

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PAUL W. BERTUCCIO AND	)	Case Nos. 77-CE-54-M
BERTUCCIO FARMS,	)	77-CE-64-M
	)	77-CE-67-M
Respondents,	)	77-CE-68-M
	)	77-CE-69-M
and	)	77-CE-70-M
	)	77-CE-70-1-M
UNITED FARM WORKERS OF	)	77-CE-74-M
AMERICA, AFL-CIO,	)	
	)	
	)	8 ALRB No. 6
Charging Party.	)	( 5 ALRB NO. 5)
	)	

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DECISION AND ORDER

On March 30, 1981, Administrative Law Officer (ALO)... Jennie Rhine issued the attached Decision in this backpay proceeding, and on June 10, 1981, she issued a Supplemental Decision. Thereafter, Respondent and General Counsel each timely filed exceptions and a supporting brief.

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

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

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondents Paul W. Bertuccio and Bertuccio Farms, their officers,

agents, successors and assigns, shall pay to Maria Castillo the sum of \$10,213.83 as the net backpay due her for the period November 25, 1977, through December 31, 1980, plus interest on said sum, computed at the rate of seven percent (7%) per annum, for the period from November 25, 1977, until the date of payment of said net backpay to Maria Castillo.

The Board further orders said Respondents to pay to Maria Castillo an additional sum as net backpay due to her for the period from January 1, 1981, through the day on which Respondents offer her full reinstatement to her former or a substantially, equivalent position, plus interest on said sum at the rate of seven percent (7%) per annum, for the period from January 1, T981, until the date on which Respondents reinstate Maria Castillo or pay her the said additional sum, whichever date is later. The additional sum of net backpay shall be computed and determined by the Regional Director in accordance with National Labor Relations Board and Agricultural Labor Relations Board precedents and procedures.

Dated: February 2, 1982

JOHN P. MCCARTHY, Member

ALFRED Ho SONG, Member

JEROME R. WALDIE, Member

8 ALRB No. 6

CASE SUMMARY

Paul W. Bertuccio and  
Bertuccio Farms  
(UFW)

8 ALRB No. 6  
(5 ALRB No. 5)  
Case No. 77-CE-54-M, et al

ALO DECISION

In Paul W. Bertuccio and Bertuccio Farms (Jan. 24, 1979) 5 ALRB No. 5, the Board determined that Respondents had discriminatorily laid off Maria Castillo on November 21, 1977, and ordered Respondents to offer the discriminatee reinstatement and to make her whole for any economic loss resulting from the discrimination including loss of pay. A backpay hearing was held on January 12, 13, and 14, 1981. The ALO concluded that Maria Castillo had not been reinstated nor offered reinstatement to her former or a substantially equivalent position with Respondents. The ALO also determined that the Board agent's method of computing the backpay due was correct.

After the hearing was closed, the ALO granted Respondents' motion to reopen the record to admit into evidence certain documents relating to a post-hearing criminal conviction of the discriminatee. In a supplemental decision, the ALO concluded that Castillo had been convicted of a felony, but that the findings and conclusions in the original decision were not affected.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALO, and adopted her recommendations. The Board ordered Respondents to pay the discriminatee the net backpay due her for the period from November 25 through December 31, 1980, plus a further undetermined amount for the period from January 1, 1981 until the date on which Respondents reinstate her to her former or a substantially equivalent position, plus seven percent per annum interest on each of the said sums.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of )  
 )  
 PAUL W. BERTUCCIO and )  
 BERTUCCIO FARMS, )  
 )  
 Respondent, )  
 and, )  
 )  
 UNITED FARM WORKERS OF )  
 AMERICA, AFL-CIO, )  
 )  
 Charging Party )

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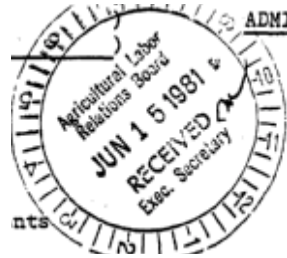
Case Nos. 77-CE-54-M 77-CE-69-M  
 77-CE-64-M 77-CE-70-M  
 77-CE-67-M 77-CE-70-M  
 77-CE-67-M 77-CE-74-M

( 5 ALRB NO. 5 )

BACKPAY PROCEEDING

DECISION OF  
ADMINISTRATIVE LAW OFFICER

Maria Elva Maldonado,  
 Salinas,, for the General  
 Lewis P. Janowsky of Dressier,  
 Quesenbery, Laws & Barsamian,  
 Newport Beach, for the  
 Respondents



STATEMENT OF THE CASE

Jennie Rhine, Administrative Law Officer: This backpay proceeding arises from the decision of the Agricultural Labor Relations Board in 5 ALRB No. 5, issued 2U January 1979. There the Board, inter alia, affirmed Administrative Law Officer Paul Albert's conclusion that the respondent discriminatorily laid off Maria Castillo on 21 November 1977 in violation of sections 1153(c) and (a) of the Agricultural Labor Relations Act,<sup>1</sup> and ordered that she be offered reinstatement and made whole for loss of pay and any other economic loss suffered as a result. The decision became final on 21 November 1979, after review was

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<sup>1</sup>Labor C. SS1153(c), 1153(a). All statutory citations are to the Labor Code, unless otherwise specified.

denied by both the court of appeal and the supreme court.

On 28 October 1980 the regional director issued a backpay specification and notice of hearing. The hearing convened on 3 December 1980 at Salinas, but it was quickly apparent that the case was not ready to proceed because the general counsel had not had sufficient access to company records to prepare an accurate specification. The hearing was continued to 12 January 1981, and interim deadlines were specified for demanding and providing records, and for filing an amended specification and an amended answer.<sup>2</sup> The reconvened hearing ended on 14 January 1981.

Based upon the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

#### MARIA CASTILLO'S 1978 REEMPLOYMENT

Introduction. Two major issues are discussed in turn: whether the company's reemployment of Maria Castillo in 1978 constituted a bona fide reinstatement which satisfied the Board's order and tolled the respondent's liability for backpay; and the method of computation of the backpay due her. Both issues are complicated by the unique position held by Castillo prior to her discriminatory termination and by the shortcomings of the company records put into evidence.

The Facts. It is undisputed that in 1978, after her discriminatory termination Maria Castillo was recalled to Bertuccio Farms soon after the ALO's

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<sup>2</sup> Hereinafter, all references to the backpay specification or the general counsel's computation are to the amended specification, GCX 6.

<sup>3</sup>The general counsel's Motion to Preclude Respondents from Offering Evidence on Certain Issues and the respondent's Motion for Bifurcated Hearing, filed at the hearing, are hereby incorporated into the record as Hearing Officer's Exhibits 1 and 2, respectively.

decision was issued. She worked from early July until November 21, when she was again laid off. The general counsel contends, however, that she was not reinstated to her former or a substantially equivalent position as a favored employee, as indicated primarily by her receiving less work than she had in former years.<sup>4</sup> It is therefore necessary to explore her previous employment history in some depth.

Located in San Benito County, Bertuccio Farms produces a variety of vegetables and fruits. It operates its own packing sheds for some crops, including onion, bell peppers, corn, gourds, apricots, peaches and pears. Castillo worked there, along with other members of her family, from approximately 1965'. The Castillo family lived on company property, at first in tents, and then in a house vacated by Paul Bertuccio's parents. Initially a general farm laborer, more recently Maria worked primarily in the sheds.

For several years prior to 1976, until she expressed dissatisfaction with the job, Castillo was the only woman to work regularly in the onion shed. As the forewoman, she operated the machinery and kept timecards for other employees; she also sorted onions, sewed sacks, made boxes and tags, and on occasion answered the telephone and took orders for sales.<sup>5</sup> After 1975, during most of the year Castillo worked in the other sheds, where she operated machinery, cut peaches and pears by hand, sorted and packed fruit and gourds, and made boxes. The onion shed is in operation from July until December or January; the other

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<sup>4</sup>I have examined the grounds for the general counsel's other arguments, and find them unsubstantiated by the evidence.

