Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KYUTOKU NURSERY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 77-CE-18-M 8 ALRB No. 73 (4 ALRB No. 55) (6 ALRB No. 32)

SUPPLEMENTAL DECISION AND ORDER

On August 8, 1978, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in this proceeding (4 ALRB No. 55), concluding that Kyutoku Nursery, Inc. (Respondent) had violated Labor Code section 1153 (e) and (a) by refusing to bargain with the United Farm Workers of America, AFL-CIO (UFW) in order to gain judicial review of the Board's certification. We ordered Respondent to make its employees whole for the economic losses they suffered as a result of its refusal to bargain.

After the California Supreme Court issued its decision in J. R. Norton Co. v. Agricultural Labor Relations Board (1979) 29 Cal.3d 1, we asked the Court of Appeal to remand the Kyutoku case to allow us to reconsider our makewhole order in light of the Norton Decision. On remand, we affirmed our original makewhole order. (Kyutoku Nursery. Inc. (May 30, 1980) 6 ALRB No. 32.)

A hearing was held before Administrative Law Officer (ALO) Robert L. Burkett for the purpose of determining the amount of makewhole due to each of Respondent's employees. Thereafter,

on February 22, 1982, the ALO issued his Decision, attached hereto, in which he made findings as to the amount of makewhole due each employee. General Counsel, the Charging Party, and Respondent each timely filed exceptions to the ALO's Decision and a supporting brief, and Respondent filed an answering brief.[1/]

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

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to reject the makewhole formula devised by the ALO, and instead to adopt in their entirety the makewhole formula and computations proposed by the General Counsel in the backpay specification which issued on June 23, 1981.

Background

Respondent is a family-owned operation engaged in growing carnations in the Salinas Valley in 266,000 square feet of greenhouse. Respondent employs between 13 and 15 year-round employees, who work approximately 50 hours a week.

[1/] The UFW moved to strike Respondent's answering brief to exceptions because the copy of the answering brief it received did not include a proof of service. However, sections 20282(b) and 20430 of the Board's regulations, read in conjunction, require only that a copy of the proof of service of an answering brief be filed with the Executive Secretary. Respondent was not required to send a copy of the proof of service to any of the parties who were served with a copy of its answering brief, and the UFW's motion to strike is therefore denied. The UFW also requested that we strike a footnote from Respondent's answering brief, arguing that the footnote contained allegations not supported by the record. We need not rule on that request, as we have not relied on said footnote in reaching the findings and conclusions expressed herein.

The parties agreed that the makewhole period, which began January 27, 1977 (the date Respondent first refused to bargain), would end March 27, 1981. The issue in this case involves the basic wage rate to be used to calculate the makewhole amount due each of Respondent's employees who worked during the makewhole period. General Counsel based the figures set forth in the make-whole specification on the general labor basic wage contained in a contract between the UFW and Pik'd Rite, a Salinas strawberry grower. Respondent argued that the basic wage rate should be based on the wage rates and fringe benefits paid by other flower growers, taking into consideration the general economic depression in the carnation industry.

In Adam Dairy (Apr. 25, 1978) 4 ALRB No. 24, we set forth our formula for computing makewhole awards. However, in ordering makewhole in Kyutoku Nursery, Inc., supra, 4 ALRB No. 55, we noted that Respondent's certification issued considerably later than the certification in Adam Dairy and, therefore, the exact data used to compute the basic makewhole wage rate in that case might not provide an appropriate basis for such a computation concerning Respondent. We therefore ordered the Regional Director to:

> ... investigate and determine a basic make-whole wage to use in calculating back-pay and other benefits due in this matter. The investigation should include a survey of more-recently-negotiated UFW contracts. In evaluating the relevance of particular contracts to the determination of a make-whole award in this case, the Regional Director shall consider such factors as the time frame within which the contracts were concluded, as well as any pattern of distribution of wage rates based on factors such as were noted in Adam Dairy supra, (size of work-force, type of industry, or geographical locations). We note, however, that the Bureau of Labor Statistics data which we used in that

> case to calculate the value of fringe benefits are unchanged so that the investigation herein need only be concerned with establishing an appropriate wage rate or rates for straight-time work. (Kyutoku Nursery, Inc., supra, 4 ALRB No. 55 at p. 3.)

General Counsel's Theory

Roger Smith, the Board agent who prepared the makewhole specification in this case, testified that there were no flower contracts in Salinas in 1977. In reviewing other UFW contracts to find a general labor rate that was representative of the rate Respondent might reasonably have agreed to had it bargained in good faith with the UFW, Smith reviewed contracts the UFW negotiated in industries similar to flower growing. He took into consideration the location, type of industry, nature of the work force, size of the employer, and time period when the contract was signed. He looked for a year-round, stable work force, not involved in the vegetable industry or covered by the master contract negotiated between the UFW and Interharvest. Smith considered the appropriate general labor market pool to be the area from San Luis Obispo to San Francisco. He testified that different general labor rates prevailed in different areas, and that unions usually negotiated contracts by area. Smith reviewed a variety of contracts, including agreements between the UFW and Monterey Mushrooms, apple growers, Montebello Rose, Egg City, West Foods, Pik'D Rite, Watanabe, Encinitas Floral, Bias Pista, and Mr. Artichoke.

