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J.J. Cassone Bakery, Inc. and Bakery, Confectionary and Tobacco Workers & Grain Miller Union, Local No. 3, AFL-CIO and Carbilio Flores and Lorenzo Macua. Cases 2-CA-32559, 2-CA-32778, 2-CA-32941, 2-CA-33144, and 2-CA-33267

March 30, 2011

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On September 7, 2010, Administrative Law Judge Raymond P. Green issued the attached second supplemental decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Acting General Counsel also filed cross-exceptions with a supporting brief.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and

¹ The judge received into evidence several exhibits consisting of notes taken by Board agents during conversations with discriminatees Macua and Flores some months or years before the hearing. The judge used the notes only in determining when Macua began searching for interim employment. We reject the Respondent's argument that these notes should be controlling where they disagree with Macua's and Flores's oral testimony. The notes are only fragmentary summaries of the agents' understanding of their conversations with the discriminatees. Macua and Flores did not write, sign, or otherwise adopt these notes, nor did they admit to making the "statements" contained in the notes. As a result, the notes plainly stand on a different footing from the documents at issue in the two cases upon which the Respondent relies, *Associated Transport Co. of Texas* 194 NLRB 62 (1971), which involved social security records, and *Domsey Trading Corp.*, 351 NLRB 824 (2007), enf. denied and petition for review dismissed 383 Fed. Appx. 46 (2d Cir. 2010), enf. denied on other grounds ___ F.3d ___ (2d Cir. Feb. 18, 2011), in which the discriminatees personally filled out or signed the relevant documents.

The Respondent excepts to the judge's refusal to reopen the record for additional testimony regarding Macua's termination from his interim employment at Rye School District. The Respondent, however, does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous ruling should be overturned. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enf. 456 F.3d 265 (1st Cir. 2006).

² 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.

conclusions as modified below, and to adopt the recommended Order as modified and set forth in full below.

This compliance proceeding involves the calculation of backpay awards for five discriminatees covering the period 1999 to 2009: Adan Aguilar, Cesar Calderon, Jose Castro, Carbilio Flores, and Lorenzo Macua. With respect to Aguilar and Calderon, we affirm the judge's findings for the reasons stated in his decision.³ With respect to Castro, Flores, and Macua, we find merit in the Acting General Counsel's cross-exceptions, which assert that certain minor modifications to the judge's calculations are necessary. These modifications are described below, and our modified calculations appear in bold in the attached appendices summarizing the amounts owed to each discriminatee.⁴

As a preliminary matter, we consider the Acting General Counsel's request to admit amended appendices to the backpay specification for Castro and Macua into evidence. The amendments at issue correct mathematical errors and update a number of quarterly calculations based on hearing testimony and documents introduced into evidence. The Acting General Counsel initially submitted the amendments to the judge following the close of the hearing, but the judge did not rule on the Acting General Counsel's request that they be admitted into evidence. Nevertheless, the judge relied on them in making almost all of his backpay calculations, and the Respondent has not objected to the Acting General Counsel's request to admit them. We therefore admit these appendices into evidence.

In addition, we note that, in several instances, the judge inadvertently relied on backpay specification appendices that had been superseded by amended appendi-

Standard Dry Wall Products, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge stated his reliance on *NLRB v. Inland Empire Meat Co.*, 692 F.2d 764 (9th Cir. 1982), in articulating the Respondent's burden of proof in a compliance proceeding. We are satisfied that the judge intended to cite the Board's underlying decision, *Inland Empire Meat Co.*, 255 NLRB 1306, 1308-1310 (1981), which the Ninth Circuit enforced by memorandum in the cited decision.

³ In affirming the judge's backpay award for Aguilar, we find it unnecessary to rely on the judge's statement that Aguilar had no obligation to search for interim employment because he was suspended, rather than discharged, as the record fully supports the judge's finding that Aguilar actually searched for interim work. In addition, the judge inadvertently stated that Aguilar began searching for work around the third week of his suspension. In fact, Aguilar testified that he began his search no later than the second week of his suspension. Moreover, because Aguilar's search was reasonably diligent, he is entitled to backpay as calculated by the judge.

⁴ The Acting General Counsel also excepts to several minor factual errors in the judge's decision. We find no need to reach these exceptions, however, because the errors do not affect the amounts owed to the discriminatees.

ces in making his backpay calculations for Castro, Flores, and Macua. As the Respondent did not object to any of the amended appendices introduced at the hearing, and as we have granted the Acting General Counsel's motion to admit the amended appendices submitted after the hearing had closed, we rely on the calculations found in Appendices A-2, A-3, and A-5 as amended, and we substitute those amounts in the attached backpay calculations.⁵

In addition, we make the following specific modifications to the judge's backpay calculations.

Jose Castro

First, the attached Appendix 1 corrects several inadvertent mathematical and typographical errors that affect the amounts due to Castro.⁶

Second, in calculating Castro's interim earnings and net backpay for the third and fourth quarters of 2003 and the first quarter of 2006, and in calculating his gross backpay, interim earnings, and net backpay for the second quarter of 2008, the judge arrived at one backpay figure in his analysis but used a different figure in his calculations. In each case we rely on the figure that corresponds with Appendix A-2 as amended.

Carbilio Flores

The attached Appendix 2 corrects several inadvertent mathematical and typographical errors in the judge's calculations that affect Flores's interim earnings for the second, third, and fourth quarters of 2004; his interim earnings and net backpay for the third quarter of 2008; and his net backpay for the fourth quarters of 2000 and 2001, the first quarter of 2004, the fourth quarter of 2007,⁷ and the first and fourth quarters of 2008.

⁵ The following calculations relating to Castro, Flores, and Macua relied on superseded versions of the backpay specification's appendices: Macua's sick pay; Flores's gross and net backpay for the second quarter of 2008 and his sick pay, vacation pay, and pension benefits; and Castro's interim earnings for the third quarter of 2001, gross backpay and net backpay for the second and third quarters of 2006, interim earnings and net backpay for the first quarter of 2008, and interim earnings for the second quarter of 2008.

⁶ The specific calculations affected are Castro's net backpay for the third quarter of 2000, net backpay for the second quarter of 2001, net backpay for the fourth quarter of 2002, interim earnings for the third and fourth quarters of 2003, net backpay for the first quarter of 2005, interim earnings and net backpay for the third quarter of 2005, interim earnings and net backpay for all quarters in 2006, interim earnings for the first quarter of 2008, gross backpay and net backpay for the fourth quarter of 2008, and interim earnings and net backpay for the first quarter of 2009.

⁷ In addition to the mathematical errors identified by the Acting General Counsel, we correct Flores' net backpay figure in fourth quarter of 2007 from \$1085 to \$1084, which results in total net and backpay figures of \$128,437 and \$150,756, respectively.

Lorenzo Macua

The attached Appendix 3 corrects certain inadvertent mathematical and typographical errors in the judge's calculations of Macua's gross backpay for the third and fourth quarters of 2001 and the second quarter of 2002, his net backpay for the third quarter of 2002, his interim earnings for the fourth quarter of 2004, and his interim earnings and net backpay for the third and fourth quarters of 2003 and the second quarter of 2005.

In addition, we modify the judge's calculations of Macua's interim earnings and net backpay for the third and fourth quarters of 2006. Pursuant to *Performance Friction Corp.*, 335 NLRB 1117, 1136 (2001), and *Regional Import and Export Trucking Co.*, 318 NLRB 816, 818 (1995), when a discriminatee works substantially more hours for an interim employer than would have been the case had the discriminatee still worked for the respondent, only interim earnings based on the same number of hours as were available at the respondent are offset against gross backpay. Because Macua worked substantially more hours at his interim employers than he would have at the Respondent during certain quarters, we reduce his interim earnings and modify his net backpay as detailed in Appendix 3.

Finally, as set forth in Appendix 3, the judge inadvertently misstated Macua's interim earnings for 2007. We correct those amounts to be consistent with Macua's W-2s, and we modify his net backpay accordingly.

AMENDED ORDER

The National Labor Relations Board orders that the Respondent, J.J. Cassone Bakery, Inc., Portchester, New York, its officers, agents, successors, and assigns, shall make payments to the following individuals in the following amounts:

Lorenzo Macua

Total net backpay of \$79,990 plus interest.
 Vacation pay of \$7279 plus interest.
 Sick pay of \$3053 plus interest.
 Pension benefit of \$5430 plus interest.
Total = \$95,752

Carbilio Flores

Total net backpay of \$128,437 plus interest.
 Vacation pay of \$11,244 plus interest.
 Sick pay of \$3527 plus interest.
 Pension benefit of \$7548 plus interest.
Total = \$150,756

Jose Castro

Total net backpay of \$160,678 plus interest.
 Vacation pay of \$12,978 plus interest.
 Sick pay of \$3838 plus interest.

