El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HIGH AND MIGHTY FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos . 78-CE-38-E 79-CE-44-EC 8 ALRB No. 100 (6 ALRB No. 34)

SUPPLEMENTAL DECISION AND ORDER

On June 19, 1980, the Agricultural Labor Relations Board (Board) issued a Decision and Order in this proceeding (6 ALRB No. 34), concluding, inter alia, that Respondent High and Mighty Farms had discriminatorily laid off employee Samuel Gonzalez in violation of Labor Code section 1153 (c) and (a).[1/] The Board ordered Respondent to reinstate Gonzalez to his former job or to a substantially equivalent position and to make him whole for all losses of pay and other economic losses he has suffered as a result of the discriminatory layoff.

On December 7 and 8, 1981, a hearing was held before Administrative Law Officer (ALO) Morton P. Cohen for the purpose of determining the amount of backpay due Gonzalez. Thereafter, or. March 31, 1982, the ALO issued his Supplemental Decision on backpay. Respondent, General Counsel, and the Charging Party each timely filed exceptions and a supporting brief, and Respondent and the

[1/] All section references herein are to the California Labor Code unless otherwise specified.

General Counsel each filed a reply brief.

Pursuant to the provisions of section 1146 of the Agricultural Labor Relations Act (Act), the 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,[2/] findings and conclusions[3/] as modified herein, and to adopt his recommended Order with modifications.

The Backpay Period

We affirm the ALO's finding that General Counsel properly

[2/] Before the hearing opened in this matter, the Charging Party (the United Farm Workers of America, AFL-CIO (UFW)), moved to intervene pursuant to section 20268 of the Board's regulations, which provides that the parties to an unfair labor practice hearing are the General Counsel and the respondent, but that the "charging party may intervene as a matter of right by notifying the Board or the hearing officer, orally or in writing, of its intention to do so." As no UFW representative entered an appearance at the prehearing conference, the ALO denied the UFW's motion to intervene without prejudice to the UFW's reasserting the motion at a later time. The UFW excepted to the ALO's ruling and to his conclusion that he had the discretion to deny the motion. We find merit in that exception. Section 20290 of the Board's regulations, which describes the procedures applicable in backpay proceedings, incorporates by reference section 20268 as to a charging party's right to intervene. As the UFW had properly notified the Board and the ALO of its intention to intervene, the ALO erred in denying the Union's motion. However, we note that the UFW did receive a copy of the ALO's Decision and filed exceptions thereto, and has not alleged that it was prejudiced in any manner by the ALO's error.

[3/] In reviewing the evidence presented by all parties in a backpay hearing, it is the ALO's responsibility to consider whether General Counsel's formula is the proper one in view of all the evidence, and to make recommendations to the Board as to the most accurate method of determining the backpay due. (See American Manufacturing Company (1967) 167 NLRB 520 [66 LRRM 1122], where the NLRB rejected the trial examiner's statement that his sole duty was to determine whether the formula utilized by the General Counsel was fair and reasonable.)

defined the backpay period as extending from March 6, 1979 (the day after Gonzalez was laid off), to January 13, 1981 (the day Respondent offered Gonzalez reinstatement). We reject Respondent's argument that the backpay period should be limited because Gonzalez[1] employment history indicates that he worked sporadically for different employers both before and after the discriminatory layoff, and that the longest he worked for any single employer was nine weeks.

The backpay period usually runs from the date of the discriminatory discharge or layoff to the date of a bona fide offer of reinstatement. (NLRB Case Handling Manual (Part Three), Compliance Proceedings, § 10530.l(a).) Reconstruction of what would have occurred but for a respondent's discrimination is often a difficult task, and, as the National Labor Relations Board (NLRB) has noted:

> Of necessity, therefore, there is always an element of doubt, if only in establishing what amounts (the discriminatees) would have earned had they continued to work for the Respondent. They might have later quit of their own accord; they might have been discharged for cause during the backpay period. ... It is difficult precisely to prove every step they took throughout the backpay period .... But regardless of where the uncertainties lie, it always remains true they were brought about by the Respondent's misconduct, by its unlawful act. And this is why the Board has long held, with court approval, that once the Regional Director has shown the gross amounts of backpay due "... the burden is upon the employer to establish facts which would negative the existence of liability." N.L.R.B. v. Brown & Root, Inc. 311 F.2d 447 (C.A. 8, 1963).
> (Atlantic Marine, Inc. (1974) 211 NLRB 230, 232-233 [87 LRRM 1060].)

A respondent's burden of proving mitigation of backpay liability is not met by conclusory statements or speculation.

(Midwest Hanger Co. (1975) 221 NLRB 911 [91 LRRM 1218], enforced NLRB v. Midwest Hanger Co. (8th Cir. 1977) 550 F.2d 1101 [94 LRRM 2878].) Respondent here failed to produce sufficient evidence to establish that Gonzalez would have left his job with Respondent after a few months. The uncertainty concerning how long Gonzalez would have worked with Respondent was created when Respondent laid him off for discriminatory reasons, and that uncertainty must therefore be resolved against Respondent. (NLRB v. Miami Coca-Cola Bottling Co. (5th Cir. 1966) 360 F.2d 569 [62 LRRM 2155]; Merchandiser Press, Inc. (1956) 115 NLRB 1441 [38 LRRM 1105].) In a case involving similar facts, where an employer argued that, based on the discriminatee's employment history both before and after the discrimination, the discriminatee would have worked for the employer for only about eight weeks, the NLRB agreed with the administrative law judge's statement that:

> ... what would have happened had the Company not discharged the man is now pure speculation. All we know with certainty is that (the discriminatee) stopped work here because the Company forced him to it. If the Respondent wished to take advantage of what it now assumes as predictable probability, all it had to do was simply let nature take its course, and not commit unfair labor practices. (Atlantic Marine, Inc., supra, 211 NLRB at 233.)

(See also McLaughlin Manufacturing Corporation (1975) 219 NLRB 920 [90 LRRM 1220]; Bagel Bakers Council of New York (1976) 226 NLRB 622 [94 LRRM 1292], enforced Bagel Bakers Council of Greater New York v. NLRB (2nd Cir. 1977) 555 F.2d 304 [95 LRRM 2444];

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Midwest Hanger Co., supra, 221 NLRB 911.)[4/]

Incurred Expenses Related to Interim Employment

It is well established that expenses incurred by a discriminatee in seeking, obtaining, and/or working at interim employment may be deducted from his or her interim earnings. (Butte View Farms (Nov. 8, 1978) 4 ALRB No. 90; Crossett Lumbe: Company (1938) 8 NLRB 440 [2 LRRM 483]; NLRB Case Handling Manual (Part Three), Compliance Proceedings, § 10610.) Such expenses include transportation costs which would not have been incurred but for the discrimination and the consequent necessity of seeking employment elsewhere. (Aircraft and Helicopter Leasing and Sales, Inc. (1976) 227 NLRB 644 [94 LRRM 1556].)

Gonzalez testified that, during January 1981, he drove ten round trips of 170 to 200 miles each from San Luis, Sonora, Mexico, to Calexico to work for J. R. Norton Company. He testified that he then resided in Mexico rather than Blythe because he believed that the road from Sonora to Calexico was less dangerous than the road from Blythe to Calexico. General Counsel excepted to the ALO's finding that there was insufficient proof of the

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[4/] In support of its argument, Respondent cites George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1980)111 Cal.App. 258, in which the court: held that only one season's backpay could be awarded to members of a cantaloupe crew who were discriminatorily discharged, since their employment was neither continuous nor permanent. In our Supplemental Decision in George Arakelian Farms, Inc. (May 10, 1982) 8 ALRB No. 32, we deferred, to the compliance proceeding, resolution of the amount of backpay to be awarded. We noted that the employer in that case would have, as Respondent here has had, an opportunity in a backpay hearing to adduce evidence on all relevant backpay issues. We find Respondent's evidence in support of its argument that the backpay period should be shortened is not persuasive.

reasonableness of that travel expense, and we find merit in the exception.

In Aircraft and Helicopter Leasing and Sales Corp., supra, 227 NLRB 644, the NLRB allowed as a deduction from the discriminatee's interim earnings, the travel expenses he incurred commuting to interim employment 150 miles from his home. The national board rejected the employer's argument that the discriminatee should have moved closer to the interim employment. We find that Gonzalez' travel from San Luis to Calexico was reasonable. Gonzalez had worked for J. R. Norton Company before, and, given the temporary nature of Norton's seasonal operation in the Calexico area, it was reasonable for Gonzalez to commute to Calexico from his home in Mexico rather than to relocate his residence for such short-term employment. We note that Blythe (the location of Respondent's, and part of Norton's, operations) is approximately the same distance from Calexico as San Luis. Accordingly, we shall deduct from Gonzalez' interim earnings the $340 in travel expenses (170 miles x ten trips x .20 per mile) he incurred in connection with his employment at J. R. Norton Company.

