Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, *and* International Ladies' Garment Workers' Union, AFL–CIO and Local 99, International Ladies' Garment Workers' Union, AFL–CIO. Cases 29–CA–14548, 29–CA–14619, 29–CA–14681, 29–CA–14735, 29–CA–14845, 29–CA–14853, 29–CA–14896, 29–CA–14983, 29–CA–15012, 29–CA–15119, 29–CA–15124, 29–CA–15137, 29–CA–15147, 29–CA–15323, 29–CA–15324, 29–CA–15325, 29–CA–15332, 29–CA–15393, 29–CA–15413, 29–CA–15447, and 29–CA–15685

September 30, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On October 4, 1999, Administrative Law Judge Michael A. Marcionese issued the attached supplemental decision. Thereafter, the Respondent and the General Counsel filed exceptions with supporting briefs and answering briefs. The Respondent also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Supplemental Decision and Order.

I. PRIOR BOARD DECISION

This compliance proceeding addresses 202 discriminatees found to be entitled to a remedy under the Board's decision in *Domsey Trading Corp.,* 310 NLRB 777 (1993), enfd. 16 F.3d 517 (2d Cir. 1994), which held that the Respondent violated the Act by, inter alia, discharging employees Giles Robinson and James Anthony Charles because they engaged in union activities. Those discharges, which occurred on December 1, 1989, and January 17, 1990,[2] respectively, were, in part, the cause of an unfair labor practice strike that commenced on January 30 and ended on August 10, when the Union made an unconditional offer to return the striking employees to work.

On August 13, 132 of the former strikers reported for work at the Respondent's facility. Although as unfair labor practice strikers the employees were entitled to immediate reinstatement, the Respondent conditioned their return to work on the completion of applications for reinstatement and the production of INS "green cards." Thus, the Board found that the Respondent did not make a valid offer of reinstatement on August 13.[3] After August 13, the Respondent sent letter offers of reinstatement to some of the former strikers on a "piecemeal" basis[4] and then unlawfully discharged 13 of the former strikers whom it had reinstated.

II. ISSUES PRESENTED

The Respondent does not dispute the gross backpay amount set out in the compliance specification, but challenges the judge's findings regarding certain alleged offsets and the adequacy of individual discriminatees' mitigation efforts during the backpay period, which, for most of the unreinstated strikers, ran from August 13, 1990, to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and, except as otherwise noted herein, find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent also contends that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's supplemental decision and the entire record, we are satisfied that the Respondent's contentions are without merit. However, we do not rely on the judge's statement, included in his discussion of the backpay owed discriminatee Leanna Joseph, that the Respondent misrepresented certain evidence or that such conduct was characteristic of many of the Respondent's arguments at the hearing and on brief.

[2] All dates hereafter refer to 1990, unless otherwise stated.

[3] In "Appendix A" attached to the Board's decision (see 310 NLRB at 781–782), 200 former strikers are listed as discriminatees entitled to backpay (Robinson and Charles, who, as noted above, were unlawfully discharged prior to the strike, are not included in the list of former strikers). Although some of these discriminatees did not report for work on the morning of August 13, the Board adopted the judge's findings that the Respondent did not make any valid offers of reinstatement then and that therefore strikers who did not return to work on August 13 were still entitled to reinstatement. See *Domsey Trading Corp.*, 310 NLRB at 777 fn. 3. On review, the Respondent challenged only that part of the Board's order that required it to reinstate former strikers who did not appear for work on the morning of August 13, or who did not reply to the Respondent's subsequent offers of reinstatement. The court found the Respondent's challenge without merit and enforced the Board's order. See *Domsey Trading Corp. v. NLRB*, 16 F.3d at 519.

[4] See *Domsey Trading Corp.,* 310 NLRB at 798–800. The judge found that most of these letter offers were invalid for the same reason that the Respondent's August 13 oral offer was invalid—they required the production of documents the Respondent was not entitled to demand. Id. at 798. The judge also found that because the Respondent made the offers "piecemeal, and at its own pace," it was not entitled to take advantage of the rule, reaffirmed in *Drug Package Co.,* 228 NLRB 108, 113–114 (1977), that the backpay period for unfair labor practice strikers commences 5 days after the date of the unconditional offer to return to work. Id. at 798.

August 20, 1991, the date the Respondent made a valid offer of reinstatement to the former strikers as a group.[5]

The first of the Respondent's primary arguments is that the judge erred in finding that strike benefits received by discriminatees between August 13, 1990, and February 1, 1991, were collateral benefits not deductible from backpay.[6] For the reasons set out in section III, we reverse the judge in part and find that the strike benefits paid to certain individuals (the nonmachinist discriminatees) were interim earnings properly deductible from backpay.[7] However, we adopt the judge's finding that the strike benefits received by other individuals (the machinists) were collateral benefits not deductible from backpay.[8] We shall remand the case to Region 29 for a recalculation of the backpay owed the affected discriminatees.

A second primary argument of the Respondent is that certain discriminatees were not authorized to be present and employed in the United States during the backpay period. This argument raises the issue of whether the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), which issued after the judge's supplemental decision in this case, affects the judge's finding that the Respondent owed backpay to certain discriminatees who lacked lawful work authorization during the backpay period. For the reasons set out in section IV, we find that *Hoffman* precludes an award of backpay to the four discriminatees who admitted during the compliance proceedings that they were unauthorized to work during the backpay period. We also find, for reasons set out in section IV, that issues have been raised regarding the authorization status during the backpay period of six discriminatees. Accordingly, we shall remand these discriminatees to the judge for the purpose of affording the parties an opportunity, including a reopening of the hearing if necessary, to develop a full and complete factual record on these issues. Thereafter, the judge shall forward to the Board a second supplemental decision setting forth only findings of fact on these issues. The parties may then file exceptions in accordance with Section 102.46 of the Board's Rules and Regulations. Absent settlement, the case will be transferred back to the Board whether or not exceptions have been filed, and the Board will resolve the legal issues.

In section V, we discuss, as necessary, backpay issues relating to the 101 of the 202 named discriminatees (including Robinson and Charles) considered individually in the judge's decision. As to the remaining 101 discriminatees, we adopt the judge's findings that 12 discriminatees are owed no backpay and that the Respondent has satisfied its backpay obligation to three other discriminatees (see Supp. JD at sec. VII,A).[9] We also adopt the judge's finding that the backpay owed to 46 discriminatees who could not be located should be placed in escrow in accordance with the Board's holding in *Starlite Cutting I*, 280 NLRB 1071 (1986), as clarified in *Starlite Cutting II*, 284 NLRB 620 (1987) (see Supp. JD at sec. VII,B). We shall, however, first remand those missing discriminatees' awards to Region 29 for a recalculation of backpay, given our finding that the strike benefits of nonmachinists are interim earnings.[10]

Finally, as the judge explained, there were 40 discriminatees who either returned to work for the Respondent or who found interim employment shortly after the backpay period commenced. The Respondent's sole defense as to these discriminatees was that their strike benefits should be deducted from their gross backpay (see Supp. JD at sec. VII,C). Since we find merit in the Respondent's argument that the nonmachinists' strike benefits were interim earnings, we shall remand 37 of these 40 discriminatees' awards to Region 29 for a recal-

[5] Since the General Counsel's burden in a backpay case is "simply to show the gross backpay due each claimant," the General Counsel has satisfied that burden here. *Hansen Bros. Enterprises*, 313 NLRB 599, 600 (1993) (footnote omitted). The burden then shifts to the Respondent "to establish facts that negate or mitigate its liability." Id. (footnote omitted).

[6] The strikers received strike benefits from the beginning of the strike in January 1990 to the end of the strike on August 10. After the strike ended and the Respondent refused to reinstate the former strikers, the Union continued to pay benefits to the former strikers until February 1, 1991. Like the judge and parties, we shall refer to the payments made to the former strikers from August 13, 1990, to February 1, 1991, as the "strike benefits."

[7] For the reasons set out in his partial dissent, Member Walsh would adopt the judge's finding that the nonmachinists' strike benefits, as well as the machinists' strike benefits, were collateral benefits and therefore not deductible from gross backpay.

[8] The machinists were those discriminatees, approximately 15 in number, who operated heavy equipment at the Respondent's facility and were the Respondent's highest-paid employees.

[9] The following discriminatees are owed no backpay: Maximo Bernardez, Rose Bertin, Lalane Camner, Christianne Celestin, Louis Cherfilus, Milka Gutierrez, Teresa Lacayo, Mireya Lugo, Juan Ramon Palacios, Antoine St. Fort, Yollande Sinrastil, and Celina Valentin. The Respondent has satisfied its backpay obligation to Hector Guity, Marie Jeanty, and Ruth Zama.

[10] These discriminatees are Dennis Aquilar, Longina Arzu, Hubert Florent Boni, Bertha Camille, Marcial Santos Castro, Sy Chiekh, Jean Robert Cyprien, Immacula Delhia, Mercedes Devillar, Mezinette Desinor, Alama Amine Diawara, Aparicia Diego, Voltaire Dorcius, Jerome Dunn, Wilmide Estimond, Hipolito Figueroa, Marc Frederique, Michelet Germaine, Jose Gonzales, Jose L. Gonzalez, Maximo Hernandez, Sako Idiessa, Evodia Joseph, Marie May Joseph, Lourdes Labissiere, Jean Lacombe, Marc Dala Louis, Diankha Mayadu, Eduardo Martinez, Fernande Mathurin, Hilda Medina, Emilio Meredith, Miguel Flores Miranda, Roberto Morales, Irene S. Nunez-Reyes, Jose Angel Ortiz, William Ortiz, Freda Osias, Alejandro Palacios, Reynaldo Pierluisse, Jacqueson Pierre, Jean Sigay Pierre, Laborian Senteno, Kathy Toussaint, Jose L. Valentin, and Imanitte Verrier.

culation of the backpay owed.[11] Two discriminatees, Chano (Feliciano) Reyes and Rene Rochez, were machinists. We therefore exclude them from the remand order. As to discriminatee Adeline Duvivier, we note that the General Counsel and the Respondent entered into a stipulation at the compliance hearing on the backpay owed her (see Supp. JD at sec. VII,C fn. 23). We therefore exclude her from the remand order.

III. STRIKE BENEFITS[12]

As noted above the Union paid strike benefits to the former strikers from August 13, 1990, when the Respondent refused to reinstate them, to February 1, 1991. The benefit amount and conditions for payment differed for individuals who worked in machinist classifications and those who did not. The majority of the former strikers were nonmachinists, and, for them, the amount of strike benefits paid each week depended on the number of days they reported to the former picket line.[13] Nonmachinists received $12 a day ($60 a week) for reporting to the picket line Monday–Friday, and $72 if they also reported on the weekend (one or both days). They had to sign in at the former picket line each day, and also sign a voucher or ledger each Friday when the payments were distributed. The nonmachinists generally went to the Respondent's facility about the time that they would have reported for work, and they generally left at the end of the workday. A large majority of them testified that while they were at the former picket line, they sang, chanted, carried signs, and/or marched.

The machinists, by contrast, received $200 or more per week in strike benefits. They did not have to sign in every day at the picket line, but signed a voucher at the end of the week to receive their strike benefits. Their payments were not reduced for days that they were absent from the former picket line. Finally, some of the machinists testified that they were flexible in the hours they remained at the line, arriving later and/or leaving earlier than nonmachinist former strikers.

A. The Applicable Analysis

Where strikers receive benefits from a union that are in exchange for or contingent upon services provided to the union, the Board treats the benefits as interim earnings deductible from backpay. *Rice Lake Creamery* Co., 151 NLRB 1113, 1131 (1965), enfd. as modified 365 F.2d 888, 893 (D.C. Cir. 1966). However, if the sums received represent collateral benefits flowing from the association of the discriminatees with their union, they are not deductible. Id. The burden is on the respondent to prove that the benefits are interim earnings. Id.

In assessing whether the particular strike benefits at issue are properly characterized as interim earnings or collateral benefits, the Board looks to the totality of the circumstances, including factors such as what the picketers were told by the union about the benefits,[14] the picketers' understandings of what was required to qualify for the benefits,[15] whether the amount of the benefits was tied to time spent on the picket line,[16] and whether the benefits were paid from a fund to which the picketers had contributed.[17] Where the weight of the evidence is to the contrary, mere conclusory testimony that picketing was or was not required as a condition of receiving the benefits will not suffice.[18]

B. Judge's Analysis

Summarizing the testimony of the discriminatees, the judge found that while virtually all of the strikers re-

[11] These discriminatees are Andrea Andre, Claire Camille, Solange Carasco, Rose Marie Castor, Brigitte Charles, Cecile Charles, Eugenie Charles, Francesca Dormetus, Yvette Fleurimond, Murat Georges, Banilia Guerrier, Pablo Guity, Ana Henandez, Marie Jacques, Clorina Joseph, Mimose Lacrois, Marie Leconte, Alma Louis, Marie N. Louis, Jean Michelet Louisma, Idiemese Lovinske, Andrew Mack, Pierre Malbranche, Jesula Massena, Rose Andre Mauvais, Josette Philogene, Marie Pierre, Loficiane Raymond, Eddy Rodrigue, Marie Romain, Marie Rousseau, Pierre-Antoine Surin, Marie Thelismond, Anna Thomas, Wilfrid Virgile, Lourdes Williams, and Auguste Zama.

[12] Supp. JD IV. See fn. 6 above for the use of the term "strike benefits" in this Decision.

[13] There were two other "classes" of strikers: (1) strike "captains" earned $65 a week in addition to their regular strike benefits; and (2) certain individuals received $55 in addition to their regular strike benefits for performing night-shift duties on sporadic occasions. There are no exceptions to the judge's findings that the additional moneys paid to the strike captains and the individuals who performed night duty were interim earnings deductible from backpay.

[14] See *Glover Bottled Gas Corp.*, 313 NLRB 43, 45 (1993), enfd. 47 F.3d 1230 (D.C. Cir. 1995), cert. denied 516 U.S. 816 (1995) (strike benefits found collateral where, inter alia, picketers were never told by the union what the requirements were to be eligible for benefits).

[15] See *Hansen Bros. Enterprises*, 313 NLRB 599, 605–606 (1993) (strike benefits found to be interim earnings notwithstanding union official's testimony that payments had nothing to do with time on the line where picketers testified unequivocally that they understood payments to be contingent on their picketing).

[16] Compare, *Rice Lakes Creamery Co.*, supra (strike benefits found to be collateral where the picketing requirement was not absolute, benefit amount was unrelated to hours picketed, and a striker received no benefits even though he picketed) and *Superior Warehouse Grocers*, 282 NLRB 802 (1987) (strike benefits found to be interim earnings where picketer was compensated for the hours that he picketed on behalf of the union, the union kept a strict accounting of his hours, and the picketing was to further the union's organizational objectives).

[17] See *Standard Printing Co. of Canton*, 151 NLRB 963, 967 (1965) (strike benefits paid from strike fund to which picketers contributed found to be collateral benefits not deductible from backpay on the ground that "the strike benefits neither resulted from nor created an employment relationship, and that the strike benefit scheme [was] in the nature of a private insurance arrangement.").

[18] See *Glover Bottled Gas Corp.*, supra, 313 NLRB at 45; *Hansen Bros. Enterprises*, supra, 313 NLRB at 605–606.

ceived money from the Union designated as strike benefits, "[t]here [was] no evidence that the Union actually required the discriminatees to do anything other than show up and sign in [in] order to receive the strike benefits." Rather, the judge found that "[t]he continued payment to [discriminatees] of the strike benefits they had received before August 13 was nothing more than an *inducement* to encourage the employees to remain available for reinstatement by the Respondent and to cooperate in the Union's efforts to find them interim employment" (emphasis added).

Relying on *Glover Bottled Gas*, supra, the judge rejected as "conclusory" discriminatees' testimony to the effect that they were paid to picket or had to picket to receive strike benefits. The judge found there was no evidence that after August 13 any union representative told the discriminatees that they were required to picket for a full day as a condition of receiving the daily payments. Citing *Standard Printing* (fn. 17 above), the judge found that while the discriminatees may have been required to appear at the former picket line and sign in, the Board has held such a requirement insufficient to establish that strike benefits were the equivalent of interim earnings. Finally, the judge found with respect to the machinists that "there [was] even less evidence that the strike benefits were wages for picketing." In reaching this conclusion, the judge relied especially on the fact that the machinists received the same amount of money each week, regardless of how many hours a day, or how many days a week, they were at the former picket line.

C. The Respondent's Exceptions

The Respondent does not contend that the legal analysis applied by the judge is incorrect, but asserts that his application of that analysis to the facts of this case is "flawed" and that he reached the wrong result by relying on *Glover Bottled Gas* to find that the payments were collateral benefits. As to the machinists, the Respondent, relying on testimony of three machinists, asserts that the judge erred in finding that the machinists were not required to remain at the site of the former picket line during the backpay period in order to receive their strike benefits.

D. Analysis

1. Nonmachinist strike benefits

Contrary to our dissenting colleague, we find, in agreement with the Respondent, that the weight of the evidence demonstrates that the strike benefits received by the nonmachinists were contingent upon the strikers' continuous presence at the picket line and more akin to compensation for services than collateral benefits. Here, unlike *Glover Bottled Glass*, the strikers were not yet represented by the Union and had not paid dues or contributions to an established strike fund from which the benefits were paid.[19] Moreover, in *Glover Bottled Gas*, the employees only had to be "available" for picketing and the benefits were not contingent upon or tied to the amount of time spent on the picket line. By contrast, the benefits here were directly proportional to the number of days the nonmachinist strikers spent on the line, and the Union kept close tabs on the picketers through sign-in sheets and vouchers.[20] Further, the nonmachinist strikers generally testified that they understood that the benefits were received for showing up to demonstrate in support of the Union's organizing campaign by singing, marching and chanting on the picket line. Indeed, once the picketing ceased, so also did the payment of benefits cease.

In dissent, our colleague relies heavily on the judge's finding that the discriminatees' testimony—that they had to spend time on the picket line—was "conclusory." The dissent contends, in effect, that after the strike ended on August 10, the picketers were no longer obligated to stand on the picket line or to demonstrate on behalf of the Union. The dissent finds determinative, as did the judge, that there was no direct evidence that union offi-

[19] The dissent asserts that the "source" of the strike benefits is irrelevant in deciding whether the benefits are collateral benefits or interim earnings. Yet, the dissent itself states that when the source of the benefits is a strike fund to which the strikers *have* contributed, that factor is relevant to show that the strike benefits are *not* interim earnings (see dissent, fn. 7 below). By the same token, if, as here, the source of the benefits is a strike fund to which strikers have *not* contributed, this factor must evidence that the strike benefits are more likely interim earnings.

[20] The dissent asserts that while the benefits were directly proportional to the days that the strikers reported to the picket line, that fact does not support our finding that the benefits were directly proportional to the amount of time the strikers spent on the line. We disagree. As explained elsewhere, and as our dissenting colleague concedes, the "vast majority" of the strikers generally reported to the picket line each day about the same time that they would have reported for work and they remained there until the end of the workday. Since they remained on the line all day, the benefits they received were indeed directly proportional to the amount of time they spent at the line, i.e., all day. The dissent also contends that the Union did not keep "close tabs" on the amount of time the strikers spent at the line. We disagree. The fact that the picketers were required to sign in each day at the line to receive benefits for that day, and then were required to sign a voucher or ledger each Friday to receive the benefits, considered together with the fact that once at the picket line, the picketers generally remained all day, evidence that the Union did indeed keep close tabs on the strikers' time on the line. In sum, we find that the Union's keeping of a strict account of the strikers' time spent on the picket line, and its payments to them for that time, is comparable to the situation in *Superior Warehouse Grocers*, 282 NLRB 802 (1987), cited by our dissenting colleague. In that case, the Board found that the benefits were interim earnings where, inter alia, the union kept a strict accounting of the time that Lopez picketed on its behalf and paid him for that time. That is what the Union did here.

cials told the strikers after August 10 that they were obligated to demonstrate in support of the Union to receive strike benefits. In our view, the absence of such testimony is not dispositive. The picketers already understood that they had to show up and demonstrate to receive strike benefits—that was their testimony. Thus, what we find significant is that after August 10 no union official ever told the employees that they did *not* have to continue to demonstrate in support of the Union to receive the benefits. As the picketers reasonably "understood," the status quo prior to August 10 continued after that date.

Our colleague contends that the employees' testimony (which elsewhere he credits even over more contemporaneous conflicting documentation) was "based on a misunderstanding"; that what they understood was wrong; and, most seriously, that we have "seized upon the mistaken testimony" to reduce the Respondent's backpay liability. The difficulty with that position is its utter lack of evidentiary support. There is simply no showing the employees testified based on any misunderstanding, and we certainly have not seized on any "mistaken testimony" in reaching our conclusions here.

In sum, we cannot agree with the judge and our dissenting colleague that the Union's continued payments of strike benefits to the strikers after August 13 "was nothing more than an inducement to encourage the employees to remain available for reinstatement by the Respondent and to cooperate in the Union's efforts to find them interim employment." We find instead that the strike benefits were akin to compensation for the strikers' continued presence in support of the Union. We therefore remand the case to Region 29 for a recalculation of backpay in accordance with this supplemental decision.

2. Machinists' strike benefits

We agree with the judge, however, that the machinists' strike benefits were a collateral benefit and therefore not deductible from gross backpay. Although the machinists received greater strike benefits than the nonmachinists, Gerstein, the Union's manager-secretary, testified that the machinists were very highly paid and that the other workers "felt that in order for them to give their support" they should receive a larger amount of strike benefits. Thus, the larger amount that the machinists received was because of their higher paying jobs in the workplace, not because of any activity that they performed at the former picket line.

Further, the judge found, in contrast to the other former strikers, that the machinists did not have to report to the picket line each day to receive their strike benefits at the end of the week. In addition, unlike the benefits received by other strikers, the amount of the machinists' benefits was the same each week regardless of the number of days that the machinists appeared at the picket line. As to the time that the machinists did spend on the picket line, the judge found that they did not have to remain at the picket line all day, but were more flexible in their hours than the nonmachinist former strikers.[21] On these bases, the judge found that the record did not establish that the machinists' strike benefits were "tantamount to wages for services performed for the Union."

In excepting to the judge's finding, the Respondent relies on the testimony of three machinists, Chano Reyes, Simion Castillo, and Fritho Lapomarede, that when they came to the site of the former picket line, they remained there all day, and on Lapomarede's further testimony that he stood outside the Respondent's facility "[s]o that there would be a union." The Respondent contends, in effect, that if the judge had specifically considered this testimony, he would have found that the strike benefits were wages paid in return for this service. We disagree.

As an initial matter, we observe that the judge did state that "[*s*]*ome* [of the machinists] testified that they spent no more than 5 hours a day with their fellow strikers" (emphasis added). Obviously, in making this statement, the judge implicitly took into account the fact that other machinists testified that they spent all day at the former picket line. Even so, the number of hours a day that the machinists spent at the site of the former picket line is not the decisive issue. What is decisive is the judge's subsequent and fully-supported finding that the machinists who testified "were not consistent in the hours or *number of days* they went to the site of the picket line, *yet the records in evidence show that they received the same amount each week"* (emphasis added). In sum, the machinists, in contrast to the other strikers, received their strike benefits regardless of whether they appeared at the former picket line. Thus, the Respondent has not met its burden of proving that the machinists' strike benefits were tantamount to wages given in return for services rendered to the Union.

IV. UNAUTHORIZED ALIENS[22]

A. Admitted Unauthorized Aliens

In the compliance proceeding, four of the discriminatees admitted that they lacked authorization to be present and employed in the United States during the backpay period. Relying primarily on the Board's decision in *A.P.R.A. Fuel Oil Buyers Group, Inc.,* 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2d Cir. 1997), the judge stated that "[t]he Board has made it clear that backpay, as a

[21] This finding further supports our finding that the nonmachinists' strike benefits were interim earnings.

[22] Supp. JD V.

retrospective remedy for an employer's unfair labor practices, is not contingent on a discriminatee's immigration status[.]" The judge found that the Board had recently reaffirmed that position in *Hoffman Plastic Compounds, Inc.,* 326 NLRB 1060 (1998). Id. However, after the judge issued his decision, the Supreme Court issued its opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), and found that, following the enactment of IRCA in 1986,[23] discriminatees who were not authorized to be present and employed in the United States were not entitled to backpay. As the Board explained in *Concrete Form Walls, Inc.,* 346 NLRB 831, 833 (2006):

> In *Hoffman*, the Supreme Court reexamined the NLRA's application to undocumented workers in light of the passage of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a. The Court held that the Board may not award backpay to undocumented workers because such an award would run "counter to the policies underlying IRCA, policies the Board has no authority to enforce or administer." Id. at 149.

Given the Court's holding in *Hoffman*, we reverse the judge and find that the four discriminatees who admitted that they were undocumented during the backpay period, Louine Joseph, Fritho Lapomarede, Francisco Moreira, and Vincente Suazo, are not entitled to backpay.[24]

B. Remand of Issues Regarding Discriminatees Whose Authorization Status Remains Unresolved

As noted above, there are six discriminatees whose authorization status during the backpay period, and consequent entitlement to a backpay remedy, remains uncertain. The discriminatees and the reasons for the uncertainty are as follows.

1. Consistent with the judge's ruling that the Respondent could ask discriminatees hired prior to the enactment of IRCA whether their immigration status affected their search for work, the Respondent attempted to question Atulie Balan, who was hired in 1983, on this issue.[25] In response, counsel for General Counsel asserted that Balan was legal and had proper documentation during the entire backpay period and that she was willing to stipulate that Balan had her immigration documentation as of August 1990 (the beginning of the backpay period). The judge accepted the proposed "stipulation" and ended the discussion.

We find merit in the Respondent's exception that the judge erred by precluding questioning of Balan regarding her immigration status during the backpay period. The Respondent never agreed to the General Counsel's proposed stipulation and was not bound by it. Moreover, because the Respondent hired Balan prior to the enactment of IRCA, it was entitled, under the judge's own ruling, to ask Balan whether her immigration status affected her search for work. The judge should not have cut off the Respondent's attempted inquiry.

2. Bardinal Brice acknowledged at the compliance hearing that he was unauthorized when he worked for the Respondent and provided fraudulent social security documents to the Respondent in June 1988. Brice further testified, however, that he corrected his immigration problems in 1991 during the backpay period, and was therefore able to find interim employment at Alfred Chemical during the second quarter of 1991. The General Counsel was subsequently able to obtain an earnings report from the Social Security Administration that matched Brice's name and number. However, that does not establish the date on which Brice secured valid work authorization. Until he did so, Brice was ineligible for backpay.

3. Michelet Exavier admitted that the social security number he provided to the Respondent and his interim employer was not valid. As the judge found, Exavier corrected this problem in 1993, and at the time of the compliance hearing possessed a valid social security number. The judge found that the Respondent had failed to establish that Exavier's lack of a valid social security number affected his search for work during the backpay period.

Exavier's use of an invalid social security number at least raises an issue as to whether he was lawfully authorized to work during the backpay period, even though it does not, standing alone, resolve that issue.[26] Thus, Exavier's authorization status during the backpay period remains to be determined.

4. Marie Jose Francois initially testified that she applied for unemployment compensation during the backpay period but was denied "[b]ecause [she] was not documented at that time . . . [she] hadn't taken care of [her] Green Card then." Later in the hearing, she submitted a green card (GC Exh. 100) that indicated it was valid from November 8, 1989, until May 7, 1992. There is a

[23] The Immigration Reform and Control Act of 1986.

[24] We note that the Respondent reinstated Joseph on April 1, 1991, and the other three discriminatees on August 20, 1991. We assume the Respondent is in compliance with IRCA.

[25] The Respondent inquired not only to ascertain whether such status affected the search for work, but also to determine whether it affected eligibility for backpay. This was true for all discriminatees discussed in this section.

[26] See *Concrete Form Walls, Inc.,* supra at 835 fn. 20, where the Board observed that "[a] Social Security Administration 'no-match' letter cannot by itself put an employer on notice that an employee is ineligible to work."

marking, however, under the "2" of "1992." The Respondent contended that the marking was a zero and that "1990" was altered to "1992." Counsel for the General Counsel stipulated that there appeared to be some marking under the "2." Relying on the Board's decision in *A.P.R.A. Fuel Oil Buyers Group*, supra, the judge found it unnecessary to determine whether the document was valid because "the fact of undocumented status alone does not render a discriminatee ineligible for backpay." Applying the Supreme Court's holding in *Hoffman Plastic Compounds*, the issue of whether Francois possessed proper work authorization during the backpay period must be resolved.

5. Rene Geronimo, like Exavier, admitted that the social security number he provided to the Respondent was invalid, but the judge found this did not warrant a denial of backpay because undocumented aliens were entitled to the Board's remedies. Under *Hoffman Plastic Compounds,* we must reject that finding but, as noted above at footnote 26, the use of an invalid social security number, standing alone, does not establish that an individual is unauthorized. Whether Geronimo was, in fact, unauthorized to work during the backpay period remains an open question.

6. At the compliance hearing, the Respondent's counsel asked discriminatee Rose Marlene St. Juste whether her immigration status affected her ability to find work. St. Juste refused to answer this question or any other questions regarding her immigration status and its effect on her search for work. The judge nevertheless found that even if a lack of documentation caused St. Juste to tailor her job search to employers who were not "apt" to request such documents, he would not find that such a lack of documentation resulted in a willful loss of earnings. Obviously, under *Hoffman*, the judge's ruling cannot stand, and St. Juste's immigration status during the backpay period remains unresolved.

In sum, we shall remand these six discriminatees to the judge to develop a complete factual record on the issues discussed above. The judge will then issue a second supplemental decision with findings of fact only. After the parties have had an opportunity to file exceptions if they so desire, the Board will issue a Second Supplemental Decision resolving the legal issues concerning these discriminatees.

V. INDIVIDUAL DISCRIMINATEES

We now discuss certain of the individual discriminatees whose backpay awards the Respondent challenges. First, in section A, we consider Giles Robinson, one of the two discriminatees discharged prior to the strike.[27] Next, in section B, we consider 5 of the 13 discriminatees found to have been unlawfully discharged after their reinstatement, and as to whom we reach a different result than the judge on certain backpay issues.[28] In section C, we discuss whether four discriminatees were properly reinstated. Finally, in section D, we consider 13 of the remaining discriminatees.[29] To the extent that our findings require a recalculation of backpay, we shall remand the case to Region 29 for a recalculation of backpay consistent with this Supplemental Decision.

A. Giles Robinson[30]

Robinson was unlawfully discharged on December 1, 1989. His backpay period runs from that date to August 20, 1991, the effective date of the Respondent's offer of reinstatement to him and the former strikers. Robinson died prior to the backpay hearing. His widow testified

[27] As to James Anthony Charles, the other discriminatee discharged prior to the strike, we agree with the judge, for the reasons stated by him, that Charles is entitled to a backpay award of $12,150.55, plus interest.

[28] Regarding the remaining eight of these discriminatees, as explained above in sec. IV, we have found that Francisco Moreira was unauthorized to be present and employed in the United States during the backpay period and that he should be denied backpay for that reason. Because we agree with the judge's findings as to the seven remaining discriminatees, we find it unnecessary to consider them individually. However, as with other discriminatees as to whom we adopt the judge's findings of backpay awards without discussion in this decision, we will remand six of these seven individuals to Region 29 for recalculation of the backpay owed them in light of our finding that the strike benefits are interim earnings deductible from gross backpay. They are Marie Rose Joseph, Marie Nichole Mathieu, Nilda Matos, Antoinette Romain, Margarett St. Felix, and Mulert Zama. The seventh individual, Victor Velasquez, was a machinist. His strike benefits are not deductible from gross backpay.

[29] We adopt the judge's findings, for the reasons set out by him in sec. VII,H of his supplemental decision, as to the backpay awards for the remaining discriminatees except that we shall remand 54 of these discriminatees to Region 29 for recalculation of backpay to include nonmachinist strike benefits as interim earnings. These individuals are Rose Abreu, Jean Max Adolphe, Marie Ahrendts, Francois Alexandre, Ana Alvarez-Contreras, Andreze Andral, Viergelie Anier, Joseph Aris, Marie Rose Armand, Marie Augustin, Jean Balan, Eloge Jean Baptiste, Gerda Benoit, Edaize Blanc, Jean Joseph Eliacin (Bonny), Inovia Brutus, Gertha Camilus, Ghislaine Caristhene, Marie Casseus, Simion Castillo, Alourdes Choute, Anne Cidieufort, Gertha Denaud, Jesula Denis, Eduardo Roman Feliciano, Marlon D. Flores, Marie Gresseau, Tomas Guervara, Yolanda Heurtelou, Therese Jean, Acces Joseph, Ghislaine Joseph, Julmene Joseph, Leanna Joseph, Marc Olyns Joseph, Ucemeze Kernizan, Nevius Lambert, Marie Louima, Rachelle Louissaint, Alta Meuze, Jean Demard Midy, Marie Mondestin, Marie Narcisse, Jean Olivier, Ludovic Pierre-Louis, Miracia Porsenna, Milton Ramos, Violette Raymond, Joseph Saintval, Monique Samedy, Justo Suazo, Josette Vaval, Agare Victor, and Joseph Virgile. The six remaining individuals (Wilner Ceptus, Luis Ramos Frederick, Oscar Nunez, Marcos Pitillo, Romulo Ramirez, and Orlando Ramos) were machinists and therefore we shall exclude them from the remand order.

[30] Supp. JD VII,D.

on his behalf. During the backpay period, he worked for the Union. The issue presented is whether the judge erred in deducting from gross backpay all of Robinson's interim earnings from the Union. We find that he did.

Mrs. Robinson testified that her husband began to work for the Union about 1 to 2 months after the Respondent discharged him. The judge found that the amounts the Union paid Robinson were in compensation for services he performed for the Union, and were deductible as interim earnings. While employed by the Union, Robinson often worked 7 days a week for an average of 58 hours. Prior to his discharge, Robinson averaged 12 hours of overtime each week for the Respondent (52 hours). Although the judge correctly noted that the Respondent was only entitled to an offset for the interim earnings from work "equivalent to the amount of time Robinson would have worked for the Respondent but for his unlawful discharge," he nonetheless deducted the full amount Robinson received from the Union. In doing so, he summarily found that the 12 hours of overtime that Robinson worked each week for the Respondent "translate[d]" to 18 hours of straight time, "which [was] equivalent to seven days a week, the same amount of time Robinson spent working for the Union."

Regional Import & Export Trucking Co., 318 NLRB 816, 818 (1995), adopts Section 10542.3 of the NLRB Casehandling Manual. That provision states that when a discriminatee works "more hours for an interim employer than he [or she] would have worked for the gross employer, only interim earnings *based on the same number of hours* as would have been available at the gross employer should be offset against gross backpay."[31] (Emphasis added.) Therefore, the judge erred in equating, or "translat[ing]," the 12-overtime hours Robinson worked for the Respondent into the 18 hours of straight time he worked for the Union on weekends. Because Robinson worked 12 hours of overtime for the Respondent, only interim earnings for the same number of hours should be deducted from gross backpay. We shall remand this issue to Region 29 for a recalculation of backpay consistent with this supplemental decision.

[31] See also *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989) ("A backpay claimant who 'chooses to do the extra work and earn the added income made available on the interim job' may not be penalized by having those extra earnings deducted from the gross backpay owed by the Respondent. *United Aircraft Corp.,* 204 NLRB 1068, 1073 (1973).").

B. The Discriminatees Unlawfully Discharged After Recall[32]

1. Joseph DeLeon[33]

DeLeon's backpay period runs from August 13 to April 1, 1991, the date of his lawful reinstatement. DeLeon was a machinist and received $200 a week in strike benefits. In the underlying case, the judge found that the Respondent had improperly reinstated DeLeon on September 19, had unlawfully harassed him thereafter, and had unlawfully terminated him on October 29.[34]

The judge found that DeLeon looked for work throughout the backpay period. However, he predicated that finding on his conclusion that given the "piecemeal" nature of the Respondent's offers of reinstatement,[35] "it would not be unreasonable for any of the discriminatees[, including DeLeon,] to forego looking for work during the first month or so while they waited to see if the Respondent would extend a reinstatement offer to them." The Respondent excepts to this finding, and we find merit to that exception to the following extent.

As an initial matter, we note that in our recent decision in *The Grosvenor Resort*, 350 NLRB 1197 (2007), we found that "absent circumstances justifying a longer delay, the discriminatees here should have begun their initial search for interim work within the 2-week period following their discharges." Id. at 1199. If the discriminatees began their search for work within this 2-week period, their backpay would begin to run from the date of the respondent's unlawful action. If, however, the discriminatee failed to commence a search for work within this 2-week period, then entitlement to backpay would not begin until the discriminatee commenced a proper search for work.[36] Ibid.

In the unique circumstances of this case, where the Respondent made "piecemeal" offers of reinstatement to some of the discriminatees in the weeks after the Union made its August 10 unconditional offer to return the striking employees to work, we find that the discriminatees would have reasonably believed that the Respondent

[32] Supp. JD VII,F.

[33] Supp. JD VII,F,1.

[34] *Domsey Trading Corp.,* 310 NLRB at 807–808.

[35] See fn. 4 above.

[36] Member Walsh dissented in *Grosvenor* and does not agree with the concept of a fixed initial period during which discriminatees are obligated to commence a search for work. Consistent with prior law, he would consider each discriminatee's efforts over the entire backpay period to determine whether the individual satisfied the obligation to mitigate backpay. In the present case, Member Walsh agrees with his colleagues that the piecemeal nature of the Respondent's offers of reinstatement is an additional relevant consideration in determining whether the discriminatees satisfied their obligation to mitigate backpay.

would recall them in August or September. Thus, we find that the former strikers were not obligated to begin their search for work until the beginning of October. If, however, discriminatees failed to commence a search for work even into October, then the delay cannot be attributed to the Respondent's piecemeal offers of reinstatement. In such cases, it would not be appropriate to grant discriminatees an initial period in which they could delay their search for work and we decline to do so. Further, if discriminatees were reinstated after this initial period, i.e., at a time when the "unique circumstances" discussed above no longer existed, and then were unlawfully discharged still within the backpay period, we shall apply the 2-week period set out in *Grosvenor* to determine whether these discriminatees unreasonably delayed their search for work at that time.

Because DeLeon was recalled on September 19, and thus before the end of the period we have found discriminatees could delay their initial search for work, we shall not toll his backpay for the period prior to his recall. Accordingly, we adopt the judge's finding of the backpay amount owed and shall order the Respondent to pay DeLeon a backpay award of $6802, plus interest.

2. Louis Antoine Dormeville[37]

Dormeville was injured at work on December 20, 1989, and was recovering from that injury when the strike started. In the underlying proceeding, the judge found that Dormeville was well enough to return to work in March 1990.[38] When Dormeville attempted to return to work on August 13, the Respondent questioned him about his injury. He returned the next day with a doctor's note stating that he was fit for work. The Respondent returned him to work, unlawfully harassed him, and unlawfully terminated him later in the day. Dormeville returned to work on August 20, 1991, worked for 2 or 3 days, and then went to his doctor. His doctor told Dormeville that he could not work. Dormeville did not work again until 1995. Dormeville received workers' compensation benefits before, during, and after the backpay period.

The issue here is whether the judge erred in deducting Dormeville's workers' compensation benefits from gross backpay. We find that he did not.

As an initial matter, at the compliance hearing, the Respondent attempted to assert as an affirmative defense that Dormeville was not entitled to receive any backpay because his receipt of workers' compensation benefits during the backpay period established that he was unable to work during that time. The judge found that the Respondent was precluded from asserting this defense because it had failed to include the defense in its answer to the compliance specification.[39] We agree. Under Section 102.56(c) of the Board's Rules and Regulations, "[i]f the respondent files an answer to the specification but fails to deny any allegation of the specification . . . and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true[.]" Therefore, the judge did not err in precluding the Respondent from raising this defense at the hearing.[40] The judge found, however, that the workers' compensation benefits Dormeville received during the backpay period were a replacement for wages and therefore deductible from gross backpay.

Citing, inter alia, *Canova Moving & Storage*, 261 NLRB 639, 649 (1982), enfd. 708 F.2d 1498 (9th Cir. 1983), the General Counsel excepts to the judge's finding and asserts that the Board has found that awards of workers' compensation consist of two components, one a payment for lost wages, which the Board has found deductible from gross backpay as interim earnings, and the other a reparation for the physical injury suffered, which the Board has found is unrelated to wages and therefore not deductible as interim earnings. The General Counsel contends the Respondent has not shown that Dormeville's workers' compensation payments were a replacement for lost wages because it cannot be determined what portion of the workers' compensation he received was payment for lost wages and what portion was reparation for his injury.

The Respondent asserts in turn that, in *Canova*, the Board distinguished the two components of workers' compensation awards as Permanent Disability benefits and Temporary Disability benefits, and that under *Canova*, "temporary disability benefits are 'a substitute for lost wages during the temporary disability period.'" Relying, inter alia, on its exhibit 338(E), the Respondent asserts that all the benefits Dormeville received during the backpay period were temporary disability benefits and are therefore deductible as interim earnings. We agree with the Respondent.

Respondent's Exhibit 338 includes as "Exhibit E" an affidavit from a senior attorney in the Legal Department of "The State Insurance Fund." The affidavit states at

[37] Supp. JD VII,F,2.

[38] *Domsey Trading Corp.,* supra at 801.

[39] The judge incorrectly stated the relevant section of the Board's Rules and Regulations. The relevant section is Sec. 102.56(c).

[40] At Supp. JD fn. 28, the judge noted that, after the close of the hearing, the Respondent requested permission from the Board to file a special appeal from his ruling on Dormeville. (The record indicates that the Respondent filed its appeal on Dec. 24, 1998.) The judge stated that "[t]o date, the Board has not ruled on this request." For the reasons stated here, we deny the Respondent's request for permission to file a special appeal.

paragraph 10 that "[t]he terms 'T' and 'P' which appear on Form C-8/8.6 dated 2/20/98 and attached herein refer to 'temporary disability' and 'permanent disability' respectively." The attached form C-8/8.6 from the State Workers' Compensation Board provides a summary of Dormeville's benefit payments for disability. For the period from December 23, 1989, to August 12, 1992, a period encompassing the backpay period, the payments were for a disability described as "T," i.e., temporary. Thus, under the Board's analysis in *Canova*, the judge was correct in considering these benefits compensation for lost wages and in deducting them from Dormeville's gross backpay.[41]

3. Ronald Jean Baptiste[42]

The Respondent recalled Baptiste on August 24, but unlawfully discharged him on August 27.[43] The judge found that after his unlawful discharge, Baptiste went to the former picket line until he found interim employment at Calvin Klein in January 1991. In computing Baptiste's backpay, the General Counsel deducted only the interim earnings from Calvin Klein. However, the social security earnings record for Baptiste also showed earnings of $2088 in 1990 from an employer identified as "Concepts of Independence, Inc."

The issue is whether the judge erred in failing to deduct from gross backpay the $2088 reported from Concepts of Independence. We find that he did.

The judge observed that the records of the Social Security Administration, after the expiration of the time for correcting such records, are conclusive for purposes of the Social Security Act. The judge further observed that there was no evidence that Baptiste ever attempted to have his social security records corrected to deduct the claimed erroneous amount. The judge nevertheless credited Baptiste's denial that he ever worked for Concepts of Independence during the backpay period.

As the judge himself observed, the Board has found social security records controlling as to interim earnings when the claimant's testimony is at odds with those records. *Associated Transport Co. of Texas, Inc.,* 194 NLRB 62, 63 (1971). Further, to the extent that a claimant's testimony is at variance with the social security records, the General Counsel can easily call the matter to the attention of the Social Security Administration and request clarification. *East Texas Steel Castings Co.,* 116 NLRB 1336, 1340 (1956), enfd. 255 F.2d 284 (5th Cir. 1958). Here, neither the General Counsel nor Baptiste sought to resolve the discrepancy prior to the trial. The mere possibility that someone else might have worked for Concepts of Independence using Baptiste's social security number is not a sufficient basis to disregard that Agency's official records of Baptiste's earnings. Where, as here, the doubt as to the amount of interim earnings is created not by the Respondent but by the claimant's own social security records—the very evidence relied upon by the General Counsel to establish backpay liability—and that doubt could have been resolved prior to the hearing, we decline to simply resolve the issue against the Respondent. In our view, under those circumstances, a bare denial of interim earnings should not trump the Social Security Administration's official records. Accordingly, we shall remand to Region 29 the issue of Baptiste's backpay for the deduction of the $2088 in interim earnings from Concepts of Independence and for the deduction of the strike benefits he received.[44]

4. Maximo Martinez[45]

Martinez was reinstated on April 1, 1991, and was unlawfully discharged on April 16, 1991.[46] He found interim employment for a few days shortly after his discharge. As a machinist, Martinez received $200 a week in strike benefits. Martinez admitted that he did not look for work while he was receiving strike benefits. Based on this admission, the judge tolled his backpay from August 13 to February 1, 1991. Martinez also testified that he never looked for work during the backpay period by going to a workplace to seek employment. Instead,

[41] Assuming, without conceding, that Dormeville's workers' compensation benefits were deductible from gross backpay, the General Counsel excepts to the judge's finding that Dormeville is owed backpay of $1,960.55, plus interest. The General Counsel contends that Dormeville's net backpay should be $3,207.77, plus interest. In explaining its calculation of the backpay owed, the General Counsel stated that "[t]he workers' compensation awards for the backpay period appear to award Mr. Dormeville the amount of $211.41 per week." (GC Exceptions at p. 12.) However, as the judge explained at the hearing, there is an ambiguity in the workers' compensation awards introduced into evidence as R. Exhs. 91(a)–(g). They do not show weekly payments, but "suggest that those payments—these periods of payment were only received after a hearing and were retroactive." (Tr. XV 151.) Thus, we are unable to determine from the record before us on what basis the judge calculated Dormeville's backpay award and whether he did so correctly. Accordingly, we shall remand this issue to the judge for a recalculation, if necessary, of the workers' compensation benefits to be deducted from Dormeville's gross backpay.

Finally, the judge found that Dormeville's strike benefits were not deductible from backpay. We shall remand this issue to Region 29 for a recalculation of backpay in light of our finding that the strike benefits are interim earnings.

[42] Supp. JD VII,F,3.

[43] *Domsey Trading Corp.,* supra at 803–804.

[44] For the reasons set out in his partial dissent, Member Walsh would adopt the judge's finding that Baptiste did not work at Concepts of Independence during the backpay period and that therefore the $2088 reported as earnings from that employer should not be deducted from gross backpay as interim earnings.

[45] Supp. JD VII,F,5.

[46] *Domsey Trading Corp.,* supra at 810–811.

about once every week or two, Martinez asked union representative Blount if he would find Martinez a job. Martinez also asked friends about jobs and read want ads.

The issue is whether the judge erred in awarding backpay for the entire second quarter of 1991 after Martinez was discharged. We find that he did.

The judge found that "Martinez' minimal job search efforts through the remainder of the backpay period [February 1 to August 20, 1991] did not fully satisfy his duty to mitigate." However, because Martinez returned to work for the Respondent on April 1 and was subsequently fired on April 16, the judge did not toll backpay for the second quarter of 1991. Giving Martinez "the benefit of the doubt," the judge found that "his minimal efforts were sufficient for the brief period before and after his reinstatement in that quarter." The judge did toll backpay for the third quarter of 1991, because he found that Martinez' "continued reliance on methods that had proven unsuccessful after July 1, did not satisfy his duty to mitigate."

Given that Martinez used the same methods to search for work in the second quarter of 1991 as he did during the rest of the backpay period, the judge's finding that Martinez' minimal job search efforts after his discharge on April 16 satisfied his duty to search for work conflicts with his further finding that Martinez' job search efforts in the remainder of the backpay period did not satisfy that duty. Further, the judge found that the one job which Martinez did find in the second quarter of 1991 did not establish that Martinez' job search efforts were reasonably diligent. We agree with this conclusion. We therefore reverse the judge's finding that Martinez is entitled to backpay for the second quarter of 1991. Because Martinez did not commence a reasonably diligent search for work after his April 16 discharge, we will toll backpay from the date of discharge. We remand this issue to Region 29 for a recalculation of backpay consistent with this Decision.

5. Dieulenveux Zama[47]

The Respondent reinstated Zama to a more difficult job on September 28, but terminated him on October 2. In the underlying case, the judge found the discharge unlawful.[48]

The Respondent excepts to the judge's finding that Zama was entitled to backpay for the period from August 13 to October 31. We find merit in this exception to the extent explained below.

Zama testified that he did not look for work while he was on strike. The judge found that this period ran from January 30, the date the strike began, until February 1, 1991, the date that the Union stopped paying strike benefits. The judge tolled backpay from November 1 to February 1, 1991, because Zama did not look for work during this period. However, the judge did not toll backpay for the period from August 13 to October 31. The judge reasoned that given the piecemeal nature of the Respondent's reinstatement offers, it would have been reasonable for Zama to postpone looking for work from August 13 to September 28, the date the Respondent reinstated him, and that Zama was permitted under Board law to wait a few weeks after his October 2 discharge before looking for work.

As explained above, owing to the "piecemeal" nature of the Respondent's offers of reinstatement, we have found that discriminatees were not obligated to search for work until the end of September. Because the Respondent reinstated Zama prior to that, we find that Zama's backpay should not be tolled prior to his reinstatement. However, after his discharge on October 2, Zama failed to search for work. Accordingly, we will toll backpay from October 3 to the end of October because Zama did not make a reasonably diligent search for work during this period. We remand this issue to Region 29 for a recalculation of backpay consistent with this Decision.[49]

C. The Four Discriminatees as to whom an Issue Arose at Compliance Regarding Whether they were Properly Reinstated[50]

The judge found that the Respondent reinstated and then terminated or laid off four other discriminatees during the backpay period: Marie Carmelle Camille, Adrian Castillo, Louis P. Jean, and Mureille LaFleur. No unfair labor practice charges were filed with respect to the termination/layoff of these four employees. Rather, the issue is whether the Respondent properly reinstated these discriminatees when it recalled them to work. If it did, backpay is tolled as of the date of reinstatement. If it did not, backpay continues to run and a discharge for "misconduct" that is a consequence of the improper reinstatement does not toll backpay.[51]

[47] Supp. JD VII,F,12.

[48] *Domsey Trading Corp.,* supra at 802.

[49] The recalculation of backpay should also take account of our finding that strike benefits are interim earnings deductible from gross backpay.

[50] Supp. JD VII,G.

[51] See *John Kinkel & Son*, 157 NLRB 744, 746 (1966) (Board found that employee who was improperly reinstated and then discharged for "insubordination" was entitled to reinstatement and backpay where the "insubordination" was "a reaction against the Employer's unfair labor practices [in failing to properly reinstate him] which had never been rectified."). See also *Mister Fox Tire Co.*, 271 NLRB 960, 960 (1984) (Board found the fact that discriminatee Bure was assigned more oner-

Although the initial compliance specification did not specifically allege that these discriminatees' reinstatement was improper, it did generally allege that the backpay period for all the discriminatees, including these four, ended on August 20, 1991, when the Respondent made a valid offer of reinstatement to all unreinstated strikers. In its answer to the compliance specification, the Respondent did not raise as a defense that backpay was tolled for these four discriminatees during the backpay period.

Although the judge had some concerns about the adequacy of the pleadings on the issue, he permitted the General Counsel to litigate the validity of the reinstatements because the issue arose early in the hearing and the Respondent had "ample opportunity" to respond before the hearing closed. The judge placed on the General Counsel the burden "of producing evidence and proving that the reinstatements were not proper under the Act." Both the General Counsel and the Respondent presented evidence on the issue of whether these four discriminatees were properly reinstated and the judge found the issue was fully and fairly litigated at the compliance hearing.

The judge found that neither the Board nor the court specifically addressed whether backpay would continue to accrue for strikers who returned to work but were subsequently terminated. However, he also found that the judge's decision in the underlying case addressed this issue. Specifically, the decision stated that employees who received facially valid individual reinstatement offers in September 1990,[52] and who were reinstated "without incident," were entitled to be made whole from the date of the Union's unconditional offer to return the strikers to work to the date when the employees actually returned to work. The judge therefore concluded that if these four discriminatees were actually reinstated "without incident" pursuant to one of the Respondent's facially valid offers of reinstatement, then backpay would be tolled as of the date they actually returned to work.

The Respondent excepts generally to the judge's finding that the General Counsel was permitted to litigate the issue of the proper reinstatement of these four discriminatees despite the lack of specificity and notice to the Respondent. We reject this exception.

We agree with the judge that it is appropriate to consider at the compliance stage the issue of whether the Respondent's recall of these four discriminatees was "without incident" and therefore sufficient to toll backpay as of the date of recall. The issue of whether backpay should be tolled as of a certain date is a compliance issue. We agree with the judge that the issue was fully and fairly litigated at the compliance hearing, and we therefore find that the Respondent was not disadvantaged by the General Counsel's failure to plead that the reinstatements at issue were not sufficient to toll backpay. We adopt the judge's findings, for the reasons stated by him, as to Camille, Castillo, and Jean.[53] However, we reverse the judge's finding that LaFleur was unlawfully discharged on January 16, 1991, and that she was therefore entitled to backpay until the end of the backpay period.

LaFleur returned to work on September 19, in response to a "second recall" notice of September 11. She continued to work until December 6, when she was laid off. She was recalled on January 2, 1991, but was terminated on January 16. The issue is whether the judge erred by failing to toll LaFleur's backpay as of September 19, the date of her lawful reinstatement. We find that he did.

The judge found that LaFleur's September 19 reinstatement was proper and that "her subsequent lay-off and recall were for legitimate business reasons." However, he also found "that her reinstatement was not 'without incident'" because when Peter Salm, Respondent's operations manager and son of the owner, told LaFleur to go home on January 16, it was reasonable for LaFleur to conclude that she had been fired. The judge determined that LaFleur was entitled to backpay until the Respondent reinstated her in August 1991 because her "abrupt termination, after a relatively long tenure with the Respondent simply because she did not show Peter the deference he thought he deserved was a continuation of the mistreatment that the Respondent afforded other returning strikers."

The problem with the judge's analysis is that it countermands his own findings. The judge found that LaFleur's September reinstatement was proper and that her subsequent December layoff was for legitimate business reasons –i.e., the layoff was not a continuation of any unfair labor practices. Consequently, the Respondent's

ous work when he returned to work after his unlawful discharge "of necessity preclude[d] a finding of proper reinstatement" and therefore backpay was not tolled when he quit because of the more onerous working conditions).

[52] See *Domsey Trading Corp.,* supra at 799 (explaining that these offers of reinstatement were facially valid because, unlike the Respondent's earlier offers of reinstatement, the offers omitted any requirement that the discriminatees produce documents the Respondent was not entitled to demand).

[53] The Respondent did not except to the judge's specific findings regarding Camille and Jean. We shall, however, remand Camille, Castillo, and Jean to Region 29 for a recalculation of backpay based on our finding that strike benefits are interim earnings deductible from gross backpay. Likewise, the recalculation of LaFleur's backpay, for the reasons set out below, shall include a recalculation of backpay for the deduction of strike benefits from gross backpay.

liability terminated as of September 19, the date LaFleur was properly reinstated. Whether she was unlawfully discharged on some subsequent date is beyond the scope of this compliance proceeding.

D. The Remaining Discriminatees

As discussed above at footnote 29, we have adopted (with adjustments for strike benefits) the judge's findings with respect to the individual claims of the vast majority of discriminatees. However, we find merit to the Respondent's exceptions concerning the following 13 individuals.

1. Cesar Amador[54]

Amador's backpay period runs from August 13 to 20, 1991. He secured interim employment during the third and fourth quarters of 1990 with Transworld Maintenance Service. He was laid off from Transworld in January 1991. The issue is whether Amador should receive backpay for the period between his January 1991 layoff and his reinstatement in August 1991. The judge found that he should. We disagree.

Discriminatees generally receive a compliance form from the Region on which they are directed to record and describe their efforts to mitigate their damages. Amador's form (R. Exh. 36) indicated on page 1 that he was unavailable for work from May 1991 until May 1992 because of a hernia. At page 3, the compliance form stated in more detail that Amador was unemployed from January to November 1991 because of a hernia, and that he was in jail from November 1991 until May 1992. The portion of the form on which claimants are asked to describe their efforts to find work was left blank. Amador testified that his brother filled out the form for him based on information Amador supplied while imprisoned. Amador signed the compliance form without making any changes. Amador testified that he could read Spanish, the language of the compliance form.

At the hearing, Amador denied that he was ever unavailable for work because of the hernia. He testified that the only work he could not do was heavy lifting, and that his hernia did not begin to bother him until he was reinstated by the Respondent in August 1991 and assigned arduous work. Crediting Amador's "sworn testimony" at the hearing over the "apparent conflicting statements" in the compliance form, the judge found that Amador satisfied his obligation to mitigate backpay "by working during a significant part of the backpay period and searching for other work when that job ended in a layoff." In reaching this conclusion, the judge noted that Amador's explanation that the hernia only prevented him from doing heavy work "is plausible and probably supported by medical science," and that the Respondent did not dispute Amador's testimony that he looked for work doing light cleaning jobs after his layoff from Transworld Maintenance.[55]

Although we agree with our dissenting colleague that compliance forms are not exhaustive records and may be supplemented by testimony at a hearing, the issue here is what weight to accord to a compliance form, not when it is *supplemented* by testimony, but when it is *contradicted* by subsequent testimony. In such circumstances, we find, contrary to the dissent, that the compliance forms are more reliable than contradictory and self-serving testimony proffered years after the fact. Admittedly, the compliance forms are not "sworn affidavits," but the information contained in them is recorded earlier in time to the events in question and is presumably more reliable than recollections offered years later. This is especially true in the present case, where Amador executed the form in the spring of 1992, and testified over 5-1/2 years later. Moreover, Amador's contemporaneous account of his inability to work due to the hernia is corroborated by the fact that he was unable to work due to his hernia after his reinstatement in August 1991. Thus, contrary to the judge, we assign greater weight to the information contained in the compliance forms than to Amador's subsequent and unsupported contradictory testimony.[56] The information included in—and absent from—the compliance form establishes that Amador was sick with a hernia from January to November 1991 and that he did not look for work during the relevant portion of the backpay period. Accordingly, we reverse the judge and find that Amador did not make a reasonably

[54] Supp. JD VII,H,6.

[55] The Respondent excepts, inter alia, to the judge's finding that it did not dispute Amador's testimony that he looked for work doing light cleaning after his layoff from Transworld Maintenance. We find merit in this exception. At the hearing, the Respondent's counsel asked Amador whether his compliance form stated that Amador was sick with a hernia between January and November 1991 and whether his compliance form listed no places where Amador looked for work. Amador replied in the affirmative to both questions. We find that by this questioning, the Respondent, in effect, disputed Amador's testimony to the contrary, i.e., that he looked for work after his layoff from Transworld Maintenance.

[56] Our finding that the compliance forms, as documentary evidence, are entitled to greater weight than contradictory testimonial evidence is consistent with Board law. See, e.g., *Granite Construction Co.*, 330 NLRB 205, 208 fn. 11 (1999). Further, in crediting Amador's testimony over his compliance form, the judge, as in the case of Baptiste discussed above at sec. V,B,3, appeared to rely on factors other than the demeanor of the witness. "The Board has consistently held that 'where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.'" *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979), quoting *Electrical Workers Local 38 (Cleveland Electro Metals Co.),* 221 NLRB 1073, 1074 fn. 5 (1975).

diligent search for work after his layoff from Transworld Maintenance until the end of the backpay period. We shall toll backpay for that period.[57]

2. Alberto Arzu (Zapata)[58]

Arzu's backpay period runs from August 13 to April 2, 1991, the date of his reinstatement. Arzu found a temporary job as a mechanic's helper at a Texaco gas station in September. He was laid off no later than January 11, 1991. Arzu testified that he did not look for work after he was laid off.

Considering Arzu's mitigation efforts over the whole backpay period, and emphasizing that Arzu diligently sought work and found it within the first few months of the backpay period, the judge found that "Arzu's failure to immediately seek other employment upon being laid off by the interim employer is not unreasonable." The judge observed, however, that "[h]ad the Respondent not offered Arzu reinstatement in March [he returned in April] and had he continued to not seek other employment, he may very well have incurred a willful loss."

We reject the judge's finding that Arzu's failure to search for work after his layoff in January 1991 was "not unreasonable" because he diligently looked for work in August and September 1990. The only question is whether Arzu made a reasonably diligent search for work after his January 1991 layoff, and on that point the record could not be more clear. Arzu admitted that he did not, in fact, search for work during this period. Moreover, Arzu did not find work in April because of his own efforts, but only because of the Respondent's decision to recall him. In these circumstances, we find that Arzu did not make a reasonably diligent search for work and we toll backpay for the period January 1991 to his recall in April.

3. Gladys Bernard[59]

Bernard's backpay period runs from August 13, 1990, to August 20, 1991. She had interim earnings from Just Industries in the last two quarters of the backpay period.

The issue is whether Bernard made a reasonably diligent search for work from August 13 to February 1, 1991, the period in which she received strike benefits. Contrary to the judge, we find that she did not.

Bernard testified that she was at the site of the former picket line every day during the backpay period until February 1, 1991. She initially testified that she stayed at the site all day, but subsequently explained that was only in the beginning. She said that later, she would leave the line to accompany Tigus, a union representative, to look for work. The judge found this explanation "plausible" because the evidence indicated that the former strikers remained outside the Respondent's facility during the first part of the backpay period awaiting reinstatement. Bernard further testified that she found the job at Just Industries by looking for work with Tigus and other strikers. Bernard could not recall when or how often Tigus took her to look for work. Bernard also testified that she looked for work on her own but could not recall when she did so.

The Respondent put in evidence Bernard's unsigned compliance form which Bernard identified as hers (R. Exh. 77). Bernard admitted answering "non" on page 3, where claimants were asked to list places where they sought work. Bernard testified that she could read Creole, the language of the form, but that she did not understand the question. She further testified that she subsequently learned that she had answered the question incorrectly. Bernard did not, however, rectify the error prior to the hearing. Bernard also testified that, as stated on page 2 of the compliance form, she worked at Just Industries from May 28 to July 30, 1991, and that Tigus helped her find that job.

Although finding the issue "not free from doubt," the judge found that Bernard's testimony regarding her efforts to find work was "plausible" and credited her testimony over the statement in the compliance form. In doing so, the judge found that the compliance form was "internally inconsistent" because her negative answer to the question regarding her efforts to find work on page 3 was inconsistent with her answer on page 2 that she found work during the backpay period. Relying on Bernard's credited testimony, the judge found that she conducted a reasonably diligent search for work during the backpay period.

As with Amador, the judge found that Bernard's testimony was entitled to more weight than the contrary information contained in her compliance form. For the reasons stated above in our discussion of Amador, we disagree with this finding. Bernard's compliance form states, in effect, that she did not search for work, at least during the period she received strike benefits. This statement is supported by Bernard's initial testimony that she did not leave the site of the former picket line while she received strike benefits. Thus, contrary to the dissent's assertion, the compliance form is not "flawed" but is consistent with Bernard's testimony described above. Our finding that Bernard did not make a reasonably diligent search for work during the period that she received strike benefits, which is based on her own compliance

[57] For the reasons set forth in his partial dissent, Member Walsh would adopt the judge's finding that Amador was entitled to backpay between his January 1991 layoff and his reinstatement in August 1991.

[58] Supp. JD VII,H,11.

[59] Supp. JD VII,H,17.

form statement ("non") and initial testimony, is not contradicted by the additional statement in her compliance form that she found work at Just Industries in May 1991, a time outside the period at issue. In sum, although the judge found "plausible" Bernard's subsequent contrary testimony, we do not find her later testimony outweighs her earlier admission, which, in turn, is supported by her compliance form. Thus, we find that Bernard did not search for work during the period that she received strike benefits. Accordingly, backpay is tolled from August 13 to February 1, 1991.[60]

4. Marie Sylvana Jean-Charles[61]

Jean-Charles' backpay period runs from August 13, 1990, to August 20, 1991. On February 12, 1991, Jean-Charles found a job in New Jersey at Caro Bags. Except for a layoff between April and mid-June 2001, Jean-Charles worked there until the Respondent recalled her.

The only issue is whether Jean-Charles' backpay should be tolled for the 3 days in the last quarter of the backpay period when she was unavailable for work due to illness. Contrary to the judge, we toll backpay for that period.

Jean-Charles testified that she was absent from work at Caro Bags and under a doctor's care when she received the Respondent's reinstatement offer. The judge determined that Jean-Charles was unavailable for work for 3 days at most and concluded that "[b]ecause this absence from work during the backpay period was caused by a medical condition [hypertension] which preceded the backpay period . . . it would be inappropriate to reduce her backpay award for these three days." However, the judge did not explain why this was significant. He cited no cases and his analysis of the issue conflicts with his own subsequent analysis of a similar issue regarding discriminatee Alourdes Choute.[62] Had Jean-Charles been working for the Respondent, it appears she would also have been out of work for these 3 days. Accordingly, we shall toll Jean-Charles' backpay for the 3 days that she was absent from Caro Bags owing to illness and was therefore unavailable for work.[63]

In doing so, we disagree with the dissent's finding that the tolling of Jean-Charles' backpay for her sick days is a de minimis matter about which the law does not care—or about which we should not concern ourselves. In analyzing the issue, the judge found, in effect, that Jean-Charles' absence from work due to illness was not a de minimis matter—i.e., it lasted for 3 days, the point at which the General Counsel, as our colleague acknowledges, generally tolls backpay. See Section 10546.2 of the NLRB Casehandling Manual (Part Three) Compliance. We see no reason to depart from that principle here.

5. Christian Delva[64]

Delva's backpay period runs from August 13, 1990, to August 20, 1991. He reported no interim earnings. Delva received the maximum weekly strike benefits from the beginning of the backpay period until February 1, 1991.

The issue is whether backpay should be tolled from August 13 to the end of the fourth quarter of 1990 on the ground that Delva did not make a reasonably diligent search for work during that period. Contrary to the judge, we toll his backpay for this period.

Delva testified that he arrived at the site of the former picket line every day between 7 and 8 a.m. and that he remained there until 5 p.m. Although he testified that during this period he looked for work before going to the picket line, Delva could not remember any places where he searched for work in 1990.

Delva did have a specific recollection of several places he looked for work beginning in January 1991, and he was able to provide details of his search for work at places listed on his compliance form. The judge found Delva's testimony regarding his search for work in 1991 credible. The judge found Delva's testimony regarding his search for work in 1990 "more questionable." Although Delva testified that all the places he searched for work were listed on his compliance form, the judge found that all specific references were in 1991 and that the references to 1990 were "vague." The judge therefore "was not sure [the compliance form] is entitled to much weight for the period before January 1991."

The judge found, however, that the evidence did show that Delva attempted to mitigate backpay "to some extent" during the period prior to January 1991 by volun-

[60] For the reasons set out in his partial dissent, Member Walsh would adopt the judge's finding that Bernard made a reasonably diligent search for work from August 13, 1990, to February 1, 1991, and he would therefore not toll her backpay for that period.

[61] Supp. JD VII,H,27.

[62] See Supp. JD VII,H,28. The judge tolled Choute's backpay for 2 weeks in December 1990 when she was absent from the site of the former picket line because of tonsillitis and therefore unavailable for work. As the judge noted, Choute had similar infections when working for the Respondent prior to the strike and occasionally missed work because of them. We find that the judge properly tolled backpay for this 2-week period.

[63] For the reasons set out in his partial dissent, Member Walsh would not toll Jean-Charles' backpay for the days she was absent from work at Caro Bags due to illness.

[64] Supp. JD VII,H,31.

teering for night-shift duty in September and October because his wife was sick and he needed money (at $55 a night, Delva earned $220 in the third quarter and $110 in the fourth quarter). Although the judge found that night-shift duty was "hardly substantially equivalent employment," he found that it did support Delva's testimony that he needed work and reasoned that, in the circumstances, "it is unlikely that Delva would have been content to remain idle and live on the $72/week he got from the Union[.]" The judge found that the fact that Delva went to the picket line every day "in the hope that the Respondent would reinstate him tends to show mitigation." He concluded "that Delva's choice to spend the majority of his time, early in the backpay period, awaiting reinstatement, was [not] unreasonable." We disagree.

There is simply no evidence that Delva conducted a reasonably diligent search for work from August 13 to the end of the fourth quarter. The fact that Delva performed night-shift duty for the Union on four occasions in September and two occasions in October may support his testimony that he *needed* work, but it does not establish that he searched for work at this time. Likewise, his attendance at the site of the former picket line in the *hope* that the Respondent would reinstate him does not evidence a search for work. Finally, for the reasons set out above at section V,B,1, we cannot agree with the judge that it was reasonable for Delva to await reinstatement rather than search for work from August 13 to the end of 1990. Therefore, we shall toll Delva's backpay for this period.

6. Marie Estivaine[65]

Estivaine's backpay period runs from August 13, 1990, to April 2, 1991, the date of her reinstatement. She reported no interim earnings. Estivaine received strike benefits.

The issue is whether Estivaine is entitled to backpay from August 13 to the end of November. We find that she is not.

Estivaine's compliance form (R. Exh. 67), which Estivaine signed April 23, 1992, lists 14 places where she looked for work but indicates that the first time she looked for work was December 5. The compliance form also indicates that she looked for work more frequently starting in February 1991, after the strike benefits ended. Estivaine admitted that she searched for work more frequently in 1991 than in 1990.

The judge found that Estivaine's efforts to find work, as she recalled them and as set out in her compliance form, satisfied her duty to mitigate.[66] While the judge, in effect, found that Estivaine delayed her job search until December, and increased her efforts in February 1991, the judge further found that this fact was not "fatal" when Estivaine's efforts were viewed over the entire backpay period. Regarding the period before December, the judge, noting the piecemeal nature of the Respondent's offers of reinstatement, found that "[e]ven assuming that Estivaine made no effort to find work in October and November . . . I would not toll her backpay for this brief hiatus."

As explained above, we have found, in the circumstances present here, that discriminatees could delay their initial search for work until the end of September 1990—provided that they commenced their search for work immediately thereafter. Because the judge himself found that Estivaine delayed her job search until December, we shall toll Estivaine's backpay from August 13 to the end of November 1990. While our colleague dissents, he fails to explain why, even looking at the entire backpay period, we should excuse Estivaine's almost 4-month delay in undertaking an initial job search.[67]

7. Rafael Gomez[68]

Gomez' backpay period runs from August 13, 1990, to August 20, 1991. He found a job as a union organizer on or about February 19, 1991. The General Counsel does not seek backpay thereafter. Gomez received strike benefits every week from August 13 to February 1, 1991, and was at the site of the former picket line every day from 8 a.m. until 4:30 p.m., except for the 2 weeks that he went to the Dominican Republic at Christmas (the judge tolled backpay for those 2 weeks).

The issue is whether Gomez made a reasonably diligent search for work from the beginning of the backpay period until February 1, when the strike benefits ended. For the reasons set out below, we find that he did not.

Gomez testified that he looked for work by asking people about jobs and reading classified ads. If someone gave him the name of a place, he testified that he left the picket line to apply for the job. He also testified that if he went to a place and they told him that they would call him or to come back another time, he would write down

[65] Supp. JD VII,H,34.

[66] In finding that Estivaine satisfied her obligation to search for work during this period, the judge described the Board's standard as a "low standard of diligence." Chairman Battista and Member Schaumber do not agree. It is well settled that, although "discriminatees are not held to the highest standard of diligence in seeking interim employment," they must "make reasonable efforts to mitigate backpay liability." *Associated Grocers*, 295 NLRB 806, 810 (1989).

[67] Consistent with his position set out at fn. 36 above and for the reasons set out in his partial dissent, Member Walsh would not toll Estivaine's backpay from August 13, 1990, to the end of November 1990.

[68] Supp. JD VII,H,41.

the name and address of the place on a piece of paper so that he would know where to go. Otherwise, he would not keep a record of the visit. In April 1995, he was asked to write down a list of places that he visited during his search for work. The list (R. Exh. 207) contains six places, only three of which, including the job he eventually got with the Union, are within the backpay period. (Gomez testified that he had lost most of the pieces of paper by this time and that he wrote the names on the list from the pieces of paper he still had.) In April 1992, however, Gomez filled out a compliance form (R. Exh. 208) which is blank except for the personal information set out on the first page. Gomez could not recall why he did not list the places he visited on that form.

The judge attached "very little weight" to the fact that the 1992 compliance form was blank and found instead that, because Gomez ultimately found interim employment and had substantial interim earnings, he was seeking work. The judge also found "plausible" Gomez' explanation for why the list he gave to the General Counsel in April 1995 was so sparse.

For the reasons set out above in our discussion of discriminatee Amador, we assign more weight to information contained in—or absent from—a compliance form filled out closer to the events at issue than to contradictory testimony given years later. Here, Gomez testified that he could read Spanish, the language of his compliance form, and that he filled out and signed the form. As noted, the page on the 1992 compliance form where Gomez was asked to list the places where he looked for work is blank. Although, as the judge found, Gomez "speculated" regarding why the page was blank, he never gave a credible explanation as to why this was so. We find this failure all the more troubling because Gomez also testified that when he filled out his compliance form in 1992, he still had the pieces of paper with the names of the places where he searched for work and where he was told to return later. His failure to refer to those pieces of paper when he filled out the 1992 compliance form remains unexplained.

In these circumstances, contrary to the judge and our dissenting colleague, we assign greater weight to Gomez' 1992 compliance form, which lists no places where he searched for work, than we do to his subsequent conclusory, contradictory and unsupported testimony.[69] Consequently, the evidence does not support a finding that Gomez searched for work during the period in which he received strike benefits. Nor can we agree that because Gomez found work in February 1991, after the strike benefits ended, he also made a reasonably diligent search for work from August 13 to February 1991, before they ended. Because Gomez did not search for work until February 1991, he is not entitled to a grace period before he was obligated to search for work. We therefore order that his backpay be tolled from August 13 to February 1, 1991.[70]

8. Rufino Guity[71]

Guity's backpay period runs from August 13, 1990, to August 20, 1991. Guity received $200 a week in strike benefits (machinist's pay) from August 13 to February 1, 1991, an amount almost equal to his gross backpay. He reported interim earnings from a job as a cook in a Manhattan restaurant starting in March 1991 and continuing through the remainder of the backpay period.