Pension benefit of \$7419 plus interest.	2005	1st	\$5822	\$0	\$5822
<u>Total = \$184,923</u>	2005	2nd	\$7569	\$1866	\$5703
Adan Aguilar	2005	3rd	\$7881	\$1866	\$6016
Total net backpay of \$1204 plus interest	2005	4th	\$7881	\$1436	\$6445
<u>Total = \$1204</u>	2006	1st	\$7881	\$3574	\$4307
Cesar Calderon	2006	2nd	\$4851	\$2225	\$2626
Total net backpay of \$5214 plus interest.	2006	3rd	\$7882	\$1907	\$5975
Vacation pay of \$66 plus interest.	2006	4th	\$7881	\$3573	\$4308
Sick pay of \$39 plus interest.	2007	1st	\$8079	\$4222	\$3857
<u>Total = \$5319</u>	2007	2nd	\$8452	\$2273	\$6179
TOTAL BACKPAY = \$437,954	2007	3rd	\$7967	\$1949	\$6018
Dated, Washington, D.C. March 30, 2011	2007	4th	\$8224	\$4222	\$4002
	2008	1st	\$7507	\$4336	\$3171
	2008	2nd	\$3707	\$2335	\$1372
	2008	3rd	\$0	\$0	\$0
Wilma B. Liebman, Chairman	2008	4th	\$5840	\$2483	\$3357
	2009	1st	\$5018	\$2477	\$2541
Craig Becker, Member	<u>Total Net:</u>				\$160,678
				Vacation:	\$12,978
				Sick:	\$3838
				Pension:	\$7419
Mark Gaston Pearce, Member				TOTAL:	\$184,923

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX 1
Backpay Calculations for Jose Castro

Year	Qtr	Gross Backpay	Interim Earnings	Net Backpay
2000	2nd	\$4593	\$220.50	\$4372
2000	3rd	\$6634	\$1830	\$4795
2000	4th	\$6634	\$2855	\$3780
2001	1st	\$6634	\$2912	\$3722
2001	2nd	\$6634	\$2912	\$3722
2001	3rd	\$6946	\$1943	\$5003
2001	4th	\$6946	\$3553	\$3393
2002	1st	\$6946	\$2692	\$4254
2002	2nd	\$6946	\$2692	\$4254
2002	3rd	\$6946	\$2692	\$4254
2002	4th	\$7258	\$2692	\$4566
2003	1st	\$7258	\$3140	\$4118
2003	2nd	\$7258	\$1401	\$5856
2003	3rd	\$7258	\$1121	\$6137
2003	4th	\$7258	\$1121	\$6137
2004	1st	\$7569	\$1380	\$6189
2004	2nd	\$7569	\$2990	\$4579
2004	3rd	\$7569	\$2990	\$4579
2004	4th	\$7569	\$2300	\$5269

APPENDIX 2
Backpay Calculations for Carbilio Flores

Year	Qtr	Gross Backpay	Interim Earnings	Net Backpay
2000	1st	\$318	\$0	\$318
2000	2nd	(no backpay owed)		
2000	3rd	\$2122	\$650	\$1472
2000	4th	\$6897	\$3220	\$3677
2001	1st	\$6897	\$2500	\$4397
2001	2nd	\$6897	\$0	\$6897
2001	3rd	\$7239	\$0	\$7239
2001	4th	\$7239	\$2500	\$4739
2002	1st	\$7239	\$1962.50	\$5277
2002	2nd	\$7239	\$1962.50	\$5277
2002	3rd	\$7239	\$1962.50	\$5277
2002	4th	\$7581	\$1962.50	\$5619
2003	1st	\$7581	\$2742	\$4839
2003	2nd	\$7581	\$4160	\$3421
2003	3rd	\$7581	\$2309	\$5272
2003	4th	\$7581	\$2112	\$5469
2004	1st	\$7924	\$2112	\$5812
2004	2nd	\$7924	\$5290	\$2634
2004	3rd	\$7924	\$5290	\$2634
2004	4th	\$7924	\$5290	\$2634
2005	1st	\$7924	\$6262	\$1662
2005	2nd	\$7924	\$6262	\$1662
2005	3rd	\$8266	\$6262	\$2004

2005	4th	\$8266	\$6262	\$2004
2006	1st	\$8266	\$6804	\$1462
2006	2nd	\$6994	\$6804	\$190
2006	3rd	\$8266	\$2473	\$5793
2006	4th	\$6359	\$1625	\$4734
2007	1st	\$6359	\$1625	\$4734
2007	2nd	\$8266	\$5455	\$2812
2007	3rd	\$8266	\$5455	\$2812
2007	4th	\$6539	\$5455	\$1084
2008	1st	\$8037	\$5444	\$2593
2008	2nd	\$6697	\$5444	\$1253
2008	3rd	\$6670	\$4070	\$2600
2008	4th	\$7256	\$1658	\$5598
2009	1st	\$3531	\$995	\$2536
		<u>Total Net:</u>	\$128,437	
		Vacation:	\$11,244	
		Sick:	\$3527	
		Pension:	\$7548	
		TOTAL:	\$150,756	

APPENDIX 3

Backpay Calculations for Lorenzo Macua

Interim Earnings and Net Backpay for the second and third quarters of 2006:

Had Macua worked for the Respondent in these quarters, he would have averaged 53.4 hours per week in the third quarter and 48.6 hours per week in the fourth; at his interim employers, he worked 65 hours in the third (40 for Park, 25 for Guardian) and 62 in the fourth (37 for Park, 25 for Guardian). We therefore reduce his interim earnings for the third quarter by \$234.32 (difference of 11.6 hours x \$10.10 [Guardian wage] x 2 weeks) and for the fourth quarter by \$1759.42 (difference of 13.4 hours x \$10.10 x 13 weeks). Macua's interim earnings to be offset against gross backpay for these quarters are therefore \$1871 and \$8689, respectively, and his net backpay for these quarters is \$4269 and \$0, respectively.

Interim Earnings and Net Backpay for 2007:

The judge incorrectly found that Macua earned \$1600 from Park Masonry and \$13,975 from Guardian in 2007. Macua's W-2s show he earned \$1680 and \$13,074.83, respectively. The \$1680 from Park was earned during the first quarter; his earnings from Guardian translate to \$3269 per quarter. As Guardian was Macua's only employer during the second, third, and fourth quarters, we modify his interim earnings for those quarters accordingly and recalculate his net backpay as \$2495, \$2283, and \$2274, respectively.

During the first quarter, Macua worked 24 hours a week at Park Masonry for the first four weeks and 25

hours a week at Guardian. He therefore worked 49 hours a week for the first four weeks, compared to 46.36 hours a week he would have worked at the Respondent. Applying *Regional Import and Export*, we reduce Macua's interim earnings for the first quarter by \$106.66 (difference of 2.64 hours x \$10.10 x 4 weeks) resulting in total interim earnings of \$4842 and net backpay of \$214.

<i>Year</i>	<i>Qtr</i>	<i>Gross Backpay</i>	<i>Interim Earnings</i>	<i>Net Backpay</i>
2000	3rd	(unavailable for work)		\$0
2000	4th	\$5995	\$160	\$5835
2001	1st	\$5995	\$0	\$5995
2001	2nd	\$5995	\$2249	\$3756
2001	3rd	\$6321	\$5848	\$473
2001	4th	\$6321	\$5848	\$473
2002	1st	\$6028	\$5458	\$569
2002	2nd	\$5684	\$5458	\$226
2002	3rd	\$5692	\$5458	\$234
2002	4th	\$5719	\$5458	\$261
2003	1st	\$5556	\$0	\$5556
2003	2nd	\$6048	\$1258	\$4790
2003	3rd	\$5961	\$3399	\$2562
2003	4th	\$5365	\$5210	\$155
2004	1st	\$5586	\$2628	\$2958
2004	2nd	\$5809	\$2267	\$3542
2004	3rd	\$6440	\$3612	\$2829
2004	4th	\$6772	\$6303	\$469
2005	1st	\$6924	\$5262	\$1662
2005	2nd	\$5972	\$3609	\$2363
2005	3rd	\$6079	\$1111	\$4968
2005	4th	\$6234	\$0	\$6234
2006	1st	\$5663	\$0	\$5663
2006	2nd	\$5850	\$0	\$5850
2006	3rd	\$6139	\$1871	\$4268
2006	4th	\$5398	\$8689	\$0
2007	1st	\$5056	\$4842	\$214
2007	2nd	\$5764	\$3269	\$2495
2007	3rd	\$5552	\$326	\$2283
2007	4th	\$5543	\$3269	\$2274
2008	1st	\$5863	\$4819	\$1043

Total Net: \$79,990

Vacation: \$7279
Sick: **\$3053**
Pension: \$5430
TOTAL: **\$95,752**

Margit Reiner, Esq. and *Olga Torres, Esq.*, for the General Counsel.

Marc L. Silverman, Esq., for the Respondent.
Jeffrey Freund, Esq., for the Union.

SECOND SUPPLEMENTAL DECISION

I. STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this backpay case in New York City in March, April, and May 2010.

