

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MIRANDA MUSHROOM FARM, INC.,)	
)	
Respondent,)	Case Nos. 78-CE-3-M
)	78-CE-3-M
and)	
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	8 ALRB No. 75
)	(6 ALRB No. 22)
Charging Party,)	
and)	
)	
CHARLES HARRINGTON,)	
)	
Charging Party.)	

SUPPLEMENTAL DECISION ON BACKPAY

On January 19, 1982, Administrative Law Officer (ALO) Ruth Friedman issued the attached Supplemental Decision in this proceeding. Thereafter, General Counsel and Respondent each timely filed exceptions and a supporting brief.

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

The Board has considered the record and the ALO's attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the ALO's rulings, findings, and conclusions as modified herein.

General Counsel excepts to the formula utilized by the ALO to compute the amount of backpay owed to claimant Charles Harrington. We find merit in General Counsel's exception.

General Counsel is responsible for establishing the gross amount of backpay owed a claimant. (NLRB v. Brown & Root, Inc. (8th Cir. 1963) 311 F.2d 447 [52 LRRM 2115].) The burden then shifts to the respondent to adduce evidence tending to negate the existence of liability or to mitigate the extent of liability. (Maggio-Tostado, Inc. (June 15, 1978) 4 ALRB No. 36.) Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. (Am-Del-Co., Inc. (1978) 234 NLRB 1040 [97 LRRM 1419].) The role of the Administrative Law Judge (ALJ) is to consider whether General Counsel's formula is appropriate in view of all the facts adduced by the parties and to make recommendations as to the most appropriate method. (George A. Angle dba Kansas Refined Helium Company (1980) 252 NLRB 1156 [105 LRRM 1651].)

Although there are four basic formulas used in computing backpay, there is no set formula which is always and everywhere appropriate, for "... each one of these basic formulas must usually be adjusted in details to meet the requirements of specific cases. More than one formula may be applicable to a given case." (Arnaudo Brothers (Aug. 31, 1981) 7 ALRB No. 25, citing NLRB Case Handling Manual (Part Three) Compliance Proceedings (Aug. 1977) § 10536; see also ALRB Case Handling Manual.)

Computation of Backpay Due to Harrington

We are here primarily concerned with the formulas based on the average earnings/hours of a "representative employee" and/or the earnings of a "replacement employee" who worked in a job

similar to that held by the discriminatee immediately preceding the unlawful discrimination. In calculating gross backpay, all earnings, bonuses, and wage increases received by the "representative" or "replacement" employee are included. (See The Richard W. Kasse Company (1967) 162 NLRB 1320 [64 LRRM 1181]; NLRB Case Handling Manual (Part Three) Compliance Proceedings, supra, § 10542.3; and Sunnyside Nurseries, Inc. (May 20, 1977) 3 ALRB No. 42.) Therein lies the problem with the instant case: General Counsel adduced evidence concerning "replacement employees" who received greater wage increases than the "representative employees" whose gross earnings, Respondent argued, and the ALO found, should be the basis for computing the gross backpay of Charles Harrington.

In the present case, General Counsel used a combination of representative-employee and replacement-employee formulas in computing the gross backpay amount owed to Harrington. While still employed by Respondent, Harrington was assisted by a general laborer, Leo Amaya, who General Counsel utilized as a representative employee in calculating the gross backpay owed to Harrington for the period preceding the date a replacement for Harrington was hired. For the period commencing on the date Miguel Montes was hired as Harrington's replacement, General Counsel used the earnings of Montes and a subsequent replacement to determine Harrington's gross backpay. When Montes was promoted to the position of assistant manager, he was replaced by Humberto Garcia, who became the third person whose gross earnings were used by General Counsel in calculating the claimant's gross backpay. Utilization of earnings of replacement employees to determine the gross backpay of

discriminatees is a reasonable method consistently used by the national board in backpay cases. (Tri-Maintenance & Contractors, Inc. (1981) 257 NLRB No. 14 [107 LRRM 1477].)

After General Counsel had thus presented his backpay formula and established the gross amount of backpay due thereunder, Respondent had the burden of adducing evidence in mitigation of the gross amount claimed. Respondent essentially argued that the replacements were superior to the claimant in job performance and more experienced with mushrooms than Harrington. The ALO apparently agreed with Respondent, but focused on the additional duties the replacements performed which Harrington assertedly never did.

The only person who testified as to the job performance differences between Harrington and the two replacements, and the additional duties of the replacements, was Carlos Hernandez, grower consultant and later personnel manager for Respondent. Hernandez began working for Respondent as a grower consultant on a part-time basis in July 1976; his duties included serving as an interpreter and assisting employees with their work related problems. During the period from July 1976 to June 1978, Hernandez was employed in a similar capacity with other growers. Due to his obligations to other employers, Hernandez worked only about one or two hours per day, four to five days a week, at Respondent's premises. In addition, most of his time with Respondent during that period was spent working with the mushroom pickers.

In June 1978, Hernandez began working full-time as Respondent's personnel manager. In addition to his grower consultant duties, Hernandez was responsible for a variety of paper work,

e.g. filling out time cards and insurance forms, and handling employee grievances.

In his testimony, Hernandez discussed Harrington's job performance as compared to that of replacement employees Montes and Garcia. He testified that Montes and Garcia performed some duties which Harrington had never performed, and that the replacements worked longer hours than the claimant. On the basis of the asserted differences in job duties and working hours, the ALO rejected General Counsel's computation formula and chose to compute Harrington's gross backpay by using the mushroom packers as a representative group.

The record before us does not clearly establish how, or whether, Hernandez had an adequate opportunity to observe Harrington's work and compare it to that of the replacements. Harrington was hired in September 1977, and was unlawfully discharged five months later, in February 1978. Hernandez worked part-time, one to two hours per day, mostly with the pickers, from June 1976 until June 1978. Harrington, therefore, was no longer working for Respondent when Hernandez began working full-time. In fact, Hernandez testified that he first became aware of Harrington two to three months before the unlawful discharge. Given those facts, Hernandez' opportunity to observe and evaluate Harrington's work is questionable. Moreover, since Hernandez provided the only evidence of Harrington's work history, there is an uncertainty as to the number of hours Harrington worked and the specific duties he performed while employed by Respondent. Finally, there is no evidence, or any contention, that Harrington was not a satisfactory

employee.