Smith testified that he found the Pik'D Rite contract wage rate to be the most appropriate because Pik'D Rite was a Salinas area grower that drew its workers from the same basic labor market pool as Respondent, and the contract was signed during the

time period in which, absent its unfair labor practice, Respondent would have bargained and presumably reached and signed an agreement with the UFW. Pik'D Rite's rate was in the middle range of the wage rates in the contracts Smith surveyed. Pik'D Rite's workers picked strawberries and, although Pik'D Rite employed many more workers than Respondent (400, as compared to Respondent's 15), employees at both growers worked approximately 50 to 60 hours a week. Smith was unable to find another grower with as few employees as Respondent which had signed a collective bargaining agreement.

At Respondent's request, Smith considered contracts the UFW had negotiated with As-H-Ne Farms and Encinitas Floral, both southern California flower growers. As-H-Ne grew carnations and was somewhat larger than Respondent, as were several other carnation growers in the San Diego area. Smith testified that he obtained the contracts negotiated by those growers, but rejected them because the wage rates in the San Diego area were generally lower than the wage rates in other areas, and the rates in the As-H-Ne and Encinitas Floral contracts were lower than those in any of the Salinas area contracts he considered. Smith testified that the availability of labor, which is more plentiful, in San Diego than in Salinas, accounted for the lower wages in the San Diego area.[2/]

In determining which contract contained a representative

[2/] John Kyutoku and Roy Hill, vice-president of the California Floral Council, both corroborated Smith's testimony that southern California growers generally paid lower wages than northern California growers.

wage rate, Smith considered crop similarity and which union had negotiated the contract (since wages and other terms vary among contracts negotiated by different unions), and concluded that, in this case, location was the most important factor, followed by the time period during which the surveyed contracts were signed.[3/]

In calculating the makewhole amount due to each of Respondent's employees who worked during the makewhole period, General Counsel used the wage rate included in Pik'D Rite's collective bargaining agreement with the UFW for the years 1977, 1978, 1979 and 1980. Pik'D Rite's contract expired on January 1, 1981. For purposes of the makewhole specification, General Counsel used Pik'D Rite's 1980 wage rate to calculate the makewhole amounts for 1981 and 1982 as well. General Counsel applied the Adam Dairy fringe benefit formula to the Pik'D Rite general labor wage rate, so that the basic wage rate comprised 78 percent of the total make-whole figure, and the other 22 percent represented the value of fringe benefits. (See Adam Dairy, supra, 4 ALRB No. 24.)

To arrive at the net makewhole, General Counsel deducted each employee's actual gross earnings from the total makewhole due to the employee for each of the calendar quarters during the

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[3/] David Martinez, a member of the UFW's National Executive Board who had participated in the negotiations of about 40 UFW agreements, testified that, in 1977, the Union negotiated the same basic contract wages and fringe benefits throughout the state, except for southern California, where wage rates were lower. Starting in 1977, the location of the operation, rather than the size or type of operation, or the crop grown, affected the terms the UFW sought in negotiations. Martinez noted that the UFW is weak in southern California, whereas the wages and benefits in the Salinas area are the best in the state because of successful union organizing in that area.

makewhole period. The actual gross earnings included the gross wages paid by Respondent plus any holiday and vacation pay, mandated employer contributions to PICA and Unemployment Insurance, and all contributions Respondent made to the California State Florists Association Insurance Fund on behalf of its agricultural employees.

ALO Decision

The ALO found that General Counsel failed to comply with the Board's instructions in Kyutoku Nursery, Inc., supra, 4 ALRB No. 55, and agreed with Respondent that General Counsel should have based its survey on all contracts negotiated by the UFW in 1977 and 1978, regardless of location.[4/] The ALO also found that General Counsel did not properly apply the factors set forth in our earlier Kyutoku Decision, such as the size of the work force and type of operation. However, the ALO agreed with General Counsel's reliance on contracts which the UFW reached with other growers during the first year following its certification as the collective bargaining representative of Respondent's employees.

After rejecting General Counsel's makewhole formula and computations, the ALO engaged in his own computations to arrive at an appropriate wage rate. For the years 1977 through 1979, he averaged the Pik'D Rite rates with the rates "in the contract between Kitayama Brothers, Inc. and the Laborer's Union." For the years 1980 and 1981, the ALO retained the Pik'D Rite rate, since

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[4/] Later in his decision, the ALO contradicted that statement and approved General Counsel's emphasis on location, since the evidence indicated that the wage levels in southern California were lower than in northern California.

"Kitayama did not have a contract" in 1980 and 1981, and the Pik'D Rite figures for those years were relatively comparable to what Respondent was paying.[5/] The ALO rejected Respondent's argument that General Counsel should have used a lower figure than 22 percent for the value of the fringe benefits that probably would have been included in a contract, noting that this Board's Order in Kyutoku (4 ALRB No. 55) clearly reaffirmed the use of the Adam Dairy 22 percent fringe benefits formula.

General Counsel and the UFW excepted to the ALO's rejection of the Pik'D Rite wage rate and to the ALO's fashioning of his own "averaging scheme". General Counsel argued that he carried his burden by showing that his selection and use of a representative contract wage was reasonable, and that the burden then shifted to Respondent to refute the findings of the General Counsel's investigation and contract survey, and to produce contracts which present a more reasonable basis for calculating the makewhole due Respondent's employees.