General Counsel also excepted to the ALO's failure to allow, as a deduction from the interim earnings of Gonzalez, the transportation expenses he incurred seeking interim employment during November 1979, and in March, April and May of 1980.

Gonzalez testified that he worked in Ehrenberg, Arizona in November 1979, and that his transportation costs to and from that job totalled about $40 a week. Respondent's Exhibit 1-I, the breakdown of Gonzalez' gross backpay and interim earnings for

November 1979, indicates that he worked for one week at J. R. Norton Company and, therefore, we shall deduct from Gonzalez' interim earnings $40 in travel expenses. Travel expense computations need not be based on precise contemporaneous written records, but may be based on estimates. (W. C. Nabors d/b/a W. C. Nabors Company (1961) 134 NLRB 1078 [49 LRRM 1289], enforced sub nom. Nabors v. NLRB (5th Cir. 1963) 323 F.2d [54 LRRM 2259].) We shall also deduct from Gonzalez' interim earnings the $10 in travel expense which he incurred searching for interim employment during March 1980, and his $4 travel expenses in May 1980 (one trip to Mesa Verde, a roundtrip of 20 miles). Those expenses were established by Gonzalez' uncontradicted testimony at the hearing, and, although based on estimates, were not too indefinite, inadequate or speculative. (Charles T. Reynolds Box Company (1965) 155 NLRB 384 [60 LRRM 1343].)[5/]

Gonzalez also testified that, in April 1980, he incurred expenses of $10 or $20 a week, for gasoline used while he was seeking employment. Respondent argued that, since Gonzalez had no interim employment during that month, his travel expenses for that period cannot be deducted from his interim earnings, and, under NLRB precedent, may not be added to his gross backpay. (Harvest Queen Mill & Elevator Co. (1950) 90 NLRB 320 [26 LRRM 1189].)

[5/] Contrary to the ALO, we find that there was insufficient evidence to establish that Gonzalez incurred expenses during the month of October 1979. Additionally, we have corrected the ALO's findings concerning the expenses Gonzalez incurred during June 1980 and October 1980. For the month of June 1980, we find that Gonzalez incurred $48.00 in expenses while working at interim employment (12 roundtrips of 20 miles) and $43.20 in expenses while working in October 1980 (27 roundtrips of 8 miles).

Section 10610 of the NLRB's Case Handling Manual (Part Three), Compliance Proceedings, states that:

> Allowable expenses of the discriminates during the backpay period are deducted from interim earnings, never added to gross backpay.
>
> . . . . . .
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> Expenses become irrelevant to any change in monetary return if, during the calendar quarter in which they are incurred, there are no interim earnings....

Based on its above-described rule, the national board does not give a discriminatee credit for job seeking expenses if he or she had no interim earnings during the calendar quarter in which the expenses were incurred. The NLRB computes backpay on a quarterly basis (F. M. Woolworth Co. (1950) 90 NLRB 289 [26 LRRM 1185]; NLRB v. Seven-Up Bottling Co. of Miami, Inc. (1952) 344 U.S. 344 [31 LRRM 2237]), while this Board, in order to fully and fairly compensate agricultural employees, has authorized the calculation of backpay on a daily or weekly basis, or by any method that is reasonable in light of the information available, equitable, and in accordance with the policy of the Act. (Frudden Produce, Inc. (Mar. 29, 1982) 8 ALRB No. 26.)

In Butte View Farms, supra, 4 ALRB No. 90, we noted that earnings are not computed on a quarterly basis under ALRB procedures, and determined that we would compute expenses for the entire backpay period rather than quarterly. We therefore allow a discriminatee to deduct expenses incurred seeking or working at interim employment at any time during the backpay period from interim earnings accumulated during the entire backpay period.

Pursuant to our Decision in Butte View Farms, we shall,

in the present matter, allow Gonzalez to claim the $40 in expenses he incurred in April 1980, as well as the $10 in travel expenses the ALO found he spent in March 1979, seeking employment, and the $10 in travel expenses the ALO found he spent in May 1979.

Computation of Backpay on a Daily Basis

Respondent excepted to the ALO's use of a daily basis computation of the net backpay; i.e., by reducing the gross backpay that Gonzalez would have earned working for Respondent by the interim earnings he earned on the same day from an interim job. We affirm our conclusion that computation of net backpay on such a daily basis is a reasonable and appropriate method by which to compensate agricultural employees for the losses they suffer as a result of an employer's discriminatory conduct. (Sunnyside Nurseries, Inc. (May 20, 1977) 3 ALRB No. 42; J & L Farms (Aug. 12, '1980) 6 ALRB No. 43.)

This Board's procedures for computing net backpay have been specifically tailored to the agricultural industry in order to insure that agricultural employees are fully and fairly compensated for all economic losses they suffer as a result: of a respondent's unfair labor practice(s). In F. M. Woolworth Co., supra, 90 NLRB 289, the NLRB adopted a practice of computing net backpay on the basis of discrete calendar quarters during the backpay period, rather than on the basis of the entire backpay period, so that an employee's interim earnings in one quarter did not affect the respondent's backpay liability for any other quarter. This quarterly formula was upheld by the court in NLRB v. Seven-Up Bottling Co. of Miami, supra, 344 U.S. 344. The NLRB and the

court found computation by separate calendar quarters to be more equitable since, under the previous entire backpay period procedure, if a discriminatee obtained a better paying interim job after a period of unemployment, it would become profitable for the respondent to delay an offer of reinstatement as long as possible, since every day the employee worked at the better paying job would reduce the respondent's backpay obligation. Such a procedure could induce a discriminatee to waive his or her right to reinstatement in order to foreclose further reduction of the backpay due him for the period of unemployment immediately following the act of discrimination.

The same concerns expressed by the NLRB in the Woolworth case are present in the agricultural setting; i.e., a discriminatee 's right to reinstatement should not be compromised by factors tending to induce him or her to waive reinstatement in order to stop further reduction of the backpay amount. In addition, the work patterns in agriculture are much more sporadic than in other industries. Employees often work for limited periods of time in a short harvest or thinning or pruning season, or work less than a full week because of weather, crop, or market conditions. Computing backpay in the agricultural setting on a daily basis is a reasonable method of effectuating the policy expressed by the NLRB in Woolworth of fully reimbursing a discriminatee for his or her economic losses without diluting the right to reinstatement.

We do find merit, however, in Respondent's exception to the ALO's averaging of interim earnings where records of such earnings were available only on a weekly basis. Since the gross backpay figures were available on a daily basis, the ALO permitted

General Counsel to average Gonzalez' interim earnings at Continental Telephone and J. R. Norton Company, and then to compute the net backpay due on a daily basis. As we noted, supra, Respondent has the burden of proving mitigation of backpay liability. (NLRB v. Brown & Root, Inc. (8th Cir. 1963) 311 F.2d 447 [52 LRRM 2115]; Midwest Hanger Co., supra, 221 NLRB 911.) Therefore, Respondent has the burden of producing evidence of interim earnings in a form that can be compared to the gross backpay figures, which, in this case, were available on a daily basis. Where a respondent introduces interim earnings in a weekly, monthly, or other form, which cannot be compared to daily gross backpay figures, and does not establish that such interim earnings data are the only data available, we will convert the interim earnings data submitted into a form comparable to the data on gross backpay. For instance, under such circumstances, General Counsel's conversion of Gonzalez[1] weekly earnings at Continental Telephone and J. R. Norton into daily figures in the present case would be reasonable. However, General Counsel stipulated at the hearing that only weekly figures were available from Continental Telephone and J. R. Norton, and we therefore find that it is appropriate to convert the daily gross backpay figures into a form comparable to that of the interim earnings; i.e., into weekly figures.

Accordingly, we have recalculated the net backpay due Gonzalez for the months of April, August, September, November and December 1979; November and December 1980; and January 1981. Where interim earnings data were available during those months only on a weekly basis, we totalled the gross backpay wages which the

discriminatee would have earned during that week or month and then subtracted the weekly or monthly interim earnings for that period. To reach a total monthly figure where weekly computations were made, we totalled the weekly net backpay figures for that month. The net backpay amounts so determined are set forth in Appendix A attached to this Decision.