In Construction and General Laborers' Local No. 1440 (1979) 243 NLRB 1169 [101 LRRM 1618], the NLRB General Counsel used a replacement employee formula in determining backpay. The respondent union attempted to persuade the administrative law judge (ALJ) to use the claimant's employment history as a basis for determining gross backpay. The union argued that, since the replacement was a better employee than the claimant, the replacement worker's earnings were an improper basis for calculating backpay. The ALJ rejected the union's reasoning, stating that the record showed that both employees were satisfactory. More significantly, the ALJ relied on the fact that the union had failed to present the testimony of the field superintendent, the only person who had had "direct contact" with both men, and who, if anyone, would be able to make such a comparison. The findings and conclusions of the ALJ were affirmed by the national board.

The Construction and General Laborers case parallels the present situation. Respondent's only witness regarding the purported differences between Harrington and his replacements was Carlos Hernandez, who did not have "direct contact" with, and never supervised, any of the three employees in question. Therefore, Hernandez' comparison of the different employees is of little probative value.

As previously stated, Hernandez testified that the replacements performed additional duties, some of which they voluntarily assumed while others were assigned, but that Harrington never volunteered for additional duties. However, as mentioned

above, during the period when Hernandez could have observed Harrington, Hernandez was working on a part-time basis mostly with the pickers, did not work with or supervise the claimant, and was unfamiliar with the claimant until two or three months before the unlawful termination.

Although there was testimony that Montes was assigned additional duties, i.e., loading trucks and supervising packers, there was no evidence that Harrington was unable or unwilling to perform such duties, had he been requested to do so. Moreover, there is no evidence that management believed Harrington was incapable of performing such duties. Finally, there was no record evidence that Harrington would not have worked additional hours if requested or assigned to do so. Instead, we are left with an uncertainty as to whether Harrington would have been assigned such duties, whether he would have voluntarily assumed such duties, and whether he would have performed the additional duties as well as the replacements. Any such uncertainties in backpay cases are resolved against Respondent as the wrongdoer, and we so find in this matter. (See Sioux Falls Stockyards Company (1978) 236 NLRB 543 [99 LRRM 1316]; Butte View Farms (Nov. 8, 1978) 4 ALRB No. 90, enforced, Butte View Farms v. ALRB (1979) 95 Cal.App.3d 961.)

We reject the ALO's backpay computation formula which utilized the mushroom packers as a "representative group". An acceptable formula for calculating gross backpay is the

[U]se of average earnings of a representative employee who worked in a job similar to the discriminatee.
(NLRB Case Handling Manual (Part Three) Compliance Proceedings, § 10542, emphasis added.)

Charles Harrington was a general laborer whose primary duties included driving a forklift to transport mushrooms to the packers and cleaning the freezer. His replacements, Montes and Garcia, also drove forklifts and cleaned the freezer. By comparison, the mushroom packers were responsible for placing mushrooms on conveyer belts, sorting them by size, placing them in boxes, weighing them, and stacking the boxed mushroom. There is no evidence that any of the packers drove a forklift or cleaned the freezer.

We reject the ALO's finding that Harrington's work most closely resembled that of the packers. The fact that Harrington and the packers would have dealt with the same quantity of mushrooms for approximately the same number of hours is unpersuasive. The quantity of mushrooms packed and number of hours worked depended upon the quantity of mushrooms picked and transported to the packers. Therefore, the mushroom pickers necessarily dealt with the same quantity of mushrooms and may have worked approximately the same number of hours as the packers and general laborers. However, the pickers understandably were not chosen as a "representative group" of employees.

We find that Harrington's duties most resembled those of his replacements, excluding the additional duties, and that the mushroom packers' work was not similar to that of the claimant. In light of the record evidence, we find that General Counsel's combined representative employee/replacement employee formula is an appropriate and reasonable one, and we reject the ALO's proffered backpay formula. (O. P. Murphy Produce Co., Inc. (Aug. 3, 1982) 8 ALRB No. 54.)

We affirm the remaining findings and conclusions the ALO has made regarding claimant Harrington. Respondent has failed to produce evidence that Harrington did not make reasonable efforts to seek interim employment. We also find that Respondent has failed to show that Harrington was discharged from interim employment for "gross misconduct".

We therefore adopt, in their entirety, General Counsel's calculations and backpay specification concerning Harrington, as amended at hearing.^{1/}

Backpay Due To Ismael Hernandez

We affirm the findings and conclusions of the ALO in her analysis of the backpay owed to Ismael Hernandez.^{2/} Hernandez made reasonable efforts to find work and thus to mitigate Respondent's backpay obligations even though he did not register with the state unemployment office. We also agree that a "ratification bonus" the claimant received at his interim employment during February and March 1979, was not an exempt bonus, but a retroactive pay raise which is included in his interim earnings as a credit against the amount of backpay which Hernandez is entitled to recover from Respondent.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural

^{1/} Harrington's amended monthly gross earnings (including benefits), interim earnings, and net backpay figures are shown on General Counsel's Exhibit 8.

^{2/} Appendix A, attached to the ALO's Supplemental Decision, accurately reflects the total backpay due to Ismael Hernandez as \$6,605.21. In the last page of her Supplemental Decision, the ALO mistakenly ordered Respondent to pay Hernandez \$6,595.21.