Respondent also excepted to the wage rate determined by the ALO, arguing that the ALO improperly failed to consider record evidence concerning economic conditions in the carnation industry and Respondent's inability to pay a higher wage. Respondent argued that General Counsel did not conduct a comprehensive wage survey and did not calculate an average wage rate, and that General Counsel

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[5/] The evidence indicates that the General Laborers and Construction Union was certified to represent Kitayama[1]s employees in 1980, and that Union and Kitayama thereafter negotiated a contract. The ALO apparently confused the years when Kitayama's employees were not covered by a contract (1977 to 1979) with the years when a contract was in existence (1980 to 1981).

should have relied on wage rates provided in flower contracts negotiated in California and wage rates paid by other flower growers in the Salinas/Watsonville area. Respondent also excepted to the ALO's approval of the Adam Dairy 22 percent fringe benefits formula, arguing that any fringe benefit package which would have been included in a contract Respondent negotiated with the Union would have represented much less than 22 percent of the total wages.

For the reasons set forth below, we find that General Counsel's and the UFW's exceptions have merit, and we adopt in their entirety the makewhole formula and computations proposed by the General Counsel in this case.

Analysis

A makewhole order is designed to remedy a respondent's unfair labor practice by placing the employees in the economic position they would likely have been in but for that unfair labor practice, in this case Respondent's unlawful refusal to bargain with their certified bargaining representative. In the instant matter, that calls for Respondent to pay each of the employees the difference between what he or she actually earned during the period of Respondent's refusal to bargain and what she or he would likely have earned had Respondent engaged in good faith bargaining leading to a contract with the Union. We find that precedents of the National Labor Relations Board (NLRB) and this Board concerning the calculation of backpay due a discriminatee are generally applicable to the calculation of the amount of makewhole due to each of Respondent's affected employees.

We recently noted in O. P. Murphy Produce Co., Inc.

(Aug. 3, 1982) 8 ALRB No. 54, that, consistent with NLRB practice, this Board may determine the amount of backpay owed by using any formula or combination of formulas which is (are) equitable, practicable, and in accordance with the purposes of the Act:

> 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 S Sons, Inc. (5th Cir. 1966) 358 F.2d 94 [61 LRRM 2655, 2656]. (O. P. Murphy Produce Co., Inc., supra, 8 ALRB No. 54, at p. 3.)

NLRA precedent requires that the burden of any uncertainty in the calculation of backpay be borne by the respondent, whose violation of the Act makes the compliance proceeding necessary. (NLRB v. Miami Coca-Cola Bottling Co. (5th Cir. 1966) 360 F.2d 569 [62 LRRM 2155]; Merchandiser Press, Inc. (1956) 115 NLRB 1441 [38 LRRM 1105].) In Adam Dairy, supra, 4 ALRB No. 24, we noted our concern that the makewhole award be applied in a manner that encourages the resumption of bargaining rather than further delaying the bargaining process by adding a lengthy compliance proceeding, and we found that it is consistent with the policies of the Agricultural Labor Relations Act to place on the respondent the burden of any uncertainty concerning what wage rates the parties would likely have agreed upon in negotiations.

Therefore, in makewhole cases, where the General Counsel has established at hearing that the makewhole amounts were calculated in a manner that is reasonable and conforms to the standards set forth in our decisions, we shall adopt the General Counsel's

formula and computations. We may reject or modify his formula and/or computations where a respondent proves that the General Counsel's method of calculating makewhole is arbitrary, unreasonable, or inconsistent with Board precedents, or that some other method of determining the makewhole amounts is more appropriate.

We find that, based on the entire record in this case, General Counsel's choice of the Pik'D Rite contract wage was a reasonable approximation of the wage rate that would likely have been included in a contract negotiated between Respondent and the UFW. General Counsel followed the instructions we set forth in Adam Dairy and focused on contracts negotiated within the year following the Union's certification in 1977. General Counsel considered contracts which were concluded in the general labor pool area (which General Counsel reasonably defined as extending from San Luis Obispo to San Francisco). General Counsel did not include in the survey regular vegetable industry or row crop contracts, since those contracts were dominated by the Interharvest master agreement and did not reflect the terms of a contract that could reasonably have been expected in the flower industry.

General Counsel chose the Pik'D Rite contract because its wage rate fell in the middle range of the wage rates in the contracts surveyed. Although Pik'D Rite employed more workers than Respondent and hired strawberry pickers on a seasonal basis rather than cut flower workers on a year-round basis. General Counsel reasonably concluded that those differences were outweighed by the similarity between Pik'D Rite and Respondent in terms of the number of hours worked per week, the common general labor pool, and the

location of the operation. In addition, General Counsel properly emphasized the year the Pik'D Rite contract was reached. Our Adam Dairy Decision did not require that General Counsel average all the wage rates in the contracts surveyed, but only that he survey the rates and determine an appropriate wage. Had General Counsel averaged the wage rates in all the UFW contracts in effect in 1977, including the vegetable industry master contracts, the result would have more accurately reflected the typical wage rate paid by row crop growers rather than other types of operations. We find that General Counsel's method of arriving at the general labor wage rate was reasonable and equitable.