<sup>5</sup>Also see 5 ALRB No. 5, Administrative Law Officer's Decision (hereinafter ALOD) at 26. At the backpay hearing Castillo testified that without her requesting it, she was transferred from the onion shed in 1977; she also conceded that the ALO's findings were correct. I conclude that she was understandably confused about the details of events occurring more than five years ago.

shed operations begin around the same time but do not continue as late, the last to cease operations being the bell pepper shed, which stops in November.

Castillo testified that both before and after she stopped working in the onion shed, until the union began organizing in the summer of 1977, Paul Bertuccio found work for her to do when others were laid off. (Paul Bertuccio primarily supervised the onion shed; his wife, Tina, supervised the others. Even after she no longer worked regularly in the onion shed, Castillo continued to receive her orders from Paul Bertuccio until the union came in.) When packing was slow, and intermittantly after it stopped, she sorted produce, made boxes, sorted and tied onion, sacks, or made onion tickets. It was the absence of other" work for her after the bell pepper shed ceased operations in 1977 that caused the Board to determine that her termination was discriminatory. In some years she also worked for brief periods at other farms during the off season. In the spring she resumed work at Bertuccio Farms, doing field work—hoeing and weeding, thinning, topping onions, transplanting bell peppers—until the shed work began in July. Although she did not work full-time throughout the year, Castillo testified that she received some work at Bertuccio Farms each month, saying that Paul Bertuccio always found something for her and her sister.

Bertuccio testified that he did not remember Castillo's ever asking for, or his giving her, extra work in the ten to fifteen years she worked for him. He then qualified his testimony, asserting that he could not remember any specific time. He was similarly evasive and uncooperative throughout his testimony. He purported to be unable to recall how many years Castillo worked for his, what kind of work she did in her earlier years, or how long her family lived on the farm. He denied that she was a responsible employee, although she had been entrusted with the job of forewoman in the onion shed and machine operator in the other sheds. When asked whether she wasn't given the opportunity to

work a maximum number of hours, he at first replied that everyone worked a regular workday, and then admitted that there are no rules, that a lot of people work different hours, set by him or his wife. In general, he demonstrated the same "extreme bitterness" at the backpay hearing as at the unfair labor practice hearing (see ALOD 27), and his contradicted testimony is given little weight.

Documentary evidence tends to support a finding that work was frequently available for Castillo during the off season. Company payroll records for her for the years 1975-1978 were introduced into evidence.<sup>6</sup> They show that she received a paycheck almost every week during the period of December 1975 through June 1976. For 1975 and 1977 they show no work until the latter part of May; however, at least for 1975 they are demonstrably unreliable.<sup>7</sup> Castillo produced assorted paycheck stubs, including one for a week in March 1975; others indicate work in earlier years in the months of December, January, and April. The company failed to produce convincing evidence that she did not work during the off season prior to 1977, although presumably it was in a position to do so if such evidence, existed.

Other factors besides the company house and the slack period work indicate Castillo's favored position. At unspecified times Paul Bertuccio gave her

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<sup>6</sup>The company's records do not show what type of work was performed when. Nor do they show the hours worked, but the amount of work can be deduced from the gross earnings.

<sup>7</sup>Castillo produced sixteen paycheck stubs for various weeks of 1975. Neither the dates nor the amounts on her stubs agree with the company's records for that year. Compare GCX 11 and GCX 12. Tina Bertuccio, who is responsible for the payroll and keeps most of the records, was unable to satisfactorily explain the discrepancies. See RT 111:146-154. Respondent stipulated to the authenticity and accuracy of the paycheck stubs. See GCX 8.

With the exception of the company's records, no evidence was offered by either party about Castillo's situation in the first part of 1977. If she did not work, this was an exception to her usual practice.



\$200 towards the purchase of a car and once paid for car repairs. She received Christmas bonuses and, on occasion, tires or a battery for her car. I concur with the previous finding (see ALOD 27-28) that Castillo was a favored employee who was given a maximum amount of work.

In 1978, after her discriminatory termination, Castillo did not return to work at Bertuccio until the second week of July. Tina Bertuccio testified that in May she telephoned the Castillo home and left word with Lupe Castillo, Maria's sister, that work was available for Maria transplanting bell peppers, but Castillo did not return her call or report for work. Bertuccio also testified that early in June, during another telephone conversation with Lupe (about a plumbing problem), Lupe told her that Maria was working elsewhere in the lettuce; Tina told Lupe that she would call Maria when work was available in the apricots. Lupe Castillo denied having either conversation with Tina Bertuccio. For reasons discussed below, I find it unnecessary to resolve this contradiction.

In July Tina Bertuccio telephoned and, speaking directly to Maria Castillo, told her that work was available. Castillo returned to work within a day or two of the call. Over the next five months, she operated the machinery in the apricot and bell pepper sheds; for two or three weeks she also worked in the corn and gourd shed, cutting corn from cobs and carrying it to the packers, a job she had not previously done. She was laid off when operations ceased in the bell pepper shed. She testified that even though she asked Tina Bertuccio or Elvira Cabrera, the forewoman, for it, she was not given the extra work she had received in the past, such as sorting fruit or making boxes.

The respondent introduced evidence purporting to show that while she worked Castillo was among the women given the most work. According to payroll records for six women, in the third quarter of 1978 Castillo earned at least \$72 more than all but Elvira Cabrera; in the fourth quarter she earned less than the

other women, but was within \$33 of all but Cabrera. (Cabrera's and Castillo's positions are compared below.) Other records introduced by the general counsel, however, show that at least five additional women earned more than Castillo in the fourth quarter, and while most of the women stopped working before or at the same time as Castillo, at least three, in addition to Cabrera, continued to work into December.<sup>8</sup> Nothing indicates what work the women performed after the bell pepper shed stopped. Work in the onion shed appears to have begun in the first week of July and continued through December.<sup>9</sup>

A comparison of Castillo's earnings over several years reveals that she earned noticeably less in the last two quarters of 1978 than in the same period of 1977 or 1976.<sup>10</sup> No evidence was introduced from which to compare Castillo's pre-1978 earnings with other women's.

The general counsel contends that the work potentially available for Castillo should be measured by that provided Elvira Cabrera and relies upon her earnings, in part, in computing the backpay obligation, while the respondent argues that Cabrera is not a representative employee. Although still employed by the company, she was not called as a witness. According to Tina Bertuccio,

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<sup>8</sup>See RX 1-6; GCX 10. The five additional women who earned more than Castillo are: Imelda Romero, Maria Luisa Arreola (GCX 10a); Evangeline Calvo (GCX 10b); Georgina Figueroa and Elvira Canela (GCX 10d). Their fourth quarter earnings were from \$15 to \$165 greater. The three who worked longer are Arreola, Figueroa and Canela.

<sup>9</sup> See RT 111:97 (T. Bertuccio); GCX ,10c. GCX 13c shows some onion shed workers working straight through March 1979, but those are all identified as loaders, forklift or truck drivers, or repairmen, work not necessarily indicating the shed was in operation.

<sup>10</sup>See GCX 11. Since Castillo was laid off prematurely in 1977, the best year for comparison is 1976. She earned \$2883.50 in the last two quarters then, compared to \$234-3.00 in 1978, in spite of a \$.25/hour increase in the interim. (The 1978 rate, \$2.75, appears in GCX 6; the 1976 rate, \$2.50, is calculated from GCX 12). No comparison is made with 1975 because of the unreliability of the company's records for that year. See note 7, above.

Cabrera assisted her in supervising the sheds (other than the onion shed), interpreted for her with other workers, cleaned employee toilets, did housework at her and her sister-in-law's residences, and worked in the fields topping onions, hoeing and weeding, and transplanting bell peppers. Bertuccio also said that Cabrera had more seniority than Castillo but, as she has no personal knowledge, arriving at the farm after both of them, I rely instead upon the testimony of Castillo and her sister Lupe that Cabrera began after they did, and find accordingly.

