

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

O . P . MURPHY PRODUCE CO . , INC.,	)	Case Nos.	76-CE-33-M
	)		77-CE-34-M
dba O. P. MURPHY & SONS,	)		77-CE-36-M
	)		77-CE-37-M
Respondent,)		
)		
and	)	8 ALRB No.	54
	)	(4 ALRB NO.	62)
UNITED FARM WORKERS	)	(4 ALRB No.	106)
OF AMERICA, AFL-CIO,)		
)		
Charging Party.)		
)		

SUPPLEMENTARY DECISION AND ORDER

On September 19 , 1978 , the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in this proceeding,^{1/} (4 ALRB No. 62) , concluding, inter alia, that O. P. Murphy Produce Co . , Inc. (Respondent) had discriminatorily discharged employees Vicente Martinez Nunez, Socorro Martinez, Maria Martinez, Baltazar Martinez, Elena Martinez, Emma Martinez, Idolina Martinez, and Roberto Martinez, in violation of Labor Code section 1153 (c) and (a) .^{2/} The Board ordered Respondent to reinstate those eight employees to their former or equivalent positions and to make them whole for all losses of pay and other economic losses they have suffered as a result of their

^{1/}The compliance ramifications of the Board's Decision and Order issued December 27 , 1978 (4 ALRB No. 106) were settled by the parties on the first day of the backpay hearing herein, with only those compliance matters raised by the Board's Decision and Order issued September 19 , 1978 (4 ALRB No. 62) proceeding to hearing.

^{2/}All code references herein are to the California Labor Code unless otherwise specified.

discriminatory discharge.

On September 16 and 17, 1981, a hearing was held before Administrative Law Officer (ALO) Joel Gomberg for the purpose of determining the amount of backpay due each of the said employees. Thereafter, on December 7, 1981, the ALO issued his Supplemental Decision on Backpay. Respondent timely filed exceptions and a supporting brief to the ALO's Supplemental Decision. The General Counsel responded to Respondent's exceptions, urging that the Supplemental Decision be adopted in its entirety by the Board.

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, findings, and conclusions^{3/} as modified herein, and to adopt his recommended order.

Respondent objects to the formula chosen by the General Counsel for computation of backpay liability, and the ALO's modification of that formula, on the ground that other formulas are more appropriate. Respondent also objects to the amount of

^{3/}We reject the ALO's dictum that, as a general rule, piece rate work in agriculture is not comparable to non-agricultural jobs compensated on a piece rate basis. See, for example, DeLorean Cadillac, Inc. (1977) 231 NLRB 329, 332 [96 LRRM 1347]. We find it unnecessary to address this issue. Assuming, arguendo, that such a modification of the above formula would be warranted, we agree with the ALO's primary reason for failing to seek such a piece rate compensation formula here, i. e. , that Respondent's records are inadequate for making backpay computations on that basis.

backpay calculated by the General Counsel and modified by the ALO, arguing that, for most of the individual discriminatees, the amount calculated is in excess of Respondent's liability.

This Board generally utilizes one or more of the basic formulas of the National Labor Relations Board (NLRB) as set forth in its Casehandling Manual (Sections 10538.1-10544.4) to compute the amount of gross backpay for discriminatees. (Arnaudo Bros. (Aug. 31, 1981) 7 ALRB No. 25.) When it is impossible to determine the exact amount of backpay due to any discriminatee(s) by the use of one of the above formulas, this Board, consistent with NLRB practice, uses any formula or combination of formulas considered equitable, practicable, and in accordance with the purposes of the Act. (Butte View Farms (Nov. 8, 1978) 4 ALRB No. 90; Maggio-Tostado, Inc. (June 15, 1978) 4 ALRB No. 36; Frudden Produce, Inc. (Mar. 29, 1982) 8 ALRB No. 26.) The test of the amount arrived at is not exactitude, but whether the formula is reasonably calculated to arrive at the closest approximation to the amount the employee(s) would have earned during the backpay period, absent the employer's unfair labor practice(s). (Butte View Farms v. ALRB (1979) 96 Cal.App.3d 961, 966 [157 Cal.Rptr. 476]? NLRB v. Toppino, Charley & Sons, Inc. (5th Cir. 1966) 358 F.2d 94 [61 LRRM 2655, 2656].)

Once the General Counsel issues a backpay specification based upon the above principles establishing the gross backpay due to each of the discriminatees, the burden of proof shifts to respondent to establish facts which would mitigate or negate its liability to the employee(s). (NLRB v. Brown & Root

(8th Cir. 1963) 311 F.2d 447 [52 LRRM 2115, 2120]; NLRB v. Flite Chief, Inc. (9th Cir. 1981) 640 F 2d 989 [106 LRRM 2910].)

Therefore, a two-pronged analysis is appropriate in backpay determinations. First, the Board must examine and, if necessary, refine the formula used by the General Counsel to compute the gross backpay amount for each discriminatee. The formula utilized by the General Counsel must not be arbitrary and must be reasonably calculated to represent the gross amount the discriminatee(s) would have earned during the backpay period, absent the discrimination. Following this analysis of the formula used, the next step is the weighing of the evidence presented by Respondent that tends to diminish or extinguish its liability and determine whether Respondent has presented a preponderance of evidence in that regard.