Respondent failed to show that General Counsel's makewhole specification was arbitrary or inconsistent with Board precedent, or that some other method of determining the makewhole amount was more appropriate. Other contracts offered by Respondent as an alternative basis for computing the makewhole wage rate were not concluded during the appropriate time period and/or pertained to growers located in southern California, where wages were lower than in the Salinas area. Those contracts therefore do not provide an appropriate alternative to the Pik'D Rite agreement.

The contract negotiated between the General Laborers and Construction Union and Kitayama Brothers, Inc., which was also offered by Respondent as an alternative, was not concluded during the relevant time period. In addition, General Counsel, in determining whether the Kitayama contract should be used as a basis for computing the basic wage rate, properly considered the fact that the contract was not negotiated by the UFW. A union organizes

workers based on campaign promises that the union will attempt to negotiate a contract with certain terms, and these promises and goals vary from union to union. For example, the evidence in this case indicates that the Teamsters historically negotiated contracts with low wage rates in the Santa Maria area, and that the Laborers Union organized Kitayama's workers based partly on a promise to seek wages parallel to those in the construction industry. Unions in their organizing campaigns often publicize other contracts they have negotiated as examples of the benefits unionization will bring the employees. We find that, based on the circumstances in this case, General Counsel appropriately limited his inquiry to UFW contracts.

We also reject Respondent's suggestion that the wage rate be based on the wages paid by Kitayama Brothers, Inc. in 1977 through 1979, and the wages paid by other flower growers in the Salinas area from 1977 through 1981. None of these growers were unionized during those years. Respondent argued that, since it paid approximately what other nonunion flower growers in the Salinas area were paying, and since its fuel and transportation costs were increasing and there was a general decline in the carnation industry, the Board should conclude that Respondent would not have negotiated a wage rate as high as the Pik'D Rite rate. We note, however, that John Kyutoku testified that his business had steadily increased during the past ten years and that, in fact, he actually hired a supervisor in 1981 for the first time, rather than rely on himself and other family members to run the business. Furthermore, in the years 1980 and 1981, Respondent paid its

workers almost the same wages as those provided in the Pik'D Rite contract utilized by General Counsel in his makewhole specification. We agree with the ALO that little weight should be given to John Kyutoku's self-serving testimony that he could not have paid his workers more than a certain amount.[6/]

Although Respondent argued that the 22 percent fringe benefits formula set forth in Adam Dairy is inappropriately high, we clearly reaffirmed that formula in our Order in Kyutoku (4 ALRB No. 55). As noted in the testimony of Board agent Smith at the hearing, and in our Adam Dairy Decision, the fringe benefits provided in a contract include much more than the funds into which an employer makes contributions (such as medical plans or pension plans).[7/] Vacation, sick leave, and other compensated nonwork time, as well as such intangible benefits as seniority and a grievance procedure, are all commonly negotiated contract terms which would likely have been included in a contract had Respondent negotiated in good faith with the UFW. These benefits are also included in the Adam Dairy 22 percent fringe benefits formula.

[6/] David Martinez testified that the UFWs 1981 contract with Pik'D Rite suspended payment of certain benefits because that employer claimed that it was going out of business and needed a break in order to be able to continue operating. Even assuming that Respondent was experiencing economic difficulties, that testimony further supports our finding that General Counsel acted reasonably in using the Pik'D Rite wage rate to calculate the makewhole amounts owed to Respondent's employees in this case.

[7/] UFW representative Barbara Macri informed Board agent Smith that fringe benefits in 1981 UFW contracts totaled 62 cents per hour, which is much less than the fringe benefits calculated by General Counsel using the Pik'D Rite wage rate and the Adam Dairy 22 percent formula. David Martinez testified, however, that the figure Ms. Macri quoted probably representated only contributions into the three funds administered by the UFW.

Respondent failed to show that use of the Adam Dairy fringe benefits formula is an inappropriate method for compensating Respondent's employees for the losses they incurred because of Respondent's unlawful refusal to bargain.[8/] As noted above, any uncertainty in calculation of the makewhole amount must be resolved against Respondent as the wrongdoer. (Adam Dairy, supra, 4 ALRB No. 24.)

We therefore adopt in their entirety the makewhole formula and computations contained in the Backpay Specification issued by General Counsel in this matter.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Kyutoku Nursery, Inc., its officers, agents, successors and assigns, pay to the employees listed below, who worked for Respondent during which time Respondent refused to bargain in violation of Labor Code section 1153(e) and (a), the amounts set forth beside their respective names, plus interest thereon compounded at the rate of seven percent per annum:

Eligio Acevedo	$1,612.47	Aurelio Carranza	$ 889.42
Asuncion Almarez	1,286.18	Roberto Cervantes	3,048.38
Adolfo Alvarado	2,416.24	Yi Yong Chol	58.71
Gabriel Alvarez	482.02	Maria Diaz	1,620.11
Moises Arteaga	293.84	Ramon Diaz	1,278.78
Raul Barajas	576.76	Evlalia Espinoza	781.24
Sabas Barrientos	1,545.04	Bartolo Garcia	54.00
Eliberto Becerra	530.00	Francisco Garcia	1,239.34
Beraldo Camacho	153.04	Francisco Garcia	2,863.59
Rafael Camacho	3,380.67	Isidro Garcia	9,972.48
Patrick Carbonell	187.43	Marta Garcia M.	219.28

[8/] The 22 percent figure includes mandatory employer contributions, such as FICA and Unemployment Insurance. We note that General Counsel added Respondent's actual payments into these funds to the employees' gross earnings.