Bertuccio implied that Cabrera consistently worked more than Castillo. However, Castillo testified that Cabrera began to get more work than she only after the union began organizing (and she became known as an outspoken supporter) in 1977. Although presumably the company was in a position to demonstrate that Cabrera earned more than Castillo prior to 1978, no records were introduced showing that to be the case. Drawing an adverse inference from the company's failure to produce evidence within its possession and relying on Castillo's credible testimony, I find that in the past Castillo had more work than Cabrera.

In 1978 the records show that Cabrera received considerably more work than Castillo. From the second week in August, when Cabrera began, until the end of the quarter, she earned \$1383 while Castillo earned \$789; during that part of the fourth quarter in which they both worked, Cabrera earned \$1623 while Castillo earned \$1062; Cabrera earned an additional \$198 after Castillo was laid off. At \$2.75 per hour, Cabrera had 492 more work hours than Castillo.

Castillo has not worked at Bertuccio Farms since her 1978 layoff through the time of the hearing. Tina Bertuccio testified that in 1979, around July 5th or 6th, she phoned and asked Lupe Castillo if she and her sisters, including Maria, were coming back when work began in the apricot shed; Lupe replied that she did not think so, because they were working elsewhere and making more

money. Bertuccio had previously learned from Hope Beltran that Castillo was working for Beltran's father, Jesus Quintero, at a higher rate, and had told Beltran that the company would have to recall her when work began in the apricot shed. Bertuccio also said that had Lupe responded affirmatively, she would have had to call again with a definite starting date. Company records show that other women received their first 1979 paychecks on June 1st, indicating that they began to work, presumably transplanting bell peppers, during the last week of May.

Analysis and Conclusions. The Board ordered the respondent to "Co]ffer Maria Castillo immediate and full reinstatement to her former position or a substantially equivalent job without prejudice to her seniority or other' rights and privileges . . . ;" the respondent's liability for backpay does not terminate until such an offer is made. See, e.g., NLRB v. Midwest Hanger Co., 550 F.2d 1101, 94 LRRM 2878 (8th C. 1977); NLRB v. Interurban Gas Co., 354 F. 2d 76, 61 LRRM 2052 (6th C. 1965).

Tina Bertuccio testified that in May 1978 she telephoned the Castillo home and' left a message that work transplanting bell peppers was available for Castillo. Assuming that to be the case for the purpose of argument, I nonetheless conclude that the telephone call did not constitute a valid offer of reinstatement because there is no evidence that Castillo received the message. See Marlene Industries Corp., 234 NLRB 285, 97 LRRM 1301 (1978); NHE/Freeway, Inc. , 218 NLRB 259, 89 LRRM 1481 (1975); Leprino Cheese Co., 170 NLRB 601, 68 LRRM 1334 (1968); Portage Plastics Co., 163 NLRB 753, 64 LRRM 1485 (1967); J.H. Rutter-Rex Mfg. Co.. Inc.. 158 NLRB 1414, 62 LRRM 1456, 1463 (1966). The respondent has the burden of establishing a valid offer. Rafaire Refrigeration Corp., 207 NLRB 523, 84 LRRM 1535 (1973).

Bertuccio made no further effort to contact Castillo when she did not return the call or report for work, even though the Castillo home was nearby

and to follow up, by phone or personal contact^ would not have been difficult. Under the circumstances, there was no good faith effort to communicate the offer. See Rutter-Rex Mfg.,. supra; Reeves Rubber, 252 NLRB No. 26, 105 LRRM 1586 (1980).

In a June 1978 telephone call Bertuccio purportedly told Castillo's sister that she would call again when work was available in the apricots. Even if Castillo received the message (there is no evidence that she did), this was, at most, an offer of possible future reemployment requiring another call to effectuate it. A categorical invitation to return to work is required. Kenston Trucking Co.. Inc., 223 NLRB 502, 91 LRRM 1538 (1976); Leeding Sales Co., Inc., 155 NLRB 755, 60 LRRM 1405 (1965).

There being no prior valid offer of reinstatement, the issue is whether Castillo was reinstated to her former or a substantially equivalent position in July. A number of factors contribute to the conclusion that she was not, because she did not receive the maximum amount of available work as she had in the past.<sup>11</sup> A reinstatement is not valid where'-the rehired employee receives less work than in the past. See Valley Oil Co., Inc., 210 NLRB 370, 86 LRRM 1351 (1974) (employee deprived of former overtime work); New Fairview Hall Convalescent Home, 206 NLRB 688, 85 LRRM 1227 (1973) (workers who had previously worked two days a week reinstated to one day a week jobs). It is well settled that the employer has the

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<sup>11</sup>The respondent would have an adverse inference drawn from the fact that a charge alleging that Castillo was discriminatorily denied her former amount of work was dismissed by the regional director for insufficient evidence. See RX 7. The dismissal of a charge without a hearing or adjudication on the merits is not res judicata in the present proceeding. See, e.g., Jersey City Welding, Inc., 92 NLRB 510<sub>s</sub>, 27 LRRM 1106 (1950); Textile Machine Works, 96 NLRB 1333, 1335 n.1, 29 LRRM 1030 (1951); Swanson's, Inc., 125 NLRB 407, 45 LRRM 1151 (1959). The filing and subsequent withdrawal or dismissal of a charge proves nothing more than the fact that it was filed. P.P. Murphy Produce Co., Inc., 4 ALRB No. 62 (1978). The regional director may well have dismissed the charge here because of a determination that the appropriate place to litigate it was in this compliance proceeding.

burden of proving that it did not have work available for a discriminator due to factors unrelated to the discriminatory termination. NLRB v. Midwest Hanger Co., 550 F.2d 1101, 94 LRRM 2878, 2880 (8th C. 1977); also see, e.g., NLRB v. Mastro Plastics Corp., 354 F.2d 170, 60 LRRM 2578 (2d C. 1965), cert, denied, 384 U.S. 972, 62 LRRM 2292 (1966).

To evaluate the nature of Castillo's reinstatement, it is reasonable to compare her position to Elvira Cabrera's, for Cabrera was favored by Tina Bertuccio in much the same way as Castillo formerly had been favored by Paul Bertuccio. Both women did similar types of field work during the off season and held responsible positions when the sheds were operating. As Cabrera interpreted for Mrs. Bertuccio, so Castillo answered the telephone and took onion orders for Mr. Bertuccio. Castillo did not get extra work cleaning toilets or doing housework, but she got extra work making boxes, preparing onion tags, and cutting, sorting and packing fruit. The positions of the two women are very similar.

In the past Cabrera had not earned more than Castillo. The fact that she earned substantially more in 1978 supports the inference that more work could have been made available to Castillo.

But even in the absence of a finding that the positions of the two are analogous, other facts establish that Castillo was not reinstated to a substantially equivalent position. She earned considerably less in 1978 than in comparable periods of earlier years. Apart from Cabrera, eight women who also worked in the sheds earned more than Castillo in the fourth quarter of 1978. As in the discriminatory termination of 1977, she was laid off when the bell pepper shed ceased operating; four other women, including Cabrera, continued to work. Although the record does not indicate what work they performed, it is improbable that Castillo could not have done it, given the variety of jobs she had performed

over the years. Moreover, work continued in the onion shed and, while the company was not obliged to restore her to her former position as forewoman there, extra work of the sort she had previously performed was presumably available. Thus, in 1978 Castillo did not get the extra work she had in the past, either during the shed season or after. The respondent has not met its burden of proving that more work was unavailable.