We find that the formula chosen by the General Counsel (the use of representative workers to estimate backpay liability), as properly modified by the ALO to more exactly represent the actual discriminatees, was not arbitrary and meets the obligations of exactness^{4/} established by applicable National Labor Relations Act (NLRA) precedent. (See Labor Code section 1148.)

^{4/} Respondent suggests that the appropriate formula would be one using the average earnings or work hours of the discriminatees during a selected normal period prior to the unfair labor practice. Such formulas are preferred by the NLRB in most settings. (See, NLRB Case Handling Manual, Part Three, section 10538-10540.4; Chef Nathan Sez Eat Here, Inc. (1973) 201 NLRB 343 [82 LRRM 1264].) However, the General Counsel and the ALO rejected that formula due to the paucity of the records maintained by Respondent. Further, the NLRB suggests that these formulas are inappropriate in a seasonal industry such as Respondent's. NLRB Case Handling Manual Part Three, sections 10538.2(c) and 10540.2(c).

Respondent's alternative formula, derived from Maggio-Tostado, Inc., supra, 4 ALRB No. 36, was rejected by the ALO because it failed to account for part-time workers.^{5/} After careful review and consideration of the various formulas suggested, we have decided to adopt the backpay formula proposed by General Counsel, as modified by the ALO, as there has been no showing that this formulation was arbitrary or an unacceptable approximation of the probable gross earnings of the discriminatees during the backpay period.

In presenting evidence that tended to reduce or extinguish the gross backpay liability to each individual discriminatee, Respondent primarily argued that as to Vicente Martinez Nunez, Socorro Martinez, Emma Martinez, and Idolina Martinez, the nature of their interim employment with Paul Masson Vineyards was such as to extinguish Respondent's obligations to these workers. The ALO found that, except for Idolina Martinez, Respondent failed to meet its burden of proof as to those employees. We agree.

As to Maria Martinez, Emma Martinez, and Elena Martinez, Respondent contends that, beyond the reductions in the gross backpay allowed by the ALO, those three discriminatees failed to exercise reasonable diligence in seeking interim employment or sought to conceal interim earnings. The ALO found, and we affirm his finding, that Respondent failed to meet its burden of proof

^{5/}The formula utilized in Maggio-Tostado, Inc., supra, 4 ALRB No. 36, was adopted only after the Board was unable to support the use of the representative-employee formula due to the nature of that employer's records. (Maggio-Tostado, supra, at p.3, n. 2.)

as to those contentions, for the record establishes that the employees exercised reasonable diligence and freely disclosed their interim earnings prior to the backpay hearing.

Finally, due to the unavailability of Baltazar Martinez (now deceased), the ALO deferred to a credibility resolution by another ALO in a prior related matter (O. P. Murphy & Sons (Sept. 19, 1978) 4 ALRB No. 62) to determine Baltazar Martinez' availability for work. Recognizing that the question before the other ALO was distinct from availability for work, we find only that Baltazar Martinez attempted to apply for work with Respondent prior to the start of its 1976 harvesting season. The speculation by Respondent that this discriminatee would have delayed beginning employment with Respondent until the end of the lettuce harvesting season creates an ambiguity in the record. This ambiguity is presumed to be the result of Respondent's discrimination and, therefore, we affirm the ALO's conclusion as to Baltazar Martinez. (International Trailer Company, Inc. (1965) 150 NLRB 1205, 1207 [58 LRRM 1233].)

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent O. P. Murphy Produce Co., Inc., its officers, agents, successors, and assigns pay to the employees listed below, who in our Decision and Order dated September 19, 1978, were found to have been discriminatorily discharged by Respondent, the amounts set forth below beside their respective names, plus interest thereon compounded at the rate of seven percent per annum, plus such additional

backpay and interest, if any, as has accrued up to the date Respondent offers reinstatement to the said employees in accordance with our prior order in this matter.

Vicente Martinez Nunez	\$1,633.24
Socorro Martinez	1,960.15
Maria Martinez	2,272.67
Estate of Baltazar Martinez	1,595.71
Emma Martinez	2,106.71
Idolina Martinez	1,080.00
Roberto Martinez	1,800.96
Elena Martinez	1,985.23

Dated: August 3, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED E. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

O. P. Murphy Produce Co. , Inc.

8 ALRB No. 54
Case Nos. 76-CE-33-M, et al.
(4 ALRB No. 62)
(4 ALRB No. 106)

ALO DECISION

The General Counsel issued specifications setting forth the amount of backpay and benefits owed discriminatees who had been wrongfully refused rehire by Respondent. (See, O. P. Murphy (Sept. 19, 1978) 4 ALRB No. 62.) Respondent objected to the formula chosen to arrive at, as well as to the actual amounts of, backpay. The ALO concluded that while the General Counsel had chosen an appropriate formula (the use of representative workers to estimate the wages due the discriminatees), the formula as applied was based on workers who were not representative of the discriminatees. The ALO therefore applied the formula using workers who were more representative. The ALO further concluded that Respondent had not proven that the amounts arrived at were incorrect, except as to two discriminatees.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALO and adopted his proposed order. The Board set forth the two-prong test used to review specifications of makewhole issued by the General Counsel. First, the General Counsel's specifications must not be arbitrary and must be reasonably calculated to approximate the amount of backpay due discriminatees. A respondent has the burden of proving, by a preponderance of the evidence, any interim earnings and mitigation not accounted for by the General Counsel's specifications.