Oscar Garcia Mera	$4,218.08	Raul Padilla	$ 59.60
Jose Garcilaza	826.27	Cristobal Paniagua	702.29
Abel Gomez	6,827.65	Eduardo Perez	68.35
David Gomez	5,494.42	Jose Perez	3,310.44
Luis Gomez	246.88	Juan Picaza	826.49
Juan Gonzales	40.80	Mariano Pineda	2,275.92
Manuel Gonzalez	1,649.37	Israel Plaza	553.97
Ysidro Gonzalez	40.80	Fernando Puga	153.11
Jose Gutierrez	63.89	Javier Ramirez	7,352.74
Adolfo Jiminez	229.00	Pedro Ramirez	336.74
Mi Suk Kim	444.18	Raul Ramirez	153.11
Sung Wong Kim	504.16	Javier Regalado	1,825.18
Sung Yol Kim	499.81	Ramon Reglando	90.65
Francisco Lopez	1,659.22	Jose Relies	211.61
Manuel Madrigal	408.66	Gustavo Rodriguez	99.89
Rodolfo Mandojano	486.53	Miguel Rodriguez	1,241.27
Everardo Marquez	2,338.01	Eliseo M. Ruiz	380.92
Guadalupe Martin	898.00	Rogelio. Sanchez	323.83
Martha Martinez	727.86	Jose Savcedo	77.92
Myron Martinez	62.48	Elpidio Serrano	885.40
Yung S. Martinez	20.83	Ignacio Serrano	1,073.42
Eliseo Meza	7,944.24	Servando Serrano	1,170.70
Gabriel Meza	502.06	Guadalupe Valenzuela	2,527.22
Ramon Montes	41.13	Manuel Vega	1,279.51
Saul Nunez	612.80	Rafael Victoria	527.05
Everardo Pacheco	15.32	P. Nolasco Virgen	184.17

Dated: October 8, 1982

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Kyutoku Nursery, Inc.
(UFW)

8 ALRB No. 73
(4 ALRB No. 55)
(6 ALRB No. 32)
Case No. 77-CE-18-M

ALO DECISION

General Counsel issued a backpay specification setting forth the amount of makewhole owed to employees who worked for the Employer, a small Salinas flower grower with a year-round work force, during the period when the Employer was violating section 1153(e) and (a) of the Act by refusing to bargain with the UFW in order to gain judicial review of the Board's certification. (See, Kyutoku Nursery, Inc. (Aug. 8, 1978) 4 ALRB No. 55 and Kyutoku Nursery, Inc. (May 30, 1980) 6 ALRB No. 32.) Since, there were no contracts in the Salinas area between the UFW and small flower growers during the relevant time period, General Counsel calculated the makewhole amounts due based on the general labor wage rate contained in a contract between the UFW and Pik'D Rite, a medium size Salinas grower which employed strawberry pickers on a seasonal basis. The ALO found that General Counsel failed to comply with the Board's instructions in its Kyutoku Order (4 ALRB No. 55), and that General Counsel should have placed more emphasis on the size of the work force and type of operation. The ALO therefore rejected the basic wage rate used by General Counsel and substituted his own wage rate, based on an average of the wages paid by another flower grower near Salinas and the wages in the Pik'D Rite contract. The ALO accepted General Counsel's use of the 22 percent fringe benefits formula set forth in our Adam Dairy Decision (4 ALRB No. 24).

BOARD DECISION

The Board noted that NLRB precedent concerning the calculation of backpay due a discriminatee is generally applicable to the calculation of makewhole awards. Where General Counsel has established at hearing that the makewhole amounts were calculated in a manner that is reasonable and conforms to the standards set forth in Board decisions, the Board will adopt General Counsel's formula and/or computations. The Board may reject or modify General Counsel's formula and/or computations where a respondent proves that General Counsel's method of calculating makewhole is arbitrary, unreasonable, or inconsistent with Board precedent, or that some other method of determining the makewhole amount is more appropriate.

The Board found that General Counsel's choice of the Pik'D Rite contract wage was a reasonable approximation of the wage rate that would likely have been included in a contract negotiated between the employer and the UFW. General Counsel surveyed contracts which were negotiated in the general labor pool area within the year following the UFW's certification, reasonably emphasizing the

location of the operation. The Board rejected contracts offered by the Employer as an alternative basis for computing the makewhole wage rate as they were not concluded during the appropriate time period and/or because they pertained to growers located in southern California, where wages were lower than in the Salinas area. The Board also rejected the ALO's reliance on the wages paid by another flower grower in northern California, since the ALO utilized wages paid by that employer when there was no collective bargaining agreement in effect.

The Board affirmed the use of the Adam Dairy 22 percent fringe benefits formula, since that formula compensates employees for all the losses they incurred as a result of the Employer's refusal to bargain, including payments into medical plans and pension plans, vacation, sick leave, and other compensated nonwork time, and such intangible benefits as seniority and a grievance procedure.