The net backpay amounts set forth in Appendix A are based on the data included in Respondent's Exhibits I-A though I-W and General Counsel's Exhibit H, the ALO's findings based on those exhibits, and the stipulations entered into by the parties at the hearing. Where it was necessary to use weekly data, those data are designated as representing the "week of ——". All other data represent daily calculations. The data in Appendix A also reflect the changes we have effected in allowance for travel expenses discussed supra.

Computation of Interest on Backpay Award

General Counsel excepted to the ALO's failure to increase the backpay award by adjusting it for inflation or by applying the NLR3's periodically adjusted interest rate. (Florida Steel Corporation (1977) 231 NLRB 651 [96 LRRM 1070].) In Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, we determined that Florida Steel is applicable precedent under section 1148 of the Act and adopted its formula for computation of interest on monetary awards. The issue presented in this case is whether we will apply the Lu-Ette method of computing interest to a backpay case even though our remedial Order in the underlying unfair labor practice case specified that interest would accrue on the backpay due the

discriminatee at the rate of seven percent per annum.

We note that the NLRB refuses to modify the interest rate in an order that has been enforced by a federal court of appeals. (Pierre Pellaton Enterprises, Inc. (1979) 239 NLRB 1211 [100 LRRM 1131]; International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378 (1982) 262 NLRB No. 56 [110 LRRM 1329].) However, the appeal process under the NLRA differs from the appeal process under our Act. Orders issued by the NLRB are not self-executing, and the NLRB must apply to the appropriate United States Court of Appeals to secure enforcement of its orders. Any person aggrieved by a final order of the NLRB may obtain review of the order in a U. S. Court of Appeals. Unlike the NLRA, the ALRA provides for discretionary review of Board orders by a California Court of Appeal, rather than review as of right. In Tex-Cal Land Management, Inc. v. ALRB (1979) 24 Cal.3d 335, the California Supreme Court examined the authority of the Court of Appeal to review ALRB orders pursuant to Labor Code section 1160.8. After holding that review of an ALRB order is discretionary, the Court stated that "... by summarily denying a petition for review the court declines to exercise further jurisdiction in the matter. Once the denial becomes final the case must be treated as one in which the time for review of the order has lapsed.. at 352.)

[6/] If the parties thereafter fail or refuse to comply with our remedial Order, the Board may, pursuant to Labor Code section 1160.8, apply to a superior court for enforcement of the Order, just as if the time for review of our Order had lapsed.

The Court of Appeal denied the petition for review in the instant case, and it has therefore been neither affirmed nor reversed by the court. According to the Supreme Court's Tex-Cal decision, the present status of this case is as if the appeal had never been filed. Since the Court of Appeal's denial of the petition for review is not a decree or order of the court, our original remedial Order in this case is intact, and our power to modify the Order is the same as it would have been had there been no appeal.[7/]

We will therefore order that the interest due on the backpay owing to Gonzalez be computed pursuant to our Decision in Lu-Ette Farms, Inc., supra, 8 ALRB No. 55. However, recognizing that our original remedial Order in this case specified that interest would be computed at the rate of seven percent per annum, we will apply the Lu-Ette formula prospectively only, from the date of our Order in this case.

ORDER

Pursuant to Labor Code' section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent High and Mighty Farms, its officers, agents, successors, and assigns, shall pay to Samuel Gonzalez the amount of $8,265.72, plus interest thereon, computed at the rate of seven percent per annum from March 6, 1979,

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[7/] Section 1160.3 of the Act provides that, until the record is filed in a court, the Board may, with notice to the parties, modify its order in a case. Since the petition for review in this matter was denied by the Court of Appeal, it is as though no record has been filed. The issue of the interest rate was raised in the exceptions briefs, and all parties had an opportunity to submit arguments and authority concerning that issue.

until the date of this Order, and thereafter computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

Dated: December 27, 1982

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

APPENDIX A

DATE	GROSS LOSS	INTERIM EARNINGS	NET LOSS	EXPENSES
March 1979			$ 644.75[1/]	$ 10.00
April 1979				10.00
4/2-4/21	$523.25	$441.18	82.07	
4/22-4/31	230.75		230.75	
			312.82	
May 1979			723.06	10.00
June 1979			144.96	20.00
July 1979			349.50	
August 1979				
8/1-8/7			71.50	
Week of 8/8-8/15	94.25	140.00		
Week of 8/16-8/22	95.89	99.75		
Week of 8/23-8/28	156.00	140.00	16.00	
			87.50	8.00
September 1979				
Week of 8/29-9/4	149.50	112.00	37.50	
Week of 9/5-9/11	126.75	140.00		
Week of 9/12-9/18	172.25	91.00	81.25	
9/19-9/30			95.00	
			213.75	
October 1979			162.00[2/]	
November 1979				
11/1-11/12			180.00	
Week of 11/13-11/19	180.00	43.60	136.40	
Week of 11/20-11/26	172.50	119.90	52.60	
			369.00	40.00
December 1979				
Week of 11/27-12/3	165.00	143.06	21.94	
Week of 12/4-12/10	180.00	151.24	28.76	
Week of 12/11-12/17	120.00	122.63		
12/18-12/31			21.75[3/]	
			72.45	
January 1980			520.00	
February 1980			453.75	

[1/] Only the monthly net loss figure is given where the ALO's figure is correct.

[2/] Our figures differ from the ALO's because of mathematical corrections.

[3/] This figure includes the ALO's adjustment for Gonzalez' absence during the Christmas season.

March 1980			$ 285.98[4]	$10.00
April 1980			665.62	40.00
May 1980			477.72	4.00
June 1980			480.62	48.00
July 1980			430.00[5]	
August 1980			616.25	
September 1980			499.12[6]	
October 1980				43.20
November 1980				
11/1-11/17			202.50	
Week of 11/18-11/24		213.00		
December 1980-	$172.50		202.50	
Week of 11/25-12/1	146.25	187.75		
Week of 12/2-12/8	146.25	133.88		
Week of 12/9-12/15	157.50	180.40	12.37	
Week of 12/16-12/22	112.50	151.75		
12/23-12/29				
January 1981[8]			12.37	
Week of 12/30-1/5	52.50	176.35		
Week of 1/6-1/12	150.00	173.85		340.00
Week of 1/13-1/19	30.00	201.30		
		Total Net Backpay	$7,723.72	$583.20
		Total Reimburseable Expenses	583.20 [9]	
		Total Due	$8,306.92	

[4] Respondent stipulated to the use of daily interim earnings figures during this month.

[5] The ALO's figure is incorrect.

[6] The ALO's figure is incorrect.

[7] The December 1980 figures reflect the ALO's adjustment for Gonzalez absence during the Christmas season.

[8] The January 1981 figures reflect the ALO's adjustment for Gonzalez' absence during the Christmas season.

[9] Gonzalez' interim earnings clearly exceed the expenses he incurred seeking and working at such interim employment. In order to simplify the required calculations, we have therefore simply added his expenses to his net backpay for the entire backpay period.

CASE SUMMERY

High and Mighty Farms
(UFW)

8 ALRB No. 100
(6 ALRB No. 34)
Case No. 78-CE-3S-E
79-CE-44-EC

ALO DECISION

The General Counsel issued a specification setting forth the amount of backpay owed a discriminatee who the Employer discriminatorily laid off. (See High and Mighty Farms (June 19, 1980) 6 ALRB No. 34 The ALO found that the backpay period extended from the date of the discriminatory layoff until the date the Employer offered the discriminatee reinstatement, rejecting the Employer's argument that the period should be shorter because the discriminatee had a history of sporadic employment and agriculture is a seasonal industry. The ALO accepted the General Counsel's choice of replacement and representative employees, and found that the discriminatee made adequate efforts to obtain interim employment during the backpay period. The ALO subtracted the discriminatee's interim earnings from his gross backpay on a daily basis and, where payroll records for interim earnings were available on a weekly basis, he averaged the weekly figure to arrive at a daily figure, which was then subtracted from the gross backpay daily figures.

The ALO allowed the discriminatee to claim certain transportation expenses he incurred while working and looking for work, but disallowed his claim for expenses incurred driving from San Luis, Mexico to work in Calexico. The ALO did not consider as interim earnings the unemployment insurance benefits paid to the discriminating during the backpay period.

The ALO denied the UFW ' s motion to intervene at the hearing, since no UFW representative had entered an appearance at the preparing conference .