The issue is whether Guity made a reasonably diligent search for work from August 13 to February 1, 1991, the period during which he received strike benefits. The judge found that he did. We disagree.

Although Guity signed his May 1992 compliance form (R. Exh. 196), he testified that he did not fill out the form and did not use his own list of places where he sought work to complete it. The judge found that "apparently" Tigus or someone else from the Union wrote down the names of the places and the dates that he sought work. Guity could recall some of the places, but not all of them. The form lists several places Guity sought work after March 1991, when he was working full time at the restaurant. Although Guity testified that the Union took him to look for work even after he found the job at the restaurant in March, the judge found this was "unlikely" considering the number of discriminatees who were still unemployed and the fact that Guity was working full time at the restaurant.

Guity testified that he did not list his job at the restaurant on the compliance form because he was being paid in cash "'off the books,'" and that he did not file an income tax return for these earnings. Guity also admitted that he used his cousin's name and social security num-

[69] We assign no weight to the list of places that Gomez gave to counsel for the General Counsel in April 1995. Of the six places listed, only two, aside from the Union where Gomez found work, are listed as places where Gomez searched for work during the backpay period. Although Gomez testified that he composed this list from pieces of paper which he still had in 1995, he never furnished those pieces of paper to counsel for the General Counsel. Thus, Gomez' 1995 recollection of places where he assertedly searched for work in 1990 is unverified.

[70] For the reasons set out in his partial dissent, Member Walsh would adopt the judge's finding that Gomez made a reasonably diligent search for work from August 13, 1990, to February 1, 1991, and would therefore toll backpay during this period only for the 2 weeks that Gomez was in the Dominican Republic.

[71] Supp. JD VII,H,43.

ber when he was first employed by the Respondent in 1984, but that he only did this until 1986.

Guity's earlier actions demonstrating a lack of trustworthiness did not convince the judge that his later testimony regarding his efforts to find work prior to February 1 was not credible.[72] Based on Guity's credited testimony that he was seeking work while receiving strike benefits, as well as the fact that Guity eventually found employment which he maintained throughout the remainder of the backpay period, the judge found that Guity satisfied his duty to mitigate backpay.

Contrary to the judge and our dissenting colleague, we find that neither the documentary evidence nor Guity's testimony establishes that he searched for work from August 13 to February 1, 1991. As to the documentary evidence (Guity's 1992 compliance form), although the judge stated that Guity "candidly acknowledged that he did not list his job at the restaurant on the form," the fact is that Guity did not simply omit this job from the form. Rather, where the form asks for a list of interim employment during the backpay period, there is written in Spanish the notation "Unemployed from 08/13/90 until 08/20/91." Guity signed his compliance form. This deliberate falsehood affects Guity's credibility.

Guity's testimony describing his search for work with the Union after he began working at the restaurant in March, a period in which, as the judge found, he did not search for work, also undermines his credibility. Further, we cannot agree with the judge that Guity's testimony regarding his search for work prior to February 1 was credible because "Guity was able to recall enough specifics regarding his job search to show that he was not fabricating evidence." The record does not support such a finding.[73] Finally, we cannot agree with the judge that, in the circumstances present here, the fact that Guity found interim employment after the strike benefits ended somehow establishes that he made a reasonably diligent search for work during the period that he did receive strike benefits. For all these reasons, we find that Guity did not make a reasonably diligent search for work from August 13 to February 1, 1991, and we toll his backpay for that period.[74]

9. Maximo Lacayo[75]

Lacayo's backpay period runs from August 13, 1990, to August 20, 1991. Lacayo performed unskilled work for the Respondent prior to the strike. He was at the former picket line and looked for work with the Union at the beginning of the backpay period. After taking an asbestos-handling training course and receiving a certificate in that field, Lacayo applied for asbestos-handling jobs. He obtained a job with Envirosafe Construction and worked there for a month and a half between October and December, when he was laid off. After that, he returned to the former picket line and again looked for work with the Union. He also looked for asbestos-handling jobs on his own. After the strike benefits stopped on February 1, Lacayo limited his job search to asbestos-handling jobs because the pay was better than the pay at jobs comparable to his prestrike job with the Respondent. In July, Lacayo abandoned his search for asbestos-handling jobs and took a home attendant training course.

The issue is whether Lacayo made a reasonably diligent search for work from February through June 1991, when he limited his search for work solely to asbestos-handling jobs. The judge found that he did. We reverse.

The judge relied on *Associated Grocers*, 295 NLRB 806 (1989), and *Aircraft & Helicopter Leasing*, 227 NLRB 644 (1976), to find that even if Lacayo restricted his search to better-paying asbestos-handling jobs, "this would not be unreasonable in light of his earlier lack of success at finding the lower-paying factory jobs similar to his pre-strike job with the Respondent." We find the cases relied on by the judge distinguishable.

In *Aircraft & Helicopter Leasing*, the issue was whether a skilled aircraft mechanic made a reasonably diligent search for work when he abandoned his search for comparable skilled work after 7 weeks and entered a carpenter apprentice program. As explained in that case, "[t]he law is settled that 'if the discriminatee accepts significantly lower paying work too soon after the discrimination in question, he may be subject to a reduction in backpay on the ground that he willfully incurred a loss

[72] In finding Guity credible, the judge reasoned that Guity must have reported his interim earnings at the restaurant to the General Counsel because the General Counsel would not have any other way of finding out about them (no social security report was submitted), and that Guity did not attempt to deny that he worked under another name and social security number when first employed by the Respondent.

[73] See, e.g., Tr. XXXII 2145, where, in response to a question from the Respondent's counsel as to whether he had any recollection of any of the places he looked for work, Guity responded:

> I don't remember very well. I do remember a place and I believe it was Cascade, it was a laundromat. Yes, it was Cascade, a laundromat and another one was a bakery and they [sic] other one was a dry cleaners. Yes, I believe it was a dry cleaners. I can't remember very well. There were four of them, but I can't remember the fourth one. I believe so—okay, it was a supermarket. I remember now it was a supermarket. There was only four of them.

[74] For the reasons set out in his partial dissent, Member Walsh would adopt the judge's finding that Guity made a reasonably diligent search for work from August 13, 1990, to February 1, 1991, and would therefore not toll backpay for that period.

[75] Supp. JD VII,H,53.

by accepting an "unsuitably" low-paying position.'"[76] In the context of that case, the Board adopted the judge's finding that the discriminatee's abandonment of his search for comparable highly-skilled work after about 2 months was not unreasonable and that his subsequent failure to seek work as an aircraft mechanic did not constitute a willful loss of earnings. Id. at 645–646.

The facts in the present case are precisely the opposite of those in *Aircraft & Helicopter Leasing* and require a different result. In the present case, Lacayo performed *less-skilled* work for the Respondent prior to the strike. Therefore, in order to mitigate backpay, Lacayo was obligated to make a reasonably diligent search for comparable work during the backpay period. Although he did find a more highly-skilled asbestos-handling job early in the backpay period, Lacayo could not then restrict his job search to asbestos-handling jobs, even when that job search subsequently proved futile, to the exclusion of looking for less skilled jobs comparable to the job he had at the Respondent. In reaching this conclusion, we emphasize that Lacayo's prestrike job required generalized skills that could readily be applied to other work, while Lacayo's specialized asbestos-handling skills would only be applicable to a limited field of work.[77] Consequently, we find that Lacayo failed to conduct a reasonably diligent search for work and shall order that his backpay be tolled from February through June 1991.[78]

10. Rufino Guerrero Norales[79]

Norales' backpay period runs from August 13, 1990, to August 20, 1991. He reported interim earnings in the first quarter of the backpay period. Although there were no receipts showing that Norales received strike benefits after August 13, Norales testified that he received such benefits each week from August 13 until February 1, 1991.

The issue here is whether the judge erred by failing to find that Norales received strike benefits during the backpay period. For the following reasons, we find that he did.

Norales testified that he continued to go to the former picket line after August 13, sometimes arriving at 8 a.m., and that he would later leave to look for work and return to the picket line and remain there until 5 p.m. or later. Norales also testified that the Union took him along with other strikers to look for work about 10 times. He testified further that he looked for work on his own.

The judge did not consider Norales' testimony that he received strike benefits during the backpay period. He simply found "there is no documentary evidence showing that Norales in fact received any money from the Union during the backpay period."

As a preliminary matter, we note that the judge credited Norales' testimony as to his own job search efforts and found that he made a reasonably diligent search for work during the backpay period. Since the judge found Norales credible, we rely on Norales' clear testimony to find that he received strike benefits after August 13. Although the dissent criticizes our finding as inconsistent with our approach elsewhere, in those other instances we deferred to the judge's crediting of documentary records (strike receipts) over conflicting testimony. Here, however, the judge did not resolve, let alone address, Norales' testimony that he received strike benefits. Since the judge did not resolve the issue, we cannot defer to him. Given that the judge generally credited Norales' testimony, and given that Norales' testimony that he received strike benefits during the backpay period was clear and unambiguous, we are persuaded that he testified accurately. In the absence of strike benefit receipts, we shall remand the issue to Region 29 for a calculation of the amount of strike benefits that Norales received and the deduction of that amount from Norales' gross backpay.[80]

11. Carolina Olivo[81]

Olivo's backpay period runs from August 13, 1990, to August 20, 1991. She reported no interim earnings. The judge tolled her backpay after the first quarter of 1991 because he found that she was unavailable for work for about 2 months after that and that she subsequently failed to conduct a reasonably diligent job search.

[76] *Aircraft & Helicopter Leasing*, 227 NLRB at 645, quoting *NLRB v. Madison Courier, Inc.,* 472 F.2d 1307, 1321 (D.C. Cir. 1972).

[77] The judge's reliance on *Associated Grocers*, supra, is also misplaced. In that case, the Board reversed the judge's finding that two warehousemen, Manley and Mullins, were not entitled to backpay because they failed to search for work at certain grocery warehouses where fellow strikers found work. In reversing, the Board found that certain cases relied on by the judge were distinguishable because they stood for the proposition that "an individual with extensive experience in a specialized field . . . must at least seek interim work within this specialty." Id. at 811. The Board found that Manley and Mullins, as warehousemen, "would appear to have generalized skills that could readily transfer to any number of working environments." Id. In the present case, by contrast, although Lacayo may have had "generalized skills that could readily transfer to any number of working environments," he did not seek such work in the period from February to June 1991.

[78] For the reasons set out in his partial dissent, Member Walsh would adopt the judge's finding that Lacayo made a reasonably diligent search for work from February through June 1991 by seeking work during that period as an asbestos handler.

[79] Supp. JD VII,H,63.

[80] For the reasons set out in his partial dissent, Member Walsh would not deduct strike benefits from Norales' gross backpay.

[81] Supp. JD VII,H,66.

The issue is whether Olivo made a reasonably diligent search for work from September 22 to February 14, 1991. We find that she did not.

Olivo testified that she received money from the Union during the entire time that she was on strike and that she had to sign a paper at the end of every week to get the weekly benefit. Olivo also testified that while she was receiving strike benefits, she went to the picket line every day, remained there from 8 a.m. to 4:30 p.m., and that she only left the picket line to look for work. Olivo further testified that after the strike ended,[82] she stayed home for 2 or 3 weeks and then began to look for work on her own, and that soon after that she stopped looking for work for about 2 months because of a tooth infection.

Finding that the union records showed that Olivo received strike benefits only through the week ending September 21, the judge concluded that Olivo stopped going to the former picket line about September 21. Although the judge found Olivo's testimony "confusing and inconsistent," he credited her testimony "that she looked for work with the Union while she was on the picket line before September 21, [1990,[83]] and that she thereafter looked for work on her own, after a hiatus of about 2 to 3 weeks." Giving Olivo "the benefit of the doubt," the judge awarded backpay "at least through February 1, 1991."

We find that the judge misconstrued Olivo's testimony. Based on the strike receipts, we adopt his finding that she stopped going to the former picket line after September 21. However, his finding that Olivo began to search for work about 2 or 3 weeks after September 21 finds no support in the record. Olivo consistently testified that she looked for work on her own in February 1991, i.e., in the period between the end of the strike (see fn. 82 above) and her unavailability for work due to the tooth infection. Although the judge credited Olivo's testimony that she was unavailable for work because of the tooth infection and therefore tolled backpay after the first quarter of 1991, he inexplicably failed to credit her equally consistent testimony that she did not begin to search for work on her own until after February 1. We find that the judge erred by failing to credit this testimony. Since we find that Olivo did not begin to search for work on her own until the middle of February, we shall toll her backpay from September 22 through the first 2 weeks of February 1991.

[82] The record clearly establishes that references to the end of the strike actually refer to the ending of strike benefits on February 1, 1991. For example, when Respondent's counsel asked Olivo, "how many times did the union take you out to look for work between August 13, 1990 and when the strike ended," Olivo responded, "[l]ike two or three times with a group." (Tr. XXXII 2175–2176.) Further, when the judge asked Olivo how long she was out on strike at Domsey, she responded, "I guess like a year, a year." (Tr. XXXII 2188.) Olivo's testimony to the effect that the strike ended on February 1, when the strike benefits ended, is consistent with the understanding of other discriminatees.

[83] The judge incorrectly gives the year as "1991."

12. Juana Perralta[84]

Perralta's backpay period runs from August 13, 1990, to August 20, 1991. She reported no interim earnings. The judge found that Perralta was mentally retarded and that it was apparent throughout her testimony that she did not understand the questions asked. Perralta's receipt of strike benefits showed that she was able to go to the site of the former picket line almost every day from August 13 through February 1, 1991.

The issue here is whether Perralta conducted a reasonably diligent search for work after February 1, 1991, when the strike benefits stopped. We find that she did not.

Perralta testified that during the period she received strike benefits she looked for work with Tigus and Natalie Mercado from the Union and that she would go with them and a group of other strikers to factories in Brooklyn and Manhattan. Considering Perralta's "unique circumstances," the judge found that her efforts to find interim employment, "even if limited to places she went with the Union," would satisfy her duty to mitigate backpay, and that her lack of success was not a reason to deny her a remedy.

The judge then addressed the issue of whether backpay should be tolled after February 1, 1991, on the ground that Perralta did not look for work with the Union after she stopped receiving strike benefits. Noting that there was evidence that the Union continued to take some former strikers to look for work after February 1, 1991, and that it was unclear whether Perralta was included in these efforts after February 1, the judge found that any doubt in this regard should be resolved against the Respondent and awarded Perralta backpay for the entire backpay period. In making this award, the judge opined that Perralta's "testimony alone should not be the basis for denying her backpay in light of her general inability to understand the proceedings and the questions she was asked."

The record does indicate that the Union took some discriminatees to look for work after the strike benefits ended. However, there is no evidence in the record that Perralta was among them. She did not testify that she looked for work after February 1 with the Union. Nor, we emphasize, did any union representative or other discriminatee testify that Perralta looked for work with them after February 1. In the absence of such evidence, we cannot award backpay on the basis of a conjecture that

[84] Supp. JD VII,H,67.

Perralta may have looked for work after the strike benefits ended. While the dissent finds a "doubt" where we find a "conjecture" and would award backpay for the period at issue on that basis, we simply cannot go beyond the record evidence to award backpay when none is due. Accordingly, we find that Perralta's backpay should be tolled as of February 1, 1991.[85]

13. Richard Simon[86]

Simon's backpay period runs from August 13, 1990, to August 20, 1991. He found interim employment at Just Industries in February 1991 and worked there until the end of the backpay period. The judge found, and we agree, that Simon did not make a reasonably diligent search for work in the third and fourth quarters of 1990 and that backpay should be tolled for that period.

The issue is whether the judge erred in finding that Simon did make a reasonably diligent search for work in January 1991. Contrary to the judge, we find that he did not.

The compliance form that Simon signed on April 20, 1992 (R. Exh. 84) was filled out by someone else "because of Simon's claimed illiteracy."[87] The form is in Creole and the handwritten answers are in English and Creole. At the bottom of the first page, where a discriminatee is asked if he was unavailable for work during any part of the backpay period, the Creole word for "yes" is checked. (There is also a check mark next to the word for "no," but that is crossed out and the word "error" is written in English.) For the dates of "unavailability," someone wrote in "01/30/90 to 02/01/91" (the period when the Union provided strike benefits). The reason given for the "unavailability" was the word "strike" in Creole. Someone wrote in that Simon was paid "$60 weekly" during this period. The interim employment at Just Packaging is identified, in English, on page two of the form, while on page three, where the discriminatee is asked to describe his efforts to find work during the backpay period, there is set out in English only the following:

> 02/11/91I was looking for a job and then I find it.
> Just Packaging, Inc.
> 269 Green Ave Br'klyn N.Y. 11222

The judge did not toll Simon's backpay for the month of January because he gave Simon "the benefit of the doubt," and found it "more than likely" that Simon began looking for work sometime in January. We reverse.

The record indicates that Simon did not look for work from August 13 to February 1, 1991, the period during which he received strike benefits. In finding that Simon looked for work in January 1991, the judge speculated that since Simon found a job in early February, he must have been searching for work in January. Such speculation is unwarranted. The fact that Simon found a job at Just Industries in the second week of February does not contradict the record evidence that Simon did not look for work in January 1991. Thus, the judge erred both by creating a doubt where there was none and by then giving Simon the benefit of that "doubt" to award backpay for January. Finally, we cannot agree with the dissent's assertion that "the record evidence, not the judge, created the doubt[.]" The record is clear. As explained above, the compliance form states unambiguously that Simon was unavailable for work from January 30, 1990, to February 1, 1991. We base our decision on that record evidence.[88]

ORDER

The National Labor Relations Board orders that the Respondent, Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a single employer, Brooklyn, New York, its officers, agents, successors, and assigns, shall satisfy its obligation to make whole the following discriminatees by paying them the following amounts, together with interest accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax and withholdings required by Federal and State laws.

Maximo Bernardez	$ 0.00
Rose Bertin	0.00
Lalane Camner	0.00
Christianne Celestin	0.00
Wilner Ceptus	8,182.15
James Anthony Charles	12,150.55
Louis Cherfilus	0.00
Joseph DeLeon	6,802.00
Adeline Duvivier	2,213.75
Luis Ramos Frederick	9,862.50
Hector Guity	SETTLED
Milka Gutierrez	0.00
Marie Jeanty	SETTLED
Louine Joseph	0.00
Teresa Lacayo	0.00
Fritho Lapomarede	0.00
Mireya Lugo	0.00

[85] For the reasons set out in his partial dissent, Member Walsh would find that Perralta is entitled to backpay after February 1, 1991, the date that the strike benefits ended.

[86] Supp. JD VII,H,78.

[87] The judge noted that Simon "claimed" not to be able to read or write in either English or Creole, and that he refused to answer questions regarding the level of schooling he attained in Haiti.

[88] For the reasons set out in his partial dissent, Member Walsh would find that Simon is entitled to backpay for the month of January 1991.

Francisco Moreira	0.00
Oscar Nunez	10,202.25
Juan Ramon Palacios	0.00
Marcos Pitillo	7,180.39
Romulo Ramirez	2,970.21
Orlando Ramos	4,123.00
Chano (Feliciano) Reyes	1,040.00
Rene Rochez	4,232.58
Antoine St. Fort	0.00
Yollande Sinrastil	0.00
Vincente Suazo	0.00
Celina Valentin	0.00
Victor Velasquez	8,007.18
Mireya Lugo	$ 0.00
Ruth Zama	SETTLED

IT IS FURTHER ORDERED that this case is remanded to Region 29 for the purpose of recalculating the backpay awards of the following individuals for the reasons set out above in our discussion of them and consistent with this Supplemental Decision and Order.[89]

Cesar Amador	Maximo Layaco
Alberto Arzu (Zapata)	Mureille LaFleur
Ronald Jean Baptiste	Maximo Martinez
Gladys Bernard	Rufino Guerrero Norales
Marie S. Jean-Charles	Carolina Olivo
Christian Delva	Juanna Perralta
Louis Antoine Dormeville[90]	Giles Robinson
Marie Estivaine	Richard Simon
Rafael Gomez	Dieulenveux Zama
Rufino Guity	

IT IS FURTHER ORDERED that this case is remanded to Region 29 for the purpose of recalculating the backpay awards of the following individuals by deducting the strike benefits they received from gross backpay consistent with this Supplemental Decision and Order.

Rosa Abreu	Julmene Joseph
Jean Max Adolphe	Leanna Joseph
Marie Ahrendts	Marc Olyns Joseph
Francois Alexandre	Marie Rose Joseph
Ana Alvarez-Contreras	Ucemeze Kernizan
Andreze Andral	Mimose Lacrois
Andrea Andre	Nevius Lambert
Viergelie Anier	Marie Leconte
Joseph Aris	Marie Louima
Marie Rose Armand	Alma Louis
Marie Augustin	Marie N. Louis
Jean Balan	Jean Michelet Louisma
Eloge Jean Baptiste	Rachelle Louissaint
Gerda Benoit	Idiemese Lovinske
Edaize Blanc	Andrew Mack
Jean Joseph Eliacin (Bonny)	Pierre Malbranche
Inovia Brutus	Jesula Massena
Claire Camille	Marie Nicole Mathieu
Marie C. Camille	Nilda Matos
Gertha Camilus	Rose Andre Mauvais
Solange Carasco	Alta Meuze
Ghislaine Caristhene	Jean Demard Midy
Marie Casseus	Marie Mondestin
Adrian Castillo	Marie Narcisse
Simion Castillo	Jean Olivier
Rose Marie Castor	Josette Philogene
Brigitte Charles	Marie Pierre
Cecile Charles	Ludovic Pierre-Louis
Eugenie Charles	Miracia Porsenna
Alourdes Choute	Milton Ramos
Anne Cidieufort	Loficiane Raymond
Gertha Denaud	Violette Raymond
Jesula Denis	Eddy Rodrigue
Francesca Dormetus	Antoinette Romain
Eduardo Roman Feliciano	Marie Romain
Yvette Fleurimonde	Marie Rousseau
Marlon D. Flores	Margarett St. Felix
Murat Georges	Joseph Saintval
Marie Gresseau	Monique Samedy
Banilia Guerrier	Justo Suazo
Tomas Guervara	Pierre-Antoine Surin
Pablo Guity	Marie Thelismond
Ana Hernandez	Anna Thomas
Yolanda Heurtelou	Josette Vaval
Marie Jacques	Agare Victor
Louis P. Jean	Joseph Virgile
Therese Jean	Wilfrid Virgile
Acces Joseph	Lourdes Williams
Clorina Joseph	Auguste Zama
Ghislaine Joseph	Mulert Zama

IT IS FURTHER ORDERED that this case is remanded to Region 29 for the purpose of recalculating the backpay awards of the following individuals, who were not located prior to the close of the compliance hearing and whose backpay shall therefore be placed in escrow, by deducting the strike benefits they received from gross backpay consistent with this Supplemental Decision and Order.

Dennis Aquilar	Marie May Joseph
Longina Arzu	Lourdes Labissiere
Hubert Florent Boni	Jean Lacombe
Bertha Camille	Marc Dala Louis
Marcial Santos Castro	Diankha Mayadu
Sy Chiekh	Eduardo Martinez
Jean Robert Cyprien	Fernande Mathurin
Immacula Delhia	Hilda Medina
Mercedes Devillar	Emilio Meredith

[89] The recalculation of backpay shall include the deduction of strike benefits from gross backpay for all these individuals except Maximo Martinez. As explained above, Martinez was a machinist. Because we have found that the machinists' strike benefits were not interim earnings, Martinez' strike benefits are not deductible from gross backpay.

[90] The issue of Dormeville's backpay award is also remanded to the administrative law judge for the limited purpose of recalculating, if necessary, his backpay award consistent with this Supplemental Decision and Order.

Mezinette Desinor	Miguel Flores Miranda
Alama Amine Diawara	Roberto Morales
Aparicia Diego	Irene S. Nunez-Reyes
Voltaire Dorcius	Jose Angel Ortiz
Jerome Dunn	William Ortiz
Wilmide Estimond	Freda Osias
Hipolito Figueroa	Alejandro Palacios
Marc Frederique	Reynaldo Pierluisse
Michelet Germaine	Jacqueson Pierre
Jose Gonzales	Jean Sigay Pierre
Jose L. Gonzalez	Laborian Senteno
Maximo Hernandez	Kathy Toussaint
Sako Idiessa	Jose L. Valentin
Evodia Joseph	Imanitte Verrier

IT IS FURTHER ORDERED that for the reasons set out in this Supplemental Decision and Order, authorization status issues regarding the following individuals are remanded to the judge to develop a complete factual record consistent with this supplemental decision and to issue a second supplemental decision setting out his factual findings based on that record. After the parties have had the opportunity to file exceptions if they so desire, the Board will issue a Second Supplemental Decision resolving the legal issues based on the judge's findings of fact.

Atulie Balan	Marie Jose Francois
Bardinal Brice	Rene Geronimo
Michelet Exavier	Rose Marie St. Juste

CHAIRMAN BATTISTA, concurring in part.

In light of the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the question of legal/illegal status of discriminatees must be resolved in order to determine issues of backpay and reinstatement. In my view, these questions of status should be resolved with the aid and guidance of the U.S. Office of Immigration and Customs Enforcement (ICE). That office has the expertise and responsibility in this area. Further, we clearly do not want a situation where the Board reaches a result that is inconsistent with the views of ICE. Finally, the Board has limited resources, and it can better conserve these resources if the responsible agency (ICE) performs the necessary tasks.

In the instant case, the events occurred in 1991. Thus, it may not be appropriate to ask ICE to render an opinion as to legal/illegal status in those years. Accordingly, I join in the remand, and in our decision to have the Board resolve those issues here. However, I urge the Board to consider, along with ICE, an arrangement under which ICE, at an early time in the processing of a case, could give the Board its opinion as to status. More particularly, as soon as the General Counsel (GC) has determined that an unfair labor practice charge has merit, and where the respondent raises a colorable argument as to status, the GC would contact ICE and seek the views of that office.

I recognize that ICE, for legal or practical reasons, may not be able to assist in this regard. And, indeed, the Board may ultimately decide, for its own reasons, not to utilize ICE in this fashion. However, I simply urge that we explore these avenues.

MEMBER WALSH, dissenting in part.

I agree with the judge, as do my colleagues, that the strike benefits that the Union paid to the former strikers who were machinists were collateral benefits and therefore not deductible from gross backpay. Contrary to my colleagues, however, I also agree with the judge that the strike benefits that the Union paid to the former strikers who were not machinists were collateral benefits. For the reasons set out in part I below, I therefore dissent from my colleagues' reversal of that finding. For the reasons set out in part II, I dissent from my colleagues' reversal of the judge's credibility findings relating to discriminatees Ronald Jean Baptiste, Cesar Amador, Gladys Bernard, Rafael Gomez, and Rufino Guity. Finally, in part III, I dissent from my colleagues' reversal of certain of the judge's backpay findings as to discriminatees Marie Sylvana Jean-Charles, Marie Estivaine, Maximo Locayo, Rufino Guerrero Norales, Juanna Peralta, and Richard Simon.

I. NONMACHINISTS' STRIKE BENEFITS

In reversing the judge's finding that the strike benefits were collateral benefits and not deductible from gross backpay, my colleagues assert that the judge erred by failing to give sufficient weight to certain facts: that the strike benefits were paid from a fund to which the former strikers had not contributed, that the former strikers were paid only for the days that they appeared at the former picket line, and that many former strikers testified that they believed that they were paid the benefits for being at the former picket line and demonstrating on behalf of the Union. As explained below, my colleagues' reliance on those reasons for reversing the judge is misplaced, and therefore their argument must fail. Simply put, there is no evidence that the strike benefits were compensation for any activities that the former strikers may have undertaken on behalf of the Union, and thus there is no "nexus" between the strike benefits and the former strikers' activities.

A. Applicable Principles

In considering whether strike benefits constitute interim earnings or collateral benefits, the Board examines the totality of the circumstances to determine whether there is a nexus between the strike benefits and the con-

duct at the picket line.[1] As explained in *Glover Bottled Gas*, 313 NLRB 43 (1993), enfd. 47 F.3d 1230 (D.C. Cir. 1995), cert. denied 516 U.S. 816 (1995), to meet its burden of showing the requisite nexus, a respondent employer must establish that the strikers picketed or performed other tasks for the union and were compensated for that work:[2]

> [I]f a striker was required to picket and is compensated for the *hours* he picketed, an employment relationship will be found. Similarly if a union in effect has "hired" a discriminatee to picket, an employment relationship will be found. In both instances, strike benefits paid to those discriminatees are viewed as interim earnings. If however, the evidence establishes that strike benefits to pickets are "collateral" to their union membership or to their activities as a union supporter or where the totality of the circumstances do not otherwise warrant a finding of an employer-employee relationship between a discriminatee and his union, strike benefits are not viewed as interim earnings.

Id. at 45 (emphasis added).

Thus, a key factual issue in determining whether strike benefits are interim earnings or collateral benefits is whether the strikers were paid for the hours they spent on the picket line.[3] In resolving that issue, the testimony of the strikers is relevant, but not determinative. For example, in *Glover Bottled Gas Corp.,* above, a case relied on by the judge in his decision here, the Board adopted without comment the judge's finding that the $50 a week that the strikers received from the union were strike benefits and not, as the employer asserted, interim earnings. In reaching that conclusion, the judge found that, although some of the former strikers testified in "conclusory form" that they were paid for picketing or that they had to picket to receive strike benefits, "[i]t [did] not appear that they were ever told by the Union what the requirements were for them to be eligible for strike benefits." Id. at 45. Rather, the evidence indicated that a list of strikers was handed in each week at the union's office, and the benefits, which ultimately came from the union's parent international, were then given to one of the strikers or to a union business agent for distribution to the strikers. Ibid.

The judge employed this "nexus" analysis in the present case. There is no dispute that it is the appropriate analysis. The majority, however, accepts the Respondent's argument that the judge misapplied the analysis and reached the wrong result. I disagree.

B. Background

The Respondent's employees went out on an unfair labor practice strike on January 30, 1990. The strike lasted until August 10, 1990, when the Union made an unconditional offer to return the striking employees to work. On August 13, the Respondent refused to reinstate the former strikers. The backpay period commenced as of that date and ran until August 20, 1991, the date that the Respondent made an unconditional offer of reinstatement to all the former strikers.

The Union gave the strikers strike benefits during the strike itself when they reported to the picket line and engaged in picketing.[4] After the strike ended and the Respondent refused to reinstate the former strikers, however, the situation changed. As the judge in the underlying decision explained, although the picketing ended when the Union ended the strike, "employees and union organizers still congregated in the same area that had been designated for picketing during the strike." *Domsey Trading Corp*., 310 NLRB 777, 796 fn. 11 (1993), enfd. 16 F.3d 517 (2d Cir. 1994). After the strike ended, union officials took the former strikers from the site of the former picket line to search for work on a daily basis. Some of the former strikers testified that they also looked for work on their own and arrived at the site of the former picket line late or left early to do so.

Summarizing the testimony of the former strikers, the judge found that virtually all of the former strikers received money from the Union designated as "strike benefits" for the period August 10, 1990, to February 1, 1991.[5] For most of the former strikers, i.e., those who

[1] See *Rice Lake Creamery Co.*, 151 NLRB 1113, 1131 (1965), enfd. as modified 365 F.2d 888 (D.C. Cir. 1966) (footnote omitted):

> If the strike benefits received by the discriminatees constitute wages or earnings resulting from interim employment, they are proper deductions from gross pay. If these sums represent collateral benefits flowing from the association of the discriminatees with their union, then these sums are not deductible. The burden of proving that the strike benefits constituted wages for picketing and thus were in the nature of interim earnings, was on Respondent.

[2] Thus, the majority's conclusion that "the strike benefits were akin to compensation for the strikers' continued presence in support of the Union" does not lead to the conclusion that the benefits are interim earnings. The relevant inquiry is whether the Respondent has proven that they were compensation for specific activities undertaken on the Union's behalf, and as explained below, the Respondent has not met that burden.

[3] In *Superior Warehouse Grocers,* 282 NLRB 802 (1987), for example, the Board found a nexus between a picketer's (Lopez) services for the union and the union's payments to him where the union kept a strict accounting of the hours that Lopez picketed on its behalf, the union paid him for those hours, and the picketing was to further the union's organizational objectives. On those bases, the Board found that the payments constituted interim earnings.

[4] The record does not indicate the amount of those benefits.

[5] Thus, although the Union continued to pay benefits to the former strikers after the strike ended, those benefits were not actually "strike"

were not machinists, the amount of the strike benefits they received depended on the number of days each week that they reported to the site of the former picket line. They received $12 a day—$60 a week for reporting to the site Monday–Friday, and $72 if they also reported on the weekend (one or both days). The former strikers signed a form each day at the site and received their benefits each Friday. They signed a voucher or ledger on Friday when they received their benefits. The former strikers generally went to the site each day about the time that they would have reported for work, and they remained there until the end of the workday. The vast majority of them sang, chanted, or marched.

C. The Judge's Analysis

Relying on *Glover Bottled Gas*, above, the judge found that the Respondent did not satisfy its burden of proving that the payments were interim earnings by relying upon the "conclusory testimony" of former strikers that they were paid to picket or had to picket to receive strike benefits. The judge found instead that there was no evidence that, after August 13, 1990, any union representative told the former strikers that they were required to picket for a full day as a condition of receiving the daily payments. Citing *Standard Printing Co. of Canton*, 151 NLRB 963 (1965), the judge found that, although the former strikers may have been required to appear at the site and sign in, the Board has held such a requirement insufficient to establish that strike benefits were the equivalent of interim earnings.[6]

The judge further found that there was no requirement that the former strikers remain all day or that they do anything (e.g., sing, chant, or march) as a condition of receiving benefits. Rather, the judge found that their primary purpose in continuing to gather at the site of the picket line after the strike ended was to show the Respondent that they were ready to return to work, and to go out from there with the Union's assistance to look for work. Thus, the judge properly found that "[t]he continued payment to [former strikers] of the strike benefits they had received before August 13 was nothing more than an inducement to encourage the employees to remain available for reinstatement by the Respondent and to cooperate in the Union's efforts to find them interim employment."

D. The Majority Decision

Reversing the judge and finding that the strike benefits were interim earnings, my colleagues agree with the Respondent's argument that the judge applied the correct analysis but reached the wrong result. They find "that the weight of the evidence demonstrates that the strike benefits received by the non-machinists were contingent upon the strikers' continuous presence at the picket line and [were] more akin to compensation for services than collateral benefits."

In support of that position, as noted above, the majority advances three arguments: (1) the former strikers had not made contributions to an established strike fund from which benefits were paid; (2) in *Glover Bottled Gas*, benefits were not contingent upon or tied to the amount of time spent on the picket line, whereas here the benefits were "directly proportional to the number of days" the non-machinists spent on the line and the Union kept "close tabs" on the picketers; and (3) the nonmachinists "generally testified" that they "understood" that they received the benefits "for showing up to demonstrate in support of the Union's organizing campaign by singing, marching, and chanting on the picket line." For the reasons set out below, those arguments are not persuasive.

E. Response to the Majority

As to my colleagues' first argument, it is true that the former strikers had not contributed to an established strike fund or paid dues prior to the strike. The issue here, however, is not what the *source* of the strike benefits was. Rather, as explained above, the relevant issue is what, if anything, the former strikers were *required to do* to receive strike benefits. The source of the benefits is irrelevant to that inquiry.[7] Accordingly, the fact that the former strikers had not contributed to a strike fund prior to receiving benefits does not support a finding that the strike benefits were interim earnings.

As to my colleagues' second argument, although the benefits were "directly proportional" to the *number of days* that the former strikers *reported* to the picket line, the evidence, as explained below, does not support their

benefits. Nevertheless, as explained above, the relevant inquiry here is what, if anything, the former strikers were required to do to receive those benefits when they continued to congregate at the former picket line after the strike ended.

[6] In *Standard Printing*, the employer contended that the benefits that the union paid the strikers were contingent on their picketing and were therefore interim earnings. The Board found instead that the requirement that members report each day and sign a strike roll did not establish that the strike benefits were interim earnings.

[7] It is correct that, if the source of the strike benefits is from a strike fund to which the strikers contributed, as in *Standard Printing Co. of Canton*, above, or is in the form of a loan, as in *My Store, Inc.,* 181 NLRB 321 (1970), enfd. as modified 468 F.2d 1146 (7th Cir. 1972), cert. denied 410 U.S. 910 (1973), then the source of the payments is a factor to be considered in determining whether the strike benefits are "wages." Such evidence, however, is relevant only to show that strike benefits are *not* interim earnings. Contrary to the majority's assertion, the absence of such evidence does not support a conclusion that the strike benefits are interim earnings.

assertion that the benefits were at all proportional to the *amount of time*, i.e., hours, the former strikers actually spent at the former picket line. And, as explained above, that is the crucial issue here. Further, and contrary to the majority's assertion, the Union did not keep "close tabs" on the time that the former strikers spent at the former picket line. The record establishes that, to receive the strike benefits, the former strikers had only to sign in when they reported to the site of the former picket line and sign a voucher or ledger when they received their benefits on Fridays. That is hardly "close tabs." Cf. *Superior Warehouse*, discussed above at fn. 3, where the union kept a strict accounting of the times that the striker picketed and paid him by the hour.

Finally, and most important, in finding that the strike benefits were interim earnings, the majority errs by relying so heavily on the testimony of former strikers to the effect that they had to spend time at the site of the former picket line in order to receive strike benefits. To the extent that former strikers so testified, it was based on a misunderstanding. Simply put, many of the former strikers, most of whom were unskilled and foreign born, testified that they understood (erroneously) that the strike ended when the benefits ended, i.e., on February 1, 1991.[8] Thus, they *assumed* that they were obligated to spend time at the picket line in support of the Union after the strike ended in August 1990 in order to continue to receive benefits. However, the testimony embodying that assumption is in conflict with more reliable evidence and is otherwise unsupported.

What the facts show, and what the judge found, is that after August 10, the former strikers were required only to appear at the former picket line and sign in in order to receive strike benefits. There is no evidence to support the majority's assertion that the Union kept track, in effect, of the hours that the former strikers spent at the site or that it required them to demonstrate in support of the Union's organizing campaign to receive benefits. Thus, there is no nexus between the former strikers' activities at the former picket line and the benefits they received from the Union. To the contrary, the fact that the former strikers received $12 when they reported to the site, and that the amount did not change regardless of whether they left the site to search for work with the Union, or arrived late or left early, undercuts the majority's argument that they were paid for the time that they "spent" at the site and for their activities on behalf of the Union. Finally, the fact that the Union took former strikers from the site to search for work strongly supports the judge's reasoning that "[t]he continued payment to them of the strike benefits they had received before August 13 was nothing more than an *inducement* to encourage the employees to remain available for reinstatement by the Respondent and to cooperate in the Union's efforts to find them interim employment" (emphasis added).

In sum, the totality of the evidence supports the judge's finding that the strike benefits were collateral benefits and therefore not deductible from gross backpay. The majority, however, has seized upon the mistaken testimony of the former strikers as a means of reducing the Respondent's backpay liability. For that reason, and for the other reasons discussed above, I dissent on this issue.

II. CREDIBILITY ISSUES

In reversing certain of the judge's credibility findings relating to the discriminatees discussed below, my colleagues rely on documents of questionable evidentiary value to overturn the judge's credibility findings. I dissent from those reversals for two reasons.

First, the Supreme Court has firmly established the deference owed to an administrative law judge's findings, particularly with respect to credibility. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), the Court stated:

> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witness and lived with the case has drawn conclusions different from the Board's than when he had reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.

In the context of a backpay case, as here, the importance of credibility cannot be underestimated. The discriminatees alone know of the totality of their efforts to search for work during the backpay period. Thus, the judge's credibility determination as to each discriminatee is crucial in determining whether that discriminatee made a reasonably diligent search for work in an effort to mitigate backpay. In these circumstances, to borrow from the standard applied in the Second Circuit, I would not reverse a judge's decision to credit a witness unless that witness' testimony was "hopelessly incredible or . . . flatly contradict[ed] either by the law of nature or undis-

[8] For example, when the judge asked discriminatee Carolina Olivo how long she was out on strike, she answered: "I guess like a year, a year." (Tr. XXXII 2188.) Olivo's testimony, to the effect that the strike lasted from January 30, 1990, until February 1, 1991, when the strike benefits ended, is consistent with that of other discriminatees.

puted documentary testimony." *Beverly Enterprises v. NLRB*, 139 F.3d 135, 142 (1998), quoting *Kinney Drugs v. NLRB*, 74 F.3d 1419, 1427 (1996). As to the discriminatees discussed below, my colleagues do not contend that their testimony met that standard. Rather, they contend that their testimony was contradicted by documentary evidence that my colleagues assert is, in effect, undisputed. They are wrong.

My colleagues rely in particular on compliance forms that the discriminatees filled out, or that were filled out on behalf of the discriminatees, after the backpay period ended. Although my colleagues are correct that those forms were filled out prior to the compliance hearing, and therefore closer in time to the events at issue than testimony given at the hearing, this does not establish that the compliance forms are inherently more reliable than the testimony. In this regard, I agree with the judge that the compliance forms are not intended "to be an exhaustive account of every effort that an employee—every single place that an employee looked for work . . . these are just an administrative form that's used by the General Counsel for them to do their administrative investigation of a compliance proceeding[.]" (Tr. XXIX 1816–1817.) Because the compliance forms are neither sworn affidavits nor journals containing exhaustive records of a search for work, I also agree with the judge that one should not "read . . . too much into these forms." Id. In sum, I agree with the judge that one cannot rely on these forms as undisputed documentary testimony.

Given these considerations, I dissent from my colleagues' reversal of the judge's credibility findings relating to the following discriminatees.

1. *Ronald Jean Baptiste*[9] found interim employment at Calvin Klein in January 1991. In computing Baptiste's backpay, the General Counsel deducted only those interim earnings. The Social Security earnings record for Baptiste, however, also showed earnings of $2088 in 1990, from an employer identified as "Concepts of Independence, Inc." The issue here is whether the $2088 reported as interim earnings from Concepts of Independence should be deducted from Baptiste's gross backpay.

Finding that Baptiste was a "generally credible witness," and mindful of other evidence in the record regarding the fraudulent use of social security numbers, the judge found it "plausible" that someone else used Baptiste's name and social security number to obtain work at Concepts of Independence in 1990. Also mindful of the respective burdens of the parties in a backpay proceeding and that any doubts should be resolved against the Respondent, as the wrongdoer, the judge found, "based on the credible denial of Jean Baptiste," that he did not work at Concepts of Independence during the backpay period and therefore that the $2088 reported as earnings from that employer should not be deducted from gross backpay. Relying on the Social Security report as, in effect, undisputed documentary testimony that Baptiste worked for Concepts of Independence during the backpay period, my colleagues reverse the judge and deduct $2088 for Baptiste's gross backpay. I would not do so.

I find nothing in the majority's reasoning that would justify overturning the judge's finding, based on credibility, that Baptiste did not work at Concepts of Independence during the backpay period. Further, given the possibility that someone else may have used Baptiste's name and social security number to obtain employment at Concepts of Independence, I would not, as my colleagues do, construe the social security record as undisputed documentary testimony that Baptiste, in fact, worked for Concepts of Independence. Rather, I would resolve the doubt arising from the social security report against the Respondent. Therefore, contrary to my colleagues, I would not require that the $2088 be deducted from Baptiste's gross backpay.

2. *Cesar Amador*[10] found interim employment at Transworld Maintenance Service at JFK Airport, where he vacuumed the gates, cleaned bathrooms, and occasionally cleaned airplanes. Amador was laid off from this job in January 1991 when the employer experienced problems. The issue here is whether Amador conducted a reasonably diligent search for work after his January layoff.

Amador's compliance form states, at page 1, that Amador was unavailable for work from May 1991 until May 1992 because of a hernia. The compliance form also states, at page 3, that he was unemployed from January to November 1991 because of a hernia and that he was in jail from November 1991 until May 1992. Amador denied that he was ever unavailable for work because of the hernia; he testified that the only work he could not perform was heavy lifting, and that the hernia did not begin to bother him until the Respondent reinstated him in August 1991 and assigned him arduous work.

Crediting Amador's sworn testimony over the compliance form, the judge found that Amador satisfied his duty to mitigate backpay by searching for work after his layoff in January 1991. In crediting Amador's testimony over the "apparent conflicting statements" in the compliance form, the judge noted that Amador's explanation that the hernia prevented him from doing heavy work

[9] Supp. JD VII,F,3.

[10] Supp. JD VII,H,6.

only "is plausible and probably supported by medical science," and that the Respondent did not dispute Amador's testimony that he looked for work doing light cleaning jobs after his layoff from Transworld Maintenance.

I would adopt the judge's findings on both issues. As to the former issue, Amador performed light maintenance and cleaning work for Transworld Maintenance before his layoff in January 1991. But for that layoff, one assumes that he would have continued to work for Transworld Maintenance beyond January. Consequently, it is reasonable to conclude that the hernia prevented Amador from doing heavy work only. As to the latter issue, the Respondent never asked Amador directly whether he looked for work doing light cleaning jobs after his layoff from Transworld Maintenance. Therefore, contrary to my colleagues' assertion, it cannot be said that the Respondent disputed that testimony.

In sum, given the inherently contradictory statements set out at pages 1 and 3 of Amador's compliance form, and the fact that Amador's brother filled out the form for him while Amador was in prison, I would not rely on the compliance form, as my colleagues do, to discredit Amador's testimony which the judge credited.

3. *Gladys Bernard*[11] had interim earnings in the last two quarters of the backpay period from Just Industries, a job that she found by searching for work with Tigus, a union official. The issue here is whether she made a reasonably diligent search for work from August 13, 1990, to February 1, 1991, the period during which she received strike benefits. The judge found that she did. My colleagues reverse. I would adopt the judge

Bernard initially testified that, during the backpay period, she went to the site of the former picket line every day and stayed all day. Subsequently, she explained that this was only at the beginning of the backpay period and that, after that initial period, she would leave the former picket line with Tigus to look for work. Although Bernard's compliance form, at page 3, states "non" where claimants were asked to list places where they sought work, it also states at page 2 that she worked at Just Industries. At the hearing, Bernard explained that she did not understand the question on page 3 and only learned subsequently that she had answered the question incorrectly. Crediting Bernard's testimony—that after an initial period she looked for work with Tigus—over the compliance form, which the judge found was "internally inconsistent" (Bernard's statement at page 2 that she found work at Just Industries contradicting her answer "non" at page 3), the judge found that Bernard made a reasonably diligent search for work during the backpay period.

Finding that Baptiste's initial error in her testimony was consistent with her mistaken answer—"non"—on her compliance form, my colleagues reverse the judge's finding and toll her backpay from August 12, 1990, to February 1, 1991. By relying on a flawed compliance form to bolster an initial answer to a question, and then ignoring Baptiste's more complete answer to the question, my colleagues not only reverse the judge's findings without solid grounds for doing so, but they also construe any doubts arising from Baptiste's testimony and her compliance form against Baptiste, the discriminatee, rather than against the Respondent, the wrongdoer. I therefore dissent.

4. *Rafael Gomez*[12] found interim employment on or about February 19, 1991, as a union organizer. The issue here is whether Gomez made a reasonably diligent search for work from August 13, 1990, to February 1, 1991, the period during which he received strike benefits. Gomez testified that, if someone gave him the name of a potential employer, he would leave the former picket line to go and apply for the job. He also testified that if an employer called him or asked him to come back another time, he would write down the name and address on a piece of paper so that he would know where to go. The compliance form that Gomez filled out in April 1992, however, is blank except for the personal information on the first page. Gomez could not recall why he did not list on that form the places he visited.

The judge attached "very little weight" to the fact that the compliance form was blank, and found instead that the fact that Gomez found interim employment in February 1991 evidenced that he was searching for work during the backpay period. The judge also found credible Gomez' description of his search for work during the period at issue.

Relying on the blank compliance form, my colleagues reverse the judge's finding that Gomez searched for work during the backpay period. The blank compliance form, however, is hardly undisputed documentary testimony that Gomez did not, in fact, search for work during the backpay period. I am therefore unwilling to exalt that compliance form over the credited testimony of this discriminatee. The judge "sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Based on Gomez' credited testimony, I would adopt the judge's finding that Gomez searched for work in the period from August 13, 1990, to

[11] Supp. JD VII,H,17.

[12] Supp. JD VII,H,41.

February 1, 1991, and I would therefore toll backpay during this period only for the 2 weeks that Gomez was in the Dominican Republic.

5. *Rufino Guity*[13] found interim employment at a restaurant in March 1991. The issue here is whether Guity made a reasonably diligent search for work during the period from August 13, 1990, to February 1, 1991, the period in which he received machinist's strike benefits of $200 a week. Finding that "Guity was able to recall enough specifics regarding his job search to show that he was not fabricating evidence," the judge found that Guity made a reasonably diligent search for work during the backpay period. My colleagues reverse. Relying on certain mistakes in Guity's compliance form and finding that Guity's testimony was not sufficiently specific to establish that he made a reasonably diligent search for work, they toll backpay for that period.

Contrary to my colleagues, I find that Guity's testimony regarding his search for work supports a finding that Guity made a reasonably diligent search for work. Further, as the judge emphasized, the fact that Guity ultimately found interim employment supports the finding that he was searching for work during the backpay period. Finally, contrary to my colleagues, I would give little, if any, weight to Guity's 1992 compliance form. The judge credited Guity's testimony that *he* did not fill out the form, and found instead that Tigus or another union official filled out the form for him. For all these reasons, I would adopt the judge's finding that Guity made a reasonably diligent search for work during the period he received strike benefits.

III. OTHER ISSUES

I agree with my colleagues' disposition of the remaining issues except for certain matters relating to the individual discriminatees discussed below.

1. *Marie Sylvana Jean-Charles.*[14] My colleagues reverse the judge and find that Jean-Charles' backpay should be tolled for the 3 days that she was absent from work at Caro Bags, her interim employer, because of illness. I would not toll backpay for that period.

Jean-Charles testified that she was absent from work because of illness when she received the Respondent's recall letter. She further testified, in effect, that her last day at work for Caro Bags was the Wednesday or Thursday during the week prior to her return to work for the Respondent, on Tuesday, August 20, 1991. Thus, the judge found that "at most she missed three days of work." Section 10546.2 of the NLRB Casehandling Manual (Part Three) Compliance, states that "[i]n general, backpay is tolled for a discriminatee who has been unable to work due to illness or injury for a period of 3 days or more." Thus, the Board considers an absence from interim employment for less than 3 days de minimis. Because Jean-Charles may have missed less than 3 days of work, it would not be appropriate to toll backpay for this short period. My colleagues, however, not only do not properly observe the maxim "*de minimis non curat lex*" in tolling backpay for those sick days, but they also fail to apply the precept that doubts should be resolved against the wrongdoer. I therefore dissent.

2. *Marie Estivaine.*[15] The issue here is whether Estivaine is entitled to backpay from August 13 to the end of November 1990. The judge found that she was. My colleagues reverse and toll backpay for this period. I would adopt the judge.

The judge found that Estivaine satisfied her duty to mitigate by searching for work from December 1990 and by increasing her efforts in February 1991. In particular, the judge found that "[e]ven assuming that Estivaine made no effort to find work in October and November," he would not toll her backpay for "this brief hiatus" given the piecemeal nature of the Respondent's offers of reinstatement. I agree with the judge.

My colleagues agree that the special circumstances arising from the Respondent's piecemeal offers of reinstatement require that the date by which discriminatees should have begun an initial search for work must be extended beyond the 2-week "rule" announced in *Grosvenor Resort*, 350 NLRB 1197 (see fn. 36 of the majority decision and accompanying text). Extending that period here to the end of September 1990 for all discriminatees, they disregard the individual discriminatees' subsequent efforts to search for work. In doing so, my colleagues ignore the precept that whether a discriminatee has made a reasonably diligent search for work must be resolved by an examination of his or her efforts to search for work over the entire backpay period. I dissent from my colleagues' adoption here of an end-of-September "corollary" to the 2-week "rule" announced in *Grosvenor Resort*, and I dissent from its application here to deny Estivaine backpay from the beginning of the backpay period until the end of November 1990.

3. *Maximo Lacayo.*[16] The issue here is whether Lacayo made a reasonably diligent search for work from February through June 1991 by seeking work during that period as an asbestos handler. Contrary to my colleagues, I would adopt the judge's finding that he did. Having searched for work comparable to his job with the

[13] Supp. JD VII,H,43.
[14] Supp. JD VII,H,27.
[15] Supp. JD VII,H,34.
[16] Supp. JD VII,H,53.

Respondent without success early in the backpay period, Lacayo took the initiative to enroll in an asbestos-handling course and received a certificate in that field. He then found a job as an asbestos handler, work that was both more skilled and better paying than his job with the Respondent. After his layoff from that job, Lacayo continued to search for work as an asbestos handler, a search which the judge found was reasonably diligent.

My colleagues find that Lacayo's job search was not reasonably diligent solely because he did not also look for less skilled and less well-paying jobs that were more comparable to his former job with the Respondent. Contrary to my colleagues, I would not reverse the judge's finding simply because Lacayo—having taken the initiative to find more skilled and better paying work and having, in fact, found such work—did not also look for less skilled and lower paying work during the period at issue.

4. *Rufino Guerrero Norales.*[17] The issue regarding Norales is whether he received strike benefits from August 13, 1990, to February 1, 1991. As explained above in part I, in order to receive strike benefits, discriminatees had to appear at the former picket line and sign in each day and, at the end of the week, they had to sign a ledger or voucher indicating that they received the benefits for that week. Those records were admitted into evidence. There are no receipts indicating that Norales received strike benefits after August 13. Relying on that documentary evidence, the judge found that Norales did not receive strike benefits during the period in issue. My colleagues, relying on Norales' testimony, not discussed by the judge, that he received strike benefits during this period, reverse the judge and find that Norales received strike benefits. I would adopt the judge.

I find, in agreement with the judge, that the strike benefit receipts are, in effect, undisputed documentary evidence that establishes which discriminatees received strike benefits and the weeks in which they received them. The judge relied on this documentary evidence over conflicting testimony in every instance in which there was a disparity between what the strike benefit receipts showed and a discriminatee's testimony.

As explained above, the discriminatees received strike benefits from January 30 until August 10, 1990, i.e., during the strike itself. They then continued to receive benefits after the strike. Many of the discriminatees believed that the strike ended only when the benefits ended, in February 1991 (see fn. 8 above and accompanying text), and some apparently believed that they continued to receive strike benefits after the strike ended on August 10 when, in fact, they did not do so. In each of those instances, the judge relied on the documentary evidence—the strike receipts—over the sometimes confused testimony of discriminatees to determine the amount, if any, of strike benefits that the discriminatees received.

My colleagues do not disagree with the judge's analysis in the case of other discriminatees. For example, although discriminatee Olivo testified that she received strike benefits until February 1, 1991, the judge relied on the strike receipts to find that she received strike benefits only through September 21, 1991. My colleagues do not dispute that finding. Inexplicably, they do dispute the judge's finding here. Not only is my colleagues' reversal of the judge contrary to the evidence, but it is also contrary to my colleagues' findings relating to other discriminatees. Accordingly, I dissent on this issue.

5. *Juana Perralta.*[18] I agree with my colleagues that Perralta made a reasonably diligent search for work during the period from August 13, 1990, to February 1, 1991, the period during which she received strike benefits. As the judge found, and my colleagues agree, Perralta, who is mentally retarded and could not search for work on her own, would go with union officials and other former strikers to search for work during that period. The issue here is whether Perralta conducted a reasonably diligent search for work after February 1, 1991.

Noting that the Union continued to take some former strikers to search for work after February 1, and that it was unclear whether Perralta was one of them, the judge found that any doubt in this regard should be resolved against the Respondent. I agree. As the judge explained, Perralta did not understand the questions asked at the hearing and therefore her testimony alone should not be the basis for denying her backpay. Although my colleagues concede this point, they find it decisive that no union official or other discriminatee testified that Perralta searched for work with them after February 1. I find it decisive that none of those individuals testified that Perralta did not search for work with them. Contrary to my colleagues, I would resolve any doubt on this issue against the Respondent, the wrongdoer, and not against this discriminatee. I would therefore adopt the judge's findings concerning Perralta.

6. *Richard Simon.*[19] The narrow issue concerning discriminatee Simon is whether he made a reasonably diligent search for work in January 1991. Simon's compliance form states on the first page that he was unavailable for work from January 30, 1990, to February 1, 1991 (the period in which the former strikers received benefits), because of a strike. On the third page of the compliance

[17] Supp. JD VII,H,63.

[18] Supp. JD VII,H,67.

[19] Supp. JD VII,H,78.

form, where the discriminatee is asked to describe his search for work, only the following is written:

> 02/11/91I was looking for a job and then I find it.
> Just Packaging, Inc.
> 269 Green Ave Br'klyn N.Y. 11222

Because Simon found the job at Just Packaging in early February, the judge gave him "the benefit of the doubt," and found it "more than likely" that Simon began his search for work sometime in January. The judge therefore did not toll his backpay for January 1991. Finding that the judge "erred by creating a doubt where there was none and by then giving Simon the benefit of that 'doubt' to award backpay for January," my colleagues reverse the judge and toll backpay for that month. They find that the fact that Simon found a job at Just Industries in February does not "contradict" the record evidence, i.e., the compliance form, that states that Simon did not look for work in January 1991. Be that as it may, the same record evidence—the compliance form—that my colleagues rely on to deny Simon backpay for January also states that he did in fact find employment in early February. Thus, the record evidence, not the judge, created the doubt as to when Simon began his search for work. By resolving the doubt in Simon's favor, the judge merely followed well-established Board law that doubts should be resolved against the wrongdoer. I would therefore adopt the judge on this issue.

Conclusion

For the reasons set out above in part I, I would adopt the judge's finding that the strike benefits at issue here were collateral benefits and therefore not deductible from gross backpay as interim earnings. I would also adopt the judge's credibility-based findings regarding the discriminatees discussed in part II and I would adopt his findings on the specific issues discussed in part III. Finally, as explained above at footnote 36 of the majority decision and consistent with my dissent in *Grosvenor Resort*, above, I would not adopt a 2-week rule—or any per se rule—that would require discriminatees to begin an initial search for work within any given period of time or risk losing backpay from the time of their employer's unlawful action until their search for work commences. Rather, consistent with prior law, I would consider each discriminatee's efforts over the entire backpay period in determining whether that individual satisfied the obligation to mitigate backpay.

Except as set out above, I join my colleagues in their disposition of the remaining issues addressed in the majority Decision.

Aggie Kapelman, Esq., Kathy Drew-King, Esq., Diane Lee, Esq., and *Rasalind Rowen, Esq.,* for the General Counsel.
Paul A. Friedman, Esq. and *Catherine Liu, Esq.,* for the Respondent.
Stuart Weinberger, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. On March 23, 1993, the Board issued its Decision and Order in this proceeding (310 NLRB 777), in which it upheld the administrative law judge's findings, inter alia, that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by discharging employees James Anthony Charles and Maximo Martinez; and violated Section 8(a)(1) and (3) of the Act by discharging employees Giles Robinson, Louis Antoine Dormeville, Dieulenveux Zama, Marie Rose Joseph, Ronald Jean Baptiste, Mulert Zama, Antoinette Romain, Marie Nichole Mathieux, Margarett St. Felix, Nilda Matos, Victor Velasquez, Jose DeLeon, and Francisco Moreira and by refusing to reinstate 201 named unfair labor practice strikers upon their unconditional offer to return to work. The Board ordered the Respondent to, inter alia, reinstate and make whole the fifteen employees who were unlawfully discharged and the 201 unfair labor practice strikers.[1]

On February 18, 1994, the United States Court of Appeals for the Second Circuit enforced the Board's Order in full (16 F.3d 517). Thereafter, controversy having arisen over the amount of backpay due under the Board's Order, the Regional Director issued a compliance specification and notice of hearing on August 20, 1997, which was subsequently amended several times at the hearing to conform to the evidence as it developed.[2] The Respondent filed its answer to the compliance specification on October 3, 1997, which was also amended at the hearing. The hearing was held, in Brooklyn, New York, on multiple dates commencing October 27, 1997, and concluding on January 29, 1999.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. THE BOARD'S DECISION

The Board adopted the administrative law judge's findings that the Respondent discharged Robinson and Charles on December 1, 1989, and January 17, 1990, respectively, because of their activities on behalf of the Union and because, in Charles' case, he refused to identify those individuals who had filed unfair labor practice charges against the Respondent with the Board. The judge further found, and the Board agreed, that the strike which commenced on January 30, 1990, was an unfair

[1] All the discharged employees, except James Anthony Charles and Giles Robinson, are also included in the list of unfair labor practice strikers entitled to reinstatement and backpay.

[2] The General Counsel's unopposed posthearing motion to amend the specification as to certain named discriminatees is granted and the motion is received in evidence as GC Exh. 148.

labor practice strike in protest of these two discharges and that the strike was prolonged by numerous unfair labor practices committed by the Respondent during the strike. On August 10, 1990, the Union made an unconditional offer to return to work on behalf of all employees on strike, to be effective on Monday, August 13, 1990. Although only 132 of the striking employees appeared at the Respondent's premises on that date, the Board found that the Respondent failed to request clarification of the status of those employees who did not appear and thereby waived any right it may have had to deny reinstatement to such employees.

The Board further found, in agreement with the judge, that the Respondent did not make valid offers of reinstatement to *any* employees on August 13, 1990, because it unlawfully required them to complete an application for reinstatement and produce INS "green cards." Because no valid offer of reinstatement was made, the Board found that striking employees who did not return to work that day were still entitled to reinstatement. The Board also agreed with the judge that former strikers had legitimate reasons for declining facially valid offers of reinstatement that the Respondent sent to them on September 11, 19, and 24, 1990, because of the manner in which the offers were sent to them and because of the Respondent's treatment of strikers who had returned in response to earlier offers, which included the unlawful discharge of 12 reinstated strikers. In enforcing the Board's Order, the court of appeals specifically found that offers of reinstatement made by the Respondent on March 22 and April 11, 1991, were similarly tainted by the Respondent's continuing egregious violations.

In the remedy section of his decision, which the Board adopted, the administrative law judge ordered as follows:

> The principal affirmative relief which is warranted is to require Respondent to reinstate all the strikers for whom the Union made its offer. The relief must insure that all employees be made whole for their losses: those who have not been reinstated; those who have been reinstated, but whose reinstatement was late, and this seems to include, if not everyone, almost everyone; those whom Respondent did not properly recall to work; and those whom Respondent recalled late, and then discharged. Which employees fit into which category cannot be fully determined from this record. Respondent did not prove that its offers of reinstatement were validly served on any striker. . . .
>
> I make no finding as to anything else, but note merely, as I have above, that those employees who refused to respond to letters which were invalid had a right not to respond to them and that Respondent's backpay liability to them continues to run. Respondent submitted into the record documents intended to show that it made further offers of reinstatement during the course of the hearing, including offers to a mass of employees on March 22 and April 11, 1991. I make no finding about the validity of those offers: whether they were sent, whether they were sent to the proper addresses, whether they were received, whether they were unconditional, and whether they offered the employees the same positions as they held before the strike, not equivalent positions, unless the original jobs no longer existed. There was enough testimony in the record to reveal that documents were not being mailed and not being received and enough indication that Respondent's witnesses were not generally worthy of belief for the Regional Director for Region 29 to insist that documents be sent by certified mail, return receipt requested, before crediting any representation that an offer of reinstatement was made. In sum, I would expect that Respondent should make all reasonable efforts to ensure that its offers are extended to everyone entitled to them, if it has not already done so.
>
> The reinstatement offers shall be subject to the provision that Respondent shall not require the employees to fill out any documents or provide any information other than their names and current addresses. . . . Respondent's time for engaging in technicalities and delaying tactics must end. Furthermore, this relief is applicable to all employees, except for those who may have been reinstated within the time limits provided in *Drug Package Co.,* 228 NLRB 108 (1977). It is intended to make whole those employees who were reinstated untimely and maintained their employment; those who were never reinstated; those employees who were discharged on August 13 . . .; and those who are specifically named above, many of whom are also entitled to be made whole for periods prior to their reinstatement and subsequent discharge.

It is settled law that a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due each claimant. *J. H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230–231 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973). Once the General Counsel has established gross backpay, the burden is on the respondent to establish affirmative defenses that would eliminate or mitigate its liability. *NLRB v. Brown & Root, Inc.,* 311 F.2d 447, 454 (8th Cir. 1963). Respondent has the burden of establishing such matters as unavailability of jobs, willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Mooney Aircraft, Inc.* 366 F.2d 809, 812–813 (5th Cir. 1966). When there are uncertainties or ambiguities, doubt should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.,* 204 NLRB 1068 (1973), and cases cited therein. The evidence in the record before me must be evaluated with these basic principles in mind.

II. THE COMPLIANCE SPECIFICATION

The compliance specification alleges that the backpay period for Giles Robinson begins on December 1, 1989, the date he was discharged, and ends on August 20, 1991, the effective date of the Respondent's offer of reinstatement. For James Anthony Charles, the specification alleges that backpay runs from the date of his discharge, January 17, 1990, until the effective date of the Respondent's offer of reinstatement, also August 20, 1991. The backpay period for all other discriminatees is alleged to begin on August 13, 1990, the date that the Respondent refused to reinstate them in response to their un-

conditional offer to return to work and to end on the date, August 20, 1991, that the Respondent effectively offered to reinstate them. The compliance specification also sets forth a formula for computation of the gross backpay due all the discriminatees, i.e., their hourly rate of pay, with any increases due to changes in minimum wage laws which became effective during the backpay period, multiplied by the average number of hours each discriminatee worked prior to Respondent's discharge or refusal to reinstate them. Net backpay is alleged to be each discriminatee's gross backpay minus interim earnings, computed on a quarterly basis.

The Respondent, in its answer, did not dispute either the backpay period or the formula for computing gross backpay. While agreeing with the General Counsel that net backpay should be the gross backpay reduced by interim earnings, Respondent disputes the amount of interim earnings reported in the compliance specification, arguing that gross backpay should be reduced further by unreported interim earnings, by strike benefits received by the discriminatees from the charging party unions and to account for the failure of the discriminatees to mitigate damages by making a reasonable and diligent search for interim employment.[3] The Respondent further argues that backpay should be tolled for time spent by the discriminatees on the Union's picket line at the Respondent's facility, equating this to a willful unavailability for work. With respect to 24-named discriminatees and any others not yet known to the Respondent, the Respondent further asserts that they are entitled to no backpay because they were undocumented aliens who were not authorized to work in the United States during the backpay period.

With the issues thus framed by the pleadings, it is clear that the Respondent bore the burden of proof throughout this proceeding. *NLRB v. Mooney Aircraft,* 366 F.2d supra at 813. No issue was timely raised as to the backpay period or the formula for calculating gross backpay. The Respondent's various defenses all amounted to attempts to reduce it's backpay liability to zero. Each of these defenses will be considered, at first in general terms and then as applicable to the individual claims of the discriminatees.

III. POSTHEARING MOTIONS

On February 8, 1999, the General Counsel filed a Motion to Strike All or Part of the Respondent's Exhibits 330, 335, and 336. The Respondent filed a response and opposition to the motion on July 9, 1999.[4] I have carefully considered the parties positions and have decided to deny the General Counsel's motion. Respondent's Exhibits 330, 335, and 336 are reports prepared by Andrea Azarm who was called by the Respondent as an expert witness regarding social security enumeration. The report is a summary of her analysis of various social security numbers provided by the Respondent. The report indicates, based on published documents describing the Social Security Administration's procedures for issuing numbers, where and approximately when each number was issued. In addition, based on her research into "credit headers," the report identified names, addresses, and other limited information regarding persons that have used each number. Azarm acknowledged that the information on the credit headers does not reveal which of multiple persons who use any given number is the rightful holder of that number. Such information is only available from the Social Security Administration and is subject to strict privacy laws and regulations. As the Respondent concedes in its response, Azarm was not intended to, and did not, provide any factual evidence regarding any discriminatee's use of any given social security number during the backpay period. Rather, the information was provided to show that individuals who had used more than one social security number had the opportunity to work and conceal earnings during the backpay period. The Respondent also relies on this information as a factor in assessing the credibility of the discriminatees. The arguments raised by the General Counsel in her motion go more to the weight to be attached to the information in Azarm's report. The weakness and limitations of this evidence, as highlighted by the General Counsel in her motion, do not affect its admissibility.

The Respondent filed with its brief a motion to add to the record a total of 324 documents. The only argument advanced in favor of this posthearing receipt of evidence is that these documents are necessary to "accurately complete the record." The General Counsel filed a response to this motion on June 1, 1999.[5] Most of the documents proffered by the Respondent are taken from the personnel files that the Respondent maintains for its employees. The Respondent offered no explanation why this previously available information in its possession could not have been offered during the hearing. Moreover, many of the documents relate to missing discriminatees who did not testify in this proceeding. Some of these records, in particular the employee cards with handwritten information, contain hearsay. Other documents, such as union strike benefit receipts and social security earnings records have not been shown to have been previously unavailable or newly discovered. Accordingly, based on the above, and for the reasons set forth in the General Counsel's response, I shall deny the Respondent's motion to add to the record all but one document proffered with the motion. *Southern Florida Hotel & Motel Association,* 245 NLRB 561 (1979), modified on other grounds 751 F.2d 1571 (11th Cir. 1985). I will receive the *Employer's Quarterly Report of Wages Paid to Each Employee* obtained by the Respondent after the hearing from Palee Fashions Corp., a/k/a The Silk Shop as Respondent's Exhibit 348 for the reasons discussed, infra, in connection with Jean Olivier's claim for backpay.

IV. STRIKE BENEFITS AND WILLFUL LOSS ISSUES RELATED TO THE PICKET LINE

There is no dispute that virtually all of the discriminatees received money from the Union that was designated as "strike benefits" during at least part of the backpay period. The General Counsel chose not to offset these sums from gross backpay.

[3] The Respondent, throughout its brief, continuously mischaracterized the discriminatees' duty to conduct a "reasonably diligent" search for work. The Board has never imposed a dual requirement that such efforts be both reasonable *and* diligent.

[4] The General Counsel's motion and the Respondent's opposition are received as ALJ Exhs. 1 and 2, respectively.

[5] The Respondent's motion and the General Counsel's response are received as ALJ Exhs. 3 and 4, respectively.

The Respondent argues that these strike benefits were a form of interim earnings that should have been deducted. The Board has held that money received by discriminatees from a union during a strike should be deducted from their gross backpay where the amounts received constitute wages or earnings resulting from interim employment. If, however, the sums received from a union represent "collateral benefits flowing from the association of the discriminatees with their union, then these sums are not deductible. The burden of proving that the strike benefits constituted wages for picketing and thus were in the nature of interim earnings, [i]s on the Respondent." *Rice Lake Creamery,* 151 NLRB 1113, 1131 (1965), enfd. as modified 365 F.2d 888 (D.C. Cir. 1966). In determining whether strike benefits constitute wages for picketing, or collateral benefits, the Board and the courts look for a "nexus between strike benefits received and picketing activity." *Lundy Packing Co.,* 856 F.2d 627 (4th Cir. 1988). Where the evidence establishes that the sums received by the discriminatees from the union were contingent upon, or compensation for picketing or other services, such sums will be deducted from gross backpay. *My Store, Inc.* 181 NLRB 321 (1970), enfd. 468 F.2d 1146 (7th Cir. 1972). Accord: *Superior Warehouse Grocers, Inc.,* 282 NLRB 802 (1987); *Hansen Bros. Enterprises*, 313 NLRB 599 (1993).

The record evidence here establishes that the Union paid benefits to the striking employees from the commencement of the strike in January 1990 through February 1, 1991.[6] For the vast majority of strikers, the amount each received was based on the number of days they appeared on the picket line. Those who showed up 5 days a week (Monday–Friday), received $60. If they also were present on the weekend, the amount was increased to $72.[7] Striking employees who appeared less than 5 days a week, saw their benefit reduced by $12 for each day that they were absent. These benefits were paid once a week, on Friday, and strikers were required to sign either a ledger or a voucher to receive the payment. The strikers also had to sign in every day that they appeared on the picket line. Although the strike ended on August 13, when the employees appeared at the Respondent's facility ready to return to work, the Union continued making these payments to the unreinstated strikers until February 1. Before February 1, the Union ceased paying benefits to any striker upon their return to work with the Respondent, or another employer. In a few cases, employees who found interim employment but continued to appear at the site of the picket line when not working in order to show their support for their fellow strikers, received no strike benefits.

Most of the discriminatees who testified recalled that they went to the site of the picket line every day at about the time they would have reported for work at the Respondent's facility and remained there until the end of the work day. Most also testified that they were only permitted to leave the site of the picket line to get something to eat or to look for work, usually with someone from the Union. Almost all conceded that they were not paid for days that they did not go to the site of the picket line. Some of the discriminatees testified that they received the same amount, i.e., $12/day, even if they were not present for a full day. The vast majority of witnesses testified that they chanted, sang, carried signs, or marched during the time they were standing outside the Respondent's facility.[8] There is no evidence that the Union actually required the discriminatees to do anything other than show up and sign in order to receive the strike benefits.

The record reveals that the Union paid those discriminatees who had been members of the Union's organizing committee an additional $65 a week during the strike and that these payments continued after the strike ended on August 13.[9] Vouchers signed by these discriminatees had the notation "captain." Jean Morisseau, a/k/a Tigus, the Union's chief organizer assigned to this campaign, testified that these individuals served as "picket captains" who assisted the Union in monitoring the picket line and maintaining order. It is not clear from the record what additional responsibilities these individuals had during the backpay period when there was no picketing. However, Bonny and Brice testified to performing some additional duties during the backpay period to assist their fellow discriminatees. Francois denied having to perform any specific duties to receive this extra benefit.[10]

The Union paid a higher benefit to those striking employees who operated the baling machines before the strike, designated as "machinists."[11] These employees were paid $200 or more per week because they were the most highly paid and skilled employees before the strike. There is no evidence that the machinists had to sign anything other than a voucher at the end of the week to receive this money. Unlike the other strikers, the machinists who testified recalled that they generally were more flexible regarding the amount of time they spent at the site of the picket line. Some testified that they spent no more than 5 hours a day with their fellow strikers. The amounts they received each week were not reduced for days that they were absent from the picket line.