Furthermore, the events of 1979 corroborate the inadequacy of the claimed reinstatement. Although Castillo had previously performed field work in the spring, in 1979 no effort was made to recall her until July, when work resumed in the sheds. The absence of any intention to employ her sooner is apparent from the fact that earlier Tina Bertuccio had advised her current employer that the company would have to offer her work when the apricot shed began. Other women began working during the last week in May.

To summarize, from her former position as a favored employee who received more work than the other women, Castillo was reduced to the status of a regular shed worker who received less. The remaining question is whether a valid offer of reinstatement was made in July 1979, when Tina Bertuccio asked Lupe Castillo whether the Castillos were returning when work began in the apricot shed and was told by Lupe that she did not think so, because they were working elsewhere and making more money. Bertuccio said that she would have had to call again if Lupe had indicated they wanted to return. Bertuccio's inquiry fails for reasons already discussed: there is no evidence that it was communicated to Castillo, and it was not a categorical invitation to return to work.<sup>12</sup>

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<sup>12</sup>See discussion and cases cited above, at pp. 9-10. A mere inquiry concerning a discriminatee's interest in returning to work does not constitute an unconditional offer of reinstatement. *Moro Motors, Ltd.*, 216 NLRB 129, 88 LRRM 1211, 1214 (1975) (dissenting opinion), and cases cited therein. (Continued)

I conclude that Castillo was not reinstated to her former or a substantially equivalent position in 1978, and that no valid offer of reinstatement was made through the time of the hearing. Consequently, the respondent's liability for backpay continues.

#### COMPUTATION OF BACKPAY

Introduction. The Board ordered calculation of the backpay due Castillo in accordance with the formula set forth in Sunnyside Nurseries, Inc., 3 ALRB No. M-2 (1977), i.e., on a daily basis. That is not possible, however, because no information on daily earnings is available. Under similar circumstances, the Board has authorized the calculation to be made on a weekly basis or, indeed, by any method that is equitable, practicable, and in accordance with the policy of the Act. See Butte View Farms, 4 ALRB No. 90 (1978), aff'd, 95 C.A. 3d 961 (1979); Maggio-Tostado, Inc., 4 ALRB No. 36 (1978).

The goal of the backpay order is to restore the discriminatee to the position she or he would have enjoyed had there been no discrimination.

Maggio-

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(n. 12 cont'd) The respondent's reliance on Moro Motors to establish a valid offer is misplaced because that case is factually inapposite to any of the alleged offers in the instant case. There the employer said directly to the discriminatee, a mechanic, "We are in a hole for mechanics, would you like to come back to work here?" and the discriminatee replied, "No." The Board found that the employer's question was specific enough to be construed as an unconditional offer of reinstatement to the discriminatee's former position, and was actually interpreted as such by the discriminatee. See Kenston Trucking Co., supra, 91 LRRM at 1535, n.3. The respondent's reliance on NLRB v. Padre Dodge, 4-71 F.2d M-16, 82 LRRM 2241 (9th C. 1973), is similarly misplaced. There the discriminatee returned to work after receiving a telephone call from the employer (as Castillo did in July 1978), but quit after two days because his inquiries about the conditions of his reemployment were unsatisfied. The court found the evidence insufficient to conclude that he was not reinstated within the meaning of the Act. Here Castillo did not quit, and the record of her reemployment clearly establishes that it was not equivalent to her former position. Regarding the other point the respondent derives from Padre Dodge (which is undiscussed there), the position is not taken here that a valid offer of reinstatement cannot be made by telephone, but rather that none was.



Tostado, Inc., supra; NLRB v. Robert Haws Co., 403 F.2d 979, 69 LRRM 2730 (6th C. 1968); NLRB v. United States Air Conditioning Corp., 336 F.2d 275, 57 LRRM 2068 (6th C. 1964. Here, the amount of the backpay obligation cannot be determined with precision because of Castillo's unique position as a favored employee, the company's record keeping methods, and the fluctuating nature of its operations. The burden is on the employer to establish any mitigation of its backpay obligation. Kawano. Inc., 4 ALRB No. 104 at 19 (1978), aff'd, 106 C.A. 3d 937 (1980); Maggio-Tostado, Inc., supra, ALOD at 6; NLRB v. Miami Coca-Cola Bottling Co., 360 F. 2d 569, 62 LRRM 2155 (5th C. 1966); NLRB v. Madison Courier, Inc., 472 F. 2d 1307, 80 LRRM 3377 (DC C» 1972). Any uncertainty must be resolved against the employer who, by his unlawful conduct» made certainty impossible. Butte View Farms, supra, citing with approval NLRB v. Miami Coca-Cola Bottling Co., supra.

Gross Backpay. For the period following Castillo's discriminatory layoff until the end of 1977, the parties stipulated that the amount claimed by the general counsel, \$837.39, is the amount due (excluding any bonuses or gifts, which are discussed below). See GCX 8.

Three weeks' earnings are claimed for the first four months of 1978. The amount claimed for the first week in January, \$251.63, is the amount earned by Elvira Cabrera in that week. Since Cabrera's position with the company is analogous to what Castillo's was previously, it is reasonable to use her earnings as a guide to what Castillo would have earned. Even though Tina Bertuccio testified that Cabrera cleaned toilets that week, work never performed by Castillo, it seems unlikely that Cabrera did so for 90-1/2 hours (the amount of time indicated by dividing the rate, \$2.75 per hour, into her gross earnings); furthermore, Bertuccio also testified that the onion shed was operating for one to two weeks that January, and Castillo could well have been given work there. It is well established that a representative employee may be used to calculate the gross

backpay due a discriminatee. See, e.g., Butte View Farms, supra at 5, citing NLRB v. Toppino S Sons, 358 F.2d 94, 61 LRRM 2655 (5th C. 1966).

The claimed amount of \$110 for each of the weeks ending 31 March and 29 April 1978 is based upon an estimate that within each of those months Castillo would have received at least forty hours extra or "fill in" work. This is a reasonable, even modest, estimate, even though no other women appear to have worked. Castillo had previously done field work such as hoeing and thinning during those months. Having precluded a definitive determination by failing properly to reinstate Castillo, the company cannot be heard to complain if the backpay formula is based on her past work history. See J/B Industries, Inc., 245 NLRB No. 78, 102 LRRM 1500 (1978) (overtime properly included in backpay award, even though no one else worked overtime during backpay period). In the past Castillo has earned substantially more in the first part of the year than the backpay amounts claimed.<sup>13</sup> Furthermore, since the company has simply denied any liability for the period without offering an alternative method of calculation, it must bear the brunt of the uncertainty. See Butte View Farms, supra at 4-5. It has not established that no work was available which could have been performed by Castillo.

In May and June the company employed at least five women who transplanted bell peppers, work regularly performed by Castillo in the past, and during that period each of them earned the amounts claimed for her. (See GCX 10a, 10b.) Her entitlement to those amounts is indisputable.

For each of the weeks from the second week in July through 21 November 1978, the period of Castillo's reemployment, the general counsel claims as gross

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<sup>13</sup>In January through April, Castillo earned nothing in 1977, \$2317.65 in 1976, and an unknown amount in 1975 (see GCX 11; n.7, above), compared to \$471.63 claimed for 1978, \$423.00 for 1979, and \$479.38 for 1980. •

backpay the largest amount earned by any woman working in the sheds, on the theory that as a favored employee Castillo would have received as much work as anyone else. Nevertheless, it seems more rational to use the earnings of Elvira Cabrera during the period she worked (see RX 2) for comparison: while Cabrera was consistently among the top earners, the other women's earnings are more erratic, with those who received more work one week getting less than Castillo in other weeks.<sup>14</sup> For the period prior to the week ending August 9, when Cabrera started work, three other women have been selected as representative of those with the most work.<sup>15</sup>

The respondent was precluded from presenting evidence challenging the computation of gross backpay for the period following Castillo's layoff.<sup>16</sup> For each of the four weeks following the layoff (with payroll dates of 28 November through 19 December 1978), the amount claimed is an average of the earnings of three onion shed workers for that period. Since work in the onion shed could have been made available and no alternative method was proposed, the general

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<sup>14</sup>For some weeks, e.g., 18 August and 5 October, atypically high amounts have been claimed. In one instance it appears that the employee may have been paid for work overlapping two weeks (see GCX 10a for Alicia Fernandez) and in the other, no female employee earning that amount could be found.

