the normal course of business and would have me rely on the cases of *NLRB v. Transamerica Freight Lines*, 45 LRRM 2864 (7th Cir., 1970); *Jobbers Supply Inc.*, 28 LRRM 1208, 236 NLRB No. 15; and *NLRB v. Carolina Mills*, 2S LRRM 2525 (4th Cir., 1951), to conclude that these employees were entitled to no backpay during an economic layoff Counsel further argues that there was no work available after May 31, 1976 when the individuals hired to replace Mr. Campos and Mr. Gutierrez were laid off.

In order to determine whether or not work was available it is necessary to analyse the entire buisness operation not only of the Van Wingerden Brothers, but of the Dutch Brothers and the successor companies. Counsel for Respondent argues that the mere fact that employment may have been available in the overall Dutch Brothers complex does not mean that the employees in question would have been entitled to employment.

The testimony of John Van" Wingerden (Reporters Transcript, pages 31-through 55) indicates strongly that there was a unity of interest between the Dutch Brothers and the Van Wingerden Brothers during the period of time that Respondent claims that Mr. Campos and Mr. Gutierrez could not have been reinstated due to the fact the that there was no work available to them. It seems clear from the record that there was an unspecified number of greenhouse employees and that these two individuals could have been merged into that workforce in compliance with the Board's previous order. While it is the position of Respondent that the mere fact that employment may have been available in the overall Dutch Brothers complex does not mean that the employees in question would have been so employed, the use of a Wingerden foreman to supervise Dutch Brothers employees indicates a clear mergence of interest on the part of the two operations.

It is true that the two individuals hired to replace Jesus Gutierrez and Luis Campos were laid off in the normal course of events on or about May 31, 1976\* there is no way that I can conclude that the same fate would have befallen Jesus Gutierrez and Luis Campos. This was a small operation, not an assemblyline plant such as General Motors.

In a small agricultural operation such as this each employee must be judged on his/her particular skills and personality and how they fit into the general operation. It is quite possible, therefore, that at the conclusion of the green house work Jesus Gutierrez and Luis Campos would have been retained and other work would have been found for them.

Finally, the payroll records were found to be of little evidentiary value. Indeed, they cast serious doubt on many of Respondent's assertions in regards to the size of the workforce, the availability of jobs, and the work histories of various members of the family. In reaching my conclusions I have given very little weight to these records, other than that they buttress my findings that there was employment available to Jesus Gutierrez and Luis Campos from the date of this unlawful discharge, November 14, 1975, until the bonafide offer of reinstatement, November 27, 1979 and for Jesus Gutierrez from November 22, 1975 to November 22, 1979.

I make no findings of fact in regards to Pedro Reyes.

#### Conclusions of Law

Having found as a matter of fact that there was work available for Luis Campos and Jesus Gutierrez from November 1975 through November 1979, I hereby conclude that they are both entitled to backpay for this entire period, subject to mitigation.

This issue of mitigation is only directed towards Mr. Gutierrez as stated at the outset.

The figures in General Counsel's backpay specifications as amended by stipulation at the hearing are not in dispute. Counsel for Respondent asks that backpay in this case be figured on an annual basis rather than quarterly, and ask that I make a suitable adjustment in the amount of interest owing according to the figures in Exhibit A of Respondent's Post Hearing Brief.

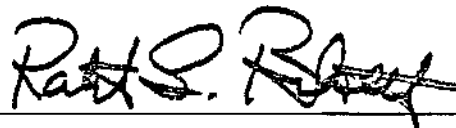
Respondent further asks that I find that Mr. Gutierrez's three months absence from work would relieve the Respondents from backpay liability as of October 1978 because he would have lost his job had he been employed by Respondents for the same reason that he lost his job with the garbage company. The record is clear that he testified that he left his job with permission and was not rehired because of numerous layoffs on the job. One cannot conclude that he would not have been given permission had he been a long term employee of Respondent or that he would have been denied a job on return. I therefore find that Mr. Gutierrez is entitled to backpay, with mitigation, from November 22, 1975 to the bonafide offer of reinstatement, November 22, 1979.

My computations are based on the formula as laid down in Sunnyside Nurseries, Inc., 5 ALRB No. 42 (1977), which mandated that:

"Loss of pay is to be determined by multiplying the amount of days the employer was out of work by the amount that the employee would have earned per day. If on any day the employee was employed elsewhere, the net earnings of that day shall be subtracted from the amount the employee would have earned at (Respondents) for that day only. The award shall reflect any wage increase, increase in work hours or bonus given by the Respondents since the discharge. Interest shall be computed at the rate of 7% annum."

In reaching my mitigation conclusions I have relied upon the stipulations entered into by counsel at the time of the hearing.

Dated: Feb 17, 1981 at Los Angeles, California



ROBERT L. BURKETT  
Administrative Law Officer

1975

Gross Backpay	\$450.00
Mitigation	-0-
Net Backpay	\$450.00 + 7% Yearly Interest

1976

Gross Backpay	\$7538
Mitigation	\$4108.75
Net Backpay	\$3429.25 + 7% Yearly Interest

1977

Gross Backpay	\$7800
Mitigation	\$8510.48
Net Backpay	-0-

1978

Gross Backpay	\$8050
Mitigation	\$7162.73 + 7% Yearly Interest
Net Backpay	\$ 887.27

1979

Gross Backpay	\$8250
Mitigation	\$6084 + 7% Yearly Interest
Net Backpay	\$2166