Labor Relations Board hereby orders that Respondent Miranda Mushroom Farms, its officers, agents, successors, and assigns, shall pay to the employees listed below, who in our Decision and Order dated May 1, 1980, were found to have been discriminated against by Respondent, the amounts set forth below beside their respective names, plus interest thereon compounded at the rate of seven percent per annum:

Charles Harrington: \$11,352.56

Ismael Hernandez: \$6,605.21

Dated: October 13, 1982

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Miranda Mushroom Farm, Inc.
(UFW and Charles Harrington)

8 ALRB No. 75
(6 ALRB No. 22)
Case Nos. 78-CE-12-M
78-CE-3-M

ALO DECISION

The General Counsel issued a specification setting forth the amount of backpay owed two discriminatees who had been unlawfully refused rehire or discharged by the Employer. (See, Miranda Mushroom Farm, Inc. (May 1, 1980) 6 ALRB No. 22.) The ALO found that the first discriminatee would have received a yearly bonus and vacation pay had he continued to work for the employer. The ALO also found that it was not appropriate to include in the discriminatee's interim earnings holiday pay or fringe benefits the discriminatee earned at an interim employer, but did include a "ratification bonus" the discriminatee received, since it represented a retroactive pay increase under a new contract, rather than a bonus. The ALO found that the discriminatee made reasonable efforts to locate interim employment, even though he did not register with the state employment office, since he registered with the union hiring hall, applied to several employers, and asked friends and relatives if they knew of available work. The discriminatee was justified in quitting two jobs since neither paid wages or included benefits substantially equivalent to those he would have received had he continued working for the Employer.

The ALO found that the General Counsel used inappropriate representative and replacement workers in order to calculate the second discriminatee's gross backpay, since those employees took on added job responsibilities and received promotions. The ALO therefore recalculated the discriminatee's gross backpay, using the average earnings of employees who packed mushrooms (the discriminatee moved mushrooms in and out of the packing area). The ALO found that the Employer did not meet its burden of showing that the discriminatee failed to mitigate damages or that his efforts to seek work were inadequate, since it failed to prove that the discriminatee was discharged from interim employment for misconduct.

BOARD DECISION

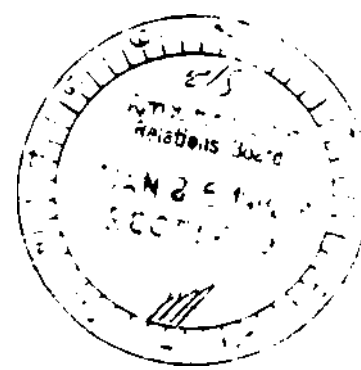
The Board affirmed the ALO's rulings, findings and conclusions as to the first discriminatee. As to the second discriminatee, the Board found that the evidence was insufficient to establish that the representative and replacement workers were superior to the discriminatee in experience and job performance. The uncertainty as to whether the discriminatee would have been assigned and/or would have voluntarily performed extra duties was resolved against the Employer. The Board rejected the ALO's use of the mushroom packers as a representative group, since the discriminatee's

duties differed substantially from those of the packers. The Board therefore adopted the General Counsel's computations and backpay specification in their entirety.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the Agricultural Labor Relations Board.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MIRANDA MUSHROOM FARM, INC.,)
)
Respondent,) Case Nos. 78-CE-12-M
) 78-CE-3-M
and)
) (6 ALRB No. 20)
UNITED FARM WORKERS OF AMERICA,)
AFL-CIO,)
) SUPPLEMENTAL DECISION
Charging Party,)
)
)
CHARLES HARRINGTON,)
)
Charging Party.)
_____)

Appearances:

Howard D. Silver
Dressier, Quesenbery, Laws & Barsamian
116 Martinelli, Suite 8
Watsonville, California 95076
On Behalf of Respondent

Jose B. Martinez
112 Boronda Road
Salinas, California 93907
On Behalf of the General Counsel

STATEMENT OF THE CASE

Ruth M. Friedman, Administrative Law Officer:

On May 1, 1980, the Agricultural Labor Relations Board issued a Decision and Order in the above-captioned proceeding (6 ALRB No. 22), finding, inter alia, that respondent had discriminatorily failed to rehire its employee Ismael Hernandez aka Enrique Fuentes^{1/} in violation of sections 1153 (a) and (c) of the Act and had discriminatorily discharged its employee Charles Harrington, in violation of Section 1153 (a) of the Act. The Board directed that respondent reinstate these employees and reimburse them for any loss of pay suffered as a result of the violations. Respondent challenged the Board's decision in a Petition for Review before the Court of Appeals for the First Appellate District, on June 2, 1980; the petition was summarily denied on April 6, 1981.

The parties were unable to agree on the amount of backpay due Ismael Hernandez and Charles Harrington, and on November 4, 1981, the Regional Director of the Salinas Region of the ALRB issued a backpay specification. The respondent filed an answer on November 23, 1981. A hearing was held before me in Salinas on November 23, and December 7, 1981. All parties were given a full opportunity to participate in the hearing.

1. Respondent's supervisor "changed" the name of Ismael Hernandez to "Enrique Fuentes" for the company payroll so Hernandez, an undocumented worker, could have his earnings attributed to a social security number assigned to "Enrique Fuentes". Even though Hernandez appears as Fuentes in company records, including company records in evidence in this proceeding, I will refer to Hernandez by his real name.

After the close of the hearing, the General Counsel and the Respondent filed briefs.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

ISMAEL HERNANDEZ

Ismael Hernandez worked for respondent as a mushroom picker for a few weeks in December, 1977. Respondent refused to rehire him on January 6, 1978. The parties agree that the backpay period runs from the week ending January 16, 1978 until the week ending April 20, 1979.

Gross Earnings

The parties agree that the gross amount of backpay due Hernandez can be computed by taking the average of the sum of the weekly earnings for all mushroom pickers who worked during each of the weeks of the backpay period. The parties stipulated that the sums listed under gross pay on Appendix A to this decision reflect the average weekly earnings of the mushroom pickers during the backpay period. Daily payroll records were not available and, since interim earnings are available only on a weekly basis, it is appropriate to compute backpay for this employee on a weekly basis. Butte View Farms (1979) 4 ALRB No. 90.