The Board found it unnecessary to determine whether a piece rate factor was warranted in the above specifications, finding only that it would be impossible to calculate such a factor using Respondent's records. The Board also clarified the ALO's ruling as to the unavailable discriminatee by resolving ambiguities in the record against Respondent.

* * *

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

* * *

1 Respondent reinstate them and reimburse them for any loss of pay
2 suffered as a result of its discriminatory practices.

3 The parties were unable to agree on the amount of back-
4 pay due the employees, and on February 13, 1981, the Board's
5 Regional Director in Salinas issued a backpay specification. The
6 Respondent filed its answer on March 17, 1981. The Regional
7 Director issued a first amended backpay specification on
8 August 20, 1981. At the hearing, the General Counsel modified
9 its backpay formula. Pursuant to my order, these changes were
10 incorporated into a second amended backpay specification, dated
11 September 25, 1981.

12 A pre-hearing conference was held before me in Salinas,
13 California, on September 10, 1981. The hearing was conducted in
14 Salinas on September 16 and 17, 1981. All parties were given a
15 full opportunity to participate in the hearing. The General
16 Counsel and the Respondent filed post-hearing briefs.

17 Upon the entire record, including my observation of the
18 demeanor of the witnesses, and after full consideration of the
19 briefs filed by the parties, I make the following findings of
20 fact and conclusions of law:

21 I. The Backpay Formula.

22 The discriminatees all worked for the Respondent in
23 1975 as tomato pickers. They were denied employment for the en-
24 tire 14-week season in 1976, and were offered reinstatement in
25 August, 1977. The parties agree that backpay should be computed
26 on a weekly basis, but differ sharply as to the method to be em-
27 ployed in making the computation.

28 //

1 A. The General Counsel's Formula

2 Ben Romo, the Board's compliance officer in this
3 matter, testified that he calculated gross backpay by selecting
4 representative employees who worked the entire 1976 tomato harvest
5 season. Romo stated that, because Respondent's 1976 payroll re-
6 cords do not indicate hours worked, it was impossible for him to
7 determine which employees worked full-time and which did not.
8 The tomato pickers were paid on a piece-rate basis nearly 100% of
9 the time. He selected four employees in Crew No. 2. He added
10 their earnings for each weekly pay period and divided by four to
11 determine gross backpay. Because Crew No. 2 did not work during
12 the first week of the season, he used four representative em-
13 ployees from Crew No. 1 for that week (see G.C. Exh. 2). Mr.
14 Romo testified that he had been directed by his superiors to use
15 only top earners as representative employees. In the course of
16 reviewing the 1976 earning records, it became clear to me that
17 the four "representative" employees chosen by the General Counsel
18 were not, in fact, representative. They were the top four
19 earners for the season as a whole, and consistently ranked in the
20 top 10%-20% of all the workers from week to week.^{1/}

21 B. The Respondent's Suggested Alternatives

22 The Respondent has submitted payroll records for
23 1975 and 1977 to form the data base for determining gross backpay
24 for each discriminatee. The Respondent correctly notes that the
25 National Labor Relations Board will typically compute backpay

26 _____
27 ^{1/}The Board disapproved the practice of selecting only
28 top earner~~y~~ for a representative group in Butte View Farms (1978)
4 ALRB No. 90, ALO Decision at p. 5. See also N.L.R.B. v. Iron
Workers, Local 378 (9th Cir. 1976), 532 F.2d 1241.

1 based on its "actual earnings" formula. DeLorean Cadillac, Inc.
2 (1977) 231 NLRB 329, 332; NLRB Casehandling Manual (Part III)
3 Compliance Proceedings, August, 1977, Sections 10538-10544. Un-
4 fortunately, the nature of tomato harvesting and of Respondent's
5 recordkeeping make it impossible to use the discriminatees' work
6 history as a basis for arriving at a reasonable backpay formula.
7 The principal difficulty is that agricultural piece-work is not
8 comparable to the kinds of jobs compensated on a piece-rate basis
9 in a factory setting. While it may be possible to determine the
10 productivity of an employee who assembles electronic components or
11 stitched garments with a fair degree of accuracy, because the ma-
12 terials involved are standard and can be provided to the worker at
13 a constant rate in a controlled environment, the same cannot be
14 said of harvest work. Respondent's payroll records demonstrate
15 that earnings of individual employees and crews as a whole fluctu-
16 ate dramatically from one week to the next. For example, using
17 Respondent's own calculations of average earnings in Crew No. 2,
18 the average worker earned \$72.76 during the week ending October 6,
19 1976, while the following week the average jumped to \$229.88. The
20 causes of these fluctuations are many: the quality of the pick,
21 the number and size of tomatoes ready to be picked per field, the
22 weather, and, most significantly, the production quota set by the
23 Company at the beginning of the day. Calculating the average
24 weekly earnings of the discriminatees in 1975 would be of little
25 value in determining 1976 earnings in view of the extreme fluctua-
26 tions in earnings from week to week. As Respondent has noted in
27 its post-hearing brief, the NLRB requires such fluctuations to
28 taken into account in devising an appropriate backpay formula.