The Board therefore adopted in their entirety the makewhole formula and computations contained in the backpay specification issued by General Counsel, and ordered the respective computed amounts paid to 74 employees, plus interest computed at seven percent per annum.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: KYUTOKU NURSERY, Respondent, -and- UNITED FARM WORKERS, of AMERICA AFL-CIO Charging Party.	Case No. 77-CE-18-M

Eduardo Blanco, For General Counsel

Frederick A. Morgan, for the Respondent

DECISION

Statement of the Case

Robert L. Burkett, Administrative Law Officer. This case was heard before me on November 24 and 25, 1981, in Salinas, California; all parties were represented by counsel.

The Agricultural Labor Relations Board (the Board) issued a Decision and Order in the matter of Kyutoku Nursery, Inc., 4ALRB No.55 Subsequently, the Board issued a Supplemental Decision and Revised Order in the same matter of Kyutoku Nursery, Inc., 6 ALRB No. 32 (4 ALRB No. 55). The Board found Kyutoku Nursery, Inc. (Respondent in violation of the ALRA through its refusal to bargain with its Employees' of America, AFL-CIO (UFW). The Board ordered as one of the remedies, that the employees be made-whole for all losses sustained by them as the result of Respondent's refusal to bargain.

Findings of Fact

1. Introduction

The single factual dispute in this make-whole hearing revolves around what criteria should to be used in computing Respondent's make-whole liability.

The Facts

Testimony of Roger Smith

The principal witness for General Counsel was Roger Smith a Field Examiner for the Agricultural Labor Relations Board. Mr. Smith, who testified that his duties had been associated with make-whole remedies was assigned to the make-whole remedy in the matter of Kyutoku Nurseries, 4 ALRB 55 No. 55.

Mr. Smith testified that he relied upon geography, the year of the contract, the size of the employer, the hours of work available to employees and the availability of the labor pool.

Mr. Smith testified that he was unable to find any contract that the UFW had signed with a flower grower and that he therefore looked for a similar industry with a work force that was, for the most part year round and stable, one that was not tied to the vegetable industry, and one where there was a majority of UFW contracts. He finally chose the Pik D' Rite contract because he testified it was in the middle in so far as the general labor rate was concerned.

Mr. Smith went on to testify that additional reasons for choosing Pik D' Rite; it was signed in a time period relative to that which Kyutoku would have bargained and arguably reached a contract with the union, it was a Salinas area employer and it drew from basically the same labor market pool.

Mr. Smith further testified that he compared the contracts suggested by respondent. He concluded that the Pik D' Rite contract was superior because it met the requirements of the Board's order and also because the contracts submitted by Respondent were in the San Diego area which generally followed a lower labor rate than the rest of the State, and the fact that they were negotiated in years other than the year Kyutoku would have been a contract.

Mr. Smith than went on to state that once he had determined that the Pik D' Rite contract was applicable he made the compensation along the lines set forth in the Adams Dairy Formula, using the Pik D' Rite contract as the generallabor rate. He calculated the actual gross earnings of each employees and calculated into that the actual fringe benefits paid by Kyutoku which included

health insurance benefits, any vacation pay, any holiday pay, contributions the employer made to unemployment insurance and to social security for the individual employee. He then arrived at a net figure representing the amount of money entitled to the employee for each calendar quarter.

The testimony of David Martinez

Mr. Martinez is a member of the United Farm Workers National Executive Board and is Director of Region 3. He has participated in approximately 40 negotiations and personally negotiated 10 contracts.

The crux of Mr. Martinez's testimony was that the economic conditions as applied to wages and benefits varied from place to place within the State. Specifically, he testified that contracts in the Santa Maria area were lower than those in Salinas and that the San Diego area was probably the poorest in the state because of an overwhelming surplus in the work force.

He further testified that 1977 was a very successful organizing year in the Salinas valley and furthermore that the Salinas Valley was one of the most pro UFW areas in California. Finally, Mr. Martinez testified that in 1981 the UFW signed an agreement with Pik D' Rite that suspended payments of some of the benefits that would have become due and payable on January of 1982. This was done because of the prospect that Pik D' Rite was going out of business.

The Testimony of Mr. Kyutoku

Mr. Kyutoku testified that he and his family grow carnations in the Salinas Valley on a 10 acre farm with approximately 266,000 square feet of greenhouse. They have been in business 14 or 15 years. They employ approximately 15 workers outside of the family. They have no secretarial or office help. Until a year or two ago they employed no supervisory help.

The business is operated through the corporation, which owns the improvements and the equipment. Mr. and Mrs. Kyutoku own the real estate and own their home on the property. The Kyutokus started their farm approximately fifteen years ago, and it has gradually increased its employment to the present size.

Mr. Kyutoku stated that carnations are particularly suited to small family operations. The reasons are that a small operation can be started with very little capital because the grower can propagate his own plants, unlike roses and other crops. In addition, the carnations do not require high quality greenhouses.

They grow best at a temperature of around fifty degrees, found in the Salinas Valley. Until recently, the air could be warmed in the winter and cooled in the summer, to approach that temperature range very economically. A large portion of the growers in Mr. Kyutoku's area are family operators and speak Japanese. Mr. Kyutoku testified that there was one grower larger, nine or ten about the same size, and a larger number of smaller size. The other carnation growing areas have historically been in the San Francisco Bay Area, Salinas, San Diego and Encinitas area, some in Santa Maria and Oxnard, and some in Colorado.