Bonus and Vacation

In addition to their piecework earnings, most pickers who worked during 1978 received a \$100 bonus at the end of that

year, reflecting in part the employer's desire to compensate the pickers for potential loss of earnings caused by relatively poor production that year. There is no reason to think that if Hernandez had been employed, he would not have received the bonus; in fact, an employee who began work at the end of May received \$100. The parties stipulated that pickers got vacation pay for 40 hours at the general labor rate after a year of work. The rate was \$3.50 an hour in 1978 and \$3.85 in 1979. Since Hernandez began work at the beginning of December 1977, he would have been eligible for vacation pay in December, 1978 and thereafter.

Therefore, Hernandez would have received a bonus of \$100 at the end of 1978 and vacation pay of \$140 for 1978 if he had continued to work for Respondent after January 6, 1978. He is also entitled to four-twelfths of vacation pay, or \$51.33 for the four months of the backpay period during 1979.

The bonus and vacation pay total \$291.33.

Interim Earnings

During forty-three of the sixty-seven weeks of the backpay period, Hernandez was employed by four different interim employers. The amount of interim earnings accrued up until the week ending September 23, 1978, when Hernandez began working as a cauliflower cutter at Valley Harvest Distributors, Inc. is not in dispute and appears on Appendix A.

a. Fringe benefits as interim earnings.

Respondent argues that in addition to the interim earnings of Hernandez reported on Appendix A the Board should.

deduct certain fringe benefits Hernandez received beginning the week of September 23, 1978, while working at Valley Harvest Distributors. During this period Valley Harvest and the United Farm Workers of America, AFL-CIO had a collective bargaining agreement. Pursuant to the agreement, Hernandez received holiday pay for Thanksgiving and New Year's, a "ratification bonus" reflecting a retroactive pay raise in a new collective bargaining agreement and funds paid by the employer to union sponsored funds for medical benefits, pension benefits and welfare.

Generally speaking, fringe benefits received at interim employers are deductible from gross pay only to the extent that similar fringe benefits are claimed as gross pay. NLRB Case Handling Manual, (Part 3): Compliance Proceedings, August 1977, section 10530.Ic.

Although there was no direct evidence on the question of whether Respondent's mushroom pickers worked on Thanksgiving and Christmas Day, 1978, their earnings during the weeks in which these days occurred was considerably less than earnings in adjacent weeks. I infer that pickers did not work on these days and were not paid. Therefore, it is not appropriate to deduct as interim earnings holiday pay earned at an interim employer.

The "ratification bonus", on the other hand, was not actually a bonus but was payment of the difference between employees' earnings under the old contract and earnings under the contract that was subsequently signed and made retroactive.

The sum of \$231 received by Hernandez was based on hours he worked during February and March, 1979, and constitutes interim earnings. On Appendix A, I have prorated this sum among the nine payroll weeks in February and March, 1979, and subtracted the sum from weekly gross earnings.^{2/}

The medical, pension and welfare benefits paid by the interim employer to the Union on Hernandez' behalf do not constitute interim earnings. Fringe benefits are deductible as interim earnings only from like benefits that the general counsel claims would have been part of gross earnings if the discriminatee had continued to work for Respondent. Glen Raven Silk Mills, Inc. (1952) 101 NLRB 239, 250, 31 LRRM 1045. Since the general counsel did not claim compensation for lost medical insurance premiums, or contribution to a pension plan or welfare fund, the sums paid by the interim employer are not deductible from gross earnings.

b. Hernandez' efforts to find work.

During the backpay period, Hernandez was first unemployed between January 6, 1978, and the week ending March 18, 1978. During this time he registered with the UFW hiring hall in Watsonville, applied to work in a mushroom company and in a cannery and asked friends and relatives if they knew of

2. The sum of the interim earnings from the beginning of February through the end of March, 1979 (\$1212.17), divided by the number of hours worked during that period (308) yields \$3.94 an hour. I have divided the interim earnings for each of the payroll weeks during this period by 3.94 and multiplied by 75C an hour to compute interim earnings attributable to the ratification bonus.

available work. He was not dispatched from the hiring hall because he lacked the immigration documents required by employers offering work. He obtained work pruning strawberries for two weeks and then was unemployed again between the week ending April 7, 1978, and the week ending April 29, 1978. He then got work operating a tortilla machine at a Mexican foods factory where his cousin's wife worked. He left after the first week in July because there were no fringe benefits or guarantees of employment. One week later he obtained a job, again through a relative, washing dishes at a restaurant in San Jose. He left after four weeks because his earnings were very low, much lower than they had been when he worked for Respondent. He was again unemployed for five weeks. During this time he continued to check weekly with the UFW hiring hall in Watsonville and asked friends and relatives for leads on employment. He applied to work with several florists. His uncle drove him to various places of employment to seek work, as he did not own an automobile. In the middle of September, 1978, he obtained work cutting cauliflower at Valley Harvest Distributors, Inc. in Watsonville where he worked continually, except for a three week layoff, until he was reinstated by Respondent in April, 1979.

Respondent claims that Hernandez should not be awarded backpay for the periods during the backpay period when he was not employed because he did not make reasonable efforts to secure employment and thereby mitigate damages. Specifically, Respondent contends that Hernandez should have registered with

the state unemployment office and contacted more employers. Respondent further contends that the established fact that Hernandez would have found suitable work more easily had he possessed proper immigration documents is chargeable to Hernandez and not the Respondent.

I find that under the circumstances, the efforts that Hernandez made to find work were reasonable and he is entitled to backpay for the periods when he was not working as well as for the difference, if any, between his interim earnings and gross earnings during the periods he was employed. The employer has failed to meet its burden of proving that during the backpay period, Hernandez failed to remain in the labor market, refused to accept substantially equivalent work, failed to diligently search for alternative work or voluntarily quit alternative employment without good reason. NLRB v. Mastro Plastics Corp. (2nd Cir. 1965) 354 F.2d 170, 60 LRRM 2578 at 2580, note 3, Brown & Root, Inc. (1961) 132 NLRB 486, 48 LRRM 1391, enf. (8th Cir. 1963) 311 F.2d 447, 52 LRRM 2115.