1 N.L.R.B. v. Iron Workers, Local 378, supra.

2 The 1975 records are unreliable for a number of
3 other reasons. First, they do not indicate the number of hours
4 worked per employee. Without this information, it is impossible
5 to calculate meaningful productivity data. There is no way of
6 determining when an employee missed work because of illness. Nor
7 can one tell if the work week was unusually short or long. Se-
8 cond, the 1975 records were maintained by a labor contractor who
9 permitted more than one family member to work on the same earn-
10 ings card. As a result, some workers had inflated production re-
11 cords, while others had no records at all.

12 The 1977 records do indicate the number of hours
13 worked. However, the available records cover only one, two, or
14 three weekly pay periods, and only a few of the discriminatees
15 worked in 1977. Further, the 1977 season was marked by a number
16 of Employer unfair labor practices and a work stoppage. See
17 O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63. Such events
18 cause turmoil and make earnings unreliable for purposes of com-
19 puting backpay. Hill Transportation Co. (1953) 102 NLRB 1015,
20 1021; NLRB Casehandling Manual, supra, Section 10562.

21 It still might be possible to use the 1975 earning
22 records to determine the relative productivity of the discrimina-
23 tees in comparison with the productivity of all the other
24 workers. The resulting productivity factor could then be applied ,
25 to 1976 earnings. However, the Respondent did not introduce the
26 1975 records for that purpose (R.T. II, pp. 136, 148). I agree
27 with Respondent that examining the 126 pages of earnings records
28 with the necessary care would be a formidable task with a low

1 probability of yielding meaningful information.

2 In sum, there is no way to extract meaningful data
3 about the productivity of the discriminatees from Respondent's
4 records. No other evidence with respect to the quality of their
5 work or their attendance was presented by either party. I must
6 therefore assume that the discriminatees were average employees
7 who would have worked the average number of hours worked by full-
8 time employees during the backpay period.

9 Respondent next suggests that, if 1976 earnings are
10 to be used, the average earnings of a crew or crews be determined,
11 excluding employees who earned less than a certain dollar figure. 12
12 This method has much to commend it and is in the spirit of the
13 method approved by the Board in Butte View Farms, supra. Unfor-
14 tunately, because the 1976 earnings records do not indicate the
15 number of hours worked, they are inadequate to determine which
16 employees worked full-time. In its computations, the Respondent
17 arbitrarily guessed that workers who earned less than a certain 10
18 amount were part-time workers, while those who earned more
19 should be considered in determining a crew average.

20 To test the fairness of Respondent's method, I
21 ranked the earnings of each picker in Crew No. 2 for several pay 99
22 periods, putting the highest figure at the top of a column and
23 the lowest figure at the bottom. I was unable to determine any
24 point which would separate full-time workers from part-time
25 workers. Any number of cut-off points could be chosen, but all
26 would be arbitrary. I therefore conclude that crew averages
27 cannot form the basis of a fair backpay calculation.

28 //

1 C. The Appropriate Formula

2 In Maggio-Tostado, Inc. (1978) 4 ALRB No. 36 , the
3 Board was faced with a situation in which it could not reasonably
4 apply any of the formulas put forth by the parties. In fashion
5 ing its own formula, the Board turned to a method of calculation
6 which it considered to be "equitable, practicable, and in conso
7 nance with the policy of the Act ." 4 ALRB No. 36 , at p. 3. In
8 determining gross backpay (see Appendix " A ") , I have modified the
9 method used by the General Counsel to avoid skewing the earnings
10 in an unrepresentative manner.

11 I followed the practice of the parties of limiting
12 their computations to Crew No. 2. I selected the only seven
13 workers whose names appear both on the August 18 and November 4
14 payrolls, the first and last periods in which the crew worked.^{2/}
15 It is reasonably certain that each of these employees worked full-
16 time. I then averaged the earnings of these employees for each 17
17 weekly pay period. By selecting all of the employees who fit the
18 category of working during the first and last payroll period, a
19 more representative sample of full-time employees was achieved.
20 Of course, this formula is not a precise computation of what the
21 discriminatees would have earned in 1976. It makes no allowance
22 for differences in skill levels among the discriminatees, differ-
23 ences which undoubtedly exist. It is simply the best approxima-
24 tion which can be made, given the inadequacy of the raw data,

25 _____
26 ^{2/}Crew No. 2 began to work during the week of
27 August 11, but I agree with the Respondent that its earnings dur-
28 ing that week were insufficient to be representative. See Res-
pondent's Brief, Appendix II. I used the earnings of four em-
ployees from Crew No. 1 selected by the General Counsel to deter-
mine gross backpay for the periods ending August 4 and 11.

1 without undertaking a complex and time-consuming examination of
2 all the underlying records. Even such an examination would prob-
3 ably not result in a more educated approximation.

4 II. The Backpay Period.

5 The central issue with respect to the backpay period is
6 whether some of the discriminatees had a fixed practice of moving
7 from crop to crop, which caused them to arrive at the Company after
8 the beginning of the tomato harvest and to leave before its
9 conclusion.