Testimony of Roy E. Hills

The California Floral Council represents a large portion of the cut flower and living plant growers in California, probably eighty percent in Northern California and twenty percent in Southern California. The Floral Council probably represents ninety percent or more of the growers in the Salinas area. The Council was incorporated in 1959, and works in all facets of the cut flower industry, including pesticides, land use, labor problems, and other problems of the industry, according to Mr. Hill.

Mr. Hills conducted a wage survey of the cut flowers growers in the Salinas area. A map showing the area of the survey was introduced as Respondent's Exhibit 3, and the wage survey itself was introduced as Respondent's Exhibit 4. The Floral Council and the Monterey chapter, over the years, have conducted other wage surveys. Mr. Hills also compared his survey with a recent survey of a group called "Northern California Flower Growers and Shippers Association", which verified his conclusions and data.

Mr. Hills found that there were nine or ten growers of the same approximate size as Mr. Kyutoku's in the immediate area, namely, 150,000 or 175,000 square feet to 275,000 square feet. He also took an additional sample of seventeen growers in the immediate area who were smaller averaging approximately 125,000 square feet. Mr. Hills did not find any growers paying significantly higher rates than Mr. Kyutoku; one paying about fifteen or twenty cents more, and another ten cents more. Mr. Hills made a less comprehensive survey of the fringe benefits, and found, in general, that the growers had medical insurance, five paid holidays, vacation; of one year-one week, two years-two weeks, with some variation. The medical insurance was handled through the California State Florist Association insurance plan. Mr. Hills found that Kyutoku's fringes were representative of the industry.

Mr. Hills testified at length about the economic conditions of the industry. In summary, the industry is in an extremely depressed condition, resulting in depressed prices and profitability, with a contraction in the number of growers and the amount of land in domestic carnations. The causes are basically competition from imports from Israel and Columbia, and much more recently Mexico, and the increase in fuel costs, together with other factors.

Mr. Hills' testimony respecting imports was based largely on United States Government reports, namely, "Floralcultural Crops" and "Marketing California Ornamental Crops". Those source Materials were available at the time of the hearing and available to counsel and the hearing officer. In addition, Mr. Hills used a report by the United States International Trade Commission. Mr. Hills' testimony in word form was also confirmed by graphs and charts that he prepared based on that evidence, which were admitted as Respondents's Exhibit 5. In summary, that evidence shows the following:

1. The imports have increased drastically over recent years, particularly the period of the make-whole (1977-81)

2. The imports now have approximately fifty percent of the market, going from 34% in 1977;

3. A decline in the acreage devoted to growing standard carnations has occured. It is to be noted that there has been an increase in miniature carnations, but that is still a minor crop;

4. The increase in the price per bloom without any adjustment for inflation has been slight;

5. Because of price suppression through imports, growers have taken carnations out of production gone out of business or switched to other crops; (Tr. 11-2)

6. The number of carnation growers has decreased in California, as well as elsewhere;

7. From 1977 to 1980, there was an overall decline of twenty-four percent in sales of carnations produced by domestic producers; (Tr. XIII-2)

8. The number of producers in leading states has declined from 503 to 364 from 1977 to 1980, or a total percentage change of minus twenty-eight percent. These trends existed also in California;

9. Mr. Hills testified that growers had reported lower operating profits and some losses have been reported, although he had not seen or investigated profit and loss statements. Two firms have been certified by the Department of Commerce as being damaged as a result of imports, qualifying for assistance from the federal government.

Testimony of Mr. Kitayama

Mr. Tom Kitayama, owner and operator of a large cut flower business, testified at length of the economic conditions of the industry. Mr. Kitayama has grown carnations since 1950 in Union City, Watsonville and Colorado, and at one time was the largest grower of carnations in the world. At the height of his carnation production, he had approximately 900,000 square feet, and today he has 300,000 square feet of carnations. In 1977, Mr. Kitayama took 200,000 square feet out of carnations in Watsonville. In 1978, he took another 150,000 square feet out. The consequence was that no carnations are produced by his company in Watsonville. In Colorado, Kitayama's production was also cut in half in recent years. In Union City, Mr. Kitayama reduced carnations by 90,000 square feet in 1974, 120,000 square feet in 1975, 150,000 square feet in 1976 and 1977, 90,000 square feet in 1978.

In summary, at Union City approximately 450,000 square feet of carnations were taken out in those years and replaced with roses and potted plants.

Mr. Kitayama's opinion was that in the future the carnation industry will find it difficult to survive; small growers who will be paid for their own labor in family operations may be able to continue.

Findings

All the witnesses testified that the wage rate in Southern California was lower than Northern California. In Kyutoku Nursery Inc. (78) 4 ALRB 55, the Board stated that "because the certification in this case issued considerably later than the certification in Adam and Perry the exact data used to compute the basic make-whole wage in those cases may not provide a satisfactory basis for such a computation in this case. See Adam Dairy, at Page 19. We therefore direct the Regional Director to investigate and determine a basic make-whole wage to use in the calculating backpay and other benefits due in this matter. The investigation should include a survey of more recently negotiated UFW contracts. In evaluating the relevance of particular contracts to the determination of a make-whole award in this case, the Regional Director shall consider such factors as the time frame in which the contracts were concluded', as well as any pattern of distribution of wage rates based on factors such as were noted in Adam Dairy, Supra, (size of work force, type of industry, or geographical location...."