The record also reveals that a few strikers received "night shift" payments from the Union, in the amount of $55, on sporadic occasions when they volunteered to spend the night out-

[6] All dates are from August 13, 1990, to August 20, 1991, i.e., during the backpay period, unless otherwise indicated.

[7] The discriminatees received the same $72 amount whether they appeared 6 or 7 days a week.

[8] Many of the witnesses had difficulty differentiating between the periods before and after the Union made the offer to return to work. Judge Schlesinger found in the underlying case that the picketing ended when the Union ended its strike on August 13 and that the employees and union organizers continued to congregate outside the Respondent's facility after that date without picketing. Supra at 796 fn. 11.

[9] Bardinal Brice, Jean Bonny a.k.a Jean Eliacin, and Marie Jose Francois are the only discriminatees who fall into this category.

[10] Although the General Counsel asserts there is no evidence that Francois also received the regular strike benefits during the backpay period, her name does appear on one of the strike benefit ledgers in evidence with a signature that appears to be the same as the one she identified on the vouchers documenting her receipt of benefits as a "captain."

[11] The discriminatees who received "machinists" benefits during the backpay period were Wilner Ceptus, Jose DeLeon, Luis Frederick, Juan Guerrero, Fritho Lopomarede, Maximo Martinez, Francisco Moreira, Oscar Nuñez, Marcos Pitillo, Romulo Ramirez, Orlando Ramos, Chano Reyes, Rene Rochez, Vicente Suazo, and Victor Velasquez.

side the Respondent's facility.[12] These payments were in addition to their regular strike benefits. When performing "night-shift" duty, the individual would remain in a van owned by discriminatee Giles Robinson, or another union vehicle, for approximately 10 hours overnight. Although not entirely clear, it appears that they were there to protect property belonging to the Union that was kept at the site of the picket line and to watch the Respondent's facility for after-hours activities.

Finally, all strikers were paid an additional $5 each day that they appeared at the site of the picket line. This money was described as transportation or lunch money. The employees did not have to sign for these payments.

With the exception of the "machinists," the money received from the Union was substantially less than what the employees earned working for the Respondent before the strike. Even the lowest paid workers, who were paid $3.50/hour without overtime, grossed $140/week while employed by the Respondent. Most of the discriminatees earned more than this. The amounts paid to the strikers, other than the "machinists," were unrelated to their prestrike wages. It is undisputed that the Union did not withhold taxes from these strike benefits and did not otherwise treat the strikers as "employees" during the period they received these sums from the Union. Because the Respondent's employees were not dues-paying members of the Union when they went on strike, they had not previously contributed to any strike funds from which these payments were made.

The purpose of having the unreinstated strikers report to the picket line each day and remain there during the Respondent's normal hours of work is not entirely clear from the record. Union officials testified that the purpose was to coordinate job search efforts for the discriminatees because the site of the former picket line was used as a meeting place for excursions to look for work conducted by the Union's organizers. It also appears from the findings of Judge Schlesinger that the discriminatees continued to congregate outside the Respondent's facility as a means of demonstrating their willingness to return to work and to await a reinstatement offer from the Respondent. It appears from the testimony of the discriminatees themselves that, once the Union ceased making these payments, the discriminatees stopped appearing at the Respondent's facility on a daily basis.

In the many years and multitude of cases that the Board has addressed this issue, it has rarely found that sums received from a union while discriminatees are engaged in a strike or picketing should be deducted as interim earnings. In only three of the cases cited by the parties has this been the result. In *Superior Warehouse Grocers, Inc.,* supra, the evidence established that the discriminatee was hired by the union to picket his employer as part of the union's organizational campaign, was paid on an hourly basis and that a strict accounting of his hours was kept.[13] In *Tubari, Ltd.,*[14] the General Counsel had conceded that the $150 weekly strike benefits received by the discriminatees were interim earnings where the discriminatees were required to be at the picket line from 7 a.m. to 3:30 p.m. every day and did not seek other employment. The administrative law judge found that an additional $25 a week that the discriminatees received from the union as "lunch money" should also be deducted as interim earnings because they were indistinguishable from the amounts that were deducted by the General Counsel.[15] The total amount received by the discriminatees represented approximately 75 percent of their prestrike earnings. The real issue in that case was whether the discriminatees had satisfied their duty to mitigate by accepting these strike benefits in lieu of seeking other employment. Finally, in *Hansen Bros. Enterprises,* supra, the Board adopted without comment the administrative law judge's finding that "the so-called strike benefits in reality were payment for and contingent upon picketing." The judge relied upon conclusory testimony from discriminatees that they were required to picket in order to receive the money from the Union. He rejected testimony from a union official and another discriminatee that no services were required. The benefits received by the discriminatees in that case were set forth in the International Union's constitution and were characterized by the Union as "out-of-work benefits."

In another case decided by the Board at about the same time as *Hansen Bros. Enterprises,* supra, the Board reached a different result on almost identical facts. In *Glover Bottled Gas,*[16] the Board adopted without comment that administrative law judge's finding that the benefits received by discriminatees from their union were not deductible as interim earnings. That judge refused to rely upon conclusory testimony of discriminatees that they were paid for picketing or that they had to picket to receive strike benefits. Instead, he accepted the testimony of the union's business agent that an employee only had to be available for picketing to be eligible for these "out-of-work" benefits, which also derived from the International Union's constitution. More recently, in *ABC Automotive Products Corp.,*[17] the Board adopted the administrative law judge's finding that a $100 weekly strike benefit paid to the discriminatees was not deductible as interim earnings even though they were required to picket 1 day a week to receive this benefit.

Although not free from doubt, I find that the discriminatees, other than the machinists and captains, were required to at least appear at the picket line site in the morning if they wanted to receive $12 in strike benefits and the $5 for lunch or transportation for that day. Although the discriminatees who went to the site of the former picket line generally remained there all day, if they were not looking for work, I find that this was not required as a condition for receipt of the benefits. On the contrary, the evidence shows that those discriminatees who left the picket line early, or arrived late, received the same amount. Thus, unlike those employees in *Tubari,* supra, the discriminatees here were not required to remain at the Respondent's facility

[12] Giles Robinson, who received these payments on a more regular basis will be discussed in more detail, infra.

[13] In *Marlene Industries,* 234 NLRB 285 (1978), not cited by the parties, the facts were similar.

[14] 303 NLRB 529 (1991), enf. denied 959 F.2d 451 (3d Cir. 1992).

[15] The Board adopted the administrative law judge's findings regarding the "lunch money" in the absence of exceptions. Thus, the Board did not have to address whether these sums were indeed interim earnings.

[16] 313 NLRB 43 (1993).

[17] 319 NLRB 599, 605 (1995).

for any set hours of the day. I further find that whatever chanting, singing and marching occurred was not required as a condition for receipt of the benefits. In this regard, it has already been found in the underlying proceeding that picketing ceased on August 13. The employees who congregated outside the Respondent's facility after that date did so primarily to show the Respondent that they were ready to return to work in the hope that the Respondent would reinstate them. The Union also used the site of the picket line as a convenient meeting place to coordinate the discriminatees' job search efforts. The continued payment to them of the strike benefits they had received before August 13 was nothing more than an inducement to encourage the employees to remain available for reinstatement by the Respondent and to cooperate in the Union's efforts to find them interim employment.

With respect to the higher amounts paid to the "machinists," there is even less evidence that the strike benefits were wages for picketing. Thus, those machinists who testified were not consistent in the hours or number of days they went to the site of the picket line, yet the records in evidence show that they received the same amount each week. While these higher payments may have been intended as an inducement to encourage the most skilled and essential employees to support the Union's strike by matching their prestrike earnings, thus increasing the Union's leverage during the strike, the continuation of these benefits after the strike has not been shown to be tantamount to wages for services performed for the Union.

In finding that the strike benefits received here are not interim earnings, I agree with Judge Morton that the Respondent does not meet its burden by relying upon the conclusory testimony of discriminatees that they were paid for picketing or were required to picket to receive strike benefits. *Glover Bottled Gas,* supra at 45. The record contains no evidence that any union representative articulated to the discriminatees that they were required to picket for a full day as a condition of receiving these benefits after August 13. At most, they were told they had to appear and sign in. The Board has held that such requirements are insufficient to establish that strike benefits are the equivalent of interim earnings. *Standard Printing Co. of Canton,* 151 NLRB 963, 966 (1965).

I reach a different result with respect to the additional $65 received by the "captains" and the "night shift" pay received by those discriminatees whom the record shows were paid for manning the night shift at the site of the Union's picket line during the backpay period. As to these payments, the record contains sufficient evidence that the payments were contingent upon services being performed for the Union. The "quid pro quo" for night-shift pay is conceded by the General Counsel on brief. Although the record does not contain much evidence regarding the precise activities performed by the captains in return for the extra pay they received, there is enough evidence from which it may be inferred that they were expected to act as they had before the strike ended, i.e., serving as leaders and assisting their fellow employees with their return to work and the job search efforts as well as monitoring activities at the site of the former picket line. Certainly, no other reason has been advanced for continuing to make these supplemental payments to a handful of strikers. Accordingly, I shall adjust the backpay for those discriminatees for whom the record establishes that either "captain" or "night-shift" payments were received during the backpay period.

The Respondent also asserted in its answer and at the hearing that backpay should be denied the discriminatees for time spent on the picket line. The Board has held that employees who engage in picketing at the expense of seeking interim employment incur a willful loss and are disqualified from receiving backpay for such periods. *Ozark Hardwood Co.,* 119 NLRB 1130 (1957); *Southwestern Pipe, Inc.,* 179 NLRB 364 (1969). Accord: *NLRB v. Madison Courier,* 472 F.2d 1307, 1320 (D.C. Cir. 1972). However, receipt of strike benefits or engaging in picketing activity does not by itself disqualify a discriminatee from receiving backpay. The Respondent has the burden of proving that employees incurred a willful loss or removed themselves from the labor market by picketing in lieu of seeking other employment. See *Tubari, Ltd.,* supra. Moreover, the Board and the courts have required an individualized analysis of each discriminatee's mitigation efforts, including the extent to which receipt of strike benefits or picketing activity interfered with their efforts to find suitable employment. Such an analysis is to be based on the record as a whole and not merely from the fact of picketing. *Rice Lake Creamery,* supra; *Madison Courier,* supra. With these precedents in mind, I will defer decision as to this affirmative defense until I consider each discriminatee's individual claim for backpay.

V. UNDOCUMENTED ALIENS

An overwhelming majority of the discriminatees in this case are immigrants, most from Haiti with a much smaller number from Latin America. It appears that some of the discriminatees may have entered and remained in the United States without proper documentation. The Respondent argues that backpay should be denied to any discriminatee who did not have documents entitling him or her to work in this country during the backpay period. The General Counsel contends that the discriminatees' immigration status is irrelevant to determination of the backpay issues in this proceeding.

Early in the hearing, I ruled that the Respondent could not inquire into the discriminatees' immigration status during the backpay period because the General Counsel had tolled backpay as of August 20, 1991, based on an offer of reinstatement extended to all unreinstated strikers on that date. Thus, there was no issue in this case as to any discriminatee's current eligibility for reinstatement under existing immigration laws. In making this ruling, I found the facts here distinguishable from those which existed in *NLRB v. Sure-Tan, Inc.,* 407 U.S. 883 (1984), relied upon by the Respondent. In that case, the discriminatees had left the country and the issue was whether a reinstatement order was appropriate as to discriminatees who lacked documentation to re-enter and work in this country. Although the Seventh Circuit has interpreted *Sure-Tan* to deny backpay to undocumented aliens who remain in the country illegally during the backpay period,[18] the Board, with the approval of the Second Circuit, has read the Supreme Court's

[18] *Del Rey Tortilleria, Inc. v. NLRB,* 976 F.2d 1115, 1121–1122 (7th Cir. 1992).

decision more narrowly. *A.P.R.A. Fuel Oil Buyers Group, Inc.,* 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2d Cir. 1997). Accord: *Ladies Garment Workers Local 512 v. NLRB (Felbro),* 795 F.2d 705, 722 (9th Cir. 1986). The Board has made it clear that backpay, as a retrospective remedy for an employer's unfair labor practices, is not contingent on a discriminatee's immigration status, a position it recently reaffirmed in *County Window Cleaning Co.,* 328 NLRB 190 (1999). See also *Hoffman Plastic Compounds, Inc.,* 326 NLRB 1060 (1998).

I did permit the Respondent to question any discriminatee that it knew lacked proper documentation during the backpay period, and any discriminatee hired by the Respondent before the effective date of the 1986 Immigration Reform and Control Act (IRCA),[19] on the limited subject of the effect, if any, that their lack of documentation had on their efforts to find interim employment during the backpay period. In permitting this limited inquiry, I read current Board law as requiring that undocumented aliens be treated the same as any other discriminatees with respect to their right to backpay, including issues regarding the duty to mitigate. I concluded that this limited inquiry was necessary to allow the Respondent to develop evidence to show whether any discriminatee who was an undocumented alien had failed to seek work because they lacked working papers, or had been forced to decline a job offer because they could not produce documents required for employment.[20] The General Counsel filed a Request to take a Special Appeal from this ruling, which was denied by a majority of the Board without prejudice to raising the issue in any exceptions filed from this decision.

The Respondent also proffered at the hearing the testimony of an "immigration expert" who would testify regarding, inter alia, INS procedures for issuing and extending various types of work permits and the application of the requirements imposed on employers in the hiring process. The Respondent argued that this testimony would assist the Board in considering whether a discriminatee's lack of documentation would prevent them from seeking and finding interim employment. I rejected this proffer, consistent with my earlier ruling, on the basis that a discriminatee's status as an undocumented alien does not, by itself, render him or her ineligible for backpay. Moreover, I found nothing in the Respondent's proffer that would be relevant to or assist in determining whether any individual discriminatee failed to satisfy his or her duty to mitigate by seeking suitable interim employment. In this regard, the evidence to be discussed, infra, demonstrated that many of the discriminatees who were undocumented during the backpay period nevertheless found interim employment. In addition, a few candidly acknowledged either not seeking employment or declining a job offer because of lack of documentation. In light of this evidence, the "expert" would have added nothing to the record.

Having considered my rulings in light of the parties' briefs and more recent case law, I reaffirm those rulings. In *County Window Cleaning Co.,* supra, the Board reaffirmed its holding in *A.P.R.A. Fuel,* supra, that backpay is an appropriate remedy, notwithstanding a discriminatee's undocumented status. In *Hoffman Plastic Compounds, Inc.,* supra, the Board tolled backpay under its after-acquired knowledge rule where the employer learned of the discriminatee's undocumented status for the first time at the compliance hearing, before a valid offer of reinstatement had been made. Because all of the discriminatees here were offered reinstatement no later than August 20, 1991, any knowledge acquired in the course of the hearing before me would be irrelevant inasmuch as the backpay period ended years ago. Accordingly, the only relevance, if any, of an individual discriminatee's alien status is the extent to which it impacted on his or her efforts to seek suitable employment during the backpay period, an area that the Respondent was permitted to explore.[21]

VI. WILLFUL LOSS ISSUES

The policy of Federal labor law is to make whole an injured party for a wrong and to restore such party to the condition he or she would have enjoyed, or as near as possible, absent the wrongful act or omission. *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344 (1953); *Phelps Dodge v. NLRB,* 313 U.S. 177, 197–198 (1941); *Freeman Decorating Co.,* 288 NLRB 1235 fn. 2 (1988). Among the factors to be considered in formulating an appropriate award to injured employees is whether they mitigated their damages by using "reasonable diligence in seeking alternative employment." *NLRB v. Mastro Plastics Corp.,* 354 F.2d at 175. However, this duty to seek alternative employment has as its purpose not the minimization of damages so much as effectuating the "healthy policy of promoting production and employment." *Phelps Dodge*, supra at 199–200.

Where, as here, an employer with a backpay liability contends that not all of the discriminatees made the requisite effort to mitigate, the "willful idleness" issue must be determined with respect to each discriminatee, considering the record as a whole. *NLRB v. Rice Lake Creamery Co.,* 365 F.2d at 894. Accord: *NLRB v. Madison Courier, Inc.,* 472 F.2d at 1318. In determining the reasonableness of any individual's efforts, factors such as the individual's age, skills and qualifications, and the labor conditions in the area must be considered. *Alaska Pulp,* 326 NLRB 522 (1998); *Laredo Packing Co.,* 271 NLRB 553, 556 (1984). A respondent does not meet his burden merely by presenting evidence of lack of success in finding interim employment or by showing minimal interim earnings. The respondent must affirmatively show that the individual discriminatee "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.,* 360 F.2d 569, 575–576 (5th Cir. 1966). See also *NLRB v. Master Slack,* 773 F.2d 77, 84 (6th Cir. 1985); *Schnabel Associates, Inc.,* 291

[19] The IRCA for the first time required employers to obtain proof of an applicant's eligibility to work in this country and imposed sanctions on employers who hired illegal aliens. Accordingly, assuming that the Respondent complied with the law, it would know whether any employees hired after that date had documentation which would permit them to obtain employment in this country.

[20] As counsel for the General Counsel points out in her brief, the Respondent abused this privilege in several cases, questioning discriminatees it knew had proper documentation for no apparent purpose other than to harass the discriminatees. In this regard, I regret not being more vigilant to protect the discriminatees from such abuse.

[21] Specific findings regarding this issue will be addressed as part of my determination of the individual discriminatee's backpay claims.

NLRB 648, 649–650 (1988). In evaluating the reasonableness of a discriminatee's efforts to mitigate, the law does not require the highest standard of diligence, but only that he make an "honest good faith effort to find suitable employment." *NLRB v. Arduini Mfg. Co.,* 395 F.2d 420, 422–423 (1st Cir. 1968); *Arlington Hotel Co.,* 287 NLRB 851 (1987). The individual's efforts during the entire backpay period, rather than in any particular quarter, must be considered to determine whether the discriminatee was reasonable in his efforts. *Black Magic Resources, Inc.,* 317 NLRB 721 (1995); *Rainbow Coaches,* 280 NLRB 166, 179180 (1986). The Board has held that a discriminatee's faulty recollection, poor recordkeeping, or exaggeration with respect to his or her job search efforts is not enough to prove lack of reasonable diligence in seeking other work. *December 12, Inc.,* 282 NLRB 475, 477 (1986); *Laredo Packing Co.,* supra at 556; *Arduini Mfg. Co.,* 162 NLRB 972, 975 (1967), enfd. 395 F.2d 420 (1st Cir. 1968).

Generally speaking, a discriminatee has a duty to seek substantially equivalent employment in the same or similar line of work as that performed for the respondent. Accordingly, a discriminatee is not required to accept a lower-paying job, or more onerous work absent compelling factors, such as an undue amount of time spent searching unsuccessfully for a comparable position. *Arlington Hotel Co.,* supra at 854. At the same time, acceptance of interim employment which is only part time, or pays less than his former employment, does not necessarily establish that a discriminatee incurred a willful loss. *Associated Grocers,* 295 NLRB 806 (1989). For example, the Board has recognized that a discriminatee who has been having difficulty finding comparable employment may at some point "lower his sights" and seek and accept a lower-paying job. *Tubari Ltd., Inc. v. NLRB,* 959 F.2d 451 (3d Cir. 1992); *NLRB v. Madison Courier,* 472 F.2d at 1321; *United Aircraft,* supra. An individual who lowers his sights too soon, however, runs the risk of being found to have incurred a willful loss of earnings. Id. But, once a discriminatee accepts a suitable lower-paying job, he is under no further obligation to continue searching for a more appropriate interim job. *Firestone Synthetic Fibers,* 207 NLRB 810, 815 (1973).

Finally, to satisfy its burden of proof that any individual discriminatee incurred a willful loss during the backpay period, the Respondent must show not only that the individual's job search efforts were unreasonable, but that there were suitable jobs available for someone with the discriminatee's qualifications that a person undertaking a reasonable search would have secured. See *Black Magic Resources,* supra at 721–722; *Lloyd's Ornamental & Steel Fabricators, Inc.,* 211 NLRB 217, 218 (1974); *Associated Grocers,* supra at 810–811; *Alaska Pulp,* supra; *Arlington Hotel Co.,* supra at 852–853.

VII. BACKPAY FINDINGS FOR EACH DISCRIMINATEE

A. Discriminatees Owed No Backpay

The compliance specification, as amended based on evidence obtained by the General Counsel while the hearing proceeded, establishes that 12 of the discriminatees are owed no backpay either because their interim earnings exceeded gross backpay in every quarter of the backpay period or, in one case, because the discriminatee returned to work for the Respondent before the beginning of the backpay period. Accordingly, as to the following employees, I find that the Respondent has no further obligation under the Board's remedial order:

Maximo Bernardez	Teresa Lacayo
Rose Bertin	Mireya Lugo
Lalane Camner	Juan Ramon Palacios
Christianne Celestin	Antoine St. Fort
Louis Cherfilus	Yollande Sinrastil
Milka Gutierrez	Celina Valentin

In addition, the Respondent and the General Counsel reached agreement during the hearing as to the amount of backpay owed to three of the discriminatees and the Respondent has already satisfied its backpay obligation to these individuals by issuing checks to cover their net backpay and interest to the date they were made whole. Accordingly, as to the following employees, I find that the Respondent has no further obligation to make them whole in accordance with the Board's remedial order:

Hector Guity	Ruth Zama
Marie Jeanty	

B. Missing Discriminatees

Although almost three-quarters of the 201 discriminatees were called to testify in this compliance proceeding, the General Counsel was unable to locate 46 discriminatees.[22] In accordance with the Board's holding in *Starlite Cutting I,* 280 NLRB 1071 (1986), as clarified in *Starlite Cutting II,* 284 NLRB 620 (1987), I shall recommend that the Respondent be ordered to pay the amounts set forth in Appendix A [omitted from publication], opposite the name of each missing discriminatee, to the Regional Director, with the amounts to be held in escrow for a period not to exceed 1 year from the later of the date that the Respondent complies with this order by making such payment, or the date the Board's Supplemental Decision and Order herein becomes final, including any enforcement thereof. At the end of the 1-year period, funds deposited in the name of any discriminatee whom the General Counsel has still not located shall be returned to the Respondent and the backpay award shall lapse as to that individual unless the individual demonstrates at a later date some compelling reason for failing to come forward within the escrow period. See also *Schnabel Associates,* 291 NLRB 648 fn. 1 (1988).

C. Discriminatees who were Reinstated or Found Interim Employment Within the First Quarter of the Backpay Period

Approximately 25 of the discriminatees returned to work at the Respondent's facility within the first quarter of the backpay period, in response to the Respondent's invalid offers of reinstatement, and continued to work, either for the Respondent or

[22] The General Counsel, in its brief, mistakenly identifies Marie Charles as one of the missing discriminatees. In fact, Marie Sylvana Jean-Charles, her correct name, testified at the hearing on December 10, 1997, and the General Counsel amended the claim as to Jean-Charles at that time. Her claim will be discussed later in this decision.

another employer, for the remainder of the backpay period.[23] For these discriminatees, the General Counsel does not seek backpay after their reinstatement. In addition, discriminatees Claire Camille, Rose Marie Castor, Cecile Charles, Yvette Fleurimond, Banilia Guerrier, Pablo Guity, Ana Hernandez, Marie Leconte, Marie N. Louis, Jean Michelet Louisma, Pierre Malbranche, Rose Andre Mauvais, Georges Murat, Rene Rochez, and Lourdes Williams were either already working elsewhere or obtained interim employment within weeks of the Respondent's refusal to reinstate them. Their earnings from this interim employment approximated or surpassed what they would have earned with the Respondent. The Respondent concedes in its brief that, for these 40 employees, the evidence is sufficient to establish that they satisfied their duty to mitigate and did not incur any willful loss of earnings. See *Lundy Packing,* 286 NLRB 141 (1987); *I.T.O. Corp. of Baltimore,* 265 NLRB 1322 (1982); *Laidlaw Corp.,* 207 NLRB 591 (1973); and *Nicky Chevrolet,* 195 NLRB 395, 398 (1972).

The only defense that the Respondent raises in its brief as to these employees is that their net backpay should be further reduced by the sums each received from the Union before they returned to work or found interim employment. Because I found above that the weekly strike benefits and daily lunch or transportation money were not interim earnings for picketing or other services performed for the Union, I reject the Respondent's defense. Accordingly, in order to make the following discriminatees whole in accordance with the Board's remedial order, the Respondent must pay each of them the amounts claimed by the General Counsel:[24]

Andrea Andre	Idiemese Lovinske
Claire Camille	Andrew Mack
Solange Carasco	Pierre Malbranche
Rose Marie Castor	Jesula Massena
Brigitte Charles	Rose Andre Mauvais
Cecile Charles	Murat Georges
Eugenie Charles	Josette Philogene
Francesca Dormetus	Marie Pierre
Adeline Duvivier	Loficiane Raymond
Yvette Fleurimond	Chano (Feliciano) Reyes
Banilia Guerrier	Rene Rochez
Pablo Guity	Eddy Rodrigue
Ana Hernandez	Marie Romain
Marie Jacques	Marie Rousseau
Clorina Joseph	Pierre-Antoine Surin
Mimose Lacrois	Marie Thelismond
Marie Leconte	Anna Thomas
Alma Louis	Wilfred Virgile
Marie N. Louis	Lourdes Williams
Jean Michelet Louisma	August Zama

[23] The parties stipulated at the hearing regarding the amount of backpay owed to one of these discriminatees, Adeline Duvivier. The Respondent has apparently not yet paid her the backpay amount as stipulated.

[24] The exact amount owed to each discriminatee, exclusive of interest, is set forth in App. B [omitted from publication].

D. Giles Robinson

The Board adopted the administrative law judge's finding that the Respondent unlawfully discharged Giles Robinson on December 1, 1989. The record reflects that he was reinstated by the Respondent sometime during the second quarter of 1991. The compliance specification alleges, and the Respondent did not deny in its answer, that the backpay period for Robinson began on the date of his discharge and ended on August 20, 1991, "the effective date of Respondent's offer of reinstatement." The General Counsel deducted wages received by Robinson from the Respondent after his reinstatement as interim earnings. The Respondent asserted in its answer that Robinson's gross backpay should be reduced by the amount of money he received from the Union in the form of strike benefits, and that backpay should be tolled for time spent on the picket line and because Robinson did not conduct a reasonable search for work during the backpay period. Robinson was not available to testify in the compliance proceeding, having passed away on December 10, 1996. The Respondent called his widow, Anna Mae Robinson, to testify regarding Robinson's activities during the backpay period.

There is no dispute that Robinson was a member of the Union's organizing committee and that he was a leader among the striking employees. The record reflects that he received a substantial amount of money from the Union during the backpay period, commencing on February 9, 1990, when he received $270. The Union's voucher reflecting this payment designates it as "Food & Transportation benefits for w/e 2/9/90 (section chiefs)." The following week, Robinson began receiving $385 a week, designated on the Union's voucher as "strike benefits . . . night shift . . . @ $55.00 a day." Robinson received these benefits every week through the week ending October 12, 1990. The following week, Robinson began receiving $275 a week from the Union, designated as "machinist" strike benefits. These benefits continued through the week ending April 5, 1991. In addition, an earnings report obtained by the General Counsel from the Social Security Administration reflects that Robinson received $340 from the Union in calendar year 1990 identified as earnings for social security purposes. The record does not indicate the nature of this payment or when Robinson received it. Robinson had no other interim earnings during the backpay period before his return to work for the Respondent.

The General Counsel concedes that the "night-shift" benefits should be deducted from Robinson's gross backpay as interim earnings, based on the evidence in the record indicating that individuals receiving such benefits were required to remain outside the Respondent's facility for approximately 10 hours overnight to watch the site of the picket line and protect union property kept there. Other discriminatees who received night-shift pay from the Union testified that either Robinson was present, or that they sat in his van while doing night shift. Although conceding that "night-shift" pay was interim earnings, the General Counsel deducted only a portion of the sums received by Robinson, i.e., $55 a day for 5 days each week, not counting money received for weekend night-shift duty as interim earnings. The General Counsel did not deduct any of the remaining sums received by Robinson from the Union during

the backpay period, contending that they were "strike benefits" unrelated to services performed by Robinson for the Union.

Mrs. Robinson testified that her husband looked for work after he was fired by the Respondent for 1–2 months until he started "working for the Union." She testified that she assumed he was an employee of the Union because they were paying him. She also "imagined" that he stopped looking for work when the Union started paying him because he was "working for the Union." Mrs. Robinson also testified that her husband told her that he was working for the Union to try to bring the Union into the Respondent's facility, but he did not tell her specifically what he did. She recalled that her husband did not stay home during the backpay period, but went out every day. She did not know what time he left home because she was babysitting her granddaughter at the time and normally left the house before her husband. She usually returned home at 5 p.m. and recalled that her husband returned at 7–8 p.m., had dinner and went back out. He did not always tell her where he was going, but she believed he spent most evenings at the church where he was a deacon. She recalled that he looked for work by reading the classified ads in the newspaper and talking to friends. She could only recall one place that he told her he went to look for work, a clothing factory. Mrs. Robinson conceded that her memory of this period, almost 8 years before the hearing, was not good.

The Union's organizer, Tigus, and other strikers testified that Robinson often accompanied the unreinstated strikers on their job searches. He would use his van to take a handful of strikers with him to look for work. Tigus also testified that, in addition to performing night duty on the picket line, Robinson would use his van to collect food for the strikers and deliver it to the picket line to be distributed to other strikers. As a member of the organizing committee, Robinson would also have responsibility during the strike for monitoring the picket line. It also appears from the record that the Union utilized Robinson as a liaison with the strikers because of his status as a longtime and highly regarded employee of the Respondent.

I credit the testimony of Mrs. Robinson that her husband looked for work after he was fired by the Respondent, at least until the time he began receiving money from the Union on a weekly basis. I also find, based on the testimony of Tigus and other discriminatees, that Robinson looked for work in connection with the Union's concerted effort to find work for the unreinstated strikers after August 13. Although the Respondent argues that there was no union effort to find work for the discriminatees, I can not discredit the many witnesses who testified about their trips with Tigus, Robinson, and other union organizers and staff to look for work. I do not believe that all of these witnesses are lying about this, even if some individual discriminatees may have exaggerated their participation in this effort. With respect to the period during the strike, i.e., from January 29 through August 10, 1990, there is no evidence in the record to establish that Robinson did or did not look for work. Although his widow assumed that he stopped looking for work when the Union started paying him, it is clear that she did not know his whereabouts throughout the day, while he was away from home. It may be that his efforts as a member of the organizing committee and night-shift duties did not leave him time to look for work as diligently as he did before the strike or after the Respondent refused to reinstate the strikers. Such speculation, in the absence of affirmative proof that Robinson did not look for work during the strike, is insufficient to deny him backpay for this period of time.

Moreover, contrary to the General Counsel's contention, I find that the payments received by Robinson, unlike that received by the majority of discriminatees, were compensation for services Robinson performed for the Union throughout the backpay period. There is no dispute that Robinson played a significant role during the strike as a leader, monitoring the picket line, performing night duty, collecting and delivering food for the strikers, and transporting them to look for jobs. While the record may not reflect precisely what he did each week in return for the money he received from the Union, there is sufficient evidence in the record that these sums were intended to compensate Robinson for his efforts and the amount of time he spent on and at the site of the picket line. The fact that his benefits were higher than every other striker and that he received the same amount each week convinces me that he was, in essence, working for the Union from the beginning of the strike until his reinstatement.

Although I agree with the General Counsel that the Respondent is only entitled to an offset for the interim earnings from work equivalent to the amount of time Robinson would have worked for the Respondent but for his unlawful discharge, I note that the gross backpay calculation for Robinson reflects overtime of 12 hours a week. The 12 hours of overtime translates to 18 hours of straight time, which is equivalent to 7 days a week, the same amount of time Robinson spent working for the Union. Accordingly, I shall deduct the full amount he received from the Union during the backpay period, as reflected on the vouchers in evidence and the social security earnings report.[25] Robinson's interim earnings from the Union, together with his job search efforts, individually before the strike and with other strikers as part of the Union's job search efforts, are sufficient to satisfy Robinson's duty to mitigate

Deduction of Robinson's interim earnings from the Union results in a net backpay award of $16,116.60 which, with interest is the amount necessary to make Robinson whole in accordance with the Board's order.

E. James Anthony Charles

The Board adopted the administrative law judge's finding that the Respondent unlawfully discharged James Anthony Charles on January 17, 1990. There is no dispute that the backpay period for Charles runs from the date of his discharge until August 20, 1991. The Respondent, in its answer, asserted that Charles was not entitled to any backpay because he did not conduct a reasonably diligent search for work. Although the original compliance specification reported no interim earnings

[25] The report from SSA does not indicate what quarter Robinson received this money. I have chosen to deduct it from gross backpay for the first quarter of 1990 because the vouchers show that he received a weekly payment beginning February 9, the first week of the strike. I infer that the Union paid him the $340 as wages before the strike commenced, which is consistent with Mrs. Robinson's testimony that her husband started working for the Union 1–2 months after he was fired.

for Charles, information received by the General Counsel during the proceeding, and the testimony of Charles himself, revealed that he in fact had interim earnings for all but two quarters of the backpay period. Nevertheless, the Respondent argues in its brief that Charles is not entitled to backpay for the period he was on the picket line at the beginning of the strike and for the second and third quarters of 1990 when it is claimed he did not seek other employment.

Charles testified and was questioned extensively by the Respondent regarding his activities during the backpay period and his interim employment. His recollection was very poor. As a result, his testimony does not fully explain the periods of unemployment reflected in the compliance specification, as amended. The record does establish that the strike commenced 12 days after Charles was terminated and that his termination was a cause of the strike. Charles was a member of the Union's organizing committee at the time of his termination, but his involvement with the Union dissipated after the strike commenced. Thus, he testified that he only went to the picket line for a month or two at the beginning of the strike to stand with the other members of the committee and show moral support for the strikers. Unlike other strikers who testified, Charles did not go to the picket line every day. On those days that he did go, he generally arrived at 8 or 9 a.m. and remained on the picket line until the end of the Respondent's workday. He did not testify that he was looking for work during this period. Charles could not recall whether he received any money from the Union during the time he went to the picket line, but he did recall other strikers receiving money from the Union after signing a sheet with a list of names. He could not explain why he did not receive money from the Union other than the fact that he was not there every day like the others.[26] Charles testified further that, once he stopped going to the picket line, he never returned. Charles was not asked why he stopped going to the picket line after only a month or two.

The first interim employment reflected in the compliance specification was a part-time job at a Popeye's fast food restaurant in Queens. The General Counsel reported earnings of $152 in the first quarter of 1990 from this job. These earnings do not appear on the earnings report obtained by the General Counsel from the Social Security Administration, even though Charles recalled being paid by check with taxes withheld. Charles could not recall when he started working at Popeye's or how long he worked there, other than that it was a short period of time, "maybe a month." He recalled being paid minimum wage and working 3–4 hours a day, usually Monday to Friday. Charles recalled that he left this job to look for another job. He found another job, through a newspaper ad, at Waldbaum's Supermarket. This was a full-time job, averaging about 40 hours a week, although he did not work a fixed schedule. According to Charles, he was paid minimum wage and performed a variety of duties, from cashier to stocking shelves, and that on two or three occasions, he worked overtime filling in for the absent porter. Although he could not recall when he started working at Waldbaum's, the social security earnings report shows only $594.90 in earnings from Waldbaum's in 1990. At minimum wage, which was $3.80/hour at the time, this would be about 1 month's wages. Thus, it appears that he did not begin working at Waldbaum's until the last quarter of 1990. There is no dispute that Charles continued to work at Waldbaum's for the remainder of the backpay period and did not leave that job until he found other employment in July 1992, after the backpay period.

Charles testified that he looked for work during the backpay period by reading the classified ads in the Daily News every day. He could not recall with any specificity where he looked for work, other than the two jobs he found.

As noted above, the strike commenced shortly after Charles' unlawful discharge. Even assuming that he did not look for work within the 12 days between his termination and the beginning of the strike, this would not be a willful loss. See, e.g., *I.T.O Corp. of Baltimore,* supra (no inquiry by Board into initial 4 weeks); *Nicky Chevrolet,* supra at 398 (no application to any employer during initial 40 days). Even if Charles did not look for work during the first month or two of the strike when he was spending almost every day at the picket line, I would not find this to be a willful loss. The employees went on strike in protest of the Respondent's unfair labor practices, including Charles' termination. A goal of the strike would be to pressure the Respondent to reinstate Charles. Thus, it would not be unreasonable for a discriminatee in Charles' position to await a possible successful outcome to the strike, which would have resulted in his reinstatement, rather than immediately seek other employment.

The General Counsel apparently assumed that Charles left the picket line because he found the job at Popeye's since she deducted these earnings in the first quarter. I do not believe that any evidence in the record would support such a conclusion. On the contrary, based on Charles' recollection, vague as it may be, it appears that he left Popeye's to take the job at Waldbaum's, which would place these earnings in the fourth quarter of 1990. Such a result makes more sense than to conclude that Charles left his part-time job at Popeye's in the first quarter "to look for another job" and did not work again until November or December, approximately 8 months later. I also conclude that the General Counsel has underestimated Charles earnings from Popeye's. He recalled that he worked 3–4 hours a day, 5 days a week for about a month at minimum wage, i.e., $3.80/hour. I thus calculate that he earned $304 from the job at Popeye's during the fourth quarter of 1990 and shall adjust the net backpay accordingly.

Based on these findings, it appears that Charles did not work from the time he stopped going to the picket line, in about March, until the fourth quarter of 1990 when he found part-time work at Popeye's. This does not necessarily mean that Charles incurred a willful loss during that period. Charles testified that he was looking for work before and after he found the job at Popeye's. His lack of success in finding work does not establish a willful loss. As the Board has said, the entire backpay period must be considered in assessing the reasonableness of an individual's job search. The fact that Charles worked continuously once he found work, changing jobs to improve his pay and increase his hours, convinces me that he was not an individual

[26] There is no evidence in the record showing that Charles received any strike benefits from the Union.

who remained willfully idle during the period he was out of work. I credit Charles' testimony that he was looking for work. His failure to recall any specifics, after so many years, is not suspect, particularly where there is no evidence that he kept any records that might have refreshed his recollection. Accordingly, because he was ultimately successful in finding suitable interim employment and remained productive through most of the backpay period, I find that Charles' is entitled to backpay for the entire backpay period, as modified by the above findings.

Accordingly, James Anthony Charles is entitled to an award of $12,150.55 plus interest under the Board's Order.

F. Remaining Dischargees

1. Jose DeLeon

DeLeon was employed by the Respondent as a machine operator on the small press before the strike. The record in the underlying unfair labor practice proceeding establishes that DeLeon returned to work on September 19 in response to the Respondent's September 11, 1990 offer of reinstatement. Judge Schlesinger found that the Respondent did not properly reinstate him to his former job, harassed him, and ultimately fired him on October 29, 1990, in violation of the Act. He was again reinstated on April 1, 1991, apparently pursuant to a proceeding in district court under Section 10(j) of the Act. The General Counsel, in the compliance specification, seeks backpay for DeLeon only for the period from the date of the Union's unconditional offer of reinstatement until he was properly reinstated on April 1, 1991. The General Counsel has deducted actual earnings received by DeLeon from the Respondent for the 1 month period that he worked before his unlawful discharge. DeLeon had no other interim earnings.

DeLeon received $200 a week from the Union in strike benefits as a machinist during the period before he was reinstated on September 19 and after he was terminated on October 29. These benefits continued through February 22, 1991. In addition, he received night-shift payments from the Union totaling $275 in September 1990, before his first reinstatement. The vouchers indicate that this was for five nights at the rate of $55 a night. DeLeon testified that the $200 was something the Union gave the strikers to help them out and, although he generally went to the picket line every day, this was not a requirement. In fact, DeLeon testified that he was frequently absent from the picket line looking for work, alone, with the Union or with other strikers. He did not testify regarding what he did in return for the additional night-shift payments. The Respondent argues that both the $200 weekly strike benefit and the additional night-shift pay should be deducted as interim earnings. For the reasons discussed above, I find that DeLeon's weekly strike benefits were not "payment for picketing" and thus not deductible as interim earnings. On the other hand, I find that the night-shift pay was payment for services, i.e., staying at the picket line all night to watch the Respondent's facility and the Union's property. I base this finding on the testimony of union officials and the other employees who testified regarding the "night shift." There is no evidence that DeLeon did not perform the same service in return for this additional payment. Accordingly, I shall reduce the net backpay for the third quarter of 1990 by $275.

The Respondent further argues that DeLeon did not search for work until after the strike benefits stopped on February 22, 1991, and that he should receive no backpay for the period October 29 until February 22 because of this perceived willful loss. The Respondent, relying on the compliance form that DeLeon filled out during the Region's backpay investigation, contends that the six places he listed as having looked for work are insufficient to meet his duty to mitigate and that he should therefore get no backpay even for the period after February 22. I reject these contentions and find that DeLeon in fact made a reasonably diligent search for work throughout the backpay period. I base this finding on DeLeon's testimony that he looked for work by going with the union representatives who took people from the picket line, going by himself to look for work at places referred to him by family and friends and by looking at classified ads in the Daily News and the Spanish language newspaper, LaPrensa. His testimony was consistent with the backpay claimant's form he completed during the backpay investigation.

In making this finding, I have considered the entire backpay period and note that DeLeon was sent a letter offering him reinstatement within the first month of the backpay period. Even had he not been looking for work during this initial period, I would not find a willful loss based on the cases cited above as well as the unique circumstances here. Because of the piecemeal manner in which the Respondent responded to the Union's unconditional offer to return to work, it would not be unreasonable for any of the discriminatees to forego looking for work during the first month or so while they waited to see if the Respondent would extend a reinstatement offer to them. Once DeLeon received the Respondent's September 11 letter, telling him to report to work on September 19, there was no reason for him to seek other work. I note further that DeLeon returned to work, as instructed, notwithstanding the reports of harassment and other unlawful conduct that greeted strikers who had returned to work earlier. Judge Schlesinger found that these reports were sufficient to excuse other strikers who failed to respond to the Respondent's offers. Even after he was reinstated to a different, more onerous job without the overtime he earned before the strike, DeLeon continued to work despite continuing harassment. It was only because the Respondent fired him for clearly pretextual reasons that DeLeon found himself back on the picket line on October 29. Thus, DeLeon's actions do not reflect someone who was content to stay on the picket line and await an undetermined backpay award. Although he was unable to find work during the next 5 months, his lack of success is not proof that he did not look for work. In the absence of any affirmative evidence to rebut DeLeon's testimony that he did search for work in the manner described, I credit his testimony.

Finally, the Respondent argues that the General Counsel failed to take into account the period of time that DeLeon went to New Orleans in order to try to regain custody of his daughter. This was the event that led to the Respondent's unlawful discharge of DeLeon. The record in the underlying proceeding establishes that DeLeon was out of work for 1 week, October 22–29, attending a custody hearing and traveling to New Orleans to get his daughter. The record does not indicate whether DeLeon was on an unpaid absence during this time or had vaca-

tion time that he was using. It is also unclear whether the amounts reflected as interim earnings from the Respondent in the fourth quarter of 1990 includes this period. Because of these doubts and the Board's admonition that all doubts should be resolved to the benefit of the discriminatee, I shall not make any further deductions for this absence.

Based on the above findings, DeLeon is entitled to an award of $6802 plus interest under the Board's Order.

2. Louis Antoine Dormeville

The Board's decision in the unfair labor practice proceeding establishes that Dormeville had a serious workplace accident on December 20, 1989, from which he was rehabilitating when the strike commenced on January 30, 1990. The administrative law judge found in that proceeding that Dormeville recovered sufficiently to return to work on March 20, 1990, and that he joined the strike at that time. The judge further found that, when Dormeville attempted to return to work with the other strikers on August 13, the Respondent questioned Dormeville's ability to work. Dormeville told the Respondent that he was recovered and offered to bring a doctor's note the next day. When Dormeville returned the following day with a note from his doctor, attesting that he was fit to return to work, the Respondent kept him waiting for 2 hours before letting him return to work. [27] The judge's findings reveal that Dormeville was not returned to his prior position, but to a different job that required him to stand at a table, bend down to cut wires holding bundles of clothes, and place these clothes on a conveyor belt. While working on this job, Dormeville was harassed by agents of the Respondent who called him vulgar names and used vicious profanity. When Dormeville complained to the Respondent, he was reassigned to his former job on the big press, but the harassment continued. Dormeville left the plant at lunchtime to speak to the union representatives on the picket line about his treatment. The judge found that the Respondent terminated Dormeville unlawfully for consulting with the union representatives. The judge also found that the harassment that Dormeville was subjected to during the short period of his reinstatement independently violated the Act. These findings were adopted by the Board. There is no dispute that Dormeville returned to work again on August 20, 1991 (the end of the backpay period). He testified that he worked for 2–3 days before he went to his doctor to complain of difficulty breathing and that his doctor told him that he could not work. Dormeville did not work again until 1995.

The compliance specification alleged that Dormeville was entitled to backpay for the entire backpay period. The General Counsel sought gross backpay in the amount of $13,144, with no reported interim earnings. This figure has remained unchanged throughout these proceedings. The Respondent, in its answer, did not dispute the General Counsel's allegations as to Dormeville's backpay period or gross backpay calculations. The Respondent instead raised four defenses aimed at reducing the gross backpay, i.e. (1) that Dormeville was not entitled to backpay for any period when he did not conduct a reasonable and diligent search for interim employment; (2) that he did not meet his obligation to mitigate backpay by filing for unemployment compensation; (3) that the General Counsel failed to deduct strike benefits Dormeville received during the backpay period; and (4) that the General Counsel failed to reflect time Dormeville spent on the picket line as willful unavailability for work. The Respondent did not assert that Dormeville was ineligible for backpay because he was disabled throughout the backpay period, nor did the Respondent assert that Dormeville's backpay should be reduced by worker's compensation benefits he received during the backpay period.

When Dormeville testified at the compliance hearing on February 24, 1998, the Respondent's counsel questioned him about worker's compensation benefits that he received during the backpay period as a result of his December 1989 injury at the Respondent's facility. I allowed the Respondent's counsel to question Dormeville regarding this and to put in evidence documents from his worker's compensation case, but reserved ruling on whether the Respondent could raise this issue at that stage of the proceeding. Ultimately, I ruled that the Respondent could not, under Section 102.56(c) of the Board's Rules and Regulations, which sets forth the effect of a respondent's failure to answer or plead specifically and in detail to allegations in a compliance specification. The Respondent's effort to deny any backpay to Dormeville on the basis that he was not physically capable of working goes to the calculation of gross backpay. Moreover, the fact that Dormeville had a work-related injury before the backpay period and received worker's compensation payments was information peculiarly within the knowledge of the Respondent since the injury occurred while Dormeville was working for the Respondent and the payments were made by the Respondent's worker's compensation insurer. Finally, the Board's Decision and Order establishes that Dormeville was able to work and in fact started to work at the beginning of the backpay period. It was only because of the Respondent's unfair labor practices, i.e., harassing and terminating him, that his employment did not continue. Under these circumstances, I ruled that the Respondent was precluded from raising Dormeville's worker's compensation claim and benefits as a defense to the compliance specification.[28] I adhere to this ruling.

The record before me reveals that Dormeville was approximately 60 years old during the backpay period. He never went to school, was illiterate, and could not speak English. In addition, he had a bad back as a result of his injury while working for the Respondent. Despite this injury, he attempted to return to work on August 13, 1990, and again on August 20, 1991. He was unable to continue working the first time because of the Respondent's unfair labor practices. The record reveals further

[27] On one of the last days of the hearing, the Respondent attempted to call Dormeville's doctor to elicit testimony to show that the doctor didn't mean what he said in the note. I rejected this late effort to essentially relitigate Dormeville's discharge case. Moreover, this proffer was another attempt by the Respondent to litigate an issue in the compliance proceeding that it was precluded from litigating because of the Respondent's own failure to file an answer to the compliance specification that met the Board's requirements for specificity.

[28] After the close of the hearing, the Respondent requested from the Board permission to file a special appeal from my rulings involving Dormeville. To date, the Board has not ruled on this request.

that, after he was unlawfully discharged, he returned to the picket line and collected the full amount of strike benefits every week until February 1, when the Union ceased paying strike benefits. He testified that he went to the site of the picket line almost every day for at least part of the day. According to Dormeville, he usually arrived at the picket line around 12 noon and stayed until the Respondent closed, at 4:30–5 p.m. He recalled that 2 days a week (Monday and Thursday), he went to look for work with his son or Tigus from the Union. He did not find any work during the backpay period.[29] Dormeville's backpay claimant form submitted to the Board's Regional Office was filled out by his son and signed by Dormeville in April 1992. Only four places are listed where Dormeville claimed that he looked for work and all are dated after the backpay period. Even when confronted with this document, Dormeville insisted that he looked for work during the backpay period.[30] Finally, Dormeville candidly admitted that he received temporary total disability benefits because of his December 1989 injury during the backpay period. He could not recall if he received such benefits every week.[31]

I credit Dormeville's testimony and find that he made a reasonably diligent search for work during the backpay period by looking for work 2 days a week. It is well settled that factors such as the discriminatee's age, skills, and qualifications must be considered when assessing the reasonableness of an individual's search for work. In Dormeville's case, he had three strikes against him, age, illiteracy, and inability to speak English, which would make finding a job difficult in even the strongest labor market. His physical condition may also have limited his ability to obtain suitable interim employment. The long-recognized tort principal that a wrongdoer takes his victim as he finds him is applicable to Board backpay proceedings. *Wakefield v. NLRB,* 779 F.2d 1437 (9th Cir. 1986). Here, but for the Respondent's unlawful harassment and termination of Dormeville, he may have been able to continue working for an indefinite period. We will never know whether Dormeville's injury would have prevented him from working had the Respondent allowed him to return to work free of discrimination and harassment. It is this doubt created by the Respondent's unlawful conduct that must be resolved in favor of Dormeville, the victim of the Respondent's wrongdoing.

Although the Respondent's failure to file a proper answer precludes the Respondent from attempting to prove that Dormeville was not eligible for backpay because he was disabled during the entire backpay proceeding, I have considered his receipt of worker's compensation benefits in fashioning an appropriate make-whole remedy. I have done this in order to achieve a just result, mindful of the court's admonition in *Phelps Dodge Corp.,* supra at 199:

> [t]he remedy of back pay . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over backpay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given to it by Congress to attain just results in diverse, complicated situations.

The worker's compensation benefits that Dormeville admittedly received during the backpay period were a replacement for wages he would have earned but for his injury. Although the Respondent's intervening unfair labor practice precludes a determination whether Dormeville would have been able to work during the backpay period, I cannot ignore sums received that are the equivalent of wages. Accordingly, to make Dormeville whole under the Board's Order, I shall recommend that he receive the gross backpay claimed by the General Counsel, reduced by the temporary total disability benefits he received during the backpay period. Applying the amounts reflected in the worker's compensation awards in evidence to the appropriate quarters results in a net backpay figure of $1,960.55, plus interest.[32]

Finally, I reject any contention that Dormeville willfully concealed information regarding his receipt of worker's compensation benefits. Dormeville testified that he told the Board agents that he received some type of benefit but he did not recall what it was for or how much. Considering his lack of education and inability to speak English, it is understandable that he would not know the details of his worker's compensation case. That is particularly true where the documents put into evidence by the Respondent show that Dormeville was required to go to multiple hearings over a number of years in order to even receive these benefits, obviously because the Respondent's compensation carrier was contesting his right to receive any benefits. At the hearing, when questioned about the worker's compensation benefits, Dormeville answered candidly, without hesitation. Thus, I find that there was no attempt on his part to hide this information from the Board.[33]

[29] The record reveals that he did work at a laundromat, for about a month, before the strike ended, notwithstanding his injury. He did not leave this job for medical reasons, but was replaced by the employer when he went to Miami, Florida, for personal reasons.

[30] Although Dormeville did not have a good recollection of the backpay period, he did recall that he looked for work after the Respondent fired him and that there was no picket line when he looked for work. As noted above, Judge Schlesinger found that the Union ceased picketing when it made it's unconditional offer to return to work on August 13. The employees continued to gather at the Respondent's facility to await reinstatement and to show their solidarity.

[31] The worker's compensation awards put in evidence by the Respondent reveal that he did not receive these payments every week. Instead, he received lump sum retroactive payments after hearings were held on his claim. The first hearing in Dormeville's case during the backpay period was February 12, 1991, resulting in an award of weekly benefits retroactive to May 30, 1990. Thus, it appears that he was not receiving any worker's compensation benefits when he attempted to return to work at the end of the strike.

[32] I have already determined that the strike benefits received by discriminatees like Dormeville should not be deducted as interim earnings.

[33] As I have noted above in this decision and repeatedly at the hearing, this is information that the Respondent was well aware of throughout the many years that the Board's General Counsel was conducting its compliance investigation. It was the Respondent that concealed the information until the last moment, when Dormeville was on the witness stand.

3. Ronald Jean Baptiste

The findings in the underlying unfair labor practice proceeding establish that the Respondent sent Jean Baptiste a letter, offering him reinstatement, on August 20, 1 week after the backpay period commenced. Jean Baptiste returned to work, as instructed, on August 24, a Friday. The Board's decision establishes that the Respondent harassed Jean Baptiste, assigned him to a more difficult job than he had before the strike, and discharged him after only a day and a half, all in violation of the Act. Jean Baptiste testified in this compliance proceeding that he rejoined his fellow strikers at the site of the former picket line after his discharge. He continued to go there at least three times a week, for 5–6 hours a day, until he found employment as a porter with Calvin Klein on January 24, 1991. The evidence in the record reveals that Jean Baptiste received the full amount of strike benefits in every week of the backpay period until he started working at Calvin Klein, despite his not being present on the picket line every day.

Jean Baptiste testified credibly that he looked for work in the morning, before going to the site of the picket line, and also went with the union people on job search excursions from that site during the day. He could not recall precisely where he looked for work, but did recall going several times to an area in Brooklyn where there are many factories, and to places in Manhattan, such as the Marriott hotel. According to Jean Baptiste, at most of the places he went, he was told that there were no jobs. He recalled only one place that gave him an application to fill out, Cardinal Industries, in Long Island City. He was told that they would call him, but they never did. This is the only place he listed on the Board's backpay claimant identification and search for work form, which will be referred to in this decision as the compliance form. Jean Baptiste testified that he understood, from the instructions he was given by Tigus, that he was to list places he "applied" for work, i.e., where he filled out an application.

Jean Baptiste testified that it was the Union that found him the job at Calvin Klein and that he had to go there two times before being hired. His earnings at Calvin Klein exceeded his gross backpay in every quarter in 1991. The social security earnings record for Jean Baptiste, obtained by the General Counsel, also shows earnings of $2088 in 1990 from an employer identified as "Concepts of Independence, Inc.," with an address on Wall Street in Manhattan. Jean Baptiste denied any knowledge of that employer and denied that he worked anywhere other than Domsey in 1990. Jean Baptiste further denied ever working as a home care attendant, and denied being trained or licensed for such work.[34] In order to corroborate Jean Baptiste's denials, the General Counsel put into evidence a tax return he filed for 1990 listing only his income from Domsey. The IRS in 1993, sent Jean Baptiste an additional refund of taxes withheld in 1990, apparently by Concepts of Independence, based on a W-2 on file with the IRS. Jean Baptiste testified that he was never penalized for "under-reporting" of earnings.

The General Counsel seeks $3200 in net backpay for Jean Baptiste, deducting only his earnings from Calvin Klein.[35] The Respondent argues that Jean Baptiste backpay should be further reduced by the $2088 in reported earnings from Concepts of Independence and by the strike benefits he received prior to his employment with Calvin Klein. The Respondent, in its brief, made no argument that Jean Baptiste failed to make a reasonably diligent search for work.[36]

I have already rejected the Respondent's argument that the strike benefits should be deducted as interim earnings. Thus, the only issue as to Jean Baptiste is what to do about the earnings reported under his name and social security number that he denies were his. Under the Social Security Act, 42 U.S.C. § 405 (c)(3)–(4), the records of the Social Security Administration as to the amounts of wages paid to an individual in any period, after the expiration of the time for correcting such records, are conclusive for purposes of the Social Security Act. The records can always be corrected to, inter alia, delete or reduce amounts which are erroneous based on fraud, or to conform social security's earnings records to tax returns filed by the individual. There is no evidence that Jean Baptiste ever attempted to have his social security records corrected to delete the claimed erroneous amount. Although the Board has historically used and relied upon social security records in its compliance proceedings, the extent to which they are controlling is unclear. See *East Texas Steel Castings Co.,* 116 NLRB 1336, 1340–1341 (1956), enfd. 255 F.2d 284 (5th Cir. 1958) ("As based on information supplied by respective employers, they are subject to refutation by the parties concerned by any other competent evidence, such as the employer's own records, or the testimony of the employees and employers concerned."). Cf. *Associated Transport Co. of Texas, Inc.,* 194 NLRB 62 (1971) (The Board found that social security records are controlling as to interim earnings where the claimant's testimony is at variance with those records).

I found Jean Baptiste to be a generally credible witness. Moreover, in light of other evidence in the record regarding fraudulent use of social security numbers by undocumented aliens, evidence offered by the Respondent, I find it plausible that someone else worked at Concepts of Independence in 1990 using Jean Baptiste name and social security number. I also note that, if Jean Baptiste was at the picket line three or more times a week for substantial parts of the day, it is less likely he was working elsewhere during the period from his August 27 discharge to January 24. At the same time, I am troubled by the

[34] Although counsel for the General Counsel made representations regarding this employer, there is no *evidence* in the record that Concepts of Independence is an employer of home care attendants.

[35] There is no dispute that Jean Baptiste worked for the Respondent 1-1/2 days during the backpay period before he was fired, yet the General Counsel has not deducted any earnings from this employment. Jean Baptiste testified that he received a check in the mail from the Respondent for this work. The Respondent's payroll records for that period show he was paid $36.74 for the time he worked. Accordingly, I shall deduct $36.74 from his third quarter gross backpay claim.

[36] Were I required to make a finding on this issue, I would find that Jean Baptiste in fact made a reasonably diligent search for work based on his credible testimony and the fact that he ultimately found interim employment at which he earned considerably more than he would have at the Respondent. Looking at the entire backpay period, it can hardly be said that Jean Baptiste failed to mitigate damages.

failure of the General Counsel or Jean Baptiste to bring this error to the attention of the Social Security Administration. After all, Jean Baptiste's social security benefits will be based, at least in part, on these earnings that he says he never received. In addition, I requested counsel for General Counsel to obtain, in writing, the information she represented was received orally from Concepts of Independence but this was never done.

Having considered the above factors, and being mindful of the respective burdens in backpay proceedings and the Board's Rule that any doubts should be resolved against the Respondent, as the wrongdoer, I find, based on the credible denial of Jean Baptiste, that he did not work at Concepts of Independence in 1990 during the backpay period. Accordingly, I shall not reduce Jean Baptiste's backpay by the earnings reported from this employer on the social security record.

Based on the above, I find that Jean Baptiste is entitled to an award of $3,163.26, plus interest, under the Board's Order.

4. Marie Rose Joseph

The judge's decision in the unfair labor practice proceeding, adopted by the Board, establishes that the Respondent sent Joseph a letter offering her reinstatement and directing her to return to work on August 20, 1990. As found by the judge, when Joseph returned to work that day, she was unlawfully harassed by an agent of the Respondent and fired after only 2 hours of work. The judge found, and the Board affirmed, that Joseph was fired when she could not produce a green card as requested by Peter Salm. The judge found that this request was illegal and that her subsequent termination violated Section 8(a)(1) and (3) of the Act. The judge's decision also indicates that, at the time of her termination, the Respondent paid her $9.23 for her work that day.

The General Counsel seeks backpay in the amount of $8,789.40, which represents Joseph's gross backpay reduced only by $100 of interim earnings received in the first quarter of 1991. The Respondent contends that Joseph's backpay should be reduced further by strike benefits she received, a claim I have already rejected as to all discriminatees. In addition, the Respondent argues that Joseph incurred a willful loss by quitting the one job she found during the backpay period and abandoning her search for work, which the Respondent asserts occurred in December 1990.The Respondent also raised questions regarding Joseph's immigration status, relying upon the work permit she gave to the Respondent when she was hired, which bore an expiration date of June 28, 1988.

With respect to the last argument, I find that the Respondent is precluded from raising this issue as to Joseph because the issue was litigated in the underlying unfair labor practice case. *Task Force Security & Investigation,* 323 NLRB 674 fn. 2 (1997). The Respondent's demand that Joseph produce a green card was the basis for the judge's finding that Joseph was unlawfully discriminated against because of her status as a returning striker. In reaching his conclusions, the judge found that Joseph had a valid work permit and was entitled to work for the Respondent. *Domsey Trading Corp.,* 310 NLRB at 802–803.[37]

Joseph's testimony regarding her efforts to find work during the backpay period was not a model of clarity. She said repeatedly that she had a poor recollection of events from so long ago, but she did recall receiving money from the Union and she did recall signing the Board's compliance form. Her signature on that form is dated May 5, 1992, and Joseph testified that she recalled events better then because they were fresh in her mind. According to Joseph, she did not fill out the form herself, but had an acquaintance do so by asking her the questions and writing down her answers. Joseph does not read English or Creole very well. The form apparently is the only record she kept of her efforts to find work.

Joseph testified that, after she was fired on August 20, she went to the site of the former picket line every day, Monday through Friday. She said she did not go on Saturdays unless she was told by the Union to be there. She recalled that she arrived early, about 7–7:30 a.m. and left when the Respondent closed for the day. She testified that she would leave the site of the former picket line during the day to go look for work and would return when she did not find work. She testified that she received money from the Union as long as they gave it out. The strike benefit records in evidence, however, show that she signed for receipt of the full amount of strike benefits through the week ending September 21 and then not again until the week ending November 2. Her signature does not appear after November 2. No other records were ever produced showing receipt of strike benefits during those weeks her signature is missing.

Joseph testified that she looked for work by taking one of two busses to areas where there are factories and going to the factory gates to see if they were hiring. Sometimes, she would be told to come back the next day and would return, only to be told there was no work. She did not know the names of any of the factories and did not know what type of work they did, because she never got inside. She only took busses because she did not know how to take the subway and did not want to go alone. Joseph did not look for work with the Union, testifying that she did not know that the Union was taking people to look for work. She testified that she found out later and asked Tigus about it and he said he would look for her. She did not say when this occurred. Although Joseph admitted having a poor recollection of the period, she was certain that she looked for work every day. The form that she signed during the Board's backpay investigation lists only three places she looked for work, the last one dated December 10, 1990. Of the three, she had a specific recollection of the first place, "UPS United Postal" on Foster Avenue. She testified that they told her, when she inquired about a job, that she could probably not handle the work because it required lifting of heavy boxes.

[37] I also note that the I-9 form filled out when Joseph was first hired, in April 1989, shows that the Respondent was on notice when it hired her that the work permit she produced had an expiration date of June 28, 1988. If Joseph was ineligible to work in this country, the Respondent would have been in violation of the IRCA of 1986 when it hired her, before the strike.

The one job she did find involved working at a table stuffing advertisements for supermarkets into envelopes. Based on her testimony, it appears that this was piece work and that, although she would go there every day, there was not always enough work for everybody. The employees would have to fight for the work and would only be paid for the amount of work they did. If one was not successful in grabbing the packages of work, one would not make much money. She testified that she did not last more than a week at this job, quitting because she barely made enough money to cover transportation. The General Counsel estimated earnings from this work at $100, based on what Joseph told the Board during the investigation. Although the General Counsel deducted these earnings in the first quarter of 1991, the record before me does not reveal when she worked at this job.

The record reveals that Joseph was 56–57 years old during the backpay period. She did not speak English, was illiterate in English and could barely read Creole. Her lack of success in finding suitable employment is not surprising. The fact that she did find one job corroborates her testimony that she was looking for work. Her reasons for quitting do not establish evidence a willful loss under Board precedent. *Lundy Packing Co.,* 286 NLRB at 144. The job was not substantially equivalent to her prestrike job with the Respondent because her earnings were based solely on her ability to fight other employees to get enough work to do. As she testified, on some days she did not make enough money to cover her transportation. Under the circumstances, her decision to leave to seek a better job was not unreasonable.

I find, however, in agreement with the Respondent, that Joseph did abandon her search for work after December 1990. I make this finding based on the omission of any places after that date on the form she signed in May 1992, a time when she admittedly had a better recollection than she did at the hearing. Although a friend filled the form out for her, he did so based on information she supplied. No explanation was given for the absence of any entries after December 1990. In making this finding, I also rely on her apparent absence from the picket line after November 1990. Although she testified that she received money from the Union every week, I find this highly unlikely because of the absence of any receipts to document this. Her memory in this regard is simply not accurate. I agree with the Respondent that her testimony that she was unaware of the Union's efforts to find work for the unreinstated strikers supports the conclusion that she was not at the site of the picket line during much of the backpay period. Based on the testimony of the other discriminatees, it is unlikely that someone who was a regular would not have been aware of the Union's job search efforts. I find it more likely that Joseph became discouraged and abandoned her efforts after leaving the one job she found in order to find a better job, only to meet with a lack of success in doing so. I shall recommend that backpay be tolled after December 31, 1990.

Because the record does not disclose when Joseph worked during the backpay period, I must make a finding, based on the total evidence in the record, regarding when it is more likely than not that she found this job. Based on her absence from the site of the picket line in October, and her return for 1 week in November, I find it more likely that she found this interim employment in the fourth quarter of 1990. She probably stopped going to the site of the picket line in order to go to work and then returned briefly after she quit that job. I shall also modify the backpay award for Joseph to give the Respondent credit for the $9.23 she received for her work on August 20, 1990.

Accordingly, I find that Marie Rose Joseph is entitled to backpay in the amount of $3,101.77, plus interest, under the Board's Order.

5. Maximo Martinez

The decision in the unfair labor practice case establishes that Martinez was reinstated on April 1, 1991, and fired on April 16, 1991, the day after he testified at the unfair labor practice hearing. The Board adopted Judge Schlesinger's finding that Martinez' termination violated Section 8(a)(1) and (4) of the Act. The General Counsel seeks backpay for Martinez in the amount of $14,325.75, which represents his gross backpay reduced only by earnings from the 2 weeks he worked for the Respondent and interim earnings from a job he obtained through the Union that lasted 3 days, in the third quarter of 1991. The Respondent seeks to reduce his backpay further by the $200 weekly strike benefits he received as a machinist from August 13 through February 1.[38] The Respondent argues further that Martinez should be denied backpay because he did not conduct a reasonably diligent search for work.

Martinez testified that, during the period that he was receiving strike benefits, he went to the site of the picket line every day, from 8:30 a.m. until 3:30 p.m. and left only to get lunch. He admitted that he did not look for work during this period. Martinez also admitted that he never looked for work during the backpay period, in the sense of going to a workplace to seek employment. Instead, Martinez asked Union Representative Joe Blount,[39] about once every week or two, if he could find Martinez a job. This effort proved minimally successful because Blount did obtain one job for Martinez, at a clothing factory in New Jersey, where he worked for 3 days and was laid off. Martinez testified that he also spoke to friends who worked as porters about once a week, asking them if they knew of any job openings. According to Martinez, they gave him no leads. The only other effort Martinez made was to look in the want ads of El Diario*,* a Spanish language newspaper, every day. Martinez testified that there were never any jobs in the paper for him because they were all professional or computer jobs.

I shall recommend that Martinez' backpay be tolled for the period from August 13 through February 1 based on his admission that he did not look for work while he was receiving strike benefits from the Union. His failure to search for work during this period may be explained in part by his receipt of strike benefits from the Union which approximated his prestrike earnings, reducing his need to work. This however does not excuse Martinez' failure to mitigate. The Board has held that discriminatees who engage in picketing at the expense of seeking in-

[38] Although Martinez admitted receiving an additional $200 from the Union for 1 week when he did night-shift duty at the picket line, I find that this occurred during the strike, in the spring 1990, before the backpay period commenced.

[39] Blount's name appears incorrectly as "Blanc" in the transcript.

terim employment incur a willfull loss and are disqualified from receiving backpay for such periods. *Ozark Hardwood Co.,* supra. Because Martinez did not look for work from August 13 through February 1, he is not eligible for backpay during that period.

I find that Martinez' minimal job search efforts through the remainder of the backpay period did not fully satisfy his duty to mitigate. While it might be sufficient early in a backpay period to rely upon friends, or union agents, for leads regarding interim employment, it is not reasonable to continue this method throughout a 1-year backpay period, particularly where these efforts are unsuccessful. At some point, the individual discriminatee must become more assertive in seeking out suitable interim employment. Because Martinez returned to work for the Respondent in April and was subsequently fired, I shall not toll backpay for the second quarter of 1991. Giving Martinez the benefit of the doubt, I find that his minimal efforts were sufficient for the brief period before and after his reinstatement in that quarter. His continued reliance on methods that had proven unsuccessful after July 1, did not satisfy his duty to mitigate. Although the General Counsel deducted estimated earnings from the job in New Jersey in the third quarter of 1991, I find it more likely that the Union found him this job shortly after his termination by the Respondent on April 16, 1991, and that the earnings should be deducted in the second quarter. Martinez could not recall when he worked in New Jersey, other than it was after his termination. The fact that he was able to find one job through the Union does not establish that his efforts were reasonably diligent. On the contrary, after being laid off from this job, it was incumbent upon Martinez to seek other work. If Joe Blount and his friends could offer him nothing more, and the ads only had jobs for which he was not qualified, it was time for Martinez to "pound the pavement" in search of work. His fellow discriminatees did this, with varying degrees of success. Martinez was a young man, with experience operating machines for Domsey. Thus he was in a better position than many of his coworkers to look for work. His failure to do so constituted a willful loss.

Based on the above, I find that Maximo Martinez is entitled to $2,995.75, plus interest, under the Board's Order.

6. Marie Nichole Mathieu

Mathieu was sent an offer of reinstatement by the Respondent on August 31, within the first few weeks of the backpay period, directing her to return on September 7. The record in the unfair labor practice case establishes that Mathieu worked for the Respondent from September 7 through 14, 1990. She did not return to work after being viciously assaulted by an agent of the Respondent on her way home from work. The Judge's decision reveals that she had been harassed and verbally abused throughout the 6 days she worked. Although her husband called the Respondent on September 17 to advise that she could not work because of the injuries she received, the Respondent terminated her, by letter dated September 19, for being a "no show, no call." The judge found that the Respondent fabricated this reason and that Mathieu's termination violated Section 8(a)(1) and (3). He found further that the various acts of verbal and physical abuse Mathieu suffered at the hands of the Respondent independently violated Section 8(a)(1) of the Act.

The General Counsel seeks backpay for Mathieu in the amount of $7,848.67, which represents her gross backpay reduced only by earnings she received from one interim employer, Just Packaging, in 1991.[40] The Respondent seeks to reduce backpay further by deducting the amount of strike benefits she received, which I decline to do for the reasons stated above. The Respondent also argues that she should be denied backpay for the first two quarters of 1991, based on an interpretation of her search for work form which the Respondent argues proves that she did not look for work during this period.

The General Counsel did not credit the Respondent for any 1990 earnings for the 6 days that Mathieu worked before her termination. At the hearing, Mathieu denied that she ever received any pay for this work. Although the Respondent's counsel indicated that he would prove this in his case, no payroll records were offered to show that Mathieu in fact was paid for her work in September.[41] I therefore find, based on Mathieu's undisputed testimony, that she had no earnings from the Respondent during the backpay period.

Mathieu testified that she looked for work with her husband, when it was convenient for him, or with her children, who were teenagers at the time. Because Mathieu can neither read nor write English or Creole, she had whoever was escorting her write down the names of places that she went to look for work. Mathieu also went out with the Union on about five occasions. Mathieu testified that she normally went to the picket line at 7 or 7:30 a.m. and remained there all day. On days that she went to look for work, Mathieu would arrive after 9 a.m. Mathieu's husband worked from 3 p.m. to midnight, and was available to escort her during the day. He had a car and would drive her to places. Mathieu testified that he also looked for jobs for her in the newspaper. As noted above, she did find a job in 1991 through a friend who worked there. Mathieu recalled the names of several places at which she sought employment. In addition to her job search efforts, Mathieu also took a 2-week home attendant course to improve her employment prospects, but she did not pass the test to become certified for this work.

The search for work form that Mathieu signed, in May 1992, was filled out for her by another striker during a meeting in the Union's office at which the strikers were told how to complete the forms. Because she could not read the form, Mathieu's friend asked her the questions and wrote down the answers. On the form, Mathieu identified her interim employment at Just Packaging and listed a number of places that she looked for work. She indicated that she looked for work at these places in August 1990, before she was reinstated by the Respondent, and then again from October 1990, "weekly" until May 29, 1991, and thereafter. May 29 is the date written next to Just Packaging. Mathieu also indicated on this form that she stayed at

[40] Mathieu also had 1990 earrings from another employer, Murachanian Export Co., in Garden City, New York. Information received from this employer during the hearing clearly establishes that she worked at this job in May–June, 1990, outside the backpay period.

[41] The Respondent did offer such evidence as to other discriminatees.

home, recovering from the injuries she sustained at the hands of the Respondent's agent for about 1 month, until October 9, 1990.[42] She indicated that she worked at Just Packaging from March 29, 1991, until the second week of June.

I find that Mathieu made a reasonably diligent search for work. Any discrepancies between her testimony and the information on the form is more likely attributable to the passage of time than any attempt by Mathieu to lie under oath. I found nothing in her demeanor, or answers, to suggest that she was not being truthful and attempting to recall, as best she could, events that occurred 7–8 years earlier. I also note that the fact that Mathieu worked before the backpay period, even when she was under no obligation to mitigate, suggest that she is someone who would not sit idly and wait for a backpay check. Any lack of success that she had in her efforts is understandable in light of the lack of skills, her illiteracy and inability to speak English.

I shall modify Mathieu's backpay claim to reflect that all of her interim earnings from Just Packaging were earned in the third quarter of 1991. At the hearing, Mathieu testified that she worked at this employer in May and June. Although on page 2 of her search for work report she put down March 29 as the date she started working there, on page 3, she list a date of May 29. Because Mathieu testified that she worked there at least 40 hours a week, the only explanation for such a small amount of earnings being reported to social security is that the job was of short duration, perhaps 3 weeks. Since she recalled being laid off in June, May 29 is, in all probability, the date she actually started working there. This modification does not change the total net backpay, but changes the backpay for the second and third quarters of 1991 to $1976 and $1,642.67. respectively.