10 Most of the discriminatees picked strawberries at Pik-
11 D-Rite during the summer. They began in May and quit or were
12 laid off in August when the amount of work in the strawberries
13 began to taper off. Maria, Idolina, and Roberto worked at Pik-D-
14 Rite in August, 1976. Emma, Vicente, Elena, and Socorro had
15 worked at Pik-D-Rite in other years, but not in 1976. Respondent
16 contends that Maria, Idolina, and Roberto were not available for
17 employment at the Company until their employment with Pik-D-Rite
18 ended about September 1, and that the backpay period did not
19 begin until that date. I find the Respondent's argument unper-
20 suasive. In 1976, Respondent hired tomato pickers directly,
21 rather than through a labor contractor, for the first time. All
22 the discriminatees filed, or attempted to file, applications
23 during the last week of July, as prescribed by Respondent. In
24 prior years, they had left their work in the strawberries before
25 the season ended, in order to go to work for the Company. Even 2(3
26 using the average earnings figures proposed by Respondent in its 27
27 post-hearing brief, it is clear that the discriminatees would
28 have earned more at the Company in August than they did at

1 Pik-D-Rite. By filing applications the discriminatees manifested
2 their interest in working for the Company. The Respondent has
3 not met its burden of proof to establish that Idolina, Roberto,
4 and Maria were unavailable for work at the Company at the begin-
5 ning of the season in 1976. Whatever uncertainty exists has been
6 created by Respondent's discriminatory practices and must be re-
7 solved in favor of the discriminatees. Butte View Farms, supra.

8 Similarly, Baltazar had worked for a number of years
9 for Admiral Packing Company. A portion of Baltazar's testimony
10 from the unfair labor practice hearing was admitted into the re-
11 cord. In it, Baltazar (now deceased) indicated that he asked
12 Respondent for an application in order to work for it when he
13 finished at Admiral. Respondent contends that this evidence
14 proves that Baltazar would not have been available to work for it
15 until October 8. Another portion of his testimony makes it
16 appear that it was Respondent's agent who told Baltazar not to
17 come back until he finished work in the lettuce. Again, it is
18 difficult to know what Baltazar would have done if he had been
19 offered work at the Company, particularly in light of its newly
20 articulated policy of giving preference to employees who would
21 work for it throughout the season. Respondent made substantially
22 the same argument in the original unfair labor practice proceed-
23 ing. The Administrative Law Officer found that Baltazar had been
24 told by the Company that he could not have an employment applica-
25 tion until he finished working in the lettuce (ALO Decision at
26 p. 8). He further concluded that the fact that Baltazar was
27 working in the lettuce did not necessarily mean that he would
28 have been unavailable to work at the Company at the beginning of

1 the season (ALO Decision at p. 19). Because the Administrative 9
2 Law Officer had an opportunity to assess the credibility of o
3 Baltazar and other witnesses, I decline to disturb his findings. 4
4 I conclude that the Respondent has not proved that Baltazar would
5 have been unavailable to work for it at the beginning of the 1976
6 season.

7 Six of the discriminatees picked grapes at Paul Masson
8 at one time or another. Vicente and Socorro first worked at Paul
9 Masson in the fall of 1975. They were recalled to do tieing work
10 during the winter. Pursuant to a provision in its collective
11 bargaining agreement with the UFW, Paul Masson recalled them on 12
12 September 21, 1976, on the basis of seniority. Respondent argues
13 that this work history demonstrates that Vicente and Socorro had
14 regular jobs at Paul Masson and would have returned to them when
15 recalled, even if they had been working for the Company in 1976
16 As a result, the backpay period for these employees should end on
17 the date of their recall. While I agree with Respondent's argu-
18 ment as a statement of principle, I am unable to find that the
19 fact that Socorro and Vicente had worked for Paul Masson in 1975 20
20 establishes that they would have done so again in 1976, in the
21 absence of discrimination against them by the Company. Respon-
22 dent must establish more of a work history than this to convert
23 interim earnings into a complete bar to recovery of backpay.

24 Emma worked for Paul Masson in 1976. Respondent cites
25 its own answer to backpay specification as evidence that she
26 also worked for Paul Masson in 1975. Even assuming that Respon-
27 dent could have properly introduced Emma's prior testimony to
28 establish such a work history, I would conclude that one prior

1 year at Paul Masson was insufficient to establish a definite
2 pattern of annual return to work there.

3 Idolina began working at Paul Masson in 1972. She tes-
4 tified that it was her practice to return when she was recalled.
5 Although the record does not indicate whether she worked at Paul
6 Masson in 1974, the gist of her testimony is that she worked
7 there on a regular basis. I find that Idolina's work history at
8 Paul Masson demonstrates a pattern of returning each year when
9 recalled. I therefore conclude that the backpay period for her
10 ended on September 22, 1976.^{3/}

11 III. The Duty To Mitigate Damages.

12 Respondent argues that Elena, Vicente, Socorro, and
13 Emma willfully failed to mitigate damages by failing to work for
14 Pik-D-Rite in August. I find no merit in this contention. The
15 evidence establishes that those family members who did work for
16 Pik-D-Rite began in May, at the onset of the strawberry season.
17 By August, work in the strawberries was winding down. The other
18 family members were clearly aware of this situation. There is
19 no evidence whatever that jobs were available in the strawberries
20 in August. Further, it did not become clear to the discrimina-
21 tees that they were not going to be rehired until shortly after
22 the season began at the Company. They returned several times
23 seeking work and were under no duty to mitigate damages while the
24 situation remained equivocal. Finally, a discriminates is not
25 required to seek new work instantly. Rather, an examination of

26
27 ^{3/}I will not deduct Idolina's earnings at Paul Masson
28 for the September 23 period from her gross backpay, because I
cannot determine what portion of those earnings came on or be-
fore September 22.