On June 26, 2007, the Board at 350 NLRB 86 (2007), concluded that the Respondent violated the Act in certain respects and issued an Order requiring the Respondent to make whole, with interest, Cesar Calderon, Adan Aguilar, Cabrilio Flores, José Mario Castro, Lorenzo Macua, and Roberto Lostaunau. This Order was enforced by the United States Court of Appeals for the District of Columbia on January 23, 2009. The backpay specification was issued by Region 2 of the National Labor Relations Board on November 30, 2009.

With respect to Aguilar, the Board majority concluded, contrary to the Administrative Law Judge that his discharge was justified but that a suspension issued to him was not. Accordingly, the Board's Order required the Respondent to make him whole only for the period of his suspension and did not require the Respondent to offer him reinstatement. In the backpay specification as amended, the General Counsel asserts that the backpay period for Aguilar is from November 12 to December 20, 1999, at which time his suspension ended. The calculations that the General Counsel allege as owing to Aguilar are contained in Appendix A-1. The Respondent admitted that the backpay period is correct and that the gross backpay figures alleged by the General Counsel are correct.

With respect to Jose Castro, the backpay specification as amended asserts that the backpay period starts on April 4, 2000, and ends on March 4, 2009, which is when the Respondent made a valid offer of reinstatement to him. The calculations that the General Counsel alleged as owing to Castro are contained in Appendix A-2. The Respondent admits that the backpay period is correct and that the gross backpay figures alleged by the General Counsel are correct.

With respect to Carbilio Flores, the backpay specification asserts that the backpay period runs from March 8-11, 2000, (during a three day suspension), and from September 3, 2000, through March 3, 2009, at which time the Respondent made a valid reinstatement offer. The calculations that the General Counsel alleged as owing Flores are contained in Appendix A-3 as amended. The Respondent admits that the backpay period is correct and that the gross backpay figures alleged by the General Counsel are correct.

With respect to Lorenzo Macua, the backpay specification asserts that the backpay period runs from July 5, 2000, to March 4, 2009, at which time the Respondent made a valid reinstatement offer. The calculations that the General Counsel alleged as owing Macua are contained in Appendix A-6. The Respondent admits that the backpay period is correct and that the gross backpay figures alleged by the General Counsel are correct.

With respect to Cesar Calderon, the backpay specification asserts that the backpay period runs from November 3, 1999, to March 31, 2001, at which time he removed himself from the New York metropolitan area labor market. As noted in the underlying Decision, Calderon was a "salt" and as discussed be-

low, he only sought employment at nonunion bakeries after he was discharged by the Respondent. It argues, inter alia, that this should not be considered as a sufficient mitigation effort on the part of this discriminate. The calculations that the General Counsel alleged as owing Calderon are contained in Appendix A-6. The Respondent admits that the backpay period is correct and that the gross backpay figures alleged by the General Counsel are correct.

At the hearing the parties settled the backpay claim for Roberto Lostaunau. Therefore, his situation is not included in this Decision.

In addition to monetary wages, the General Counsel set forth in the respective appendices, certain amounts of money allegedly owed by the Respondent to some of the discriminates for pension payments, sick pay, and vacation pay. These were calculated in accordance with the Respondent's policies in existence during the backpay period. The Respondent does not challenge the method by which these benefits were calculated. In the case of Aguilar, the General Counsel did not calculate an amount for pension benefits because the Board decided that he was lawfully terminated. Also, no pension benefit was calculated for Cesar Calderon because he would not have worked the 2 year period that would have qualified him for this benefit.

In relation to the gross backpay figures, there is no dispute about the way that the amounts were calculated. That is, the parties agreed on the wage rates and the overtime rates that the discriminatees would have earned during the backpay period. They also agreed on the amount of regular and overtime hours that each discriminate would have worked during each quarter of the backpay period. In addition, the General Counsel has, with one exception, tolled the backpay period for any period of time that the discriminates were out of the country or were otherwise unavailable for work due to injury, sickness, or a requirement that a discriminate had to care for a sick relative. Accordingly, the gross backpay calculations, including the derivative "benefit calculations, are largely not in dispute.

That is not to say that there are no disputes in this case. For example, in one instance, a discriminate testified that he was injured while working at a private residence after his discharge from the Respondent. The General Counsel asserts that this was a work related injury and therefore his unavailability for work did not disqualify him from backpay during the period of his injury. The Respondent contends otherwise. Additionally, the Respondent contends that the discriminates did not make adequate efforts to mitigate their loss of earnings, in that they either made inadequate searches for work or quit or were fired from interim jobs. All of these issues will be discussed below.

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

II. FINDINGS AND CONCLUSIONS

(a) *General Principles*

The general principles governing backpay proceedings are well settled. A finding of an unfair labor practice is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp. and French American Reeds Mfg. Co., Inc.*, 354 F.2d

170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). If the General Counsel has shown the gross backpay due in the specification, the Employer has the burden of establishing affirmative defenses which would mitigate his liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); see also *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978). And although a Board majority in *St. George Warehouse*, 351 NLRB 961 (2007), held that the General Counsel has the burden of producing evidence concerning an employee's efforts to find interim employment, the Board reaffirmed the long standing principle that the employer still bears the ultimate burden of persuasion concerning whether discharged employees made an adequate search for work.

A Respondent does not meet its burden of proof simply by presenting evidence of lack of employee success in obtaining interim employment or of so-called "incredibly low earnings." It must affirmatively demonstrate that the employee did not make reasonable efforts to find interim work. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (5th Cir. 1966).

A Respondent cannot merely rely upon cross-examination of the claimant and allegedly impeaching testimony. *NLRB v. Inland Empire Meat Co.*, 692 F.2d 764 (9th Cir. 1982). The evidence must establish that during the backpay period there were sources of actual or potential employment that the claimant failed to explore and must show if, where, and when the discriminatee would have been hired had they applied. *Id.* at 1308; *McLoughlin Mfg. Corp.*, 219 NLRB 920, 922 (1975); *Isaac & Vinson Security Services* 208 NLRB 47, 52 (1973). *Champa Linen Service Co.*, 222 NLRB 940, 942 (1976).

Although discriminatees are required to make reasonable efforts to mitigate a loss of income, they are held only to reasonable exertions, not to the highest standard of diligence. *NLRB v. Arduini Mfg. Co.*, 384 F.2d 420, 422-423 (1st Cir. 1968); *Otis Hospital*, 240 NLRB 173, 175 (1979). Lack of success, by itself, is not the measure of the sufficiency of a search for employment. A discriminatee is only required to make an "honest, good faith effort." *NLRB v. Cashman Auto Co. & Red Cab Co.*, 223 F.2d 832, 836 (1st Cir. 1955).

A discriminatee is not required to apply for each and every possible job that might have existed in the industry, or even to apply for work during each and every quarter. *Champa Linen Service*, supra at 942; *The Madison Courier, Inc.*, 202 NLRB 808, 814 (1973); *Sioux Falls Stock Yards*, supra at 551; *Cornwell Co.*, 171 NLRB 342, 343 (1968). What constitutes reasonable efforts depends upon the circumstances of each case, an examination of the entire backpay period. It does not depend upon a purely mechanical examination of the number or kind of applications for work made by the discriminatees. *Cornwell Company*, supra; *Mastro Plastics Corp.*, supra at 1359. In determining the reasonableness of an employee's effort, his or her skill, qualifications, age and labor conditions in the area are factors to be considered. *Id.* Even where the evidence raises doubt as to diligence, discriminatees must receive the benefit of the doubt rather than the respondent wrongdoer whose conduct has created the situation giving rise

to the uncertainty. *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d at 572-5573; *Neely's Car Clinic*, supra at 1421; *George A. Angle*, supra at 1157, enfd 683 F.2d 1296 (10th Cir. 1982); *Otis Hospital*, 240 NLRB at 174.

The Board has also held that poor record keeping, uncertain memory and even exaggeration do not necessarily disqualify an employee from receiving backpay. *George A. Angle*, supra at 1159; *Sioux Falls Stock Yards*, supra at 559-560. It is not unusual nor suspicious if a discriminatee cannot accurately recall details of a work search undertaken several years before. *United Aircraft Corp.*, 204 NLRB 1068 fn. 4 (1973). In the present case, the backpay period began 10 years before the hearing in this matter commenced.

Although a willful concealment of interim earnings will warrant a denial of benefits for the period of the concealment, the mere existence of discrepancies to reported income is insufficient to establish a willful concealment of earnings. *Cibao Meat Products*, 348 NLRB 47 (2007), and *Parts Depot, Inc.*, 348 NLRB 152 (2006). Also, the Board has found that the "mere suspicion and uncertainty" created by third party documents are insufficient to meet the employer's burden of proving that the General Counsel's interim earnings calculations were not accurate, *Cibao*, supra at 48.

It should be noted that the Board and the courts have held that:

It is not enough that the respondent thinks that employees should have been able to secure jobs. Suspicion and surmise are no more valid bases for decision in [the] backpay hearing than in an unfair labor practice hearing. *The Laidlaw Corporation*, 207 NLRB 591, 594, enfd, 507 F.2d, 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975).