Accordingly, Mathieu is entitled to a backpay award of $7,848.67, plus interest, under the Board's Order.

7. Nilda Matos

The decision in the underlying unfair labor practice case establishes that the Respondent unlawfully delayed Matos' reinstatement on August 13, 1990, when Peter Salm crossed her name off the list of returning strikers, telling her to "forget it" when she presented herself for work. On September 11, the Respondent sent Matos a "second recall" letter, instructing her to return to work on September 19, which she did. According to Judge Schlesinger's findings, the Respondent assigned her to a more onerous job than her prestrike job, harassed and verbally abused her, supervised her work more closely, and ultimately discharged her on September 21, all in violation of Section 8(a)(1) and (3). The General Counsel seeks $8316 in backpay for Matos. The only interim earnings reported are $100 from Lycra Pants in the fourth quarter, 1990. No deductions are made for any earnings from the Respondent for the 2–3 days that Matos worked in September 1990. The Respondent claims that the record reflects that Matos earned $83.60 for this work and that this amount should be deducted. The Respondent also seeks to deny any backpay to Matos on the basis that she quit her sole interim employment and did not conduct a reasonably diligent search for work.[43]

The Respondent, in its answer, also sought to reduce any backpay by the amount of strike benefits she received and claimed that Matos was not entitled to any backpay because she was an undocumented alien. I have already addressed these two issues above.

The evidence in the record does not establish what, if anything, Matos was paid for the short period that she worked for the Respondent in September 1990. Matos herself did not even remember having returned to work. The Respondent put in evidence what purports to be a payroll register dated September 20, 1990, indicating gross pay for Matos of $32 with various withholdings. There is no record of any other pay for Matos in evidence. Thus there is no evidentiary basis for the conclusion drawn by the Respondent that Matos was paid $83.60 for work during her brief reinstatement period. The Respondent also put into evidence Matos' W-2 Wage and Tax Statement for 1990, reflecting gross earnings from the Respondent in the amount of $596.01. This included Matos' earnings from January 1990, before the strike commenced. The September 20, 1990 payroll register showed gross year-to-date wages in the amount of $632.01. The Respondent's payroll and personnel clerk, Luisa Alvarez, explained that the lower amount on the W-2 could be due to a void check, i.e., a payroll check returned and never cashed. I also note that the September payroll register showed no Federal tax withheld (FWT) that period and year to date Federal tax withholdings in the amount of $14.19, the same amount reflected on Matos' yearend W-2. I must infer from this that Matos never received the $32 shown on the September 20 payroll register, or any other pay after the strike commenced. Because the Respondent would be in possession of records which would show how much Matos was paid, I must draw an adverse inference from its failure to produce any other documents showing payments actually received by Matos for this work.

Matos had no present recollection at the hearing regarding the dates or places she looked for work. She testified that she clearly remembered looking for work, and recalled being taken by the Union to factories in Brooklyn to look for work. She recalled that, as best she could determine with her inability to read English, they went to clothing or sweater factories. She recalled going with the Union two or three times a week. Matos also recalled asking friends if they knew of any jobs. This was the way that she found the job at Lycra Pants. Matos recognized the compliance form bearing her name, but she testified that only the information on the top of page 1 was her handwriting. Matos recalled that Luis Acevedo, a union organizer, helped her fill the form out and that she believed the rest of the handwriting on the form was his. The form is not signed. When shown the form, Matos could not recall any of the places listed on pages 3 and 4 as places she looked for work, saying that it

[42] Because these injuries were the direct result of the Respondent's unfair labor practice, i.e., the assault on September 14, the Respondent's backpay liability continued during this period even though Mathieu was not seeking work.

[43] There is no evidence in the record regarding Matos' immigration status. Matos was not asked whether her status impacted her search for work. I note that the record indicates that Matos was able to find work during the backpay period. Thus, even if she lacked documentation, it did not affect her ability to look for work.

was a long time ago and she did not remember such things. She could not recall why the question on the form regarding unavailability for work has both the affirmative and negative responses marked.

With respect to the job she found at Lycra Pants, Matos testified that she worked there 2 weeks, more or less, and earned about $50 a week, even though she was working 8 hours a day, 6 days a week. Her job was to cut loose strings off the pants as they came off the sewing machines. She was paid on a piece work basis. Because she had never worked in this kind of a job, Matos did not know her way around the floor. She testified that other workers knew where to go to get work. It appears that people doing the work she did had to go to the sewing machine operators to get their pants as they were finished and whoever got there first, got the work. According to Matos, she quit that job after only 2 weeks because she was paid too little. She recalled that she looked for work after leaving this job but, again, could not recall any specifics.

Considering the entire backpay period and the record as a whole, I find that Matos conducted a reasonably diligent search for work during the backpay period. I note that Matos received her "second recall" notice within a month of being turned away by Salm. Thus, even had she not begun to actively search for work during the interim, that would not be unreasonable under existing Board law. Similarly, after being fired on September 21, a reasonable amount of time is permitted before Matos would be expected to start her job search efforts. In any event, I believe Matos' testimony that she was looking for work with the help of the Union during this period. The record also establishes that Matos found employment at some point and that she did so by asking friends. This lends credibility to her testimony that this was one of the ways that she looked for work. Although Matos left this job after only 2 weeks, I find that her reasons for quitting were justifiable in light of the low amount of earnings she received. I note that this job was not even substantially equivalent to her job with the Respondent because of the piecework method of payment with its attendant variability in earnings potential. Despite the lack of specific recall regarding the details of her search for work, Matos recalled sufficient information to make her testimony that she clearly remembered looking for work during the backpay period credible.

The Respondent also argues that Matos could not have been looking for work because she was on the picket line all day and only left to get lunch. This argument is based on only a small piece of Matos' testimony. Even the one piece of testimony relied upon is not free from doubt. When Matos was asked when she arrived at the site of the picket line, she said, "[S]ometimes 8:00, sometimes 9:00. She testified that she left at 5:00 PM." When she was then asked if she ever left during the day, she responded. "No. Not every day." This suggests there were times that she left. The Respondent's counsel then asked a leading question implying that she only left to get lunch and Matos replied affirmatively. Later in her testimony, however, she volunteered, without the aid of any leading questions, that the Union took her to look for work from the site of the picket line. Although Matos later said she could not recall if she left the picket line to look for work, this was after repeated questioning about details that she could not recall. When considered in its entirety, Matos testimony does not establish that she engaged in picketing at the expense of seeking other employment.

The compliance specification indicates that Matos worked at Lycra Pants during the fourth quarter of 1990. There is no record in evidence establishing the actual dates of employment and Matos was not asked when she worked there. In the absence of any evidence to show that these interim earnings should be assigned to a different quarter, I shall defer to the General Counsel's decision to deduct these earnings in that quarter. Accordingly, I find that Matos is owed $8316, plus interest, under the Board's Order.

8. Francisco Moreira

The Board's decision and order establishes that the Respondent sent Moreira an offer of reinstatement on September 11, directing him to return to work on September 19. When he returned, the Respondent unlawfully failed to reinstate him to his former job. Moreira continued to work for the Respondent until November 2, when he was discharged in violation of Section 8(a)(1) and (3). The compliance specification seeks $7820 in backpay for Moreira and indicates that he had no interim earnings other than wages he received from the Respondent for the period September 19 through November 2, 1990. The Respondent seeks to reduce Moreira's backpay further by the amount of strike benefits he received. This issue has been previously discussed. The Respondent further asserts that Moreira should be denied backpay because he did not conduct a reasonably diligent search for work and because he incurred a willful loss of earnings by spending time on the picket line instead of seeking work. The Respondent argued in its brief that Moreira should also be denied backpay because he lacked immigration documentation and was too ill to work.

Moreira testified that he went to the site of the former picket line every day at 8 a.m. and did not leave until 5 p.m., other than to get lunch. Moreira did this before and after his period of reinstatement by the Respondent. He testified that he continued to go to the picket line for about a week even after the Union stopped paying strike benefits. Moreira also testified that, while at the site of the picket line, he went to look for work with Union Representatives Tigus and Natalie. He recalled that he went with the Union to look for work on Mondays and Thursdays and recalled further that the Union took him to look for work at factories in Brooklyn. He was able to recall going to an aluminum factory, a factory that makes pots and pans, and one that made cardboard boxes. He was not offered employment at any of these places. Moreira identified the compliance form bearing his name, but testified that someone helped him fill it out because he does not read or write. According to Moreira, the list of places he looked for work was done using a list that Tigus kept of the places he went to with Moreira. Moreira did not sign the form. There are six places on this list.

In addition to his efforts through the Union, Moreira also tried to find work by asking an acquaintance, Rufino Guerrero,[44] who worked in construction, if he knew of any jobs.

[44] Moreira testified that this is not the same Rufino Guerrero who is a discriminatee in this case. He did acknowledge also being friendly with the Guerrero who is a discriminatee.

Moreira had experience doing masonry work in his native country but had been unable to find such work when he came to this country because he did not have the proper credentials as a mason. According to Moreira, he asked Guerrero about work every time he saw him, at the train station or in the park, about 1–2 times a week. Although at first Moreira said that Guerrero would take him to construction jobs and introduce him to the supervisor, later he testified that Guerrero never had any jobs for him. I understand Moreira to mean that he never found a job through these efforts. Moreira admitted that his sole efforts to find work were these conversations with Rufino Guerrero and his trips with the union representatives.

Moreira testified that he was sick from the time he worked for the Respondent, before the strike. He claimed to have aches and pains from the constant bending and straining of the job, and also reported having an eye injury. Moreira testified that he was able to function, despite these maladies, by taking aspirin and home remedies. I note that Moreira in fact worked for the Respondent for about 6 weeks during the backpay period despite his illness and was able to go to the picket line every day until sometime in February 1991. Moreira denied that he was hospitalized or bedridden during any part of the backpay period because of these medical problems. I find that the Respondent has not established that Moreira was incapable of working due to illness or accident during any part of the backpay period.

Moreira also testified that he did not apply for unemployment benefits after being fired by the Respondent because he lacked "documentation." Moreira denied that his lack of "documentation" prevented him from looking for work. According to Moreira, if he had found work and someone asked for documentation, he would have explained his situation. Because he did not find work, he was never required to produce any documentation.[45] I find that Moreira's immigration status did not prevent him from looking for work, nor was he required to decline a job because of his inability to produce documentation.

The sole remaining issue is whether Moreira's efforts to find interim employment were sufficient to satisfy his duty to mitigate. I find that they were, at least through the first quarter of 1991. I note that he was sent an offer of reinstatement by the Respondent within the first month of the backpay period and returned to work a week later. He continued to work until he was fired by the Respondent. Before and after his reinstatement, he used the Union to look for work, which I find sufficient under the circumstances. These efforts continued until he stopped going to the site of the picket line in early February. After that, Moreira's job search efforts were limited to speaking to Rufino Guerrero about job possibilities. As I found above with respect to Maximo Martinez, this is not enough, particularly where such efforts do not result in any leads that are productive. At some point, Moreira was required to make additional efforts to find work, instead of relying on one individual as the source of all job leads. I find that that point came at the end of the first quarter of 1991, approximately 6 weeks after his efforts to find work through the Union ended. Accordingly, I shall toll Moreira's backpay as of March 31, 1991, because of his failure to conduct a reasonably diligent search for work thereafter.

Based on the above and the record as a whole, I find that Moreira is owed backpay in the amount of $4420, plus interest, under the Board's Order.

9. Antoinette Romain

The Board's decision and order establishes that the Respondent denied Romain reinstatement on August 13, 1990, when she appeared at the Respondent's facility with other strikers ready to return to work. About a week later, the Respondent sent Romain a letter directing her to return to work at 8 a.m. on August 24. The decision establishes that she presented the immigration documents requested in the Respondent's letter and was assigned to work at a different job than the one she held before the strike. According to the unfair labor practice findings, the Respondent's agents then harassed and assaulted her to the point that she ran from the factory, screaming for help, and was taken by ambulance to the hospital. She did not return to work after recovering from her injuries because she believed that the Respondent would not accept her because of the way she had been treated. Based on these facts, the judge found that Romain was constructively discharged in violation of Section 8(a)(1) and (3).

The General Counsel seeks backpay in the amount of $7,767.95, which represents gross backpay through the second quarter of 1991. The General Counsel does not seek backpay after June 30, 1991, because Romain's interim earnings from her job as a home attendant at Central Civic Association exceeded her gross backpay for the last quarter of the backpay period. No other interim earnings are reported. In particular, no earnings are reported by the General Counsel for the work that Romain performed for the Respondent on August 24 prior to her constructive discharge. Romain denied that she ever received any pay for this work and the Respondent offered no evidence to rebut this testimony.

The Respondent asserted, in its answer to the compliance specification, that Romain's backpay should be reduced by the amount of strike benefits she received between August 13 and February 1. I have already found above that the strike benefits provided by the Union here are not an offset to backpay because they were not "wages for picketing."[46] The Respondent also asserted, in its answer and on brief, that Romain should be denied backpay because she did not make a reasonably diligent search for work. The Respondent relies, in part, upon the compliance form, completed by Romain's child based on information she provided and signed in April 1992, as proof that Romain did not look for work before July 1991. The only place listed on the form is the Central Civic Association where Romain found work on July 17. Although Romain testified that she recalled going to other places to look for work during the backpay period, the Respondent argues that there is no docu-

[45] I note that Moreira was hired by the Respondent after the effective date of IRCA and Respondent presumably would have known whether he lacked documentation when they hired him.

[46] Although Romain testified that she went to the site of the picket line every day, because she "had to go," the record reflects that the Union paid Romain strike benefits even when she was absent from the picket line recovering from the assault by the Respondent's agents.

mentary or other evidence to corroborate this testimony. The Respondent argues further that Romain incurred a willful loss by remaining on the picket line every day from 8 a.m. until 5 p.m., instead of looking for work, during the period from August 13 through February 1 when she was receiving strike benefits.

Romain testified that, although she did not recall much about the backpay period because of many difficulties she has had since then, including the death of her mother in September 1991, she insisted that she looked for work even while going to the site of the picket line. She could recall the name of only one place that she went to look for work, Baby Rex. She testified that she went to this place, where they make undergarments, shortly before the Union sent her to school to become a home attendant. According to Romain, a woman supervisor put her to work folding socks to pack in boxes, but shortly thereafter, the "white man" came over, told her they did not need her, wrote out a check for a small amount of money and sent her home.[47] She testified that the Union then sent her to school on July 8, that she got her home attendant certificate and went to look for work. She found the job at Central Civic Association after being turned down by two other home attendant agencies.

Romain recalled that she also looked for work at two places in Manhattan, at one of which they stuffed envelopes, and a place in Brooklyn where they pack socks in boxes. It is unclear whether the latter place is Baby Rex, or another factory. She testified that she went to many other places but could not recall any others. Romain did not testify regarding any job search efforts through the Union, other than the home attendant schooling. Romain testified that she obtained leads about possible jobs through friends and that, when someone told her about a place, she would go there. She did not keep a list of any of these places. Her explanation for listing only the Central Civic Association on the search for work form is that it was the only place that "interested her" because she obtained work there. The record reflects that Romain was 55–56 years old during the backpay period and, although she could read and write French and Creole, she had only a limited facility with the English language.

Romain is clearly entitled to backpay for the period from August 13, when the Respondent initially turned her away, through the end of the third quarter, when she was recovering from the injuries suffered as a direct result of the Respondent's unfair labor practice. Thus, even if she did not start to actively seek work during this initial period, that would be reasonable under the circumstances. It is also clear that Romain was actively seeking work in the last quarter of the backpay period. Her testimony regarding her attempt to find work with Baby Rex, going to school to become a home attendant and looking for work at several agencies before finding the job at Central Civic Association is credible and establishes that she was making a diligent effort to find suitable employment.[48] The only issue as to Romain is whether she looked for work from October through June.

Romain did recall going to places, other than Baby Rex and the home attendant agencies, to look for work. Although she was unable to recall when she went to these places, the names of the places, or even the nature of the work performed at all but one or two places, this lack of recall is not fatal in view of the passage of time since the backpay period, the witnesses advanced age at the time of the hearing and intervening events, such as the loss of loved ones, which may have affected her memory. I also attach little weight to Romain's failure to list any places other than Central Civic Association on the search for work form in April 1992. Although presumably she would have had a better memory of the backpay period at that time than she did at the hearing, she adequately explained the failure to list other places. She listed the only place she found work because that was the one that most "interested" her, i.e., that stood out in her mind when the form was filled out. I note that she also did not list Baby Rex and the place or places in Manhattan that she looked for work but was not hired.

Although I find that Romain made a reasonably diligent search for work, when one considers her age, lack of skills, and language difficulty, I do not believe that she began her search before February 1, the date the Union ceased paying strike benefits. Although Romain testified that she did look for work during the period she went to the site of the picket line, she never explained how she was able to do this if she remained on the picket line all day, every day. Accordingly, I shall toll Romain's backpay for the period from October 1, 1990, through February 1, 1991, because I find that, after Romain recovered sufficiently from her injuries to look for work, she opted to support the Union by remaining at the picket line in lieu of seeking other employment.

Accordingly, I find that Romain is owed backpay in the amount of $2,605.80, plus interest, under the Board's Order.

10. Margarett St. Felix

The Board's decision and order establishes that the Respondent sent St. Felix an offer of reinstatement on August 31, 1990, directing her to return on September 7. When St. Felix returned on September 7, she was "badgered " and harassed by the Respondent's agents while working. After working under these conditions for about 6 weeks, the Respondent abruptly fired her, on October 23. The judge found that the Respondent's harassment of St. Felix violated Section 8(a)(1) and that her discharge violated Section 8(a)(3).

The record before me establishes that St. Felix returned to the site of the picket line after her termination and continued to go there every day until she found interim employment at a factory where they made Christmas flowers. A social security earnings record in evidence identifies the employer as Belle Knitting Mills. St. Felix testified that Tigus took her and two other strikers to this place and all were hired. She recalled that she started working there while the employees were still going to the site of the picket line outside the Respondent's facility.

[47] Many of the discriminatees, including Romain, referred to bosses and owners of companies as the "white man."

[48] Any money she earned from the short stint at Baby Rex would not affect her backpay in the quarter it was earned because the General counsel concedes that her earnings from Central Civic Association in the same quarter exceed her gross backpay.

On the compliance form, she indicated that she started at this job on or about February 1. St. Felix recalled that she worked for this employer for about 6 months and was laid off shortly before the Respondent reinstated her again, on August 20, 1991. She was paid by piecework and her earnings varied from week to week, the social security record shows total earnings in 1991 from Belle in the amount of $4,725.74. The General Counsel's apportionment of these earnings over the first three quarters of 1991 does not add up to the total reflected on the social security report. Because there is no dispute that the entire amount was earned during the backpay period, I shall recalculate St. Felix' backpay to ensure that the Respondent gets credit for all of St. Felix' interim earnings.

In its brief, the Respondent concedes that the evidence establishes that St. Felix satisfied her obligation to mitigate by working in every quarter of the backpay period. The Respondent argues, however, that her backpay should be reduced by the amount of strike benefits she received during periods when she was not working. I have already found above that the strike benefits here are not properly deductible as interim earnings.

The Respondent also implicitly argues that St. Felix did not search for work during the period before she was reinstated by the Respondent on September 7 and after her termination on October 23 when she was on the picket line every day, receiving strike benefits. I reject this argument. The Respondent sent St. Felix a reinstatement offer less than 3 weeks after the backpay period commenced. It would not have been unreasonable for St. Felix to remain on the picket line awaiting reinstatement during this initial period, particularly in light of the piecemeal nature of the Respondent's offers during August and September. I find further, based on St. Felix testimony, that she did search for work, after her termination on October 23, by going with Tigus to look for work from the site of the picket line, and by seeking employment as a babysitter through friends and acquaintances in the evenings and on weekends when she was not at the site of the picket line. The fact that she found interim employment with Tigus' assistance, while employees were still meeting at the site of the picket line, corroborates her testimony.

Accordingly, I find that St. Felix is entitled to $2,938.26, plus interest, under the Board's Order.[49]

11. Victor Velasquez

The Board's decision and order establishes that the Respondent sent Velasquez a "second recall" notice on September 11, directing him to return to work on September 19, 1990. Velasquez returned to work that day and was assigned to a job on the conveyor belt. Before the strike, Velasquez had worked as the hi-lo, or forklift, operator, and was not required to do any heavy lifting or bending. The judge found that Velasquez was limited from doing physical labor because of injuries received in a serious motor vehicle accident before he started working for the Respondent. As a result of the injuries, Velasquez had an iron bar in his left leg and a metal plate in his right ankle. The judge found that the Respondent was aware of these limitations when it assigned Velasquez to the conveyor belt after the strike. Velasquez left after only working for 5 hours because of pain, telling his supervisors that the job was too hard for him. The judge found that the Respondent's failure to reinstate Velasquez to his prestrike position violated Section 8(a)(1) and that his leaving the job was a constructive discharge in violation of Section 8(a)(1) and (3) of the Act. There is no evidence in this record that Velasquez received any pay for the five hours he worked on September 19, 1990.

Velasquez testified before me that he looked for work after leaving the Respondent, seeking jobs such as cleaning floors or operating a forklift that he knew he could do. He eventually found a job washing cars at a parking garage in Manhattan and worked there for about 6 weeks. He had to quit that job because the constant bending over the cars, and the cold weather, were aggravating his prior injuries. He was paid $7/hour, the same rate he had received at the Respondent, but he did not always work a full week because they could not wash cars when its was raining. After leaving this job, Velasquez returned to the site of the former picket line to support his coworkers and continued looking for work. He asked the Union's organizer, Joe Blount, if there were any jobs with the Union and Blount told him about a possible opening in the mailroom that would be coming up. Velasquez continued to pursue this job through Blount and was finally hired in February 1991. According to Velasquez, he learned he had the job about 2 weeks before he started. Velasquez continued to work for the Union until November 1993, earning $7/hour during the backpay period. The amount of Velasquez earnings from these two jobs are shown on the social security record. In addition, a letter from the Union establishes how much Velasquez earned in each quarter during the backpay period.

The Respondent, in its brief, concedes that Velasquez met his duty to mitigate. Respondent seeks to reduce Velasquez backpay by the $240 a week he received in strike benefits. Velasquez received this amount, which was the highest among those strikers receiving strike benefits, because of his position before the strike as the forklift driver. Velasquez testified that he asked the Union for this amount before he went on strike because it approximated his after-tax earnings from the Respondent. Velasquez received the same amount every week, except for a 6-week hiatus, even though he only spent about 5 hours at the site of the picket line, leaving about 4 hours before the other strikers. Velasquez testified that he continued to go to the site of the picket line, even after he found the job washing cars, in order to show his support for the other workers. He would go to the site on days he did not work, or if he got out of work early for the day. Velasquez testified that he was paid the same amount by the Union, even though he was working and was not there every day. However, there are no receipts for strike benefits signed by Velasquez for the period November 16, 1990, through January 18, 1991. This appears to coincide with the time he was working at the car wash because his social security report reflect earnings from this job in 1990 and 1991. For the reasons discussed above, I find that Velasquez strike benefits are not deductible as interim earnings. The fact that he asked for an amount that approximated his prestrike earnings and received the same amount regardless of how many hours he

[49] This amount is based on the calculation in GC Exh. 118 which I find better reflects the apportionment of St. Felix interim earnings over the first three quarters of 1991.

appeared at the picket line suggests that these benefits were given to Velasquez to support him during the strike as an inducement for him to support the Union's cause, not as wages for picketing.[50]

The General Counsel has apportioned Velasquez' earnings from the car wash job over the third and fourth quarters of 1990. Based on his testimony, and the strike benefits receipts showing a hiatus in November and December, I find that the entire $1140 that Velasquez received from Park Place Parking in 1990 was earned in the fourth quarter and shall adjust the backpay computation accordingly. This results in net backpay of $2,070.25 and $2,704.75 in the third and fourth quarters of 1990, respectively. The amounts for the remaining quarters are unchanged, as is the total net backpay.

I find that Velasquez is owed $8,007.18 in backpay, plus interest, under the Board's Order.

12. Dieulenveux Zama

The Board's decision and order establishes that D. Zama was reinstated on September 28, 1990, pursuant to a written offer of reinstatement dated September 24. The judge found that an earlier offer sent to him on August 20 contained illegal conditions. When D. Zama returned on September 28, the Respondent did not assign him to his prestrike position. Instead, he was assigned to a more difficult job where he was harassed and verbally abused by the Respondent's agent. On October 2, 1990, Peter Salm abruptly terminated D. Zama when he refused to give his number, instead giving his name, thereby supporting one of the Union's demands from the strike. The judge found that the Respondent's failure to reinstate D. Zama to his prestrike job violated Section 8(a)(1) and that his discharge on October 2 violated Section 8(a)(1) and (3). The compliance specification includes an offset from gross backpay for the $45.69 that he received from the Respondent for the work he did between September 28 and October 2.

D. Zama clearly testified that he did not look for work while he was on strike. He testified that the "strike lasted about a year." This indicates to me that D. Zama equated the strike as the period from January 30, 1990, to February 1, 1991, when the Union was supporting the employees with strike benefits. Although D. Zama testified that he went to look for work with Tigus, he admitted that he did not do this until after the strike ended. As noted above, the Board has held that employees who continue to engage in protected activity, such as picketing, in lieu of looking for other employment, incur a willful loss of earnings and are not entitled to backpay during such periods. *Ozark Hardwood Co.,* supra. In light of D. Zama candid admission, I shall toll backpay for the period November 1, 1990, through February 1, 1991. Because of the piecemeal nature of the Respondent's reinstatement offers, I believe it was not unreasonable for D. Zama to postpone looking for work from August 13 until he was actually reinstated by the Respondent. I also note that the Board has recognized that an employee who has been unlawfully discharged need not seek other work instantly, but may wait a few weeks to begin an active job search. See *I.T.O. Corp. of Baltimore,* supra. With these principles in mind, I shall extend D. Zama's entitlement to backpay through the end of October, the month in which he was fired. However, by November 1, D. Zama's choice to remain at the site of the picket line instead of seeking other work became a willful loss of earnings which continued until he began his search for work.

D. Zama testified that he began to look for work after the strike ended, i.e., after the Union stopped providing strike benefits. He testified that he used to go out with Tigus and other strikers to look for work and that he also "walked to look for work." I interpret this testimony as essentially that he "pounded the pavement" in search of a job. He recalled going to places in Brooklyn and Manhattan, although he did not remember any by name. D. Zama testified that he also looked for work through employment agencies and achieved success by doing so. The record reflects that D. Zama began working for an employer called Isratex in July, about a month before the backpay period ended. He testified that he found this job through an agency on 14th Street in Manhattan. He was still working there at the end of the backpay period. Paystubs in evidence establish the amount of his earnings from this employment during the backpay period. I find that D. Zama's testimony regarding his efforts to seek interim employment after February 1 were very credible, particularly in light of his candid admission that he did not seek work before then. The fact that his efforts ultimately proved successful further supports his testimony.[51]

To the extent that the Respondent seeks to reduce D. Zama's backpay by the amount of strike benefits he received through October 31, I reject this argument for the reasons discussed above. Although the record reflects that D. Zama started going to school shortly before the strike ended, his classes were in the evening, from 4–9 p.m. and did not interfere with his efforts to find or hold other employment.

Based on my findings above, I shall modify the backpay award to exclude backpay for the period between November 1, 1990, and February 1, 1991. This results in a reduction in his net backpay for the last quarter of 1990 and the first quarter of 1991. D. Zama is thus entitled to net backpay in the amount of $6,335.05.

13. Mulert Zama[52]

The Board's decision and order establishes that M. Zama was offered reinstatement by letter dated August 20, 1990, and that he returned to work on August 24. The judge found that the Respondent violated Section 8(a)(1) of the Act by embarrassing him and other returning strikers in front of other employees, by assigning him to a different and more arduous job than he held before the strike, and by subjecting him to foul language and verbal abuse by its agents, and violated Section 8(a)(1) and (3) by discharging him on August 29 for violation of a rule that the judge found was invalid. The compliance specification includes an offset from gross backpay for the $130.50 that he received

[50] Because of Velasquez unique position as the forklift driver, it is understandable that the Union would not want Velasquez to abandon the strike. Keeping him out of work would increase the Union's leverage with the Employer.

[51] I attach no weight to the unsigned compliance form which was filled out by D. Zama's brother, Mulert Zama. The information on the form has not been shown to be information provided by D. Zama.

[52] Mulert Zama is the brother of Dieulenveux Zama and the son of discriminatees Ruth and Auguste Zama.

from the Respondent for the work he did between August 24 and August 29, 1990.

M. Zama returned to the site of the picket line after his discharge. He testified that he continued to go there every day until the Union stopped paying strike benefits on February 1, 1991. His time at the site of the picket line generally coincided with the Respondent's hours of work. Although M. Zama testified that he never left the picket line during the day, he also testified that there were occasions that he was not there on Fridays when the Union gave out strike benefits. On those occasions, he would call the Union and have his father or brother sign his name to receive the money from the Union. In addition, the strike benefit ledgers in evidence show that there were several weeks when Zama did not receive the full amount of strike benefits, from which I infer that there were times that he did not go to the site of the picket line. For the reasons discussed above, I find that these strike benefits were not interim earnings and not an offset to backpay.

M. Zama denied that he waited until the strike benefits stopped to begin his search for work. In fact, he testified that he did work for about 2 weeks for Duane Reade, a retail pharmacy, while the strike was in progress. His social security record shows 1990 earnings from this employer in the amount of $220.50. The General Counsel argues that this was earned before August 13, 1990. The Respondent claims that it should be credited with these earnings because M. Zama testified at one point that he worked for Duane Reade after he was fired by the Respondent. M. Zama testified initially that he could not recall when he worked for Duane Reade. In response to a leading question from the Respondent's counsel, he said it was after his unlawful discharge. Later, in response to a question from me, he said it was before "Peter [Salm] came outside with a list and called some people to go back to work." The decision in the underlying case establishes that this occurred on August 13, 1990. M. Zama also recalled that he was wearing a heavy coat when he went to work at Duane Reade, suggesting that it was either early in the strike, or late in the year. M. Zama also testified that he did not go to the picket line while working at Duane Reade, and that he did not receive any money from the Union for those 2 weeks because he was not there. Because the strike benefit records in evidence show that he received at least $48, and often as much as $72, every week from August 13, 1990, to February 1, 1991, I find that he worked at Duane Reade before August 13. Thus those earnings are outside the backpay period and are not an offset to the gross backpay. In making this finding, I note that it is the Respondent's burden to prove deductions from gross backpay and that any doubts are to be resolved in favor of the discriminatee.

The fact that M. Zama found work and left the picket line, even though it occurred before August 13, 1990, supports his testimony that he was looking for work even while receiving money from the Union. M. Zama also testified that he went to look for work early in the morning, before going to the site of the picket line and that he sometimes met Tigus, who took him to look for jobs. While I generally credit M. Zama and believe that he did look for work throughout the backpay period, I found his testimony that he went to New Jersey or New Rochelle to look for work before going to the site of the picket line and still managed to get there by 8 a.m. exaggerated. It would seem to be physically impossible to do such a thing. However, as noted above, there were weeks when M. Zama was not at the site of the picket line every day. He thus had opportunities to seek work in these distant locations even while maintaining his commitment to his fellow strikers. I find that his exaggeration at the hearing was more the product of a poor memory for events long ago than an attempt to fabricate testimony.

The record establishes that M. Zama ultimately found interim employment, on April 15, 1991, working for Aramark Services, Inc. at an insurance company cafeteria in Manhattan. He found this job through a friend from night school. According to M. Zama, he got the application from this friend, filled it out at home and gave it back to the friend about 2 weeks before he was hired. He was still working at this job at the time of the hearing. His 1991 earnings from this employer are reported on his social security record. The fact that he found interim employment and substantially mitigated his losses is further support for the finding that he conducted a reasonably diligent search for work during the backpay period.[53] As the Board has said, the discriminatees' efforts over the entire backpay period must be considered in determining whether they were willfully idle and lost their right to a remedy under the Board's order. The record in this case does not support a finding of willful idleness for M. Zama.

Based on the above, and the record as a whole, I find that M. Zama is entitled to backpay in the amount of $6,283.25, plus interest, under the Board's Order.

G. Discriminatees who were Alleged to have been Improperly Reinstated

In addition to the above 13 discriminatees, who were found in the underlying case to have been unlawfully terminated after being reinstated by the Respondent during the backpay period, the record before me reveals that four additional discriminatees returned to work and were terminated by the Respondent during the backpay period.[54] No unfair labor practice charges were filed or litigated with respect to these four employees. The General Counsel argues at the hearing that backpay continued to accrue for these individuals because their reinstatements were improper. The Respondent argues that backpay should be tolled upon the dates of their respective reinstatements. The Respondent further argues that the General Counsel is precluded from litigating the legality of their terminations because no unfair labor practice charge was filed within the 10(b) period and because the compliance specification did not afford the

[53] I attach little weight to M. Zama's failure to list any places he looked for work on the Board's compliance form. The form he was given is in English and, as found by Judge Schlesinger, M. Zama did not read English very well. This fact is apparent from the face of the document, revealing that he did not fully understand the questions asked on the form.

[54] Marie Carmelle Camille, Adrian Castillo, Louis P. Jean (referred to incorrectly in parts of the transcript as "Pshan"), and Mureille LaFleur. Although the General Counsel initially included Ana Hernandez in this group, the parties have essentially agreed in their respective briefs that there is no evidence that she in fact returned to work before the end of the backpay period.

Respondent sufficient notice that the propriety of their reinstatement was at issue in this proceeding.

The initial compliance specification did not specifically allege that their reinstatement was improper, but did generally allege that the backpay period for all the discriminatees, including these four, ended on August 20, 1991, when the Respondent made a valid reinstatement offer to all unreinstated strikers. It appears that such offers were made to these four discriminatees, notwithstanding their earlier terminations by the Respondent. The Respondent, in its answer to the specification, did not raise as a defense that backpay was tolled upon the reinstatement of these four discriminatees during the backpay period. When the issue first arose, early in the hearing, I expressed concern about the adequacy of the pleadings on this issue, but allowed the General Counsel to litigate the propriety of the reinstatement of these discriminatees because Respondent now had notice of the General Counsel's intent to litigate this issue and ample opportunity to respond before the hearing closed. In addition, I placed the burden on the General Counsel of producing evidence and proving that the reinstatements were not proper under the Act. The General Counsel and the Respondent presented evidence on this issue and I find that, notwithstanding any lack of specificity in the pleadings, the issue was fully and fairly litigated.

Judge Schlesinger, in the remedy section of his decision, adopted by the Board, required that "all employees be made whole for their losses: . . . those who have been reinstated, but whose reinstatement was late . . . ; those whom Respondent did not properly recall to work; and those whom Respondent recalled late, and then discharged. Which employees fall into which category cannot be fully determined from this record." *Domsey Trading Corp.,* 310 NLRB at 811. He explained further that his proposed remedy was "intended to make whole those employees who were reinstated untimely and maintained their employment; those who were never reinstated; those employees who were discharged on August 13 [see above]; and those who are specifically named above. . . ." Id. at 812. While this language would seem to suggest that reinstatement of any of the strikers during the backpay period would not necessarily toll backpay because the Respondent had not yet satisfied its statutory obligation to reinstate all the strikers, other language in the decision contradicts this interpretation. The judge and the Board found that the Respondent's reinstatement offers that were made on and after September 11, 1990, were valid on their face, because they no longer contained illegal conditions for reinstatement, but were insufficient to toll backpay for those employees who received them but did not report because the designated reporting date had passed or because they feared harassment on the job. Id. at 778 fn. 3 and at 800. The court of appeals, in enforcing the Board's Order, expressly rejected the Respondent's argument that its offers of reinstatement made in March and April 1991 should toll backpay. The court held that the Respondent remained obligated to reinstate strikers who did not return in response to its offers because the offers were made in the climate of continuing egregious violations of the Act. *Domsey Trading Corp. v. NLRB,* 16 F.3d at 519. Thus, it was the Respondent's conduct that rendered otherwise valid reinstatement offers invalid for purposes of tolling backpay as to those strikers who refused or failed to respond. Neither the Board nor the court specifically addressed whether backpay would continue to accrue for strikers who did return to work and were subsequently terminated. Judge Schlesinger did address this issue when he said that employees receiving the Respondent's facially valid reinstatement offers in September who were actually reinstated without incident, are entitled to be made whole from the date of the Union's offer (August 13) to the date when the employees actually returned. 310 NLRB at 799. I conclude that, if these four discriminatees were actually reinstated pursuant to one of the Respondent's facially valid offers, "without incident," then backpay would be tolled as of the date they actually returned to work.

The General Counsel argues, relying upon Board precedent, that the Respondent's backpay obligation continues, notwithstanding actual reinstatement, until such time as a proper offer of reinstatement is proffered and that a subsequent discharge, even though lawful, does not toll backpay. In such cases, the Board has held that backpay would be tolled only if the Respondent could show that the conduct for which the employee was discharged was "so egregious as to require forfeiture of the right to reinstatement and further backpay." See *Ryder System, Inc.,* 302 NLRB 608, 609 (1991), enfd. 983 F.2d 705 (6th Cir. 1993), and cases cited therein. Similarly, the Board has held that, if an employee's misconduct resulting in his termination after reinstatement was provoked by the respondent's unlawful conduct, backpay continues to accrue. *John Kinkel & Son,* 157 NLRB 744 (1966). See also *NLRB v. M & B Headwear Co.,* 349 F.2d 170, 174 (4th Cir. 1965). The cases relied upon by the General Counsel all involved situations where reinstatement was improper because the employees were not reinstated to their former positions, or ones that were substantially equivalent if the former position no longer existed, or where the employees did not receive the proper rate of pay and benefits upon reinstatement. Because a discriminatee is not obligated to even accept such reinstatement, he can not be penalized for accepting less than full reinstatement, even if he quits or abandons the job. See *Manhattan Graphic Productions,* 282 NLRB 277 (1986). None of these cases stands for the proposition that an employee who is reinstated to his or her former position, including the same rate of pay and benefits, and is not subjected to more onerous conditions or other forms of harassment, is entitled to backpay after being subsequently terminated, unless the subsequent termination is an unfair labor practice or a continuation of the earlier unlawful conduct. The circumstances surrounding the reinstatement and subsequent termination of each of these four discriminatees must be considered in light of the remedial provisions of the Board's Order and the above precedent.

1. Marie Carmelle Camille

The Respondent sent Camille an offer of reinstatement on August 15, 1990, directing her to return on August 20, and requiring her to produce certain documents. Camille did not return to work in response to this offer. As noted above, it was found in the underlying case that these reinstatement offers were invalid because the Respondent imposed illegal conditions on the strikers' return to work. 310 NLRB at 798. Under the

Board's Order, as enforced by the court, backpay continued to accrue for Camille until a valid offer was made. On September 19, 1990, the Respondent sent Camille a "second recall" letter which omitted any requirement for production of documents. This is one of the offers that were found to be "facially valid" in the underlying proceeding. The record reflects that Camille in fact returned to work in response to this offer on September 24, 1990. Camille testified that she was reinstated to her prestrike position on a full-time basis, the same as before the strike. Payroll registers in evidence show that she was paid the correct rate of pay, i.e., $3.80/hour. Camille continued to work for the respondent until December 5, 1990, when she was laid off. The record reflects that other employees, strikers and nonstrikers, were laid off at the same time. Unlike many of the other laid off employees, however, Camille was never recalled. According to Camille, she called the Respondent several times after her layoff, asking if they were taking people back who had been laid off. Camille could not recall whom she spoke to, or the dates she called, but she remembered being told that the Respondent was not recalling employees. Camille testified that, after her layoff, she looked for another job while waiting to be recalled. She eventually found a job, finishing suits for Morris Hertling Company, in May 1991 and that she worked there through the remainder of the backpay period.

The General Counsel argues that Camille's backpay was not tolled when she returned to work on September 24 because the reinstatement offer was "invalid." Under this theory, backpay continued to accrue until August 20, 1991, when there is no dispute that the Respondent sent valid offers to all strikers. The record does not reflect whether Camille was sent another offer at that time. The Respondent contends that Camille was laid off as part of a seasonal layoff due to business being slow around the Christmas holidays. The Respondent did not explain why Camille was never recalled when business picked up in January. The General Counsel does not contend that Camille was not reinstated properly to her prestrike position or that she did not receive the correct wages and benefits upon her return to work. There is no evidence in the record that Camille was subjected to the kind of harassment that other returning strikers experienced. Although Camille was laid off and never recalled, the evidence shows that approximately 20 employees were laid off at the same time, of whom only 7 were former strikers.[55] The evidence also shows that the Respondent recalled 17 of the laid off employees at the beginning of January, including all the former strikers except Camille. Personnel records in evidence reveal that several employees who were sent certified recall letters did not return and that one employee, Juan Espinal, whose certified letter was unclaimed was subsequently rehired. Camille was not the only laid-off employee not recalled, but she was the only former striker laid off and not recalled. Significantly, the General Counsel does not seek backpay for any of the former strikers who were laid off and recalled for the approximately 4-week period that they were laid off.

[55] In its brief, the Respondent claims that 35 employees were laid off, including 10 former strikers. I can not determine from the evidence in the record where the Respondent got these numbers.

I find that Camille was properly reinstated on September 24 and that the Respondent's obligation to make her whole was tolled at that time. She is one of the discriminatees who falls into the category of employees receiving "facially valid" reinstatement offers who actually returned without incident referred to in the judge's decision. I find further that the layoff on December 5 was not a continuation of any unfair labor practice but was the result of business conditions. The fact that the majority of employees laid off were not former strikers convinces me that this was not a form of retaliation against reinstated strikers. Thus Camille is no more entitled to backpay for the period of the lay-off than the other reinstated strikers who were laid off in December and recalled in January. The Respondent's failure to recall Camille with other laid off employees does not revive her backpay claim absent evidence that the failure to recall was improper. I note that other employees, none of whom had been on strike, were also not recalled after the lay off. Accordingly, Camille's backpay is tolled as of the date she returned to work.

The Respondent argues that Camille's backpay claim for the period before her reinstatement should be reduced by the amount of strike benefits she received from the Union. I have already rejected this contention. The Respondent also claims that Camille did not make a reasonably diligent search for work before her reinstatement. Camille testified that between August 13 and September 24 she looked for work with the Union, leaving from the site of the former picket line to do this. She recalled several places that she went to with the Union. I find that her efforts were reasonable under the circumstances. As noted above, she had already been sent an invalid offer and, as with the other strikers, was awaiting a valid offer of reinstatement. Considering the piecemeal nature of the Respondent's response to the Union's offer to return to work, it would not be unreasonable even if Camille had not begun her search for work before September 19, the date the Respondent sent her a facially valid offer. In any event, I find that she did look for work with the Union and these efforts were sufficient for that brief period of time.

Based on the above, the Respondent owes Camille $968, plus interest, under the Board's Order.

2. Adrian Castillo

The record establishes that Castillo was actually reinstated on April 4, 1991, pursuant to one of the Respondent's reinstatement offers in March 1991 that the court of appeals found was insufficient to toll backpay as to those discriminatees who failed or refused to respond. He was terminated on June 17, 1991. A memo in his personnel file indicates he was terminated for refusing to work with a supervisor, Juan Perez. This memo was typed by the Respondent's personnel and payroll clerk, Luisa Alvarez, who testified that she had no first hand knowledge of the incident and merely typed what was dictated to her by Peter Salm. Both Castillo and Peter Salm testified regarding the incident that led to Castillo's termination. Neither had a clear recollection of events, but I found that Castillo's unaided testimony was more reliable than Salm's testimony which was "refreshed" by the memo only after the document was rejected as a past recollection recorded. Moreover, Peter Salm admitted that he was not physically present during the incident between

Perez and Castillo, but learned about it from Perez. Perez did not testify.

According to Castillo, when he was reinstated in April, he was not returned to his prestrike position. Before the strike, Castillo had worked on the big press and then the wheeler. After the strike, he was put to work on the tables, sorting out clothes. Big bundles of used clothing would drop onto the tables and Castillo had to cut the bundles, pull the clothing apart, sort it and throw pants onto a conveyor belt. Castillo testified, without dispute, that before the strike employees who worked this table only had to do it for a week or so before being moved to another job. The more arduous nature of the work is demonstrated by the fact, also undisputed, that Castillo was injured shortly after his return when a bundle fell on him.

Although Castillo initially did not recall the incident, upon being refreshed by leading questions from the Respondent's counsel, he was able to recall in substantial detail the nature of his disagreement with Perez. Castillo testified that he did the job on the table as he was told until Perez told him that the Respondent was going to keep him there for three months. Castillo told Perez that, if he had to work there for 3 months, then Perez could "punch his card" and he would go home because that was not his job. He admitted that Perez told him to go home if he did not want to work on the table. Another supervisor, Williams, in fact punched Castillo's card and sent him home. Castillo testified that he did not return to work for the Respondent until the Respondent sent him another letter, offering him reinstatement in August 1991. The memo in Castillo's file tends to corroborate Castillo's testimony that the dispute was over Perez' telling Castillo that he would have to work on the table for a period of time, although in the memo the period was a "few weeks." There is no dispute that Castillo was paid his prestrike rate of pay during this period.

I find that the Respondent's reinstatement of Castillo did not toll his backpay because he was not properly reinstated to his prestrike position. The judge in the underlying case already found that the employees had specific jobs that they would go to every day before the strike and Castillo's was the wheeler. Although his rate of pay may have been the same, the new job was substantially different in that it was more arduous and resulted in his being injured. Because Castillo was not properly reinstated, he could have walked away from this job at any time without relinquishing his right to backpay. See *Manhattan Graphic Productions,* supra. *Deauville Hotel,* 256 NLRB 561 (1981), enf. denied on other grounds 751 F.2d 1562 (11th Cir. 1985). To the extent that Castillo may have been "insubordinate" in refusing to work at the table with Perez, his misconduct was provoked by the Respondent's continuation of its unfair labor practices by failing to properly reinstate him. *John Kinkel & Son,* supra. Accordingly, the Respondent's obligation to make Castillo whole continued until he was properly reinstated on August 20, 1991.

The Respondent argues that any backpay owed to Castillo should be reduced by the amount of strike benefits he received from the Union prior to February 1, 1991. For the reasons discussed above, I reject this argument as these strike benefits were not a form of wages for picketing. The Respondent also argues that Castillo is not entitled to backpay because he did not conduct a reasonably diligent search for work. The record reveals that Castillo had no interim earnings other than wages he received while working for the Respondent between April 4 and June 17, 1991. Castillo testified that he looked for work with the Union, Tigus in particular, while he was receiving the strike benefits and that he looked for work on his own after the strike benefits were stopped. He admitted that he increased his efforts to look for work after that, testifying that he had more time to look for work because there was no picket line to go to, and because there was a greater need to find a job because "we had already lost the Domsey job." This latter reason is consistent with the other evidence in the record establishing that the employees continued to gather outside the Respondent's facility with the expectation that they would eventually be recalled. The Respondent's piecemeal reinstatement offers in August and September and then again in March and April gave the employees good reason for believing this. Castillo testified that, in addition to his efforts with the Union and on his own, he checked the want ads in the Spanish-language newspaper and by talking to family members and friends. Although his memory was vague, he did recall several places that he went to with Tigus and on his own.

I find that Castillo's efforts were reasonable in light of the circumstances and that his lack of success is not evidence of a willful loss of earnings. Nor do I attach any weight to Castillo's lack of recall, in light of the length of time that passed between his job search efforts and testimony at the hearing. Similarly, the omission of any places he looked for work on the Board's compliance form bearing his name does not prove he did not look for work since he had no recollection of filling out the entire form, which is only partially completed and has no signature. Two lists of places he looked for work are in evidence. Castillo candidly admitted that one of them is a list of places he went to after getting his home attendant certificate, which was outside the backpay period. The other list, although it contains someone else's handwriting indicating that these are places he went to in August 1991, at the end of the backpay period, does list places that Castillo was able to recall in his testimony. Castillo explained that these are the places he could remember because they were the last ones he went to.

Accordingly, based on the above, I find that Castillo is owed backpay in the amount of $7,164.34, plus interest, under the Board's Order.

3. Louis P. Jean

The evidence in the record establishes that Jean returned to work on September 19 in response to the Respondent's September 11, 1990 letter. This was the first letter that the judge in the underlying case found to be "facially valid" because it contained no unlawful conditions. Although Jean testified that he only worked for 3 days before being terminated after being absent 1 day, payroll registers in evidence show that Jean was paid through the week ending October 17, 1990. These records also show that he received the proper rate of pay following his reinstatement. There is no contention that Jean was reinstated to a different job. The reason for termination identified in the Respondent's personnel records is "no call/no show," meaning that he was absent without calling in for 3 days, which results

in termination under the Respondent's rules. As noted above, Jean recalled being terminated after being absent only 1 day, but he admits not calling in.

The record also reflects that Jean was hired and started working for Lansdell Protective Agency as a security guard at JFK Airport on October 24, 1990, about a week after his termination by the Respondent. Jean denied that he applied for this job during his absence from the Respondent. Jean continued to work for Lansdell for 4 years, never returning to the Respondent, and his interim earnings exceed his gross backpay in 1991. The record reflects that Jean also mitigated backpay by working for his brother-in-law, doing construction work for 2–3 weekends before his reinstatement by the Respondent, earning about $300. The Respondent, in its brief, correctly concedes that Jean satisfied his duty to mitigate, regardless of the date backpay is tolled.

I find that Jean is one of those discriminatees referred to by Judge Schlesinger who "were actually reinstated without incident" and are entitled to be made whole only to the date they were actually reinstated. I note that there is no contention that Jean was subjected to the type of harassment other returning strikers experienced, nor any contention that his termination was a continuation of, or an independent unfair labor practice. Moreover, I infer from the fact that Jean started work for Lansdell almost immediately after his termination that he applied for this job while still working for the Respondent and voluntarily abandoned his employment by the Respondent. Accordingly, I find that the Respondent's obligation to make Jean whole was tolled upon his reinstatement on September 19, 1990.

Based on the above, Jean is owed backpay in the amount of $935.39, plus interest, under the Board's Order.[56]

4. Mureille LaFleur

The decision in the unfair labor practice case establishes that LaFleur was one of the first strikers offered reinstatement by the Respondent. She was actually brought into the plant by Cliff Salm on August 13, 1990, but almost immediately sent home because she did not have any documents with her, even though she offered to bring them the next day. The judge specifically found that the Respondent's treatment of LaFleur was unlawful because the Respondent had no right to demand production of documents as a condition to reinstatement. Thus, she was entitled to backpay until the Respondent sent her a valid offer. The judge's decision reveals that LaFleur was sent a "second recall" notice on September 11, which was valid on its face because it contained no illegal conditions. The record before me shows that she in fact returned to work on September 19 in response to this offer. There is no contention, nor evidence, that LaFleur was reinstated to a different job or that she did not receive the proper rate of pay and benefits upon her reinstatement. LaFleur continued to work until December 6, 1990, when she was laid off with other employees as part of the seasonal layoff described above. Unlike Camille, the Respondent recalled LaFleur from layoff and she returned to work on January 2, 1991. The record reveals that she was terminated 2 weeks later, on January 16, 1991. The facts regarding this termination are in dispute with LaFleur and Peter Salm giving different versions of the events leading up to her termination.

LaFleur testified that, the day before she was terminated, Peter Salm asked her to work overtime and she told him that she could not because she had a headache. Peter Salm replied that he was going to ask Evans, a union organizer, if she could work overtime. She told Peter Salm that "Evans is not my father, Jesus is my father." Peter Salm then told her that he was her father because he gave her a check every week. There is no dispute that she was not disciplined for refusing to work overtime. The next day, at about 8:30 in the morning, Peter Salm approached her holding a piece of cloth in his hand and asked her "what is this." According to LaFleur, the cloth was of the type that are categorized as "wipers" because they are not good. She apparently responded to him by showing him where to put it, i.e., in the place for wipers. Although at first LaFleur testified that she told him what it was and then where to put it, she later conceded that she did not respond verbally to Peter. According to LaFleur, Peter Salm then said, "I talk to you and you don't answer, go home." LaFleur testified that she did not think that she had to answer him because she had already shown him where to put the wiper. She denied that Peter Salm told her that she was being suspended for 1 week and denied telling him that she would rather quit. LaFleur testified that she went home and did not return until she was again recalled to work in August 1991. LaFleur was still employed by the Respondent at the time of the compliance hearing.

Peter Salm did not contradict LaFleur's testimony regarding the request to work overtime the day before her termination. He testified that the Respondent had changed some procedures in her work area during the layoff and that, as he tried to explain the new procedures to the employees, LaFleur ignored him. According to Peter Salm, he asked LaFleur several times to pay attention and, when she continued to ignore him, he told her that she was suspended for 1 week. LaFleur responded that she would rather quit. Salm could recall these events only after his memory was refreshed by looking at notes on LaFleur's employee card from her personnel file.

Although LaFleur's reinstatement was "proper" and her subsequent layoff and recall were for legitimate business reasons, I find that her reinstatement was not "without incident." I credit LaFleur's testimony over that of Peter Salm because she was able to recall the incident vividly without assistance. I also find that her description of the events, including Peter Salm's statements to her when she told him that she could not work overtime, are consistent with the way the Respondent, and Peter in particular, treated other returning strikers, as established in the prior decision. His comments revealed continuing animus toward the employees' support for the Union. Based on LaFleur's testimony, I find that Peter Salm told her to go home because she did not speak to him when he asked her a question, not because she ignored his instructions regarding some new work procedure. It was reasonable for LaFleur to conclude that she had been fired when Peter told her to go home, particularly in light of the difference in language as between Peter and LaFleur. LaFleur's abrupt termination, after a relatively long tenure with the Respondent, simply because she did not show Peter the

[56] For the reasons discussed above, I reject the Respondent's argument that Jean's strike benefits should be deducted from his backpay award.

deference he thought he deserved was a continuation of the mistreatment that the Respondent afforded other returning strikers. As a result, LaFleur is entitled to backpay until the Respondent reinstated her in August 1991.

The Respondent argues that LaFleur is not entitled to any backpay because she did not conduct a reasonably diligent search for work. Although the record reveals that LaFleur in fact found interim employment after her termination by the Respondent at two places, the Respondent argues that these jobs were not suitable because she earned less than she would have with the Respondent. LaFleur testified that she looked for work both before her reinstatement by the Respondent and after her termination. Because she was actually reinstated within a month of the Respondent's initial refusal to reinstate her, even a minimal search for work would have been sufficient in August and September 1990. See *I.T.O. Corp. of Baltimore,* supra. After her termination by the Respondent, LaFleur found a job with Just Packaging[57] that lasted about 2 weeks until she was laid off because work was slow. Her social security earnings record shows she earned $239.40 from this job, which the General Counsel has deducted from her backpay in the first quarter of 1991. After she was laid off by Just Packaging, LaFleur resumed her search for work and was hired by another employer, Idea Nuova, in May 1991. She continued to work for this employer until she was reinstated by the Respondent in August 1991, earning a total of $1,915.09, as shown on her social security record. Her earnings from the last job are substantially equivalent to what she would have earned with the Respondent without overtime. She testified that she did not work overtime at Idea Nuova, as she had at the Respondent.

Based on the above and the record as a whole, I find that LaFleur satisfied her duty to mitigate during the backpay period, as evidenced by the significant amount of interim earnings she had throughout the backpay period. The fact that she was able to find two jobs after being terminated by the Respondent tends to corroborate her testimony that she was looking for work and not sitting idly at home awaiting reinstatement by the Respondent. For the reasons discussed above, the strike benefits that LaFleur received before her reinstatement are not deductible as interim earnings. I shall, however, modify the backpay claim for LaFleur to exclude any net backpay in the fourth quarter of 1990, as this would be for the period when LaFleur was on layoff from the Respondent. As noted above, the General Counsel does not seek backpay for this period for any of the other discriminatees who were laid off and recalled in December and January. Because the layoff was for legitimate business reasons, no backpay is owed for this period.

Accordingly, LaFleur is owed backpay in the amount of $4,739.62, plus interest, under the Board's Order.

H. Remaining Discriminatees

1. Rosa Abreu

The General Counsel seeks $6864 in backpay for Abreu, representing gross backpay for the period August 13, 1990, to April 2, 1991, the date that she was actually reinstated by the Respondent. No interim earnings are reported for Abreu. The Respondent argues that Abreu is not entitled to backpay for the period August 13, 1990, through February 1, 1991, because she did not look for work while collecting strike benefits from the Union. In the alternative, the Respondent argues that her backpay should be reduced by the amount of strike benefits she received.

Abreu testified that she looked for work "from time to time" during the backpay period. She could not recall any specifics, but remembered generally applying for work in factories in the Corona section of Queens, where she lived at the time. She did not find any work before the Respondent offered her reinstatement in April. Abreu admitted going to the site of the former picket line every day "when [she] was not looking for work." She did not report to the site of the picket line at the same time every day, because she would get there later if she had to look for work. Once there, Abreu remained at the site of the picket line until 4:30, the end of the Respondent's workday.

In contrast to her testimony, the compliance form submitted to the Region during the compliance investigation contains a statement that she did not look for work during the backpay period because she was on strike. Abreu admitted signing the form, but claimed the statement was not accurate. Abreu explained that her daughter filled out the form for her because Abreu's handwriting was not good. Although her daughter reads and writes Spanish, the language that the form was in, she does not understand the language that well because she was born in this country. Abreu herself reads Spanish and could understand the form.

Abreu also denied receiving any money from the Union during the backpay period, while at the same time acknowledging that her signature appears on the Union's strike benefit ledgers indicating receipt of money every week between August 13 and February 1. She testified that her recollection that she did not receive money from the Union was as clear as her recollection that she looked for work. Abreu testified that she received unemployment benefits for about 6 months, at the end of 1990 into January and that, every time she went to unemployment they asked her if she looked for work. She did not have to fill out any forms verifying her job search efforts. She admitted that she did not avail herself of any employment services offered through the unemployment office.

I do not credit Abreu's testimony that she looked for work throughout the backpay period. Her memory regarding that time was admittedly poor and the form she signed much closer in time contained an unambiguous statement that she did not look for work because she was on strike. Abreu's denial that she received money from the Union, in the face of contrary evidence also convinces me that she was not being entirely truthful in her testimony. Although Abreu testified that she looked for work at factories near her home, I find it more likely that she did this after February 1, when the Union stopped providing strike benefits to the unreinstated strikers. Accordingly, I find that Abreu falls into the category of discriminatees who chose to support the Union's concerted action against the Respondent in lieu of seeking interim employment and thus is not eligible for backpay during the period she was at the site of the former picket line. *Ozark Hardwood Co.,* supra.

[57] This employer is erroneously referred to in the transcript as "Jeffs Packaging." I shall correct the transcript accordingly.

Respondent does not seek to deny backpay to Abreu during the 2-month period between the cessation of strike benefits and her actual reinstatement by the Respondent. Because I find that Abreu did seek work after she stopped receiving money from the Union, I shall recommend that she be awarded backpay for the period February 1 to April 2, 1991. Her lack of success in finding suitable employment is not sufficient to deny her any backpay under the Board's Order, particularly considering her age and language difficulties.

Accordingly, I find that Abreu is entitled to $1664, plus interest, under the Board's Order.

2. Acces Joseph[58]

The General Counsel seeks $4,038.14 in backpay for Joseph. The record reflects that Joseph was already working for an interim employer at the beginning of the backpay period. He had obtained employment with National Delivery Service in March 1990, delivering the Wall Street Journal. He worked 5 days a week, about 3 hours a day. After he finished his work, he went to the site of the former picket line to support his fellow strikers. Joseph testified that he continued to look for a better job, while working for National Delivery Service, throughout the backpay period, either on his own or with the Union. He eventually found another job with Tobin Home Fashions on July 26, 1991. At that job, he earned an amount equivalent to what he was paid by the Respondent. He continued to work there through the end of the backpay period.

In its brief, the Respondent concedes that Joseph engaged in a reasonable and diligent search for work. The testimony and record evidence would hardly suggest any other conclusion. The Respondent seeks only to reduce Joseph's backpay by the amount of strike benefits he received from the Union. Since I have already found that the strike benefits are not deductible as interim earnings, I shall recommend that Joseph receive the amount sought by the General Counsel.

Accordingly, Acces Joseph is entitled to $4,038.14, plus interest, under the Board's Order.

3. Jean Max Adolphe

The General Counsel seeks $11,520.20 in backpay for Adolphe. The Respondent did not contest the General Counsel's calculation of gross backpay for Adolphe, which includes a significant amount of overtime. The Respondent does contend that Adolphe did not conduct a reasonably diligent search for work, and that strike benefits he received between August 13, 1990, and January 1991 should be deducted from any backpay he is awarded. There is no dispute that Adolphe found interim employment at Pergament Home Centers, Inc., working there from April 19, through August 19, 1991, when he left to return to work for the Respondent. His social security earnings record shows that he earned a total of $5,187.91 during the backpay period from this employer. The record also reflects that his starting pay at Pergament was $5.50/hour and that he received a raise to $5.60/hour on May 27, 1991.

Adolphe testified that he looked for work during the entire backpay period, including the period when he received money from the Union for going to the site of the former picket line. He testified that he went to look for work with Tigus, the union organizer, about two times a week. He also recalled that he looked for work on his own, at car washes and factories. In addition, Adolphe testified that he asked Wilson Desir, a radio personality and leader in the Haitian community, about employment and had his children look in the Haitian language newspaper for jobs for him. He was able to obtain the job at Pergament through his nephew who worked there. Adolphe was 56–57 years old during the backpay period, could not speak English and was illiterate in his native Creole.

The Respondent relies upon the compliance form signed by Adolphe on April 17, 1992, and submitted to the Board's Regional Office as proof that Adolphe did not look for work during the backpay period. The form is in Creole, but Adolphe could not read Creole. On page 2, where the claimant is asked to list places he worked during the backpay period, the word "unemployed" in English appears, with the reason, also in English, "because I was on strike." On page 3, where the claimant is asked to describe his efforts to find interim employment, the word "unemployed" appears again, in English. Despite these entries, the question on page 1, whether the claimant was unavailable for work during any part of the backpay period, is checked "non," i.e., no. Adolphe did not recognize the form, although he did identify the signature. He was not asked by the Respondent any questions regarding how the form was completed. Adolphe did deny telling anyone from the Board or the Union that he did not look for work because he was on strike.

I find it highly unlikely that Adolphe could have written the answers that appear on the form in English because he was essentially illiterate in English and Creole. Moreover, the answer, "unemployed," is ambiguous and does not necessarily mean that Adolphe did not look for work. He was, after all, unemployed because of the strike and the Respondent's refusal to reinstate him at its conclusion. Whoever filled out the form may have misunderstood the question on page 3. In any event, whoever completed the form denied on page 1 that Adolphe was unavailable for work during the backpay period for any reason. Thus, this form is significantly different from that signed by Abreu which contained a clear admission. Accordingly, I attach little weight to the entries on Adolphe's compliance form.

Adolphe testified that he went to the site of the former picket line 7 days a week and was generally there from 8 a.m. until 4 p.m.. He acknowledged receiving the full amount of weekly strike benefits from the Union. The ledgers and receipts in evidence, however, indicate that he did not receive any benefits from August 13 through the beginning of September 1990 and after January 11, 1991. Thus, it appears that there were weeks when he was not at the site of the picket line, despite his recollection to the contrary. It may very well be that he was looking for work during these absences. I note in particular that the first gap in receipt of strike benefits occurred soon after the Respondent denied him reinstatement on August 13 and sent him a letter informing him that it had no further obligation to reinstate him. See *Domsey Trading Corp.,* 310 NLRB at 797. It is plausible that such a letter would lead Adolphe to believe that he had lost his job at the Respondent, which would lead him to

[58] Joseph is identified incorrectly in the Board's Order and the compliance specification as Joseph Acces.

absent himself from the picket line to seek another job. As noted above, Adolphe testified that he also looked for work with the Union while he was at the site of the picket line.

In resolving the issue regarding Adolphe's efforts to find interim employment, I note that he appeared confused throughout the questioning and did not understand many of the questions he was asked, by both the Respondent and the General Counsel, despite the assistance of a translator. Adolphe was 65 years old when he testified at the compliance hearing about events that occurred 7–8 years earlier. His difficulties were understandable and certainly do not establish any attempt to lie or conceal the truth. Under well-established Board law, any doubts regarding the testimony and evidence are to be resolved against the respondent and in favor of the discriminatee in a backpay proceeding. Accordingly, I find that Adolphe did look for work during the backpay period and that his efforts were successful. The fact that it took him 8 months to find a suitable job does not prove that his efforts were not reasonable, particularly considering his lack of skills, language ability and advanced age. The fact that he did find substantially equivalent employment tends to corroborate his testimony that he was looking for work.

Accordingly, I find that Adolphe is entitled to backpay in the amount of $11,520.20, plus interest, under the Board's Order.[59]

4. Marie Ahrendts

The General Counsel seeks $5084 in backpay for Ahrendts which represents her gross backpay for the period from August 13, 1990, until she was reinstated by the Respondent on April 2, 1991. No interim earnings are reported. The Respondent argues that Ahrendts is not entitled to any backpay because she did not conduct a reasonably diligent search for work during the backpay period, relying on her testimony and the information provided on the compliance form she signed and submitted to the Regional Office.[60]

Ahrendts testified that, during the backpay period, she went to the site of the former picket line 6 days a week and remained there from 8 a.m. until 4 p.m.. She also testified that she went with the Union to look for work 2–3 times a week, usually in a van with about 10 strikers. She recalled that they usually went to five or six places on each trip and would return to the picket line when done. According to Ahrendts, when they went to a place with the Union, they would all go into the office with the union representative who would ask about jobs for them. Sometimes they would fill out applications. She did not find any jobs as a result of these efforts. Ahrendts testified that she could not recall the names of the places that the Union took her to, but that someone from the Union wrote down for her the names and gave her the list to keep. She believed that this list was used to fill out the form she signed and submitted to the Board's Regional Office. Ahrendts also recalled that the Union took her to New Jersey about three times and one time to Long Island. In addition to these job-hunting trips with the Union, Ahrendts looked for work by asking friends who had jobs if they knew of any job openings for her. Despite these efforts, Ahrendts did not work until she was reinstated by the Respondent.

The Respondent argues that Ahrendts testimony regarding her efforts to find work should be discredited because she had no clear recollection of the places and times she looked for work. The Board has long held that a discriminatees' inability to recall such information is not fatal to a backpay claim. *December 12, Inc.,* supra. The Respondent also argues that, because of Ahrendts' lack of recollection, it should be found that the only places she went with the Union are those listed on her compliance form. Because she has listed only a few places each month, the Respondent argues that she did not conduct a reasonable search. The Board has not established any minimum number of places a discriminatee must go to satisfy her duty to mitigate backpay. Instead, the Board requires an individualized analysis and a determination under all the circumstances whether a particular discriminatee's search has been reasonably diligent.

Ahrendts was approximately 60 years old during the backpay period and 67 years old when she testified at the compliance hearing. Her inability to recall details of her search for work 7–8 years earlier is understandable. In addition, I note that Ahrendts is illiterate in English and Creole and, obviously, did not fill out the compliance form without assistance. She necessarily had to rely upon someone from the Union to keep a record of places she was taken to look for work and to record them properly on the form. She should not be held accountable if the person filling out the form for her did not list every place she went to work, or listed places that she did not go to. I find Ahrendts testimony that she utilized the services of the Union to look for work and that she inquired about job openings from friends credible. The overwhelming weight of the evidence in this proceeding establishes that the Union in fact conducted such job searches with various of the discriminatees and I have no trouble believing that Ahrendts was a participant in these activities. Even if Ahrendts only went to a few places a month, the conclusion the Respondent claims should be drawn from the form she signed, that would not be unreasonable in light of Ahrendts age, illiteracy, inability to speak English, and lack of skills. Based on the above, and the record as a whole, I find that Ahrendts satisfied her obligation to mitigate backpay by looking for interim employment and shall recommend that she receive backpay in the amount sought by the General Counsel

Accordingly, I find that Ahrendts is entitled to $5084, plus interest, under the Board's Order.

5. Francois Alexandre

The General Counsel seeks backpay for Alexandre in the amount of $6,650.55, which represents his gross backpay for the period August 13, 1990, to April 3, 1991, the date he was reinstated by the Respondent, less earnings he received from interim employment which ended on October 10, 1990. The Respondent seeks to deny him any backpay for the period between his layoff by the interim employer and his reinstatement by the Respondent, arguing that he did not conduct a reasona-

[59] For the reasons discussed above at sec. IV, the strike benefits are not an offset to Adolphe's backpay.

[60] The Respondent also seeks to deduct the strike benefits Ahrendts received from the Union as interim earnings, a claim I have already rejected.

bly diligent search for work.[61] The Respondent relies chiefly on the fact that the compliance form submitted to the Board's Regional Office does not list any places that Alexandre looked for work, other than the place he obtained employment.

Alexandre testified that he found a job cleaning golf shoes at a country club in Queens in April 1990, during the strike, and continued to work there until he was laid off when the club closed for the season in October. Alexandre's earnings from this job are reported on his social security earnings record. Alexandre worked 4 days a week, Thursday through Sunday, about 10 hours a day. On the days that he did not work, he went to the site of the former picket line to stand outside with the others awaiting reinstatement. Occasionally he would take 3–4 other unreinstated strikers to look for work in his car. According to Alexandre, he volunteered to do this and received no compensation from the Union other than the strike benefits that others received. Alexandre would go with the others to places that he was familiar with from previous jobs, in Manhattan and Brooklyn. He recalled applying for work at hospitals and restaurants as well as factories. After he was laid off by the country club, he spent more days each week at the site of the picket line and continued to take people with him to look for work. Despite these efforts, he was unable to find another job before the Respondent reinstated him.

Alexandre recognized the compliance form as one he received in the mail. He said he filled it out at home with help from his cousin. Although he reads Creole, he apparently misunderstood the question on page 3, which asks the claimant to describe what he did to look for work. Instead of listing places that he looked for work, Alexandre wrote the name of his supervisor at the country club and had that individual sign the form. Alexandre apparently believed he was being asked to have someone verify his employment on that page. According to Alexandre, had he understood the question, he would have listed places he went to look for work.

Considering the record as a whole, and noting that Alexandre had already found interim employment before the backpay period even began and maintained that employment until the job, which was seasonal, ended, I find that he met his obligation to mitigate backpay. I credit Alexandre's testimony that he continued to look for work while going to the site of the former picket line. The strike benefit ledgers and receipts in evidence show that Alexandre received benefits indicating he was at the site of the picket line usually only 2 to 4 days a week. Thus, he had ample time to look for work. The fact that he found a job early in the strike tends to corroborate his testimony that he was looking for work because he had to support his family. The record as a whole clearly does not paint the picture of a man who would be willfully idle, waiting for a backpay check. Alexandre's explanation of the omission of specific places from the backpay claimant form was plausible. Thus, his failure to describe his efforts on that form does not affect his credibility.

Accordingly, I find that Alexandre is entitled to backpay in the amount of $6,650.55, plus interest, under the Board's Order.

6. Cesar Amador

The General Counsel seeks backpay for Amador in the amount of $5,260.62. The record reflects that Amador had interim earnings which exceeded his gross backpay in the third and fourth quarters of 1990. No interim earnings are reported after the first quarter of 1991. The Respondent argues that Amador is not entitled to any backpay between January 1991, when his interim employment apparently ended, and August 1991, when he was reinstated by the Respondent because he was "unable to conduct a reasonable search for work."[62]

Amador testified that he worked for Transworld Maintenance Services at JFK Airport vacuuming the gates, cleaning bathrooms and occasionally cleaning planes. He was laid off along with many other employees in 1991 when the employer experienced problems. According to Amador, he waited a week or two and then applied for unemployment benefits. He collected unemployment for about 3 months. Amador testified that he looked for another job, doing similar light cleaning work, after his layoff until he was reinstated by the Respondent, in August 1991. Amador could not recall the dates of his employment by Transworld Maintenance. It appears from the minimal amount of interim earnings reported in the first quarter of 1991 that he was probably laid off in January.

The compliance form submitted to the Board's Regional Office, which was admittedly signed by Amador in May 1992, indicates on page 1 that Amador was unavailable for work from May 1991 until May 1992 because he had a hernia. On page 3, there is a statement that Amador was unemployed from January 1991 to November 1991, again because of a hernia, and that he was in jail from November 1991 until May 1992. The page on which claimants are asked to describe their efforts to find work is blank. The form is in Spanish and Amador acknowledged that he can read Spanish. Amador explained these apparent contradictions by testifying that his brother filled out the form for him while he was in jail and mailed it to him to sign. He admitted reading the form before signing it, without making any changes. At the hearing, Amador denied that he was unavailable for work because of his hernia. Amador testified that he was able to work at the airport without any problems and looked for similar light jobs after his layoff. The only work he could not do was heavy lifting. Amador further testified that his hernia didn't begin to bother him until after his reinstatement by the Respondent, when he was assigned to work on the tables, a more arduous job than his prestrike job. Amador testified that he told Peter Salm that he could not do this work because he was getting pain in his side and that Peter told him to leave if he could not work. Amador left and, at some later point, went to a doctor who told him he had a hernia. He was not operated on for the hernia until 1993.

[61] The Respondent also seeks to deduct the strike benefits Alexandre received from the Union as interim earnings, a claim I have already rejected.

[62] The Respondent also seeks to reduce Amador's backpay by deducting money he received from the Union between August 1990 and January 1991. In addition to the reasons set forth above for not deducting strike benefits from backpay, there is no basis for doing so here because Amador's net backpay for this period is 0.

I credit Amador's sworn testimony at the hearing over the apparent conflicting statements in the form he signed in 1992. I note that the form itself contains two inconsistent statements, one indicating he was unable to work from May 1991 to May 1992 and another saying he was unemployed because of the hernia from January to November 1991. We know from the evidence in the record that these statements are not accurate. There is no dispute that Amador in fact worked for the Respondent in August 1991, albeit briefly. I also note that Amador's explanation that the hernia only prevented him from doing heavy work is plausible and probably supported by medical science. The Respondent did not dispute Amador's testimony that he looked for work doing light cleaning jobs after his layoff by Transworld Maintenance. Accordingly, I find that Amador satisfied his duty to mitigate backpay by working during a significant part of the backpay period and searching for other work when that job ended in a layoff.