1 his or her efforts to find work, during the entire backpay period,
2 is considered. Saginaw Aggregates, Inc. (1972) 198 NLRB 598.

3 Elena is the only discriminatee who had no interim
4 earnings whatever in 1976. She was unable to remember any efforts
5 she may have made to find work that year. 'Given the experience of
6 the other discriminatees in finding work and her past history of
7 employment at Paul Masson, I find that it is reasonable to assume
8 that she would have been hired to work at Paul Masson in 1976.^{4/}
9 I conclude that Elena willfully failed to mitigate damages and
10 that she should be denied backpay for the pay periods ending
11 September 29, October 6, 13, and 20, 1976.^{5/}

12 Respondent contends that Maria failed to make reason
13 able efforts to find work because she sought work in the fields,
14 rather than at offices, after being laid off by Pik-D-Rite.
15 Maria testified that she did seek work in the fields, but could
16 not remember asking about work at offices.^{6/} Her testimony was
17 understandably vague about events which took place five years
18 earlier. But, unlike Elena, Maria did remember making some
19 effort to find employment and she actually did find work in a
20 garlic shed. A discriminatee is only required to make a reason
21 able effort to seek employment. Butte View Farms, supra. I

22
23 ^{4/}Roberto was hired by Paul Masson as a new employee in
1976.

24 ^{5/}While backpay is not tolled as a result of a willful
25 failure to mitigate damages, it is assumed that interim earnings
would have equaled gross backpay. Brotherhood of Painters,
26 Local 419 (1957) 117 NLRB 1596.

27 ^{6/}There is no evidence that farm workers are customarily
28 hired in offices. Decisions of the Board demonstrate that hiring
is frequently done by foremen in the fields. Respondent hired
some employees in the fields in 1976 (ALO Decision at p. 5).

1 conclude that the Respondent has not established that Maria will-
2 fully failed to mitigate damages.

3 IV. Interim Earnings.

4 The parties have stipulated to the amounts of interim
5 earnings for most of the discriminatees. The only unresolved
6 issues concern Roberto's earnings at Paul Masson and the work
7 done by Socorro and Maria at a garlic shed in Greenfield.

8 Roberto testified that he worked at Paul Masson in the
9 fall of 1976. Because Respondent had an incorrect social secu-
10 rity number for Roberto, it did not obtain his earnings records
11 from Paul Masson in time for the hearing. I permitted the re-
12 cords to be introduced after the hearing ended. Respondent has
13 tendered an unemployment insurance claim form in Roberto's name
14 showing earnings of \$593.05 at Paul Masson for the fourth quarter
15 of 1976. I accept this document as evidence of Roberto's earn-
16 ings. I will assume that he worked during the same pay periods
17 as the other members of his family and will apply his earnings to
18 particular pay periods in approximately the same proportion as
19 their earnings at Paul Masson.

20 Socorro was laid off at Paul Masson on October 18. She
21 testified that she then worked for about five days at a garlic
22 shed in Greenfield. Socorro remembered working about eight hours
23 per day and being paid on an hourly basis. She stated that
24 Maria worked with her. Maria could not at first remember working
25 at the shed. After her memory had been refreshed by reading her
26 former testimony, Maria stated that she had worked at the shed
27 for about two weeks and was paid between \$3.00 and \$4.00 per
28 hour. Respondent represents that the company in question has

1 gone out of business and that payroll records are unavailable.
2 Because Socorro's testimony was clearer than Maria's I conclude
3 that Maria and Socorro had interim earnings for five days at the
4 garlic shed during the pay period ending October 26, 1976. I
5 will adopt Respondent's suggestion that an hourly wage of \$3.50
6 be used in determining the interim earnings, which will there-
7 fore be \$140.00 for each discriminatee (eight hours x five days
8 x \$3.50/hour = \$140.00) .

9 In deducting interim earnings from gross back pay, I
10 will apply the interim earnings to the Respondent's pay period
11 which most closely corresponds to the period during which they
12 were earned. For example, I will apply interim earnings at Paul
13 Masson for the period ending September 23 to gross pay at the
14 Company for the period ending September 22, rather than to the
15 September 29 period, as suggested by General Counsel.

16 V. The Remedy.

17 The Respondent's obligation to make the discriminatees
18 whole will be discharged by payment of the net backpay due them
19 as set forth in Appendix " B " plus interest at the rate of 7% per
20 annum to accrue commencing with the last day of each week of the
21 backpay period when such sum became due and owed to the discrimi-
22 natees until the date this decision is complied with, minus any
23 tax withholding required by federal and state laws.