There is a general rule that an employer is ordinarily not liable for backpay for periods when an employee is unavailable for work due to illness or a disability. *NLRB v. Louton, Inc.* 822 NLRB 413, 415 (3d Cir. 1987); *Canova v. NLRB*, 708 F.2d 1498 (9th Cir. 1983); *American Mfg. Co. of Texas*, 167 NLRB (1967). Cf. *Jenkins Index Corp.* 283 NLRB 457 fn. 3 (1987). But see *Superior Export*, 299 NLRB 61, where employee collecting disability benefits under Social Security because of deafness not automatically excluded from backpay.

In *American Mfg Co. of Texas*, supra, the Board held that the employer was liable for backpay during a period where the discriminatee was unavailable for work due to an injury occurring at an interim employer. The Board stated;

The origins and causes of infections and organic infirmities, such as influenza and heart attacks, for example, are usually not known and cannot be determined or assumed. It is ordinarily reasonable to assume, however, that absences from work because of such illnesses would probably have occurred even if the employee had not been discharged. As the claimant's loss therefore cannot be said to have a likely relationship to the unlawful discrimination, disallowance of backpay for all periods of unavailability because of such illnesses is proper....

The same underlying reasoning does not, however, apply to periods of illness, which occur because of industrial accidents

suffered during the course of interim employment or are otherwise attributable to the unlawful conduct of the Respondent. The causes of such ailments are known and attributable to events which would not have taken place, or to environmental factors which would not have been present, had the employee not been unlawfully removed from his employment in the Respondent's plant...

Where an interim disability is closely related to the nature of the interim employment or arises from the unlawful discharge and is not a usual incident of the hazards of living generally, the period of disability will not be excluded from backpay. Consonant with its obligation to establish deductions from backpay, the Respondent continues to have the burden of demonstrating that an excludable period of absence from work because of illness has taken place, and the General Counsel may rebut this by showing the unusual nature of the disability, its causes, probable relation to the unlawful discharge because of the hazards of interim employment, search for work, etc. (Case citations omitted).

There are also cases dealing with the consequences of a discriminatee quitting or being fired from an interim job.

In *Newport News Shipbuilding*, 278 NLRB 1030 fn 1. (1986), the Board held that being discharged from an interim job will not cause a loss of backpay due to a failure to mitigate, unless the discharge was caused by the employee's willful or gross misconduct. The Board also held that although quitting an interim job may constitute a willful loss of earnings warranting a reduction of backpay, the job being quit must be equivalent to the job that the discriminatee had at the Respondent at the time of his or her unlawful discrimination. See also *Met Food*, 337 NLRB 109 (2001).

(b) *Lorenzo Macua*

Macua was illegally discharged on July 5, 2000.(during the third quarter of 2000). At the time of his discharge, he was employed to do physical labor in the bakery. As an employee of J.J. Cassone, Macua's earnings were higher than the New York or Federal minimum wage rates. He also was entitled to other benefits such as vacation and sick pay plus the right to participate (after an appropriate period of eligibility), in the employer's retirement plan. Before his discharge, Macua had a work related injury and received a workers' compensation award relating to that injury which limited his ability to lift things with his left arm.

Macua was born in Mexico and his original language is Spanish. Before coming to the United States, he had obtained a grade school level education and worked as a farmer. He can neither read nor write English and can't speak much English either. He does not drive a car and relies on his sons to drive him to and from work. As far as I can see, Macua looks physically fit and is about 53 years old at the present time. Except for the period immediately after his discharge, Macua did not suffer any disabilities or illnesses during the backpay period.

The Respondent asserts that Macua was an untruthful witness pointing to lapses in memory and contradictions between his testimony and documentary evidence. But it must be recalled that this hearing took place almost 10 years after his

initial unlawful discharge by the Respondent and these lapses are typical of people trying to accurately recollect events that happened so long ago. See for example, *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). Contrary to the Respondent's contention, I thought that Macua was an honest witness doing his best to recollect and give detail to his search for work and his job history after his illegal discharge. Nor am I impressed with the Respondent's contention that Macua should have kept better records. Macua, who is barely educated, had no legal obligation to keep records. *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996), enf. granted, 113 F.3 845 (8th Cir. 1997).

The backpay calculations asserted by the General Counsel were set forth in Appendix A-5 to the specification and in General Counsel Exhibit 77. But due to last minute revisions, this was again revised as Exhibit C to the General Counsel's Brief.

2000

As noted above, Macua was discharged by the Respondent in the third quarter of 2000. Because of his predischarge injury, and because he had more time available after his discharge, he underwent a course of physical therapy after his discharge. Thus, according to Macua he started at three times per week, after which it was reduced to 2 days a week and then to 1 day per week. According to a pretrial statement that Macua gave to a Board agent, he did not begin to look for work for 3 to 4 months after his discharge because he was so physically injured that he knew that he could not find a job. He testified that during this period of time, he did not ask friends or family if they knew of any available work.

For the third and fourth quarters of 2000, Macua had no regular job and had, with the exception of \$160, no earnings during that period of time. He testified that during this period and after his appointments with the physical therapist were reduced to 1 day a week, he searched for work by going to his church where lists of employment openings were kept; that he visited golf clubs; and other business in the local area and that he went to an area in Portchester where day laborers gathered in the morning in order to seek construction or other jobs.

Macua's recollection of what efforts he took to look for work in the second half of 2000 is, necessarily, obscured by the passage of time. However, it seems to me that it is more probable that Macua's memory was more accurately portrayed at the time that he gave a statement to a Board agent. And while it seems unfair that he should be penalized for not being able to search for work when receiving therapy for a work related injury that he suffered while working at the Respondent, the applicable law here is that he is not entitled to backpay during a period of time when he was unavailable for work due to his injury. Accordingly, I shall exclude backpay for the third quarter of 2000 but not for the fourth quarter of 2000 which is approximately when he started to look for work.

I credit Macua's testimony that he did in fact search for work in 2000 and did so by asking friends about jobs; by going to his neighborhood church which had job listings; by having his daughter in law make phone calls to possible employers; and by visiting a local corner in Portchester where Spanish speaking men presented themselves each morning to prospective em-

ployers from the surrounding and more affluent areas of Westchester and Connecticut (a kind of informal labor exchange).

The Respondent contends that Macua failed during 2000 and thereafter to mitigate his losses by making an inadequate search for work. I reject that contention at least with respect to Macua's search for work starting from the fourth quarter of 2000.

The Respondent asserts that there is another baking company in Portchester called Neri Bakery within walking distance of Macua's residence where he could have sought employment. And although the Respondent presented a witness who testified that Macua visited the retail outlet of that bakery on a regular basis, there is no evidence that Neri had job openings at the time that Macua was seeking work in 2000 or that he was ever offered a job at Neri. In fact, Macua credibly testified that at some point before he obtained employment at Concrete Cutting (described below), he asked for work at Neri and was told that there was nothing available at that time.¹

According to the Respondent, a failure to mitigate losses by Macua and other of the discriminatees is shown by their failure to utilize the Union to help them obtain jobs. But this was not available to them because the Union has contracts with a limited number of bakeries in New York (many far distant from Portchester), and those companies have no contractual obligation to use the union as a source of hiring. The Union does not have a hiring hall or an active referral service.

The Respondent presented an "expert" witness who testified that in her opinion, there were plenty of jobs that Macua could have done. Apart from the fact that this person is not a labor economist and has little or no experience in dealing with unskilled, non-English speaking people, her methodology in making these conclusions as relating to Macua and the other discriminatees, was essentially useless. Basically, she looked through the local English language newspaper and designated certain jobs that she felt the discriminatees could fill within a 25 mile radius of where they lived. (Portchester). She could not say if any of the listed jobs during the periods of time of their listing were actually available or would have been suitable for or offered to Macua or the other discriminatees. In fact, many of the listed jobs required the ability to speak and/or read and write English, a skill set that Macua and other of the discriminatees simply did not adequately have. Moreover, many of these jobs would have required either the use of a private vehicle or the utilization of public transportation that would have taken hours for Macua to use each day even if he obtained a job offer.

Considering such cases as *St. George Warehouse*, 353 NLRB 497, 508 (2008), and *Ernst and Young*, 304 NLRB 178, 179 (1991), I conclude that the "expert" testimony has not demonstrated that Macua did not make an adequate search for work starting in the fourth quarter of 2000 or thereafter. In fact,

¹ I note that even though Macua and the other discriminatees worked at Cassone which is a wholesale bakery, it would not be unreasonable for them to first look for equivalent paying jobs elsewhere. The testimony regarding Neri Bakery is that the pay rate was low, the hours exceedingly long, the job physically demanding, and the nonwage benefits minimal.

the evidence shows quite clearly that Macua made a diligent search for work and was fairly successful in his efforts. Accordingly, for the year 2000, I conclude that his backpay is as follows:

- Q3** No search for work due to injury. Net backpay = \$0
- Q4.** Gross backpay of \$5,995 – Interim earnings of \$160 = Net backpay \$5835

2001

Macua testified that he had no interim earnings during the first quarter of 2001 despite his efforts to gain employment in the manner described above.