Amador is entitled to backpay in the amount of $5,260.62, plus interest, under the Board's Order.

7. Andreze Andral

The General Counsel seeks $6,087.76 in backpay for Andral. The compliance specification shows interim earnings in the first and second quarters of 1991 from Belle Knitting Mills. These earnings appear on Andral's social security earnings record. The Respondent does not argue in its brief that Andral did not conduct a reasonably diligent search for work. Instead, the Respondent contends that Andral should be denied backpay for the third quarter of 1991 because she incurred a willful loss by quitting her interim employment.[63]

The record shows that Andral received either $60 or $72 in strike benefits every week from the beginning of the backpay period until the Union stopped paying such benefits on February 1. Andral testified that she generally went to the site of the former picket line every day and remained there all day, unless she had to leave to look for work. She recalled going with Tigus and other unreinstated strikers to look for work about three times a week. She testified that she also looked for work occasionally with her husband or a friend. Andral testified that she never went alone to look for a job because she does not speak English. According to Andral, she only looked for work in factories, primarily in Brooklyn. Her efforts proved successful in 1991 when she obtained the job at Belle Knitting Mills. Andral could not recall when she started working for this employer, but she recalled that she found this job before the Union stopped paying strike benefits.[64] Andral also could not remember how long she worked at Belle, or when she left that job. The General Counsel apportioned Andral's earnings from this job equally between the first and second quarters of 1991 to reduce the Respondent's backpay obligation in the quarters that carry the most interest. In the absence of other evidence showing when these earnings were received, I find this to be a fair and reasonable approach.

Andral admitted that she quit the job at Belle. According to Andral, she was paid on a piecework basis at this job and left because the employer did not always pay her the correct amount of money. Andral testified that she questioned the employer about the amount she was paid, because by her count she should have received more money. The employer told her by their count this was all she had earned. This discrepancy occurred more than once before Andral decided to quit. According to Andral, if it had happened only once, she never would have quit because she needed to work. Although Andral could not recall how long she worked for Belle, or even how long before she was reinstated by the Respondent that she quit, it appears by the total amount of earnings reported on her W-2 from Belle that she worked there a considerable amount of time. For example, if her weekly piecework earnings from Belle were equal to what she would have been paid by the Respondent on an hourly basis, it would have taken her almost 5 months to earn that amount of money. If she were earning less at Belle, then she would have had to work there longer than that. Andral also testified that, after she quit her job at Belle, she looked for another job, but could not find one before the Respondent reinstated her on August 20, 1991. If all of her earnings from Belle were in the first and second quarters of 1991, she was only out of work for about 7 weeks before the Respondent reinstated her.

The Board has long held that a discriminatee is not required to retain interim employment under all circumstances. A discriminatee is not required to accept or retain interim employment that is not substantially equivalent to the job the discriminatee held with the respondent. A discriminatee who quits interim employment that is substantially equivalent will be found to have incurred a willful loss of earnings only where it is shown that the discriminatee quit without reasonable justification. *Lundy Packaging Co.,* 286 NLRB at 144 (1987), and cases cited therein. As with other mitigation issues, the burden is on the Respondent to show an unjustified quitting of interim employment. Id.[65] I find that Andral's job at Belle Knitting Mills was not substantially equivalent to her prestrike job with the Respondent because of the significant difference between being paid on an hourly basis as opposed to a piecework basis. Under the latter method of compensation, an employee's earnings are not predictable and can vary according to how much work is available to do and productivity of the employee. This contrasts with the predictability of receiving the same hourly pay regardless of how much work is done. Moreover, even assuming that Andral's interim employment was substantially equivalent, I find that her reason for quitting, i.e., that the employer was not paying her properly under it's piecework system, was reasona-

[63] The Respondent also seeks to reduce Andral's backpay for the period August 13 through February 1, 1991, by the amount of strike benefits she received. I have already found above that the strike benefits here are not interim earnings.

[64] Because Andral received the maximum benefit through February 1, indicating that she was at the site of the picket line 5 days a week, I infer that she did not start working for Belle Knitting Mills until after February 1.

[65] The cases cited by the Respondent as placing the burden on the General Counsel are inconsistent with the plain language of the Board's decision in *Lundy*. I note that the portions of the decisions cited by the Respondent are the administrative law judge's decision and the Board did not specifically address the pertinent finding. In the absence of any subsequent Board decision overruling *Lundy,* I shall apply the law set forth therein.

bly justified. I note that Andral's testimony and the objective evidence of her actual earnings from this employer show that her decision to quit was not a hasty one. She in fact maintained this employment for a considerable period and left only after being cheated out of her proper earnings on more than one occasion. Accordingly, Andral did not incur a willful loss by quitting interim employment.

Although the Respondent did not argue the point in its brief, the record here supports a conclusion that Andral sufficiently mitigated backpay by engaging in a reasonably diligent search for work, a search that was ultimately successful and resulted in significant interim earnings to reduce the Respondent's backpay obligation.

Based on the above, I find that Andral is entitled to backpay in the amount of $6,087.76, plus interest, under the Board's Order.

8. Viergelie Anier

The General Counsel seeks backpay for Anier in the amount of $5796, which represents her gross backpay with no interim earnings reported. The General Counsel concedes that Anier is not entitled to backpay for a period of unavailability, from December 23, 1990, through April 15, 1991, when Anier admits that she did not look for work following the deaths of her father-in-law and daughter. The Respondent, in its brief, agrees with the General Counsel as to this period of unavailability. The Respondent does not specifically argue that Anier should be denied backpay for any other period for failure to conduct a reasonably diligent search for work.[66]

Anier testified that she looked for work with her husband or with friends who were already working, but that she did not find any work. She admitted being unable to look for work due to depression for a period of time after the two deaths in her family, but testified that, when she felt better, she resumed her search for work. She could recall the names of a few places where she looked for work, as well as the geographic areas and types of jobs. Although she went to the site of the picket line almost every day between August 13 and December 23, 1990, she testified that when she had to look for work, she would let Tigus know the day before that she would be coming late the next day. I find Anier's testimony regarding her efforts to find work credible and, considering her age, illiteracy, and inability to speak English, find that her lack of success in finding interim employment does not prove a lack of effort. With the exception of the admitted period of unavailability, Anier satisfied her duty to mitigate backpay by seeking suitable interim employment.

Accordingly, Anier is entitled to $5796 in backpay, plus interest, under the Board's Order.

9. Joseph Aris

The General Counsel seeks backpay in the amount of $9,168.25 for Aris. There are no reported interim earnings. The Respondent argues, on credibility grounds, that I should find that Aris did not make a reasonably diligent search for work, or that he did not begin looking for work until the Union stopped paying strike benefits. The Respondent also seeks to reduce Aris' backpay by the amount of strike benefits he received, an argument I have already rejected above.

Aris testified that he looked for work throughout the backpay period. During the period that he was receiving strike benefits, he reported to the site of the former picket line every day, between 6:30 and 8 in the morning and remained there at least until 4:30 or 5 p.m. Aris testified that he sometimes slept at the site of the picket line, but he did not remember receiving any extra benefits from the Union for doing this. There are no union records documenting the receipt of "night shift" strike benefits by Aris. Aris testified that after arriving at the site of the picket line, Tigus or others from the Union would take him and other strikers in cars to look for work. He recalled that he went with the Union about two times a week. According to Aris, the Union took him and the others to factories. He did not find any jobs through these efforts.

Aris testified that he also looked for work on his own, before and after the money from the Union stopped. Because he did not have a car, he had to walk to places to look for work. Aris admitted that his efforts to find work increased after the Union stopped supporting the strikers monetarily, candidly acknowledging that he had a greater need to find work. Aris testified that he wrote down the names of the places he went to on pieces of paper and, if the address was on the outside of the building, the address as well. According to Aris, he transferred the information from theses pieces of paper onto a form, which he recognized as the Board's compliance form for backpay claimants. Aris conceded that he had help from Tigus and another union representative, Evans, in filling out this form. When it was pointed out to Aris by the Respondent's counsel that the form does not show any places that he looked for work after May 1991, Aris explained that he ran out of room. Aris testified further that he did not list every place he looked for work, only those he had written down on a piece of paper. In fact, at the hearing, he recalled going to places that do not appear on the form. I noted that, in answering questions about this form, Aris appeared confused at times. For example, he testified that he filled out the form and signed it during the strike. Aris was obviously mistaken as to this because his signature is date April 23, 1992, more than a year after the Union stopped paying strike benefits and the employees stopped gathering at the site of the former picket line. Aris testified that he also collected unemployment benefits during part of the backpay period and that he was asked by the unemployment office to keep track of where he looked for work. It's possible that he was confusing the NLRB form with whatever paperwork he was required to fill out for unemployment benefits. In any event, any doubts must be resolved in Aris' favor under well-established backpay principles.

Aris testified that he went to Haiti for a week in 1991 after his sister died. He could not recall precisely when in 1991 this occurred, but he testified that he returned to the picket line when he came back. Because there was no formal picket line after August 1990, and the employees did not regularly gather outside the Respondent's facility after the strike benefits stopped, it appears unlikely that Aris went to Haiti during the

[66] The Respondent also seeks to reduce Anier's backpay by deducting the strike benefits that she received from the Union prior to December 23. For the reasons set forth above in sec. IV of this decision, Anier's strike benefits are not deductible as interim earnings.

backpay period in 1991. I note that the strike benefits ledgers in evidence show that Aris signed for the maximum amount every week between August 13, 1990, and February 1, 1991, indicating he didn't miss any time at the site of the picket line while benefits were being paid. I conclude that Aris' trip to Haiti occurred outside the backpay period. Because Aris' recollection regarding these events was poor, and is contradicted by other documentary evidence, I find that his testimony that he went to Haiti in 1991 is not sufficient to deny him a week's backpay based on any absence from the country during the backpay period.

The Respondent argues that I should discredit Aris' testimony regarding his efforts to find work. The Respondent further argues that I should attach no weight to the compliance form he signed in 1992 because of its contention that Aris merely copied the names of places provided to him by Tigus or Evans, rather than listing places he actually went to look for work. The Respondent notes in particular that the inclusion of zip codes makes the list suspect. I note that not all of the places on the list have zip codes. I also do not find this surprising in light of Aris testimony that he copied down the addresses as they appeared on the buildings. It is not that unusual to see a factory or other establishment with a sign on the door or in front of the building bearing the full address, including a zip code. Although Aris' testimony regarding his recordkeeping and the completion of the form was not free from doubt, I do not believe he was lying about his efforts to find work, or the manner in which he recorded the places he visited to satisfy the requirements of the Board as well as the unemployment office. The fact that the list in the compliance form may be incomplete does not prove that he did not look for work.

The Respondent also argues that Aris efforts were not reasonably diligent because he did not look for work as a carpenter or mason, trades he worked at while living in Haiti. Because Aris did not work as a carpenter or mason for the Respondent, he was not obligated to look for such work to satisfy his duty to mitigate backpay. Moreover, Aris explanation for not seeking such work in this country, i.e., his age and his lack of experience in the trade in this country, was reasonable. The record shows that Aris was 57–58 years old during the backpay period and could not speak, read, or write English. Under these circumstances, his decision not to seek a skilled trades job is not surprising. The same factors also support a finding that Aris efforts to seek interim employment were reasonably diligent under the circumstances, when the entire backpay period and the record as a whole are considered.

Accordingly, I find that Aris is owed backpay in the amount of $9,168.25, plus interest, under the Board's Order.

10. Marie Rose Armand

The General Counsel seeks backpay for Armand in the amount of $5625. Interim earnings are reported for Armand in three of the five quarters. The Respondent argues that Armand should be denied backpay for the periods when she was not working during the backpay period because she did not conduct a reasonably diligent search for work. The Respondent relies on the fact that the compliance form completed by Armand in 1992 only listed places she sought work in 1991 and 1992. The Respondent also seeks to exclude backpay for a 2-week period when Armand was taking a course to be certified as a home attendant and seeks to deduct strike benefits that she received from the Union in the third quarter of 1990. I have already rejected the last argument.

Armand testified that she looked for work on her own from the beginning of the back pay period until she went to school to become a home attendant. This training was arranged by the Union to assist the unreinstated strikers in finding interim employment. According to Armand, she went to school for 2 weeks during the day and, when finished, received a certificate making her eligible to work as a home attendant. She also was given a list of agencies that employ home attendants. Armand used this list to seek employment and was ultimately successful, obtaining a job at an agency called B.H.R.A.G.S. Homecare, Inc. in November 1990. Armand testified that she continued to work for this employer until she was laid off in May 1991. The Respondent sent a subpoena to this employer seeking records regarding Armand's employment. In response, the Respondent received a letter dated October 13, 1998, signed by a case coordinator, stating that Armand was employed by that agency from November 1990 to August 1991 and that records from that period are no longer available.

Armand testified that, after she was laid off by B.H.R.A.G.S., she looked for another job, by going to the agencies on the list she had obtained from the school when she got her certificate. She was not able to find another job before the end of the backpay period. Armand signed a compliance form in 1992 in which she indicated that she worked for B.H.R.A.G.S from November 1990 until April 1991, earning $200/week. On that form, Armand only identified four home attendant agencies as places where she sought work in 1991. She listed two other places for 1992, after the backpay period. At the hearing, Armand said it took her until 1993 to find another regular job as a home attendant and that, until then she had worked sporadically whenever she could get such work. Armand testified further that she looked for work at factories and places other than home attendant agencies after her lay off by B.H.R.A.G.S, but no such place is listed on the form.

As the General Counsel correctly points out, the entire backpay period must be considered when assessing an individual discriminatee's efforts to find interim employment. See, e.g., *Electrical Workers Local 3 (Fischbach & Moore),* 315 NLRB 1266 (1995); *Arlington Hotel Co.,* 287 NLRB at 852; *I.T.O. Corp. of Baltimore,* 265 NLRB at 1322; *Sioux Falls Stockyards Co.,* 236 NLRB 543, 566 (1978); *Saginaw Associates,* 198 NLRB at 598. In Armand's case, she took the home attendant course in October 1990, less than 2 months into the backpay period, in order to obtain skills that would enable her to find a suitable job. Within a month of obtaining her certificate, she found such a job and continued to work there, earning a substantial amount of money, for at least 6 months. She was then unemployed for about 3 months, through the end of the backpay period. The form she filled out in 1992 corroborates her testimony that she looked for similar home attendant jobs during this period. Looking at the backpay period as a whole, I cannot say that Armand was willfully idle or had withdrawn

from the labor market for any significant period of time during the backpay period.

The Respondent argues that Armand's failure to list any places she sought work in August and September 1990 on the compliance form she signed in 1992 is proof that she did not begin to look for work until she took the home attendant course. Even assuming that were true, I would not find that a delay in seeking interim employment during the first 7 weeks of the backpay period precludes Armand from receiving backpay. See *Nicky Chevrolet,* 195 NLRB at 398. As I've noted before, in the circumstances of this case, where the Respondent had made piecemeal offers of reinstatement to strikers throughout August and September, it would not be unreasonable for an employee to remain at the site of the picket line awaiting an offer, in lieu of seeking another job. In any event, I credit Armand's testimony that she was looking for work on her own from August 13 until she began the home attendant course. I note that the strike benefit ledgers in evidence show that Armand was not at the site of the former picket line every day, tending to corroborate her testimony that she was out looking for work. It is also unlikely that she would have resorted to a training course to prepare for a different career without first trying to find work similar to the work she did for the Respondent.

Finally, the Respondent seeks to toll backpay for the 2 weeks that Armand was in school to obtain her home attendant certificate. The Board has held that a discriminatee who enrolls in a training or educational program during the backpay period may nevertheless be entitled to backpay while in school, so long as the discriminatee does not remove himself from the labor market. *J. L. Holtzendorff Detective Agency,* 206 NLRB 483, 484–485 (1973); *Lozano Enterprises,*152 NLRB 258, 259 (1962). Here, when considered in the context of the entire backpay period, Armand's training did not constitute a withdrawal from the labor market. On the contrary, it was this training which allowed Armand to successfully mitigate backpay by finding suitable interim employment which benefited the Respondent. See *E & L Plastics Corp.,* 314 NLRB 1056, 1058–1059 (1994). Accordingly, I find that Armand did not withdraw from the labor market, or make herself unavailable for work, while attending the home attendant school.

Based on the above, I find that Armand is entitled to $5625 in backpay, plus interest, under the Board's Order.

11. Alberto Arzu (Zapata)

The General Counsel seeks backpay for Arzu in the amount of $3,574.95. Arzu was one of the discriminatees who was reinstated by the Respondent on April 2, 1991. He has interim earnings reported in two of three quarters of the backpay period prior to his reinstatement. These earnings were obtained from his social security record and are presumably accurate. The Respondent argues that Arzu should be denied backpay for the first quarter of 1991 based on his testimony that he did not look for work after he was laid off by the interim employer. The Respondent also seeks to deduct from Arzu's backpay the amount of strike benefits he received. For the reasons set forth in section IV of this decision, Arzu's strike benefits are not deductible as interim earnings.

Arzu testified that he sought interim employment during the backpay period by asking friends, looking in the newspaper and going with the Union to factories to look for work. He recalled that, in late September 1990, he found a job as a mechanic helper at a Texaco gas station near the Newark Airport in New Jersey. He was paid $8/hour at this job and worked some overtime. According to Arzu, the job was only temporary and lasted about 3 months. He testified that after this job ended, he returned to the site of the picket line at the Respondent's facility and received money from the Union. He testified, on direct and cross-examination, that he did not look for another job before being recalled by the Respondent. His recollection at the hearing is that he was offered reinstatement about 15 days after he was laid off by Texaco.

The Union's strike benefit records in evidence show that Arzu signed for $12 the week ending August 24 and did not sign for benefits again until the week ending January 18, 1991. He then signed for the maximum amount through February 1, indicating that he was at the site of the picket line every day during that period of time. This evidence, when considered in light of Arzu's testimony that he returned to the picket line after the job at Texaco ended, would suggest that he was laid off in early January, not February as the General Counsel contends. Arzu himself could not recall when he was laid off, other than that it was shortly before the Respondent called him to come back to work. The absence of Arzu's signature showing receipt of strike benefits from August through early January also suggests that he was absent from the site of the picket line and may have been working at the gas station before November 1990, as the General Counsel contends. However, the amount of earnings from the interim employer reported on Arzu's social security record for 1990 and 1991, considered in light of his testimony regarding the hourly rate and hours he worked at this job, would suggest he worked more than 10 days in January 1991. The total earnings reported for 1990 and 1991 does corroborate Arzu's testimony that he only worked for this employer about 3 months.

It is not clear, based on the testimonial and documentary evidence described above, whether Arzu worked at the interim employer from late September until early January, or from November until mid- February. Resolution of this issue is only relevant to determination whether Arzu's failure to look for work after his interim employment ended is a willful loss.[67] Because he could not have been at the site of the picket line and at work at the same time, I must conclude that his interim employment ended no later than January 11. Some of the earnings reported for 1991 on his social security record may have been for work performed in December. Based on this finding, it appears that Arzu was out of work for about 2 months before he was offered reinstatement by the Respondent. Since he admits that he did not look for work after being laid off by the Re-

[67] Regardless of the precise date he worked at the gas station, the apportionment of his interim earnings as between fourth quarter of 1990 and the first quarter of 1991 would be the same. The social security records establish which year the money was earned and we know he only worked in those two quarters.

spondent, I must determine whether that lapse amounted to a willful loss of earnings.

As noted above, the Board requires that a discriminatee's mitigation efforts over the entire backpay period must be considered. A discriminatee does not relinquish backpay for an isolated period when he fails to look for work if the backpay period is otherwise indicative of an industrious job search. *I.T.O. Corp. of Baltimore,* supra. Here, Arzu diligently searched for work and found work within the first few months of the backpay period. He maintained that job for 3 months, about half his total backpay period, and earned considerably more than he would have at the Respondent. Under these circumstances, Arzu's failure to immediately seek other employment upon being laid off by the interim employer is not unreasonable. Had the Respondent not offered Arzu reinstatement in March and had he continued to not seek other employment, he may very well have incurred a willful loss. My only finding here is that any lapse in Arzu's efforts to seek other employment between his layoff by Texaco and his reinstatement by the Respondent was not sufficient to preclude his right to backpay for the first quarter of 1991.

Accordingly, I find that Arzu is entitled to $3,574.95 in backpay, plus interest, under the Board's Order.

12. Marie Augustin

The General Counsel seeks $8504.38 in backpay for Augustin. She had interim earnings only in the second and third quarters of 1991, shortly before the end of the backpay period. The Respondent argues that Augustin should be denied backpay for the period before she obtained interim employment on the basis that her efforts were not reasonably diligent. The Respondent relies on Augustin's testimony regarding the amount of time that she spent on the picket line and the "paucity of job searches" listed on her compliance form submitted to the Region during the compliance investigation. The Respondent also argues that backpay should be tolled for the 2 weeks that Augustin attended a home attendant training course and that strike benefits should be deducted as interim earnings. I have already rejected the last argument.

Augustin testified that she went to the site of the former picket line 6 or 7 days a week, generally arriving at 8 a.m. and remaining there until the Respondent's employees left work at 4:30 or 5 p.m. She testified that she only left the picket line "when it came time to look for work." According to Augustin, she was taken by the Union in a car about two or three times a week to look for work at factories in Brooklyn. She testified that she also spoke to friends and relatives about possible job openings, had her nephew look in the *Daily News* for cleaning, cooking or housekeeping jobs, and listened to a Haitian radio program where job announcements were made. Augustin testified that, because she had experience testing electronic parts in Haiti, the Union took her to apply for a job at IBM. She went there two times but was not hired because she had no experience testing computer parts. Augustin testified that a friend told her about another electronics factory in Queens, but she did not go there to look for work because it was far and she did not know how to get there.

In March 1991, Augustin took the home attendant training course offered through the Union. She went to this course every day, from 8 a.m. until 5 p.m. for 2 weeks. At the end of the course, she was given a certificate and a list of agencies employing home attendants. According to Augustin, she applied for work as a home attendant before and after taking the course. Before taking the course, she hoped that an agency would hire her and send her for training. Although she applied to many home attendant agencies, she did not find such work until 1992, after the backpay period ended.

Despite her efforts, Augustin was unable to find a job before May 29, 1991. She obtained a job at Just Packaging on that date and worked there about 2 months, until she was laid off on July 20, 1991. Her reported earnings from that job were equivalent to what she would have earned at the Respondent for the same period of time. Augustin testified that she was first taken to Just Packaging by the Union, but was told that they were not hiring then, but to come back later. When she was hired, she had gone back there on her own.

The compliance form that was submitted to the Region on Augustin's behalf is not signed. She testified that she does not read Creole and had her nephew fill it out for her. She testified that the places identified on the form as places she looked for work are not the only places that she went. She testified that there was not enough room to list them all. The Respondent, relying on this form, argues that her search was not "reasonably diligent" because she listed only one or two places in some months and no places in others. The reasonableness of a discriminatee's job search can not be determined by numbers alone. Rather, it is whether the discriminatee's efforts over the course of the entire backpay period are reasonable in light of factors such as age, education, job skills and the job market in the local economy. I found Augustin's testimony regarding her efforts to find other work credible. Considering her inability to speak or read English and lack of relevant work experience in this country, I find that her efforts were reasonably diligent. I note that Augustin did not limit herself to looking for work like her pre-strike job at the Respondent. Rather, she attempted to find work in this country using experience she acquired many years ago in Haiti. She also looked for work in a different industry, i.e., health care, hoping that a prospective employer would train her for such work. When she was offered this training by the Union, she availed herself of the opportunity to learn a new trade and improve her marketability. Her lack of success in finding work in this field until after the backpay period ended does not prove she was not diligent in her efforts. Finally, the fact that she ultimately found substantially equivalent employment tends to corroborate her testimony that she was looking for work during the backpay period.

As I did with Armand above, I find that Augustin did not remove herself from the labor market, or make herself unavailable for work during the 2 weeks that she attended the home attendant training course. Her purpose in taking this course was to enable her to find a better job and, in fact she looked for this type of work before and after taking the course. The facts her are thus different from those where a discriminatee returns to school full time to purse educational objectives unrelated to their search for interim employment. *E & L Plastics Corp.,*

supra*; Madison Courier, Inc.,* 202 NLRB at 810. Because I find that Augustin was available and looking for work throughout the backpay period, I shall not toll her backpay for the 2 weeks she was in school.

Accordingly, based on the above, I find that Augustin is entitled to $8,504.38 in backpay, plus interest, under the Board's Order.

13. Atulie Balan

The General Counsel seeks backpay for A. Balan in the amount of $6,090.34, which represents her gross backpay for the period August 28, 1990, until her reinstatement by the Respondent on April 2, 1991.[68] There are no interim earnings reported. The Respondent makes several arguments in an attempt to deny all backpay to A. Balan. The Respondent argues that she should be denied backpay for the time that she was on the picket line receiving strike benefits because she could not have been looking for work at the same time.[69] The Respondent also contends that backpay should be tolled for 2-week period in 1991 when A. Balan was attending a home attendant training course. Finally, the Respondent argues that Balan should be denied backpay because it is unclear if she worked during the backpay period under one of three different social security numbers that the Respondent asserts she had used. The Respondent contends that she had the opportunity to work and conceal earnings under any of these numbers.

A. Balan testified that she looked for work throughout the backpay period, on her own and with the assistance of the Union. Although she admitted going to the picket line every day, she did not report there at the same time, arriving as late as 1 p.m. on days that she looked for work. She also testified that Tigus or someone else from the Union would regularly take her and others to look for work by dropping them off in front of factories where they inquired about job openings. According to A. Balan, she tried to get a card from every place she went to look for work and would keep these cards in a notebook where she also recorded the dates and places that she looked for work. When she received the Board's compliance form in the mail, she used the cards and information in the notebook to fill out the form. The Respondent put in evidence two versions of the form, with the same date next to her signature. The dates that she went to the first few places appeared to have been altered or changed on one of the forms. A. Balan explained this by testifying that that she made a mistake when she first filled out the form and corrected it. A. Balan testified that she also had her children look for jobs for her in the Daily News and that they called places for her to inquire about jobs because they could speak English.

A. Balan admitted that she had used a different social security number before the strike than the one appearing on the compliance form. She testified that she had one number when she was first employed by the Respondent and was married to Guy Charles. He passed away and she later married Jean Balan, another discriminatee in this case. At some point after she remarried, according to A. Balan, she lost her social security number and applied for a new one under her new married name. This was the number she was using during the backpay period. A. Balan denied that she had worked under any other number, including those specifically relied upon by the Respondent. No evidence of interim earnings under any of the social security numbers used by A. Balan was offered by the Respondent.

At the time of the hearing, A. Balan was working as a home attendant. She recalled taking the course to get her certificate for this work in 1991, but could not recall the month. She did recall it was after the picket line was down and the Union was gone. On further questioning, she recalled that she took this course after the Respondent fired her in September 1991. She also recalled that she did not take her course the same time that everybody else who was referred by the Union did. I find, based on her testimony and the fact that she did not obtain employment as a home attendant until 1992, that this training occurred late in 1991, outside the backpay period.

There is no dispute that A. Balan had used more than one social security number during her employment with the Respondent. Based on the testimony and report of the expert witness called by the Respondent regarding how such numbers are issued, it appears that only one social security number used by A. Balan was a valid one, issued in her name. This by itself does not prove that A. Balan worked during the backpay period and concealed interim earnings. I note, for example, that the Union's strike benefit records show that A. Balan was receiving the maximum amount of strike benefits every week from early September 1990 through February 1, 1991. This indicates she was at the site of the former picket line every day. She herself testified that, with the exception of times she went to look for work, she was outside the Respondent's facility all day, every day, while receiving strike benefits. Because she could not be in two places at the same time, I find it highly unlikely that A. Balan worked anywhere between August 28, 1990, when she returned from Haiti, and February 1, 1991. With respect to the period after February 1, 1991, the Respondent offered no evidence to rebut A. Balan's testimony that she did not work under any social security number, valid or invalid, during this period. To deny her backpay on the speculation that she was hiding earnings, without further proof, would be contrary to well-established Board law regarding the rights of discriminatees to backpay and the relative burdens in backpay proceedings.

In assessing the credibility of A. Balan's testimony regarding her efforts to find work, I have considered her demeanor. She was hostile and argumentative with the Respondent's counsel, at one point threatening to sue him. Her answers to his questions were frequently evasive. At the same time, I noted that she answered questions from me or the General Counsel in a direct and straightforward manner. Rather than reflecting an attempt to evade the truth or conceal evidence, I perceived her demeanor in response to questioning by the Respondent to be the product of the intense hostility she bore toward the Respon-

[68] The General Counsel concedes that A. Balan is not entitled to backpay before August 28, 1990, because she was out of the country.

[69] The Respondent also argues, as with other discriminatees, that any backpay awarded for this period should be reduced by the amount of strike benefits received. For the reasons discussed in sec. IV of this decision, I have rejected this argument.

dent over her termination[70] and the irritation she felt at being questioned many years after the fact about private matters, such as her childbearing and the death of her child. I note that A. Balan had to take a day off from her current job to attend the hearing and that she did so without being subpoenaed. I also note that her testimony regarding the efforts she made to find interim employment were consistent with the form she filled out during the compliance investigation and with other evidence in the record regarding the Union's efforts to find work for the discriminatees. Accordingly, I credit Balan's testimony and find that she did conduct a reasonably diligent search for work during the backpay period.

The Respondent attempted to question A. Balan at the hearing regarding her immigration status during the backpay period and its impact on her search for work. I sustained the General Counsel's objections to this line of questioning. Although A. Balan was hired by the Respondent before the effective date of 1986 IRCA, the Respondent contended in the underlying proceeding that the INS had criticized the Respondent in 1989 for not properly documenting its employees. Because A. Balan was employed in 1989, the Respondent could have ascertained her immigration status at that time. I also note that the Respondent did not specifically raise, as an affirmative defense, that A. Balan lacked proper immigration documents. It appeared that the Respondent's questioning of A. Balan regarding her immigration status was no more than a fishing expedition. In any event, whether A. Balan had proper immigration documents during the backpay period would not affect her eligibility for backpay, as explained above in section V. Because she testified credibly to a diligent search for work during the backpay period, it is doubtful that her efforts to find work would have been impacted by any issue regarding her immigration status, even if there were such an issue.

Accordingly, I find that A. Balan is entitled to backpay in the amount of $6,090.34, plus interest, under the Board's Order.

14. Jean Balan

The General Counsel seeks backpay for J. Balan in the amount of $7,397.40. J. Balan was reinstated by the Respondent on April 2, 1991, and was still working there at the time of the hearing. He has interim earnings in the amount of $1440 from New Style Recycling Corporation reported in the fourth quarter of 1990. These earnings are reflected in his social security earnings record. The Respondent argues that J. Balan should be denied backpay for the period after he left New Style because he incurred a willful loss by voluntarily quitting interim employment. The Respondent also asserts that J. Balan should be denied backpay for the period before he started working for New Style because the Respondent doubts he looked for work during that period. The Respondent argues that J. Balan is only entitled to the difference between what he would have earned working for the Respondent and what he actually earned working for New Style for a 6-week period.

J. Balan testified that he did not go to the site of the former picket line at the Respondent's facility on a regular basis. Although he generally arrived at 9 a.m. on the days that he went, he did not stay there all day. The Union's strike benefit records show that J. Balan received strike benefits only for the period August 13 through October 12, 1990, and that he did not always receive the maximum amount. This tends to corroborate his testimony that he did not go to the picket line every day.[71] After J. Balan started working for New Style, he did not return to the picket line.

J. Balan testified that somebody who worked close to New Style "put him there." The Respondent interprets this testimony as meaning he did not seek this job. I do not agree with the Respondent's interpretation of this testimony. Rather, what J. Balan was saying is that he was referred to this job by someone who worked nearby. The fact that he pursued this referral and accepted a job there, which he retained for at least 6 weeks, tends to corroborate his testimony that he was looking for interim employment during the period before he worked at New Style. J. Balan testified that he enjoyed this job at New Style but left because he had to work outside in the rain and that this was not good for him. He also described other hazards on that job, such as having to pick up metal, and boards with nails and working in close proximity to trucks and other moving equipment. He explained that he quit out of concern for his safety. The compliance form that J. Balan signed on April 20, 1992, gives "sickness" as the reason for leaving this job. J. Balan denied that this was the reason and testified that his wife filled out the form for him because he does not read Creole. He did not know why his wife put that down as the reason.[72]

The Respondent put into evidence copies of six paychecks from New Style for weeks ending October 19 through November 30, 1990. These checks show that J. Balan generally worked 40 hours a week, at $5/hr, but that he worked less in 2 weeks. J. Balan could not recall if these were all the checks he received and did not remember the date he quit. The six checks total only $1080, less than the amount shown on J. Balan's social security earnings record. Based on his total earnings reported to Social Security, it appears that J. Balan actually worked at this job longer than 6 weeks. Assuming average gross weekly earnings of $200, it appears he worked for New Style approximately 7–8 weeks before he quit this interim employment. Thus, it appears he actually worked until about mid-December 1990.

I find that J. Balan did not incur a willful loss when he left interim employment at New Style. I note that this job was not substantially equivalent to his former job with the Respondent because he was required to work outdoors exposed to the elements. In addition, the materials he had to handle exposed him to hazards significantly different from the used clothing that he sorted at the Respondent's facility. Because this work was not substantially equivalent, J. Balan was not required to stay there. *Lundy Packaging Co.,* supra. Moreover, I find that the reasons

[70] A. Balan testified that she was terminated by Peter Salm in September 1991 after she took her child to the doctors despite his denying her request for time off to keep this appointment. Her child later died.

[71] The Respondent did not specifically argue that strike benefits should be deducted from any backpay awarded to J. Balan. For the reasons set forth above in sec. IV, I would not deduct these benefits in any event.

[72] J. Balan's wife is Atulie Balan, whose backpay claim is discussed above.

given by J. Balan for leaving this job were reasonable and not unjustified. Accordingly, I find that his eligibility for backpay was not tolled when he left this job.

J. Balan testified that, after he stopped working for New Style, he stayed at home for a while to care for his sick child before looking for other work. He only went to the picket line occasionally and did not take any money from the Union other than the $5/day that the Union paid for carfare and food. J. Balan testified that he did not look for work with the Union. Instead, he went with his wife or people he met on the street. He kept no records of the places he sought work and did not identify any places where he sought work at the hearing. As noted above, his wife filled out the compliance form for him. He testified that they went to many of the same places, so he relied upon her to list them. A comparison of the forms signed by Atuli and Jean Balan, respectively, show many of the same places listed on both forms. Two of them, "930 Mademoiselle" and "200 Junius Street Decy Wiping Cloth" have the same dates, corroborating the testimony that he and his wife sometimes went together to look for work.

Based on the above, and considering the entire backpay period, I find that J. Balan satisfied his obligation to mitigate backpay by seeking and accepting interim employment. Although he may have stopped looking for a brief period in December 1990, this isolated lapse must be considered in the context of his overall efforts to find other work and does not warrant denial of backpay. I find that J. Balan made a reasonably diligent search for work throughout the backpay period.

Accordingly, I find that J. Balan is entitled to $7,397.40, plus interest, under the Board's Order.

15. Eloge Jean Baptiste

The General Counsel seeks backpay for Eloge Jean Baptiste in the amount of $7,621.10, which represents her gross backpay for all but 2 months of the backpay period, unreduced by any interim earnings. The General counsel concedes that E. Jean Baptiste was unavailable for about 2 months in the fourth quarter of 1990 due to the birth of a child. The Respondent argues that she is not entitled to any backpay on the basis that her testimony regarding her efforts to find work is not credible.

E. Jean Baptiste testified that she went to the site of the former picket line outside the Respondent's facility every day throughout the backpay period and that she received money from the Union every week to support her because she was not working. She testified further that she would get to the picket line at 8 or 9 in the morning, after going to look for work, and would remain there until 4:30 or 5 p.m. It took her about 1 hour to get to the Respondent's facility from home. When it was pointed out by the Respondent's counsel that this did not leave time to look for work, Jean Baptiste testified that she went to factories at 7 in the morning, when they start work to see if they needed people to work. I find this a plausible explanation. She testified that she also went to stores and restaurants and agencies that hire people for babysitting and cleaning. I find it less likely that such places would be open to accept job inquiries at 7 in the morning,

Although Jean Baptiste testified that she received money from the Union every week during the backpay period, except for about 1 month when she stopped going to the site of the picket line, just before and after the birth of her child, her signature does not appear next to her name on any of the Union's strike benefit records in evidence. She explained that sometimes she would get the money without signing for it because the line of people waiting to sign was too long. I note that no other witness described such an occurrence. While it might be believable that this could happen on occasion, it is hard to believe this happened every week that she received strike benefits during the backpay period. Her testimony that she received money from the Union throughout the backpay period is inconsistent with all the other evidence in the record showing that the Union stopped paying strike benefits on February 1. When pressed to explain these apparent discrepancies in her testimony, it appeared that E. Jean Baptiste really had very little recollection regarding the period of time that strike benefits were paid. Because of the absence of any documentation that she received strike benefits during the backpay period, I find that she did not receive money from the Union and that she did not go to the site of the Union's picket line every day during the backpay period. In reaching this conclusion, I also note the absence in her testimony of any reference to the Union's efforts to find interim employment for the unreinstated strikers. Had she been going to the site of the picket line as frequently as she claimed, surely she would have been aware of this and participated in these efforts.

E. Jean Baptiste recognized the compliance form bearing her name as one she received from the Board and filled out at home, then brought to a meeting with a Board agent. The parties stipulated that the form is date stamped as having been received in the Regional office on April 24, 1992. She could not recall why she did not sign the form. When asked about the list of places that she looked for work, E. Jean Baptiste testified that she wrote these from notes she kept in a small notebook of places she had gone to seek work. She said there were other places that she sought work, but she did not list those because they were not in her book and she did not remember the dates she had gone there when she was filling out the form. Under repeated questioning by both the Respondent's counsel and the General Counsel, E. Jean Baptiste remembered many other places, not on the list, that she went seeking work. She testified that the questioning helped to jog her memory. E. Jean Baptiste's testimony regarding her efforts to find other work was exaggerated. She testified that she went to look for work every day, Monday through Friday, from August 13, 1990, to August 20, 1991, with the exception of the two months, October and November 1990, surrounding the birth of her child. I find this highly unlikely, particularly where E. Jean Baptiste also claimed to be at the site of the picket line every day from 8 or 9 in the morning until 4:30 or 5 p.m.

While I have found that E. Jean Baptiste's testimony was exaggerated and not entirely credible, I do not totally discredit her. I believe that she did look for other employment, at least initially, until she was about to deliver her child, and then again after her child was about a month old. However, I find that she stopped looking for work on February 14, 1991, based on the compliance form she submitted closer in time to the backpay period. E. Jean Baptiste had no credible explanation why she

listed no efforts to look for work after that date. Her description of her visits to the places that are listed was detailed and credible, as was her testimony about going to factory gates at 7 in the morning to see if they were hiring for the day. Her testimony that she did not write down on the form the factories where she sought work in this manner because she did not remember the dates she had gone there is plausible. Despite the problems with her testimony noted above, nothing in this record convinces me that E. Jean Baptiste was not being truthful when she filled out the compliance form more than 5 years before the hearing in this case and before the Board's Order had even issued.

Based on the above, I shall toll E. Jean Baptiste's eligibility for backpay as of February 14, 1991, on the basis of my finding that she did not seek interim employment after that date. I shall also correct an obvious mathematical error in the General Counsel's gross backpay calculation to reflect the correct amount of backpay for the fourth quarter 1990.[73] Although the compliance specification, and the witness testimony, indicates that E. Jean Baptiste's period of unavailability ended in late November 1990, she is credited with backpay for only 52 hours that quarter. In fact, if she were available for the period November 28 through December 31, she would be entitled to 5 weeks of backpay. Based on her rate of pay ($3.80/hour) and a 40-hour week, her backpay for the fourth quarter of 1990 is $760.

Accordingly, I find that E. Jean Baptiste is entitled to backpay in the amount of $2,812, plus interest, under the Board's order.

16. Gerda Benoit

The General Counsel seeks $5526 in backpay for Benoit, which represents her gross backpay for the period August 13, 1990, to April 22, 1991, the date she was actually reinstated by the Respondent. There are no interim earnings reported. The Respondent argues that backpay should be tolled for a 1-month period around Christmas 1990 based on Benoit's testimony that she was in Haiti at the time. The Respondent argues further that she should be denied backpay for the entire period because her efforts to find other employment, as evidenced by the compliance form she signed in 1992, were not sufficient. According to the Respondent, the form should be credited over Benoit's testimony at the hearing based on her concession that she had a clearer recollection of events during the backpay period when the form was filled out than she now has.

Benoit testified in the unfair labor practice hearing regarding her efforts to return to work on August 13 and 14, 1990. Based on this testimony, the administrative law judge made findings that she was unlawfully denied reinstatement. The judge found that the Respondent finally told Benoit that she could start to work after she had been waiting in line the hot sun for more than 3 hours. When Benoit asked if she could start the next day instead, the Respondent refused. Benoit testified at that hearing, and the judge found, that she went back early the next day and asked for her job back and was refused. She continued to go every day for a week or two, asking Peter Salm for her job and each day he refused. After 2 weeks, she rejoined the picket line. Ultimately, the Respondent sent her a letter informing her that it had no further obligation to reinstate her because she had not returned on August 13. The Respondent's conduct toward Benoit was found to be an unfair labor practice.

Benoit testified in this proceeding that she continued to go to the site of the former picket line every day until the Union stopped providing strike benefits and that she received money from the Union every week. The Union's strike benefits records show that Benoit signed for $60 or $72 every week except for a 4-week period between December 21, 1990, and January 18, 1991. Benoit recalled that she did go to Haiti for Christmas during the strike and was gone for about a month. This is also consistent with the compliance form she signed in 1992 which shows a gap in her efforts to find interim employment between November 1990 and February 1991. I find that Benoit's backpay should be tolled for this 4-week period because she had removed herself from the labor market.

The compliance form that Benoit signed in April 1992 lists only six places that she sought work between August 14, 1990 and March 11, 1991, with no more than two places in any 1 month and no places listed for several months. At the hearing, Benoit testified that she looked for work at other places that are not listed on the form. She testified that her efforts to find interim employment were limited to going with the Union from the site of the picket line to look for work. According to Benoit, Tigus or someone else from the Union would pick her and other unreinstated strikers up at the picket line about 8 or 9 a.m. and take them in a car to factories and other places. When they were finished, they would return to the site of the picket line. She recalled that they were usually gone about an hour, although on one occasion when Tigus took them to 25 places, they returned later. According to Benoit, Tigus helped her to fill out the form.

As noted above, the Respondent argues that the form should be credited over Benoit's testimony at the hearing and that a search for work at six places over an 8-month period is not reasonably diligent. The Board has never held that there is a minimum number of places a discriminatee must visit to seek work in order to avoid forfeiture of backpay. Rather, the Board considers a number of factors, including the age, job skills, experience of the discriminate, and the job market in evaluating whether an individual's efforts were reasonably diligent. Benoit was 54–55 years old at the time, did not speak English, and could only read a little Creole. Although she had 19 years experience as a seamstress in Haiti, her only work experience in this country was unskilled work for the Respondent. Under these circumstances, I would find that Benoit's efforts, even if limited to the places listed on her compliance form, were reasonably diligent. Certainly, the Respondent has not attempted to prove that there were substantially equivalent jobs that would have been available to Benoit had she conducted a more exhaustive search. In any event, I credit Benoit's testimony that she went to look for work with Tigus and the Union and visited places in addition to those listed on the form. Her testimony in this regard is consistent with that of other discriminatees who conducted similar job searches with the Union's help.

[73] The General Counsel's calculation for the third quarter is also in error and has been corrected ($3.80/hour multiplied by 280 hours is $1064, not $2,047.50).

Based on the above, I shall modify Benoit's backpay to reduce her gross backpay by 1 week in the fourth quarter of 1990 and 3 weeks in the first quarter of 1991 to reflect the 1-month she was out of the country. Accordingly, I find that Benoit is entitled to $4918 in backpay, plus interest, under the Board's Order.

17. Gladys Bernard

The General Counsel seeks backpay for Bernard in the amount of $7102, which represents her gross backpay reduced by the interim earnings that she received from Just Industries[74] in the last two quarters of the backpay period. The Respondent argues that Bernard is not entitled to any backpay because the compliance form submitted in her name during the investigation contains a statement indicating that she made no efforts to find work during the backpay period. The Respondent argues further that this form, which is unsigned, should be given more weight than Bernard's testimony at the hearing because it was completed closer in time to the backpay period.

The Union's strike benefits records show that Bernard received the maximum amount every week from the beginning of the backpay period through February 1, 1991, indicating that she was at the site of the former picket line every day. This is consistent with her testimony that she was there 7 days a week, from 8 a.m. until 4:30 p.m.. Although at first she said that she did not leave the picket line during the day, she later testified that was in the beginning and that, later she went with Tigus to look for work. I find this explanation plausible because the evidence in the unfair labor practice case and in the compliance hearing indicates that, during the strike and at the beginning of the backpay period, the strikers remained outside the Respondent's facility all day. Early in the backpay period, they were waiting to see if the Respondent would call them back to work.

Bernard testified that she went with Tigus and other unreinstated strikers to look for work during the backpay period and in fact found work at Just Industries in this manner. She could not recall when, or how often, Tigus took her to look for work, but she recalled being taken to factories in Flushing, in the vicinity of Just Industries. She also recalled that, when Tigus took her to look for work, they usually went to three or four places at a time. She did not recall the names of any of these places. Bernard testified that she also looked for work on her own at clothing factories in Manhattan, at the Grand Hyatt Hotel in Manhattan and at a Marriot Hotel in Trenton, New Jersey, where her brother worked. She could not recall when she went to any of these places to look for work.

The Respondent put in evidence the compliance form submitted by Bernard to the Region during the compliance investigation. Although Bernard at first did not recognize the form and claimed it was not in her handwriting, she later acknowledged that this was the form she submitted, although it is not signed by Bernard. She acknowledged that the personal information on the first page and the information concerning her interim employment on the second page is accurate. On the third page, where claimants are asked to describe their efforts to find work and to list places where they sought work, Bernard admitted answering "no" in Creole. Bernard testified that she can read Creole, but that she did not understand the question when she filled out the form. According to Bernard, she learned later that she had answered the question incorrectly. While not free from doubt, I credit Bernard's testimony regarding her efforts to seek interim employment over the statement contained in the unsigned form. I note that the form itself is internally inconsistent. Her negative answer to the question regarding her efforts to find work is inconsistent with her answer on page two indicating that she found work during the backpay period. How can one find work if one is not looking for it? I credit Bernard's explanation that she did not understand the form when she answered "no" on page three.

I find further, based on Bernard's testimony, that she conducted a reasonably diligent search for work during the backpay period. The fact that she found interim employment through Tigus' efforts tends to corroborate her testimony that she went with him to look for work. Her testimony regarding the other places she sought work on her own did not appear to have been fabricated. The fact that she did not find work until May 1991 does not prove that she was not looking for work before then.

There were no social security earnings reports or other documents to establish the precise amount of interim earnings Bernard received from her job at Just Industries. The General Counsel estimated interim earnings based on Bernard's testimony that she received $200 every week for 2 months and that she worked 10 hours/day Monday through Friday and an undetermined number of hours on Saturdays. Because Bernard did not work overtime at the Respondent, the General Counsel deducted only the portion of Bernard's estimated interim earnings reflecting 40 hours/week. Had Bernard been paid only $200/week for working 55 or more hours, she would have been paid less than minimum wage. I find this unlikely. I note that, with respect to other discriminatees like Marie Nichole Matthieu, there is evidence that Just Industries paid minimum wage. I find it is more likely that the $200 Bernard received every week was her net wages after taxes and other withholdings. I shall thus modify Bernard's backpay award to deduct $170/week (40 hours x $4.25/hour) for the 5 weeks in the second quarter and the four weeks in the third quarter of 1991 that she worked for this employer.

Accordingly, I find that Bernard is entitled to $6886 in backpay, plus interest under the Board's Order.

18. Edaize Blanc[75]

The General Counsel seeks backpay for Blanc in the amount of $1,756.60. The General Counsel concedes that Blanc was not entitled to backpay for a 10-week period in the second quarter of 1991 based on her testimony that she was unavailable for work for medical reasons. For the remainder of the backpay period, the evidence shows that Blanc had interim earnings in all but the first quarter of the backpay period. Blanc's periods of employment and the amount of interim earnings are based on

[74] Just Industries is also referred to as Just Packaging. A number of discriminatees found interim employment at this company through the Union in 1991.

[75] Blanc is also referred to in the record by her full name, Rose Edaize Blanc Milien.

information provided by the interim employers. The Respondent seeks to deny Blanc backpay for the first quarter of the backpay period based upon its claim that she was not seeking work before she obtained employment with U.S. Home Care, the first interim employer.

Blanc testified that she went to the site of the former picket line every day from 8 a.m. to 4 p.m. from the beginning of the backpay period until September 21, 1990. She testified that she did not leave the site of the picket line to look for work during this time, but that she stopped going there on September 21 because she had to look for work to support her three children. She went to factories and several home health care agencies but was told that they were not hiring. When she went to U.S. Home Care, they told her that they would hire her but that she had to go to school to get her certificate as a home health aide. She went to school for 3 weeks and then had 2 weeks of on the job training, without compensation, before she started working for U.S. Home Care. U.S. Home Care reported that she began employment there on October 17, 1990. Because this employer provided the schooling for free, Blanc had to work for them at minimum wage for a certain number of hours until she could look for a higher paying job. She continued to work for this employer until she had to stop for medical reasons. When she recovered, she was told her job had been given to someone else. That is when she applied and was hired by the second interim employer at a substantially higher rate of pay. In fact, her interim earnings in the last quarter of the backpay period exceeded her gross backpay.

Considering this discriminatee's efforts to mitigate backpay over the entire course of the backpay period, I find that she conducted a reasonably diligent search for work and satisfied her obligations under the Act. The fact that Blanc may have spent the first 5 weeks of the backpay period outside the Respondent's facility, awaiting reinstatement, before she began her search for work, does not constitute a willful loss under the circumstances here previously noted. I find further that the 5 additional weeks that Blanc was undergoing training to become a home health aide did not amount to a withdrawal from the labor market. She was attending classes and receiving training provided by the interim employer to prepare her for a specific job which she then held for approximately 6 months. This training also provided her with the skills she used to find an even better job toward the end of the backpay period, one she still held at the time of the compliance hearing.

Based on the above, I find that Blanc is entitled to $1,756.60 in backpay, plus interest, under the Board's Order.

19. Jean Joseph Eliacin f/k/a Jean Bonny[76]

The General Counsel seeks backpay for Eliacin in the amount of $9,616.15. The General Counsel has deducted from gross backpay "night shift" benefits he received from the Union during the third and fourth quarters of 1990 and interim earnings from two employers, i.e., Alfred Chemical in the second and third quarters of 1991 and First Chinese Presbyterian Home Attendant Corp. in the third quarter of 1991. Correspondence from the latter employer establishes that Eliacin started this job on August 19, 1991, the day before the backpay period ended and continued it through the remainder of 1991. The interim earnings from Alfred Chemical are based on what was reported on Eliacin's W-2 tax form for 1991 from this employer. The Respondent argues that Eliacin was not entitled to any backpay from the beginning of the backpay period through April 5, 1991, the date he stopped receiving strike benefits from the Union, on the basis that he did not conduct a reasonably diligent search for work during this period. The Respondent also recites the facts regarding Eliacin's use of three different social security numbers, but does not indicate what that has to do with a determination of the backpay he is owed under the Board's Order.

The Union's strike benefit records show that Eliacin received the maximum weekly strike benefit from the beginning of the backpay period through April 5, 1991, 2 months beyond the date other employees stopped receiving such benefits. In addition, he received $65/week as "captain's pay" for the same period of time. Eliacin testified that he received this because he was a leader of the Union's committee. When asked what he had to do as a leader, he testified that he assisted the Union in handing out the $5 carfare that the strikers got every day and that he accompanied other strikers when they went to look for work. He testified further that he was there every day that the Union maintained a presence outside the Respondent's facility, even after the others no longer went there. The record shows that Eliacin also received $110 for "night shift" on September 28 and October 12, 1990. As I explained more fully above, I find that the "captain's pay" should be deducted from Eliacin's backpay as interim earnings as it appears that he was required to perform services for the Union in exchange for this additional compensation. The General Counsel has already conceded that the night-shift benefit was interim earnings. I shall modify Eliacin's backpay award to reflect the additional deduc-

[76] Jean Bonny, who is named as a discriminatee in the Board's Order, changed his name to Jean Joseph Eliacin in 1990. When asked by the Respondent whether he had "legally" changed his name and what process he went through to change his name, Eliacin refused to answer, essentially asserting a fifth amendment privilege. Although the Respondent's counsel stated on the record that he was going to seek a "waiver" or a grant of immunity so that Eliacin could answer his questions, Eliacin was never recalled to testify and nothing more was ever said regarding the matter before the hearing closed. Based on repeated assertions by the Respondent's counsel that he believed there was evidence of social security fraud involving Eliacin's use of three social security numbers over the years, I would not permit the Respondent to ask any further questions of the witness which might invade his fifth amendment privilege.

tion for captain's pay for the period August 13, 1990, through April 5, 1991.

Eliacin did not find interim employment until sometime in May 1991. According to Eliacin, he applied for this job after Tigus told him that they might be hiring there. Bardinal Brice, to be discussed, infra, was also sent to this job by Tigus. Eliacin worked for Alfred Chemical, where he was paid $5/hour, until he left for a job as a home attendant at First Presbyterian. Eliacin had taken a 2-week course to get his home attendant certificate in March 1991. He was paid $6.20 as a home attendant and worked 12 hours a day. As noted above, Eliacin started this job the day before the backpay period ended. Eliacin testified that he looked for work throughout the backpay period before finding these jobs. He described his efforts to find work through the Union, including accompanying other strikers to look for work in his role as a leader of the committee. Eliacin also testified to efforts he made on his own to find work at factories, restaurants, stores, and other home attendant agencies. Eliacin testified that he applied for work at home attendant agencies even before he got his certificate, even though he knew that he could not be hired without a certificate. Eliacin also described applying for work with a Haitian language newspaper and radio program because he had experience as a journalist in Haiti and seeking work as a community organizer with a Haitian Social Service agency.

Eliacin acknowledged signing the Board's compliance form on April 20, 1992. The list of places where Eliacin sought work on page three of that form does not contain the names of any factories other than Alfred Chemical. Nor are there any stores or restaurants listed. The bulk of the places on the form are home attendant agencies, many of them before he even had a certificate. Eliacin did list on this form the newspaper, radio station and community organization that he described in his testimony. When asked how he compiled this list, Eliacin testified that he used a notebook where he had kept a record of the places he went to look for work. He explained that he could not write down all the places in his notebook because there was not enough space. Eliacin testified that he also used the list of agencies employing home attendants that he was given by the School when he got his certificate in March. I find that with the exception of a few entries, the form Eliacin signed in 1992 does not accurately describe his efforts to find work. Rather, it appears that all he did was copy the names of home attendant agencies from the list he got with his certificate and added a few places, such as the Haitian Center, the newspaper and Alfred Chemical where he did actually seek work. It simply is not credible that he would have applied to seven different home attendant agencies between October 1990 and March 1991, knowing that he needed a certificate to get such a job and not having one.

The fact that Eliacin was not entirely truthful on the form in describing his efforts to find work does not mean that he was lying under oath at the hearing before me. I credit his testimony that he did look for work with the other strikers because that is one of the things he was being paid by the Union to do as a "captain." I also found his testimony regarding seeking work as a reporter and a community organizer credible. Eliacin clearly was more educated than many of the strikers, being aware enough to assert a constitutional privilege, as well as being a leader. Thus, these are the types of jobs someone like Eliacin might seek. In addition, he took the course to get a home attendant certificate to improve his chances of finding work and he ultimately did obtain interim employment at two places. Although Eliacin may have exaggerated his efforts to find work on the form and in his testimony, I can not conclude that he was willfully idle for most of the backpay period. At a minimum, he was working for the Union as a "captain" and receiving compensation for, inter alia, assisting his colleagues in finding interim employment. I thus find that Eliacin's efforts, when considered in the context of the entire backpay period, were sufficient to satisfy his duty to mitigate under Board law.

There is no dispute that Eliacin used one social security number when he was first hired by the Respondent in May 1988 and that he changed his social security number in the Respondent's records a few months later, after he was assigned a new social security number by the Immigration and Naturalization Service as part of his application for legalization under the IRCA of 1986. There is no evidence that Eliacin used the earlier number again after August 1988. Eliacin admitted that he changed his social security number again and his name sometime after the strike commenced and that this is the number he used when he worked at both interim employers. Eliacin denied working under any other name or social security number during the backpay period and the Respondent offered no evidence to contradict this. Even its expert witness on the issuance of social security numbers confirmed that Eliacin's numbers were issued about the times he was using them. The General Counsel was able to obtain the social security record for the last two numbers used by Bonny/Eliacin and all earnings reported there have been accounted for in the General Counsel's most recent calculation of his net backpay. There is simply no evidence in this record to suggest that Eliacin was concealing interim earnings during the backpay period by use of fraudulent social security numbers. In this regard, based on Eliacin's testimony that he went to the site of the picket line every day during the period he was receiving strike benefits, captain's pay and occasional night shift pay from the Union, he hardly would have had any time to work and hide earnings.

Accordingly, I find that Eliacin is entitled to backpay in the amount of $7,543.15, plus interest, under the Board's Order.

20. Bardinal Brice

The General Counsel seeks backpay for Brice in the amount of $9,471.60. The General Counsel has deducted from Brice's gross backpay "night shift" benefits he received from the Union in the third and fourth quarters of 1990 and interim earnings from Alfred Chemical in the second and third quarters of 1991. The earnings from Alfred Chemical are as reported on his social security earnings record, apportioned to the quarters in the backpay period.[77] As with Eliacin above, he found this job through Tigus. The Respondent argues that Brice is not entitled to any backpay for the period before he obtained employment

[77] Brice testified that he worked for Alfred Chemical from May 24, 1991, until he received his letter to return to work at Respondent's facility in October 1991. Some of his reported earnings from this employer are thus outside the backpay period

at Alfred Chemical because he did not conduct a reasonably diligent search for work. The Respondent contends that Brice's testimony at the hearing was not credible because it was replete with contradictions and inconsistent with testimony he gave at the unfair labor practice hearing. Under the Respondent's view of the evidence, Brice did not begin to look for work until Tigus took him to apply at Alfred Chemical.

The Respondent represented at the compliance hearing that the transcript of Brice's testimony at the unfair labor practice hearing on March 20, 1991, shows that Judge Schlesinger asked Brice if he had been outside the Respondent's facility "every day, Monday to Friday, since August 13" and that Brice responded, "Yes, because I am a member of the committee. All the time I am standing in front of to this day" (sic).[78] At the hearing before me, Brice testified that he spent 7 days a week in front of Domsey and also spent some nights there. When asked how he could look for work if he was outside the Respondent's facility "all the time," Brice explained that he and the others would gather outside in the morning, when the employees went into work, and after everyone was inside, the strikers would go out in groups to look for work and return when they were finished so that they could be there at 12:30 p.m. when the employees came outside for their break. According to Brice, another group would then go out to look for work because the Union could not take everyone at the same time. Brice also testified in this hearing that he could not spend all the time outside the Respondent's facility because he had to go look for work after it became clear that the Respondent would not call him back.[79] I find nothing inconsistent in Brice's testimony at the two hearings. His explanation of the manner in which he fulfilled his dual obligations to be at the site of the former picket line and look for work was credible and consistent with testimony of other witnesses in this proceeding regarding the way in which the Union helped the discriminatees to look for work.

The Union's strike benefit records show that, in addition to the maximum weekly benefit of $72 and later $60 that all strikers received for showing up 6–7 days a week, Brice received $65 a week as "captains pay." Brice acknowledged being a leader of the committee. He testified that he also went to New Jersey with union representatives and other strikers to get food to distribute to the strikers and that he went to the union office to put the food in bags to be distributed to the strikers. As I found above, the "captains pay" was clearly compensation that Brice and other leaders received for the extra duties, like this, that they performed. As such, it is deductible from gross backpay in the same manner as the night shift pay that represented compensation for being the Union's eyes and ears outside the Respondent's facility during the night. I shall thus modify the backpay award to deduct in the appropriate quarters the $65 week that Brice was paid by the Union from August 13, 1990, through April 5, 1991.

Brice testified that he looked for work from the beginning of the backpay period until he found the job at Alfred Chemical. He testified that he looked at factories in Brooklyn and Long Island City and had a specific recollection of going to three places that are in the same type of business as the Respondent, Ricatto Clothing where there is a Haitian supervisor, a place known as "Ya-Ya's" on Morgan street in Brooklyn, and another in Queens whose name he did not recall. Brice also described the way in which he looked for work with his limited ability to speak English. Thus, he would say, in English, "I am looking for job." Sometimes he was told there weren't any jobs, but to leave his number or to call. He testified that he would either take a card that had the address and phone number, or he would have someone write it down. Other times, he would copy down the name and address from the outside of the building. Brice testified that he gave these notes and pieces of papers to the person he met with at the NLRB and to the person who filled out the compliance form he signed on April 26, 1992. The list on the form is consistent with his testimony regarding the location and types of places he sought work. For date, there is written, "every week from August 1990 weekly up to 5/91" (sic). This is also consistent with his testimony at the hearing. I find that Brice's testimony regarding his efforts to find interim employment was credible and that he satisfied his duty to conduct a reasonably diligent search under Board law.

Brice testified that he worked for Alfred Chemical from May 24, 1991, through the end of the backpay period, a 12-week period of time. He was paid $5/hour, or about $200/week with no overtime. The portion of his social security earnings that was earned within the backpay period, as calculated by the General Counsel, is $2340. However, the General Counsel division of this total as between the second and third quarters of 1991 does not accurately reflect the testimony. Brice only worked for Alfred 5 weeks in the second quarter and 7 weeks in the third quarter. I shall thus modifying the award by deducting $975 in the second quarter (5/12th of $2340) and $1365 in the third quarter (7/12th of $2340).

Finally, I note that Brice volunteered that he was "undocumented" when he worked for the Respondent and in the beginning of the backpay period. He candidly acknowledged that the social security number and card he gave to the Respondent when hired in June 1988 was not "good." Brice corrected his immigration problems in 1991, during the backpay period and was given a valid social security number and papers that allowed him to work for Alfred Chemical. The fact that the General Counsel was able to obtain an earnings record from the Social Security Administration matching his name and number establishes that it was a valid one. He denied that his immigration problems affected his efforts to find work during the backpay period, explaining that many places simply told him they were not hiring so he didn't need to show any documents, and others that asked to see documents accepted his social security card and the seal in his passport. The Respondent has not shown that Brice was offered any job that he could not accept because of a lack of documents. I note all this because Brice's candid testimony regarding these issues convinced me that he

[78] Although the Respondent's counsel stated that he would offer the pertinent pages of the transcript in evidence in this case, he never did so.

[79] Brice was one of the strikers whom the Respondent claimed in the unfair labor practice proceeding that it would not reinstate because of picket line misconduct. The Board found specifically that the Respondent's refusal on this grounds was discriminatory. *Domsey Trading Corp.,* 310 NLRB at 778 fn. 4.

was a credible witness. Any minor conflicts in his testimony were more the result of the 3 hours of sometimes confusing questions that the was subjected to by the Respondent's counsel than any conscious effort to lie.

Accordingly, based on the above, I find that Brice is entitled to $7,240.60, plus interest, under the Board's Order.

21. Inovia Brutus[80]

The General Counsel seeks backpay for Brutus in the amount of $8746, which represents her gross backpay unreduced by any interim earnings. The Respondent argues that her search for work was a "pretext," as demonstrated by the fact that she found two jobs during the backpay period, which she quit after working only 1 or 2 days, and by the fact that she refused to expand a moonlighting business she had when she worked for the Respondent to make up for the loss of income from her job there. The Respondent argues further that her gross backpay should at least be reduced by the earnings she would have received from the two jobs she quit had she continued to work there.

Brutus testified that she looked for work three times a week during the backpay period. During the period that she received money from the Union, she went to the site of the former picket line almost every day. She testified that the gentlemen from the Union, either Tigus, Evans, or others whose names she did not know, took her and other strikers to look for work. Brutus also looked for work on her own. Although she said she could not recall much from that period of time because it was so long ago, she was able to recall a number of places she visited looking for work and what happened there. For example, she recalled going to "Ya-Ya's," the place that is in the same business as the Respondent, with a former employee of the Respondent who worked there and told her that he would ask them to hire her. When she went to Ya-Ya, she was told she was too old.[81] Brutus also recalled going to Marcel Mirror with another discriminatee, Julmene Joseph, and other places in Manhattan and Brooklyn. The compliance form that she signed on May 2, 1992, corroborates much of her testimony regarding her efforts to find work. Although she could not recall the circumstances regarding how the form was filled out, she did recognize her signature.

Brutus efforts to find work were not totally unsuccessful. She testified that she was hired to work in a laundry on Church Avenue, washing clothes, that she worked there for 2 days and then did not go back. She testified further that she did not even go back to collect her pay for the 2 days that she worked. According to Brutus, when she was hired, she replaced someone who had left because the employer did not pay what they were supposed to. Brutus testified that she had been told she would be paid $150 a week in cash instead of a paycheck. Apparently, these two factors caused her to be concerned whether she would be paid at the end of the week if she continued to work there. Brutus also testified that she did not go back to work because "they made gestures" that she didn't like and did not treat the employees with respect. She testified that she thought it was going to be "an adult place," but found instead that it was "kid's play." At one point in her testimony, she also testified that she was not used to this type of work. Brutus could not recall when she was hired for this job other than that it was in 1991 during the time that she was "outside in the Union." While Brutus' testimony was not altogether clear regarding her reason for abandoning this job after only 2 days, I find that she did not incur a willful loss by doing so. When her entire testimony regarding this employment is considered, it appears she did not continue in this job because of the way the employer treated its employees, which she was able to observe in the 2 days that she worked there, i.e., the gestures, others not being paid properly, "kid's play." As she said in her own words:

> It's not that I wanted to quit the job. It's the way the job was that I could not do it. . . . It's not that I could not do the job. If I left my home to look for work, that means I needed work. But my life—the job could not be more important than my life.

These are not the words of an individual that would willfully abandon employment without reasonable justification. I thus credit Brutus testimony regarding her reasons for leaving this job.

Brutus also found a job at a restaurant but worked there only one day. She testified that she sent a child to get her pay for the day, but the employer would not give it to the child and she made no further effort to collect her pay. According to Brutus, she was told that she would be paid $160 a week, also in cash, for this job. She testified that she had to work in front of two ovens cooking and preparing food, with a sink behind her, and also had to serve people. When she started, someone else washed dishes at the sink. When that person left, Brutus was expected to wash the dishes in addition to her other duties. She left because she could not do all of this alone. I found her explanation of the reason for leaving this job credible as well and reasonably justified. I also note that, while the pay was substantially equivalent to her prestrike wages at the Respondent, the nature of the work was substantially different. At the Respondent's facility, Brutus had worked at the head table, putting clothes into one of the wheelers to be taken to other workers as the bales were dropped onto the table. Although she had to stand for 8 hours a day, and the bales were sometimes heavy, she was not required to do three things at once. A discriminatee's duty to mitigate does not require that she accept or retain employment that is not suitable. *Glover Bottled Gas,* 313 NLRB at 43; *Future Ambulette,* 307 NLRB 769 fn. 3 (1992). Accordingly, I find that Brutus did not incur a willful loss by leaving the job in the restaurant after only 1 day.

Considering Brutus' age at the time of the backpay period, her lack of skills, and limited ability to understand English, I find that her efforts to find suitable interim employment were reasonably diligent. The fact that she found two jobs during the backpay period even though they were not suitable, tends to corroborate her testimony that she was looking for work.

Accordingly, I find that Brutus is entitled to $8746, plus interest, under the Board's Order.

[80] This discriminatee is referred to in the parties' briefs as "Ivovia." Her correct name, as reflected by her signature on the strike benefit records and the compliance form and in the Board's Order is "Inovia."

[81] Brutus was 55–56 years old during the backpay period.

22. Gertha Camilus

The General Counsel seeks backpay for Camilus in the amount of $8925, which represents her gross backpay for all but 3 days of the backpay period. The General Counsel concedes that Camilus was "unavailable" for 3 days in the first quarter of 1991 while she was hospitalized. No interim earnings are reported. The Respondent argues that Camilus should be denied all backpay because "it is unclear from Camilus' testimony whether she actually went to each place listed on [her compliance form] or if she copied the names from another list." As an alternative, the Respondent argues that, even if she is found credible, she did not conduct a reasonably diligent search for work based strictly on the number of places listed on the form.[82]

Camilus testified that she looked for work during the entire backpay period but was unable to find work. She testified that a week did not go by when she did not look for work, although she could not recall how many days she spent looking for work. She testified that she looked for work on her own and with the Union. Her description of the manner in which she looked for work with the Union is consistent with other evidence in the record regarding the Union's program to help discriminatees find jobs. Although she could not recall many of the places she went to look for work, she did have a specific recall as to some places.

Camilus also testified regarding the manner in which she recorded the places she sought work. She testified that Tigus suggested that the discriminatees write down the names and addresses of the places they sought work, "in case they would need them." She testified further that every time a friend told her about a place to look for work, she wrote it down. When it came time to fill out the Board's compliance form, Tigus explained how to fill the form out to her and other discriminatees in a group. She specifically denied that he told her the names of places to write on the form. According to Camilus, the places listed on the form and two additional handwritten pages came from the records she had kept of her efforts to find work. Camilus testified that every place on the list was a place she either visited or called to inquire if they were hiring. I find nothing in Camilus' testimony to suggest that she was not being truthful in describing either her efforts to find work or the manner in which the compliance form was completed. Any lack of clarity in her testimony was the result of the confusing nature of the questioning by the Respondent's counsel and difficulties with translating these questions from English to Creole.

A determination whether Camilus was reasonably diligent in her efforts to find other employment during the backpay period can not be determined by simply counting the number of places listed on the form. Rather her testimony under oath at the hearing, in addition to the other evidence in the record must be considered to determine whether her efforts over the entire backpay period were reasonable. The Respondent has not shown that any greater effort on her part would have been successful. Nor has the Respondent offered evidence of substantially equivalent jobs that were available during the backpay period that Camilus would have obtained had she applied for them. Keeping in mind the Board's admonition that a discriminatee is not held to the highest standard of diligence, and that any doubt as to the reasonableness of a discriminatee's efforts must be resolved against the Respondent as the wrongdoer, I find that Camilus satisfied her duty to mitigate under the Board's backpay order. See *Arlington Hotel Co.,* 287 NLRB at 851; *Chem Fab Corp.,* 275 NLRB at 21.

Camilus testified that she was hospitalized for 3 days in February 1991 when she gave birth. She testified that she was able to work immediately after this because she had a baby-sitter. Based on this testimony, the General Counsel has reduced Camilus' backpay by only 20 hours in the first quarter of 1991. I find that this is not a reasonable period of unavailability, notwithstanding the witness' testimony that she was able to resume her efforts to find work so soon after giving birth. I note that Camilus did not sign the strike benefits ledger after December 21, 1990, instead receiving her weekly strike benefits by signing a separate receipt. This indicates that she was not present at the site of the former picket line when the Union distributed the money to the strikers every Friday and got her benefits at a different time. Moreover, the individual receipts that Camilus signed for the period January 4 through February 1, 1991 all contain the notation "pregnant." I infer from this that the Union was continuing Camilus' strike benefits even though she was absent from the site of the picket line because she was pregnant. Furthermore, it is doubtful that Camilus would have been able to resume work or looking for work so soon after giving birth. I find that a 2-month period of unavailability, for the months of January and February 1991, would more accurately reflect the impact of Camilus' pregnancy and childbirth on her eligibility for backpay. I shall modify her backpay to reflect this.

Accordingly, based on the above, I find that Camilus is entitled to $7548, plus interest, under the Board's Order.

23. Ghislaine Caristhene[83]

The General Counsel seeks backpay for Caristhene in the amount of $7,303.55. Caristhene has interim earnings reported for the second and third quarters of 1991 from Just Packaging.[84] The total earnings reported were derived from her social security earnings record, obtained by the General Counsel after she had testified. The Respondent seeks to deny Caristhene any backpay for the three quarters of the backpay period preceding her interim employment on the basis that she was not diligent in her search for work. The Respondent bases its argument on the number of places per month listed on Caristhene's compliance form and on the amount of time Caristhene admitted spending at the site of the former picket line. The Respondent also argues that Caristhene's efforts were lacking because she did not seek employment taking care of children, work she had done before her employment with the Respondent. Finally, the Respondent

[82] The Respondent also seeks to deduct strike benefits from any backpay awarded to Camilus. I have already rejected this argument.

[83] Caristhene's first name has been misspelled by the court reporter in the transcript.

[84] It appears that Caristhene worked there for about 2 months, between May and June 1991, before being laid off. This is consistent with the testimony of other discriminatees, such as Marie Augustin and Gladys Bernard, who found interim employment at this company.

argues that backpay should be tolled for the 2 weeks in 1991 that Caristhene took the home attendant training course.

Caristhene testified that she looked for work every day during the backpay period by waking up early and going to factories she found on her own or through friends. Caristhene testified that she generally went to look for work by herself. She testified that she went to look for work first thing in the morning and then, when she did not find work, she went to the Respondent's facility to join her fellow unreinstated strikers who were gathered there. She recalled that she arrived at the site approximately 10 a.m. and left at 5 p.m. Caristhene could not recall at the hearing the names of the factories where she looked for work. The compliance form, which was filled out by her husband and signed by Caristhene on May 11, 1992, lists a number of factories with dates throughout the backpay period. Caristhene recalled that, when she was looking for work, she kept a record or log of the places she visited and that is how she was able to recall the specific dates and places listed on the form. Caristhene never testified that the places identified on the compliance form were the only places she sought work. She expressly denied that the Union gave her a list of names to put down on the form.