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

27 //

28 //

APPENDIX "A"
COMPUTATION OF GROSS BACKPAY

1. Payroll period ending August 4, 1976:

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
Angelina Chavez	602	
Rafael Chavez	613	\$ 102.30
Jose Chavez	612	95.30
Jesus Contreras	611	96.30
		73.45
	Total	\$ 367.35
	Average	91.83

2. Payroll period ending August 11, 1976:

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
Angelina Chavez	602	\$ 231.37
Rafael Chavez	613	246.35
Jose Chavez	612	121.47
Jesus Contreras	611	238.61
	Total	\$ 837.80
	Average	209.45

3. Payroll period ending August 18, 1976:

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
Clementina Chavez	623	\$ 200.86
Trinidad Chavez	619	246.10
Francisca Gonzalez	1205	126.34
Virginia Gonzalez	1208	205.26
Rafael Ledesma	1884	278.53
Samuel Martinez	2153	195.93
Sijifredo Ramirez	3178	261.19
	Total	\$1,514.21
	Average	216.32

4. Payroll period ending August 25, 1976:

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
Clementina Chavez	623	\$ 88.94
Trinidad Chavez	619	137.82
Francisca Gonzalez	1205	101.36
Virginia Gonzalez	1208	120.08
Rafael Ledesma	1884	162.60
Samuel Martinez	2153	105.75
Sijifredo Ramirez	3178	121.07
	Total	\$ 837.62
	Average	119.66

1 APPENDIX "A" (continued)

2 5. Payroll period ending September 1, 1976:

3

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
4 Clementina Chavez	623	\$ 141.95
5 Trinidad Chavez	619	187.38
6 Francisca Gonzalez	1205	(43.25)*
7 Virginia Gonzalez	1208	135.11
8 Rafael Ledesma	1884	231.34
9 Samuel Martinez	2153	174.13
10 <u>Sijifredo Ramirez</u>	3178	204.67
		Total \$ 1,074.58
		Average 179.10

11 *Earnings excluded from computation because they are too
12 low to represent full-time work for the pay period.

13 6. Payroll period ending September 8, 1976

14

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
15 Clementina Chavez	623	\$ 186.02
16 Trinidad Chavez	619	222.38
17 Francisca Gonzalez	1205	153.19
18 Virginia Gonzalez	1208	164.99
19 Rafael Ledesma	1884	228.99
20 Samuel Martinez	2153	186.20
21 <u>Sijifredo Ramirez</u>	3178	187.00
		Total \$1,328.77
		Average 189.82

22 7. Payroll period ending September 15, 1976

23

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
24 Clementina Chavez	623	\$ 187.20
25 Trinidad Chavez	619	293.95
26 Francisca Gonzalez	1205	230.43
27 Virginia Gonzalez	1208	308.77
28 Rafael Ledesma	1884	361.01
Samuel Martinez	2153	243.20
<u>Sijifredo Ramirez</u>	3178	288.30
		Total \$ 1,912.86
		Average 73.27

1 APPENDIX " A " (continued)

2 8. Payroll period ending September 22, 1976:

3

<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
Clementina Chavez	623	\$ 234.92
Trinidad Chavez	619	221.50
Francisca Gonzalez	1205	118.79
Virginia Gonzalez	1208	204.47
Rafael Ledesma	1884	210.77
Samuel Martinez	2153	206.38
Sijifredo Ramirez	3178	247.99
	Total	\$ 1,444.82
	Average	206.40

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9 9. Payroll period ending September 29, 1976:

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<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
Clementina Chavez	623	\$ 181.10
Trinidad Chavez	619	187.61
Francisca Gonzalez	1205	122.07
Virginia Gonzalez	1208	194.58
Rafael Ledesma	1884	249.99
Samuel Martinez	2153	193.46
Sijifredo Ramirez	3178	205.22
	Total	\$1,334.03
	Average	190.58

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17 10. Payroll period ending October 6, 1976:

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<u>Name</u>	<u>Employee No.</u>	<u>Earnings</u>
Clementina Chavez	623	\$.00
Trinidad Chavez	619	104.25
Francisca Gonzalez	1205	61.90
Virginia Gonzalez	1208	83.84
Rafael Ledesma	1884	103.82
Samuel Martinez	2153	.00
Sijifredo Ramirez	3178	108.13
	Total	\$ 461.94
	Average	92.39

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1 APPENDIX "A" (continued)

2 14. Payroll period ending November 4, 1976:

3	<u>Name</u>	<u>Employee No.</u>	<u>Earnings.</u>
3	Clementina Chavez	623	\$ (41.60)*
4	Trinidad Chavez	619	207.47
5	Francisca Gonzalez	1205	182.34
5	Virginia Gonzalez	1208	131.34
6	Rafael Ledesma	1884	296.66
6	Samuel Martinez	2153	210.23
7	Sijifredo Ramirez	3178	<u>294.93</u>
8		total	\$1,322.97
8		Average	220.50

9 *Earnings excluded from computation because they are too low to
10 represent full-time work for the pay period.