<sup>15</sup>Carmen D. Ramos (GCX 10a), Maria E. Lezama and Maria de Lezama (GCX 10b).

<sup>16</sup>Although the initial and the amended specifications filed by the general counsel differ substantially, the respondent's answers are identical. In neither answer are the amounts claimed for the period following Castillo's reemployment specifically controverted. Consequently, upon motion by the general counsel the respondent was precluded from presenting its own evidence concerning amounts for that period, although it was permitted to cross-examine the general counsel's witnesses. See ALKB Reg. SS20290(d), 2Q290(g), 8 Gal. Admin. C. S820290(d), 20290(g); Three States Trucking, Inc. 252 NLRB No. 153, 105 LKRM 1457 (1980). Because a five-week continuance had already been granted for the express purpose of clarifying the parties' positions, the respondent was denied further leave to amend its answer.

counsel's method provides a rational basis for the computation. The general counsel withdrew the claim for backpay for the period preceding 31 December 1978 because Castillo had gone to Mexico and was unavailable for work. See RT IV: 33-34.

The \$120 claimed for the week ending 30 March 1979 is based upon the assumption of the availability of forty hours of extra work during the month, at the \$3.00 per hour rate the company paid women during the first half of 1979. I have already found that to be a reasonable assumption.

For the weeks ending 20 April through 7 December 1979, the general counsel once again claims the highest amount paid to any woman worker. The amounts claimed for the first six weeks are actually based upon the earnings of a man, not a woman,<sup>17</sup> and are inappropriate for that reason. In 1979 bell pepper transplanting began in the last week of May. Therefore, I assume that in April, as in 1978, forty hours of extra work could have been made available to Castillo; the amount due at the 1979 rate is \$120. For the reasons previously stated, the earnings of Elvira Cabrera (see GCX13d) are used for the remainder of the period. An average of the earnings of three onion shed workers is again used for the last three weeks in December.

For 1980, once again forty hours of extra work is assumed for the months of March and April, the average of three onion shed workers is used for

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<sup>17</sup>The Board agent testified that the figures are derived from the earnings of Carmen Arreola, and that while he assumed Arreola is a woman, he did not know whether that was so. Arreola's earnings throughout the year (see GCX 13a) substantially exceed those of any workers known to be women; they were not used as a basis for calculating gross backpay once Elvira Cabrera and other women began to work. I also take official notice of the fact that in the Spanish-speaking culture Carmen is a name given to men as well as women. It thus appears likely that Arreola is a man.

December,<sup>18</sup> and Elvira Cabrera's earnings are used for the rest of the year.

Interim Employment. In 1979 and 1980 Castillo worked for other employers. The parties stipulated that the amounts set forth in the general counsel's amended computation accurately reflect her earnings. Those amounts are subtracted from her gross backpay for the appropriate weeks. See Maggio-Tostado, Inc., supra. Her earnings during her reemployment at Bertuccio Farms are similarly treated. Since there was no valid reinstatement, that period is comparable to interim employment with a stranger. See ALRB v. Aycock, 377 F.2d 81, 65 LRRM 2352 (5th C. 1967).

During the hearing the respondent suggested that Castillo was not actually available for reinstatement because she earned more elsewhere and had said she was applying for a license as a labor contractor. Be that as it may, she testified that she was willing to return. A discriminatee is not required to make a choice of employment before receiving an unconditional offer of reinstatement. Kenston Trucking Co., 223 HLRB 502, 91 LRRM 1538 (1976); Richard W. Kaase Co. 162 NLRB 1320, 64- LRRM 1181 (1967); Leeding Sales Co., Inc., 155 NLRB 755, 60 LRRM 1M-05 (1965). It would be contrary to the purposes of the Act to penalize a discriminatee by reducing the amount of backpay to which she would otherwise be entitled merely because of a speculative possibility. See Robert Haws Co., 161 NLRB 299, 63 LRRM 1302 (1966), enforced in pertinent part, "403 F.2d 979, 69 LRRM 2730 (6th C. 1968).<sup>19</sup>

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<sup>18</sup>The company's records for late November and December were not available when the computation was made, so the number of hours was assumed to be the same as in 1979, and the 1980 pay rate of \$3.50 was applied.

<sup>19</sup>In a letter received after the post-hearing briefs, the respondent argues that Castillo should be denied backpay because she willfully and fraudulently concealed earnings from interim employment, citing NLRB v. Flite Chief, Inc. F.2d \_\_\_, \_\_\_ LRRM \_\_\_, 81 L.A. Daily Journal DAR 529 (Continued)

Bonuses and Gifts. The general counsel claims \$400 in lost gifts and Christmas bonuses. Such items are properly includable in a backpay award. See NLRB v. Madison Courier, Inc., 472 F.2d 1307, 80 LRRM 3377, 3379 n.9, and cases cited therein. Castillo reported only a few gifts, made at unspecified times over a period of years, however, and the testimony of both Paul and Tina Bertuccio that no one has received a Christmas bonus since 1976 is uncontradicted.<sup>20</sup> Consequently, the assumption that Castillo would have received gifts or Christmas bonuses but for the employer's discrimination is not supported by the record and calls for speculation.

Job Seeking Expenses. The Board has held that a discriminatee is entitled to reimbursement for expenses incurred seeking and holding interim employment throughout the backpay period. Butte View Farms, supra. Of the \$500 claimed for such expenses, \$193 is a reasonable estimate of transportation and living expenses incurred during Castillo's interim jobs; the balance is job seeking expenses and includes \$100 for a December 1980 bus trip to El Centro, where Castillo applied for work with two companies. The claim is supported by the record.

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(n.19 cont'd) (9th C., 23 Feb. 1981). Assuming arguendo, that Flite Chief is applicable, I, unlike the Administrative Law Judge there, do not find that Castillo intended to willfully conceal her interim earnings in order to fraudulently obtain more backpay than she is entitled to. All that the record shows is that she did not tell one Board agent of two weeks' earnings in the first part of 1978 until a second interview, after he had been advised of them by the respondent. See RT 11:118-119. She was not asked about this and may well have had an innocent explanation: she apparently did tell him of many other weeks of interim earnings.

<sup>20</sup>Since the discontinuance of Christmas bonuses in 1977 came soon after a UFW election victory (see ALOD at 4), it may have violated sections 1153(a) and (c), in which case an order of retroactive payments would be appropriate. See, e.g., Stark Ceramics, Inc., v. NLRB, 375 F.2d 202, 64 LRRM 2781 (6th C. 1967); Valley Oil Co., Inc., 210 NLRB 370, 86 LRRM 1351 (1974). However, this issue is not properly a part of the present proceeding.

THE REMEDY

The backpay obligation accrued by the respondent through 1980 totals \$10,213.83, computed as shown in the attached appendix, plus interest. The obligation continues to accrue in an undetermined amount<sup>21</sup> until a valid offer of reinstatement is made. See NLRB v. Interurban Gas Co., 354- F.2d 76, 61 NLRB 2052 (8th C. 1965).

Pursuant to section 1160.3 of the Act, based upon the foregoing findings and conclusions and upon the entire record of this proceeding, I recommend the following:

ORDER

The respondents, Paul W. Bertuccio and Bertuccio Farms, their officers, agents, successors and assigns, shall pay to Maria Castillo the sum of \$10,213.83, plus interest thereon compounded at the rate of seven percent per annum, plus a further undetermined amount which continues to run until the respondents offer Maria Castillo reinstatement to her former or a substantially equivalent position.