General Council failed in part to meet its burden under the holding of Kvutoku; its survey of recently negotiated UFW contracts was incomplete. While the holding in Kvutoku was vague as to location, I am in agreement with Respondent that survey based on all contracts negotiated by UFW in 1977 and parts of 1978 would have expedited a more educated decision.

The issue of make-whole is further confused by General Council's failure to properly appraise the factors set down in Kvutuko such as the size of workforce and type of industry.

In fact the evidence indicate that Pik D' Rite was chosen in part because it is a Salinas area employer of comparable employee size and has had a collective bargaining agreement with the UFW since 1977. A review of the evidence indicates strongly that Pik D' Rite was not an employer of comparable employee size and in fact had as many as 400 workers working in strawberries along on a seasonal basis. Kyutoku employs 13 to 15 workers on a year round non-seasonal basis.

Respondent points out correctly that General Council's understanding of the Kyutoku operation was ill-formed: They apprcntly confused nurseries with cut flowers. The whole question becomes relevant because the Pik D' Rite operation is a seasonal operation which covers strawberries and vegetables, while the Kyutoku operation is a non seasonal one.

General Council argues that the time frame factor is critical. Indeed the Board in Adam Dairy, 4 ALRB No. 24, Supra, stated "the presumption embodied in the statute that the year following certification both will and should be the period of most fruitful bargaining lends further support to our reference to contracts concluded during this period. Labor Code 1156.6 ...'Particularly in a first bargaining situation where Respondent's refusal to bargain in good faith spans this protected period of the certification year, it is appropriate to look at contracts concluded during this period as a measure of employee loss." Adam Dairy pp. 19-20.

Based upon the Board's language, General Council argues that the various flower grower UFW contracts offered by Respondent as an alternative basis for their representative contract to be used in calculating the make-whole award should be rejected because they were not concluded in 1977. It should be noted however that they were concluded in a period later than 1977 during a time when it would seem the rates were on the rise not declining.

General Council's argument that geographic location is critical is a well founded one. It is undisputed that the wage structure in San Diego is lower than that in Northern California. Therefore for the purposes of this case, I have limited my findings to contracts solely in Northern California.

While I found the testimony of Mr. Hills and Mr. Kitayama elucidating and educational they bear no relevance to the matters at hand in this case. While I might have sympathy with the plight of the flower business, the economic condition of this industry, particularly in years after 1977, are irrelevant. The same is true of Respondent's defense of inability to pay. These are both issues that are best raised at the bargaining table amongst the parties but should play no part in a make-whole remedy.

CONCLUSION

I conclude that General Counsel did not use an average wage rate as was used in Adam's Dairy. The Board in Adam's Dairy concluded that the evidence at that time showed a fairly negotiated average field rate and a fairly regular wage increase. The General Counsel made no effort to take that approach here. General Counsel merely chose the Pik D' Rite contract as a comparable one. There was no attempt to find a range or an average wage rate.

In light of my finding that the Pik D' Rite contract falls far short of the standards set forth in Kvutoku as to comparability, I am forced to enter into my own averaging scheme in a manner I hope meets the requirements of the Board in the Adam Diary case. I therefore use the following formula. I have taken the Pik D' Rite figures as follows:

1977	$3.35
1978	$3.45
1979	$3.90
1980	$3.90
1981	$3.90

and Ihave averaged them with the Kitayama Watsonville figures for

1977	$3.05
1978	$3.15
1979	$3.65

These figures represent an average between two Watsonville pay rates; one UFW contract offered by General Counsel that represents vegetable, and one a contract negotiated with another union offered by Respondent. I have averaged Kitayama and Kyutoku only from 1977 to 1979 because there was no contract with Kitayama in 1980 and 1981. The Pik D' Rite figures for 1980 and 1981 have been retained because they are relatively comparable to the Kyutoku figures for that year. In reaching my figures for the years of 77, 78, and 79 I have taken the higher of the two Kitayama figures offered by Respondent for those two years and the lower of the 1977 Pik D' Rite figure as supplied by General Counsel.

In reaching this decision I have attempted to balance the factors established in Adam with the data presented by the parties.

B) Wage Rate

It is therefore my finding that the basic rate of pay for the purposes of this make-whole remedy shall be:

1977	$3 .17 per hour
1978	$3 .30 per hour
1979	$3 .77 per hour
1981	$5 .90 per hour

C) Fringes

The Board in Kyutoku stated "we note however, that the Bureau of Labor Statistics data which we used in that case (Adam Dairy) to calculate the value of fringe benefits are unchanged so that the investigation hearing need only be concerned with establishing an appropriate wage rate or rates for straight time worked."

Following the Board's decision in Kyutoku the Adam Dairy method requires the fringe benefits to be valued and 22% and such is my holding.

Dated: Feb 22, 1982 at Los Angeles, California

ROBERT L. BURKETT
Administrative Law Officer