On or about May 25, 2001, Macua got a job at Concrete Cutting Company Inc., where his rate of pay was \$10 per hour. (He therefore commenced interim employment in week seven of quarter 2 which begins in April.) The evidence suggests that Macua worked at this company from May 23, 2001, to mid-October 2001 when he was let go. During 2001 his earnings from Concrete Cutting were \$13,945 and the General Counsel reasonably allocated his interim earnings by multiplying Macua's weekly earnings (\$449.83), times the number of weeks worked during each quarter.² Therefore his net backpay, (exclusive of pension, vacation or sick leave benefits), for 2001 were as follows:

- Q1.** Gross backpay of \$5995 – Interim earnings of \$0 = Net backpay \$5995
- Q2.** Gross backpay of \$5995 – Interim earnings of \$2249 = Net backpay \$3746
- Q3.** Gross backpay of \$5995 – Interim earnings of \$5848 = Net backpay \$147
- Q4.** Gross backpay of \$5995 – Interim earnings of \$5848 = Net backpay \$147.

2002

It appears that Macua worked for Concrete Cutting for most of 2002 although he left or was more likely laid off before the end of the year. (It seems likely that Concrete Cutting was subject to a degree of seasonality and laid off people during the winter months.) A W2 form from Concrete Cutting showed that Macua earned \$21,832 during all of 2002. (He had received a raise to \$11 per hour.) Since the testimony was not certain as to the dates of his employment by Concrete Cutting, the General Counsel ultimately and justifiably allocated his yearly income at \$5458 per quarter. Therefore Macua's net backpay (exclusive of pension, vacation, or sick leave benefits), for 2002 should be as follows:

- Q1** Gross backpay of \$6028 – Interim earnings of \$5458 = Net backpay \$569(\$570)
- Q2** Gross backpay of \$5682 – Interim earnings of \$5458 = Net backpay \$224
- Q3** Gross backpay of \$5682 – Interim earnings of \$5458 = Net backpay \$224
- Q4** Gross backpay of \$5719 – Interim earnings of \$5458 = Net backpay \$261

² Most numbers are rounded up to the nearest dollar.

2003

The evidence relating to Macua's work history in 2003 was somewhat confusing. There is documentation that he worked during that year for Concrete Cutting, for a company called Laro Services and for a company called CMT Home Improvements. In all, he earned \$5611 from Concrete Cutting; \$2516 from Laro and \$1740 from CMT. The problem is figuring out when he worked for these companies.

In an e-mail from Laro to the Board, that company stated that Macua worked for them from May 16 to September 19, 2003. However, it is not clear at all when Macua worked for Concrete Cutting or CMT.

Macua testified that he thought he started to work for Laro in September which is in the third quarter of 2003. The compliance officer therefore allocated his earnings (\$2516) from Laro to that quarter.

Macua also testified that he got the job at CMT after he was laid off by Laro and we know that he had earnings in 2003 from that Company in the amount of \$1740.

Regarding Concrete Cutting, Respondent Exhibit 4 shows that Macua told the compliance officer that he returned to work at Concrete Cutting on or about September 23, 2003, and that he worked there until Thanksgiving in November 2003. This would represent 1 week in the third quarter of 2003 and approximately 8 weeks during the fourth quarter of 2003.

Since the evidence suggests that Macua had been laid off by Concrete Cutting during the preceding year as a seasonal event, it seems most probable that in 2003, he first worked for Laro from the Spring to the Fall and that he worked at CMT during the hiatus between his job at Laro and his return to Concrete Cutting. Based on the above, it appears that as Macua worked for Laro during about half of the second quarter of 2003 and about half during the third quarter of 2003, I will therefore allocate the total he received from Laro in equal parts to each of those quarters (\$1258). As to the third quarter, I will also ascribe all of interim earnings (\$1740), from CMT and \$401 from Concrete Cutting to this period. Accordingly, as to the fourth quarter, I calculate that Macua's interim earnings from Concrete Cutting as \$4910.

In light of the foregoing, I calculate Macua's net back pay in 2003 as follows:

Q1 Gross backpay of \$5556 – Interim earnings of \$ 0 = Net backpay \$5556
 Q2 Gross backpay of \$6048 – Interim earnings of \$ 1258 = Net backpay \$4790
 Q3 Gross backpay of \$5961 – Interim earnings of \$ 2141 = Net backpay \$3820
 Q4 Gross backpay of \$5365 – Interim earnings of \$ 4910 = Net backpay \$ 455

2004

The evidence tends to show that Macua continued to work for CMT in the first quarter of 2004 until that company closed. A W2 form from that employer shows that Macua earned \$1610 during 2004.

After losing his job at CMT, Macua resumed searching for work in the manner described above. Based on payroll records, he obtained a job at Sodexho Management which is a company

that provided laundry services for a local hospital. These records show that he worked at this job from March 1 to May 14, 2004, that his rate of pay was \$6.80 per hour and that his total earnings from Sodexho were \$2241. (Therefore his interim earnings from Sodexho would have been in the first and second quarters of 2004.)

According to Macua, he left the Sodexho job because he obtained a better and higher paying job in the kitchen at the Rye High School. In this regard, it seems that Macua first started working at the school in late May through a contractor (Labor Ready), until the end of the school term in June. He then was put on the school's direct payroll after the summer vacation. The school's records show that he was on their payroll from about September 3, 2004, until February 25, 2005. A W2 statement shows that he earned \$4476 in 2004 and \$1653 in 2005.

The evidence shows that during the summer of 2004, Macua, managed to obtain employment at a company called Guardian Services where he was employed to do manual labor. A pay stub from Guardian shows that Macua began working on July 15, 2004, and his W2 statement shows that he earned \$5438.75 from Guardian in 2004. He was assigned to work a shift from 6 to 11 p.m. at a commercial building located at 2000 Westchester Ave., in Harrison, New York. Therefore, his interim earnings from Guardian during 2004 were earned during the third and fourth quarters of that year and the evidence shows that at least for part of the year, he worked two jobs, one at Guardian and that other at the Rye School.

In light of the above, I calculate Macua's net back pay for 2004 as follows:

Q1 Gross backpay of \$5586 – Interim earnings of \$2628³ = Net backpay \$2958
 Q2 Gross backpay of \$5809 – Interim earnings of \$ 2267⁴ = Net backpay \$ 3542
 Q3 Gross backpay of \$6440 – Interim earnings of \$ 3612⁵ = Net backpay \$ 2829
 Q4 Gross backpay of \$6772 – Interim earnings of \$ 6393⁶ = Net backpay \$ 469 (\$379)

2005

After Christmas, Macua returned to the school and worked in February until the first school break. The payroll records show that he worked until February 25 and that he earned \$1653 during the first quarter.

The Respondent contends that Macua resigned from the school job in early 2005 and therefore should not be entitled to any further backpay. I do not agree.

³ This figure is all earnings from CMT plus earnings made from Sodexho during the first quarter of 2004.

⁴ This figure includes all of the remaining earnings from Sodexho during 2004 plus his earnings from the school before the summer break in June 2004.

⁵ This figure represents Macua's earnings from the school and from Guardian during the third quarter of 2004.

⁶ This figure represents earnings from the school and from Guardian during the third quarter of 2004.

The Respondent offered into evidence a letter of resignation purportedly signed by Macua and dated February 28, 2005. This is a form letter that states:

I Lorenzo Macua have resigned my position as a food service helper at the Rye City School District Food Service Department.

I gave notice to John M Rubbo, Food Service Director, on Monday at 1:20 p.m. of my intent to not return on Tuesday. Therefore, my last day of work was Monday, February 14, 2005.

I understand that it is necessary for me to return my ID and cleaned uniforms.

This form essentially is the same as other examples of resignations that have been signed in the past by other employees. The evidence shows that these types of “resignations” have been solicited by management, usually when an employee has not shown up for a while and the company wants confirmation that he or she quit. The documents can therefore be used as a means to show that an employee was not fired or laid off and therefore would not be eligible for unemployment insurance.

Macua denied that the signature on the letter was his and denied that he ever resigned. In fact, he testified that he was told that he could not return to work because the company had hired another employee in his stead.

I received into evidence a number of exemplars that were unquestionably signed by Macua. I also had him quickly write his signature 10 times on a piece of paper that was then received into evidence as an ALJ exhibit. In my opinion, the signature on the resignation letter clearly and unequivocally does not match any signature on either the ALJ exhibit or on any of the other established exemplars. And although the Respondent was well aware that the General Counsel intended to challenge the assertion that Macua resigned, the Respondent did not produce at the trial, John Rubbo, the person who allegedly obtained and witnessed Macua’s resignation.⁷

Moreover, even if Macua had resigned (which I do not believe), such resignation would not disqualify him from back pay because the job at the school was not equivalent to his job at *Cassone*. *Glover Bottled Gas*, 313 NLRB 43 (1993), enfd. 47 F.3d 1230 (D.C. Cir. 1995).