BOARD DECISION

The Board affirmed the ALO ' s definition of the backpay period, noting that the Employer's argument that the discriminatee would have quit was speculative, and that any uncertainty concerning hew long the discriminatee would have continued to work for the Employer absent his discriminatory layoff should be resolved against the Employer .

The Board reversed the ALO ' s finding concerning the discriminates ' s travel expenses from Mexico to Calexico, noting that a discriminatee may deduct from interim earnings the expenses he or she incurred in seeking, obtaining, and/or working at, interim employment. The Board found that it was reasonable for the discriminatee to travel from San Luis, Mexico to Calexico rather than to relocate his residence for short-term employment. The Board deducted from the discriminatee ' s interim earnings all travel expenses that were established by the discriminatee's testimony and were not too

indefinite, inadequate, or speculative. The Board noted that, while it calculates backpay on a daily or weekly basis, or by any method that is reasonable, it computes expenses for the entire backpay period. The Board therefore allowed the discriminatee to deduct expenses incurred seeking or working at interim employment at any time during the backpay period from interim earnings accumulated during the entire backpay period.

The Board affirmed the computation of backpay on a daily basis, noting that this procedure is specifically tailored to the agricultural industry, where work patterns tend to be sporadic and seasonal. However, the Board rejected the ALO's averaging of interim earnings, since the parties stipulated at the hearing that records of such interim earnings were available only on a weekly basis. The Board instead added the daily backpay figures and compared the results to the weekly interim earnings.

The Board concluded that it had jurisdiction to increase the interest rate included in its Order in the underlying unfair labor practice case, and ordered the Employer to pay interest on the backpay due the discriminatee, computed at 7 percent per annum until the date of the Order in the backpay proceeding, and thereafter in accordance with the Board's Decision in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HIGH AND MIGHTY FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 78-CE-38-EC 79-CE-44-EC 6 ALRB No. 34

Darrel Lepkowsky,
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of El Centro, California,
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Dressier, Ouesenbery, Laws & Barsamian,
by Larry Dawson, Esq.,
of El Centro, California,
for the Respondent

SUPPLEMENTAL DECISION

Morton P. Cohen,
Administrative Law Officer:

STATEMENT OF THE CASE

This case was heard before me in Blythe, California on December 7 and 8, 1981. Previously, on June 19, 1980, the Agricultural Labor Relations Board, hereinafter referred to as the "Board", issued its Decision and Order

directing respondent herein, High and Mighty Farms (hereinafter referred to as "respondent"), to "Make Samuel Gonzalez whole for any loss of pay or other economic losses incurred by reason of his discharge, plus interest thereon at the rate of 7 percent per annum " (p. 3, decision of Board.) . Such order was based upon the Board's affirmance, as amended, of the decision of the administrative law officer that respondent had violated Section 1153 (c) of the Agricultural Labor Relations Act in discharging Samuel Gonzalez on March 6, 1979 Thereafter, upon petition for review of the Board's Decision and Order having been made by respondent herein, the Court of Appeal for the 4th Appellate Dsitrict, Division 2, on October 17, 1980 ruled that said petition be denied. On June 4, 1981, at El Centro, California, a Back Pay Specification and Notice of Hearing concerning the Board's order to make Samuel Gonzalez whole was issued together with Back Pay Specifications appended thereto, indicating further that the parties had been unable to informally resolve the amount of back pay due and still further that, using the Sunnyside Nurseries, Inc. formula (see 3 ALRB No. 42(1977)), as modified in Kawano, Inc. (4 ALRB No. 104 (1978)), respondent owed Samuel Gonzalez $11, 049.38 including 7 percent interest per annum, as of January 13, 1981 with additional interest to accrue until payment. On July 6, 1981, respondent filed its

Answer to Back Pay Specifications, admitting that the Board had ordered respondent to make Samuel Gonzalez whole in its decision rendered in 6 ALRB No. 34 and further that the parties had been unable to informally resolve the matter. Respondent however denied that the amount due was $11,094.38 (sic) and instead offered the following affirmative defenses: 1. that the period used for computation should be March 6th through June 9th, 1979 since nine weeks is the longest period during which Gonzalez had worked at any one employer and thus the amount should be $1804.09; 2. that the period to be computed should be January 30, 1980 through June 18, 1980, a period of 17 weeks, since agriculture is seasonal and thus the amount should be $4072.18; and 3. if affirmative defenses 1 and 2 were rejected, the amount should be $8345.79 since the representative employee used by the general counsel had missed a considerable amount of work which absence should be attributed TO Mr. Gonzalez.

Prior to the hearing, on November 25, 1981, general counsel filed a First Amended Back Pay Specifications, pursuant to Section 20290 (g) of the Board's regulations. Additionally, prior to the hearing in the instant matter, general counsel's office filed a Motion to Strike Portion of Respondent's Answer to General Counsel's

Back Pay Specifications. Lastly, prior to the hearing, on August 10, 1981, a motion to intervene was filed by the legal department of the United Farm Workers of America, AFL-CIO. Additionally, a motion concerning discovery was made by the general counsel's office. At the pre-hearing, the motion for discovery was settled based upon oral statements by counsel for the respondent(see transcript, hereafter T, pages 1 through 3), and a determination that an in camera inspection would be made by the hearing officer concerning unemployment documents of the Employment Development Department(T, pages 8-14). The only further determination as to the motion for discovery was that a seniority list, if any existed, be produced (T, pp. 15-18). As to the motion concerning intervention by the United Farm Workers, it was decided that, there being no representative of the UFW present at the hearing, the motion would be denied subject to the opportunity on the part of the UFW to reopen and make an intervention motion upon the appearance of a representative of the UFW. As to the motion concerning the striking of respondent's answer as being sham and irrelevant under Section 453 of the California Code of Civil Procedure, argument was heard and decision reserved.[1]

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[1] Decision on the motion to strike the answer was subsequently made and will be discussed in the section on Conclusions of Law herein.

Sub-sequent to the hearing briefs were received from both parties, and subsequently a motion to strike respondent's post-hearing brief as being untimely served was made by representatives of general counsel's office.[2]

At the hearing, 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. Upon the entire record, including exhibits and testimony, and my personal observation of the demeanor of the witnesses, and after careful consideration of all applicable law inclusive of my own independent research, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Through his answer, as set forth earlier herein, respondent admitted that the Board had issued its Order directing respondent to make Samuel Gonzalez whole for a loss of pay or other economic losses resulting from his discharge, plus interest, and as well that such order remained unfulfilled. Thus the only thing before me is the question of the amount due.

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[2]The decision concerning the motion to strike respondent's brief has been made and will be discussed in the Conclusions of Law herein.

As set forth in the factual findings of the ALO in his determination of a discriminatory layoff as to Samuel Gonzalez, affirmed with modifications unrelated to this proceeding by the Board (6 ALRB No. 34), Gonzalez worked for respondent as a shoveler from the end of January 1979 until March 5, 1979, whereupon he was discriminatorily laid off. (See General Counsel Exhibit 1A, Decision of the Administrative Law Officer, pp. 10-20). The Administrative Law Officer further found that on March 6, 1979 Militon Sanchez, respondent's general foreman, hired one Ramiro Aguayo as a shoveler in the same crew in which Gonzalez had previously been employed, and further that Aguayo worked steadily thereafter as a shoveler for respondent. (General Counsel Exhibit 1A, Decision of the ALO, p. 12) In rejecting respondent's argument that Gonzalez was laid off due to the slowness in the shoveling work and the absence of seniority on his part, the ALO made particular findings that "...Aguayo was hired and replaced Gonzalez as a shoveler..." (General Counsel Exhibit 1A, Decision of the ALO, p. 19).[3]

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[3]Respondent argues that neither collateral estoppel nor res judicata should apply as to the determination by the ALO that Aguayo was a replacement worker. This being a legal determination, decision will be rendered on the point in the portion of this decision entitled Conclusions of Law.