Hernandez' work search through friends and relatives and by use of the union hiring hall was appropriate in his circumstances; one indication is that, generally speaking, he was successful in finding work. The fact that he was an undocumented worker and that he did not have a car undoubtedly disqualified him for some employment, but that does not render the search that he made inadequate. An employee is required to seek work only in the work market of a person in like circumstances, including his employment history, station in life and employment

trends and requirements in the place where the discrimination against him occurred. Efco Manufacturing, Inc. (1955) 111 NLRB 1032, 1036, 35 LRRM 1647, enf. (1st Cir. 1955) 227 F.2d 675, 37 LRRM 2192, cert. denied (1956) 350 U.S. 1007. A discriminatee is not obligated to accept employment in a different community from his former place of employment or where transportation is a problem for him. Hopcraft Art and Stained Glass Workers (1981) 258 NLRB No. 190, 108 LRRM 1237.

Respondent was aware that Hernandez was undocumented both when he was originally hired and when it refused to rehire him after he had been deported. Hernandez cannot be chargeable for seeking work in a job market for which he was not eligible.

Under the circumstances, Hernandez' failure to register with the state unemployment office is reasonable, particularly since the unemployment office itself did not require farm laborers to register in order to get benefits.

Hernandez was justified in quitting his employment as a tortilla maker and as a dishwasher; neither job paid wages or had benefits substantially equivalent to those he would have received had he been working for Respondent and so he was not required to accept them in the first place. Sioux Falls Stock Yards (1978) 236 NLRB No. 62, 99 LRRM 1316, Midwest Hanger Co. (1975) 221 NLRM No. 135, 91 LRRM 1218, affd. (8th Cir. 1977) 94 LRRM 2878. Low pay and long commutes are acceptable reasons for quitting and do not result in forfeiting backpay. Maggio Tostado (1979) 4 ALRB 36, Alberci Construction Co. (1980) 249 NLRB No. 102, 104 LRRM 1444.

CONCLUSION

Ismael Hernandez is entitled to backpay in the amount of \$6595.21, as shown on Appendix A plus interest at the rate of 47% per annum to accrue commencing with the last day of each week of the backpay period when such sum became due until the date this decision is complied with.

CHARLES HARRINGTON

The backpay period for Charles Harrington began on February 8, 1978, when he was discharged and ended on June 18, 1981, when he was offered reinstatement. The parties disagree both on the proper basis for computing gross earnings and the basis for computing interim earnings. However, they agree that both should be computed on a monthly basis since all interim earnings were earned on a monthly basis.

Gross Earnings

Respondent hired Harrington as a General Laborer in September, 1977. He was paid the minimum wage, then \$3.50 an hour. Harrington's job was to bring mushrooms from the mushroom houses where they had been picked into the packing area. The mushrooms were moved on carts. When the carts were empty, Harrington took them back to the mushroom houses and re-filled them. He was also responsible for cleaning the "reefer" where the mushrooms were kept cool. Harrington was assisted in this work by Leo Amaya, another employee.

After Harrington was discharged, Respondent hired Miguel Montes, whose beginning wage was also \$3.50 an hour. Montes, like Harrington, was responsible for bringing the mush-

rooms from the houses where they were picked to the packing area, but when this work was finished, instead of going home, as was Harrington's practice, Montes stayed to make boxes. Gradually, because he was interested in more work and had experience working with mushrooms, Montes filled in for other employees by watering the mushrooms and helping with the casing, dumping and spawning work of the outside crew. He helped with the packing and, because he was one of few bilingual employees, could interpret between the English speaking management and Spanish speaking work force. In April, 1978, Leo Amaya left and Montes did Amaya's work in addition to his own. In June, 1978, Montes was given responsibility for loading trucks, in addition to his other responsibilities. In August, 1978, his pay was raised to \$4.50 an hour; in December, 1978, he received a plantwide raise of 35C an hour to \$4.85. In May, 1979, he was put in charge of packing. In October he was given a raise to \$5.00 an hour. In December, 1979, he received the plantwide 50C an hour raise to \$5.50. In December, 1980, he became assistant manager of the plant.

When Montes became assistant manager, his job loading and carrying mushrooms was taken by Humberto Garcia, who in December, 1980, received \$4.65 an hour. Garcia, like Montes: and unlike Harrington, continued to work after he finished carting the day's mushroom production. He made boxes and helped the chemical spraying crew. At times he cleaned the outside portions of the plant and the mushroom beds. In April, 1981, he demanded and received a raise to \$4.90 an hour

because of the quality of his work.

It is apparent from this comparison of the job duties of Harrington, on the one hand, and Montes and Garcia, on the other, that Montes and Garcia worked longer and performed different tasks than would Harrington had he stayed, considering Harrington's work record with Respondent.

The General Counsel does not claim otherwise. Rather, he claims that the earnings of Montes and Garcia during the backpay period should be used to measure what Harrington would have earned because Respondent's attorney represented to the board agent that Montes and Garcia replaced Harrington and the investigating board agent relied on this representation. A few days before the hearing, the attorney informed the board agent and the general counsel that he had been mistaken and that Montes and Garcia did work other than replace Harrington. During the investigation, the earnings records of all employees were available to the investigating board agent and Respondent's attorney expressed the position, now taken by the Respondent that one proper measure of gross backpay is the wages earned by packing employees with certain adjustments upward.

While any agreement by the employer or his attorney as to gross pay due a discriminatee would be binding, here there was no agreement on this issue. Lacking formal agreement as to the sums due, the board agent's investigation should not stop at the words of an employer's representative where the records indicate the representative is mistaken. In 1978, Montes earned from about 50% more to about 250% more than

Harrington earned in comparable months in 1977. These figures should have put the board agent on notice that Montes was earning much more than Harrington would have earned, and he should not be considered a replacement or representative employee for Harrington in computing backpay. Kamimoto Farms (1981) 7 ALRB No. 45, slip opinion at 6.