At the school Macua was paid \$9.75 per hour. He also enrolled in a retirement plan pursuant to which 3 percent of his pay was deducted and the employer matched up to some amount. This, however, was at best, a 10 month job that ran each year from late August to mid June. Employees were not paid for the periods between Christmas and New Years, for a week in February and for a school break in each April. At the end of the school year, employees in the food service department, if they were going to be retained, were given letters indicating that there would be a job for them in the following school year. For the 2 months that they did not work, they were not paid. There was no health insurance and no sick leave or

vacation pay. While it is probable that the school job was physically less demanding than the one at Cassone, it is clear that the jobs were not equivalent. Although the pay rate at the school job was higher than at Cassone, Macua’s total income at the school job was substantially lower than at Cassone because he worked 27.5 hours per week on average and overtime pay was virtually nonexistent. Additionally, at Cassone, he had health care benefits, sick leave benefits, and a retirement plan.

In the meantime, Macua continued to work for Guardian and a document indicates that he worked from January 1 through July 31, 2005. (The first and second quarters of 2005 and about four plus weeks during the third quarter.) A W2 from Guardian shows that he earned \$8329.50 during 2005. In this regard, the evidence shows that he lost his job at Guardian in August 2005, albeit there is no evidence that he was discharged for willful or gross misconduct.⁸ He resumed his search for work in the manner described above.

At some point during either the third or fourth quarter of 2005, Macua was offered his job back at Guardian but he declined because he had lost his ride to the jobsite. As noted above, he was assigned to work at an office building in Harrison, New York, which was a bit more than three miles from his home. When he worked there, he typically took a bus and had a ride home at night. (His hours were from 6 to 11 p.m.) But when his car ride was unavailable, and as bus service ceased before 11 p.m., this would have required him to walk home, late at night, a walk that even for a man in relatively good shape would take about 50–60 minutes. Harrison is an affluent suburb in Westchester and Portchester is low income town nearby. I am not suggesting that Portchester is inherently unsafe at night. What I am concluding is that Macua’s choice to forego this job because it would have required him to walk three miles late at night was not unreasonable in my opinion. See *Allied Lettercraft Co.*, 280 NLRB 979, 982 (1986).

In light of the above, I calculate Macua’s net back pay for 2005 as follows:

Q1 Gross backpay of \$6924 – Interim earnings of \$5262⁹=
Net backpay \$1662
Q2 Gross backpay of \$5972 – Interim earnings of \$3698 =
Net backpay \$2224
Q3 Gross backpay of \$6079 – Interim earnings of \$1111 =
Net backpay \$4968
Q4 Gross backpay of \$6234 – Interim earnings of 0 = Net
backpay \$6234

⁸ In this instance, the evidence is that after receiving a leave of absence, Macua was replaced by some else. In *Newport News Shipbuilding*, 278 NLRB 103, 1033 (1986), the Board held that a discharge from an interim job even for just cause, does not necessarily result in a finding of a failure to mitigate.

⁹ The General Counsel calculated that as Macua’s 2005 earnings from Guardian were \$8329.50 and as he worked at total of about 30 weeks for that company in 2005, that his weekly earnings were \$277.65 per week or \$3609.45 during each of the first two quarters of 2005. For the third quarter, his interim earnings would have been \$1111 because he worked only 4 weeks during that period. This seems to me to be correct. For the first quarter, I therefore calculate that Macua had interim earnings from Guardian and the Rye school (both part-time jobs) that totaled \$5262.

⁷ I rejected the Respondent’s motion to reopen the record in order to have Rubbo testify in this case. See my Order dated July 14, 2010, which is attached hereto as Appendix A.

2006

As noted above, Macua declined a job offer from Guardian that was made to him in the latter part of 2005. His next job did not come until September 2006 and the question is what happened in between.

Macua testified that he searched for work in the same manner described above and could not find a job. Although the Respondent suggests that Macua did not look hard enough, it has not, in my opinion produced evidence either that he failed to look for work, that he quit employment equivalent to his job at Cassone, that he turned down any equivalent job offers or that he was discharged from any interim employer for willful or gross misconduct.

On or about September 6, 2006, Macua obtained employment as a laborer at a company called Park Masonry (construction work). At this job, his rate of pay was \$15 per hour and he usually worked 40 hours a week. A document from Park Masonry shows that Macua was employed there from September 6 through January 23, 2007. A W2 from that company shows that he earned \$8760 during 2006 and this translates into weekly earnings of \$547.50.

On September 15, 2006, Macua was rehired by Guardian for the night shift and he worked both jobs at the same time.¹⁰ He accepted the job this time because his son was available to drive him to and from the jobsite. Macua continued to work at Guardian during the remainder of 2006 and a W2 shows that he earned \$3474 during that year which translates to \$231.63 per week. (He continued to work at Guardian during 2007 and 2008).

In view of the foregoing I conclude that his net backpay for 2006 is as follows:

Q1 Gross Backpay \$5663 – Interim earnings 0 = Net backpay \$5663

Q2 Gross Backpay \$5850 – Interim earnings 0 = Net backpay \$5850

Q3 Gross Backpay \$6139 (I think this should be transposed to \$6319 – Interim earnings \$2106 = Net backpay \$4213

Q4 Gross Backpay \$5398 – Interim earnings \$10128 = Net backpay 0

2007

Macua continued to work at Park Masonry until he was laid off on January 23, 2007. His earnings from that company were \$1600. He also continued to work at Guardian and his earnings for 2007 were \$13,975. This translates to \$3278 per quarter.

Based on the above, I calculate Macua's net backpay as follows:

Q1 Gross Backpay \$5056 – Interim earnings \$4878 = Net backpay \$178

Q2 Gross Backpay \$5764 – Interim earnings \$3278 = Net backpay \$2486

Q3 Gross Backpay \$5552 – Interim earnings \$3278 = Net backpay \$2274

¹⁰ The fact that Macua was willing to work two jobs at the same time indicates to me that he was no slacker.

Q4 Gross Backpay \$5543 – Interim earnings \$3278 = Net backpay \$2265

2008 and 2009

The documentary evidence shows that Macua continued to work at Guardian and that he earned \$14,036 during 2008. On or about March 1, he got a second job at the Sacred Heart High School which is located in Greenwich, Connecticut.¹¹ At Sacred Heart, Macua worked a 5 day per week consisting of 8 hours per day. His hourly rate of pay was \$12.50 and his total income from this job in 2008 was \$20,791.

The General Counsel in the final revised Appendix concedes that during the second, third, and fourth quarters of 2008 and for the first quarter of 2009, Macua is owed no net backpay because his interim earnings were greater than the gross back pay for those periods. As to the first quarter of 2008, the evidence is that Macua's earnings from two jobs worked simultaneously were \$5443. However, the General Counsel, relying on *Performance Friction Corp.*, 335 NLRB 1117, 1136 (2001), and the Section 10542.3 of the Board's Compliance Manual, argues that I should not deduct interim pay for hours worked in excess of the number of hours that the discriminate would have worked at the Respondent during the same period of time. She calculates that the deductible interim earnings for the first quarter should be calculated on the basis of the \$49.55 hours that Macua would have worked at Cassone had he not been discharged. Therefore, the General Counsel contends that as the combined hours (65) worked during this quarter at Guardian (25 hours per week) and at Sacred Heart (40 hours per week) exceed \$49.55, the earnings from \$15.45 hours should be deducted from his interim earnings. As the General Counsel's calculation for interim earnings is consistent with the law, I shall adopt her conclusion. Therefore,

Q1 Gross backpay \$5862 – Interim Earnings \$4819 = Net backpay \$1043

In addition to the net backpay amounts described above, the Respondent owes Macua monies for vacation pay, sick pay, and pension contributions. Because I have concluded that Macua is not entitled to backpay for the third quarter of 2000 because of his unavailability for work, I have recalculated the amounts claimed by the General Counsel by reducing each amount by one of the two quarters in 2000 that he was unavailable for work. (Reduction by one half). Therefore, I conclude that the amounts are; \$7279 for vacation pay, \$3233 for sick pay, and \$5430 for the pension benefit. These amounts do not include interest which must be added.

(c) *Carbillo Flores*

Flores was found to have been illegally suspended in March 2000 and thereafter illegally discharged on September 3, 2000. It is agreed that his backpay period runs from March 8–11, 2000 and from September 3, 2000, through March 3, 2009, when he offered reinstatement. The calculations for Flores were originally set forth in Appendix A3 to the Specification.

¹¹ Greenwich, Connecticut, is the town directly to the north of Portchester, New York.

However, the General Counsel's final calculations are set forth in General Counsel Exhibit 53. There is no dispute that for the first quarter of 2000 (when he was suspended), his net backpay is \$318. There is no backpay for the second quarter of 2000 as he was still employed by Cassone.