Caristhene admitted that she did not seek work in child care during the backpay period, despite having had experience in such work, because she no longer wanted to do that kind of work. Caristhene testified that she looked for work in factories instead. She explained that she did not want to take care of children in private homes, as she had done before, because when she did this work she was paid in cash and no taxes were paid. Caristhene preferred to be paid by check with taxes withheld. I interpret her testimony as indicating her concern with the failure of some people hiring "nannies" to care for their children to pay social security taxes on behalf of such employees. In any event, since the Respondent did not employ Caristhene in child care, there was no requirement under the Board's order that she seek such work. A discriminatee is only required to seek interim employment that is substantially equivalent to the work she did for the Respondent. The factory jobs Caristhene sought, such as the one she found at Just Packaging, were substantially equivalent.

Caristhene testified that she took a 2-week home attendant course in 1991, received a certificate and looked for such work but did not find any until 1994. She did not recall when she took the course, but believed it was in January or February. The Respondent argues that the two weeks should be deducted in May based on evidence showing that other discriminatees took the course at that time. However, the evidence shows that employees took the course at other times as well, before and after the backpay period. I also note that Caristhene's compliance form, filled out by her husband, contains the following entry on page two, where discriminatees are asked to list the places they looked for work: "7/91 for 2 weeks. Learning Couture." Unlike the entries for Just Packaging, there is no information listed regarding rate of pay or reason for leaving. Caristhene testified that she never worked for any place other than Just Packaging during the backpay period and that her husband probably made a mistake.[85] Although the word "couture" ordinarily refers to the business of fashion design, it is more likely that Caristhene's husband intended to list the 2-week home attendant course. Because Caristhene was laid off from her job at Just Packaging in July, it is likely that is when she took the course and began to seek work in this different field but was recalled by the Respondent before finding any such work. That would explain why she did not begin to work as a home attendant until 1994. In any event, for the reasons previously discussed in connection with Augustin's backpay claim, I find that Caristhene did not withdraw from the labor market or incur a willful loss by taking this 2-week course. A respondent should not be credited with a reduction in its backpay obligation because of a discriminatee's good-faith effort to improve her chances of finding interim employment by taking short-term vocational training.

Having considered Caristhene's efforts throughout the backpay period, and the evidence in the record as a whole, I find that she satisfied her obligation to mitigate backpay by seeking and finding interim employment during the backpay period. Accordingly, Caristhene is entitled to $7,303.55, plus interest, under the Board's Order.

24. Marie Casseus

The General Counsel seeks backpay for Casseus in the amount of $7,045.36 with interim earnings reported in the second and third quarter of 1991 from St. Nicholas Human Support Group where Casseus worked as a home attendant. She was still working there at the time of the hearing.[86] The Respondent argues that Casseus should receive no backpay for the period before February 1, 1991. This is the period during which Casseus was receiving strike benefits from the Union. The Respondent contends that her testimony regarding the amount of time she spent at the site of the former picket line together with the limited number of places she sought work, as listed on her compliance form, establishes that she was not diligent in her efforts to find interim employment. As to the remainder of the backpay period, the Respondent seeks a deduction for the few days that Casseus spent in Florida renewing her work permit.

Casseus testified that she looked for work in factories and agencies employing home attendants during the backpay period. She looked for work alone, with friends, and sometimes the Union took her to look for work. She could not recall how many days each week or the particular time of the day that she looked for work. She recalled that, although she had to go to the site of the picket line every day if she wanted to receive money from the Union, there was no exact time that she had to arrive or leave. She recalled that she arrived at the site as late as

[85] I find this possibility credible in light of the fact that he also made a mistake in writing down the date that Caristhene sought work at various places.

[86] The Respondent obtained records from this employer by subpoena which establish that Casseus obtained her home attendant certificate on March 29, 1991, applied for the job with St. Nicholas on April 15, 1991, and was hired and started her "in-service training" on June 12, 1991. A W-2 tax form shows that her total 1991 earnings from this employer were $8,070.10. A substantial portion of that was earned after the backpay period ended on August 20, 1991.

9 a.m. and left sometimes as early as 3 p.m. In response to a leading question from the General Counsel, Casseus was able to recall that there were times that she left the picket line during the day to look for work and returned when she was done. Although she could not recall the names of the factories where she sought work, she did recall going to a place called "Mademoiselle" in August 1990. She also recalled the names of three home attendant agencies where she sought work, the last one being St. Nicholas, where she was hired. These agencies do not appear on the compliance form that Casseus signed in August 1992.

Casseus testified that she had help from Tigus in completing the compliance form. She testified that at the time, she could recall the names of places but not the dates or addresses. Because Tigus or others had gone to some of the places with her, they were able to give her this information to put down on the form. Casseus also received unemployment benefits in the beginning of the backpay period, until October 1990, and testified that she was required to document her efforts to find work to receive these benefits. Casseus acknowledged going to Florida for a short time to renew her work permit. She could not recall when she did this, but did recall that she completed the trip within the same week because she was able to return to the strike and received strike benefits that week. Because the evidence is unclear whether she went to Florida before or during the backpay period, I shall not toll backpay for this trip. Moreover, I find that such a short absence from the New York area for the purposes of maintaining documents enabling a discriminatee to work in this country is not a "withdrawal from the labor market" that would justify a reduction in backpay.

I found Casseus' testimony regarding her efforts to find suitable interim employment credible, notwithstanding any discrepancies between her testimony and the form she signed in 1992. I note that the form was not intended to be an exhaustive list of her efforts to find work. Any assistance she received from Tigus or others in completing the form was harmless and not a fabrication as the Respondent would suggest. The fact that Casseus received unemployment benefits during the backpay period, for which she had to demonstrate that she was seeking work, supports her testimony. Casseus good-faith efforts are further demonstrated by the fact that she took the home attendant course in order to enhance her chances to find employment. She was ultimately successful in finding interim employment in this field that paid substantially more than her prestrike position with the Respondent. Contrary to the Respondent's argument, the record here does not establish that Casseus remained willfully idle for any extended period of time during the backpay period that would justify denying her a remedy for the Respondent's unfair labor practices.

Accordingly, I find that Casseus is entitled to $7,045.36, plus interest, under the Board's Order.

25. Simion Ramon Castillo

The General Counsel seeks backpay for Castillo in the amount of $5,872.87. Castillo has interim earnings reported in the first and second quarters of 1991 from two employers. The General Counsel is not seeking any backpay for the last quarter of the backpay period based on Castillo's unavailability due to the birth of a child and his own medical problems. The Respondent argues that Castillo is not entitled to any backpay before February 1 because he was not looking for work while receiving money from the Union. The Respondent also cites additional periods of unavailability as occurring in 1990, when Castillo was home taking care of his newborn child and for a two week period in November when he went to Honduras. The Respondent interprets the testimony as showing that Castillo only looked for work for about 4 weeks before finding interim employment.

The first issue with respect to Castillo is to determine when he was home caring for his newborn son because the parties argue that this occurred at different times. Although Castillo's testimony was not always clear, he did recall that his son was born on June 27, by cesarean, and was about to turn 8 years old when Castillo testified on May 15, 1998. Based on this testimony, I find that the child was born on June 27, 1990, outside the backpay period. Castillo admitted that, after his wife gave birth, he remained at home to care for her and the baby for a period of time. Because he testified that he stayed home for 90 days, the Respondent argues that he was unavailable from the beginning of the backpay period through the end of September 1990, which would render him ineligible for backpay for the third quarter of 1990. However, receipts from the Union show that Castillo was receiving weekly strike benefits at the machinists rate every week from the beginning of the backpay period through February 1. He testified that, during the time he received this money, he was at the site of the former picket line every day, Monday through Friday, from 9 a.m. to 4 p.m.. Although he testified that the Union held his checks for him when he was in Honduras for 2 weeks in November 1990 and that he signed for them on his return, he was never asked by the Respondent's counsel how he could receive the full amount of strike benefits while at home caring for his wife and child. Based on the documentary evidence, I must conclude that Castillo had finished his child care responsibilities and returned to the site of the picket line by the beginning of the backpay period, on August 13. Because he was able to stand outside the Respondent's facility every day during this period, I find that he was available for work in all but 2 weeks during the period August 13, 1990, to February 1, 1991. I will deduct two weeks from the fourth quarter of 1990 to account for the time that Castillo was out of the country and thus unavailable for work.

Castillo testified that during the time that he received money from the Union, he looked for work with the Union. He testified that the Union would take him and other strikers from the picket line after 9 a.m. to look for work and would return at 12 noon. This is consistent with the testimony of other strikers who availed themselves of the Union's assistance. He recalled that it was the Union who brought him to the first interim employment he found and that this occurred while he was still receiving money from the Union. According to Castillo, the Union took him and others to this job, but only he was hired because they only needed one person. The General Counsel obtained information from one of Castillo's interim employers, Randal Plastics, establishing that he worked there from February 16 to March 9, 1991. The earnings reported by this employer match the earnings on his social security earnings record

and confirm that he worked for this employer in the first quarter of 1991, contrary to his recollection at the hearing that he did not find work until April or May 1991. His social security record also shows the amount of interim earnings from the other employer, Velsco, Inc., but doesn't indicate which quarter he worked there. No other documentary evidence establishes the precise period of this employment.

Castillo's recollection at the hearing is that he first worked for a company that made mattresses for about 2 months, earning $4.50/hour and averaging 40 hours a week until he was laid off. He testified at one point that he worked for this employer in April and May, and at another point recalled that it was in June and July. According to Castillo, after he was laid off, he remained at home for about a month, seeing doctors about a hernia until he had surgery. He recalled that the surgery was in June or July and that he had to stay home to recuperate about six weeks. Castillo testified that it was after recovering from surgery that he worked for the second company, a hangar factory, and that he only worked there 2 weeks before he was fired. Soon thereafter, he received his letter to go back to work for the Respondent and he returned to work in late August or September 1991. Castillo's testimony is not consistent with his hospital record showing that he had surgery on August 5. He could not have stayed home recuperating for 6 weeks, worked another job for 2 weeks and still been able to return to the Respondent by the end of August. I conclude that Castillo's recollection is faulty on this subject and that, in all probability, he worked for the second employer in the second quarter of 1991, before his surgery. I agree with the General Counsel that he was probably unavailable for the last quarter of the backpay period because of the hernia which was surgically repaired on August 5, but he worked or looked for work during the entire second quarter. I shall modify his backpay calculations consistent with these findings.

Contrary to the Respondent, I find that Castillo did not wait until the money from the Union ran out before he sought interim employment. I credit his testimony that he looked for work with the Union during the period before February 1 and that it was these efforts that led to his employment by Randal Plastics on February 16. The fact that he found another job in the quarter after he was laid off by Randal corroborates his testimony that he was looking for work. His efforts, which were successful, were reasonably diligent under the circumstances.

Accordingly, I find that Simion Castillo is entitled to $5,738.87, plus interest, under the Board's order.

26. Wilner Ceptus[87]

The General Counsel seeks backpay for Ceptus in the amount of $10,763.15. The General Counsel concedes that, if his strike benefits were not a form of interim earnings, then Ceptus is not entitled to backpay for 1990 because he admitted that he did not look for work while receiving money from the Union. Ceptus had interim earnings from a job in Massachusetts during the second and third quarters of 1991. The Respondent argues that Ceptus is not entitled to any backpay before March 11, 1991, about a week after moving to Massachusetts, because he did not conduct a reasonably diligent search for work until that time. The Respondent also argues that Ceptus is not entitled to any backpay after he found interim employment in Massachusetts because he had no intention of returning to work for the Respondent after that point.

Ceptus candidly acknowledged that he did not look for work during the period that he was receiving $200/week in "machinist" strike benefits from the Union. Ceptus testified that he did not look for work because the Union told him that his job with the Respondent was still open. After he stopped receiving strike benefits, Ceptus went to a place in the Bronx that is in the same business as the Respondent to look for work. He was taken there by a friend who worked there. He was told that they were not hiring. Ceptus admitted that he did not seek work anywhere else in the New York area. Instead, on March 2, 1991, he moved to the Boston area where his sister-in-law lived. According to Ceptus, she told him that, if he moved there, she would help him find a job. Ceptus testified that he started looking for work in Boston about a week after he moved there. His sister-in-law's husband took him to two or three places, including the Hebrew Center, where he filled out an application and was hired about 2 weeks later. He was employed by a company called Custom Management Corp., doing housekeeping on Saturdays, Sundays, and holidays. A letter from this employer establishes that Ceptus held this job from March 30 to October 12, 1991. Because this was only a part-time job, Ceptus continued to look for full-time work in Boston and eventually found it at the Sheraton Hotel. He left the job at the Hebrew Center to take this full-time job. Ceptus' quarterly earnings from his job at the Hebrew Center are set forth in a letter from the Employer. Because the backpay period ended in the middle of the third quarter, the General Counsel has appropriately apportioned the third quarter earnings by multiplying his average weekly earnings by the seven weeks within the backpay period.

I agree with the Respondent that Ceptus is not entitled to any backpay for the period before he moved to Boston. He admitted that he went to only one place, in February, and did nothing else to look for work before moving to Boston on March 2. However, I find that Ceptus efforts to mitigate backpay by moving to Boston and finding suitable interim employment were sufficient and that he is entitled to backpay for the period from March 11, 1991, to the end of the backpay period, reduced by his interim earnings. It is irrelevant whether Ceptus may have formed an intention not to return to work at the Respondent's facility following his move to Boston. Because the Respondent had not yet made a valid offer of reinstatement to Ceptus by the time he moved to Boston, it is inappropriate to inquire into his state of mind and speculate whether he would have accepted such an offer. See *Domsey Trading Corp.,* 310 NLRB at 777 fn. 3.

Accordingly, based on the above, I find that Ceptus is entitled to $8,182.15, under the Board's Order.

[87] The General Counsel has offered two alternative theories with regard to this witness' backpay based on the outcome of the strike benefits issue. Because I have found above that the strike benefits received by Ceptus and the other discriminatees were not interim earnings, I need not consider the alternative calculation based on a contrary finding.

27. Marie Sylvana Jean-Charles[88]

The General Counsel seeks backpay for Jean-Charles in the amount of $5,548.69. The compliance specification and evidence at the hearing show that Jean-Charles had interim earnings in every quarter of 1991 from two different employers. The Respondent argues that Jean-Charles is not entitled to any backpay for the period before February 1, 1991, because she did not conduct a reasonably diligent search for work while receiving strike benefits from the Union. The Respondent also seeks to reduce her backpay in the last quarter of the backpay period by one week on the basis that she was unavailable to work due to illness.

Jean-Charles testified that she looked for work, either with her husband or a friend, while receiving money from the Union. She admitted that her efforts to look for work were more frequent after the Union stopped providing strike benefits. She was able to find employment through the efforts of a friend at Caro Bags, in New Jersey, on February 12, 1991. She worked there until she was recalled by the Respondent on August 20, 1991, except for a period between April and mid-June when she was laid off because work was slow at Caro Bags. Jean-Charles also worked for another employer, Forward Industries in Brooklyn, for 1 day in 1991, but she could not recall when that was. There are no records establishing the date that she worked at this employer. She recalled that she was assembling photo albums at Forward Industries and that they hired her only for a day because they had a big order to fill. It appears from her testimony and other evidence in the record that she worked for Forward Industries either before she started at Caro Bags or while on layoff from that job, i.e., in either the first or second quarter of 1991. The General Counsel has deducted these earnings from Jean-Charles' second quarter earnings.

Jean-Charles recognized her signature on the Board's compliance form, but testified that others filled it out for her because she can not write. Tigus filled out the first two pages, which contains personal information and detailed information regarding when she worked and how much she earned at her two interim employers. She testified that another discriminatee, Marie Jose, wrote the list on page three based on what Jean-Charles told her. This list indicates that Jean-Charles looked for work "August 15, 1990 and every week" in 1990 and identifies 10 or 11 places she sought work. Jean-Charles testified that she remembered these places because she had asked friends with whom she looked for work to write down the names and addresses of places they went. Jean-Charles did not testify that she looked for work with Tigus or anyone else from the Union.

Jean-Charles acknowledged receiving strike benefits from the Union every week until February 1, 1991, as shown on the Union's records. She testified that she went to the site of the former picket-line every day, from 8 a.m. to 4 p.m. and left only if she became ill.[89] She did not testify that she left the site of the picket line to look for work. This testimony would seem to be inconsistent with her testimony above and the form she signed indicating that she was looking work during this same period of time. Jean-Charles was not asked by the Respondent or the General Counsel to explain this inconsistency. The Respondent argues that the fact Jean-Charles found a job shortly after she stopped receiving strike benefits is proof that she did not look for work earlier. I disagree. She may well have been looking without success in Brooklyn and went to New Jersey in February precisely to broaden her efforts. Moreover, as she candidly admitted, she was able to increase her efforts because she no longer had to appear at the Respondent's facility to get strike benefits and this increased effort could explain the sudden success of her efforts. I find that the apparent inconsistency in her testimony is more likely the product of the passage of time and her inability to recall events from so long ago than an attempt to fabricate evidence of a job search that did not occur. Jean-Charles impressed me as a truthful witness and someone not likely to lie under oath for such a small sum of money. The fact that she found two jobs and had interim earnings for most of the backpay period is further evidence that she was attempting to mitigate backpay and was not willfully idle during the backpay period.

Having found that Jean-Charles satisfied her duty to mitigate, she is entitled to backpay for the entire backpay period, reduced by the actual earnings she received from Caro Bags and Forward Industries, as reflected in the compliance specification. Jean-Charles testified that she was home from work at Caro Bags, under her doctors instructions, when she received the letter from the Respondent offering her reinstatement. She recalled that her last day at Caro was a Wednesday or a Thursday and that she was out of work barely a week. She went to work for the Respondent on August 20, 1991, a Tuesday, and did not return to Caro Bags. Thus, at most, she missed 3 days of work. Because this absence from work during the backpay period was caused by a medical condition which preceded the backpay period, I find that it would be inappropriate to reduce her backpay award for these 3 days.

Accordingly, Jean-Charles is entitled to $5,548.69, plus interest, under the Board's Order.

28. Alourdes Choute

The General Counsel seeks backpay for Choute in the amount of $4946 for the period August 13, 1990, until her reinstatement by the Respondent on April 22, 1991. Her only interim earnings reported are from a babysitting job she held in the first quarter of 1991. The Respondent argues that backpay for Choute should be tolled for 2 weeks in December 1990 when she was absent from the site of the picket line due to an illness. The Respondent, in its brief, did not specifically argue that Choute failed to satisfy her duty to mitigate, although this defense was raised in its answer to the compliance specification and the Respondent's counsel did question her about her efforts to find work at the hearing.

Choute acknowledged receiving strike benefits from the Union every week until February 1, except for 2 weeks in December 1990, as shown on the Union's records. She generally received the maximum amount indicating that she appeared at the site of the former picket line every day. She explained that she did not receive strike benefits for 2 weeks in December because

[88] This discriminatee's name appears as corrected at the hearing.

[89] Jean-Charles suffers from hypertension, a condition she had while working for the Respondent before the strike, that sometimes necessitated visits to the doctor and rest at home.

she had tonsillitis and was too sick to go. Choute testified that she had experienced similar infections while working for the Respondent before the strike, but seldom missed many days of work. She would sometimes go to work even when she was ill to avoid getting into trouble. Other times she used vacation days when she was too sick to work. I agree with the Respondent that, if Choute was too ill to go to the site of the former picket line, she was too ill work or to look for work. Accordingly, I shall reduce her backpay for the fourth quarter of 1990 by 2 weeks to reflect this period of unavailability.

Choute testified that she looked for work during the backpay period by going in a van with Tigus or Allen from the Union. According to Choute, they would leave from the site of the picket line in the morning. When they got to a place, she and others would get out of the van and go around to inquire if there were any jobs. She did not find any work in this manner. Choute testified that she also looked for work with friends who took her to the places where they worked and by asking friends and relatives if they knew of any jobs. She finally found a job babysitting through a friend. The mother brought the child to her home at 6 a.m. and returned at 5:30 or 6 p.m. While she was babysitting, Choute could not look for work, although she continued to ask friends if they knew of any jobs for her. She recalled being paid $70/week, cash, and that she did this for three months. Based on her testimony that she did not receive strike benefits if she did not go to the site of the picket line and the evidence showing that she received strike benefits until February 1, I find that she did not begin babysitting until after February 1. Thus, part of the earnings from this employment should be attributable to the second quarter of 1991. Accordingly, I will adjust the backpay calculation to reflect that she had $700 in the first quarter and $210 in the second quarter of 1991 from babysitting.

Because the Respondent did not argue the issue in its brief, I assume it has abandoned any claim that Choute's efforts to find suitable interim employment were lacking. In the event the Respondent has made such a claim, I find that Choute's testimony was credible and consistent with the compliance form she signed and submitted to the Board's Regional Office in 1992. I further find that her efforts to find interim employment were reasonably diligent when considered in the context of the entire backpay period and in light of the circumstances.

Accordingly, I find that Choute is entitled to $4622, plus interest, under the Board's Order.

29. Marie-Anne Cidieufort[90]

The General Counsel seeks backpay for Cidieufort in the amount of $3520, representing her gross backpay for the period August 13, 1990, to January 13, 1991. The General Counsel concedes that Cidieufort was unavailable for work after that date because she had suffered a stroke.[91] There are no interim earnings reported. The Respondent argues that Cidieufort is not entitled to any backpay because there is no evidence in the record that she searched for work during the backpay period. The Respondent also argues that it is entitled to a longer period of disability because of testimony from her nephew that Cidieufort had diabetes before she suffered a stroke.

At the time of the compliance hearing, Cidieufort was in a nursing home, paralyzed on one side, as a result of the stroke. Her nephew, Jean Marcel Raymond, who lived with Cidieufort during the backpay period and is her guardian, testified that she had been in the hospital for one day when she had the stroke and went right from the hospital to the nursing home where she has been ever since. Raymond testified that his aunt had diabetes which was treated with medication before she was hospitalized and that she went to the clinic regularly. The Union's strike benefits records in evidence show that Cidieufort signed for the maximum weekly benefit in virtually every week of the backpay period until the week ending January 19, 1991. I find, based on the other evidence in the record regarding the Union's strike benefits, that Cidieufort's receipt of these benefits establishes that she was generally at the picket line Monday through Friday until the week ending January 19, 1991. This is the week in which the General counsel has tolled backpay and appears to be the week that Cidieufort was hospitalized and had her stroke. Because she was able to report to the picket line site, she was not unavailable for work due to her diabetes.

Although Raymond had no direct knowledge regarding her efforts to find work before she was hospitalized, he recalled that his aunt told him that she had gone to New Jersey two or three times to look for work. Raymond testified that Cidieufort had a cousin there and that she looked for work near where the cousin lived. He knew of no other efforts she made to find work. An unsigned compliance form bearing Cidieufort's name was submitted to the Region with the entry "unknown" in the section where discriminatees are asked to describe their efforts to find interim employment. Raymond testified that he did not fill out the form and did not recognize the handwriting.

The Respondent's argument that Cidieufort is not entitled to any backpay because there is no evidence that she looked for work must be rejected. The Respondent cites no cases in support of such a proposition. Such a conclusion would be at odds with years of legal precedent that place the burden on the Respondent, not the discriminatee, to prove facts which would reduce or eliminate backpay. The Board's order is presumptive proof that some backpay is owed to Cidieufort. See *NLRB v. Brown & Root,* 311 F.2d at 454; *NLRB v. Mooney Aircraft, Inc.,* 366 F.2d at 813. Cidieufort's inability to testify in this proceeding as a result of her unfortunate circumstances is no basis to deny her a remedy for the Respondent's unfair labor practices. See *NLRB v. Mastro Plastics,* 354 F.2d at 179.

Accordingly, I find that Cidieufort is entitled to $3520, plus interest, under the Board's Order.

30. Ana Alvarez-Contreras

The General Counsel seeks backpay for Alvarez-Contreras in the amount of $5590. There are no interim earnings reported. However, the General Counsel admits that Alvarez-Contreras was unavailable for work from January 1 to May 1, 1991, due to pregnancy and childbirth. The Respondent argues that her period of unavailability was actually longer, beginning in Sep-

[90] This discriminatee's name is corrected to reflect the correct spelling.

[91] Cidieufort's incapacity was referenced in the judge's decision in the unfair labor practice case. *Domsey Trading Corp.,* 310 NLRB at 788 fn. 2.

tember 1990, and that she was also unavailable in July and August 1991 when she was hospitalized. Under the Respondent's view of the evidence, Alvarez-Contreras is entitled to backpay only for the months of May and June 1991.

Alvarez-Contreras testified that she gave birth on February 1, 1991. She admitted that she remained at home with her baby for 3 months before seeking work. Alvarez-Contreras also testified that she had a difficult pregnancy and almost lost the baby. As a result, she was not able to go to the site of the former picket line every day as her pregnancy advanced. Even when she was there, she became dizzy and had to sit down much of the time. Alvarez-Contreras recalled that these problems began in the 5th or 6th month of her pregnancy, which the parties stipulated at the hearing would be about October 1990. Although Alvarez-Contreras testified that she received strike benefits from the Union and had to sign a paper every week or she would not get paid, her signature does not appear next to her name on the Union's records for any week in the backpay period. There are no other documents showing her receipt of money from the Union during the backpay period. The absence of such documentation convinces me that Alvarez-Contreras was unable to go to the site of the former picket line much earlier than the General Counsel concedes. The absence of a signature in all probability means that she was not there on those Fridays when the Union distributed strike benefits. The absence of individual receipts such as those signed by others who were paid at times other than Friday suggest she was not around to collect her benefits, even if she did make an occasional appearance at the picket line site. Her testimony regarding the frequency and duration of her appearance at the picket line site is probably based on confusion and poor recall as to the period before and after August 1990. I also note that Alvarez-Contreras candidly acknowledged that she would probably not have been able to continue working in the months from September 1990 through January 1991 because of the complications from her pregnancy.

Based on the above, I find that Alvarez-Contreras was unavailable, and thus ineligible for backpay, from October 1, 1990, to May 1, 1991. I find that Alvarez-Contreras is entitled to backpay for the third quarter of 1990, the beginning of the backpay period, even if she was not at the site of the former picket line every day. Because of the uncertainty created by the Respondent's unlawful piecemeal reinstatement offers extended to the strikers through the month of September, it is impossible to determine when Alvarez-Contreras would have returned and how long she would have continued to work but for the Respondent's unlawful conduct. I have resolved these doubts by tolling backpay as of the first month that the discriminatee acknowledged having significant difficulties due to her pregnancy.

Alvarez-Contreras testified that, 3 months after the birth of her child, she started looking for work again and that she continued to look for work without success until she was hospitalized at the end of July. She admitted that she was unavailable from that point through the end of the backpay period. The General Counsel did not ask any questions regarding this testimony. Based on the discriminatee's admission, I shall deduct 3 weeks from Alvarez-Contreras' backpay for the period from the end of July through August 20, 1991.

Alvarez-Contreras testified that she looked for work on her own. She specifically denied that anyone from the picket line took her to look for work. she recalled that she looked for work at factories, offices and stores, but could not find work. An unsigned and undated compliance form submitted to the Board's regional office contains the entry, "ninguna," which means none in Spanish, in response to questions asking the discriminatee to describe his or her efforts to find work and to list the dates, names and addresses where the discriminatee looked for work. Alvarez-Contreras testified that she recognized the form as one of the papers that the Union was handing out on the picket line during the highest time of the strike so that the strikers could get their jobs back. She even recalled that she filled this form out while she was pregnant, i.e., before February 1, 1991. She explained that she wrote "none" in Spanish because she did not have a job yet. I do not attach any weight to this unsigned form. It is clear that Alvarez-Contreras was confused as to the document she was shown at the hearing. There is no evidence in the record before me that these compliance forms were being filled out during the strike. On the contrary, all the evidence is that they were distributed to the discriminatees and filled out in 1992 and later. Thus, it appears that the document she "recognized" was some other document distributed by the Union and not the compliance form.[92] I credit Alvarez-Contreras testimony under oath at the hearing that she did look for work, at least during the period May through July 1991. I find that her efforts to find work during the brief period when she was able to work, were sufficient to satisfy her duty to mitigate backpay.

Based on the above, I find that Alvarez-Contreras is entitled to $3104, plus interest, under the Board's Order.

31. Christian Delva

The General Counsel seeks backpay for Delva in the amount of $12,725.30. He has no interim earnings reported. The Respondent argues that Delva is not entitled to any backpay, citing testimonial and documentary evidence suggesting that he did not look for work in 1990. The Respondent also relies upon the fact that only eight places are listed on his compliance form for 1990. The Respondent argues that Delva's efforts, as described in his compliance form do not meet even the minimum burden required of discriminatees.

Delva received the maximum weekly strike benefits every week from the beginning of the backpay period until February 1, 1991. He testified that he was at the site of the former picket line every day, from about 7 or 8 a.m. until 5 p.m. Once he arrived outside the Respondent's facility, he remained there all day. According to Delva, he and the other unreinstated strikers were outside waiting for the Respondent to call them back to work. Delva testified that he looked for work during this period, but he could not remember specifically any places he went in 1990. He testified that he always went in the morning, before

[92] There is evidence in the record that the Union distributed other papers during the strike, such as when it assisted the strikers in applying for unemployment benefits. Thus, Alvarez-Contreras' confusion is understandable.

going to the site of the picket line. Because he can not speak English, he always went with a friend or relative who could speak English. He recalled that the people who went with him to look for work would sometimes pick him up at 4 a.m. so that he could be at the picket line site by 7:30 or 8 a.m.. Delva did not testify regarding any attempts to look for work with the Union.

Delva did have a specific recollection of several places where he sought work beginning in January 1991. These places are listed on the compliance form he signed on April 26, 1992. Delva was able to provide the details of his efforts to find work at some of the places listed on the form, such as Forklifts "R" Us, American Airlines, and BBR Products, which convinces me that his testimony regarding these efforts was credible. All these places are listed as having been visited in 1991. Delva testified further that Joe Blanc (sic) from the Union took him to apply for unemployment and that he was given a paper by the N.Y. State Labor Department to go to "Ya-Ya's" for a job. According to Delva, when he handed the paper to Ya-Ya, they would not hire him. This attempt to find work is also listed on the compliance form as having occurred in February 1991. The fact that he filed for unemployment benefits and sought assistance from the State Labor Department in seeking work is corroborative of his testimony that he was seeking work during the backpay period. I thus credit Delva's testimony that he looked for work, at least for the period after January 1, 1991.

Delva's testimony regarding his efforts to find work in 1990 is more questionable. Delva stated several times in his testimony that all the places he sought work are listed on the compliance form he signed in 1992. All of the places listed on that form with specific dates were in 1991. The only references to 1990 are vague. Delva testified that he can read Creole and that all the handwriting on the form is his. However, he also testified that his brother helped him fill out the form and told him what to write in English. For example, several places are listed on the form as having been visited "weekly" in 1990, but Delva testified that he went to some of these places only once. When questioned about this discrepancy, he recalled that his brother told him to write "weekly" in English. It was apparent at the hearing that Delva did not know what "weekly" meant. Although the form is helpful to the extent it corroborates his testimony regarding his efforts to find work in 1991, I am not sure it is entitled to much weight for the period before January 1991. Delva appears to have simply written down what his brother told him without knowing what he was writing. Under these circumstances, the form can hardly be considered an accurate reflection of Delva's recollection at the time he signed it.

Delva's testimony that he was able to look for work in 1990 and still get to the site of the picket line by 7:30 or 8, where he remained until 5 p.m. strains credulity. I am not sure whether he was being untruthful when he testified that he looked for work in 1990, was exaggerating his efforts, or merely did not recall what he was doing during that period of time, other than going to stand outside the Respondent's facility every day waiting to be recalled to his job. The evidence does show that he attempted to mitigate backpay to some extent during this period by volunteering for night-shift duty at the site of the picket line in September and October 1990 because his wife was sick and he did not have enough money to take her to the hospital. I have already found above that the additional $55/night that the Union paid strikers who performed this service was a form of interim earnings. Delva earned $220 in the third quarter and $110 in the fourth quarter of 1990 performing night-shift duty for the Union. This is hardly substantially equivalent employment, but it does support Delva's testimony that he needed to work. Having such a need, it is unlikely that Delva would have been content to remain idle and live on the $72/week he got from the Union, occasionally supplemented by night shift pay.

Having considered all of the evidence, and recognizing that Delva's testimony is not free from doubt, I find that he satisfied his duty to mitigate under Board law. It is clear that Delva looked for work after January, 1991. While the number of places listed may not be to the Respondent's liking, the Board has never quantified a discriminatee's obligations. There is no minimum number of places a discriminatee must look and a lack of success does not prove that a discriminatee has been willfully idle. The Respondent has not shown here that any greater effort would have been fruitful by identifying jobs that were available to Delva which he failed to seek. While his efforts before January 1991 may have been more limited, Delva nevertheless attempted to lessen his losses by accepting work with the Union. I note, in addition, that Delva's testimony that he went to the Respondent's facility every day in the hope that the Respondent would reinstate him tends to show mitigation. Delva was ready, willing and able to work and it was only because of the Respondent's unfair labor practices that he was not working. Under these circumstances, I cannot find that Delva's choice to spend the majority of his time, early in the backpay period, awaiting reinstatement, was unreasonable.

Accordingly, I find that Delva is entitled to $12,395.30, plus interest, under the Board's Order.

32. Gertha Denaud

The General Counsel seeks backpay for Denaud in the amount of $5882. She has interim earnings reported in the fourth quarter of 1990 and the first quarter of 1991 from employment as a home attendant by a company called Health Force. The Respondent makes several arguments in an effort to reduce Denaud's backpay remedy. The Respondent argues that strike benefits should be deducted from her backpay;[93] that the full amount of her earnings from interim employment has not been deducted; that she is not entitled to backpay for the 2-week period that she was taking a home attendant course; that backpay should be tolled as of the date she was terminated from interim employment because she did not pass the test to get a home attendant certificate; and that she did not conduct a reasonably diligent search for work after her termination by Health force.

Denaud testified that she was employed by Health Force from September 1990 until April 1991. She worked 4 hours a day, 6 days a week (9 a.m. to 1 p.m.) and was paid $200, after taxes, every 2 weeks. Denaud could not recall her hourly rate of pay, nor the amount of her gross earnings before taxes. No social security record or documentation from the employer

[93] This argument has already been rejected above.

establishes the actual amount of her gross earnings. The General Counsel only deducted the $200 net earnings that Denaud recalled receiving. The Respondent argues that, in the absence of proof of Denaud's gross earnings, the Board should presume that her interim earnings equaled her gross backpay, resulting in no net backpay pay for the period that she worked at Health Force. To take the Respondent's approach would essentially resolve any doubt regarding Denaud's interim earnings in favor of the Respondent, which is contrary to Board law. As the General Counsel correctly points out, it is the Respondent's burden to prove any offsets from gross backpay, including interim earnings. While the Board's General Counsel will attempt to determine interim earnings by soliciting information from various sources, including the Social Security Administration, it does not assume the Respondent's burden by doing so. *NLRB v. Brown & Root,* 311 F.2d at 454. See also *NLRB v. Mastro Plastics Corp.,* 354 F.2d at 177; *NLRB v. Mooney Aircraft,* 366 F.2d at 813. In the absence of any better evidence which would establish the exact amount of Denaud's earnings from Health Force, I shall deduct only the $200 biweekly earnings that the discriminatee recalled receiving from this employer.

Denaud testified that she did not have a home attendant certificate when she was hired by Health Force. Health Force sent her to classes to get her certificate. Because she was unable to pass the test required to get a certificate, Health Force eventually terminated her. Contrary to the Respondent's contention, Denaud's entitlement to backpay was not extinguished by her termination from interim employment. Denaud did not abandon or voluntarily quit this employment. The Board has held that, where a discriminatee has been terminated from interim employment, the Respondent must show that the discharge was caused by the discriminatee's deliberate or gross misconduct to establish a willful loss and toll backpay. *Ryder System, Inc.,* 302 NLRB 608 (1991), and cases cited therein. The evidence in the record here does not meet this standard.

Denaud testified that she continued to look for work at factories and hotels during the time that she was working part time at Health Force. After she was let go by Health Force, she took another home attendant course, similar to that taken by other discriminatees, and this time was successful in obtaining a certificate. Once she obtained her certificate, Denaud looked for work at home attendant agencies, using the list of such agencies she got with her certificate. She was unable to find such a job before the backpay period ended. On the compliance form Denaud signed on April 18, 1992, Denaud listed only three home attendant agencies as places she sought work, all in 1991. She did not specify the month she sought work at these places and testified at the hearing that she did not now recall when in 1991 she went to these places. She explained that she was able to recall the names and addresses of these places when the form was filled out because she had the list she had received with her certificate and copied the information from that list. Unlike other discriminatees, Denaud did not keep any notes of the places she went to seek work. The form does not identify any factories, or other places Denaud sought work during the backpay period. I note that Denaud never testified that this list was exhaustive. I find it logical that, when the form was filled out, she would have been able to recall the home attendant agencies where she applied for work but not the factories and other places, because she at least had a list of such places that she had utilized in her job search. Because she kept no other record of her efforts to find work, it is credible that she would not have recalled other places she went.

Considering Denaud's testimony, which I found credible, in the context of the entire backpay period, I find that she satisfied her duty to mitigate backpay. I note that she found interim employment within the first quarter of the backpay period and maintained that employment for seven months, that she continued to look for full-time work while holding a part-time job, and that she took a home attendant course in order to acquire a certificate which would improve her chances at finding suitable employment. The fact that she was unable to find a job utilizing this training before the backpay period ended does not prove that her efforts were not reasonably diligent. For the reasons discussed above with respect to discriminatees Armand and Augustin, I do not consider the two weeks that Denaud was in training to be a willful loss or removal from the labor market.

Accordingly, I find that Denaud is entitled to $5882, plus interest, under the Board's Order.

33. Jesula Denis

The General Counsel seeks backpay for Denis in the amount of $5,398.11. She has interim earnings reported in the first three quarters of the backpay period from Caro Bags in New Jersey. Correspondence from Caro Bags received by the General Counsel, as well as records subpoenaed by the Respondent, establish that she worked for this employer from August 30, 1990, until February 19, 1991. The interim earnings reported in the compliance specification also match those on Denis' social security earnings record. The Respondent argues that Denis' credibility regarding her efforts to find interim employment is suspect because of an apparent inconsistency between her testimony and documentary evidence regarding receipt of strike benefits. The Respondent appears to be arguing that, based on credibility, I should find that she did not look for work after her layoff from Caro Bags and deny her backpay for the remainder of the backpay period.

I note initially that Denis found interim employment within a few weeks of the Respondent's unlawful failure to reinstate her. She maintained this employment for almost 6 months before being laid off because work was slow. Moreover, she found another job in 1991, at Majestic Sportswear in Brooklyn, and worked there for about 3–4 weeks before being laid off again. She testified that she applied for and received unemployment benefits after her layoff by Majestic. The fact that she found this second job tends to corroborate her testimony that she looked for work after her layoff by Caro Bags. Because Denis could not recall in what quarter of 1991 she worked at Majestic, and because she could not even recall if it was before or after August 20, 1991, the General Counsel did not deduct Denis' earnings from Majestic from her gross backpay. The absence of proof regarding whether Denis worked for Majestic Sportswear before or after August 20, 1991, together with her poor recollection generally, creates a doubt whether these earnings should be attributable to the backpay period. As noted above, the Board generally resolves such doubts in favor of the discrimi-

natee and against the Respondent. Moreover, as noted above, it is the Respondent's sole burden to prove facts which would justify a further reduction in a discriminatee's gross backpay. The Respondent did not meet its burden of showing that Denis worked for Majestic Sportswear before August 20, 1991. Because she never returned to the Respondent, she is as likely to have worked there after August 20 as before. Accordingly, I shall not deduct Denis' earnings from Majestic, as reported on her social security report, from her gross backpay.

The Respondent suggests that Denis' testimony regarding her search for work is not believable because she testified that she received strike benefits from the Union during the backpay period for standing outside the Respondent's facility every day. She also testified that she was taken from the picket line by Union representatives Tigus and Evans to look for work during the backpay period. Denis' signature does not appear on any of the Union's strike benefits records from August 10 through February 1 and no other documents showing her receipt of any strike benefits during the backpay period have been found. The Respondent argues that this, together with the fact that she was working in New Jersey between August and February, establishes that she was not at the site of the former picket line. Under the Respondent's view, this proves that she was lying. I do not agree. Denis' testimony that she was at the site of the former picket line every day and received $72 every week and $5 every day from the Union was elicited by the Respondent's counsel through leading questions. When asked a direct question, Denis testified that she did not recall exactly over what period of time she received money from the Union, but she remembered receiving it. Her lack of recall in this regard was consistent with the rest of her testimony in which she said that she did not recall when she started working at Caro Bags, other than that it was summertime and after the picket line was over.[94] Denis also did not recall how long she worked at Caro Bags, how long she was out of work before finding the job at Majestic Sportswear, or even when she worked at Majestic Sportswear. Her lack of recall regarding events that occurred 7 or 8 years earlier is understandable, particularly since Denis did not make any notes or keep any records of her efforts to find work during the backpay period. It does not prove to me that she was being untruthful. Rather, she impressed me as a witness who endeavored to recall these things and answered whatever she was asked as best she could.

It is well established under Board law that a discriminatee should not be denied backpay because of poor recordkeeping or an inability to recall the details of their efforts to find interim employment. *December 12, Inc.,* 282 NLRB at 477; *Laredo Packing Co.,* 271 NLRB at 556; *Arduini Mfg.,* 162 NLRB at 975. I thus find that the Respondent has failed to meet its burden of proving that Denis did not satisfy her duty to mitigate by conducting a reasonably diligent search for interim employment.

Accordingly, I find that Denis is entitled to $5,398.11, plus interest, under the Board's Order.

34. Marie Estivaine

The General Counsel seeks backpay for Estivaine in the amount of $5016. The General Counsel seeks backpay only for the period prior to her actual reinstatement by the Respondent on April 2, 1991. No interim earnings are reported. The Respondent argues that Estivaine is not entitled to any backpay because she did not conduct a "diligent and reasonable" search for work during the backpay period. The Respondent relies on her testimony that all the places she sought work are listed on page three of the compliance form that she signed in 1992. The first place listed on the form is dated December 5, 1990. A total of 14 places are listed, with most of them after February 1991. The Respondent further argues that Estivaine's receipt of strike benefits for the period before February 1, 1991, indicates that she was on the picket line every day and not seeking work.

Estivaine testified that she went to the site of the former picket line outside the Respondent's facility every day, until she returned to work, and that she was paid $5/day and $60 every Friday. She testified that she did not arrive at any specific time every day, but she was always there "on time," meaning by 8 a.m. She further testified that she remained there until she left for home at 4 p.m. She identified her signature on the Union's records showing that she generally received at least $60/week prior to February 1. However, there are some weeks in which she received no strike benefits or less than the full amount. This indicates that, despite her testimony, there were times when she did not go to the site. While acknowledging that the Union gave her and the other strikers money when they were "picketing outside," she did not remember when the Union stopped paying strike benefits, whether she continued to picket after August 1990 and whether the picketing continued after the money stopped.

With respect to her search for work, Estivaine testified that she went to look for work 4 days a week, every week, until she was reinstated by the Respondent. She testified that friends would take her, or she would go by herself. She recalled that there were times that she left her home at 5 a.m. in order to look for work before going to the site of the former picket line. As noted above, the compliance form she signed does not suggest such an extensive effort to look for work. Estivaine testified that she did not fill out this form herself, that Tigus did it. She testified that Tigus copied down on the form all the places she had written down on her own list that she kept while looking for work. She testified several times that all the places she went are listed on the form. At the very end of her testimony, Estivaine testified that she did not record on her own list any places she went by herself because she can not write. When she went to look for work with others, she would have them write down the name on a piece of paper. Finally, I note that Estivaine admitted that she looked for work more frequently in 1991 than in 1990, which coincides with the end of the strike benefits, and is consistent with the information provided on the compliance form.

Estivaine's testimony was at times confusing and contradictory. She also appeared to be exaggerating both the frequency

[94] It should be remembered that Judge Schlesinger found that the picket line was taken down on August 13, 1990, and that the employees continued to gather at the same place to await reinstatement, not to picket.

of her attendance at the site of the picket line and her efforts to find interim employment. At the same time, I note that she had great difficulty recalling events and appeared to confuse the period before and after August 13, 1990, when describing the "picket line" outside the Respondent's facility. The convoluted questions asked by the Respondent's counsel at times contributed to Estivaine's confusion. I also note that the Respondent's almost exclusive use of leading questions too often suggested the answer that the Respondent wanted to hear and did not afford Estivaine an opportunity to explain herself. Considering all these factors, I cannot conclude that Estivaine was lying when she testified that she looked for work. The question remains whether her efforts to find interim employment, as she recalled them and as reflected on the form she signed in 1992, satisfied her duty to mitigate.

While Estivaine clearly exaggerated her efforts, this is not enough to warrant a denial of backpay. See *December 12, Inc.,* supra. I believe her true efforts are more likely what is reflected in the compliance form, i.e., that she delayed seeking work until December, and increased her efforts in February. The fact that Estivaine may have postponed her job search, or that there was a gap during the backpay period, is not fatal because her efforts over the entire period must be considered. As I have frequently noted in this decision, some delay was reasonable here because of the Respondent's unlawful behavior in piecemealing the invalid offers it extended to the strikers. The Respondent was making such offers through the end of September. No further offers appear to have been made until March 1991. It was in response to this offer that Estivaine returned to work. I find that Estivaine's efforts from December through the date of reinstatement were sufficiently diligent to meet her duty to mitigate, considering the low standard of diligence the Board has set for discriminatees. Even assuming that Estivaine made no effort to find work in October and November, by which time the Respondent had stopped offering reinstatement to the strikers, I would not toll her backpay for this brief hiatus. Considering her efforts over the entire period, I find that Estivaine made a reasonably diligent effort to find interim employment.

Accordingly, I find that Estivaine is entitled to $5016, plus interest, under the Board's Order.

35. Michelet Exavier

The General Counsel seeks backpay for Exavier in the amount of $5260. He has interim earnings reported for the fourth quarter of 1990 and first quarter of 1991 from United Talmudic Academy in Brooklyn. The earnings reported in the compliance specification, as amended, are taken from W-2 tax forms issued by that employer to Exavier. The Respondent seeks to deny all backpay to Exavier on the basis that the page of the compliance form he signed in 1992 where a discriminatee is asked to describe their efforts to find work is blank. The Respondent argues that more weight should be given to this document than Exavier's testimony at the hearing. The Respondent also argues that backpay should be denied because Exavier conceded that there were some employers who would not hire him during the backpay period because his social security number was not good.

I found Exavier to be a very credible witness. He volunteered that the social security number under which he worked for the Respondent and the interim employer was not good. In 1993, he corrected his problems and now has a valid number, as reflected by the social security record the General Counsel received showing a match between his name and number. Exavier also was forthcoming in acknowledging that there were factory and security jobs that he was not hired for because of the social security number he was using at the time. Exavier's candor only invited a series of irrelevant and abusive questions from the Respondent's counsel which Exavier answered as best he could.

Exavier testified that, before he obtained the job at United Talmudic Academy, he regularly went to the site of the former picket line and received strike benefits from the Union. He testified that the Union helped him look for work during this period. He testified that he also sought work on his own by asking friends and relatives who were working if there were any jobs at their places of employment. In fact, he found the job at United Talmudic Academy through a cousin. He worked there from November 1990 until April 1991, 8 hours a day from Sunday through Thursday and a half-day on Friday. He was paid $5/hour. According to Exavier, he was laid off in April as the school year ended because they did not need as many employees to work in the cafeteria where he worked. Exavier testified that he did not apply for unemployment benefits following this layoff, citing his social security number, but instead looked for another job. He did not get help looking for work from the Union because the Union was not there, i.e., outside the Respondent's facility every day, at the time that his interim job ended. Exavier testified that he looked for work after the layoff by again asking people he knew about jobs, checking the newspaper classifieds and obtaining information about job openings from Wilson Desir at the Haitian Council. He was not able to find another job before the backpay period ended.

As noted above, the compliance form that Exavier signed in 1992 is blank regarding efforts to find interim employment. Exavier did not fill out the form himself. A cousin filled it out for him. Exavier testified that he told his cousin where he looked for work, from memory, and believed his cousin wrote them down. He had no explanation for why the page is blank. I note that other sections of this form were not filled out correctly by Exavier's cousin. On the first page, instead of providing information regarding Exavier's employment by the Respondent, the cousin has written down information regarding Exavier's interim employment. It is apparent from this that neither Exavier or his cousin understood the form when it was filled out. I therefore attach no weight to the absence of any entry describing Exavier's efforts to find interim employment.

As noted above, Exavier conceded that there were jobs he was not hired for because of questions about his social security number. The Respondent did not pursue this to establish when such employment opportunities had been offered to Exavier, nor the terms under which he would have worked if he had a valid social security number. Even assuming this would amount to a "willful loss", the Respondent bears the burden of showing when this occurred and the amount of projected interim earn-

ings lost as a result of Exavier's inability to take such a job. I will not speculate as to these facts. Moreover, Exavier credibly testified that he looked for work, notwithstanding any concerns about his social security number. The fact that he was able to obtain employment even with a bad social security number that provided him with a substantial amount of interim earnings proves that this was not a significant impediment to Exavier's efforts to mitigate backpay.

The Respondent also seeks to deduct one week from Exavier's backpay in the second quarter of 1991 for a trip he took to Florida during the backpay period. Although Exavier testified that he went to Florida for a week during the backpay period, the Respondent never attempted to learn from him when he took this trip, nor was he asked the purpose of the trip. I agree with the Respondent that Exavier's receipt of strike benefits every week from August 13 until he started working for the interim employer and the evidence regarding the duration of that employment makes it unlikely that he went to Florida before April 1991. But there is nothing in the record on which to base a finding whether he took this trip in the second or third quarter. Moreover, it is possible that Exavier went to Florida as part of his efforts to find interim employment, to explore work opportunities there. If that were the case, his entitlement to backpay could have continued, assuming it were reasonable for him to seek work in a different geographic area. In the absence of more evidence regarding this trip, it would be pure speculation to find this trip was a withdrawal from the labor market or a willful loss. As with all other doubts, I shall resolve it in favor of Exavier and reject the Respondent's argument.

Accordingly, based on the above, I find that Exavier is entitled to $5260, plus interest, under the Board's Order.

36. Eduardo Roman Feliciano[95]

The General Counsel seeks backpay for Feliciano in the amount of $8259. The only interim earnings reported are $157 from RBG Management in the first quarter of 1991. Roman is currently deceased, having passed away in 1993. The Respondent argues that the General Counsel has not deducted all of Roman's interim earnings, relying on the social security earnings record for the name and social security number of the discriminatee as the best evidence of his interim earnings. The General Counsel did not deduct the earnings reflected in the social security report on the basis of uncertainty whether the discriminatee is the individual who worked for the employers listed there.

Because Roman was not alive at the time of the hearing, the Respondent questioned a relative, Edwin Freytes, regarding the discriminatee's activities during the backpay period. Freytes' wife is Roman's cousin. Freytes testified that Roman lived with his father-in-law, i.e., Roman's uncle, on and off during the backpay period and spent time with Freytes and his wife. He recalled that Roman was a private individual who did not like to talk about what was going on in his life. Nevertheless, Freytes recalled that Roman told him he worked for a company that was on strike. Freytes even accompanied Roman to the picket line on one occasion. Although he could not recall Roman telling him about his efforts to find work, or whether he was working during the backpay period, he did recall that Roman came to the Waldorf Astoria Hotel, where Freytes worked at the time, to fill out an application in 1990. Roman did not get the job and Freytes could not recall what month or season in 1990 this occurred. Freytes testified further that he left his employment at the hotel at the beginning of 1991 and that he went with Roman to look for work at two places in the summer of 1991, UPS in Manhattan and a security company on the Grand Concourse in the Bronx, near Yankee Stadium. Freytes cousin was a supervisor at the security company and he thought she would be able to hire Roman. According to Freytes, his cousin told him that she could not hire Roman because he did not speak English. Although Freytes could not recall whether Roman worked during the backpay period, he did remember that he was working for Marriott at a cafeteria in the ABC building about a year before his death and also remembered Roman talking about getting a job at Conway Stores in Penn Station. Roman's social security record reflects earnings from Conway Stores in 1991 but correspondence from that employer establishes that he worked there after the backpay period ended. Finally, Freytes testified that Roman often complained that he could not afford to pay rent to anybody and that he had a dispute with his uncle over not paying rent to live there. The record contains no other evidence regarding Roman's efforts to find interim employment during the backpay period.

The parties stipulated that the signature appearing next to the name Eduardo R. Feliciano on the Union's strike benefits records is that of the discriminatee, who signed his name Eduardo Roman. These records reflect that he received at least some strike benefits every week from the beginning of the backpay period until February 1, 1991. In most weeks, he received $60 or $72 indicating that he was present at the site of the former picket line at least 5 days those weeks. There is no evidence in the record regarding the hours of the day Roman spent at the site of the former picket line.

As noted above, the social security report for "Eduardo Roman" under the social security number in the Respondent's personnel records and the Union's strike benefits records shows significant earnings in 1990 and 1991 from Breakfast Productions, Inc. Correspondence from this employer received by the Board's regional office in 1996 shows that an individual with the same name and social security number as that used by the discriminatee worked there from April 26, 1990, through October 6, 1993. Records that the Respondent obtained from this employer during the hearing reveal that the Eduardo Roman employed there was born March 27, 1967, worked full time, received a raise to $6/hour in June 1990 and had a work-related injury to his left hand on January 29, 1991, for which he was out of work until March 21, 1991, and received worker's compensation benefits. These records show that the Roman who worked there was frequently disciplined during his employment leading up to his being discharged on October 6, 1993, for fighting on the job. Also included in his personal file is an I-9 form filled out when he was hired on April 26, 1990, showing that he documented his eligibility to work in this country with a certificate of U.S. citizenship and social security card.

[95] Roman is the discriminatee's surname and Feliciano is his mother's maiden name, which traditionally follows the father's surname in the Spanish language. He will be referred to as Roman.

Confusing the matter even further, Jack Hannan, executive vice president of Breakfast Productions, who was personally familiar with the employee named Eduardo Roman who worked for his company, having seen him as recently as 1997, testified that the discriminatee in this case is not the Eduardo Roman who worked for his company. The Respondent put into evidence photographs from their respective personnel files of the Eduardo Roman who worked for the Respondent and the one who worked for Breakfast Productions. These photographs appear to be of two different people. I agree with the General Counsel that the evidence in the record does not establish that the discriminatee involved in this proceeding worked for Breakfast Productions during the backpay period. Hannan was a very credible witness who obviously would have no reason to lie in this proceeding. In addition, I note that Roman's receipt of strike benefits indicating his presence at the site of the picket line almost full time from August 13 to February 1 would be inconsistent with his working full time at Breakfast Productions. Based on the other evidence in the record showing that use of different names and social security numbers was not uncommon among immigrants with questionable status, including the testimony of the Respondent's expert on the social security numbering system, I find it not surprising that two people could be working under the same name and number at the same time.[96] Accordingly, I will not reduce Roman's backpay by the amount of earnings reported to Social Security Administration by Breakfast Productions.

The Social Security record for the number used by the discriminatee reflects earnings in 1990 from two other companies: Armed Courier Security Corp. in Brooklyn and Guardian Transport, Inc. in the Bronx. The General Counsel was unsuccessful in obtaining any information from these employers which would show whether these earnings are attributable to the backpay period. Freytes testified that he was unaware of Roman working for either of these companies.[97] As noted above, the strike benefit records show that Roman was regularly outside the Respondent's facility with his fellow strikers during that portion of 1990 within the backpay period. I agree with the General Counsel that there is insufficient evidence in the record to establish that Roman received these earnings during the backpay period. As it is the Respondent's burden to prove this, I shall not deduct these earnings from Roman's backpay.

The only earnings that the General Counsel admits are attributable to the discriminatee is the $157 reported on the social security record from RBG Management. The General Counsel received correspondence from this employer establishing that this money was earned in the first quarter of 1991. This employer sent in another letter showing that an individual named "Feliciano (first name) Roman (last name) with a different social security number worked there in March and April 1991 about a month after the discriminatee. there is no further information about this other individual in the record. Because there is no evidence that Roman ever used the social security number used by "Feliciano Roman," nor that he ever went by that name, I agree with the General Counsel that there is insufficient evidence to establish that these earnings were received by the discriminatee. As noted above, it has already been established that Roman worked for Conway Stores after the end of the backpay period.

The evidence in the record regarding Roman's efforts to mitigate backpay is thus limited to testimony that he looked for work at two or three places in 1990 and 1991 and other evidence showing that he worked for about a week in February 1991. The lack of evidence regarding a discriminatee's job search does not by itself warrant a finding that the discriminatee failed to satisfy his duty to mitigate. See *NLRB v. Mastro Plastics Corp.,* supra at 178–179. The discriminatee's unfortunate passing during the long delay between the unfair labor practice hearing and the compliance proceeding should not inure to the benefit of the Respondent. Any doubts created by Roman's unavailability to testify at this proceeding must be resolved in his favor under well-established precedent.

Accordingly, I find that the estate of Roman is entitled to $8259, plus interest, under the Board's Order.

37. Marlon David Flores

The General Counsel seeks backpay for Flores in the amount of $5016 for the period from August 13, 1990, to April 1, 1991, the date he was reinstated by the Respondent. No interim earnings are reported. The Respondent argues that Flores was in fact working during the backpay period and that earnings that appear on his social security record for 1990 should have been deducted as interim earnings. The Respondent relies on the absence of Flores' signature on any of the Union's strike benefit records as proof that he was not at the site of the former picket line during the backpay period. The Respondent also relies upon the compliance form that Flores signed in 1992 as showing that he did not look for work during the backpay period. The Respondent contends that these two factors and Flores lack of credibility establish that he was working. The Respondent would deny him all backpay as a result.

Flores' testimony was not very helpful to resolving the issues regarding the amount of backpay he is owed. He responded to many questions from the Respondent and the General Counsel by saying that he did not remember or could not recall. Yet he was able to recall that he left the picket line three times a week, at 3 p.m., to look for work with several other strikers. He recalled that he looked for work at places in Brooklyn, Manhattan, the Bronx, and Yonkers. He recalled going to McDonald's and various home attendant agencies. Flores also recalled taking a home attendant course for 2 weeks in the evenings to get a certificate for this kind of work. He got the addresses of home attendant agencies from his mother who was working as a home attendant at the time. The compliance form that Flores signed on April 14, 1992, lists a number of these places in the

[96] The report compiled by the Respondent's expert indicates that the number used by the discriminatee when he worked for the Respondent and received strike benefits was issued in Puerto Rico in1976. Freytes testified that the discriminatee's mother lives in Puerto Rico. Thus, it may be that the discriminatee is the rightful holder of that number and, if a native of Puerto Rico, a U.S. citizen.

[97] As the Respondent points out, however, this testimony is of limited value since Freytes acknowledged that Roman did not talk about work and, because of his dispute with Freytes' father-in-law, would have good reason not to tell Freytes where, or if, he was working.

section where he was asked to describe his efforts to find work. However, most are dated after the backpay period had ended. On page two of the form, where a discriminatee is asked to list all employment during the backpay period, Flores listed only his employment by the Respondent and stated his reason for leaving, which occurred after the backpay period. When questioned about the form, it appeared that Flores confused this form with a form he had to fill out to receive unemployment benefits. This confusion may have affected him even when he filled out the form since the record shows he did receive unemployment benefits from October 13, 1991, following his termination by the Respondent, through April 12, 1992, shortly before he moved to Houston, Texas, to take a job that his father found for him. The dates on the form all fall within this period. Flores did testify that he looked for work at other places that are not listed on the form.

As noted above, Flores' social security record shows that he had earnings in 1990 from two employers other than the Respondent. Because he was hired by the Respondent on January 3 and went on strike on January 30, his 1990 earnings from the Respondent are minimal. He has almost $7000 in 1990 earnings reported from Sunnybrook Gardens Owners, Inc. Flores recalled working for this employer as a porter or maintenance man, but he could not remember what month or quarter. All he could recall is that he was filling in for a Peruvian who had gone home for vacation, that his cousin got him the job, and that he worked there only 2–4 weeks. However, because he recalled being paid $8 or $9 an hour and working only 40 hours a week, he must have worked there longer than 4 weeks. In fact, the earnings would indicate that he worked there from 19–21 weeks. When pressed, Flores recalled that it was cold outside when he was working there. He said the same thing regarding the time he was on the picket line. The record also shows that Flores received 1 week unemployment benefits for the week ending April 1, 1990.

I agree with the Respondent that it is more than likely that he stopped collecting unemployment at that time because he had started working for Sunnybrook Gardens. I note that after his employment with the Respondent ended in 1991, Flores collected unemployment for 27 weeks because he was unable to find another job. Because he had to work at Sunnybrook Gardens during the day, Flores could no longer go to the picket line. That would explain why he recalled it being cold when he was on strike. If Flores was earning $8/hour for 40 hours a week, it would have taken him 21.3 weeks to earn the total amount reported on the social security record. If he started working at Sunnybrook Gardens April 8, the week after he received unemployment, he would have been employed through August 30, 1990. Therefore, I shall deduct 3 weeks worth of earnings from Sunnybrook Gardens, at $320/week, from Flores' third quarter 1990 backpay.

In September 1990, Flores obtained a job at the USTA Tennis Stadium in Flushing, Queens, cleaning the stadium at night. This was a temporary 2-week job for the duration of the U.S. Open. The General Counsel did not deduct his earnings from this job because she equated it with "moonlighting" income. Flores testified that he did the same work in September 1991, while working for the Respondent. His social security record does show earnings from USTA National Tennis Centers, Inc. in both 1990 and 1991. Flores testified that he also worked there in 1989, but he was not working for the Respondent at that time. I disagree with the General Counsel's argument. At the time Flores took the job at the tennis stadium he was unemployed. Although he worked nights, his earnings were equivalent to earnings from a full-time job. This is not something he had always done on the side while working for the Respondent because he only worked for the Respondent a few weeks before the strike. I therefore conclude that the $928.13 from the USTA should be deducted from Flores' 1990 third quarter backpay.

There is no evidence that Flores worked anywhere else between the job at the Tennis stadium and his recall by the Respondent. He expressly denied that he worked during the backpay period other than at the stadium. Based on the absence of his signature on any records showing the receipt of strike benefits during this period, I must conclude that he never returned to the site of the former picket line during the backpay period. Flores testified that he did look for other work, but could not find any. He did list one place, Alliance Home Care, as a place he sought work in November 1990. Although vague and limited by poor recall, I credit Flores' testimony that he was looking for work during the fourth quarter of 1990 and the first quarter of 1991. The fact that he was working at the beginning of the backpay period and held two jobs in 1990 convinces me that Flores was not the type of person to remain willfully idle. His lack of success at finding another job after the USTA job does not prove he wasn't looking. The absence of any other listings for jobs sought during the backpay period is not fatal because Flores testified that the list was not complete. Considering Flores' efforts over the entire backpay period, I find that he satisfied his duty to mitigate backpay. I refuse to speculate, as the Respondent does, that Flores was working at some unknown job during the entire backpay period. The Respondent has the burden of proving affirmatively that there are additional earnings before any further reduction in Flores' remedy can be made.

Accordingly, I find that Flores is entitled to $3952, plus interest, under the Board's Order.

38. Marie Jose Francois

The General Counsel seeks backpay for Francois in the amount of $8,582.10. No interim earnings are reported. The Respondent argues that Francois should not receive any backpay because she was unable to find work during the backpay period due to her alleged status as an undocumented alien.

When Francois first testified, she volunteered that she was denied unemployment benefits during the strike because she "hadn't taken care of her green card." Towards the end of the hearing, the General Counsel recalled Francois and introduced into evidence an immigration document stamped "Employment Authorized" with the date November 8, 1989. Handwritten at the bottom of the card was the notation, "valid til May 7, 1992." It appeared that the year had been altered from 1990 to 1992. Francois testified that all the handwriting on the document was put there by the immigration official who gave her the document. She denied that she or anyone else altered the date. Francois testified that when she applied for work and was

asked for documents, she presented this. She specifically denied that she was offered any jobs during the backpay period that she could not accept because of problems with immigration documentation and further denied that she abstained from looking for work because of concerns about her documentation. The Respondent relies on the apparent alteration of the date on the document in evidence, together with her earlier testimony about the green card, as proof that Francois was not legally authorized to work in this country during the backpay period. The Respondent asks me to draw an inference from this evidence that she was unable to work in the same manner as a discriminatee with a physical handicap.

It is unnecessary for me to determine the validity of the document which the General Counsel put in evidence. As noted above, the Board has clearly ruled, with agreement from the Second Circuit, that the fact of undocumented status alone does not render a discriminatee ineligible for backpay for the period before a respondent makes a valid offer of reinstatement. *A.P.R.A. Fuel Oil Buyers Group,* supra. Thus, whether the documents Francois had in her possession during the backpay period allowed her to work in the United Status is irrelevant. The only possibly relevant inquiry is whether any alleged lack of documentation actually resulted in a loss of potential interim earnings. Based on Francois' denial that she was denied any jobs for this reason, and her credible testimony regarding her efforts to seek other employment, I find that the Respondent has not proved that Francois' alleged undocumented status caused any loss of interim earnings.

Francois testified credibly regarding her efforts to find interim employment. She recalled asking friends if they knew of any places that were hiring and following up on any such leads. She testified that she sought work on her own and with the Union. Although she could not recall the names of all the places where she sought employment, she recalled a few and gave details as to others which convinced me she was not fabricating her testimony. Francois estimated she looked for work on average about three times a week, for varying amounts of time. After searching for work, she generally returned to the site of the former picket line. She recalled that when she went with the Union, if they did not find work, they would return to the site of the picket line as well. Thus, she was able to look for work while maintaining her presence outside the Respondent's facility on a daily basis. Finally, I note that Francois took the 2-week home attendant training course offered by the Union when she could not find any other work and that she ultimately was successful in finding work in this new career, after the end of the backpay period. I find that Francois satisfied her duty to mitigate backpay and did not incur any willful loss of earnings during the backpay period.[98]

The Union's strike benefit records establish that Francois received $65 a week, designated as "captain" benefits, in addition to the regular weekly strike benefits of $60 or $72. I have already found above that this additional benefit was a form of interim earnings because it was intended to compensate the members of the committee for their leadership roles during and after the strike. I shall modify Francois' backpay to deduct the amount of captain's pay she received, on a quarterly basis, from August 13, 1990, through February 1, 1991.

Based on the above and the record as a whole, I find that Francois is entitled to $6922, plus interest, under the Board's Order.

39. Luis Ramos Frederick

The General Counsel seeks backpay for Ramos Frederick in the amount of $1,0461.25. He has minimal earnings from self–employment reported as having been earned in the first and second quarters of 1991 and $80 in earnings from the Respondent reported in the first quarter of 1991. The Respondent argues that backpay should be tolled for the period that Frederick was receiving $200 in weekly strike benefits on the theory that any search for work during that period was "pretextual." The Respondent relies upon the discriminatee's asserted lack of credibility and the compliance form he signed on April 3, 1995, as proof that he did not diligently seek work during the backpay period.

Ramos Frederick's testimony was not helpful to resolving the issues raised by the pleadings because he demonstrated an inability to recall dates and events during the backpay period. Ramos Frederick did recall receiving the weekly strike benefits and the $5 in daily transportation money that the Union gave to the strikers. Because he was a machinist before the strike, he received the higher benefit of $200/week. The records show he received this amount every week from the beginning of the backpay period through February 1, 1991. He testified that he went to the site of the picket line Monday through Friday, generally from 7 a.m. to 4 p.m., but that he sometimes left the picket line in the morning to look for work and returned when he was done. He also recalled going to factories early in the morning looking for work, before going to the site of the former picket line.

Ramos Frederick recalled that, after the strike was over, i.e., after he stopped receiving strike benefits, he earned some money by using his car to help people move. He charged different amounts based on how much and how far people were moving. He recalled that he did this only for a month or two and estimated his earnings at about $350/month. He was paid in cash and kept no records of this employment. He could not recall precisely when he did this work. Ramos Frederick was able to recall that he returned to his native Honduras for 2–3 weeks in April 1991.

Ramos Frederick recalled further that sometime after he returned from Honduras, he was told about the course to become a home attendant and decided to take it because he had been unsuccessful in finding other work in factories. He could not recall when he took the course or how long it was after he stopped getting money from the Union. He recalled that the course lasted 2–3 weeks. After he got his certificate, Ramos Frederick began looking for work as a home attendant, applying at the agencies that were on a list he got from the training

[98] For the reasons discussed above, I find that Francois' attendance at the home attendant course did not constitute a withdrawal from the labor market which would warrant tolling of backpay. In addition, I note that the Respondent has not proved that she attended this course during the backpay period. Francois could not recall when she took the course other than that it was long after the Union was all done with the strike and picketing and that it could have been in 1991 or 1992.

program. Ramos Frederick remembered looking for a long time at different agencies for work as a home attendant before he found such a job with Sunnyside Home Care. He obtained this job through the school where he had taken the home attendant course. He could not recall when he started working there, how long it was after he got his certificate, or how long it was after he stopped receiving money from the Union. He had only a vague recollection of starting this employment around the holidays, at the end of November or early in December and that it was cold at the time. A W-2 tax form issued to him by Sunnyside shows that his total 1991 earnings were $6,121.20.

The General Counsel did not deduct any of Ramos Frederick's earnings from Sunnyside as interim earnings, relying upon his "recollection" that he did not commence this employment until after the backpay period ended. Because it is unlikely that he would have earned more than $6000 from work as a home attendant in 6–8 weeks, I do not accept his recollection that he did not start this job until November 1991. Based on his testimony that he was paid $6 and change per hour and started out working only 5 hours a day, 3 days a week, which increased to as much as 12 hours a days, I find it more likely that he worked at this job for 4–6 months. This would appear to place some of his earnings from Sunnyside within the backpay period. However, for reasons to be discussed below, I find it more likely that he obtained this job shortly after the backpay period ended, in late August 1991.

As noted above, the General Counsel has deducted $80 in 1991 earnings from the Respondent as interim earnings in the first quarter of 1991. These earnings are reported on a 1991 W-2 tax form issued to Ramos Frederick by the Respondent. Ramos Frederick could not recall when he returned to work for the Respondent, other than that it was during the "strike" before the Union stopped paying strike benefits. He recalled that he went back to work when the Union told them to return and that, 2 days later, he and 10–20 others who had returned were terminated "because the company didn't want the strikers there." Based on his recollection, the General Counsel appears to have concluded that he returned to work in January or February 1991.[99] This would be inconsistent with the other evidence in the record. No other strikers returned at that time. In fact, the evidence in the record shows that there were only two mass recalls in 1991, the first in response to two separate offers of reinstatement sent by the Respondent in March and April, and the last, on August 20, 1991, that the General Counsel deemed sufficient to toll backpay. The Respondent, in possession of records that would have shown the precise dates that Ramos Frederick worked in 1991, did not offer any evidence on this issue, even though it was apparent on the face of the specification that earnings from the Respondent were being reported as interim earnings. Because it would have been in the Respondent's interest to show that Ramos Frederick returned to work in early 1991, thereby possibly tolling backpay before August 1991, it was incumbent upon the Respondent to produce such evidence. I must draw an adverse inference from its failure to do so. I find it more likely that Ramos Frederick returned to the Respondent's employ in response to the August 20, 1991 offer since there is evidence in the record of other strikers who returned at that time lasting only a few days before they too were terminated.

A finding that Ramos Frederick worked for the Respondent after August 20, 1991, and then obtained employment with Sunnyside would be consistent with the chronology of events as recalled by Ramos Frederick and as shown on the compliance form he signed in 1995. As noted above, he recalled taking the home attendant course after he returned from his April 1991 trip to Honduras and that he did not look for work as a home attendant until after he got his certificate. The compliance form lists three home attendant agencies where Ramos Frederick sought work, in May, June, and July "1990." Ramos Frederick must have been mistaken as to the year in which he sought work from these employers because he did not have a certificate in 1990. Moreover, the period from May through July 1990 was at the height of the strike and it is unlikely that he would have been seeking work as a home attendant at that time. I conclude that when he filled out the form, 4 years after the events, he confused the year and that he in fact sought work at Boricua Community Center, Personal Touch, and Special Touch in May, June and July 1991, respectively. This would also be consistent with his testimony that he looked for work as a home attendant for a long time before being hired by Sunnyside.

Considering all of the above, and trying to make sense out of Ramos Frederick's poor recall, I conclude that he looked for work at factories while receiving strike benefits, that he then worked for himself as a mover until he went to Honduras in April, that he took a home attendant training course sometime in April or May 1991, and then sought work at agencies employing home attendants until he was reinstated by the Respondent on August 20, 1991. After he was terminated 2 days later, Ramos Frederick found the job at Sunnyside which he held for 5 years. I find that these efforts to mitigate backpay were sufficient to satisfy his obligations as the victim of discrimination. Backpay should be tolled only for the period he was out of the country, in April 1991, which I shall calculate at three weeks based on his testimony. I shall not toll backpay for the period that Ramos Frederick was in training to become a home attendant for the reasons discussed above in connection with other discriminatees who availed themselves of this opportunity to improve there employability. Because I found that Ramos Frederick did not return to work for the Respondent until the end of the backpay period, I shall delete the $80 as interim earnings from the first quarter of 1991.

Accordingly, based on the above, I find that Ramos Frederick is owed $9,862.50, plus interest, under the Board's Order.

40. Tomas Guervara

The General Counsel amended the specification after the close of the hearing to toll Guevara's backpay as of September 19, 1990, the date that he was actually reinstated by the Respondent. The General Counsel also reported as interim earn-

[99] If this is the case, the General Counsel appears to be claiming that backpay continued to run for Ramos Frederick because his reinstatement was not proper. However, the General Counsel never explicitly stated that this was her theory to support a claim to backpay after actual reinstatement.

ings $275 that Guevara received from the Union, prior to his reinstatement, for performing "night shift" duty at the site of the picket line in September 1990. The only issue raised by the Respondent in its brief is whether there should be an additional deduction for the regular weekly strike benefits that Guevara received between August 13, 1990, and his reinstatement on September 19, 1990. I have already found, in section IV above, that the weekly strike benefits were not interim earnings. Therefore, I shall make no further reduction in Guevara's backpay claim.