On January 13, 1981, a letter offering reinstatement was sent to Mr. Gonzalez by respondent.[4]

The general counsel, in calculating its specifications as to the gross amount due the discriminatee, Mr. Gonzalez, used the earnings of Mr. Aguayo during the period in question. During that period Mr. Aguayo's earnings were $11, 712.05.[5] This was computed as a result of Mr. Aguayo's earning $2.95 per hour commencing March 6, 1979, being raised to $3.25 per hour as of March 28, 1979 and to $3.75 an hour as of February 6, 1980. He remained at the S3.75 an hour rate until the end of the period in question, January of 1981. The figures stated herein were obtained by calculating the hours worked by Mr. Aguayo, wherever given, as set forth in General Counsel's Exhibit 2, a compilation of timesheets for crews and for individuals ranging from March, 1979 through January of 1981. The hours given were then multiplied by the rate of pay for the particular period of time. For Mr. Gonzalez, the discriminatee, the only

[4]Although this letter was testified to by Jorge Vargas, Field Examiner for the ALRB, it was not put into evidence. Nevertheless no objection to its absence was made by the respondent nor were any questions asked, on cross examination concerning a prior offer of reinstatement. I therefore conclude that Mr. Vargas's statement as to the offer of reinstatement having been made on January 13, 1981 was both accurate and credible.

[5]Both counsel mistakenly totaled gross earnings for May, 1979 at $721.44 instead of $723.06, resulting in a discrepancy of $1.62 in their total gross earnings, which I have corrected.

information, given as to pay rates was on D. 2 of General Counsel's Exhibit 2 indicating that Mr. Gonzalez worked eight hours on February 28, 1979, nine hours on March 1, 1979, nine hours on March 4, 1979, and nine hours on March 9, totalling 35 hours at *a* pay rate of $2.95 for a total of $103.25.

During a period commencing with the pay period of October 2, 1979 through the pay period ending January 29, 1980 Aguayo voluntarily left work for respondent, returning on Tuesday, January 29, 1980, at which time he worked for four hours at a pay rate of $3.75 an hour, earning total wages of $15.00. During this period of approximately four months the pay records (General Counsel's Exhibit 2) reflect that from September 26, 1979 through October 30, 1979 the average rate of the crew was $3.25 per hour as reflected by the pay records of, inter alia, Aristeo Diaz, Candelario Castellanos, Abel Tapia, and Enrique Moreno. Over this period of time the wages of each of the above were approximately the same, as witness the week of October 23, 1979 when each of the employees made the same amount of money, $156 for the week, and worked the same number of hours at the same rate of pay. For the period commencing October 31, 1979 and ending with January 29, 1980, an examination of General Counsel's Exhibit 2 revealed that a number of different employees worked during that period at

the pay rate of $3.75 an hour and that employees representative of the norm during that period would be only Enrique Moreno and Candelario Castellanos. For example, during the pay period of January 8, 1980, six employees worked at a pay rate of $3.75 per hour, three of them at 48 total hours, one at 50 total hours, one at 24 and one at ten. I thus conclude that during this period Mr. Moreno's hours were representative of an average worker at the pay scales given previously. For this period from October 1979 until January 1980, Mr. Moreno's total wages, computed at the $3.25 and $3.75 rates per hour, were $3045.25.[6]

Thus, should the representative method be used herein, and should Mr. Aguayo be used as the replacement employee with the exception of the tine when he voluntarily left and further should Mr. Moreno be used as representative employee during the period of time Mr. Aguayo was not available for work, the total gross amount involved herein would be $14,757.30 unless the period

[6]On February 20, 25, and 26, 1980, general counsel credits the discriminatee with loss of wages while respondent does not. (See General Counsel Exhibit 1, Respondent Exhibit 1.; An examination of General Counsel Exhibit 2 for the dates in question shows that Mr. Moreno worked eight hours on the 20th, eight on the 25th, and four on the 26th at a pay scale of $3.75 per hour totalling $75. *I* therefore determine that credibility should be given to general counsel's version as it comes from respondent's records.

in question should not be March 6, 1979 until January 13, 1981, as was alleged by respondent.

In regard to work done by the discriminates prior to working at respondent during 1979, Mr. Gonzalez testified, when called by the respondent, that he had worked for C & C Farms in June 1978 doing tractor work, and that he had worked for Nish Norian for eight months to one year in 1977 and 1978. He further worked, prior to coming to work for respondent, for Frank Cota and for Larry Works in irrigation. In December 1978 he worked for Robertson Farms in November and a part of December 1978. He testified that he had left Nish Norian in November of 1978 to go to Robertson since he was only working three hours a day at Nish Norian.

During March 6, 1979 through January 13, 1981, Mr. Gonzalez went through a number of activities in searching for work. To begin with, he would speak with foremen at various employers such as C & C Farms, Frank Cota, Nish Norian, and others. Additionally he would speak with friends as to whether they knew of employment available. In order to speak with the various foremen, he would go to the "Winchells Donuts" shop on Main Street to speak with the foremen. Additionally he would go to the foremen's houses and, since he was receiving unemployment insurance benefits, would also check with the employment office to

find employment. Beyond this, he would also go out to the fields where the crews were and ask about employment. The only time during the 22-month period between March 1979 and January 1981 when Mr. Gonzalez was not looking for work was a 1½ week period around Christmas of both 1979 and 1980 when he went to Mexico on a vacation. Mr. Gonzalez testified, and I find credible, that had a job been offered, he would have accepted it.

During the period subsequent to March 5, 1979 and up to January 13, 1981, and as well subsequent to January 12, 1981, Mr. Gonzalez obtained a number *of* jobs at varying pay scales. The parties stipulated to the names of employers, dates of employment, and amounts of interim earnings involved, including whether the earnings were daily or weekly paid. (See Respondent's Exhibit 1A through W as amended in transcript, pp. 142-159; transcript pp. 74-76).

Thus it was agreed that for the month *of* March 1979 there were no mitigating earnings. For the month *of* April 1979 mitigating earnings were $441.18 based on earnings on each day of April 2nd through 21st, excepting the 8th and 15th, of $24.51 per day.[7] The parties then

[7]It is to be noted that Respondent's Exhibit IB reflects a total of $441.11, and that the mathematics of that figure are incorrect and should be $441.18 as was stipulated to by the parties.

stipulated to the gross figures and mitigating earnings figures shown within Respondent's 1C for the month of May 1979 (it is to be noted that although the parties stipulated to the gross loss figure of $721.44, the correct figure was $723.06 which I have taken the liberty of correcting to insure accuracy in the record.). As to Respondent's ID, the parties stipulated that the figures contained therein, i.e., those concerning gross loss and mitigating earnings, were correct, and I so find. As to the records for July of 1979, concerning Mr. Gonzalez's mitigating earnings, the parties stipulated that the mitigating earnings were as contained within Respondent's Exhibit IE rather than those contained within General Counsel's Exhibit 1H. As to the month of August, 1979, the parties stipulated and I so find that the mitigating earnings contained within Respondent's IF are correct including the fact that such earnings are daily for August 2nd and 3rd, 1979 and weekly for the remaining earnings within that month. For September 1979 the parties agreed that the mitigating earnings contained within Respondent's Exhibit 1G were correct. As to the dates up to the 18th of September were correct and further that Mr. Gonzalez worked on the 22nd through 29th of September, earning $28 per day on the 22nd through the 26th, $14 on the 27th, $28 on the 28th, and $21 on the 29th

For October 1979, the parties agreed and I so find that the mitigating earnings contained within General Counsel's Exhibit 1H, and repeated in Respondent's 1H were correct. For November 1979, the parties stipulated and I find that the mitigating earnings were as contained within both General Counsel's Exhibit 1H and Respondent's Exhibit II, such figures having been obtained from weekly payroll records providing hourly and unit amounts in addition to wage rates. As to December 1979, the parties stipulated that the figures contained within both General Counsel's 1H and Respondent's 1J were accurate and were weekly records excepting those from December 17th through December 31st, which were daily figures.

For January and February 1980, the parties agreed that the mitigating earnings shown both on Respondent's IK and L as well as General Counsel's Exhibit 1H were correct. As to March 1980 (Respondent's Exhibit 1M) it was agreed, and I find, that the figures contained within Respondent's Exhibit lM were correct and were earned each day of that period and further that, although General Counsel's Exhibit IK reflects earnings from March 3rd through March 6th of 1980, there were no such interim earnings. As to April and May, 1980 (General

Counsel's Exhibit 1H, Respondent's Exhibit IN, 10), it was agreed that the figures contained therein were accurate, and further that they were daily figures wherever given.

For June 1980, it was agreed by the parties and I find that the figures contained within Respondent's Exhibit IP were correct and further that they were daily figures. As to July 19SO, it was agreed by the parties and I find that the figures contained within Respondent's 1Q were correct and further that Mr. Gonzalez earned $45.28 mitigating earnings on July 8, 1980, and further that such figures were daily figures. As to August 1980, it was agreed that the only mitigating earnings within that month were $25 earned on August 22, 1980 as reflected in Respondent's 1R, and further that such earnings were daily.