Flores who is originally from El Salvador, worked as a laborer at the Respondent and his hourly rate of pay at the time of his discharge was \$7.05. Flores has a fifth grade education and basically worked as a farmer before his arrival in the United States. Since arrival, he has mainly worked a number of odd jobs which involved manual labor. In my opinion, the credible evidence is that he neither speaks nor reads English well enough to obtain work that would require those skills. When he worked at Cassone, he lived in Portchester and had a 5 minute walk to work.

Like Macua, Flores looked for work by going to the informal labor exchange that existed in Portchester and asking various enterprises such as local restaurants and stores if they had jobs. He did not have a car or license until 2008 and therefore was limited in the geographic scope of his job search. Using public transportation, he did search for work in White Plains and Portchester, New York. He also went to Greenwich and Stamford Connecticut. Usually these efforts consisted of visiting stores, restaurants, construction sites, country clubs, etc.

In my opinion, Flores was an honest witness, who given the circumstances of testifying about events occurring so long ago, was trying to be as detailed and accurate as possible. There were not doubt, lapses in memory, and resulting inaccuracies. But to the extent possible, the General Counsel made substantial efforts to seek and obtain documentary evidence regarding his job search and job history to fill in the gaps. I reject the Respondent's contention that Flores was an untruthful witness and I reject its contention that he had some kind of bookkeeping obligation that should somehow adversely affect his backpay.

2000

As noted above, the parties agree that the net backpay for Flores for the first quarter is \$318 and that there is no backpay owing during the second quarter of 2000.

As in the case of Macua, the Respondent asserts that Flores should have looked for a job at Neri Bakery. For the same reasons set forth above, I reject this contention. I also note that a discriminatee is not under any obligation to look for any particular job or the jobs that the Respondent would find suitable for him.

In two affidavits that he gave to Board agents in 2009, Flores recalled that he had various jobs as a day laborer by going to the labor exchange in Portchester. In one of these affidavits, he stated that about a week after he was discharged from Cassone, he got a job doing work for a home owner and broke his leg. In this regard, it seems that his memory as to the timing of these events (that took place 9 years ago), was not accurate inasmuch as the medical records obtained by the General Counsel show that he suffered a broken ankle around April 2001 and that he received treatment in May and June 2000.

The credible testimony of Flores is that immediately after his discharge from Cassone on September 3, 2000, he began

searching for work in the manner described above. He testified that he obtained a number of short term day labor jobs, generally earning between \$30 to \$90 per day. The General Counsel estimated that during the third quarter of 2000, Flores earned \$650 as a day laborer. This seems reasonable to me and Respondent has not shown that he earned more.¹²

Through Macua, Flores managed to get a job at Park Masonry. That company's records show that he worked there from November 1 to December 4, 2000. The records also show that he earned \$1920 from Park Masonry during the fourth quarter of 2000. For the fourth quarter, the General Counsel summed her estimate of what Flores earned as a day laborer plus what he earned from Park Masonry. This yielded the sum of \$3220 and the Respondent has not shown that Flores earned more during this period.

In light of the above, I conclude that Flores' net backpay for 2001 is as follows:

- Q1.** Gross backpay \$318 – Interim earnings \$0 = Net backpay \$318
- Q2.** No net backpay.
- Q3.** Gross backpay \$2122 – Interim earnings \$650 = Net backpay \$1472
- Q4.** Gross backpay \$6897 – Interim earnings \$3220 = Net backpay \$3677

2001

Flores went back to work at Park Masonry in January 2001 and that company's records show that he earned \$1416 before being laid off. At that point, Flores went back to the Portchester "labor exchange" and obtained work from a woman who assigned him the task of raking leaves and cleaning the yard. The evidence is that it was at this job that Flores broke his ankle and he was operated on at the North Westchester Hospital Center on or about April 6, 2001. The medical records show that his leg was put in a cast on May 15 and that he visited the Mount Kisco Medical Group on June 14, 2001. According to his testimony, Flores then went for physical therapy and used crutches for around 8 weeks thereafter. He testified that he could not put his full weight on the injured foot for about 6 months. He did not work during the second and third quarters of 2001.

Flores filed a federal tax return for 2001 and he stated that he earned \$5000 for the year (this no doubt is a guess). In any event, since Flores was unable to work due to his injury during the second and third quarters, the General Counsel reasonably assumed that the \$5000 was earned equally during the first and fourth quarters.

The General Counsel asserts that because his broken ankle occurred while working for an interim employer, Flores should not be construed as being out of the labor market and therefore ineligible for backpay during the period when he was unavailable for work due to the injury. In this regard, the General Counsel cites *American Mfg. Co. of Texas*, 167 NLRB 520, 522

¹² At the time of his discharge, Flores was married with a new baby. Because of his ignorance, he did not file for unemployment insurance or public welfare. Given his family circumstances, it beggars belief that he would have sat around all day and foregone a job search.

(1967), where the Board stated that “(w)here an interim disability is closely related to the nature of the interim employment... and is not a usual incident of the hazards of living generally, the periods of disability will not be excluded from backpay.” The General Counsel also points to *Big Three Industrial Gas*, 264 NLRB 1198, 1199 (1982), where a discriminate did not have his backpay tolled during the period of time when he was unavailable for work due to an industrial accident suffered at an interim employer. I find these cases to be dispositive.

I therefore conclude that the net backpay for Flores during 2001 is as follows:

- Q1. Gross backpay \$6897 – Interim earnings \$2500 = Net backpay \$4397
- Q2. Gross backpay \$6897 – Interim earnings \$ 0 = Net backpay \$6897
- Q3. Gross backpay \$7239 – Interim earnings \$ 0 = Net backpay \$7239
- Q4. Gross backpay \$7239 – Interim earnings \$2500 = Net backpay \$4739

2002

In 2002, Flores was unable to obtain a full-time job. Instead, according to his credible testimony, he worked as a day laborer and worked sporadically at numerous temporary jobs for between \$30 to \$90 per day. He could not recall any particular employers but the General Counsel offered into evidence a Social Security report that showed that Flores had earnings of \$7850. The General Counsel proposed that this be divided by four and she allocated \$1962.50 for each quarter.

Based on the above, I conclude that the net backpay for Flores during 2002 is as follows:

- Q1. Gross backpay \$7239 – Interim earnings \$1962.50 = Net backpay \$5277
- Q2. Gross backpay \$7239 – Interim earnings \$1962.50 = Net backpay \$5277
- Q3. Gross backpay \$7239 – Interim earnings \$1962.50 = Net backpay \$5277
- Q4. Gross backpay \$7581 – Interim earnings \$1962.50 = Net backpay \$5619

2003

Flores obtained a regular full-time job at a cafeteria in Greenwich, Connecticut, sometime around early March 2003. As his testimony was that he worked as a day laborer during January and February in the manner described above, the General Counsel proposed that he be charged with interim earnings of \$162.50 for the first 9 weeks of the first quarter. Also, the evidence indicates that Flores worked at the cafeteria for about 18 weeks and earned \$320 per week. Therefore, it would be appropriate to add \$1280 to his interim earnings during the first quarter.

Flores’ job at the cafeteria continued into the second quarter of 2003 but ended when the cafeteria was sold and the new owners didn’t hire him. Based on the \$320 per week figure, it is calculated that he had interim earnings for that period of \$4160. Because Flores lost this job, he resumed his job search in the manner previously described. Based on his social security records and his tax return, the General Counsel reasonably pro-

posed that Flores be charged with interim earnings of \$2309 for the third quarter which includes his earnings cafeteria earnings for a portion of the first week during that quarter. She also proposes that Flores be charged with interim earnings of \$2112.50 for the fourth quarter.

Based on the above, I conclude that the net backpay for Flores during 2003 is as follows:

- Q1. Gross backpay \$7581 – Interim earnings \$2742 = Net backpay \$4839
- Q2. Gross backpay \$7581 – Interim earnings \$4160 = Net backpay \$3421
- Q3. Gross backpay \$7581 – Interim earnings \$2309 = Net backpay \$5272
- Q4. Gross backpay \$7581 – Interim earnings \$2112 = Net backpay \$5469

2004

Starting in 2004, Flores continued to look for and obtain day labor jobs. The General Counsel proposed that his interim earnings for this period be calculated in the same manner as in the year before and she arrived at the figure of \$2112.

In April 2004, Flores obtained regular full-time employment at Putnam Park doing manual labor. (As noted above, this job which was in Greenwich, Connecticut, is not far from his home in Portchester and is accessible by bicycle or public transportation.) He testified that he earned \$480 per week and based on his W2 form showing that he earned \$15870, the General Counsel charged him with interim earnings of \$5290 for the second, third and fourth quarters of 2004.