Dated: 30 March 1981



Jennie Rhine  
Administrative Law Officer

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<sup>21</sup>In an attempt to avoid or simplify future litigation about the method of computation, I recommend that the ongoing obligation be calculated by 'using the gross backpay figures established for 1980, adjusted to reflect increases in the rate of pay.

## APPENDIX

Computation of Net Backpay

Week Ending <sup>a</sup>	Rate of Pay	Gross Backpay	Interim Earnings	Net Backpay
11/25/77	\$2.75/hr	\$156.75	-	\$156.75
12/02/77		156.75	-	156.75
12/09/77		148.50	-	148.50
12/16/77		155.38	-	155.38
12/23/77		116.88	-	116.88
12/30/77		103.13	-	103.13
01/07/78	\$2.75/hr	\$251.63	-	\$251.63
01/14/78		-	-	-
01/21/78		-	-	-
01/28/78		-	-	-
02/04/78		-	-	-
02/11/78		-	-	-
02/18/78		-	-	-
02/25/78		-	-	-
03/04/78		-	-	-
03/11/78		-	\$105.87	-
03/18/78		-	193.45	-
03/25/78		-	160.62	-
03/31/78		110.00	193.46	-
04/08/78		-	156.95	-
04/15/78		-	-	-
04/22/78		-	-	-
04/29/78		110.00	-	110.00
05/06/78		-	-	-
05/13/78		-	-	-
05/20/78		44.00	-	44.00
05/27/78		176.00	-	176.00
06/03/78		90.75	117.02	-
06/10/78		22.00	143.67	-
06/17/78		-	-	-
06/24/78		-	-	-
06/30/78		-	-	-
07/08/78	\$3.00/hr	-	-	-
07/10/78		-	-	-
07/12/78		91.50	88.50	3.00
07/19/78		132.00	132.00	-
07/26/78		138.00	138.00	-

<sup>a</sup>The irregularity in the week ending dates reflects the respondent's use of different paydays for different operations.



Week Ending	Rate of Pay	Gross Backpay	Interim Earnings	Net Backpay
08/02/78	\$3.00/hr	\$144.00	\$133.50	\$ 10.50
08/09/78		162.00	96.00	66.00
08/18/78		171.00	159.00	12.00
08/25/78		156.00	-	156.00
09/02/78		177.00	-	177.00
09/06/78		217.50	169.50	48.00
09/14/78		168.00	109.50	58.50
09/20/78		177.00	126.00	51.00
09/27/78		154.50	129.00	25.50
10/05/78		187.50	163.50	24.00
10/11/78		211.50	100.50	111.00
10/18/78		213.00	153.00	60.00
10/25/78		231.00	159.00	72.00
11/01/78		216.00	171.00	45.00
11/08/78		208.50	96.00	112.50
11/15/78		208.50	97.50	111.00
11/21/78		147.00	121.50	25.50
11/28/78		133.25	-	133.25
12/05/78		71.00	-	71.00
12/12/78		131.17	-	131.17
12/19/78		133.50	-	133.50
12/31/78		139.55	(unavailable)	-

01/05/79	\$3.00/hr		-	-
01/12/79		-	-	-
01/19/79		-	-	-
01/26/79		-	-	-
02/02/79		-	-	-
02/09/79		-	-	-
02/16/79		-	-	-
02/23/79		-	-	-
03/02/79		-	-	-
03/09/79		-	-	-
03/16/79		-	-	-
03/23/79		-	-	-
03/30/79		120.00	-	120.00
04/06/79		-	-	-
04/13/79		-	-	-
04/20/79		-	-	-
04/27/79		120.00	-	120.00
05/04/79		-	-	-
05/11/79		-	-	-
05/18 /79		-	296.00	-
05/25/79		-	268.00	-
06/01/79		118.50	256.50	-
06/08/79		124.50	276.25	-
06/15/79		109.50	276.25	-
06/22/79		235.50	178.50	57.00
06/29/79		-	-	-

Week Ending	Rate of Pay	Gross Backpay	Interim Earnings	Net Backpay
07/06/79	\$3.25/hr	-	-	-
07/13/79		\$227.50	\$ 80.75	\$146.75
07/20/79		256.75	333.99	-
07/27/79		247.00	313.62	-
08/03/79		248.63	304.50	-
08/10/79		235.63	165.25	70.38
08/17/79		251.88	216.75	35.13
08/24/79		235.63	229.50	6.13
08/31/79		225.88	310.50	-
09/07/79		188.50	136.00	52.50
09/14/79		229.13	208.25	20.88
09/21/79		232.38	323.00	-
09/28/79		229.13	-	229.13
10/05/79		255.50	405.87	-
10/12/79		242.13	468.00	-
10/19/79		270.38	346.37	-
10/26/79		222.25	176.38	45.87
11/02/79		241.50	235.87	5.63
11/09/79		211.75	227.38	-
11/16/79		238.00	229.50	8.50
11/23/79		231.00	167.88	63.12
11/30/79		231.00	-	231.00
12/07/79		238.00	-	238.00
12/14/79		167.84	-	167.84
12/21/79		147.34	-	147.34
12/28/79		95.67	-	95.67
01/04/80	\$3.25/hr	-	-	-
01/11/80		-	-	-
01/18/80		110.50	-	110.50
01/25/80		108.88	-	108.88
02/01/80		-	-	-
02/08/80		-	-	-
02/15/80		-	-	-
02/22/80		-	-	-
02/29/80		-	-	-
03/07/80		-	-	-
03/14/80		-	-	-
03/21/80		-	-	-
03/28/80		130.00	-	130.00
04/04/80		-	-	-
04/11/80		-	-	-
04/18/80		-	-	-
04/25/80		130.00	-	130.00
05/01/80		156.00	-	156.00
05/09/80		188.50	-	188.50
05/16/80		149.50	-	149.50
05/23/80		175.50	-	175.50
05/30/80		50.38	-	50.38

Week Ending	Rate of Pay	Gross Backpay	Interim Earnings	Net Backpay
06/06/80	\$3.25/hr	\$144.63	-	\$144.63
06/13/80		130.00	-	130.00
06/20/80		216.13	-	216.13
06/27/80		224.25	-	224.25
07/04/80		-	-	-
07/11/80		224.00	\$130.50	93.50
07/18/80		287.00	267.50	19.50
07/25/80		285.25	261.00	24.25
08/01/80		260.75	105.75	155.00
08/08/80		245.00	261.00	-
08/15/80		210.00	162.75	47.25
08/22/80		210.00	294.00	-
08/29/80		210.00	294.00	-
09/05/80		192.50	-	192.50
09/12/80		210.00	-	210.00
09/19/80		210.00	-	210.00
09/26/80		210.00	-	210.00
10/03/80	\$3.50/hr	210.00	-	210.00
10/10/80		210.00	-	210.00
10/17/80		210.00	-	210.00
10/24/80		210.00	225.00	-
10/31/80		210.00	-	210.00
11/07/80		210.00	199.50	10.50
11/14/80		210.00	210.00	-
11/21/80		210.00	330.00	-
11/28/80		175.00	-	175.00
12/05/80		255.50	-	255.50
12/12/80		180.25	-	180.25
12/19/80		157.50	-	157.50
12/26/80		101.50	-	101.50
			Total	\$ 9,713.83
Interim Job			Expenses	<u>500.00</u>
			TOTAL DUE	<u>\$10,213.83</u>

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of )  
 )  
 PAUL W. BERTUCCIO and )  
 BERTUCCIO FARMS, )  
 )  
 Respondents, )  
 )  
 and )  
 )  
 UNITED FARM WORKERS OF )  
 AMERICA, AFL-CIO, )  
 )  
 Charging Party. )