I find that Harrington's work most closely resembled the employees who packed mushrooms and his backpay should be calculated by the average earnings of the packers with certain adjustments. Harrington's work consisted of picking up the mushrooms and transporting them to the place where they were cooled and packed. The packers sort, box, weigh and stack them, after which Harrington picked up the empty carts. Therefore, Harrington, had he stayed, would have dealt with the same quantity of mushrooms for approximately the same number of hours as the packers, only he would have been required to work an extra two and a half hours a day or about 65 hours a month since he came earlier and left later than the packers. During 1978 and 1981 packers received the same wages as general laborers; but in 1979 and 1980, general laborers received ten cents an hour more.

Appendix B shows gross earnings by month. Although weekly records are available, monthly figures are used since all of Harrington's interim earnings were paid on a monthly basis.

Appendix B reflects a projection of Harrington's wages by month during the backpay period. During February and

March, 1978, the earnings of Leo Amaya, who did the same work as Harrington before and after the discharge are used.

For the remaining months, I have started with the average earnings of all packers who worked during each pay period during the month. To this figure I have added the additional amount Harrington would have earned for working an extra 2% hours a day at the general labor rate. In 1979 and 1980, I also added a sum equal to the ten cent an hour differential between the general labor and packer rate times the average number of hours worked by the packers.

In addition, I have credited Harrington with vacation Pay calculated at the agreed rate of 40 times the general labor rate beginning in September, 1978, which would have marked his first anniversary with the company. I also credited him with the bonuses of \$100.00 in December, 1978, and \$65.00 in July, 1979, as claimed since the respondent did not dispute them.

Interim Earnings

During the backpay period of February, 1978, through June 18, 1981, Harrington had interim earnings at Bruce Church, Inc., where he was employed as a management trainee from July, 1978 until he was discharged in January, 1979, at Knudsen Vineyards in June, 1979, and at Oregon State University from July, 1979 until he was offered reinstatement in June, 1981. There was evidence of token earnings in February and March, 1979, and no evidence of interim earnings from February through June, 1978, and in April and May, 1979.

Respondent claims that Harrington did not make

reasonable efforts to find employment during the periods when he did not have interim earnings. Respondent has the burden of proving that a discriminatee failed to mitigate damages and failed to offer any evidence that Harrington's efforts to seek work were inadequate. NLRB v. Madison Courier, Inc. (1970) 180 NLRB 781, 76 LRRM 1802, (D.C. Cir. 1972) 472 F.2d 1307, enf. SO LRRM 3377, Brown & Root, Inc. (1961) 132 NLRB 486, 48 LRRM 1391, (8th Cir. 1963) 311 F.2d 447, 52 LRRM 2115.

The parties agree that the interim earnings are as listed on Appendix B except that Respondent claims that medical insurance premiums and life insurance premiums that the Bruce Church company paid on Harrington's behalf should be added to his monthly wages and subtracted from gross pay. These fringe benefits are not properly interim earnings for the reasons stated in the discussion of Hernandez' interim earnings, but the subject is moot since Harrington had no net earnings for backpay purposes during the time he worked at Bruce Church.

Finally, Respondent contends that Harrington should be charged with the interim earnings he would have made at Bruce Church throughout the backpay period if he had not been discharged from employment.

The NLRB has said that backpay may be tolled when a Respondent meets its burden of proving that a discriminatee was discharged from an interim employer solely for misconduct. Midwest Hanger Co. (1975) 221 NLRB Mo. 134, 91 LRRM 1218, enforced (9th Cir. 1977) 94 LRRM 2878. The rationale apparently is that if misconduct justified a discharge by the interim

employer, the discriminates would have engaged in the same misconduct were he in respondent's employ, thereby justifying the Respondent in discharging him and tolling Respondent's obligation for reinstatement and backpay. Barberton Plastic Products, Inc. (1964) 146 NLRB 393, 396, 55 LRRM 1337. Therefore, the mere fact that an employee is unsuitable or unsatisfactory to an interim employer does not render him unsuitable to Respondent and does not relieve Respondent of its backpay obligation. Barberton Plastic Products, Inc., supra, Webb Manufacturing Company (1969) 174 NLRB 37, 38, 70 LRRM 1110, enf. (6th Cir. 1970) 421 F.2d 848, 73 LRRM 2560. For example, the Board held that an employee who was terminated from an interim employer for excess absenteeism did not willfully lose earnings because the Respondent did not prove that he absented himself from work wilfully or without excuse or that his records of absenteeism with the interim employer was different from his record with the employer who discharged him. Aircraft and Helicopter Leasing and Sales, Inc. (1976) 227 NLRB 644, 94 LRRM 1556.

According to the testimony of the production manager of the interim employer, Bruce Church, Harrington was discharged as a management trainee for several reasons: he demonstrated that he lacked the requisite experience working with sprinkler systems, though he had represented when he was hired that he had experience, he arrived for work late, and his dress and general grooming was below the standards required for a potential supervisor. When his duties were changed because of his

unsatisfactory performance running the sprinkler system, he spent large amounts of time on unnecessary socializing.

Given the high standard of proof required by the NLRB in cases where an employer seeks to lessen his backpay obligation because of a discharge from an interim employer, Respondent here has not proven that Harrington was discharged for misconduct. Midwest Hanger Company (1975) 221 NLRB 911, 91 LRRM 1218. Inability to perform work is not misconduct (Hopcraft Art and Stained Glass Works, Inc. (1981) 258 NLRB No. 190, 108 LRRM 1237) neither is poor grooming. There was insufficient proof that Harrington's lateness for work was misconduct; for one thing, no records were introduced, for another it was not asserted that this alone would have been a basis for discharge, and for another, the record leaves ample room for speculation that Harrington's failure to attend the sprinklers at 4:30 a.m. was part of his claimed inexperience in the proper operation of sprinkler systems. Harrington is entitled to backpay for the period after he was discharged from Bruce Church.