Accordingly, Guevara is entitled to $663, plus interest, under the Board's Order.

41. Rafael Gomez

The General Counsel seeks backpay for Gomez in the amount of $5,046.84. There is no dispute that he obtained interim employment with the Union, as an organizer, in mid-February 1991 and that his interim earnings thereafter exceeded his gross backpay. The General Counsel does not seek backpay after the first quarter of 1991. The Respondent argues that Gomez is not entitled to any backpay before he obtained interim employment because he did not conduct a reasonably diligent search for work, as evidenced by the lack of documentation to support his testimony that he looked for work. The Respondent also relies upon the fact that Gomez received the maximum weekly strike benefit as proof that he spent his time at the site of the former picket line in lieu of looking for work. The Respondent also seeks to toll backpay for the last 2 weeks of 1990 when Gomez was admittedly out of the country, delivering Christmas presents to a family in the Dominican Republic.[100]

Gomez acknowledged that he received strike benefits from the Union every week from August 13, 1990, through February 1, 1991, except for the 2 weeks that he went to the Dominican Republic in December 1990. He recalled that he reported to the site of the former picket line every day, from 8 a.m. until 4:30 p.m. during this time. He testified, however, that he also was looking for work during this time by asking friends and relatives about prospective jobs and by reviewing the classified ads in the newspaper. If someone gave him the name of a place, or he clipped an ad from the newspaper, he would leave the picket line to apply for the job and return when he was through. Gomez testified that, if he went to a place and they told him that they would call him, or asked him to come back another time, he would write down the name and address so he would know where to go. With respect to those places where he was told there were no jobs, he discarded the paper or ad that he used to go to the place and kept no other record of his search. At some point, in April 1995, Gomez was asked to write down any places he could recall where he sought work during the backpay period. He compiled a list from the pieces of paper he could find and gave it to the General Counsel. Of the six places on this list, only three are dated within the backpay period, including the job he ultimately obtained with the Union. Several years earlier, on April 20, 1992, Gomez had signed a compliance form which is blank except for the personal information he filled out on the first page. Gomez could not recall why he did not list places he sought work or otherwise describe his efforts to find interim employment on this form. He speculated that he may have been told to provide the personal information and sign the form and return it to the Union. Gomez acknowledged that he could read and understand Spanish, the language the form was in.

I attach very little weight to the fact that the compliance form is blank. The fact that Gomez ultimately found interim employment and had substantial interim earnings is proof that he was seeking work. His explanation for why the list he gave the General Counsel in April 1995, more than 4 years after the events, is so sparse was plausible. It does not surprise me that he did not save the pieces of paper on which he had jotted down addresses of places where there were no jobs and only saved those that indicated there might be an opening in the future. I found his testimony describing how he sought interim employment credible. Accordingly, I shall not toll backpay for the period from August 13 through February 1, other than the 2 weeks that he was out of the country. To the extent that the Respondent seeks to deduct the strike benefits he received as interim earnings, I have already rejected this argument.

Accordingly, I find that Gomez is entitled to $4,631.88, plus interest, under the Board's Order.

42. Marie Gresseau

The General Counsel seeks backpay for Gresseau in the amount of $8017. Interim earnings are reported in the second and third quarters of 1991 from two jobs. The Respondent argues that Gresseau should receive no backpay for the period before she obtained interim employment because she limited her efforts to find interim employment to home attendant jobs. The Respondent argues further that backpay should be tolled for the 2 weeks in May 1991 that she attended the training course to become a home attendant.[101]

The Union's strike benefit records show that Gresseau received either $60 or $72 a week from the Union in all but 2 weeks of the backpay period prior to February 1, 1991. She received $48 for the week ending December 14, 1990, and the week ending January 11, 1991. This is consistent with Gresseau's testimony that she went to the site of the former picket line generally 5–6 days a week while receiving strike benefits. However, Gresseau testified that she looked for work during this period. Sometimes she went to look for work at 7 a.m., before going to the picket line site. Other times, she left the picket line in the morning to look for work and returned when she did not find any. Sometime in 1991, after the Union stopped providing strike benefits, Gresseau worked as a baby-

[100] The Respondent argues that the cost of Gomez round trip airline ticket should be deducted as interim earnings because the family for whom he transported Christmas presents paid for his transportation. Although such an in-kind payment for services could count as interim earnings, the Respondent did not prove the facts necessary to determine the amount of interim earnings to deduct, i.e., the cost of the airline ticket. Moreover, since I agree with the Respondent that backpay should be tolled for the 2 weeks that Gomez was out of the country, there is no gross backpay from which to deduct these "interim earnings."

[101] The Respondent also seeks to deduct strike benefits from any backpay awarded to Gresseau. I have already rejected this argument.

sitter for a woman who worked nights. She was paid $100 a week, in cash, for this work which lasted about 2 months. Although Gresseau could not recall which months she worked as a babysitter, the General Counsel has deducted $800 in interim earnings for this work in the second quarter of 1991.

Gresseau admitted that she did not look for any factory jobs, nor did she seek work using her previous sewing experience from work in Haiti. Instead, Gresseau limited her efforts to find work to home attendant jobs. She explained that she had decided that, if she left factory work, she would not go back to it. Although she acknowledged being aware that she needed a certificate to work as a home attendant, she did not take the training course until May 1991. Gresseau testified that she applied for home attendant jobs before taking the course in the hope that one of the agencies would hire her and send her for training. She testified that friends told her that the agencies will provide such training and that she should take a chance by applying for such jobs without a certificate. Unfortunately, none of the agencies she applied to hired her before May, when she finally took the course that the Union offered. After she completed this course and got her certificate, she was hired by Community Home Care, on July 31, a job she held for 7–8 months before finding her current job. When asked by the Respondent's counsel why she waited so long to take the course, Gresseau testified that she expected to be reinstated by the Respondent because the "Labor Board" told her that the Respondent had to take her back. Only when the strike benefits ended, did she realize that the Respondent was not going to take her back. She denied, however, that she waited until the strike benefits stopped to look for work.

The Board has held that a discriminatee is obligated to seek work that is "substantially equivalent" to the position he or she held with the respondent. A discriminatee who limits his or her job search to jobs that are not substantially equivalent may be found to have incurred a willful loss of earnings. See *Tubari Ltd., Inc. v. NLRB,* 959 F.2d at 454; *NLRB v. Madison Courier, Inc.,* 472 F.2d at 1318. Here, there is no dispute that Gresseau did not seek work similar to the work she did for the Respondent, choosing instead to limit her job search to work as a home attendant that she knew she was not qualified to do. Had Gresseau looked for substantially equivalent work while also seeking a job that would provide training to become a home attendant, her efforts would have satisfied the Board's standards. Similarly, had Gresseau taken the training course earlier and then limited her search to jobs for which she had been trained, I would be less inclined to find a willful loss. However, she admittedly continued to look only for home attendant jobs, without the requisite certificate, even after it became apparent that none of the agencies were going to send her for training. I find that this did not satisfy her duty to mitigate backpay.

Because the Board generally allows discriminatees a period in the beginning of the backpay period during which they will not be penalized for failing to seek interim employment, I will toll Gresseau's backpay only for the fourth quarter of 1990 and the first quarter of 1991 for her failure to seek substantially equivalent employment. The Respondent's piecemeal reinstatement offers in August and September, which would cause a discriminatee to reasonably believe that reinstatement was imminent, are further reason not to penalize Gresseau in the third quarter of 1990. By the second quarter of 1991, Gresseau no longer limited her search to home attendant jobs, as evidenced by her willingness to take a job as a babysitter for 2 months. From that point forward, she satisfied her duty to mitigate, as further evidenced by her attendance at the training course and her successful search for a home attendant job in the third quarter of 1991. Because her attendance at the home attendant training course was intended to and did in fact help her to obtain interim employment, I shall not toll backpay for those 2 weeks.

Accordingly, based on the above, I find that Gresseau is entitled to $3,403.90, plus interest, under the Board's Order.

43. Rufino Guity

The General Counsel seeks backpay for Guity in the amount of $7,291.95. He has interim earnings reported from employment as a cook in a restaurant in Manhattan starting in March 1991 and continuing through the remainder of the backpay period. The Respondent argues that Guity should be denied backpay for the period August 13, 1990, through February 1, 1991, when he was receiving strike benefits from the Union, because he did not conduct a reasonably diligent search for interim employment. The Respondent's argument is based upon it's contention that Guity's testimony was not credible.

Guity acknowledged receiving $200 a week and $5 a day from the Union during the period August 13, 1990, through February 1, 1991. He received the higher amount of strike benefits because of his job as a machine operator before the strike. As the Respondent points out, the amount he received from the Union was almost equal to his gross backpay. Guity testified that he went to the site of the former picket line Monday through Friday during this period and generally remained there once he arrived. However, he testified that he had no set time to arrive or leave the site and denied that he was there when the Respondent opened in the morning and closed in the afternoon. Thus, his attendance at the site of the picket line is not incompatible with his testimony that he was also looking for work during this period.

Guity testified that he looked for work by himself and with others, including the union representatives. He recalled looking for work with Pablo Guity, who in fact found interim employment early in the backpay period, and two other discriminatees who are now missing. The fact that Pablo Guity was working by the end of September 1990 is not inconsistent with this testimony because Rufino Guity did not testify when he looked for work with Pablo and he could very well have done so in August and September 1990. Guity testified further that he went to many places, with the Union and on his own, but he could recall only four of them at the time of the hearing. Although he kept a record of the places he went seeking work, he no longer had this list.

Guity signed a compliance form on May 7, 1992. He testified that he did not fill out the form himself and did not use his own recording of places he sought work to complete the form. Instead, he apparently relied on Tigus or someone else from the Union to write down the names of places and the dates he sought work. According to Guity, the Union knew where he

went and when because they were the ones who took him to these places. Upon reviewing the form, Guity was able to recall going to several of the places, but not all of them. The form list a number of places as places that Guity sought work after March 1991, by which time he was already working at the restaurant. Guity testified that the Union did take him to look for work, even after he found work. I find this to be unlikely, considering the number of other discriminatees who were still unemployed at that time and the fact that his job at the restaurant was virtually full time.

Guity candidly acknowledged that he did not list his job at the restaurant on the form because he was being paid "off the books," i.e., in cash. He also acknowledged not filing an income tax return as to these earnings. Guity also admitted that, when he was first employed by the Respondent in 1984, he used his cousin's name and social security number. He testified further that he only did this from 1984 to 1986. Guity denied that he worked under any other name or social security number during the backpay period.

Guity testified that he found the job at the restaurant, whose name he could not recall, through a brother-in-law, about a month after he stopped receiving strike benefits from the Union. He was paid $5 an hour in cash and the hours he worked varied from week to week, sometimes more and sometimes less than 40 hours/week. The most he ever worked was 50 hours in a week. The Respondent argues that because his strike benefits equaled his earnings from the Respondent and because he admitted being at the site of the picket line during the workday, I should infer that he did not begin to look for work until after February 1. The Respondent argues that his contrary testimony is incredible for a number of reasons, including his admitted failure to file an income tax return, failure to disclose interim employment in 1992 when he signed the compliance form, and his use of someone else's name and social security number to obtain employment with the Respondent in 1984. These actions in Guity's past, demonstrating a lack of trustworthiness, do not convince me that he was being untruthful in his testimony regarding his efforts to find interim employment prior to February 1, 1991. Although Guity may not have disclosed his interim earnings in 1992, he clearly had provided this information before the hearing. Because he was being paid off the books, the General Counsel would have no way of knowing about this employment but for Guity's reporting it. I also note that Guity did not attempt to deny that he worked under another name and social security number when first employed by the Respondent, 14 years before the hearing. His testimony regarding his efforts to find work was consistent with other evidence in the record regarding the Union's efforts to find work for the discriminatees. In addition, Guity was able to recall enough specifics regarding his job search to show that he was not fabricating evidence.

Because Guity's testimony that he was seeking interim employment during the same period that he was receiving strike benefits is credible, and because he ultimately found substantially equivalent employment which he maintained through the remainder of the backpay period, I find that he satisfied his duty to mitigate backpay. Therefore, I shall not toll backpay for any part of the backpay period.

Accordingly, I find that Rufino Guity is entitled to $7,291.95, plus interest, under the Board's Order.

44. Yolanda Heurtelou

The General Counsel seeks backpay for Heurtelou in the amount of $8416. No interim earnings are reported. The Respondent argues that Heurtelou should receive no backpay because there is no credible testimony or documentary evidence to support a finding that she sought work during the backpay period. The Respondent's argument requires that I discredit Heurtelou's testimony that she did look for work but was unsuccessful in finding any.

Heurtelou testified that, during the backpay period, she received money from the Union every week and went to the site of the former picket line outside the Respondent's facility every day. She testified that she arrived there by 8 a.m. and remained until the end of the Respondent's workday. She testified further that she looked for work in the morning, before going to the Respondent's facility, leaving her home at 5 a.m. to arrive at factories by 6 or 6:30 a.m. to seek work. If there was no work, she went to the picket line site. This testimony is consistent with that of several other discriminatees who described going to factory gates early in the morning to see if any workers were needed that day. This appears to be a routine way for people like the discriminatees here, who do not speak English, have no skills, and may have questionable legal status in this country, to find work in the New York metropolitan area.

Heurtelou testified further that the Union also took her to look for work, in cars driven by the union representatives, two or three times a week. She recalled that she looked for work by herself every day in some weeks, and less often other weeks. Because she cannot read or write, she kept no list or other record of the places she went. Heurtelou also testified that she had friends look in the Daily News for job openings and, if they saw any, she would go to those places. Heurtelou also asked friends if they knew of any jobs and she pursued any leads given to her. Heurtelou also recalled looking for work at day care agencies taking care of children because she had experience doing this. Despite these efforts, she found no work during the backpay period.

On April 19, 1992, Heurtelou signed a compliance form that was filled out by someone else because she can not read or write. She could not recall whose handwriting was on the form. She did recall that the Board agent who interviewed her then told her that the places she was able to recall were too few and suggested that she go back to the places she looked for work to try to refresh her memory. She testified that the five places listed on the form (which were addresses or streets where she looked for work) were the only places she could recall at the time of the interview. On the form, all are dated after she had been reinstated and terminated by the Respondent in October 1991. Heurtelou testified that she had a second meeting with a representative of the NLRB about 2–3 weeks before she testified when she was again asked where she had gone to look for work and, this time she provided other places she had remembered in the intervening years. During questioning by the Respondent's counsel, Heurtelou acknowledged that she looked for work after she was terminated by the Respondent, perhaps

more aggressively because she was not receiving any money from the Union, and that she generally sought work in the same manner. However, she was affirmative in her testimony that she had sought work during the backpay period, even if she could not recall where and when she did so

I note that Heurtelou was 56–57 years old during the backpay period, could not read or write and had limited to no ability to speak or understand English. With such a vocational profile, it would not be surprising that she was unsuccessful in her job search efforts. Contrary to the Respondent's assertions on brief, Heurtelou's responses to questioning by the General Counsel were not significantly different from her responses to questioning by the Respondent's counsel. Any difference was the result of the difference in the manner of questioning. The Respondent's counsel essentially limited Heurtelou's ability to provide information by asking her leading questions that did not allow her to describe in detail what she did to find work. The General Counsel asked her a direct, open-ended question, e.g., "how did you go about looking for work?" Obviously she provided more information because she was allowed the opportunity to do so. Moreover, her responses to the Respondent and the General Counsel were consistent in that she told both counsel that she sought work at day care agencies during the backpay period and that union representatives took her to look for work during the time she was at the picket line site. At worst, Heurtelou had a poor recollection of the details of her efforts to find interim employment. In light of the fact that she had no record of the places she went, not being able to read or write, her poor recollection is not surprising. At the same time, her general recollection of going with the Union to look for work and asking friends about job vacancies, going to factories in the early morning, etc., is what one might expect from a witness so long after the events. A discriminatee's inability to recall facts regarding her job search, or poor recordkeeping is not evidence of an inadequate search for work. See, e.g., *NLRB v. Arduini Mfg.,* 394 F.2d at 423; *December 12, Inc.,* 282 NLRB at 477; *Laredo Packing Co.,* 271 NLRB at 556. I find nothing in Heurtelou's testimony, nor in the record as a whole, to suggest that her testimony was a complete fabrication and that she in fact did not look for work. On the contrary, I find, based on her testimony, that Heurtelou did conduct a reasonably diligent search for work under the circumstances and satisfied the Board's test for mitigating backpay.

Accordingly, I find that Heurtelou is entitled to $8416, plus interest, under the Board's Order.

45. Therese Jean

The General Counsel seeks backpay for Jean in the amount of $8,169.10. She has interim earnings reported from two jobs in 1991. The Respondent argues that Jean should receive no backpay because she did not conduct a reasonably diligent search for work during the backpay period. The Respondent bases its argument on the fact that she did not find interim employment until after the strike benefits stopped and a purported four-month gap on the compliance form she signed in May 1992. According to the Respondent, this evidence establishes that she did not begin to look for work until after the Union stopped providing strike benefits and that her efforts were "sporadic" at best.

Jean testified that she did look for work during the entire backpay period. She recalled that the gentlemen from the Union, including Giles Robinson, Tigus and Joe (Blount), took her in their cars to look for work two or three times a week during the time she was at the site of the picket line. She recalled being taken to New Jersey, Long Island and Brooklyn. She also testified that she asked friends and relatives if they knew of any jobs for her and that she would either go with these people or by herself to pursue such leads. In fact, the two jobs she found during the backpay period were referred to her by a relative. Jean testified that she worked for Just Packaging for about a week in March 1991 and was laid off with others because work was slow. She was told that she would be recalled but they never called her back. Jean continued to look for work after her layoff until she was hired by Idea Nuova in about June 1991. She continued to work for this employer until the Respondent reinstated her on August 20, 1991. Paystubs and her social security earnings record established the amounts of her interim earnings and the approximate quarter in which they were earned.

The Respondent argues that the compliance form that Jean signed in May 1992 is internally contradictory and inconsistent with her testimony. In the space where a discriminatee is asked to list places he or she sought work, the form at first indicates that she looked "weekly" and then lists places by specific months with no places listed for the months of January through April 1991. Jean testified that she can not read or write in English or Creole and that someone filled out the form for her. She recalled being asked about her efforts to find work and providing answers, but she could not read what was written down and did not know what was on the form. Under these circumstances, it would be inappropriate to reject her sworn testimony in favor of what was put on the form. In any event, I see nothing inconsistent with someone writing down that they looked for work weekly and then listing those places they could recall by month. The "gap" may be the result of a failure to recall specific places for that period, rather than a failure to look. The fact that Jean found a job in March proves she was looking for work that month, notwithstanding what is on the form. Finally, I note that the Board requires that I consider Jean's efforts over the entire backpay period and that a lapse or hiatus in a discriminatee's job search does not prove a willful loss if other evidence shows that the discriminatee was diligently seeking work. Here, the fact that Jean looked for work with the Union from August through January, found work in March and then found another job in June is sufficient to establish that she was reasonably diligent in her efforts to mitigate backpay, even assuming there was a 4-month hiatus in her efforts.

Accordingly, I find that Therese Jean is entitled to $8,169.10, plus interest, under the Board's Order.

46. Rene Geronimo[102]

The General Counsel seeks backpay for Geronimo in the amount of $9,047.20. There are no interim earnings reported. The Respondent argues that no backpay should be awarded to Geronimo because the only evidence in the record that he searched for work is his testimony, which the Respondent contends is not credible. The Respondent relies upon Geronimo's lack of recall, alleged "evasiveness," and the undisputed fact that he used an invalid social security number when he worked for the Respondent.[103]

Geronimo testified that he searched for work during the backpay period by asking his coworkers on the picket line if they knew of jobs, checking the want ads in the Spanish-language newspaper, and going to factories and other places in Brooklyn, Manhattan, and the Bronx to look for work. He could not recall the names of any of the places he went seeking work and he did not keep any list during his job search. He could not recall how often he looked for work, but he remembered looking for work on days he did not go to the site of the former picket line, occasionally leaving the site to look for work, and going out to look for work anytime he saw an ad in the paper or someone told him about a job. He admitted that he did not look for work every day. He went by himself to look for work.

Geronimo recalled initially that he went to the site of the former picket line and collected money from the Union during the entire backpay period. He testified that he went there from 5 to 7 days a week, generally arriving at 7 or 8 a.m. He was not always there at the beginning of the Respondent's work day and had no set time to leave. According to Geronimo, he left the picket line site any time between 12 noon and 5 p.m. As noted above, he occasionally left to go look for a job. The Union's records in evidence show that he only signed a receipt for strike benefits through the week ending November 2, 1990. These records also show that he did not always receive the maximum amount as a weekly benefit, indicating that he was absent from the picket line even during the period he was receiving strike benefits. This is consistent with his testimony that he was looking for work even while attending the picket line. When it was pointed out to Geronimo that the Union's records do not show him receiving any strike benefits after November 2, Geronimo testified that he could not remember dates and really had no recollection if he went to the picket line every day until the end. When the Respondent's counsel asked if the reason he stopped receiving money from the Union is that he was working, Geronimo replied that he could not remember. Earlier, he had testified several times that he did not work at all during the backpay period.

Geronimo candidly admitted that the social security number he used when he worked for the Respondent was not a valid number. He denied using any other social security number during the backpay period. Geronimo testified that, when he looked for work and filled out applications, he wrote down this invalid social security number. He denied that any prospective employer ever questioned his social security number, or refused to hire him because of it. He denied that this affected his search for work.

Geronimo's lack of recall regarding the places he sought work or the frequency of his efforts and his failure to keep any records of his efforts is not fatal to his claim for backpay. Nor is the fact he was unsuccessful in his efforts sufficient to deny him any backpay. The Respondent suggests that his inability to remember whether the reason he did not receive strike benefits is that he was working is sufficient to prove he had concealed earnings during the backpay period. The Board requires affirmative proof that a discriminatee was working and hiding earnings during the backpay period before it will deny him a remedy under the Act. See *Hagar Management Corp.,* 323 NLRB 1005, 1007 (1997); *American Navigation Co.,* 268 NLRB 426 (1983). Geronimo's inability to recall falls short of this proof.

I credit Geronimo's testimony that he did look for work, in the manner he described, during the backpay period. At worst, Geronimo's poor recollection creates a doubt as to the diligence of his efforts to mitigate backpay. Under well-established Board law, such doubts are to be resolved against the Respondent to ensure that violations of the Act do not go unremedied. Finally, the fact that Geronimo did not have a valid social security number during the backpay period, by itself, does not warrant denial of backpay. The Board, with approval of the Second Circuit, has clearly held that undocumented aliens are entitled to the Board's remedies when they are the victims of unfair labor practices. Based on Geronimo's testimony, I find that problems he had with his documentation during the backpay period did not adversely affect his efforts to find interim employment.

Accordingly, I find that Geronimo is entitled to $9,047.20, plus interest, under the Board's Order.

47. Louine Joseph

The General Counsel seeks backpay for Louine Joseph in the amount of $4560, representing her gross backpay for the period August 13, 1990, through March 31, 1991. Joseph was reinstated by the Respondent about April 1, 1991. The General Counsel has tolled backpay for a 3-week period at the beginning of the backpay period based on Joseph's testimony that she returned to Haiti for about 3 weeks in August 1990. No interim earnings are reported. The Respondent contends that Joseph is not entitled to any backpay based on her testimony that she had difficulty obtaining interim employment because she did not have a green card during the backpay period.[104]

Joseph testified that she went to the site of the former picket line generally 6 or 7 days a week. On those days that she went to look for work, she arrived outside the Respondent's facility at about 10:30 a.m. On other days she arrived earlier. Once there, she remained until about 4 or 4:30 in the afternoon. Jo-

[102] This discriminatee's name appears as amended at the hearing to reflect the correct spelling.

[103] The Respondent also argues, apparently in the alternative, that the amount of strike benefits Geronimo received should be deducted from his gross backpay. I have already rejected this argument at sec. IV above.

[104] The Respondent also argues, apparently in the alternative, that Joseph's backpay should be reduced by the amount of strike benefits she received from the Union. I have rejected this argument above in sec. IV of this decision.

seph recalled that she went to look on her own, with friends who spoke English, or with people from the Union. She had no specific recollection of places she went seeking work during the backpay period, but recalled looking for work in Brooklyn, the other boroughs and Long Island. She recalled further that she looked for work 2–3 times a week.

Louine Joseph can not read or write and she did not keep her own list of the places she visited in her job search. She recalled that, when the compliance form was filled out, a friend filled it out for her and she signed it. It appears that, when this form was filled out, she relied upon records kept and the memories of others who had looked for work with her in completing the list on page 3. When asked about the names on the list, she had some recollection of going to these places to look for work. The fact that the places listed on the compliance form may not be the product of her independent recollection is not fatal to Joseph's testimony that she looked for work during the backpay period. It is not surprising that someone who can not read or write and speaks very little English would rely upon others to keep track of such things and fill out the form. I credit Joseph's testimony that she did look for work, on her own and with the help of the Union. Her inability to recall specifics 7–8 years later is not a sufficient basis to discredit her testimony.

Louine Joseph volunteered the testimony that her lack of a green card was an obstacle to finding work. She recalled that "every single place" she went to look for work asked for a green card and she did not have one. All she had at the time was a social security number that she acknowledged was not good.[105] She testified further that, "if you don't have work permit, you cannot work" and acknowledged that she did not have a work permit during the backpay period.[106] As was the case with Michelet Exavier, the Respondent did not establish the existence of any specific job that Joseph was unable to accept because of her lack of documentation. Her testimony reflects her own belief as to the reason she was unsuccessful at finding work. It does not establish that there were any jobs for which Joseph would have been hired if she had a green card or work permit. It is clear from other evidence in the record that there were employers, even in 1990–1991, who were willing to hire discriminatees who lacked documentation. For example, Exavier found a job notwithstanding an invalid social security number. Although Joseph did not find such an employer willing to hire her, I decline to penalize her where she in fact attempted to mitigate backpay by seeking work at many places and was not willfully idle during the backpay period.

Accordingly, I find that Louine Joseph is entitled to $4560, plus interest, under the Board's Order.

48. Ghislaine Joseph

The General Counsel seeks backpay for Ghislaine Joseph in the amount of $5,781.07. She has interim earnings reported from work as a babysitter in the first quarter of 1991 and from two interim employers, Intercontinental Casing Corp. and Just Packaging, in the second and third quarters of 1991. The Respondent argues that there is nothing in her testimony or the documentary evidence to establish that she looked for work before February 1, 1991. The Respondent relies on the fact that she did not find interim employment until after the Union stopped providing strike benefits as proof that she did not begin looking for work until after February 1. The Respondent argues further that she incurred a willful loss when she "quit" her interim employment at Intercontinental Casing to go to Haiti when her father died and that backpay should be tolled for the two weeks she was in Haiti following his death.

Joseph testified that she looked for work during the backpay period, on her own and with Tigus and others from the Union. Because she can not read or write, she relied upon the people who took her to look for work to write down or record the places she visited. When it came time to complete the compliance form for the Board's regional office, she again relied upon someone from the Union to fill out the section which asked her to describe her efforts to find work. According to Joseph, because the people who helped fill out the form were with her when she looked for work and "knew more than she did," she trusted them to fill out the form for her. She acknowledged her signature appears on the form, but she could not read it before signing. Joseph did have an independent recollection of three of the places she went seeking work, Marcel Mirror and two others identified by the name of the owner, but she could not remember when she went there. She also recalled going to see Wilson Desir, identified previously as a leader in the Haitian community, several times, telling him that she needed a job. He only gave her the names of people who were looking for someone to spend the night in their houses, work she did not want to do.[107] He never referred her to any factory jobs.

Although the places listed on the compliance form may not have been the product of Joseph's independent recollection at the time she signed the form, I find that she described her efforts to find work with sufficient particularity to convince me that she was not fabricating this evidence. Her lack of recall regarding dates, names of places, etc., is understandable considering the passage of time and the fact that she can neither read nor write. Moreover, the fact that she worked as a babysitter for 12 weeks, found two jobs during the backpay period and worked for a considerable period of time convinces me that she was not willfully idle during any part of the backpay period. Accordingly, I find that Joseph satisfied her duty to mitigate backpay by conducting a reasonably diligent search for work.

Joseph testified that she worked for Intercontinental Casing Corp for about 6 weeks until she received a call from Haiti that her father had died. She testified further that she obtained permission to go to Haiti from this employer but, when she returned in 2 weeks, she was told there was no job for her. She then went and found the job at Just Packaging, which she recalled holding for about 6 weeks until she was told there was no more work for her. The actual earnings she received from

[105] It was apparently good enough for the Respondent to hire her on November 5, 1986, the day before the effective date of the IRCA which, for the first time, imposed sanctions on employers who knowingly hire undocumented aliens.

[106] Joseph subsequently obtained a green card and valid social security number, in 1993.

[107] It appeared that Joseph was describing work providing overnight care for a sick person in their home, similar to a home health aide or home attendant.

these two jobs are reported on her social security record. Although she testified at the hearing that her father died and she left the job at Intercontinental Casing about July 7, 1991, the compliance form filled out in 1992 indicates that she left this job on May 7 and began working at Just Packaging on May 29. I will accept these dates as they were recorded closer in time to the events and are more reliable than her recollection at the hearing almost 7 years later. I also note that the these dates are consistent with her description of the sequence of events, i.e., her father died on the seventh, she left the country for 2 weeks, returned to find her job was gone and found another job at Just Packaging.

I do not agree with the Respondent that Joseph voluntarily quit her employment with either interim employer. She had permission to go to Haiti and only learned on her return that her job was no longer available. This is hardly a "willful loss," unless the Respondent is suggesting that it is somehow voluntary to return home for a parent's funeral! Similarly, Joseph was told when she was terminated by Just Packaging that there was no more work. This is consistent with the testimony of other discriminatees who worked for the same interim employer indicating that they too were laid off when there was no work. I therefore find that Joseph did not incur a willful loss when her interim employment ended at these two jobs. I find further that, under the circumstances, it would be inappropriate to toll backpay for the two weeks that Joseph was out of the country when her father died. She testified that she had permission to leave and expected to return to the same job. Thus, this was not a withdrawal from the labor market as occurred when other discriminatees left the country while unemployed.

Accordingly, based on the above, I find that Ghislaine Joseph is entitled to $5,781.07, plus interest, under the Board's Order.

49. Marc Olyns Joseph

The General Counsel seeks backpay for Marc Olyns Joseph in the amount of $9540. No interim earnings are reported. The Respondent argues that Joseph should receive no backpay based on his admission that he did not look for work during the time he received strike benefits from the Union. The Respondent argues further that his testimony shows only minimal efforts to find interim employment after he stopped receiving strike benefits and that these minimal efforts are insufficient to satisfy his obligation to mitigate backpay.

Joseph testified that he went to the site of the former picket line every day, Monday through Friday, arriving by 8 a.m. and remaining there until 5 p.m.. He left the site only to get lunch. Joseph testified further that he was absent from the site of the picket line only for a few days in September or October 1990 when he had pneumonia. He stated clearly, without prompting, that he did not begin to look for work until after the Union stopped paying strike benefits, on February 1. He recalled that in March 1991, he started to look for work with Tigus and other unreinstated strikers. This testimony is consistent with the compliance form filled out in 1995 at the Board's Regional Office with his brother serving as interpreter. On that form, where he was asked if there was a time during the backpay period that he was unavailable for work, he replied "yes," in Creole. The dates of unavailability provided on the form are January 30, 1990, to February 1991, and reason given is the Creole word for strike. I find, based on the witness' admission, that he falls into the category of discriminatees who chose to support the Union by going to the picket line site at the expense of seeking work. As a result, he is not entitled to backpay for the period from August 13, 1990, through February 1, 1991. *Ozark Hardwood Co.,* supra.

As noted above, Joseph testified that he did look for work after February 1. Although he recalled going with Tigus and others to many factories, he could not recall the names of any of these places. He did not keep a list, probably because he cannot read or write. He testified that he also looked for work on his own, by taking the train to Manhattan and Queens and going to factories he learned about from people who worked there. He specifically recalled going to one factory in Queens where they made shirts and recalled that his brother also took him to his job at the Wall Street Journal. Although he went to the latter place in March 1991, he was not hired for this job until after he had been fired by the Respondent in October 1991.[108] The section of the compliance form where he was asked to describe his efforts to find work during the backpay period is blank except for Joseph's signature. As noted above, Joseph did not fill out the form himself because he cannot read even Creole. His brother acted as translator when he met with the Board agent to fill out the form. He could not recall why this section is blank. This blank section is not consistent with Joseph's testimony that he did look for work. I find his testimony credible and shall give it more weight than the absence of information on a form completed by someone else. I note that Joseph was truthful in admitting that he did not look for work before February 1. This enhances his overall credibility. Because the form was not completed until 1995, and because Joseph had kept no records of his job search, it is possible that this section was left blank because he could not recall where he went and not because he did not look for work at all. His testimony at the hearing also indicated a lack of recall regarding the specifics of his efforts to find work. I find, based on Joseph's testimony, that he did seek interim employment during the period from February 1 until he was reinstated by the Respondent on August 20, 1991. His inability to recall details and failure to document his job search is no basis to deny him backpay.

Joseph testified that, during the backpay period, he did household chores for his father. He was not paid for this work, but his father let him stay in his house. The Respondent argues that the "room and board" provided by Joseph's father should count as interim earnings. While the Board will deduct in kind payment for services as interim earnings, it is still the Respondent's burden to establish the value of such payments and the quarter in which they were earned. Here the Respondent did not ask Joseph any questions regarding the duration and frequency of this "work" he did for his father, nor did he attempt to put a value on the "room and board" that could be used to calculate the amount of any deduction. Moreover, the arrangement that

[108] Joseph's brother is Acces Joseph, another discriminatee. The record shows that Acces Joseph worked for a contractor delivering the Wall Street Journal throughout most of the backpay period.

Joseph had with his father appears to be no more than what would exist in any situation where a parent helps out a child who finds himself unemployed and short of funds. Under these circumstances, I find that no offset is warranted for any "work" Joseph did for his father during the backpay period.

Accordingly, based on the above, I find that Marc Olyns Joseph is entitled to $5040, plus interest, under the Board's Order.

50. Leanna Joseph

The General Counsel seeks backpay for Leanna Joseph in the amount of $10,076.63. There are no interim earnings reported. The Respondent argues, essentially based on credibility, that Joseph is not entitled to any backpay. The Respondent contends that her credibility is adversely impacted by her use of more than one social security number; the manner in which the compliance form was filled out; her "selective memory" and her admission that she did not begin to look for work until after the Union's strike benefits ceased. According to the Respondent, Joseph's testimony was "replete with inconsistencies and contradicted by the contents" of the compliance form.

Joseph acknowledged her signature on the Union's strike benefit records, which show that she received the maximum weekly benefit every week from August 13, 1990, through February 1, 1991. She testified that she was at the site of the former picket line 7 days a week, from 8 a.m. until 5 p.m. and did not leave the site during the day. When asked when she began to look for work, she replied after the strike was over. When asked when that was, she said August 13, 1990. When she was shown the Union's records showing that she received benefits until February 1, she testified that she went to look for work, "after the money was finished." In response to questions from the General Counsel, she again said she looked for work immediately after the strike was over on August 13, 1990. However, when asked how long she was on strike, she said 1 year, i.e., from January 30, 1990, to February 1, 1991. At one point, she testified that she was not supposed to look for work because she was on strike. I find, based on this testimony, that Leanna Joseph did not look for interim employment until after February 1. As discussed above, she is not entitled to backpay for the time she chose to support the Union by remaining outside the Respondent's facility at the expense of seeking work.

The Respondent argues that there is no credible evidence that she looked for work at any time during the backpay period. The Respondent bases this argument primarily on Joseph's inability to recall specifics of her job search and the unreliability of the information provided on her compliance form. Joseph testified that she looked for work with her sister, who speaks English and can write some English, and with friends of her sister. She also recalled that Tigus took her to look for work one time. She testified that she went to look for work with people who were already working so that there would be no competition if there were any openings. Even the Respondent's counsel conceded at the hearing that this was a sensible approach. She did not write down the names of any of the places she went seeking work but believed that the people who were with her did this. When it came time to describe her efforts to find work, in April 1992, Joseph had help from her sister in filling out the form. She testified that the places listed on the form were provided to her sister by the friends who had accompanied her on her job searches. Joseph herself could not recall where she went to look for work. She had no explanation why no places were reported for certain months on the form, but insisted that she looked for work every day of the week but Sunday, an obvious exaggeration. I attach very little weight to the compliance form Joseph signed in 1992. It is clear from her testimony that the information provided on page three of the form did not come from her. Whether her sister or her sister's friends were accurate or truthful in providing this information is irrelevant to a determination whether Joseph was being truthful during her sworn testimony at the hearing. Before resolving this issue it is necessary to discuss several other factors that the Respondent argues undermine Joseph's credibility.

The record shows that Joseph reported a different social security number on the compliance form in 1992 than that which appears next to her name on the Union's strike benefit records. She testified that the number she reported on the compliance form is her true number and that she gave a different number to the Union because she could not remember her number at the time. The Respondent's expert regarding the social security numbering system confirmed that the number Joseph gave the Union had not been issued yet. She also confirmed that the number Joseph claimed was her true number was issued in New York in 1988 or 1989. This is consistent with Joseph's testimony that she had been a resident of the U.S. since 1988.

The Respondent also contends that Joseph's responses to questions regarding the impact of her immigration status on her search for work were "unusual," "evasive," or "strange." I do not agree. When first asked this question, she replied that she had been residing here since 1988, apparently because she was taken aback by such a question. When the Respondent persisted, she replied that her brother is an American citizen and "gave me my permanent residence."[109] When the Respondent's counsel asked her if any prospective employers had asked her to provide documents, she replied, "If my green card was not good when I went to unemployment, I would not receive benefits." It came out later in her testimony that she had in fact received unemployment compensation while she was on strike in 1990, something which would not have happened if she were not lawfully residing and working in this country. The Respondent asked Joseph if she had been unable to provide documentation upon any employer's request at any time during the backpay period. Joseph replied that she was always able to provide documentation because she always had it with her. When I asked if she meant her green card, she replied affirmatively. Contrary to the Respondent's contention on brief, I did not suggest to her the appropriate answer. The transcript establishes that Joseph had already testified that she had a green card when she applied for unemployment benefits. This misrepresentation of the evidence by the Respondent, characteristic of many of its arguments at the hearing and on brief, does not persuade me that Joseph was lying.

I find that the Respondent has not met its burden of proving that Joseph did not conduct a reasonably diligent search for

[109] This may be a reference to preferences given to family members of American citizens under immigration quotas.

work after February 1, 1991. She testified that she looked for work and described generally the manner in which she did so. Her poor recall of dates, places and other details is not a basis for discrediting her. Similarly, the Board has declined to deny backpay to discriminatees who exaggerate their efforts. See *December 12, Inc.,* supra. Accordingly, I find that Joseph satisfied her duty to mitigate backpay by seeking interim employment after she stopped receiving strike benefits from the Union.

I find, based on the above, that Leanna Joseph is entitled to $5,323.51, plus interest, under the Board's Order.

51. Julmene Joseph

The General Counsel seeks backpay for Julmene Joseph in the amount of $6293. She has interim earnings reported from General Rag Co. in all three quarters of 1991. The Respondent, relying on the fact that she did not find interim employment until after the Union stopped paying strike benefits, argues that she did not look for work before February 1, 1991, notwithstanding her testimony to the contrary. The Respondent also argues that Joseph did not satisfy her duty to mitigate by working for General Rag because her interim earnings were substantially less than her gross backpay. The Respondent contends that, notwithstanding her contrary testimony, Joseph did not look for work during periods she was laid off from General Rag. The Respondent also seeks to toll backpay for a one-month period in the second quarter of 1991 when Joseph was in Haiti.[110]

Joseph testified that, during the time she was receiving money from the Union, Tigus took her to look for work. She recalled that they would go early in the morning and, if they did not find work, would return to stand outside the Respondent's facility where they waited to be recalled to work. She testified that she had no set time to arrive at the picket line, but once there, she remained until her fellow strikers went home. She testified further that, after she stopped receiving strike benefits, she returned on her own to some of the places where she had gone with Tigus. General Rag, where she found employment in February, was one of these places.

Joseph testified that she worked full time at General Rag from February until August 1991, but that, on about two occasions, she was sent home because work was slow. She testified that many workers were sent home at the same time. She recalled being told that she would be recalled when they had more work. According to Joseph, the first time this happened, she was home for two weeks before being recalled. She did not remember the length of any subsequent layoff. Joseph testified that she looked for work when she was laid off by General Rag, but did not find any other jobs. During the time that she worked for General Rag, Joseph went to Haiti, in May 1991. Her husband passed away on June 4, 1991, while they were in Haiti, and she remained there for about 3 weeks. She was absent from the U.S. for about 1 month in total. She apparently returned to work at General Rag after this absence because earnings are reported from this job through the end of the backpay period. The total amount of interim earnings reported are as reflected on Joseph's social security record.

In 1992, Joseph signed a compliance form that was filled out for her by Tigus. Because she had not kept any log of the places she sought work, she relied upon Tigus to record this information on the form. The form does not list any places that Joseph sought work after January 1991. Joseph testified that she did not look for work with Tigus after that date and that she did not remember the places where she went on her own. In explaining how the form had been completed, Joseph testified that Tigus took her to look for work and he knew where they had gone. All she knew was that she went with Tigus. It is clear from her testimony that the information on page three of the form is not the product of Joseph's independent recollection. Therefore, it would be inappropriate to deny backpay to Joseph because, as the Respondent argues, not enough places are listed on the form or because none are listed for the period after she found work. I shall rely instead on Joseph's sworn testimony at the hearing before me in assessing the sufficiency of her efforts to mitigate backpay.

I credit Joseph's testimony that she looked for work with Tigus on a regular basis during the period she was receiving strike benefits and that she continued to look for work on her own thereafter. She was successful at finding interim employment and did so on her own at a place she had gone to previously with Tigus. This tends to corroborate her testimony. I find further that the job she took at General Rag was substantially equivalent to that she had with the Respondent. I note that this employer is in the same business as the Respondent, that her hourly rate was equivalent to what she earned at the Respondent and, except when on layoff, she worked a 40-hour week. The reason her interim earnings did not equal her gross backpay is that she lost work due to a couple layoffs and the unfortunate loss of her husband. To the extent that Joseph was required to further mitigate backpay by looking for work during her layoffs at General Rag, I credit her testimony that she did. Because she was working for General Rag when she went to Haiti and returned to that job when she came back, her absence from the country is not akin to a withdrawal from the labor market. Rather, it appears more like a vacation that turned into bereavement leave. It is unclear from the record before me whether either the Respondent or General Rag provided paid leave to their employees for such absences. Joseph testified that General Rag did provide sick leave to its employees. Because of this uncertainty in the record, I shall not toll backpay for the period that Joseph was in Haiti in May–June 1991.

Accordingly, based on the above, I find that Julmene Joseph is entitled to $6293, plus interest, under the Board's Order.

52. Ucemeze Kernizan

The General Counsel seeks backpay for Kernizan in the amount of $7,608.85. She has interim earnings reported in the first quarter of 1991 from Typewrite Ribbon Mfg. Co., Inc. The Respondent argues that she should receive no backpay for the period before she obtained a home attendant certificate in June 1991 and that backpay should be tolled for the 2 weeks that she was in school to obtain that certificate. The Respondent relies

[110] The Respondent also argues that the strike benefits that Joseph received should be deducted from backpay as interim earnings. I have already rejected this argument in sec. IV above.

upon testimony from Kernizan indicating that she did not start looking for work until after the money from the Union stopped.

Kernizan testified several times that she started to look for work after the strike, using the French word for strike, "grev." She explained that the "grev" ended in August 1991 when there was no more marching, chanting, and picketing, but that the strike, in English, continued with people standing outside the Respondent's facility until August 1991. Her testimony became even more confused when she testified that she started to look for work after the money from the Union stopped. She testified further that, when the Union told the strikers there was no more money, "everybody started to look for work." Kernizan testified that, after the strike, she found interim employment at Typewrite Ribbon in late January or February and worked at this job for about 2 months until she was laid off with other employees because work was slow. She testified that she then looked for another job and took a two week home attendant training course. She took the course and got her certificate in June 1991. With her certificate, she got a list of agencies employing home attendants and used this list to look for such a job. She was unable to find any work as a home attendant before being reinstated by the Respondent.

The unsigned and undated compliance form which Kernizan acknowledged filling out supports her testimony by showing that she worked from February 1 to April 1991, that she took a training course and got her certificate and that she looked for work at home attendant agencies. Kernizan testified that she only put on the form the dates that she remembered, both in August 1991, and that she looked for work before August and at places other than those listed on the form. She recalled that she was given the form while at the Board's office and filled it out there. She stopped listing places when she ran out of space. When the Respondent's counsel asked if Kernizan kept a record of the other places she looked for work, she told him that she did and that she had the list in her pocketbook. The Respondent's counsel chose not to pursue this, but the General Counsel did. Kernizan identified a multipage list of places she sought work which was written out by her husband using the various pieces of paper on which she had recorded the places she sought work. This list was prepared in 1995 and indicates that she was looking for work before February 1991. Kernizan also identified the list of home attendant agencies she got with her certificate with checkmarks she placed next to the names of places she had sought such work.

The list that Kernizan carried with her in her purse was inconsistent with her testimony that she did not begin to look for work until she learned that the Union had no more money to give the strikers. Although there was some confusion in her testimony regarding when the "grev" or strike ended, she clearly linked the end of the strike benefits with the beginning of her efforts to find work. I therefore find that Kernizan incurred a willful loss by remaining at the site of the strike in lieu of seeking work through the end of 1990. Although Kernizan received strike benefits through January 25, she obviously began looking for work in January because she started interim employment before the Union's last strike benefits were paid. This is consistent with her testimony that people, including her, began looking when the Union told them there would be no more money. Accordingly, I shall toll backpay for Kernizan for the third and fourth quarters of 1990.

I find that, from January through the remainder of the backpay period, Kernizan satisfied her duty to mitigate by seeking interim employment. As noted above, she found interim employment which began in late January, worked there until she was laid off, resumed her search for work after her layoff and took the home attendant course in an attempt to improve her chances of finding interim employment. Kernizan specifically testified that she did not limit her efforts to home attendant jobs after getting her certificate. The list she carried in her pocketbook identifies a number of factory jobs where Kernizan sought work. Although it appears the 1990 date was added after the fact, I believe the actual places listed were an accurate representation of her job search after January 1991.

Accordingly, I find that Kernizan is entitled to $4,226.86, plus interest, under the Board's Order.

53. Maximo Lacayo

The General Counsel seeks backpay for Lacayo in the amount of $8,454.75. The only interim earnings reported are approximately 1 week's pay from People Care. Correspondence from this employer establishes that Lacayo started work there on August 13, 1991. There is evidence in the record that Lacayo had earnings in 1990 from two other employers, UFS Industries, referred to in the record as Sally Sherman Foods, and Envirosafe Construction. The General Counsel has not deducted these earnings from Lacayo's gross backpay, arguing that there is insufficient evidence in the record to establish that Lacayo worked for these employers after August 13, 1990. The Respondent concedes that the testimony and other evidence supports a finding that the job at UFS or Sally Sherman Foods, was outside the backpay period. The Respondent argues that Lacayo's earnings from Envirosafe should be deducted from backpay for the fourth quarter of 1990 because a preponderance of evidence establishes that is when he worked there. The Respondent also contends that no backpay should be awarded for the first two quarters of 1991 because Lacayo did not conduct a reasonably diligent search for work before he took the home attendant course in July 1991.

Lacayo testified that the first job he found after the strike commenced was at Sally Sherman Foods, where he worked for about 3–4 weeks before he quit because he was not making enough money. I agree with the parties that this occurred before the backpay period began. Lacayo testified that he returned to the picket line after quitting the job at Sally Sherman Foods and remained there, supporting the strike, until he took a course in asbestos handling after seeing an advertisement for it in the newspaper. He could not recall when he took this course other than that it was in the "middle of the strike." The course met on Saturday and Sunday over two weekends. He went to the picket line during the week while taking this course. After completing the course, Lacayo took a test to get his asbestos handling license from the city and began looking for work in this field. He was given a list of about 50–60 companies that perform this work. About a month later, he was hired by Envirosafe. He worked at this job from 4 p.m. until midnight, 5 days a week. He testified that he "sometimes" went to the picket line during

the day while holding this job. He worked there for 1-1/2 months until he was laid off when the job he was working on was finished. According to Lacayo, he was told when laid off that he would be recalled. Lacayo testified that he returned to the site of the picket line after his layoff and collected strike benefits until the Union stopped paying the strikers. Although he could not recall what months or season he worked for Envirosafe, he did recall that he was laid off close to the time the strike benefits stopped. The Union's strike benefit records for the period from October through early December are consistent with Lacayo's testimony that he "sometimes" went to the picket line while working at Envirosafe because there are two weeks when he did not sign for any strike benefits and several other weeks when he received only $24, $36, or $48, indicating less than a full week's attendance. In addition, the unsigned and undated compliance form that Lacayo acknowledged completing list the dates of employment at Envirosafe as "10/91 to 12/91." Because the W-2 tax form issued by Envirosafe establishes that he worked there in 1990, not 1991, it appears that Lacayo was off by a year when he filled out the form. This is apparent on the remainder of the form and from his testimony, in which he said he did not even have a clear recollection of events during the backpay period at the time that he filled out the form. Based on this evidence, I agree with the Respondent that a preponderance of the evidence establishes that Lacayo worked for Envirosafe during the fourth quarter of 1990. Accordingly, I shall modify his backpay award by deducting his earnings, as shown on the W-2, from gross backpay for that quarter.

Lacayo testified that, after he was laid off by Envirosafe, he waited to be recalled for a period of time, the length of which he could not recall. He also went to the site of the former picket line and collected strike benefits from the Union until they stopped. Lacayo testified that, while at the picket line, during the "middle of the strike," he went with Joe Blount from the Union to look for work. In addition, he began seeking other asbestos handling jobs, using the list he had received from the training program. He went to apply for these jobs with a friend, but could not recall how many he went to, or the dates he sought such work. He kept no records of his job search efforts during the backpay period. According to Lacayo, after being unable to find such work for a period of time, he took a home attendant training course offered by the agency that subsequently employed him. This was a 2-week course, during the day, which he attended without pay. Within days of completing the course and obtaining his certificate, he began working for People Care. Lacayo admitted that, from the time the strike benefits ended until he took the course to become a home attendant, he only looked for asbestos-handling jobs because the pay, $10/hour, was better.

Considering Lacayo's efforts over the entire course of the backpay period, I cannot agree that he incurred a willful loss by failing to conduct a reasonably diligent search for work. On the contrary, Lacayo made significant efforts to mitigate the Respondent's backpay obligation by seeking training for better-paying jobs and in fact working at such jobs. He also used the assistance of the Union to find work similar to that offered by the Respondent. Even if he limited his search to better-paying asbestos jobs from February until July, this would not be unreasonable in light of his earlier lack of success at finding the lower-paying factory jobs similar to his prestrike job with the Respondent. See *Associated Grocers,* 295 NLRB at 806; *Aircraft & Helicopter Leasing,* 227 NLRB 644, 645 (1976). For the reasons discussed above in connection with other discriminatees, I shall not toll backpay for the 2 weeks that Lacayo was training to become a home attendant. I note in particular that this training was provided by the employer which hired him upon successful completion of the course. His attendance at this training was therefore not equivalent to a withdrawal from the labor market which would warrant the tolling of backpay

Based on the above, I find that Lacayo is entitled to $6,374.75, plus interest, under the Board's Order.

54. Nevius Lambert

The General Counsel seeks backpay for Lambert in the amount of $6,860.55. He has interim earnings from General Rag Co. reported in every quarter of 1991. The Respondent argues that Lambert should be denied backpay for the period before February 1, 1991, because his efforts to seek work before the strike benefits stopped are "questionable."

I note initially that Lambert is mentioned in Judge Schlesinger's decision as one of the discriminatees who received an offer of reinstatement from the Respondent in September, after the date of return specified in the letter had passed. The judge found that, when Lambert tried to go back to work, on September 13, 1990, the Respondent turned him away. *Domsey Trading Corp.,* 310 NLRB at 800. Lambert remained outside the Respondent's facility and received strike benefits from the Union until he obtained employment at General Rag in mid-January 1991. He generally received the maximum weekly amount and recalled that he went to the site of the former picket line every day. Although he testified that he generally arrived at 8 a.m. and remained there until 5 p.m. or later, he also recalled that he sometimes arrived late in the morning when he went a great distance to look for work. Lambert testified that his brother-in-law, who drove a taxi and was supporting him during the strike, took him to many places to look for work. He could not recall the names or addresses of the places, because he can neither read nor write, but he recalled going to factories and other places. He testified that his brother-in-law would sometimes pick up other strikers at their homes and they would all go together to look for work. When they were finished, they would go back to the picket line. Lambert testified that Tigus also took him to look for work before he found the job at General Rag. Despite Lambert's generally poor recollection of the details, I found his testimony credible, particularly when the Respondent's counsel asked more direct questions that allowed the witness to provide information. His description of the manner in which he looked for work had the ring of truth and did not appear to be fabricated.

The Respondent relies on the fact that the compliance form signed by Lambert lists only two places a month during the period from August through December 1990 as demonstrating that Lambert's efforts were not reasonably diligent. However, because he is illiterate in English and Creole, Lambert did not fill out this form. He had almost no recollection regarding the

date or circumstances under which the form was completed. All he was able to do was identify his signature. Lambert testified that he believed his brother-in-law wrote down the names and addresses that appear on the form because it was his brother-in-law who kept track of where they went in a notebook. Lambert testified that he did this so that he would know where to go if the prospective employer called Lambert to come back. Under the circumstances, no weight should be attached to the form as a prior statement of the witness. Nor does it have much value as a past recollection recorded since it appears to be someone else's recollection. I find that Lambert's credible testimony, limited though it may be as a result of his poor recollection, is sufficient to establish that he satisfied his duty to mitigate backpay by conducting a reasonably diligent search for work. In fact, Lambert was successful in his effort, finding interim employment doing the same work for another employer in the same business as the Respondent.

Accordingly, I find that Lambert is entitled to $6,860.55, plus interest, under the Board's Order.

55. Fritho Lapomarede

The General Counsel seeks backpay for Lapomarede in the amount of $17,102.28. The only interim earnings reported are night-shift pay from the Union in the third and fourth quarters of 1990. The Respondent contends that no backpay is due to Lapomarede based on his failure to conduct a "reasonable and diligent" search for work. The Respondent essentially argues that Lapomarede's testimony regarding his efforts to find work is not credible. According to the Respondent, it is "incredible" that Lapomarede would search for work at a time when he was receiving money from the Union that was equivalent to or greater than his prestrike earnings from the Respondent. The Respondent also relies upon the number of places listed on Lapomarede's compliance form, his failure to keep any record of places where he sought work on his own, and his inability at the hearing to recall any places he sought work other than those listed on the form.[111]

The compliance specification establishes that Lapomarede worked 13 hours of overtime every week when employed by the Respondent before the strike. His gross weekly earnings were about $336/week. Lapomarede testified that there were times that he worked double shifts and brought home as much as $400 a week. During the period from August 13, 1990, through February 1, 1991, he received $200 a week in strike benefits from the Union, plus the $5 a day for food and transportation money. This is hardly equivalent to his prestrike earnings. His strike benefits from the Union were comparable to his gross backpay only for about 6 weeks in September and October when Lapomarede was performing night shift duty 2–3 nights a week for an extra $55/night. Contrary to the Respondent's argument, the amount of strike benefits Lapomarede received for most of the backpay period before February 1 was not sufficient to establish a motivation for him to not seek work.

Lapomarede testified that, during the period that he received strike benefits, he went to the site of the picket line every day, but he did not arrive at the same time, getting there "sometimes at 8:30, 9:00." He did not recall what time he left in the afternoon other than that it was the same time that others left the picket line to go home. When asked if he left the picket line during the day, Lapomarede volunteered that he did leave to go with Tigus to look for work. He recalled that he would go with Tigus once every several weeks. When he went with Tigus, he kept a record of the places they went so that Tigus would not take him to the same place twice. Lapomarede testified that he also went to look for work on his own, in the early morning before going to the Respondent's facility to join his fellow strikers. He recalled that he did this about two or three times a week. He did not keep a record of the places he went on his own because he would be able to remember on his own the places he had been and not duplicate his efforts. Lapomarede admitted that, after he stopped receiving money from the Union he spent more time looking for work. He testified that, since the strike was over and he no longer had to go to the Respondent's facility every day, he had more time to look.

Lapomarede filled out the compliance form himself without any assistance. The form is signed and dated April 21, 1992, but Lapomarede believed that he did not fill it out until 1993. He testified that the places listed on page three are places he went with Tigus because he had kept a record of such places. Lapomarede listed about one to two places for each month for the period August 1990 through March 1991. At the bottom of the page, he wrote, "more places I was looking." This is consistent with his testimony regarding the frequency of his job searches with Tigus and his testimony that there were other places than those listed where he sought work.

Despite the efforts he described, Lapomarede was unable to find interim employment. This is somewhat surprising considering that he was a young man at the time, with experience operating machinery for the Respondent, had prior work experience in a clothing factory here and at a community center in Haiti, could read and write English and had a better command of the English language than most of the other discriminatees. Other discriminatees with far worse vocational profiles managed to find some work in the course of a year. His lack of success at finding work for an entire 1-year period can only be explained by the fact, which he admitted at the hearing, that he did not have a green card.[112] Although Lapomarede twice denied that his lack of a green card impacted his ability to find a job, and denied that he was ever asked to produce a green card, I find that hard to believe in light of other evidence in the record. Had Lapomarede sought work as frequently as he claimed, visiting many potential employers and filing applications at some, at least a few would have asked to see immigration documents.

The real issue, in my mind, is whether Lapomarede should be denied backpay if in fact his lack of a green card limited his

[111] The Respondent also argues, as an alternative, that Lapomarede's backpay should be reduced by the amount of strike benefits he received. I have already rejected this argument above in sec. IV.

[112] The only other conceivable explanation is that Lapomarede was either lying about his efforts to find interim employment or had concealed interim earnings. Lapomarede did not appear to me to be an untruthful witness.

ability to obtain a job during the backpay period. Based on the Board's holdings in *A.P.R.A. Fuel Oil Buyers Group,* supra; *County Window Cleaning Co.,* supra; and *Hoffman Plastics,* supra, I conclude that this fact should not be a basis to deny a discriminatee all backpay. The Board has consistently held that backpay, as a retrospective remedy, is available to undocumented aliens as a remedy for an employer's unfair labor practices. To deny backpay to an individual discriminatee because he or she was unable to find interim employment because of a lack of documentation would render this holding a nullity. As is evident in this case, many of the discriminatees who lacked proper documentation during the backpay period found work. In addition, the record here and in the underlying unfair labor practice hearing establishes that the Respondent itself was willing to look the other way when an employee or applicant presented questionable documents. Under these circumstances, it would be unfair to deny someone like Lapomarede a remedy simply because he had been unable to find another employer like the Respondent who was willing to hire him without a green card.

Accordingly, based on the above, I find that Lapomarede is entitled to $17,102.38, plus interest, under the Board's Order.

56. Rachelle Louissaint

The General Counsel seeks backpay for Louissaint in the amount of $6,548.42. She has interim earnings from two employers, Belle Knitting Mills, Inc. and Just Packaging, in all three quarters of 1991. The Respondent argues that Louissaint is not entitled to any backpay for the period before she obtained interim employment at Belle Knitting. The Respondent contends that her compliance form is "suspect" because some of the dates on which she claimed to have sought work fell during a 3-week period when she was in Canada due to a family emergency. The Respondent also finds it suspicious that all the dates on the form on which Louissaint claimed she sought work were Mondays. The Respondent also seeks to toll backpay for the 3 weeks that Louissaint was in Canada and for a 1-month period when she admitted that she stopped looking for work.

The only issue with respect to Louissaint's claim for backpay is whether she conducted a reasonably diligent search for work during the period from August 13, 1990, through February 1, 1991, when she was receiving strike benefits from the Union. The Union's strike benefit records show that she received the maximum weekly amount in all but 3 weeks of that period. When questioned regarding the 3 weeks for which her signature is missing from these records, Louissaint volunteered that she had gone to Canada because a child who was living there had an emergency. She testified that, for those weeks when she received strike benefits, she went to the site of the former picket line Monday through Friday and sometimes on Saturday. She generally arrived by 8 a.m. and remained there until she went home at 4:30 p.m., but testified that she sometimes arrived later. She testified further that, during this time, Tigus used to take her and several other strikers to look for work, about two times a week. He would pick them up near their homes and, after they had finished looking for work, would take them to the picket line. Louissaint also testified that she went on her own to look for work about two times a week, except for a 1-month period beginning in mid-January when she stopped looking for work. When she resumed her efforts, in mid-February 1991, she was successful in finding the job at Belle Knitting. She worked there almost 2 moths until she was laid off. About a month later, she found work at Just Packaging. She was laid off by Just Packaging in July 1991, less than a month before the Respondent reinstated her.

Louissaint acknowledged her signature on the compliance form, which is dated April 23, 1992. She testified that some of the handwriting is hers and the rest is that of Tigus, who helped her fill out the form. She recalled filling the form out at a meeting with other strikers and the Union at the Church near the Respondent's facility which had served as a meeting place during the strike. The dates and names of places on page three, where Louissaint indicated she looked for work, were taken from a list she had kept during her job search. She no longer had this list, testifying it had been lost in one of two moves she made since 1992. When the Respondent's counsel pointed out that some of the dates on the form fell during the period when she said she was in Canada, Louissaint explained that she may have recalled the dates wrong. She also testified that she may have been mistaken regarding when she went to Canada because she was not on strike when she went to Canada. She testified that she did not list every place she sought work on the form because she was told by someone that the ones she wrote on the form were sufficient.

Considering the passage of time since the backpay period and the date she filled out the form, it is not surprising that Louissaint could not recall or adequately explain any discrepancies on the form. Although Louissaint recalled that she was not on strike when she went to Canada, I find it more likely that she went during the 3 weeks in October and early November 1990 when her signature is missing from the Union's records. No other explanation has been offered for her non-receipt of strike benefits at that time. Because this absence from the country was not related to her search for work, I shall toll backpay for those 3 weeks when she was out of the labor market attending to a family emergency. Although the compliance form may not have accurately reflected her efforts to find work, in light of the discrepancy regarding the dates listed, I nevertheless credit her testimony that she sought work with the help of Tigus and on her own during the time she was receiving strike benefits. As is apparent from my findings throughout this decision, I have no question that the Union did conduct a concerted campaign to find jobs for the strikers and there is no reason to believe that Louissaint did not participate in this effort. The fact that she ultimately found two jobs and worked throughout most of the backpay period corroborates her testimony that she was seeking interim employment. In addition, she had added incentive to find work because her father, with whom she was living, told her that she needed to get a job. Finally, I do not find that a 1-month hiatus in Louissaint's efforts to find work warrants tolling backpay where she looked for work throughout the remainder of the backpay period and in fact found work shortly after this break.

Accordingly, based on the above, I find that Louissaint is entitled to $6,066.77, plus interest, under the Board's Order.

57. Marie Louima

The General Counsel seeks backpay for Marie Louima in the amount of $10,103.11. She has interim earnings reported from two employers, Just Packaging and Idea Nuova, in all three quarters of 1991. The Respondent argues, essentially on credibility grounds, that Louima did not conduct a "reasonable and diligent" search for work during the period from August 13, 1990, until she started working at Just Packaging in March 1991. The Respondent cites the "coincidence" between the date the Union stopped providing strike benefits and when she found work, and her inability to recall the specific places she sought work, at the hearing and on the compliance form she signed in 1992, in support of this argument.

Louima testified that she would look for work with the gentleman from the Union on Mondays. She recalled that they left the site of the picket line at about 11 a.m. and would return any time between noon and 2 p.m. She also recalled looking for work on her own about once a week during the time she was going to the site of the picket line. She recalled that the gentleman from the Union took her to "Ya-Ya's," "Jeffrey's" and a place on Manhattan Avenue and that she herself went to Marsel Mirror on one occasion. She could not recall any of the other places she went seeking work, nor could she recall dates of these job searches. She did recall finding a job at one place, in March, where she worked for 12 days until they gave her check and told her there were no more orders. She then continued looking for work and found a job at another place where she was also laid off and then recalled. She worked at this place until she was reinstated by the Respondent. At the hearing, she was unable to recall anything other than the location of these two jobs. However, the compliance form she signed in 1992 has the precise names and dates of employment for Just Packaging and Idea Nuova. On that same form, when asked to describe her efforts to find work, someone wrote, in English, "I went to a lot of places looking for job. I was employed twice by the companies I mentioned previously and laid off." Louima can not read or write and speaks very little English. Obviously, someone else filled out the form for her, but she had no recollection who it was, or even when and where she was when the form was signed.

The fact that Louima could not recall the names and dates of the places where she looked for work is not fatal to her claim for backpay. Her testimony at the hearing, limited as it was, was consistent with the statements on the form she signed in 1992, within 2 years of the backpay period. She recalled enough details to convince me that she was not fabricating her testimony that she looked for work during the backpay period. As the board has consistently held, any doubts regarding the sufficiency of her efforts raised by her poor recollection are to be resolved against the Respondent as the wrongdoer. The only reason Louima was looking for work in 1990 and 1991 is because the Respondent unlawfully refused to reinstate her at the conclusion of the strike. She should not be penalized because she was unable to provide detailed information about her activities 6–7 years later. Moreover, Louima found work during the backpay period. Even when she was laid off from this job, she did not sit at home, idly waiting for reinstatement, but went out and found another job. Under these circumstances, I am unable to find that the Respondent met its burden of proving that Louima incurred a willful loss of earnings during any part of the backpay period.

Accordingly, I find that Marie Louima is entitled to $10,103.11, plus interest, under the Board's Order.

58. Ludovic Pierre-Louis[113]

The General Counsel seeks backpay for Pierre-Louis in the amount of $6,914.30. He has interim earnings reported in every quarter of the backpay period, from three different jobs. The Respondent's sole argument with respect to this discriminatee is that his efforts to find interim employment "should not be considered reasonably diligent because he immediately accepted a lower paying job without first using reasonable efforts to secure comparable employment." The Respondent's argument is contrary to the evidence in the record.

Pierre-Louis testified that he received money from the Union during the backpay period. During the time that he received this money, he would stand outside the Respondent's facility with his fellow strikers. When he went there, he would arrive any time between 10 a.m. and noon and would leave at 4 or 4:30 p.m. He sometimes left as early as 3 p.m.. During this period, Pierre-Louis was looking for work and found a job at Romanoff Bakery early in the backpay period. He recalled that he worked at the bakery 40 hours a week and was paid $300 a week. He recalled that the job lasted 4 or 5 months, but could not recall the dates he worked there. He stopped working there when the friend who got him this job called him at home and told him that he was told by the employer to tell Pierre-Louis not to come back to work. He was not given any reason. Because his friend was still working there, he did not pursue unemployment benefits or attempt to find out why he had been let go. Instead, he returned to the site of the picket line and looked for another job. He recalled that, after about 3 weeks, he found another job through the Union at General Rag Co., the same employer where Nevius Lambert was working. General Rag is in the same business as the Respondent. Pierre-Louis recalled working full time, 40 hours a week, for $3.35/hour. His hours of work were from 7 a.m. to 3 p.m. After work, he would join his fellow strikers who were standing outside the Respondent's facility. Pierre-Louis recalled that he worked for General Rag about 4–5 months and was let go after a dispute with another worker who had been there longer. Sometime after he stopped working at General Rag, he started working for a friend who is a superintendent of a building, painting, for which he was paid $80 a week. He did this for 2–3 months until the Respondent called him back to work. He was still working for the Respondent at the time of the hearing.

It is clear from Pierre-Louis' testimony that he worked throughout the backpay period. Even the Union's strike benefit records show that he did not appear at the picket line regularly after September 21, 1990. Moreover, the job which he "immediately accepted" paid him more than he would have made working for the Respondent. His gross backpay was $245.05 a week and he was paid $300 a week by Romanoff Bakery. It

[113] This discriminatee is incorrectly identified in the Board's Order as Pierre Louis Ludovic.

was only much later, after his termination from the Bakery, that he took a job paying less. His acceptance of the job at General Rag can not be considered a willful loss because it was the same type of work he did for the Respondent. His pay was much lower because he was a new employee. He had a higher hourly rate with the Respondent because he had worked there since 1982. Accordingly, I find that Pierre-Louis satisfied his duty to mitigate backpay throughout the backpay period.

The General Counsel has deducted $2400 in interim earnings from Romanoff Bakery in the third quarter of 1990, which would be the equivalent of 8 weeks pay at $300/week. Because only 7 weeks of this quarter are within the backpay period, the General Counsel's calculation is in error. Moreover, the strike benefit records show that Pierre-Louis was receiving the maximum weekly benefit from August 13 through September 21, 1990. The amount and frequency of his receipt of strike benefits declines substantially thereafter until the week ending December 21, when he begins to receive either $48 or $60 a week from the Union. This indicates that he was at the picket line 4 or 5 days a week. He received no further strike benefits after January 18, 1991. Considering this evidence in light of his testimony, I find that Pierre-Louis probably worked for Romanoff Bakery from September 22 until sometime in mid-December 1990, about 3 months. I shall modify the backpay calculation to reflect this finding. In the absence of any contrary evidence, I shall accept the General Counsel's allocation of Pierre-Louis' interim earnings from General Rag and the painting job among the three quarters of 1991.

Accordingly, I find that Pierre-Louis is entitled to $6344, plus interest, under the Board's Order.

59. Alta Meuze

The General Counsel seeks backpay for Meuze in the amount of $10,812. There are no interim earnings reported. The Respondent argues that Meuze is entitled to no backpay because she did not conduct a "diligent" search for work. The Respondent bases its argument on her testimony and the compliance form she completed and signed in May 1992.

Meuze testified that she looked for work during the backpay period with her husband and friends. She testified that she also was taken to look for work as part of a group of strikers in vans driven by people from the Union. She could not recall how often she went with the Union but did recall that they would leave either from in front of the Respondent's facility or from the church nearby. She recalled going to many places, with her husband and the Union, including factories, hotels, hospitals, restaurants, and agencies. She was able to recall some by name. She kept track of most, but not all of the places she went, by writing them down on a piece of paper. The places she went with the Union are recorded on page three of the compliance form. Her husband, who is self-employed and literate in English, typed a list of places he took her to look for work. Despite these efforts, Meuze was unable to find work during the backpay period.

I find that Meuze's description of her efforts to find work was credible. She was able to recall enough detail regarding her search to convince me that she did not fabricate her testimony. The fact that her efforts were unsuccessful does not warrant a denial of backpay.

Accordingly, I find that Meuze is entitled to $10,812, plus interest, under the Board's Order.

60. Jean Demard Midy

The General Counsel seeks backpay for Midy in the amount of $10,187.20. He has only minimal interim earnings reported in the last two quarters of the backpay period. The Respondent argues, "based upon testimony and documentation there is no showing that the witness engaged in search for work during the last two quarters of 1990 nor the first quarter of 1991," i.e., the time he was receiving strike benefits from the Union. The Respondent therefore would deny Midy any backpay before March 1991. The Respondent argues further, apparently in the alternative, that strike benefits should be deducted from gross backpay as interim earnings, a claim I have already rejected.

Contrary to the Respondent's assertions, there is evidence, both testimonial and documentary, sufficient to support a finding that Midy made reasonably diligent efforts to find interim employment. He testified that, during the backpay period, he woke up every morning and went to look for work at factories in Brooklyn before going to the site of the former picket line. He did not arrive there at the same time every day, sometimes arriving as late as 10:30 a.m. Midy testified that the Union also took him to look for work. In March, not having found any work in Brooklyn, he went to Philadelphia and applied at a company called Cardon where his nephew worked. He did not get that job. He then went with friends to look for work in New Jersey, ultimately finding a job at Marlboro Marketing where he fixed and tied boxes for $4.75/hour. That job lasted 3 weeks until he was laid off because there were no orders. Midy then found a job at Fink Baking Corp., where he only worked on Saturdays. He held this job until October 1991, even after being reinstated by the Respondent. In addition to his testimony, which I found credible, Midy saved a letter he had received from IBM, dated March 8, 1991, advising him that they had no work for him. Midy recalled that he had gone to IBM in January or February, while still standing outside the Respondent's facility with the Union, and that a gentleman who had gone with him filled out the application for him.[114] Midy had also saved a copy of an employment application that had been filled out for him for a job with Ogden Services in New Jersey. He provided his niece's address and phone number on the application. That application is dated May 30, 1991.

The compliance form filled out for Midy by a friend who was also a striker, tends to corroborate his testimony. The form identifies both interim jobs he found, including the dates of employment and wage rate. In the section where he was asked to describe his efforts to find work during the backpay period, his friend listed IBM with the same date as the letter and Ogden Services, for which he had saved the application, followed by the statement, "and in other places I don't remind the names without forgotting [sic]." Fink Baking is also listed on this page. Midy testified that his friend did not read him the questions on the form when he filled it out. Instead, he relied upon

[114] It was apparent that Midy was illiterate in English and Creole.

his friend to complete the form because his friend could read a little Creole and knew what to put on the form. Even his signature was put on the form by his friend. It is apparent that, in filling out the form, Midy's friend made several mistakes. For example, he wrote that Midy quit the job at Fink to return to the Respondent when in fact Midy continued to work there on Saturdays for several months after his reinstatement. Under these circumstances, it would hardly be appropriate, as the Respondent argues, to credit this form over Midy's testimony at the hearing. In any event, the Respondent reads too much into the form. The list on page three of the form does not establish that Midy did not look for work before March 8, 1991. That date is listed there because it was taken from the letter he received from IBM. Whoever filled out the form specifically stated that there were other places that Midy could not recall, similar to his testimony at the hearing. Because Midy did not keep any list of the places he sought work, it is understandable that the only places recalled when the form was filled out were those for which he had documentation, i.e., IBM and Ogden Services.