Case Nos. 77-CE-54-M 77-CE-69-M  
 77-CE-64-M 77-CE-70-M  
 77-CE-67-M 77-CE-70-1-M  
 77-CE-68-M 77-CE-74-M

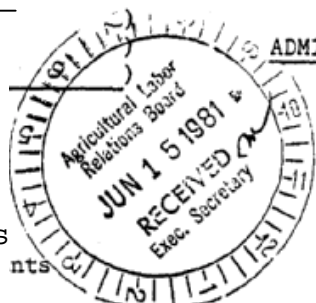
(5 ALRB No. 5)

BACKPAY PROCEEDING

DECISION OF  
ADMINISTRATIVE LAW OFFICER

Maria Elva Maldonado, Salinas,  
 for the General Counsel

Lewis P. Janowsky of Dressier,  
 Quesenbery, Laws S Barsamian,  
 Newport Beach, for the Respondents



STATEMENT OF THE CASE

Jennie Rhine, Administrative Law Officer: This backpay proceeding arises from the decision of the Agricultural Labor Relations Board in 5 ALRB No. 5, issued 24 January 1979. There the Board, inter alia, affirmed Administrative Law Officer Paul Albert's conclusion that the respondent discriminatorily laid off Maria Castillo on 21 November 1977 in violation of sections 1153(c) and (a) of the Agricultural Labor Relations Act,<sup>1</sup> and ordered that she be offered reinstatement and made whole for loss of pay and any other economic loss suffered as a result. The decision became final on 21 November 1979, after review was

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<sup>1</sup>Labor C §§1153(c), 153 (a). All statutory citations are to the Labor code, unless otherwise specified.

denied by both the court of appeal and the supreme court.

On 28 October 1980 the regional director issued a backpay specification and notice of hearing. The hearing convened on 3 December 1980 at Salinas, but it was quickly apparent that the case was not ready to proceed because the general counsel had not had sufficient access to company records to prepare an accurate specification. The hearing was continued to 12 January 1981, and interim deadlines were specified for demanding and providing records, and for filing an amended specification and an amended answer.<sup>2</sup> The reconvened hearing ended on 14 January 1981

Based upon the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

#### MARIA CASTILLO'S 1978 REEMPLOYMENT

Introduction. Two major issues are discussed in turn: whether the company's reemployment of Maria Castillo in 1978 constituted a bona fide reinstatement which satisfied the Board's order and tolled the respondent's liability for backpay, and the method of computation of the backpay due her. Both issues are complicated by the unique position held by Castillo prior to her discriminatory termination and by the shortcomings of the company records put into evidence.

The Facts. It is undisputed that in 1978, after her discriminatory termination, Maria Castillo was recalled to Bertuccio Farms soon after the ALO's

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<sup>2</sup>Hereinafter, all references to the backpay specification or the general counsel's computation are to the amended specifications GCX 6.

<sup>3</sup>The general counsel's Motion to Preclude Respondents from Offering Evidence on Certain Issues and the respondent's Motion for Bifurcated Hearing, filed at the hearing, are hereby incorporated into the record as Hearing Officer's Exhibits 1 and 2, respectively.

decision was issued. She worked from early July until November 21, when she was again laid off. The general counsel contends, however, that she was not reinstated to her former or a substantially equivalent position as a favored employee, as indicated primarily by her receiving less work than she had in former years.<sup>4</sup> It is therefore necessary to explore her previous employment history in some depth.

Located in San Benito County, Bertuccio Farms produces a variety of vegetables and fruits. It operates its own packing sheds for some crops, including onion, bell peppers, corn, gourds, apricots, peaches and pears. Castillo worked there, along with other members of her family, from approximately 1965. The Castillo family lived on company property, at first in tents, and then in a house vacated by Paul Bertuccio's parents. Initially a general farm laborer, more recently Maria worked primarily in the sheds.

For several years prior to 1976, until she expressed dissatisfaction with the job, Castillo was the only woman to work regularly in the onion shed. As the forewoman, she operated the machinery and kept timecards for other employees; she also sorted onions, sewed sacks, made boxes and tags, and on occasion answered the telephone and took orders for sales.<sup>5</sup> After 1975, during most of the year Castillo worked in the other sheds, where she operated machinery, cut peaches and pears by hand, sorted and packed fruit and gourds, and made boxes. The onion shed is in operation from July until December or January; the other

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<sup>4</sup>I have examined the grounds for the general counsel's other arguments, and find them unsubstantiated by the evidence.

<sup>5</sup>Also see 5 ALRB No. 5, Administrative Law Officer's Decision (hereinafter ALOD) at 26. At the backpay hearing Castillo testified that without her requesting it, she was transferred from the onion shed in 1977; she also conceded that the ALO's findings were correct. I conclude that she was understandably confused about the details of events occurring more than five years ago.

shed operations begin around the same time but do not continue as late, the last to cease operations being the bell pepper shed, which stops in November.

Castillo testified that both before and after she stopped working in the onion shed, until the union began organizing in the summer of 1977, Paul Bertuccio found work for her to do when others were laid off. (Paul Bertuccio primarily supervised the onion shed; his wife, Tina, supervised the others. Even after she no longer worked regularly in the onion shed, Castillo continued to receive her orders from Paul Bertuccio until the union came in.) When packing was slow, and intermittantly after it stopped, she sorted produce, made boxes, sorted and tied onion, sacks, or made onion tickets. It was the absence of other work for her after the bell pepper shed ceased operations in 1977 that caused the Board to determine that her termination was discriminatory. In some years she also worked for brief periods at other farms during the off season. In the spring she resumed work at Bertuccio Farms, doing field work--hoeing and weeding, thinning, topping onions, transplanting bell peppers--until the shed work began in July. Although she did not work full-time throughout the year, Castillo testified that she received some work at Bertuccio Farms each month, saying that Paul Bertuccio always found something for her and her sister.

Bertuccio testified that he did not remember Castillo's ever asking for, or his giving her, extra work in the ten to fifteen years she worked for him. He then qualified his testimony, asserting that he could not remember any specific time. He was similarly evasive and uncooperative throughout his testimony. He purported to be unable to recall how many years Castillo worked for him, what kind of work she did in her earlier years, or how long her family lived on the farm. He denied that she was a responsible employee, although she had been entrusted with the job of forewoman in the onion shed and machine operator in the other sheds. When asked whether she wasn't given the opportunity to

work a maximum number of hours, he at first replied that everyone worked a regular workday, and then admitted that there are no rules, that a lot of people work different hours, set by him or his wife. In general, he demonstrated the same "extreme bitterness" at the backpay hearing as at the unfair labor practice hearing (see ALOD 27), and his contradicted testimony is given little weight.

Documentary evidence tends to support a finding that work was frequently available for Castillo during the off season. Company payroll records for her for the years 1975-1978 were introduced into evidence.<sup>6</sup> They show that she received a paycheck almost every week during the period of December 1975 through June 1976. For 1975 and 1977 they show no work until the latter part of May; however, at least for 1975 they are demonstrably unreliable.<sup>7</sup> Castillo produced assorted paycheck stubs, including one for a week in March 1975; others indicate work in earlier years in the months of December, January, and April. The company failed to produce convincing evidence that she did not-work during the off season prior to 1977, although presumably it was in a position to do so if such evidence, existed.

Other factors besides the company house and the slack period work indicate Castillo's favored position. At unspecified times Paul Bertuccio gave her

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<sup>6</sup>The company's records do not show what type of work was performed when. Nor do they show the hours worked, but the amount of work can be deduced from the gross earnings.

<sup>7</sup>Castillo produced sixteen paycheck stubs for various weeks of 1975. Neither the dates nor the amounts on her stubs agree with the company's records for that year. Compare GCX 11 and GCX 12. Tina Bertuccio, who is responsible for the payroll and keeps most of the records, was unable to satisfactorily explain the discrepancies. See RT III: 14-6-154. Respondent stipulated to the authenticity and accuracy of the paycheck stubs. See GCX 8.

With the exception of the company's records, no evidence was offered by either party about Castillo's situation in the first part of 1977. If she did not work, this was an exception to her usual practice.