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APPENDIX "B"

<u>PAYROLL PERIOD</u>	<u>GROSS BACKPAY</u>	<u>INTERIM EARNINGS</u>	<u>NET BACKPAY</u>
<u>Vincent's Martinez</u>			
8/4/76	\$ 91.83	\$ 0.00	\$ 91.83
8/11/76	209.45	0.00	209.45
8/18/76	216.32	0.00	216.32
8/25/76	119.66	0.00	119.66
9/1/76	179.10	150.00	29.10
9/8/76	189.82	150.00	39.82
9/15/76	273.27	75.00	198.27
9/22/76	206.40	100.69	105.71
9/29/76	190.58	95.88	94.70
10/6/76	92.39	157.66	0.00
10/13/76	318.27	145.67	172.60
10/20/76	198.19	225.75	0.00
10/26/76	278.88	143.60	135.28
11/4/76	220.50	0.00	220.50
TOTAL:		\$ 1,633.24	
<u>Socorro Martinez</u>			
8/4/76	\$ 91.83	\$ 0.00	\$ 91.83
8/11/76	209.45	0.00	209.45
8/18/76	216.32	0.00	216.32
8/25/76	119.66	0.00	119.66
9/1/76	179.10	0.00	179.10
9/8/76	189.82	0.00	189.82
9/15/76	273.27	0.00	273.27
9/22/76	206.40	101.36	105.04
9/29/76	190.58	109.32	81.26
10/6/76	92.39	171.83	0.00
10/13/76	318.27	286.23	32.04
10/20/76	198.19	95.21	102.98
10/26/76	278.88	140.00	138.88
11/4/76	220.50	0.00	220.50
TOTAL:		\$1,960.15	

1 APPENDIX "B" (Continued)

2	<u>PAYROLL</u>	<u>GROSS</u>	<u>INTERIM</u>	<u>NET</u>
3	<u>PERIOD</u>	<u>BACKPAY</u>	<u>EARNINGS</u>	<u>BACKPAY</u>
4		<u>Maria Martinez</u>		
4	8/4/76	\$ 91.83	\$ 82.86	\$ 8.97
	8/11/76	209.45	82.86	126.59
5	8/18/76	216.32	82.86	133.46
	8/25/76	119.66	82.86	36.80
6	9/1/76	179.10	15.75	163.35
	9/8/76	189.82	.00	189.82
7	9/15/76	273.27	.00	273.27
	9/22/76	206.40	.00	206.40
8	9/29/76	190.58	.00	190.58
	10/6/76	92.39	24.80	67.59
9	10/13/76	318.27	.00	318.27
	10/20/76	198.19	.00	198.19
10	10/26/76	278.88	140.00	138.88
	11/4/76	220.50	.00	220.50
11		TOTAL:	<u>\$ 2,272.67</u>	

12		<u>Baltazar Martinez</u>		
13	8/4/76	\$ 91.83	\$.00	\$ 91.83
	8/11/76	209.45	.00	209.45
14	8/18/76	216.32	246.20	.00
	8/25/76	119.66	113.39	6.27
15	9/1/76	179.10	.00	179.10
	9/8/76	189.82	183.41	6.41
16	9/15/76	273.27	221.53	51.74
	9/22/76	206.40	142.56	63.84
17	9/29/76	190.58	333.22	.00
	10/6/76	92.39	103.83	.00
18	10/13/76	318.27	28.77	289.50
	10/20/76	198.19	.00	198.19
19	10/26/76	278.88	.00	278.88
	11/4/76	220.50	.00	220.50
20		TOTAL:	<u>\$1,595.71</u>	

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1 APPENDIX "B" (Continued)

2	PAYROLL	GROSS	INTERIM	NET
3	<u>PERIOD</u>	<u>BACKPAY</u>	<u>EARNINGS</u>	<u>BACKPAY</u>
		<u>Emma Martinez</u>		
4	8/4/76	\$ 91.83	\$.00	\$ 91.83
	8/11/76	209.45	.00	209.45
5	8/18/76	216.32	.00	216.32
	8/25/76	119.66	.00	119.66
6	9/1/76	179.10	.00	179.10
	9/8/76	189.82	.00	189.82
7	9/15/76	273.27	.00	273.27
	9/22/76	206.40	101.36	105.04
8	9/29/76	190.58	109.32	81.26
	10/6/76	92.39	162.63	.00
9	10/13/76	318.27	282.98	35.29
	10/20/76	198.19	91.90	106.29
10	10/26/76	278.88	.00	278.88
	11/4/76	220.50	.00	220.50
11				
		TOTAL:	<u>\$ 2,106.71</u>	
12				
		<u>Idolina Martinez</u>		
13				
	8/4/76	\$ 91.83	\$ 98.84	\$.00
14	8/11/76	209.45	98.84	110.61
	8/18/76	216.32	98.84	117.48
15	8/25/76	119.66	98.84	20.82
	9/1/76	179.10	17.50	161.60
16	9/8/76	189.82	.00	189.82
	9/15/76	273.27	.00	273.27
17	9/22/76	206.40	.00	206.40
18				
		TOTAL:	<u>\$1,080.00</u>	
19				
		<u>Roberto Martinez</u>		
20				
	8/4/76	\$ 91.83	\$ 61.86	\$ 29.97
	8/11/76	209.45	61.86	147.59
21	8/18/76	216.32	61.86	154.46
	8/25/76	119.66	61.86	57.80
22	9/1/76	179.10	10.50	168.60
	9/8/76	189.82	20.70	180.14
23	9/15/76	273.27	58.48	214.79
	9/22/76	206.40	142.67	63.73
24	9/29/76	190.58	90.52	100.06
	10/6/76	92.39	166.59	.00
25	10/13/76	318.27	237.02	81.25
	10/20/76	198.19	95.00	103.19
26	10/26/76	278.88	.00	278.88
	11/4/76	220.50	.00	220.50
27				
		TOTAL:	<u>\$1,800.96</u>	
28				