CONCLUSION

Charles Harrington is entitled to backpay in the amount of \$5921.82 as set forth in Appendix B plus interest at the rate of 7% per annum to accrue commencing with the last day of each week of the backpay period when such sum became due until the date this decision is complied with.

THE REMEDY

The Respondent's obligation to make the discriminatees whole will be discharged by payment of the net backpay due

them plus bonuses and vacations as set forth in appendices A and B plus interest at the rate of 7% as more fully described above.

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

ORDER

The Respondent, Miranda Mushroom Farm, Inc., its officers, agents, successors, and assigns, shall make the discriminatees in this proceeding whole by payment to them of the following amounts together with interest at the rate of 7% per annum to accrue commencing with the last day of each week of the backpay period for each of them when such sum became due until the date this decision is complied with:

Ismael Hernandez aka Enrique Fuentes: \$6595.21

Charles Harrington: \$5921.82

Dated: January 19, 1982

AGRICULTURAL LABOR RELATIONS BOARD



Ruth M. Friedman
Administrative Law Officer

APPENDIX A

Ismael Hernandez

<u>WEEK ENDING</u>	<u>GROSS EARNINGS</u>	<u>INTERIM EARNINGS</u>	<u>NET EARNINGS</u>
1/16/78	\$274.29	0	\$274.29
1/23/78	221.44	0	221.44
1/30/78	216.93	0	216.93
2/6/78	92.34	0	92.34
2/13/78	204.60	0	204.60
2/20/78	86.89	0	86.89
2/25/78	230.72	0	230.72
3/4/78	177.55	0	177.55
3/11/78	178.47	0	178.47
3/18/78	155.00	0	155.00
3/25/78	154.00	189.37	0
4/1/78	122.00	139.37	0
4/7/78	141.00	0	141.00
4/15/78	148.00	0	148.00
4/22/78	161.58	0	161.58
4/29/78	157.00	0	157.00
5/6/78	125.00	93.68	31.32
5/13/78	172.00	147.00	25.00
5/20/78	170.00	152.62	17.38
5/27/78	161.00	142.50	18.50
6/3/78	173.00	139.13	33.87
6/10/78	169.00	144.75	24.25
6/17/78	134.00	145.68	0
6/24/78	186.00	147.00	39.00
7/1/78	175.00	148.12	26.88

<u>WEEK ENDING</u>	<u>GROSS EARNINGS</u>	<u>INTERIM EARNINGS</u>	<u>NET EARNINGS</u>
7/8/78	175.00	49.50	125.50
7/17/78	188.50	0	188.50
7/22/78	161.23	60.00	101.23
7/29/78	189.00	70.00	119.00
8/5/78	164.00	60.00	104.00
8/12/78	171.00	65.00	106.00
8/19/78	154.00	0	154.00
8/26/78	170.90	0	170.90
9/2/78	178.00	0	178.00
9/9/78	172.00	0	172.00
9/16/78	193.00	0	193.00
9/23/78	115.00	131.60	0
9/30/78	119.00	159.70	0
10/7/78	145.00	175.90	0
10/14/78	132.00	202.91	0
10/21/78	146.23	162.22	0
10/28/78	127.00	187.76	0
11/4/78	164.00	155.78	8.22
11/11/78	187.00	126.15	60.85
11/18/78	135.00	190.35	0
11/25/78	108.00	116.14	0
12/2/78	165.00	102.87	62.13
12/9/78	196.00	18.50	177.50
12/16/78	156.77	91.83	64.94
12/23/78	159.00	49.95	109.05
12/30/78	229.00	81.40	147.60
1/6/79	200.00	21.00	179.00

<u>WEEK ENDING</u>	<u>GROSS EARNINGS</u>	<u>INTERIM EARNINGS</u>	<u>NET EARNINGS</u>
1/6/79	284. 00	26.82	257.18
1/13/79	192. 00	0	192.00
1/20/79	166. 00	0	166.00
1/27/79	192. 50	0	192.50
2/3/79	174. 50	33.65 + 6.41 ^{1/}	134.44
2/10/79	127. 00	75.85 + 14.40	36.75
2/14/79	120. 00	208.15 + 39.62	0
2/17/79	133. 00	177.44 + 33.78	0
3/3/79	180. 00	162.28 + 30.89	0
3/10/79	173. 00	192.92 + 37.48	0
3/17/79	134. 00	83.69 + 15.93	34.38
3/24/79	205. 00	124.73 + 23.74	56.53
3/31/79	184. 00	149.46 + 28.45	6.09
4/7/79	174. 50	59.23	115.27
4/14/79	220. 00	208.69	11.31
4/21/79	207. 00	0	207.00
			<hr/>
			\$6,313.88
NET EARNINGS	\$ 6,313.88		
PLUS BONUS AND VACATION	<u>291.33</u>		
NET BACKPAY OWED	\$6,605.21		

1. These figures are a prorated share of the "ratification bonus."

APPENDIX B

Charles Harrington

MONTH	AVERAGE PACKER EARNINGS ^{1/}	10¢/HR WAGE DIFFEREN- TIAL 1979 AND 1980 ONLY ^{2/}	EXTRA 65 HOURS ^{3/}	TOTAL GROSS EARNINGS	INTERIM EARNINGS	NET EARNINGS
2/78				\$349.78	0	\$349.78
3/78				538.13	0	538.13
4/78	\$296.09		\$227.50	523.59	0	523.59
5/78	276.72		227.50	504.22	0	504.22
6/78	264.59		227.50	492.09	0	492.09
7/78	313.51		227.50	541.01	1200.00	0
8/78	257.10		227.50	484.60	1200.00	0
9/78	358.30		227.50	585.80	1200.00	0
10/78	271.95		227.50	499.45	1200.00	0
11/78	210.23		227.50	437.73	1200.00	0
12/78	430.33		227.50	657.83	1200.00	0
1/79	414.19	11.00	250.25	675.44	900.00	0
2/79	312.39	8.33	250.25	570.97	26.00	544.97
3/79	454.91	12.13	250.25	717.46	66.00	651.46

1. In computing an average for each month, only wages of each packer who performed some work during each weekly payroll period of the month were used. The names of each packer and the months they were averaged in are listed on Appendix C.