I find based on Midy's testimony, as supported by documentary evidence, that he made reasonably diligent efforts to find interim employment. The Respondent argues that Midy's efforts were not sufficient because he did not seek work doing auto body and fender repairs, work he had done in Haiti. However, Midy did seek such work by asking a friend in that type of business if he had any work. The friend told him he did not. Because he did not do auto body and fender work for the Respondent, he was not obligated to do more than this in seeking interim employment. The Respondent also argues that backpay should be tolled for three weeks when Midy is alleged to have gone to Haiti to visit his wife. Midy's testimony regarding this trip was unclear. At first he testified that he went to Haiti in "July of 91. Not July of 91 but July of 90." Almost immediately, he corrected himself and said it was in May. When asked for the year, he said 1991. In response to a leading question from the General Counsel, he recalled that it was in May 1990. This testimony raises a doubt whether he left the country before or during the backpay period. Under well-established Board law, I shall resolve that doubt against the Respondent. Accordingly, backpay should not be tolled for any part of the backpay period.

Based on the above and the record as a whole, I find that Midy is entitled to $10,187.20, plus interest, under the Board's Order.

61. Marie Mondestin

The General Counsel seeks backpay for Mondestin in the amount of $5,437.58, which represents her gross backpay for the period August 13, 1990 until April 2, 1991, the date that she was actually reinstated by the Respondent. No interim earnings are reported. The only argument that the Respondent makes in its brief is that it should be credited for the two weeks in the first quarter of 1991 when Mondestin took the home attendant training course and for the amount of strike benefits she received from the Union between August 13, 1990, and February 1, 1991. The Respondent makes no argument regarding the adequacy of Mondestin's efforts to obtain interim employment.

I have already determined that the strike benefits provided by the Union were not a form of interim earnings and should not be deducted from gross backpay. For the reasons discussed above in connection with other discriminatees who took home attendant training courses, I find that Mondestin did not remove herself from the labor market while attending these classes. The course was specifically intended to facilitate her efforts to find interim employment after having been unsuccessful at finding work similar to that which she had done for the Respondent. Even had she not continued to look for work while in classes, I would find that a brief 2-week hiatus in a backpay period otherwise characterized by a reasonably diligent search for work is no basis for tolling backpay.

Accordingly, I find that Mondestin is entitled to $5,437.58, plus interest, under the Board's Order.

62. Marie Narcisse

The General Counsel seeks backpay for Narcisse in the amount of $8416. No interim earnings are reported. Narcisse was deceased at the time of the compliance hearing. Marie-Eddie Racine Menard, who had known Narcisse since she was 7 years old testified regarding Narcisse activities during the backpay period. The Respondent argues that no backpay is owed to Narcisse because Menard was unable to recall the year in which she helped Narcisse look for work. According to the Respondent, the absence of any evidence in the record that Narcisse looked for work during the backpay period relieves the Respondent of any liability under the Board's Order.

Menard testified that Narcisse died on March 6, either 1992 or 1993. She recalled that Narcisse first became ill and went into the hospital the day after Thanksgiving and remained ill until her death. Narcisse left a husband, who resides in Haiti, and a daughter who was 19 years old at the time of the hearing. Narcisse's daughter lived with Narcisse during the backpay period and still resides in New York City. The Respondent made no attempt to subpoena either Narcisse's daughter or husband.

Menard testified that Narcisse was 50–52 years old during the backpay period. She could write her name but otherwise was illiterate in English. She spoke very little English. Menard testified that she saw Narcisse every weekend during the backpay period, with Narcisse and her daughter sometimes spending the weekend at Menard's house. She knew that Narcisse was on strike and was unaware of her working between the time of the strike and her death. Menard recalled that Narcisse was looking for work because she needed to support herself and her daughter. Menard testified further that, for two consecutive summers, she gave Narcisse a ride to places where she was going to apply for a job. Menard did this only on Fridays during the summer months because she had those days off from her job in Manhattan. She did not do it every Friday, but recalled doing this 8–10 times. She recalled specifically taking Narcisse to two hospitals and to Atlantic Avenue in Brooklyn and to Jamaica Avenue, near Western Beef. Menard could not recall with any certainty whether she did this during the summers of 1990, 1991, or 1992. She did recall that it "was way before [Narcisse] went into the hospital" and that Narcisse was not working when she

became ill. Menard was unaware whether Narcisse ever returned to work for the Respondent.

The parties stipulated that Narcisse's signature appears on the Union's strike benefit records for the period August 13, 1990, through February 1, 1991. These records show that Narcisse received the maximum weekly amount from the Union in all but two weeks in January 1991. She received $48 those 2 weeks. From other evidence in the record, I can infer that Narcisse appeared on the picket line at least for part of every day, Monday through Friday, in every week for which she received the maximum benefit and appeared four days in the other 2 weeks. Narcisse's social security record also establishes that she earned $3,092.94 from the Respondent in 1991. This establishes further that Narcisse did return to work for the Respondent at the end of the backpay period. The Respondent was asked at the hearing to check it's records to determine how long Narcisse worked for the Respondent after August 1991 to assist in determining the year in which she passed away. By the close of the hearing, the Respondent had furnished no other evidence regarding its employment of Narcisse. I must infer from this that any such evidence would not have been favorable to the Respondent. Based on Narcisse's hourly rate, her total earnings as reported to the Social Security Administration would represent more than 18 weeks of pay, assuming a 40-hour week. If she was reinstated on August 20, 1991, this would mean that she worked for the Respondent well past Thanksgiving 1991 and perhaps through the remainder of the year. Based on this evidence, I conclude that Narcisse did not become ill until November 1992 and that her death occurred in 1993. I conclude further that Menard's testimony establishes with a reasonable degree of certainty that Narcisse was looking for work at least in the summers of 1991 and 1992, as that would be two consecutive summers before her death.

The Respondent's argument for denying any backpay to the estate of Narcisse, if accepted, would reverse the burden of proof in a backpay proceeding. It is not the burden of the General Counsel or the discriminatee to prove that the discriminatee looked for work. It is the Respondent's sole burden to prove facts which affirmatively establish a willful loss of earnings, such as a failure to make "reasonably diligent" efforts to find interim employment during the backpay period. The absence of evidence is not sufficient to meet this burden. *NLRB v. Mastro Plastics,* 354 F.2d at 178–179. Where a discriminatee dies before the Respondent satisfies its obligation to remedy the unfair labor practices committed against her, the Respondent is not relieved of its obligation under the Board's Order. Id. at 179. At most, a doubt is created regarding the discriminatee's efforts to mitigate backpay. As with all other doubts, it must be resolved against the Respondent. Moreover, in the case of Narcisse, the testimony of Menard and the other evidence in the record tends to show that Narcisse made some efforts to find work in at least part of the backpay period. The Respondent has thus failed to satisfy its burden.

Accordingly, I find that Narcisse is entitled to $8416, plus interest, under the Board's Order.

63. Rufino Guerrero Norales

The General Counsel seeks backpay for Norales in the amount of $9050. He has interim earnings reported only in the first quarter of the backpay period. The Respondent argues that Norales is entitled to no backpay because it is "clear that he did not conduct a reasonable and diligent search for work." The Respondent cites Norales ability to recall only five places he went seeking work in support of its argument. The Respondent also argues, apparently in the alternative, that there should be an offset for the amount of strike benefits Norales received during the backpay period. While I have already found that the strike benefits provided by the Union in this case were not interim earnings, I note there is no documentary evidence showing that Norales in fact received any money from the Union during the backpay period.

Norales testified that he looked for work during the backpay period by going to the Local 32E union hall in the Bronx, where he resided at the time. Local 32E is the Union that represents porters, superintendents, and other building maintenance employees at many residential and commercial properties in the New York metropolitan area. From Norales' description, it appears that he went to some sort of hiring hall where temporary vacancies were filled. Norales recalled that he started going to the union hall every morning, before he went to the picket line, in March 1990. He continued to go there, without ever being offered a job, until he learned that applications were being taken for jobs at Shea Stadium during the U.S. Open tennis tournament. He was hired to make sandwiches for the 2-week duration of the tournament. Paystubs from this job show that he worked there from August 26 through September 8, 1990, and earned a total of $702. After this job ended, he resumed his search for work, but did not go back to Local 32E. He recalled that he went to the Terrace Hotel to apply for a job as a porter based on information he got from a coworker at the Tennis Center. He also recalled going to two different dry cleaning establishments in response to newspaper advertisements he saw about the same time, in September 1990. At one of these establishments, he was given three pants to iron, as a test, and was told he was too slow. Norales testified that, after the job at the stadium ended, he also went to the New York State job service office on Third Avenue in the Bronx and used "machines" that were there to look for job openings. Norales continued to go there for an undisclosed period of time. He never found any other work through these efforts. Norales could not recall any other places he sought work. He did not keep any list, nor was he ever asked to fill out a compliance form for the Board's Regional Office.

Norales also described being taken by the Union with other strikers to look for work at factories and other places. He recalled doing this about 10 times. Although there are no receipts or other records showing that he received strike benefits after August 13, 1990, Norales testified that he continued to go to the site of the former picket line "every day" after that date. Norales testified that he would arrive there sometimes at 8 a.m., but would leave to look for work and return later in the day. He would then remain there until 5 p.m. or later. He recalled routinely doing "night duty" at the picket line, sitting by the fire and playing cards with other men on strike. He denied being

paid for this duty. In any event, based on his description, it appears that this occurred during the early part of the strike itself, when it was cold enough to have a fire to keep warm. There is no evidence that the Union had strikers doing night duty after the fall of October 1990.

Norales testified that, in August and September 1991, he earned some money by doing chores in his apartment building for a man named Isaac White, who appears to have been the building superintendent. Norales recalled being paid either $25 or $30 at a time for sweeping the floors or taking out the garbage. He recalled that he was paid by White about 30 times during that 2-month period. Based on this testimony, I shall adjust Norales backpay by deducting $250 as interim earnings during the third quarter of 1991, representing approximately 10 times in the 3 weeks in August before the backpay period ended.

Contrary to the Respondent's argument, it is not "clear" from Norales testimony that he did not conduct a "reasonable and diligent" search for interim employment. His testimony establishes that he looked for work, that he found work for a brief period early in the backpay period and that he continued to look for work thereafter. His inability to recall the names of more than five places is no basis for denying him backpay. He recalled sufficient details regarding the manner in which he sought work to convince me that his testimony was not a fabrication. The Respondent has not met its burden of proof that Norales incurred a willful loss during any part of the backpay period.

Accordingly, I find that Norales is entitled to $8800, plus interest, under the Board's Order.

64. Oscar Nuñez

The General Counsel seeks backpay for Nuñez in the amount of $10,202.25. He has interim earnings reported from Elite Suede & Leather Cleaning Co, Inc. beginning in March 1991 through the remainder of the backpay period. The Respondent argues that Nuñez is not entitled to backpay for the period before February 1, 1991, when he was receiving $225 a week in strike benefits from the Union. According to the Respondent, Nuñez had no incentive to look for interim employment because he was making more than he did when he worked for the Respondent. The Respondent contends that his testimony and the documentary evidence show that his efforts to find interim employment were not reasonable and diligent. The Respondent also argues that he should be denied backpay for the 1-month period when he was on layoff from Elite because he did not look for another job at that time.

Nuñez recalled receiving a total of $225 a week from the Union in strike benefits for about 1 year, from January 30, 1990, to February 1, 1991. He received the machinist rate of strike benefits because his prestrike job was operating the big press. During the time that he received this money, Nuñez went to the picket line from Monday through Friday, from 8 a.m. to 4 p.m. He left only for lunch and to look for a job. Later in his testimony, he testified that he started to look for a job after the Union stopped paying strike benefits. He explained this discrepancy in his testimony by saying that, while on the picket line, he would go at lunch time to look for work at factories in the vicinity of the Respondent's facility and would leave early on Fridays to look for work before doing errands on his way home. He also recalled that Tigus would sometimes take him and other strikers to look for work on Saturdays. He admitted that he spent more time looking for work and went to more places after he stopped receiving the money from the Union because he had more time to look for a job.

Nuñez found the job at Elite in March but was laid off after a short time when the factory shut down for a month. Because he was a new employee, he received only 1-week's pay for the shutdown. He was told at the time of his layoff that he would be recalled. He admitted that he did not look for another job during this period because he already had a job at Elite. He was in fact recalled after about a month and has continued to work for Elite to the present time. He was paid about $4 or $4.25/hour when he started, receiving a raise to $4.50 after 6 months, and worked 40 hours a week with some overtime. He could not recall at the hearing how much overtime he averaged during the backpay period. No specific earnings information was ever received from this employer to establish the exact amount of his interim earnings from Elite on a quarterly basis.

Nuñez recognized the Spanish-language version of the compliance form bearing his name as the one he filled out. He is able to read and write Spanish, but not English. The form is neither signed nor dated and Nuñez could not recall when he completed it. The statements on page 3 of the form, regarding his efforts to find work, are consistent with his testimony at the hearing. In addition, Nuñez indicated on the form, as well as in his testimony, that he went to the job service on Third Avenue in the Bronx, in February 1991, seeking work. An English language version of the form, filled out in a different handwriting in English was also offered, but Nuñez did not recognize it and could recall nothing regarding how it was completed. This form is also undated and unsigned.

I credit Nuñez testimony that he looked for work both during and after the time that he received strike benefits. The fact that he increased his efforts after the strike benefits ended, without more, does not prove that his efforts before February 1 were inadequate. Thus, the Respondent has not shown that greater efforts would have resulted in earlier success at finding interim employment. I find further that Nuñez was not required to look for another job while on layoff during the plant shutdown at Elite because he already had a job with a reasonable expectation that he would be recalled in a short time. Nuñez testified that, sometime after the strike benefits stopped but before he was hired by Elite, Tigus took him to a factory in the Bronx where he was offered a job as a mechanic. Nuñez testified that he declined this job because he was not a mechanic. There is no evidence in the record regarding the rate of pay Nuñez was offered with this job. Because of the scarcity of evidence regarding the offer, I find that his rejection of it did not constitute a willful loss of earnings. There is insufficient evidence in the record to determine whether it was even substantially equivalent employment. I note, for example, that Nuñez did not work as a mechanic for the Respondent. Because it is the Respondent's burden to prove a willful loss, any doubts regarding the rejection of this job offer must be resolved against the Respondent.

Accordingly, based on the above, I find that Nuñez is entitled to $10,202.25, plus interest, under the Board's Order.

65. Jean Olivier

The General Counsel seeks backpay for Olivier in the amount of $5123. He has interim earnings from the Silk Shop, a/k/a Palee Fashions Corp., reported in every quarter of the backpay period. The Respondent disputes the manner in which the General Counsel allocated Olivier's 1990 interim earnings among the quarters within the backpay period. The Respondent also argues that Olivier should be denied backpay for the last quarter of the backpay period because of his "nonexistent efforts" to find other work during a slow period at his interim employment.

Olivier could not recall the month that he started working at the Silk Shop, other than that it was before he and the other strikers were turned away by the Respondent on August 13, 1990. He acknowledged that the information provided on the compliance form he signed on May 4, 1992, indicating that he began working at the Silk Shop in June 1990, was probably accurate. According to Olivier, he started working part-time as a salesman, about 12–16 hours a week on Thursdays and Fridays, but worked more when it was busy in the store. Over time, his hours increased, particularly toward the end of 1990. He continued working at the Silk Shop in 1991, but his hours were greatly reduced for a 2–3 month period, around June or July, which he referred to as the slow period. According to Olivier, he was told to go home and wait until it got busy again when he would be recalled. In the meantime, the employer continued to call him in on the occasional busy day, about 1–2 times a week. On these occasions, he was paid "off the books" at his regular rate of $4.50/hour. Olivier could not recall the exact amount of his earnings in any given quarter at the time of the hearing.

Olivier's total earnings from the Silk Shop in 1990 and 1991 are reported on his social security earnings record. In addition, correspondence received by the General Counsel from this employer shows the quarterly breakdown of his 1991 earnings. The employer did not report to the General Counsel the 1990 earnings on a quarterly basis. The Respondent filed with its brief a Motion to Add to the Record which included, inter alia, New York State Department of Taxation Form WRS-2, "Employer's Quarterly Report of Wages Paid to Each Employee" from Palee Fashions Corp./The Silk Shop for the quarters relevant to the backpay period. The General Counsel generally opposed the Respondent's Motion on the basis that none of the evidence proffered posthearing by the Respondent was newly discovered or unavailable at the time of the hearing. While I have already rejected the Respondent's motion as to the remainder of the documents proffered, I will grant its motion with respect to these documents and will add them to the record as Respondent's Exhibit 348. It appears from the face of the proffered exhibit that the Respondent did not receive these documents until after the hearing had closed on December 16, 1998.[115] In addition, these documents are consistent with the correspondence provided by the Silk Shop with respect to the 1991 quarterly breakdown of earnings, thus establishing their authenticity. Receipt of this exhibit will assist the Board in properly apportioning Olivier's interim earnings for 1990, the only real issue remaining as to his backpay. Without these documents, one would be left to guess as to the actual amount of earnings received by Olivier in the third and fourth quarters of 1990.

Based upon the interim employer's quarterly report of wages paid to Olivier, I have adjusted his net backpay. Because only seven weeks of the third quarter of 1990 fell within the backpay period, I have divided the total by 13 weeks, resulting in an average of $200/week and multiplied this by 7, resulting in a deduction of $1400 in interim earnings for that quarter. I find that this adjustment more accurately reflects Olivier's true interim earnings than that done by the General Counsel. Under the General Counsel's calculation, less than 25 percent of Olivier's 1990 social security earnings was deducted for the 4-1/2 months he worked from August 13 through December 31, 1990. That would mean he earned almost $5800 working part-time in the 2 to 2-1/2 months from June through August 13, 1990. I thus reject the General Counsel's calculation of Olivier's 1990 net backpay.

The Respondent argues that Olivier should have sought other work during the 2–3 months in the third quarter of 1991 when he was being paid off the books to work 1–2 days a week at the Silk Shop. I disagree. Olivier's interim earnings over the course of the entire backpay period shows that he fully satisfied whatever duty he had to mitigate backpay, even assuming he did not look for another job while waiting for the Silk Shop to get busy again. In any event, I credit Olivier's testimony that he was not idle during this period, but in fact looked for work at the Marriott, the Greyhound bus terminal, and other department stores in New York. He even went to Boston where he had family in search of work.

Based on the above, I find that Olivier is entitled to $2893, plus interest, under the Board's Order.

66. Carolina Olivo

The General Counsel seeks backpay for Olivo in the amount of $6716. No interim earnings are reported. The General Counsel has tolled backpay for a period of 10 weeks in the second quarter of 1991 based on Olivo's unavailability due to a tooth infection. The Respondent argues that Olivo is entitled to no backpay because of her failure to conduct a "reasonable and diligent" search for work. The Respondent's argument is based on its contention that Olivo was not a credible witness.

Olivo testified that she received money from the Union during the entire time that she was on strike and that she had to sign a paper at the end of every week to get the weekly benefit. She testified that while receiving this money, she went to the picket line every day from 8 a.m. to 4:30 p.m.. She only left the picket line when she went with the Union to look for work. Although she could not recall when the strike ended, she recalled being told by people from the Union that the strike was over. She also recalled that the strike lasted about a year. Although this testimony is consistent with other evidence in the record showing that the discriminatees received strike benefits

[115] The hearing was re-opened on January 29, 1999, for a very limited purpose.

from the Union from January 30, 1990, through February 1, 1991, the union records in evidence show that Olivo only signed the receipt for strike benefits through the week ending September 21. She had no recollection or explanation why her signature does not appear on any receipts after that date. It seems unlikely that Olivo would have been at the picket line every day after September 21 without receiving money from the Union. It also seems unlikely that she would have received benefits for such a long period of time without having to sign any receipts. I must conclude that, despite her recollection to the contrary, Olivo stopped going to the site of the former picket line about September 21, 1990.

Olivo testified further that, while she was on strike, her efforts to look for work were limited to going with the Union. Olivo initially testified that, after the strike ended, she stayed home for awhile, waiting for one of the places she had visited with the Union to call her, and then began to look for work by herself. She testified that she would go to look for work on Mondays, and sometimes Wednesdays, leaving her house at 7 a.m. and returning around noon. Although she initially testified that she did this every week, she later conceded that there were some weeks when she didn't look for work at all. She testified that she has been looking for work since the strike ended, but has never found another job. At one point in her testimony, Olivo recalled that she looked for work in Brooklyn until she moved to Manhattan, about 6–7 years before the hearing. She testified that she did not look for work after she moved because it was very difficult to look for work in Manhattan. Yet she later recalled applying for a job at a hospital in Manhattan. On further questioning, Olivo testified that, while she was staying at home after the strike, she had a tooth pulled which became infected. Her face was swollen and she had to have oral surgery. She testified that she could not look for work until her face was no longer swollen. She recalled that she was unable to look for work because of this for a period of two months and one week. Based on this testimony, the General Counsel tolled backpay for 10 weeks in the second quarter of 1991.

Olivo denied that she ever went back to work at the Respondent's facility. Near the end of the hearing, the Respondent attempted to put in evidence her employee card with the notation that Olivo was offered reinstatement in April 1991 and declined. I rejected this exhibit at the hearing on the basis that the Respondent had not raised in its answer any claim that backpay should be tolled for Olivo based on her rejection of any reinstatement offer before the one on August 20, 1991. I note in further support of my ruling that the court of appeals, in enforcing the Board's order in this case, specifically found that backpay was not tolled by the Respondent's offers of reinstatement in March and April 1991 because they were made "in a climate of continuing egregious violations." Thus, even if Olivo rejected this invalid offer, the Respondent would still be obligated to offer her reinstatement and make her whole until August 20, 1991, when it made an offer of reinstatement that the General Counsel concedes was valid.

Olivo had been missing until shortly before the hearing. The General Counsel had amended its backpay claim for Olivo before she testified to toll backpay on February 1, 1991, on the basis that she became discouraged and stopped looking for work at that time. Olivo denied that she stopped looking for work and denied that she ever told anyone that she had. After she testified, the General Counsel amended the specification again to seek backpay for Olivo for the full backpay period, except for the ten weeks when she was unavailable. Because of her poor recollection regarding the backpay period, and the absence of any documents to refresh her recollection, Olivo's testimony was at times confusing and inconsistent. As noted above, the Union's strike benefit records indicate that she stopped going to the picket line on September 20, several months before it ended. Moreover, It appears that Olivo withdrew from the labor market for a time, immediately after leaving the picket line and then when her face became swollen due to the tooth infection. She may also have removed herself from the labor market when she moved to Manhattan, which could have occurred as early as 1991, 7 years before her testimony. Because I believe her testimony that she looked for work with the Union while she was on the picket line before September 21, 1991, and that she thereafter looked for work on her own, after a hiatus of about 2 to 3 weeks, I shall give her the benefits of the doubt and award backpay at least through February 1, 1991. I do not believe that Olivo looked for work throughout the backpay period and shall toll backpay after the first quarter of 1991. This takes into account the period when she was unavailable because of her medical problems and appears to coincide with her move to Manhattan, after which she did not look for work as diligently as before.

Based on the above, I find that Olivo is entitled to $5016, plus interest, under the Board's Order.

67. Juana Peralta

The General Counsel seeks backpay for Peralta in the amount of $8878. She has no interim earnings reported. The Respondent argues that no backpay is owed to Peralta, relying upon her testimony that she only looked for work with the Union and that she had a medical condition that was "very delicate" during the backpay period.

As noted by Judge Schlesinger in his decision, Peralta is retarded.[116] It was apparent throughout her testimony that she did not understand the questions she was being asked. At times, her answers were nonresponsive or incoherent. The interpreter had great difficulty understanding and translating her answers. Her repeated references to her medical condition and physical disabilities almost always returned to a discussion of an injury to her right hand that she incurred in an 1992 accident, well after the backpay period. Although she did testify that she had medical problems before the accident, these predated the strike. Peralta testified that she was able to work for the Respondent before the strike despite her regular doctors' appointments and one short hospitalization. I also note that, despite her "delicate condition," she was able to go to the site of the picket line almost every day from August 13, 1990, through February 1, 1991. In the absence of more definitive evidence showing that

[116] Peralta had been denied reinstatement by the Respondent on the basis of strike misconduct. Judge Schlesinger found Peralta to be very sweet and incapable of the misconduct alleged. *Domsey Trading Corp.,* 310 NLRB at 809. The Board adopted his findings and conclusion in this regard. Id. at 778 fn. 4.

her condition worsened to the point that she could not work or look for work during the backpay period, I find that she was physically able and available for work throughout the backpay period.

Peralta testified that she looked for work with Tigus and Natalie [Mercado] from the Union. She would go with them and a group of other strikers to factories in Brooklyn and Manhattan. Many of the places that she went with the Union only had jobs operating machinery, which Peralta could not do. She had always been a floor worker, sorting the clothes, at the Respondent's facility. She testified several times, in response to questions from the Respondent and the General Counsel, that she did not look for work on her own. Considering her unique circumstances, I find that her efforts to find interim employment, even if limited to places she went with the Union, would satisfy her duty to mitigate backpay. Because she is developmentally disabled, the range of work available to her is limited. Moreover, she may not have been capable of seeking work on her own and reasonably relied on Tigus and Natalie to help her find a job. Her lack of success is no basis to deny her any remedy under the Board's Order.

The sole issue remaining is whether Peralta's backpay should be tolled after February 1 on the basis that she did not look for work with the Union after she stopped receiving strike benefits. There is evidence in the record that the Union continued to take some strikers to look for work, and in fact, was able to place some in jobs, after February 1, 1991. Thus, even though strike benefits were no longer being paid and strikers were no longer required to appear outside the Respondent's facility, it appears that the Union maintained its efforts to find employment for the discriminatees. It is unclear whether Peralta was included in these efforts after February 1. Her testimony alone should not be the basis for denying her backpay in light of her general inability to understand the proceedings and the questions she was asked. Applying well-established principals of Board law applicable to backpay proceedings, I shall resolve any doubt regarding Peralta's continuing efforts to seek interim employment in her favor and against the Respondent.

Accordingly, I find that Peralta is entitled to $8878, plus interest, under the Board's Order.

68. Marcos Pitillo

The General Counsel seeks backpay for Pitillo in the amount of $7,180.39 for the period August 13, 1990, to April 2, 1991, the date he was reinstated by the Respondent. No interim earnings are reported. The Respondent argues that Pitillo is entitled to no backpay for the period before February 1, 1991, when he was receiving strike benefits that were equivalent to his gross backpay. The Respondent further argues that Pitillo's testimony at the hearing regarding his efforts to find interim employment was not credible because the compliance form submitted to the Board's Regional Office is blank.

Pitillo acknowledged that he received $200 a week from the Union in strike benefits during the period August 13, 1990, through February 1, 1991. He received the higher amount because he had been a machine operator before the strike. Pitillo testified that, during this period, he went to the site of the former picket line every day. He testified further that he would look for work in the morning, before going to the picket line, and would not arrive at the Respondent's facility until 11 a.m. or later. On days that he did not look for work, he would be at the picket line from 8 a.m. to 4 p.m. He recalled that he looked for work 2 or 3 days a week. He recalled going to factories in the Bronx, where he lived. In addition, he would look for work by going to the office of a Union in the Bronx. From his testimony, it appears this is the Local 32E hiring hall described by other witnesses. Pitillo testified that he sometimes went with Tigus and other strikers to look for work. Pitillo also sought work by checking the want-ads in two Spanish-language newspapers and by talking to friends and relatives about possible job openings.

Pitillo recognized the unsigned and undated compliance form that bears his name, but could recall very little about the circumstances under which it was filled out. He did remember meeting at the Board's offices with a lady who spoke Spanish, that she explained the form to him and asked him questions, but he did not recall when that occurred. Pitillo acknowledged that he can read Spanish, the language that the form is in. The two sections of the form where discriminatees are asked to list the places they sought work and to describe other efforts they made to find work are blank. Pitillo did not know why they are blank. The Respondent emphasizes this omission in its brief, arguing that it essentially proves that Pitillo's sworn testimony at the hearing was a fabrication. I do not agree. There could be many explanations for the blank pages. For example, only the first two pages are completed and the form is neither signed nor dated. It is possible that he never completed the form when he met with the Board agent. I note that Pitillo testified that he kept no list or other record of his efforts to find work. Thus, it is possible that he simply did not remember where he looked for work at the time the form was filled out. Even at the hearing, Pitillo's recollection was not detailed or specific regarding the places he went in search of work. He recalled only generally that he went to factories and to the Union hall in the Bronx. I find that Pitillo's testimony at the hearing was credible and is entitled to greater weight than the unsigned and incomplete compliance form that the Respondent submitted into evidence.

Based on the above, I find that Pitillo is entitled to $7,180.39, plus interest, under the Board's Order.

69. Miracia Porsenna

The General Counsel seeks backpay for Porsenna in the amount of $7,587.96. She has interim earnings reported from a job at A.D. Sutton in the second and third quarters of 1991. The Respondent argues that backpay for Porsenna should be tolled for the period before February 1, 1991, on the basis that she was collecting strike benefits from the Union and not seeking interim employment. The Respondent cites the fact that the compliance form submitted in her name lists no places before January 1991 where she sought work.

Porsenna testified that she looked for work in the morning, before going to the site of the former picket line. She would leave her house at 6 or 6:30 a.m. and would either go directly to look for work, or go to the Respondent's facility to meet Tigus, who would take her and others to look for work. After looking for work, she would return to the picket line, arriving at 9 or 10

a.m. and would remain there until 6 p.m. Porsenna testified that her children would look in the Daily News for jobs for her, but that they only found part-time or cleaning jobs that were too far, where she would have to take a train to get there, so she did not seek these jobs. After the strike benefits ended, Porsenna's children gave her money to buy tokens so that she could take the bus to look for work. Porsenna testified that she also looked for work with friends in New Jersey, where she was ultimately successful in finding a job, stuffing handbags at A.D. Sutton. She worked at this job from June 1, 1991, until she was reinstated by the Respondent on August 20, 1991. The interim earnings reported for this job were taken from her social security record. Porsenna did not keep any lists or records of the places she went to seek work.

Porsenna recognized the unsigned and undated compliance form bearing her name. She recalled that she was called to the Board's offices to fill out this form. She recalled meeting with a Board agent and having her daughter, who speaks English and Creole translate for her. She recognized the handwriting on the form as that of her daughter. When asked to explain why there are no places listed before January 1991, Porsenna testified that, at the time, she did not remember all the places she had gone to seek work and only gave the ones that she could remember. It is understandable that the most recent efforts would be the easiest to remember. She insisted that she had looked for work, with Tigus and on her own, in 1990, despite the omission of any entries on the form before 1991.

I find that Porsenna's testimony regarding her efforts to find interim employment is credible. The unsigned form is not an inconsistent statement because it does not purport to be a sworn statement, nor an exhaustive list of her efforts to find work. I note that her efforts proved successful when she found a job where she was paid the same rate she would have earned working for the Respondent, albeit without the overtime she was accustomed to. In addition, Porsenna received unemployment benefits during at least part of the backpay period. The Board has found that a discriminatee's receipt of unemployment benefits is corroborative of efforts to seek interim employment.

Based on the above, I find that Porsenna is entitled to $7,587.96, plus interest, under the Board's Order.

70. Romulo Ramirez

The General Counsel seeks backpay for Ramirez in the amount of $8,017.21. He was reinstated by the Respondent in April 1991 and has interim earnings reported for the period from March 22, 1991, through his date of reinstatement. The Respondent argues that backpay should be tolled for Ramirez for the period prior to February 1, 1991, during which he was receiving strike benefits that were greater than his gross backpay would have been after taxes. The Respondent essentially argues that Ramirez' testimony at the hearing was not credible and that a statement he wrote on the compliance form should be given greater weight.

Ramirez acknowledged receiving $200 a week in strike benefits, in addition to the $5 a day that the Union gave the strikers for carfare and lunch money. Before the strike, he worked on the big press and his strike benefits reflected the fact that he was a "machinist." His gross backpay for the same period is about $252. Because no taxes were withheld by the Union from the strike benefits he received, they compare favorably to his prestrike earnings. Ramirez testified that, during the time he was receiving money from the Union, he reported to the site outside the Respondent's facility 5 or 6 days a week. Although he said that he was generally there from 7 or 8 in the morning until 4 or 5 in the afternoon, he denied that he had a set schedule.

Ramirez acknowledged that he filled out the Board's compliance form by himself, at home, and that he was able to read and write Spanish. Ramirez identified his interim employment on the form, but did not describe in detail his efforts to find other work. On page 4, where he was asked to describe his efforts to find work, Ramirez wrote, in Spanish, "1/12/91 I was looking in and around for a job at 700 White Plains Road in the Bronx until the end of the month of March of the same year." In response to a question from the Respondent's counsel, Ramirez said that January 12, 1991, was the date he started looking for a job. Ramirez further testified that he had a better recollection of the backpay period at the time he filled out the form than he did at the hearing.

In response to a leading question from the General Counsel, Ramirez said he looked for work between August 1990 and March 1991. When asked to describe his efforts, he replied that he looked in Queens, the Bronx, Brooklyn, and Manhattan and that he went every day with the Union from 8 in the morning until 1 in the afternoon. He kept no list or other record of his efforts. He testified that he found his job at Grand Manor Health Related Facility through a friend. The quarterly interim earnings reported from this job are based on correspondence received from that employer. Ramirez was still employed there at the time of the hearing.

In Ramirez' case, I agree that his statement on the form, although neither signed nor dated, nor under oath, is a more accurate reflection of his efforts to find interim employment than his testimony at the hearing. I note that Ramirez readily admitted in response to the Respondent that he started looking for work on the date set forth in the form, i.e., January 12, 1991. The General Counsel made no effort to have Ramirez explain the apparent inconsistency between his testimony on direct and cross-examination. Moreover, his testimony that he looked for work before January 1991 was in response to a leading question from the General Counsel and is entitled to less weight than his admission in response to the Respondent's questioning. I also note that his testimony that he looked for work every day with the Union for 5 hours is inconsistent with the other evidence in the record indicating that different groups of employees went with the union organizers on different days. Accordingly, I shall recommend that Ramirez' backpay be tolled for the third and fourth quarters of 1990. Because he started looking for work in early January and found employment within the first quarter, I find that he satisfied his duty to mitigate beginning on January 1, 1991.

Based on the above, I find that Ramirez is entitled to $2,970.21, plus interest, under the Board's Order.

71. Milton Ramos[117]

The General Counsel seeks backpay for Ramos in the amount of $8416. No interim earnings are reported for Ramos even though it is undisputed that he was employed by Mama Leone's restaurant during the backpay period. The Respondent argues that no backpay is owed to Ramos because his earnings from Mama Leone's exceeded his gross backpay.

Ramos testified that he worked for Mama Leone's before going to work for the Respondent. He started working for the Respondent while on layoff from the restaurant. During the strike, he was recalled by Mama Leone's. Although he could not recall when he went back to work, a letter of reference signed by the General Manager of Mama Leone's in 1993 states that he worked there as a utility person from August 24, 1991 through August 7, 1993, and that his average weekly salary was $349.55. Ramos testified that his normal work week was 35 hours, from 3:30 p.m. to 1 a.m., but that he sometimes worked more hours and sometimes worked less. He also testified that there were times when he was laid off because business was slow at the restaurant. He had no recollection at the hearing regarding how many hours he was working on average and how many times he was laid off during the backpay period. Ramos did have a copy of a paystub from Mama Leone's, for the week ending March 2, 1991, which shows that his hourly rate at that time was $9.987 and that he worked 21 hours that week. His gross year-to-date earnings through March 2, 1991, were $908.83. As I observed at the hearing, this shows that he was not averaging 35 hours a week, in early 1991, and may have been on layoff for part of January and February. No further evidence regarding Ramos' exact quarterly earnings was obtained before the close of the hearing.

Ramos testified that he continued to go to the site of the former picket line at the Respondent's facility while working at Mama Leone's. He would go at 7 in the morning and stay until he had to go to work. The Union's strike benefit records show that his attendance at the picket line was irregular after August 24, 1990. Thus, there are several weeks when he received no benefits, other weeks when he received only $24 or $36, indicating he was there 2 or 3 days. I infer from these records that the weeks he was at the picket line a full 5 days are weeks he was not working at the restaurant and, conversely, those weeks when he did not receive strike benefits were weeks he was working full time at the restaurant. The other weeks when he was there 2, 3, or 4 days show that his hours at Mama Leone's fluctuated greatly and could not have averaged 35 hours throughout the backpay period.

The General Counsel did not deduct any interim earnings from Mama Leone's based on her argument that the evidence was insufficient to determine the amount to offset in each quarter.[118] Although it is the Respondent's burden to prove the existence and amount of interim earnings, I disagree with the General Counsel's view of the evidence here. There is no dispute that he worked during the backpay period. The record also discloses that he earned at least $908.83 from this interim employment in the first quarter of 1991. From that paystub and other evidence in the record, one can make a reasonable calculation as to the probable earnings per quarter for the rest of the backpay period. The interim earnings for the two quarters of 1990 can be calculated using the strike benefit records to estimate how many days Ramos worked at his interim employment based on the days he was absent from the picket line. For 1991, I have used the year to date earnings through March 2, 1991, to arrive at an average weekly earnings of $101. While this is much less than he probably earned in any given week, it serves the purpose of accounting for the undetermined number of weeks when he did not work, because he was laid off, or when he worked fewer than 35 hours a week because business was slow. In the absence of more specific evidence, the calculation I have employed gives Ramos the benefit of the doubt, while acknowledging the reality that he had some interim earnings in every quarter of the backpay period. Because Ramos worked throughout the backpay period, I find that he satisfied his duty to mitigate backpay.

Based on the above, I find that Ramos is entitled to $2,167.17, plus interest, under the Board's Order.

72. Orlando Ramos

The General Counsel seeks backpay for Orlando Ramos in the amount of $4123. He has substantial interim earnings reported in all but the first quarter of the backpay period. The Respondent, in its brief, only argues that there should be a deduction for the amount of strike benefits he received from the Union.[119] The Respondent did not, however, concede the issue of mitigation, as it did with respect to other discriminatees who worked regularly during the backpay period.

The record amply supports a finding that Orlando Ramos satisfied his duty to mitigate backpay. He found interim employment with Envirosafe as an asbestos handler in October 1990, after taking a 2-week course to be licensed for this work. He worked there until he was laid off on December 31, 1990. After his layoff, Ramos resumed his search for work, took a 2-week home attendant training course and found work as a home attendant after he got his certificate on February 8, 1991. He worked for the Caring Neighbor from February 28, 1991, through the remainder of the backpay period. His interim earnings exceeded his gross backpay in the last two quarters of the backpay period.

Accordingly, I find that Orlando Ramos is entitled to $4123, plus interest, under the Board's Order.

73. Violette Raymond

The General Counsel seeks backpay for Raymond in the amount of $7200. She has no interim earnings reported but the General Counsel concedes that she was unavailable for 2 months in the first quarter of 1991 due to illness. The Respondent, relying on a portion of her testimony, argues that no

[117] Ramos complete name, in Spanish, is Alan Milton Melendez Ramos.

[118] The General Counsel did not argue that Ramos' employment at Mama Leone's should not be counted as interim employment. Specifically, there is no contention that Ramos' job at the restaurant was "moonlighting." Such a contention, if made, would not be supported by the record.

[119] For the reasons set forth above in sec. IV, I find that Ramos' strike benefits were not interim earnings.

backpay is due for the period prior to February 1, 1991, when Raymond was receiving strike benefits from the Union. The Respondent argues that no backpay is due for the period January through July 1991 based on a statement in the compliance form submitted to the Board's Regional Office. Finally, the Respondent argues that Raymond should receive no backpay because any efforts to find work by Raymond were "minimal" at best.

The Union's strike benefit records show that Raymond signed for either $60 or $72 in every week from August 13, 1990, through February 1, 1991, except for the week ending January 11, 1991. This indicates that she was present outside the Respondent's facility at least 5 days a week. Raymond testified that she arrived at the former picket line site at 8 a.m., if she did not go to look for work. When she went to look for work, she would go to the picket line after she did not find any work. Raymond also testified that sometimes Tigus or Evans, from the Union, would go with her and other strikers to look for work. I find nothing in her testimony which is inconsistent with a finding that she looked for work while receiving strike benefits from the Union. The Respondent's counsel tried repeatedly, through leading questions, to get an admission from the witness that she did not look for work when she was going to the site of the former picket line. Raymond's nonresponsive answers to such questions convinces me that was not the case. Raymond in fact looked for work, while receiving money from the Union.

Raymond credibly described her efforts to look for work, albeit not in the detail or with the specificity that the Respondent desired. According to Raymond, she looked for work, in Brooklyn and when she could not find any, she went to Flushing. She recalled three factories in Flushing, one that was in the same business as the Respondent, another where they made clothes and asked her if she could operate a sewing machine (she could not), and another factory where they also made clothing. She could not remember the names of any of the places. She recalled further that she went to a factory in New Jersey called Pier Five, where they made pillows and linens. She was even able to accurately describe how to get there by taking a train to the Port Authority, then going upstairs to get the bus to New Jersey. Her inability to recall names, addresses, and other specifics is understandable when one considers that she was 70–71 years old during the backpay period, and 78 years old when she testified, is illiterate, and did not keep any list or other record of the places she went.

The Respondent relies upon the compliance form submitted in Raymond's name during the compliance investigation. This form is neither signed nor dated. Although Raymond recognized the form and recalled that a friend, Carlos, who speaks English and Creole filled it out for her, she could not recall when that was. Raymond could not read the form and did not know what was written on it. She had a vague recollection of meeting with Carlos and an English-speaking man at the Board's offices where she was interviewed with Carlos acting as her translator, but she could not recall with any certainty what she was asked or what she told them. Although the form contains a statement that Raymond was unavailable from January to July 1991 because she was ill, Raymond denied telling this to Carlos or the man from the Board. According to Raymond, she was only unable to work for 2 months due to leg pain, that she had gone to the doctor who prescribed pain medication and that, after 2 months, she was better and could look for work again. She insisted that this is what she told them when the form was filled out. In the section of the form where discriminatees are asked to describe their efforts to look for work, the only thing written is a statement, in Creole, that "I was ill. I could not walk with a pain." Raymond testified that this was true only for 2 months. She did not know why the form did not contain the names of any places she looked for work, other than that she could not recall the names. She testified that she did tell Carlos and the man that she looked for work during the backpay period.

The discrepancy between Raymond's testimony and the compliance form raises at most a doubt regarding her efforts to find work and the duration of her unavailability. Because Raymond could not read, did not fill out the form and had not signed or otherwise adopted the statements contained therein, it hardly qualifies as a prior inconsistent statement of the witness. It's conceivable that Carlos made a mistake, or that he or she did not understand the questions they were asked, or that Carlos did not properly translate the questions or her answers. Under these circumstances, I cannot give greater weight to the form than Raymond's sworn testimony, which I found credible. Based on her testimony, I find that Raymond made sufficient efforts to find interim employment during all but the two months of the backpay period when her leg pain made it difficult for her to look for work. In evaluating the reasonableness of her efforts, I have considered her age, inability to speak/understand English, illiteracy, and lack of job skills and have resolved any doubts against the Respondent, as is required in a backpay proceeding.

Accordingly, I find that Raymond is entitled to $7200, plus interest, under the Board's Order.

74. Vicente Suazo

The General Counsel seeks backpay for Vicente Suazo in the amount of $3,927.30. He has interim employment reported in every quarter of the backpay period from work as a soccer coach. The General counsel acknowledges in her brief that this calculation is not entirely consistent with his testimony at the hearing. Nevertheless, the General Counsel has declined to amend the specification further on the grounds that her calculation is a reasonable approximation of the net backpay owed to the discriminatee. The Respondent argues that Suazo is entitled to no backpay because he admitted that he had difficulty obtaining interim employment due to his lack of immigration documents. The Respondent argues further that his efforts to find interim employment were not reasonable and diligent.

Suazo's recollection of the dates and even months in which he worked during the backpay period was poor. However, he did recall that he received money from the Union, i.e., $200 a week as a machinist and $5 a day for transportation, until he found a job. When he found a job, making deliveries to a supermarket in the Bronx, he stopped going to the picket line at the Respondent's facility. Suazo testified that he thought he was only on strike for two months and then began working at this job, in March 1990. He did not recall being at the picket

line and receiving strike benefits during the summer. Receipts for strike benefits that bear his signature show that in fact he received $200 a week from the Union through the week ending September 21, 1990. I find that these records are more reliable than Suazo's poor recollection in establishing the date he worked at the delivery job.

Suazo testified that he got the job making deliveries through his cousin, who returned to his native country for vacation. Suazo was hired to replace his cousin. He recalled working there for 3 to 3-1/2 months until his cousin returned. He was paid $8/hour and worked 10 hours a day, Monday to Friday. He was paid overtime when he worked more than 8 hours. He recalled that he took home about $325 a week, after taxes were withheld. Based on this testimony, I find that Suazo had interim earnings in the third and fourth quarter of 1990 in the amounts of $440 and $5720, respectively.[120]

Suazo testified that after his cousin returned and he stopped working at the market, he went to the Respondent's facility to see his fellow strikers and to see if the Respondent would allow them to return to work. He did not stay at the site of the former picket line and received no money from the Union. This is consistent with the Union's records which show no further receipt of strike benefits after September 21. Suazo testified that he then started working for a friend who ran a soccer league as a trainer/coach. Suazo's friend paid him $150 a week, sometimes in cash and sometimes by check. He did not start to do this work until the beginning of soccer season, about May 1991. He continued to be paid for this work through the end of the backpay period. I shall revise the General Counsel's calculation of these interim earnings to reflect the fact that he was only paid for his work as a soccer coach from May 1991 through the end of the backpay period.

Suazo testified that, while unemployed, he looked for work by talking to friends and relatives and asking them about possible jobs. That's how he found the two jobs he had during the backpay period. He admitted that this was the only method he used to find work. According to Suazo, this is how he found his job with the Respondent in 1986. Suazo also testified candidly that there were some jobs he was told about that he did not pursue because his friends told him he needed to produce documentation to be hired. Suazo was not legalized until 1994. He specifically recalled being told about one job that paid $9/hour doing the same work he did for the Respondent that he did not apply for because he was told he needed to have documents to work. He recalled being told about this job sometime after he left the delivery job at the market. The Respondent argues that this constitutes a willful loss sufficient to deny Suazo backpay. I disagree. Suazo made reasonably diligent efforts to find work during the backpay period using the methods that had been successful in the past and which were tailored to his circumstances, i.e., seeking employment from employers willing to violate the immigration laws by hiring undocumented aliens. In fact, he was successful in finding interim employment using these methods during the backpay period that significantly reduced the Respondent's backpay obligation. Under these circumstances, I find that Suazo's decision not to apply for jobs he knew he could not get because of his immigration status did not constitute a willful loss of earnings.

Based on the above, I find that Vicente Suazo is entitled to $6124, plus interest, under the Board's Order.

75. Rose Marlene St. Juste

The General Counsel seeks backpay for St. Juste in the amount of $8416. She has no interim earnings reported. The Respondent argues, primarily on credibility grounds, that St. Juste is entitled to no backpay either because she did not look for work or because her immigration status prevented her from finding work.

St. Juste testified that she looked for work during the backpay period. She testified that she generally looked for work in the morning before going to the Respondent's facility to stand at the site of the former picket line. She testified that she went there every day so she would be there if the Respondent called her back to work. She would generally report to the site at the beginning of the Respondent's workday and remain there until the workday ended. On days that she looked for work, she arrived later. Although she did not leave the site of the picket line during the day to go home, she did leave to look for work. The Union's strike benefit records confirm her testimony that she normally was outside the Respondent's facility, waiting to be reinstated, 5 or 6 days a week. There were several weeks, however, when she only went 4 days and received $48 in strike benefits.

St. Juste described the manner in which she looked for work in sufficient detail to convince me that she was not fabricating her testimony. Thus, she described looking for work with other strikers, recalling two by name and with Tigus and others from the Union. She recalled how they would go to a building that housed several different businesses and would split up to look for work then meet to return to the site of the picket line. She also described trips to Long Island with friends who worked at factories there and the research she and others did to find out how they would get to and from such jobs in the event they were hired.

St. Juste recognized the Board's unsigned compliance form bearing her name. She recalled that it was filled out by Tigus using information she provided to him, including a list of places she had sought work that she kept during the backpay period. St. Juste testified that she gave Tigus the list to copy over for her, but believed that she had not reviewed it afterward because it is unsigned. She testified that not every place she sought work is listed on the form, even though every line is filled. She testified that, had all the places she sought work been listed, the list would be much longer. The Respondent notes that only one or two places are listed for each month. Even if those were the only places she looked for work, it would not prove that her efforts were not "reasonably diligent." There is no minimum quantum of prospective employers that a discriminatee must visit to satisfy their duty to mitigate. Rather, the efforts of the discriminatee over the course of the entire backpay period in light of his or her individual circumstances must be considered

[120] This is based on earnings of $8/hour for 55 adjusted hours each week (8 hours regular time and 2 hours overtime a day, 5 days a week) from week ending September 28, 1990, through week ending December 28, 1990.

in evaluating the reasonableness of the discriminatee's efforts. I find nothing in this form, completed by someone else and not reviewed or signed by the discriminatee, which would warrant a denial of all backpay.

The Respondent also argues that St. Juste immigration status must have been the cause of her inability to find work during the entire backpay period. St. Juste specifically denied that any prospective employer asked her to produce documents and denied that she did not seek work at any particular employer because of any concerns that she would be asked to produce documents.[121] The Respondent contends that this testimony is not credible. As I indicated above with respect to other discriminatees, even if a lack of documents entitling her to work in the U.S. caused her to tailor her job search to employers who were not apt to request such documents, I would find no willful loss. The fact is she looked for work during the backpay period and evidence in the record establishes that other discriminatees were able to find work notwithstanding lack of documentation.

Based on the above, I find that the Respondent has not met its burden of proving that St. Juste is not entitled to any remedy for the Respondent's unfair labor practices or that the gross backpay calculated by the General Counsel should be reduced for any reason.

Accordingly, I find that St. Juste is entitled to $8416, plus interest, under the Board's Order.

76. Joseph Saintval

The General Counsel seeks backpay for Saintval in the amount of $4,689.34. He has interim earnings from employment by Marlboro Marketing in So. Kearney, New Jersey in the fourth quarter of 1990 and was reinstated by the Respondent on April 24, 1991. The Respondent, again on credibility grounds, argues that Saintval should receive no backpay because he did not conduct a "reasonable and diligent" search for work.

Saintval testified that he looked for work at various factories in Brooklyn until a friend took him to Marlboro Marketing in New Jersey where he was hired. He worked there for about a month, from October 9 to November 9, 1990, until he was laid off because work was slow. He did not go to the site of the former picket line or look for work while working in New Jersey. After he was laid off, he returned to the site of the picket line and resumed his search for work in the same manner as before. He continued to look for work until the Respondent reinstated him. Saintval testified that he went to places that are in the same business as the Respondent and other factories. He looked for work on his own, not with the Union. Saintval testified further that he had friends who read English look in the newspaper for him and find job openings that he would then seek. Saintval also testified that he wrote down the date, name and address of the places he sought work. He did this so that he would know where to go in case he wanted to go back there.

Saintval recognized the undated compliance form bearing his signature. He recalled filling it out at the Board's offices and that his brother was with him in case he needed assistance. His brother filled out the top of the first page, but Saintval identified his handwriting on the remainder of the form. He testified that the places he listed on page three are places he sought work during the backpay period. The dates written on the form for three of the places on the list fall during the one month that Saintval was working in New Jersey. The Respondent argues that this proves that the list is a "sham" and that Saintval did not seek work at any of the places identified on the form. Saintval however, explained this apparent internal inconsistency on the form. He testified that he may have been mistaken regarding the dates he went to these places, but he did go to those places in October, before finding work in New Jersey. I accept this explanation. The form was filled out some time after the backpay period and it is not clear whether Saintval was using the log he had kept during his job search to fill out this form. In any event, the "discrepancy" pointed out by the Respondent raises, at worst, a doubt about the extent of Saintval's efforts to find work. The fact that he did find work during the backpay period, at a time when the Union was still providing strike benefits to the discriminatees, establishes that he was seeking interim employment and was not willfully idle. Even if the list itself was a "sham," that does not prove he did not seek work or otherwise mitigate backpay.

The Respondent also argues that Saintval's receipt of strike benefits indicating his full-time presence on the picket line, and his testimony that he remained on the picket line throughout the Respondent's workday, proves that he was not looking for work. However, Saintval testified that, when he was on the picket line, he would leave his house at 6:30 a.m. to look for work. He would look for work sometimes until 10 a.m. and, if he did not find work, he would go to the picket line. He also testified that he sometimes left the picket line as early as 3 p.m. Because all of the places listed on the compliance form are in Brooklyn, and many are within close proximity to the Respondent's facility, Saintval's explanation is credible. Thus, I find nothing inconsistent with Saintval's presence on the picket line and his search for work. Accordingly, I conclude that the Respondent has not met its burden of proving that Saintval failed to satisfied his duty to mitigate backpay.

Based on the above, I find that Saintval is entitled to $4,689.34, plus interest, under the Board's Order.

77. Monique Samedy

The General Counsel seeks backpay for Samedy in the amount of $3648. The General Counsel does not seek backpay for the period from August 29, 1990, when Samedy gave birth, until November 1, 1990, on the basis that she was unavailable for work. The General Counsel seeks no backpay after April 2, 1991, the date that Samedy was reinstated by the Respondent. She has no reported interim earnings. The Respondent argues that Samedy's period of unavailability actually began on August 13, 1990, the date the backpay period began. The Respondent argues further that no backpay should be paid for the period from November 1, 1990, to April 2, 1991, because Samedy failed to engage in a "diligent and reasonable" search for work.

Samedy testified and the strike benefit records show that she was at the site of the former picket line every day from August 13, 1990, until she gave birth. She testified that, if she got tired, she sat down. She also testified that she could look for work

[121] The record does not disclose whether in fact St. Juste lacked proper documentation because she refused to respond to any question regarding the documentation she had at the time.

during the first 4 months of her pregnancy but "when the belly is too big, you cannot go to people and ask for a job." The Respondent argues, based on this testimony and the assumption that her "belly was too big" during the 2 weeks before she gave birth, that Samedy was unable to look for work from August 13 through August 29, 1990. Even if that is true, it would not be a sufficient basis to deny Samedy backpay for the first two weeks of the backpay period. As noted above, the Board generally will not require a discriminatee to immediately begin their search for work after the Respondent has unlawfully denied them reinstatement. In some cases, the Board has excused a failure to look for work for up to 6 weeks. In this case in particular, because of the piecemeal manner in which the Respondent responded to the strikers' unconditional offer to return to work, it would not have been unreasonable for Samedy to remain outside the Respondent's facility, awaiting a reinstatement offer, until it was time to give birth. The fact that she may not have felt comfortable applying for a job with "a big belly" does not let the Respondent off the hook for its unlawful conduct. Had the Respondent complied with its obligations under the law, Samedy would have been reinstated and either working or on pregnancy leave at the time she gave birth. Accordingly, I shall not toll backpay for the period August 13 to August 29, 1990.

Samedy testified that, about a month after giving birth, she started to look for work. The General Counsel is willing to concede that she did not begin her search before November 1, 1990. Samedy testified that "sometimes" she went to look for work and, when she didn't find any, she went to the site of the former picket line. She would normally arrive at the picket line at 9 a.m. The strike benefit records show that, for most weeks from November 1, 1990, through February 1, 1991, she was at the site of the picket line 5 or 6 days a week. There were several week when she signed for benefits indicating attendance at the picket line only 3 or 4 days that week. She did not look for work with the Union, but did go with friends. Samedy could not recall the names of any of the places she went, but she did recall that, at each place she sought work, she asked for a card so she could record the name and address. She no longer had these cards at the time of the hearing, but testified that she used them when the compliance form was filled out for her by a friend who can read and write. Samedy is illiterate in English and Creole.

The compliance form in evidence contains two pages numbered three, one in English and one in Creole, on which the discriminatee is asked to describe his efforts to find work during the backpay period. Samedy identified her signature on both pages. The signature on the Creole version is dated October 1, 1992, that on the English version is dated April 18, 1995. Samedy could not recall why she signed two versions on different dates. She did recall that the form was filled out by her friend at the Board's offices and that, whenever she was asked to come for a meeting, she brought her cards and papers with her. The prospective employers listed on both versions are identical. The only difference is the dates identified as when she sought employment at these places. On the 1992 Creole version the dates August 1990 with an arrow to April 1991 is crossed out. Samedy did not know who did this or why the dates were crossed out. The 1995 English version has the dates "Feb.–Aug. 1990" next to each employer's name. It is obvious that these dates are inaccurate because, by her own testimony, Samedy would not have sought work at these places from April through August 1990, when she was in the latter stages of her pregnancy. Because Samedy herself did not write this information and had no recollection regarding the circumstances under which these two pages were completed, I attach no weight to them as to the dates she sought work.

The compliance form does corroborate Samedy's testimony that she looked for work during the backpay period because it identifies four places. This was information that she provided based on cards she had collected during her job search. The fact that she could not recall the names of any places at the hearing is not a sufficient basis to deny her backpay. Similarly, the fact that only four places are identified on the form, by itself, does not establish that her efforts were not reasonably diligent. The Respondent has not attempted to show that any greater effort on her part would have been successful, or that there were jobs available for Samedy at other employers for which she would have been hired had she applied for them. Accordingly, I find that the Respondent has not met its burden of proving that Samedy is entitled to no backpay, or that her gross backpay should be reduced beyond that calculated by the General Counsel.

Based on the above, I find that Samedy is entitled to $3648, plus interest, under the Board's Order.

78. Richard Simon

The General Counsel seeks backpay for Simon in the amount of $7,472.70. He has interim earnings reported from Just Packaging in each of the last three quarters of the backpay period. The Respondent argues that backpay should be tolled for Simon until he obtained employment with Just Packaging. The Respondent argues that his testimony at the hearing regarding his efforts to find work is not credible. According to the Respondent, a statement on the compliance form that Simon signed in 1992, indicating that he was "unavailable" before February 1, 1991, because of the strike, is more reliable.

Simon testified that he looked for work throughout the backpay period. He testified that he would leave his house at 6 a.m. to look for work by 7 a.m. and would get to the site of the picket line at various times between 9 and 10 a.m. About once a week he would go with Tigus to look for work, but would go by himself or with friends more often. According to Simon, the only day that he did not look for work was Fridays because that is payday and he did not believe companies hire on payday. Simon recalled the geographic areas in Brooklyn and Manhattan where he looked for work and the types of factories and stores he visited seeking a job. The only name he recalled, however, was "Ya-Ya's," referring to the owner of a place that also processes used clothing like the Respondent. Simon claimed that he could neither read nor write English or Creole. He refused to answer questions regarding the level of schooling he attained in Haiti. Despite his illiteracy, Simon was able to copy down the names of places he went as they appeared on a sign or the building. Simon testified that he also collected business cards from places he went and gave these and newspaper advertisements he had cut out to his sister to make a list of

places where he looked for work. He testified that he sent this list to the NLRB's Regional Office in an envelope that was given to him by a female Board agent. The General Counsel represented that no such list was in the file at the time of the hearing.

The compliance form that Simon acknowledged signing on April 20, 1992, was filled out by someone else because of Simon's claimed illiteracy. He could not recall who filled it out. The form is in Creole, the handwritten answers are in English and Creole. At the bottom of the first page, where a discriminatee is asked if he or she was unavailable to work during any part of the backpay period, the Creole word for yes is checked. There is also a checkmark next to the word for no, but that is crossed out and "error" is written in English. For the dates of "unavailability," someone has written "01/30/90 to 02/01/91," coinciding with the period that the Union provided strike benefits to the Respondent's employees. The reason given for the "unavailability" is "strike," in Creole. When asked if, and how much, he was paid during this period, someone wrote "yes" in Creole, and "$60 weekly" in English. The interim employment at Just Packaging is identified on page two of the form, with the information written in English. On page three, where the discriminatees are asked to describe there efforts to find work during the backpay period, only the following appears, in English:

> 02/11/91-I was looking for a job and then I find it.
> Just Packaging, Inc.
> 269 Green Ave Br'klyn n.y. 11222 [sic]

I agree with the Respondent that Simon's testimony that he looked for work during the period that he was receiving strike benefits is not credible. I do not believe that Simon is truly illiterate. He appeared able to understand more English than he claimed. Moreover, his ability to copy down names of businesses and addresses belies a certain degree of literacy. His defensive manner when questioned about his schooling and prior work experience, for the explicit purpose of testing the credibility of his claims to illiteracy, convinced me that the witness was not being truthful. As a result, I find his testimony that the person who filled out the form made a mistake in answering the question on page 1, and that he was not asked where he looked for work when page three was filled out, is not credible. On the contrary, I find that his statements on the form, completed within a year of the backpay period, are more reliable than his testimony. Because the Union's strike benefit records show that Simon was receiving $60 or $72 every week from August 13, 1990, through February 1, 1991, I find that he falls into the category of discriminatees who elected to support the Union's cause by remaining on the picket line at the expense of seeking work. Accordingly, he is not entitled to backpay for the third and fourth quarters of 1990. I will not toll backpay for the month of January because Simon recalled being at the meeting when the strikers were informed that benefits were going to stop on February 1. This meeting occurred sometime in January, before the cessation of benefits. Giving him the benefit of the doubt, and accepting the statement he wrote on page three of the form indicating that he was looking for work before he found the job at Just Packaging, I find it more than likely that he began looking for work sometime in January. His success in finding substantially equivalent employment so soon after the start of his job search establishes that he satisfied his duty to mitigate backpay in all of 1991. The interim earnings reported on the compliance specification are his actual earnings as reported to the Social Security Administration. He is entitled to the difference between these actual earnings and what he would have earned working for the Respondent from January 1 to August 20, 1991.

Based on the above, I find that Simon is owed $2,734.70, plus interest, under the Board's Order.

79. Justo Suazo

The General Counsel seeks backpay for Suazo in the amount of $7,791.94. The only interim earnings reported are $75 in each of the first three quarters of the backpay period from occasional "off-the-books" cleaning jobs. No backpay is sought after April 2, 1991, the date that Suazo was reinstated by the Respondent. The Respondent argues that no backpay is owed because Suazo did not conduct a reasonably diligent search for work prior to his reinstatement. In the alternative, the Respondent argues that there should be a deduction for the strike benefits he received prior to February 1, 1991. As discussed above, the strike benefits here are not deductible as interim earnings.

Suazo testified that he sought work by going to the offices of a union on 233d St. in the Bronx where he would sit down and wait to be called for work. From his description, it appears that this is the same Local 32E hiring hall that several other discriminatees visited in search of work. Marcos Pitillo, another discriminatee, testified that he saw Justo Suazo at this union hall when he was looking for work. Suazo went to the union hiring hall on more than one occasion, but it is unclear how often or when he made these efforts. In any event, he never found work in that manner. Suazo testified that he also made applications at two factories in the Bronx, but he was never called for a job, and that the Union took him a couple times to factories near the Respondent's facility to look for work. He testified further that, on the days that he looked for work on his own, he did not go to the picket line and received a lesser amount of strike benefits at the end of the week. The times he went with the Union to look for work occurred on days he was at the picket line.

The Union's strike benefit records corroborate his testimony that he was not at the picket line every day. For example, he did not sign for any benefits for the weeks ending August 31 and September 7, 1990, and signed for only $36 or $48 for weeks ending August 17, and September 21, 1990, and January 11 and 18, 1991. Moreover, Suazo testified credibly that he had to look for work even while receiving money from the Union because he could not live on the $60 that the Union gave him. He testified that even though he would receive less money if he didn't go every day, he nevertheless looked for work instead of going to the picket line on some days. I find that Suazo did not remain on the picket line at the expense of seeking work during the period August 13, 1990, through February 1, 1991.

The Respondent argues, based on his testimony and the compliance form in evidence, that his efforts to find work were not reasonable. However, the Respondent did not attempt to

show that any greater effort would have proved successful. Moreover, I note that Suazo attempted to mitigate backpay not only by looking for work as described above, but by working occasionally "off-the-books" doing cleaning jobs. The fact that the sections of the compliance form bearing his name, which asked for a description of his efforts to find work, are blank or do not list the places he looked for work, is not enough to discredit his testimony. The form is neither signed nor dated. Although Suazo recognized the form as one filled out the first time he came to be interviewed at the Board's offices, it is obvious he didn't understand the form. For example, instead of listing places he went to seek work, Suazo, or someone else, wrote in the name address, etc., of the Respondent, with a date that appears to be the date he returned to work. This nonresponsive answer suggests he did not understand the question. I noted a similar tendency when answering questions at the hearing. Under these circumstances, it would be unfair to deny him any remedy for the Respondent's unfair labor practices.

Based on the above, I find that Justo Suazo is entitled to $7,791.94, plus interest, under the Board's Order.

80. Josette Vaval

The General Counsel seeks backpay for Vaval in the amount of $8416. She has no reported interim earnings. The Respondent argues that no backpay is owed because "there is no credible evidence in the record that she looked for work during the backpay period." The Respondent cites various inconsistencies in her testimony and the seeming improbability of some of her testimony as a basis for discrediting her.

Vaval's testimony was at times confusing and some of it was not believable. However, this appears to be explained more by an inability to recall events that happened 7–8 years before she testified rather than any effort to deceive the court. For example, Vaval clearly recalled being reinstated by the Respondent on August 20, 1991, but she believed that she was at the site of the picket line, receiving money from the Union until she went back to work. We know from other evidence in the record that this is not accurate. Similarly, although she clearly recalled being fired by Peter Salm in January 1993, she believed that the Union was standing outside the Respondent's facility when she was fired and that she joined the union there. This also appears contrary to reality. Vaval seemed genuinely confused at times, giving answers that were nonresponsive or made no sense. Rather than being evidence that she was lying, it appears she simply did not recall what happened during the backpay period in any but the most general terms.

The fact that her testimony may be unreliable because of poor recall or mental confusion is not sufficient to prove that she failed to satisfy her duty to mitigate backpay. The Respondent has the burden of proving affirmatively that she incurred a willful loss during the backpay period. The evidence in the record, in its current state, does not establish that. For example, Vaval did testify that she would meet Tigus outside the Respondent's facility, at the site of the picket line, and would go look for work with a group of strikers. This is consistent with other evidence in the record regarding the Union's efforts to find work for the strikers. Her testimony that Tigus also came to her house in Manhattan to pick her up to look for work, in all probability relates to the period after she was fired in 1993, when Tigus did not have over a 100 discriminatees to assist in finding work. Her confusing testimony, at its worst, raises a doubt regarding the specifics of her efforts to find interim employment, a doubt which I shall resolve in her favor as the victim of the Respondent's wrongdoing. She certainly cannot be blamed for failing to recall events that occurred so long ago, or for confusing dates and events that occurred before and after the backpay period.

Accordingly, based on the above, I find that Vaval is entitled to $8416, plus interest, under the Board's Order.

81. Agare Victor

The General Counsel seeks backpay for Victor in the amount of $8,246.50. She has interim earnings from a job at 3 Stars Distributors in Elizabeth, New Jersey, beginning in the first quarter of 1991 and continuing through the remainder of the backpay period. The Respondent argues that Victor is not entitled to any backpay because she did not conduct a "reasonable and diligent search for work." The Respondent relies upon her testimony and the undated compliance form she filled out to prove that her efforts were inadequate. The Respondent argues that no backpay is owed for the period after she started working at 3 Stars because her earnings represented only part-time employment and she failed to look for full-time employment.

Victor testified that she looked for work until she found the job at 3 Stars. She testified that she filled out applications at three places in New Jersey and was hired at the third. She had a specific detailed recollection regarding her efforts to find work at these three places. Victor also recalled going with a friend to another company in Rahway, New Jersey. She did not fill out an application there because she was told when she got there that the jobs had been filled. In addition to these efforts, she asked relatives and friends if they knew of any job openings and had relatives looking in the Newark Star Ledger newspaper for cleaning jobs. Either her husband or a relative would call in response to these ads. It appears that every such job that she inquired about was already filled when called. All of Victor's efforts to find work were limited to New Jersey, where she lived. She did not look for work in Brooklyn, even though she had commuted there from New Jersey before the strike and was still going there 5–6 days a week to assemble outside the Respondent's facility with the other strikers.

Victor recognized the undated compliance form that bears her signature. She did not fill out the form herself, but had assistance from her husband and the Union. She recalled the form being filled out with a group of strikers but could not recall specifically who wrote the answers on the form. At the bottom of page one, in response to the question regarding unavailability for work, the affirmative answer is checked, with the date commencing entered as "1/30/90," i.e., the date the strike started. The Creole word for strike is circled as the reason for the unavailability. When shown this answer, Victor testified she did not recall anything about the answer, but denied that it was accurate. Page 4 of the form, where discriminatees are asked to describe their efforts to find work, is blank except for her signature. Victor did not recall why nothing was written there.

Victor testified that she went to 3 Star Distributors two times before being hired. A friend who worked there took her both times. The first time, there were no jobs. She testified that she was hired for a full-time job, stuffing pocketbooks, at the hourly rate of $4.10. Paystubs in evidence show the starting rate was actually $4, which increased to $4.25 by May 1991. She testified further that, after she started working there, there were times when work was slow and she would only work 2 or 3 days a week. Apparently, employees were assigned to work by groups and would alternate days. According to Victor, she worked full time for about 2 months, but the rest of the time, only worked 2–3 days a week. She is still working for this employer and, apparently, this has not changed over time. Although Victor testified that she stayed home on the days she was not working at 3 Star, she also testified that, to the present time, she has been looking for other work that would be full-time, without success. It may be that she used the same method to find other full-time work after being hired by 3 Star that she did before, i.e., talking to friends and relatives rather than physically going out to look for work unless a specific opening is available to apply for.

The Respondent also cites the Union's strike benefit records as proof that Victor did not look for work while receiving money from the Union because they show that she was at the site of the former picket line at least 5 days in virtually every week. However, there are some weeks in November, December, and January when Victor attended the picket line only 3 or 4 days. In all probability, this coincides with the few times she physically went to apply or seek work in New Jersey. Based on her testimony and the other evidence, it appears her efforts to find work before she found the job at 3 Star were not very extensive and that she relied primarily on others to inquire for her and let her know about openings. In the context of the entire backpay period, these efforts satisfied the Board's standards of reasonable diligence because she was ultimately successful at finding employment where she was paid an hourly rate equivalent to what she would have earned at the Respondent's facility. This work continued throughout the remainder of the backpay period and resulted in a significant reduction in the Respondent's backpay obligation.

Contrary to the Respondent's contention, the record does not establish that the job Victor found at 3 Star was so deficient in earnings that she was required to keep looking for other work. The year to date figures on the three pay stubs in evidence show that, with the exception of the period from February 16 through March 16, she was working the equivalent of 4 or 5 days a week. For example, when the year to date earnings shown for week ending March 23, 1991, are subtracted from the year-to-date earnings shown for the week ending May 25, 1991, it leaves $1,246.64 having been earned between March 23 and May 25. Since we know from the pay stub that she worked 31.75 hours and earned $135.69 in the week ending May 25, the remaining $1,110.95 averaged over the missing 7 weeks comes to gross weekly earnings of $158.71. Even assuming that her hourly rate was $4.25 for this entire period, she was averaging more than 37 hours a week. This is hardly part-time work! In extrapolating these figures through the remainder of the backpay figure, the General Counsel has credited the discriminatee with at least 32 hours a week worth of earnings. I find that this represents substantial mitigation. Accordingly, the Respondent has not met its burden of proving that Victor should be denied backpay due to any willful loss of earnings.

Based on the above, I find that Victor is entitled to $8,246.50, plus interest, under the Board's Order.

82. Joseph Virgile

The General Counsel seeks backpay for Virgile in the amount of $2,087.15. The General Counsel seeks no backpay after April 2, 1991, the date that he was reinstated by the Respondent. He has substantial interim earnings from work in construction for the last two quarters of 1990 which exceeds his gross backpay. Thus, the only issue is the amount of backpay due, if any, for the first quarter of 1991. The Respondent argues that Virgile should get no backpay based on its contention that he failed to conduct a reasonable search for work from January to April 1991.

The evidence in the record establishes that Virgile was already working as a mason's helper for J. Petrocelli Construction at the beginning of the backpay period. He was laid off when that job ended on September 4, 1990, and found another job doing similar work for Bri-Den construction within a short time. When he was laid off from that job, he worked for his brother, also doing masonry work, and was paid $400/week. His interim earnings from these three jobs exceeded his gross backpay in both the third and fourth quarters of 1990. According to Virgile, he worked for his brother until the end of the year and stopped working when it became too cold. Virgile testified that he did look for other work as a mason, but there were no jobs because it was wintertime. He testified that he also looked for work in other industries, and that he asked friends if they knew of any jobs. He did not find other employment before being reinstated by the Respondent. Virgile did not keep a list of the places that he looked for work and did not remember any places at the hearing.

The compliance form that Virgile signed on April 15, 1992, was filled out by his girlfriend based on information he provided to her. Virgile acknowledged that he can read Creole, the language of the form. The Respondent relies on the fact that the page where Virgile was asked to describe his efforts to find work is blank as proof that he did not look for work from January through March 1991. Assuming Virgile did not look for work in the first quarter of 1991, I would nonetheless find that he satisfied his duty to mitigate under current Board law. A discriminatee's efforts must be considered over the course of the entire backpay period. A brief hiatus in a discriminatee's efforts to find work, in the context of a backpay period marked by substantial interim earnings, hardly proves that someone is willfully idle. See *Electrical Workers Local 3 (Fischbach & Moore),* supra. In any event, I credit Virgile's testimony that he was looking for work during the time that it was too cold to work as a mason and while he was awaiting reinstatement by the Respondent. The blank form does not prove that he did not look for work. It may well be that, at the time the form was filled out, Virgile did not recall where he had gone in search of work. That would be understandable since he had not kept any list or other record of his efforts during the backpay period. The

fact that he was productively employed through most of the backpay period tends to corroborate his claim that he looked for work.

Accordingly, I find that Joseph Virgile is entitled to $2,087.15, plus interest, under the Board's Order.

[Recommended Order omitted from publication.]