As to September 1980, the figures found within Respondent's Exhibit IS are accurate, as agreed to by the parties and found by me, and further these figures are on a daily basis. The same is true concerning the earnings of Mr. Gonzalez during October 1980 (Respondent's Exhibit IT). As to November 1980, the figures given within Respondent's Exhibit 1U are accurate, including the fact that Mr. Gonzalez earned $213.50 for the week commencing

November 18 and ending November 24. As to December 1980 and January 1981 the parties agreed, and I find, that the figures contained within Respondent's Exhibits IV and 1W were accurate and further that such figures were on a weekly basis.

Insofar as the discriminatee's expenses were concerned, Mr. Gonzalez presented testimony on cross-examination as to his expenses. This testimony was objected to by counsel for respondent as not being part of the direct examination of the witness, and further as not being part of general counsel's case (see transcript pp. 102-103). I reserved decision on the question and requested the parties to argue the question within their briefs, permitting counsel for respondent a continuing objection to the line of questioning. Thus testimony was taken from Mr. Gonzalez, which testimony I find credible, but nevertheless subject to exclusion as will be subsequently determined herein within the section en conclusions on law, that Mr. Gonzalez had to pay for rides to work and to look for work on several occasions including twice each in the months of March, April, and May, 1979 at S5 per ride, as well as ten times in June of 1979 at S2 per ride. Thereafter he testified that he used his own car to drive to work or to look for work during the months

of July 1979 through January of 1981, averaging approximately ten miles per day, and sometimes, as with January 1981, as much as 85 miles per day.

In April of 1981 Mr. Gonzalez returned to work for the respondent remaining there for approximately eight weeks, and thereafter working at Aztec.

Testifying for the respondent was Militon Sanchez, general foreman for the respondent for the past 17 years or more. Mr. Sanchez testified, and I find credible, the fact that the rate of turnover of laborers, including shovelers, is 50% and that such individuals often leave for better pay. He also testified that perhaps two or three shovelers remain on a year-round basis working with respondent, although at tasks other than shoveling at certain times during the year. (See transcript pp. 130-135.)

At the close of hearing, the parties were directed to submit briefs in support of their case, both of which were to be submitted simultaneously to the ALO 20 days after receipt of the transcript (see transcript p. 138). Thereafter both briefs were so received. However on February 1, 1982, counsel for general counsel's office moved to strike respondent's post-hearing brief, claiming that general counsel's office had not been served with a copy of respondent's brief and that the California

Administrative Code requires such service. Based upon this failure general counsel's office moved to strike respondent's brief.

CONCLUSIONS OF LAW

Prior to the hearing in the instant matter, counsel for general counsel's office moved to strike respondent's answer as being "immaterial or irrelevant" as well as "based solely on conjecture and speculation and... without legal precedent" (Motion to Strike, p. 3), based upon Section 453 of the California Code of Civil Procedure. The portions of the answer which general counsel's office sought to have stricken involved a claim that the period of computation concerning Mr. Gonzalez's back pay ought to be shorter than that proposed by general counsel's office because Mr. Gonzalez was not likely to remain at respondents during the period of 22 months had there not been a discrimination, and further that the seasonal nature of employment at respondent was such that Mr. Gonzalez would not have remained there for that reason during the period of *22* months. General counsel claims that these defenses were or would be based solely on conjecture and speculation as well as without precedent and further indicates that respondent prepared and presented no legal authority

for its position. General counsel then cited to several labor cases which indicated that such defense would be unacceptable since speculative (such as NLRB v. Miami Coca Cola Bottling Co. (5th Cir. 1966), 360 F2d 569; Butte Farms 4.ALRB 90 (197S)}. Such however does not make the portions of the answer general counsel seeks to strike either sham, irrelevant, or redundant. There is no indication here of improper motive attributable to respondent (see McNeil v. Higgins (1948), 86 CA2d 723), nor is there any indication of irrelevance. Indeed, on its face, which is the only basis upon which to judge such an answer for purposes of this motion, the answer is entirely relevant, and certainly adequate on its face to sustain the theory (see Palmer v. Emmanuel (1926), 77 CA 772! To do otherwise would cause a hearing officer to be obliged to prejudge the case, and to require, as suggested by general counsel's office, that pleadings be accompanied by supportive law. Such is not the law. The motion to strike is denied.

As to the motion to strike respondent's brief because of a failure to serve a copy upon general counsel's office, such motion is also denied. There having been no obligation to serve general counsel's office with respondent's brief in advance of general counsel's filing its

brief, there can have been no prejudice. Additionally, it appears that the general counsel's office has received a copy of respondent's brief. Further, general counsel's office cites to no case in support of its motion indicating that any court or administrative tribunal has, under the circumstances shown herein, made such determination and stricken a brief under such circumstances (see, for example, Decision of ALO, S & F Growers, 5 ALRB No. 50, at page 5-6).

Having determined that the answer would not be stricken nor the brief of respondent, it is next necessary to reach conclusions concerning the legal merits of general counsel's and respondent's case. A number of problems were presented by respondent insofar as the back pay owing the discriminatee is concerned. Thus, it is necessary for me to determine the period of computation in question, the method of computation, whether these are to be affected by the seasonal nature of the industry and the work history of the discriminatee, whether res judicata should apply to the decision ordering back pay, whether a daily or weekly equation should apply to the interim earnings, and what, if any, consideration should be given to the expenses involved. Additionally respondent has questioned the efforts of search by the discriminatee for employment. The basic

policy to be followed in back pay cases has been set forth by the Board in Arnaudo Brothers (August 31, 1981), 7 ALRB No. 25 in its SUPPLEMENTAL DECISION AND ORDER:

> The policy of the Act reflected in a back pay order is to restore the discriminatee to the same position he or she would have enjoyed had there been no discrimination. Maagio-Tostado (June 15, 1978), 4 ALRB No. 36; NLRB v.Robert Haus Co. (6th Cir. 1968), 403 F2d 979 (69 LRR.M 2730) ; NLRB v. United States Air Conditioning Corp. (6th Cir. 1964) , 366 F2d 275 (57 LRRM 2068). Our decision in Sunnyside Nurseries Inc. (May 20, 1977), 3 ALRB No. 42, sets forth a formula calculating back pay on a daily basis. The Board has since authorized the calculation of back pay 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 (November 8, 1978), 4 ALRB No. 90, aff'd (1979) 95 CA3d 961; Maggio Tostado, supra, 4 ALRB No. 36.

The ALRB uses the NLRB four basic formulas in computing back pay awards. See NLRB Case Handling Manual (Part Three) Compliance Proceedings, August 1977, sections 10538-10544; ALRB Case Handling Manual, Computation of Back Pay. There are many variations of these formulas and "each one of these basic formulas must usually be adjusted in detail to meet the requirements of specific cases. More than one formula may be applicable to a given case." NLRB Case Handling Manual, Part Three, supra, section 10536.

The first issue to be resolved is the period within which the discriminatee suffered economic loss as a result of the previously determined discrimination and as to which the discriminatee is to be made whole. Absent some exceptional circumstance, the rule normally is that "The period covered is that from the discriminatory loss or refusal of employment to a bona fide offer of reinstatement. .." (section 10530.1 (a) NLRB Case Handling Manual (Part Three) Compliance Proceedings). Respondent accepts such rule in its brief saying "Normally under NLRA precedent the cutoff date for a back pay period is the time that the discriminatee is offered reinstatement. However it is clear that rigid application of NLRA precedent is not required under the ALRA." (Respondent Brief p. 1). However, instead of citing to precedent,

respondent seeks a unique decision concluding that the nature of the agriculture industry is such that back pay periods should be determined according to the employment history of the discriminatee and the employment practices of the respondent. Such speculation has been rejected by the NLRB, as affirmed by the federal courts as well as the ALRB, as affirmed by the state courts. Thus in East Texas Steel Castings Co., 116 NLRB 1336, 38 LRRM 1470 (1956), aff'd NLRB v. East Texas Steel Castings Co., 255 F2d 284, the employer had unlawfully discharged employees whose union thereafter struck the employer. Employment was offered the discriminatees after the strike, but the employer argued that the cutoff date for back pay liability should be the date of the strike since the discriminatees would probably have struck with their union. Both the Board and the Fifth Circuit determined that the cutoff date should instead be the date of the offer of employment since the discrimination made it speculative to determine what the employees would have done at the time of strike. Similarly in NLRB v. Miami Coca Cola Bottling Co., 360 F2d 569 (5th Cir. 1966), where the question was whether an employee would have been given an annual $100 safety award which was precluded to the discriminatee based upon the unlawful discharge by the employer, the court stated, citing to Merchandiser Press Inc., 115 NLRB

1442, that "...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." (See also Butte View Farms, 4 ALRB 90 (1978), affd Butte View Farms v. ALRB, 95 CA3d 961). Precisely on point is the decision of the NLRB in Midwest Hanger Co. (1975), 221 NLRB 911, 91 LRRM 1218 (cited in General Counsel's Brief at p. 22 as Midwest Hunger (sic) Co.). In that case the Board rejected as "sheer conjecture" the argument that given respondent's high turnover rate the discriminatees would have voluntarily quit at some time during the back pay period, and instead the Board adopted the normal rule as to determination of the back pay period, saying that it was from termination until offer of reinstatement.