2. Packers and general laborers earned the same hourly wage in 1978 and 1981. In 1979 and 1980 general laborers earned ten cents more per hour. The figures in this column were calculated by dividing the average packer earnings by their hourly wage (\$3.75 in 1979 and \$4.15 in 1980) for the average number of hours worked and multiplying by ten cents to get the general laborer wage for the same number of hours.

3. During the backpay period Harrington would have worked 2^{1/2} hours per day or 65 hours per month more than the packers at \$3.50 an hour in 1978 and \$3.85 an hour in 1979.

MONTH	AVERAGE PACKER EARNINGS	10¢/HR WAGE DIFFEREN- TIAL 1979 AND 1980 ONLY	EXTRA 65 HOURS	TOTAL GROSS EARNINGS	INTERIM EARNINGS	NET EARNINGS
4/79	452.10	12.06	250.25	714.41	0	714.41
5/79	499.37	13.12	250.25	762.64	0	762.64
6/79	730.65	19.50	250.25	1000.40	1070.83	0
7/79	577.69	15.40	250.25	843.34	1019.00	0
8/79	709.65	18.90	250.25	978.80	1019.00	0
9/79	598.59	16.00	250.25	864.85	1019.00	0
10/79	478.95	12.80	250.25	742.00	1019.00	0
11/79	316.09	8.40	250.25	574.75	1019.00	0
12/79	487.34	13.00	250.25	750.59	1019.00	0
1/80	563.87	13.59	276.25	853.71	1019.00	0
2/80	547.49	13.19	276.25	836.93	1019.00	
3/80	696.91	16.79	276.25	989.95	1019.00	0
4/80	595.19	14.34	276.25	885.78	1039.00	0
5/80	732.90	17.66	276.25	1026.81	1039.00	0
6/80	741.65	17.87	276.25	1035.77	1039.00	0
7/80	825.10	19.88	276.25	1121.23	1114.00	7.23
8/80	862.60	20.78	276.25	1159.63	1114.00	45.65
9/80	763.52	18.39	276.25	1058.16	1136.00	0
10/80	728.62	17.55	276.25	1022.43	1136.00	0
11/80	801.24	19.30	276.25	1096.74	1136.00	0
12/80	721.85	17.39	276.25	1015.49	1136.00	0
1/81	982.59		302.25	1234.84	1159.00	75.84
2/81	613.29		302.25	915.54	1159.00	0
3/81	835.24		302.25	1137.49	1159.00	0

MONTH	AVERAGE PACKER EARNINGS	10¢/HR WAGE DIFFEREN- TIAL 1979 AND 1980 ONLY	EXTRA 65 HOURS	TOTAL GROSS EARNINGS	INTERIM EARNINGS	NET EARNINGS
4/81	745.32		302.25	1047.57	1182.00	0
5/81	980.89		302.25	1283.14	1200.00	83.14
6/81	616.37		209.25	822.62	900.00	0
					TOTAL	<u>\$5,293.15</u>

Vacation Pay^{4/}

1978	3.50 x 40 x 4/12	= \$ 46.67
1979	3.85 x 40	= 154.00
1980	4.25 x 40	= 170.00
1980 (6 mos	0 4.65 x 40 =	93.00
	TOTAL	<u>\$463.67</u>

Bonuses

12/78	\$100.00
7/79	<u>65.00</u>
TOTAL	\$165.00

NET EARNINGS	\$5,293.15
VACATION	463.67
BONUSES	<u>165.00</u>
NET BACKPAY OWED	\$5,921.82

4. Vacation pay calculated at company formula of 40 hours times general labor rate.

APPENDIX C

Following is a list of each packer used and the months in which they were used as an average:

C. Contreras: April, May, June, July, August, September, 1978; February, March, April, May, 1979.

M. Contreras: April, May, June, July, August, September, October, November, December, 1978; January, June, 1979.

Jensen: July, August, 1978.

C. Martinez: June, July, August, September 1978; March, 1979.

J. Noble: June, July, 1978.

L. Otero: July, 1978.

B. Strouse: September, October, November, December, 1978.

L. Tate: May, June, July, August, September, November, December, 1978.

S. Walker: April, December, 1978.

J. Correa: October, November, December, 1979; January, February, March, April, May, June, July, August, September, October, November, December, 1980.

M. Espinoza: January, February, 1979.

L. Hernandez: January, March, 1979.

B. S. Kim: January, 1979.

L. Martinez: November, December, 1979.

P. Saavedra: January, February, March, April, May, June, July, August, September, October, November, December, 1979; January, February, March, April, May, June, July, August, September, October, November, December, 1980.

V. Saavedra: April, May, June, July, August, 1979.

S. Sabala: January, February, March, April, May, June, July, August, 1979.

C. Chavarria: June, July, August, September, October, November, December, 1979; January, February, 1980.

M. Chavez: February, May, July, August, September, October, November, December, 1979; January, February, March, April, May, June, July, August, September, October, November, December, 1980; January, February, March, April, May, June, 1981.

S. Chavez: January, June, July, August, September, October, 1979.

P. Carrion: January, February, March, April, May, June, July, August, September, October, November, December, 1980.

G. Chavez: May, June, July, August, September, November, December, 1980.

L. Chavez: January, February, March, April, June, July, August, September, October, November, December, 1980.

E. Contreras: August, September, October, November, December, 1980.

D. Rodriguez: June, 1980.

S. Hernandez: October, November, December, 1980; January, February, March, April, May, June, 1981.

H. Martinez: December, 1980.

L. Mendoza: June, 1980.

P. Orosco: September, October, 1980.

L. Barnerna: June, 1981.

N. Gomez: June, 1981.

A. Garcia: February, March, April, May, June, 1981

C. Chavez: January, February, March, April, May,
June, 1981.