\$200 towards the purchase of a car and once paid for car repairs. She received Christmas bonuses and, on occasion, tires or a battery for her car. I concur with the previous finding (see ALOD 27-28) that Castillo was a favored employee who was given a maximum amount of work.

In 1978, after her discriminatory termination, Castillo did not return to work at Bertuccio until the second week of July. Tina Bertuccio testified that in May she telephoned the Castillo home and left word with Lupe Castillo, Maria's sister, that work was available for Maria transplanting bell peppers, but Castillo did not return her call or report for work. Bertuccio also testified that early in June, during another telephone conversation with Lupe (about a plumbing problem), Lupe told her that Maria was working elsewhere in the lettuce; Tina told Lupe that she would call Maria when work was available in the apricots. Lupe Castillo denied having either conversation with Tina Bertuccio. For reasons discussed below, I find it unnecessary to resolve this contradiction.

In July Tina Bertuccio telephoned and, speaking directly to Maria Castillo, told her that work was available. Castillo returned to work within a day or two of the call. Over the next five months, she operated the machinery in the apricot and bell pepper sheds; for two or three weeks she also worked in the corn and gourd shed, cutting corn from cobs and carrying it to the packers, a job she had not previously done. She was laid off when operations ceased in the bell pepper shed. She testified that even though she asked Tina Bertuccio or Elvira Cabrera, the forewoman, for it, she was not given the extra work she had received in the past, such as sorting fruit or making boxes.

The respondent introduced evidence purporting to show that while she worked Castillo was among the women given the most work. According to payroll records for six women, in the third quarter of 1978 Castillo earned at least \$72 more than all but Elvira Cabrera; in the fourth quarter she earned less than the

credibility should be considered, and the NLRB does not have a consistent policy. Compare, e.g., Preferred Homes Corporation, 127 NLRB 1350, 46 LRRM 1220 (1960), where the ALJ was ordered to consider the effect of a post-hearing conviction on credibility, with Decker, supra. A remand of this case would prolong it unduly.

I have carefully reviewed Castillo's testimony and demeanor while testifying, in view of her felony conviction, and remain convinced that her testimony is credible. Moreover, even if she were discredited, my findings are supported by independent testimonial and documentary evidence, and inferences reasonably drawn from it. Castillo's testimony that prior to manifesting support for the union she received extra work from Paul Bertuccio is substantiated by company records, and her testimony that in 1978 she asked for but did not receive extra work is uncontradicted, being undenied by Tina Bertuccio, her supervisor that year. Regarding my finding that prior to 1978 Castillo was given more work than Elvira Cabrera, no company records or explicit testimonial evidence was offered to contradict Castillo's testimony. Her testimony that she received gifts from Paul Bertuccio, expressly contradicted by him, is not essential to my finding that she was a favored employee prior to her unlawful discharge, and does not affect the computation of back pay, where the claim for gifts and bonuses is disallowed.

The conflict in testimony about 1978 offers of reinstatement, a point raised by the respondent, is primarily between Castillo's sister Lupe and Tina Bertuccio, and remains unresolved in my analysis. Even if Bertuccio did tell Lupe in May that Castillo should report to work, there is no basis for inferring that Lupe relayed the message. The established fact that Castillo immediately reported after Tina Bertuccio spoke to her personally indirectly substantiates the finding that no other offer was communicated to her. Reliance was placed upon the company's records, not Castillo's testimony, to establish the amount of

work provided her when she was reemployed. The remaining factual question raised by the respondent, the question of whether Castillo fraudulently concealed interim earnings, is not a credibility issue at all: since Castillo was not asked and did not testify about the subject, there is no testimony to be discredited.<sup>7</sup>

Impeachment aside, where a discriminatee is convicted of a crime after being unlawfully discharged, the conviction may affect the backpay and reinstatement obligations of the employer. In Decker, the court declined to enforce the board's order that the convicted discriminatees be reinstated, and remanded the case, because the board had not considered the effect of the convictions on its order. Where facts which may affect the respondent's obligations are made available before a board order is issued, it is unfair to leave uncertainties that could lead to coercive compliance proceedings, where mistaken action runs the risk of contempt. See Decker, supra, 97 LRRM at 3185-3186.

Reinstatement of an unlawfully discharged employee will not be ordered where the employee is guilty of unlawful or offensive conduct of such a nature that an unacceptable employment relationship would be created. Decker, supra, 636 F.2d 129, 106 LRRM 2M-94, 2195 (1981), enforcing 2M-4 NLRB Ho. 14-0, 102 LRRM 1386 (1979) (decision on remand);<sup>8</sup> also see, e.g., NLRB v. Big Three Welding

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<sup>7</sup>The respondent contends that Castillo's alleged fraudulent failure to inform the board of interim earnings "must be accorded new and significant weight" in light of her conviction for food stamp fraud. The argument illustrates the risk of prejudice created by admitting evidence of other offenses similar to one in question in the current proceeding. See People v. Fries, 24 Cal. 3d 222 (1979); note 3 above. It improperly suggests that apart from any impeaching effect, because Castillo committed food stamp fraud she probably committed fraud in the instant case.

<sup>8</sup>On remand, after a supplemental hearing before the ALJ, the board affirmed the ALJ's findings that in the absence of unlawful discrimination the employee who had a good work record would not have been discharged because of his conviction on drug charges unrelated to his work, but the second employee, who had a poor work record and was still in a probationary period at the time (continued)

Equipment Co., 359 F.2d 77, 62 LRRM 2058 (5th Cir. 1966) (employee admitted theft from employer); NLRB v. R.C. Can Co., 340 F.2d 433, 58 LRRM 2214 (5th Cir. 1965) (employee threatened company president). Where an employer contends that an employee is unsuitable for rehire, the employer has the burden of proving the employee's unsuitability. Big "G" Corp., 223 NLRB No. 204, 92 LRRM 1127 (1976).

There is no indication here that Castillo's reinstatement would create an unacceptable employment relationship. No reason other than the bare fact of her conviction has been suggested. Her unlawful conduct was not connected in any way with her employment at Bertuccio Farms. Nor is there other evidence indicating that in the absence of the unlawful discrimination and discharge, she would have been fired because of her conviction. Therefore, I conclude that despite the conviction, the policies of the Act are best served by her reinstatement, and she is entitled to back pay until she receives a valid offer.<sup>9</sup> See Decker, *supra*, 106 LRRM at 2496.

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(note 8 cont'd) of his discharge, would have been; consequently, the former was entitled to full reinstatement and backpay, and the latter was not entitled to reinstatement but was nevertheless entitled to wages for the period between his unlawful discharge and his conviction. This order was enforced by the appellate court.

<sup>9</sup>Even if reinstatement were found to be inappropriate, Castillo should be awarded back pay from the date of her discharge until the date of her conviction. Otherwise, she would not be made whole for losses suffered as a result of her unlawful discharge and the respondent would profit from its unlawful conduct. See Decker, *supra*, 106 LRRM at 2496.

The respondent cites NLRB v. Northern States Beef, Inc., 575 F.2d 658, 98 LRRM 2404 (8th Cir. 1978), for the proposition that Castillo is not entitled to either reinstatement or back pay. The court there was silent about the board's reinstatement order, however, and its only explanation of its decision not to enforce the backpay order was that it had "weigh[ed] the equities." Factors which are not present here distinguish the case: the unlawfully discharged employee was convicted of scheming to defraud the respondent's chief officer by attempting to sell him nonexistent recordings of spurious conversations concerning the fabrication of testimony to be presented to the board.

For the foregoing reasons, after reconsidering the entire record, I conclude that the new evidence of Castillo's felony conviction does not require modification of the findings of fact, conclusions of law, or recommended order contained in my original backpay decision.

Dated: 10 June 1981

A handwritten signature in cursive script, appearing to read "Jennie Rhine". The signature is written in black ink on a white background.

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Jennie Rhine  
Administrative Law Officer