In light of the foregoing, I determine that the back pay period herein is from March 5, 1979, the date of Mr. Gonzalez's layoff, until January 13, 1981, the date on which an offer of reinstatement was communicated to Mr. Gonzalez.

The next issue to be resolved is the method of computing the gross pay to which Mr. Gonzalez is entitled, As set forth by the ALRB in its decision in Arnaudo

Brothers, supra, there are many variations of the four basic formulas for computation of back pay awards (Arnaudo Brothers, supra, at p. 3). The four suggested are: 1) use of discriminates's average earnings prior to the unfair labor practice (section 10538, NLRB Case Handling. Manual, supra); 2) use of discriminatee's average hours of work prior to the unfair labor practice (section 10540, NLRB Case Handling Manual); 3) use of average earnings (or hours) of a representative employee (or employees) who worked in a job similar to the discriminatee ' s before the unfair labor practice and during the back pay period (section 10542, NLRB Case Handling Manual); and 4) use of earnings (or hours) of replacement employee (or employees) who worked in jobs similar to the discriminatee's during the back pay period (section 1054^, NLRB Case Handling Manual). As has been said by the California courts,

> "In framing a remedy, the Board has wide discretion, subject to limited judicial scrutiny. We can reverse only if we find that the method chosen was so irrational as to amount to an abuse of discretion,... IP A back pay award is only an approximation, necessitated by the employer's wrongful conduct. In any

> case there may be several equally valid methods of computation, each yielding a somewhat different result.... The fact that the Board necessarily chose to proceed by one method rather than another hardly makes out a case of abuse of discretion."
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> (Bagel Bakers Council of Greater New York v. NLRB (2nd Cir, 1977), 555 F2d 304, 305.
>
> (In accord see NLRB v. Carpenters Union Local 180 (9th Cir. 1970), 433 F2d 934, 935; NLRB Brown & Root Inc. (8th Cir. 1963), 311 F2d 447, 452.})

Butte View Farms v. ALRB (3rd District, 1979) , 95 CA3d 961; 157 CR 476

Given the short period of time within which Mr. Gonzalez had been employed by respondent, and the increasing earnings for other employees during the long back pay period, the first and second methods suggested by the NLRB are inappropriate herein. Thus, the NLRB Case Handling Manual indicates that these methods should be used only if discriminatees have been with the company for a relatively long period of time, the business is not seasonal, and the back pay period is relatively short, none of which are the case herein (see sections 10538.2 (a), (c) , (d) ; and section 10540.2 (c), (d) , and (e), NLRB

Case Handling Manual. Thus, the use of the replacement employee and representative employee methods are appropriate herein. Respondent argues that the replacement employee method ought not be used as Mr. Aguayo was not a replacement and that any determination by the ALO in High and Mighty Farms (6 ALRB No. 34) to that extent is not res judicata herein. Further respondent argues that if Mr. Aguayo was a replacement employee, then Mr. Moreno could not be used as a representative employee during the four-month absence of Mr. Aguayo and that that four-month period should be subtracted from the total amount.[8]

As to the argument that res judicata does not apply herein, respondent misunderstands the nature of the proceedings. Thus, unlike the new and separate proceedings normally involved when res judicata and collateral estoppel are applied or rejected (see, e.g., Anderson v. San Mateo Community College District (1978) , 87 CA3d 441) , the instant proceeding is a supplementary one (see, e.g., S & F Growers

[8]Unfortunately respondent's brief contains a number of errors which make it difficult to consider and reflect upon respondent's arguments. Thus pages are misnumbered (see page 16, numbered as page 15, and vice versa; see footnote 2 on page 12 wherein respondent leaves blank the total gross earnings involved; and see page 9 wherein respondent cites to George Arakelian Farms v. Agricultural Labor Relations Board at 101 CA3d 258 instead of 111 CA3d 258).

(5 ALRB No. 50), Arnaudo Brothers (7 ALRB No. 25)). Thus the concept of finality is of even greater importance. As is stated in the Restatement of Judgments (Second) at pp. 157-158, "The appropriate question... is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. *If so,* the determination is conclusive between the parties..."(see also Ashe v. Swenson (1970), 397 U.S. 436). In the instant matter the facts ultimately found by the ALO in the ULP proceeding, that Aguayo was Gonzalez's replacement shoveler, were undoubtedly both necessary and critical to the very same parties as are present herein, particularly when respondent put it in issue by arguing "...that it laid off Gonzalez because the shoveling work was slow..." (see Decision of ALO, p. 18-19, High and Mighty Farms, 6 ALRB No. 34). At the very least such evidence is sufficient to find that a prima facie case has been made out that Mr. Aguayo was Mr. Gonzlaez's replacement, but respondent offered no evidence to controvert such fact.

Respondent argues, in its brief, that if the replacement method is used to compute back pay during the period in question, the method permits only of that time during which Mr. Aguayo was in fact employed, so that the computation would have to be reduced by the four-months during which Mr. Aguayo was not available (see Respondent's Brief, p.12,

footnote 2). Respondent gives no citation for such determination, and in fact such argument appears to be in direct opposition to the use of the replacement employee method by the NLRB. Thus, in section 10544.1 of the NLRB Case Handling Manual, it is stated

> Appropriate allowance for excessive absence of replacements must be made (see 10542.3 (b)). Thus where the rates of pay, for example, of a group of replacement employees do not make their average earnings truly representative of what the discriminatee would have earned... then their average hours per pay period multiplied by the discriminatee's rate of pay (adjusted for changes which would have been made during the back pay period) may be a reasonable measure of what he would have earned.

In the instant matter, given that Mr. Moreno has already been determined to have worked the number of hours which were representative of the period, inclusive of pay rate changes which occurred during the period, the more equitable conclusion is to substitute, for the approximately four-month period in question, the earnings of Mr. Moreno as representative employee, using that method for the period.

The next issue to be determined herein is whether to use a daily, weekly, monthly, quarterly, or annual method of computation to determine the gross wages due, and from which to compute net back pay due. The NLR3, as determined in F.W. Woolworth Co. (1950), 90 NLRB 289, 26 LRRM 1185, decided that computations in proceedings such as these would be made on a quarterly rather than yearly basis for reasons stated therein. Thereafter the United States Supreme Court, in NLRB v. Seven Up Bottling Company (1953), 344 U.S. 344, approved the method by stating that it would "...avoid entering into the fog of logomachy, *as* we are invited to, by debate about what is 'remedial' and what is 'punitive'." (344 U.S. at 348). As stated above, the ALRB has determined that either daily (see Sunnyside Nurseries Inc. (1977), 3 ALRB No. 42) or weekly (see Butte View Farms (1978), 4 ALRB No. 90) methods of computation are acceptable as long as the method is equitable and in accordance with the Act's intent to restore discriminatees to the position they would have enjoyed had there been no discrimination. (See S & F Growers (1979), 5 ALRB No. 50.) In the instant matter, where, as has been seen by examination of gross wages and interim earnings during the period in question, daily records were available concerning the wages paid by respondent, whereas daily

records were irregularly available as to some of the employers for whom the discriminates, Mr. Gonzalez, worked during the period in question. In keeping with the decision of the Board in S & F Growers, supra, my responsibility is to determine whether the daily, weekly, or monthly method should be used, or a combination of all three in order to make the discriminatee whole for the discrimination caused by the respondent. An example of the distinction between using daily versus monthly methods of computation is found by examining the figures presented for the month of April, 1979 wherein both parties agree that the gross loss totalled $754 and that the earnings if totalled for the month would be $441.18. Thus, if matching month to month, the net loss would total $312.82. However if the monthly mitigating earnings are broken into daily figures for the period of time during that month in which the discriminatee worked, then, since there would have been no gross loss on which to offset any mitigating earnings on April 21, 1979, the discriminatee would benefit from the fact that his earnings on that day could not be offset, resulting in a total net loss of $337.33 for that month computed on a daily basis.

Respondent argues in its brief that since the only figures given are on a monthly basis, the monthly basis is the only method of computation which can be used. In doing so

respondent cites to Butte View Farms, supra, wherein the Board permitted calculations on a weekly basis warranted by the limited information contained in the record of that case. In the instant matter, the conflict between the limited information and the need to make the discriminates whole must be resolved in favor of the discriminates. While it is true that daily information in some instances is unavailable, it is equally true that earnings averaging is often used by the NLRB in calculating the amounts due (see, e.g., section 10542.4, NLRB Case Handling Manual). This conclusion is in keeping with the goals of the Act, as interpreted by the courts (see, e.g., Butte View Farms v. Agricultural Labor Relations Board, supra). I therefore conclude, that to insure that Mr. Gonzalez is adequately made whole, the daily method *of.* computation will be used throughout.

Respondent argued at the hearing, although not in its brief, that Mr. Gonzalez had made inadequate efforts to find work. The facts are otherwise. As has been stated by the Board, "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). (See S & F Growers, supra, at p. 2.) There is no question in my mind that Mr. Gonzalez made more than reasonable efforts to secure employment and, as

his interim earnings show, obtained such employment wherever possible. Further, his efforts were quantitatively sufficient (see NLRB v. Mercy Peninsula Ambulance Service Inc., 589 F2d 1014 (9th Cir. 1979)).

In regard to expenses, discriminatees as has been determined by the NLRB, are entitled to have their expenses in seeking work or working elsewhere than at the discriminator, deducted from interim earnings (see section 10610, NLRB Case Handling Manual). Respondent argues, without citation, that "General counsel has the burden in a compliance hearing of proving expenses." (Respondent's Brief at p. 18). I have determined that general counsel is under no such burden, particularly since expenses are to be deducted from interim earnings and are therefore inappropriate to be presented during general counsel's case, but only appropriate after there has been some indication of interim earnings, or some question presented as to whether the discriminatee has made adequate efforts to seek work. Thus, general counsel's sole burden is to establish the gross back pay due a discriminatee, as set forth in NLR3_v. Brown & Root, Inc. (8th Cir. 1963), 311 F2d 447. General counsel has satisfied this burden. Nevertheless, once the discriminatee seeks to mitigate interim earnings by showing expenses, there must be a showing that the expenses are reasonable and related

either to the new job or to seeking work (see Miami Coca Cola Bottling Co., 51 NLRB 1701). Thus, I conclude herein, that there is insufficient proof of the reasonableness of the expenses incurred in driving 170 miles per day for ten days during the month of January 1981 in order to work for the J.R. Norton Company.

Respondent also argues that the unemployment insurance paid to Mr. Gonzalez should be considered in arriving at a net figure herein. Both the NLRB and the courts have held that unemployment insurance benefits are not to be calculated as a deduction from the back pay award (see NLRB v. Gullette Gin Co. (1951), 340 U.S. 361). Nevertheless respondent argues that such decisions should not be determinative herein since the processes of payment of unemployment compensation in California are different from those before the court in the Gullette case, supra. In fact, however, the Board has rejected any such argument in Arnaudo Brothers, supra, wherein the Board stated "...it is well settled under NLRB precedent that unemployment insurance compensation benefits are not interim earnings and are not deductible from back pay awards...", citing to the Gullette case, supra, as well as to Marshall Field & Co. v. NLRB (1943), 318 U.S. 253.

It remains then to compute specific amounts in order to conclude, as a matter of law the actual amounts, if any,

due the discriminatee in order to make him whole. To begin with, insofar as the gross loss is concerned, it stemming from March 6, 1979 through January 13, 1981, it *is* to be noted that, with the exceptions set forth within the Statement of Facts herein, there is no essential dispute between the parties. Thus the dispute centered around the period of computation, as well as questions of whether Mr. Aguayo and Mr. Moreno were to be used. These questions having been determined, I conclude that, when calculated on a daily basis, the gross loss to Mr. Gonzalez was $14,757.30, less $363.75 for a period of unavailability during the Christmas seasons of 1979 and 1980.[9] Thus, the total gross loss for the period in question is $14,393.85, computed on a daily basis but shown in Appendix A hereto on a monthly basis.

Interim earnings, previously stipulated to by the parties as to amounts, are shown in Appendix A hereto on a monthly basis for purpose of brevity. However, in computing

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[9]Mr. Gonzalez testified (see transcript, p. 100-101) that he normally took vacations during the period from approximately December 23rd until January 2nd. for a period of several years. While he stated that if ?. good job were available he would have taken it, there is no question that he was not looking for work during that period and preferred instead to vacation. I therefore find that during those periods Mr. Gonzalez was not available for work. (See section 10612, NLRB Case Handling Manual; see also Brotherhood of Painters, Local No. 419 (Spoon Tile Co.), 117 NLRB 1596.

the net loss to the discriminatee, the figures for gross loss and mitigating earnings were computed on a daily basis.

As to expenses, these are set forth in Appendix B attached hereto. In a number of instances there was either no evidence or insufficient evidence with which to reach a conclusion resulting in a finding that there were expenses. Further, in one instance the evidence proferred was rejected for reasons stated earlier herein. Thereafter, as determined by section 10610 of the NLRB Case Handling Manual, the expenses were deducted from interim earnings and not added to gross back pay.

THE REMEDY

For the reasons described above, and the conclusions stated therein, I find that respondent's obligations to the discriminatee will be discharged by the payment to Mr. Gonzalez of 5 8,094.11, the sum set forth in Appendix A herein as his net loss, and that such amount shall be payable plus interest at the rate of 7% per annum calculated to the date of payment.

Accordingly, I hereby issue the following recommended:

ORDER

Respondent High and Mighty Farms shall pay to Samuel Gonzalez, the discriminatee herein, $ 8,094.11 together

with interest at the rate of 7% per annum calculated to the date of such payment.

Dated: March, 1982

NORTON P. COHEN
Administrative Law Officer

Aopendix A

Date	Gross Loss	Interim Earnings	Expenses	Net Loss
March 1979	644.75	-	10.00	644.75
April 1979	754.00	441.18	10.00	350.58
May 1979	723.06	-	10. 00	723.06
June 1979	612.53	884.00	20.00	164.96
July 1979	640.25	484.00	-	349.50
August 1979	547.64	519.75	8.00	180.25
September 1979	575.25	462.00	-	230.25
October 1979	728.75	1042.53	20.00	156.00
November 1979	735.00	298.01	-	570.22
December 1979	495.00*	665.42	-	64.95
January 1980	656.25*	166.25	-	520.00
February 1980	453.75	-	-	453.75
March 1980	727.50	505. 80	-	285.98
April 1980	665.62	-	-	665.62
May 1980	716.92	280. 00	-	477.72
June 1980	684.37	486. 00	40.00	480.62
July 1980	675.00	549. 01	-	460.00
August 1980	641.25	25. 00	-	616.25
September 1980	914.37	229. 25	-	467.32
October 1980	703.12	1248. 21	108.00	-
November 1980	645.00	724. 86	-	221.25
December 1980	416.25*	621. 03	-	11. 08
January 1981	202.50*	279. 96	-	-
			Total	~~S8 ,094.11~~

* As set forth in the instant decision, these gross figures were adjusted downward for periods of unavailability during December 23-January 2 of each year.

Appendix B

Schedule of Expenses

Month	Expense
March 1979	2 rides @ $5.00 = $10.00
April 1979	2 rides @ $5.00 = $10.00
May 1979	2 rides @ $5.00 = $10.00
June 1979	10 rides @ $2.00 = $20.00
July 1979	insufficient evidence
August 1979	2 trips of 20 miles @ 20* per mile = SS.OQ
September 1979	no evidence
October 1979	1 trip of 100 miles @ 20* per mile = S2C.OO
November 1979	insufficient evidence
December 1979	no evidence
January 1980	insufficient evidence
February 1980	insufficient evidence
March 1980	insufficient evidence
April 1980	insufficient evidence
May 1980	insufficient evidence
June 1980	10 round trios of 20 miles @ 20¢ per mile = $40.00
July 1980	conflicting evidence
August 1980	insufficient evidence
September 1980	insufficient evidence
October 1980	27 round trips of 20 miles 5 20¢ per mile = $108.00
November 1980	no evidence no
December 1980	evidence
January 1981	evidence rejected