I therefore conclude that the net backpay for Flores during 2004 is as follows:

- Q1. Gross backpay \$7924 – Interim earnings \$2112 = Net backpay \$5812
- Q2. Gross backpay \$7924 – Interim earnings \$5920 = Net backpay \$2004
- Q3. Gross backpay \$7924 – Interim earnings \$5920 = Net backpay \$2004
- Q4. Gross backpay \$7924 – Interim earnings \$5920 = Net backpay \$2004

2005

Flores continued to work for the Putnam Park for all of 2005 and his W2 shows that he earned \$25,049 for the year. The General Counsel allocated this equally for each quarter and accordingly, I conclude that his net backpay for 2005 is as follows:

- Q1. Gross backpay \$7924 – Interim earnings \$6262 = Net backpay \$1662
- Q2. Gross backpay \$7924 – Interim earnings \$6262 = Net backpay \$1662
- Q3. Gross backpay \$8266 – Interim earnings \$6262 = Net backpay \$2004
- Q4. Gross backpay \$8266 – Interim earnings \$6262 = Net backpay \$2004

2006

In 2006, Flores worked for Putnam Park until he was laid off during the second week of July. His W2 shows that he earned

\$13,132 from this job and the General Counsel allocated these earnings equally among the 27 weeks that he worked until July 9. This was \$523 per week. The General Counsel also tolled his backpay because Flores went to El Salvador for 2 weeks during the second quarter.

Having lost his job, Flores resumed working as a day laborer and the General Counsel estimated that he earned \$162.50 per week for the remainder of the year.

Based on the above, I conclude that the net backpay for Flores during 2006 is as follows:

- Q1. Gross backpay \$8266 – Interim earnings \$6804 = Net backpay \$1462
- Q2. Gross backpay \$6994 – Interim earnings \$6804 = Net backpay \$190
- Q3. Gross backpay \$8266 – Interim earnings \$2473 = Net backpay \$5793
- Q4. Gross backpay \$6359 – Interim earnings \$1625 = Net backpay \$4734

2007

During the first quarter of 2007, Flores spent a week in El Salvador and also spent some time at home caring for his wife who had undergone surgery. The General Counsel therefore tolled his backpay by 3 weeks.¹³ Thereafter, he worked as a day laborer and the General Counsel estimated his interim earnings for this period in the same manner as described above (\$162.50 per week).

At some undetermined point in 2007, but probably in the second quarter, Flores got a job at M & M Lawn Maintenance where he did landscaping work at Greenwich Hospital. At this job he worked 40 hours per week and earned \$12 per hour. His W2 from M & M shows his annual income as being \$10,640 while his social security records show that he earned \$16,364. The General Counsel gave the benefit of the doubt to the Respondent and assumed that he earned \$16,364 from M & M. She therefore allocated 1/3 of that amount equally to the second, third and fourth quarters of 2007. The General Counsel also tolled Flores' backpay by three weeks in the fourth quarter of 2007 because he was in El Salvador.

Based on the above, I conclude that the net backpay for Flores during 2006 is as follows:

- Q1. Gross backpay \$6359 – Interim earnings \$1625 = Net backpay \$4734
- Q2. Gross backpay \$8266 – Interim earnings \$5455 = Net backpay \$2811
- Q3. Gross backpay \$8266 – Interim earnings \$5920 = Net backpay \$2811
- Q4. Gross backpay \$6539 – Interim earnings \$5920 = Net backpay \$1084

2008

Flores continued to work for M & M until September 3, 2008, when he was effectively discharged. According to his

¹³ I wonder if the NLRB is the only agency or judicial forum where, in determining backpay, the victim of discrimination is precluded from receiving backpay for the time he or she spends caring for a sick or dying family member.

W2 form, his earnings from M & M in 2008 were \$14,448 which works out to \$419 per week for 35 weeks. During the first quarter, Flores spent a week in El Salvador. He also was in that country for 2 weeks during the second quarter and for 2.5 weeks during the third quarter.

The evidence shows that on September 4, 2008, Flores was discharged because he overstayed his visit to El Salvador. In this regard, the evidence convinces me that there was some misunderstanding about how long Flores was going to be out of the country. And even assuming that the Respondent was justified in discharging Flores for this infraction, it hardly amounts to a discharge for gross, outrageous, or willful misconduct. *KSM Industries, Inc.*, 353 NLRB 1124 at 68 (2009); *Cassis Management Corp.*, 336 NLRB 961, 967 (2001); *First Transit, Inc.*, 350 NLRB 825 (2007).

After his discharge from M & M, Flores resumed working as a day laborer. Additionally, he credibly testified that he spoke to a supervisor at Neri Bakery about a job on two occasions but did not get a job offer.¹⁴

For the remainder of 2008, the General Counsel estimated Flores' interim earnings for work as a day laborer at \$127.50 per week. (This was during the midst of the great recession).¹⁵

Based on the above, I conclude that the net backpay for Flores during 2008 is as follows:

- Q1. Gross backpay \$8037 – Interim earnings \$5444 = Net backpay \$2593
- Q2. Gross backpay \$7915 – Interim earnings \$5444 = Net backpay \$2471
- Q3. Gross backpay \$8037 – Interim earnings \$5444 = Net backpay \$1236
- Q4. Gross backpay \$7256 – Interim earnings \$1658 = Net backpay \$5598

2009

Until the Respondent reinstated Flores, he worked as a day laborer. The General Counsel estimated that he earned \$127.50 per week during the first quarter of 2009. As in previous years, this estimate seems reasonable to me and the Respondent has not shown that he had higher earnings. The General Counsel tolled his gross backpay by 1.2 weeks because Flores was in El Salvador from January 23 to February 2. I therefore conclude that his net backpay is as follows:

- Q1. Gross backpay \$3531 – Interim earnings \$995 = Net backpay \$2536

In addition, I conclude that Flores is entitled to \$10,473 for vacation pay, plus \$3442 for sick pay, plus \$7172 for a pension benefit. Interest must be added to these amounts.

(d) Jose Castro

Castro was illegally discharged on April 4, 2000, and his backpay runs from that date until March 4, 2009, the date that he was offered reinstatement. The General Counsel's proposed

¹⁴ The General Counsel points out that according to Neri's supervisor, he received prior to 2009, about 40 job applications per month and that he had about 5 to 10 vacancies per month.

¹⁵ I note that starting in the second quarter of 2008, the amount of overtime started to lessen at Cassone.

calculations regarding his backpay were originally set for at Appendix A-2 of the backpay specification. Amendments to the specification are contained in General Counsel Exhibit 76, but the final position of the General Counsel is contained in Exhibit B to the Brief. (The General Counsel acknowledged that GC Exh. 76 contained a few mathematical errors which have been corrected in Exh. B to the brief). Among other things, Exhibit B revised the gross backpay down for the first quarter of 2000 in order to account for Castro's testimony that he did not begin his search for work until about 4 weeks after he was discharged by Cassone.¹⁶

Castro was born in El Salvador and has a primary school education. He can speak limited English and can read some English. Since coming to the United States he has done manual labor or other unskilled jobs. At Cassone, he cleaned a dough machine. In my opinion, his lack of job skills and his lack of English language skills make the universe of available jobs for him, extremely limited.

After his discharge he basically searched for work by going to stores, restaurants, nurseries, and malls in Portchester, New York, and Greenwich and Stamford, Connecticut. And whenever he found himself unemployed during the backpay period, this was his basic method by which he searched for work.

In my opinion, Castro was a truthful witness, albeit because of the length of time that has transpired since is unlawful discharge, it was reasonable to expect that there were some lapses in memory and some inconsistencies with documentary evidence.

I reject the Respondent's contention that Castro did not make an adequate search for work. Indeed, his work record shows that apart from two quarters during the backpay period, Castro had interim earnings during every other quarter. Thus, the Respondent's argument that Castro had an incentive to not work because he won a significant amount of money on three lottery tickets in 2006, 2007, and 2008, is belied by the fact that he found work during almost all of the backpay period. In 2006 and 2007, he had interim earnings in every quarter. In 2008, he had interim earnings in the first, second, and fourth quarters.

2000

As noted above, the General Counsel tolled Castro's backpay by 4 weeks in the second quarter of 2000. During that quarter, Castro obtained employment at Pathmark and earned \$220.50. (I assume that this job was at the minimum wage, which was a lower rate than Castro earned at Cassone.) He worked there from June 20 to 25, 2000, and testified that he quit that job because he moved to a location in Greenwich that was too far for him to get to. The Pathmark job did not provide overtime and it did not have any vacation pay or health benefits. As such, the Pathmark job would not be construed as being equivalent employment to the job Castro had at Cassone and his quitting

¹⁶ This would be in conformity with *Grosvenor Resort*, 350 NLRB 1197 (2007), where a Board majority held that discriminates who failed to commence a search for work within the 2 week period after their discharge will not begin to accrue backpay until they start a proper search.

would therefore not affect his backpay. *Met Food*, 337 NLRB 109 (2001).

According to Castro, his next job was at Neri's Bakery in Portchester where he did manual labor related to bagels. He testified that the job required heavy lifting and that when his neck began to hurt, he asked if there was anything else he could do. According to Castro, when he was not reassigned, he decided to quit rather than risk an injury that would not be covered by any health insurance. Although Castro could not recall when and for how long he worked for Neri in 2000, a review of various records relating to his employment during 2000 yielded a figure of \$412.¹⁷ In my opinion, Castro's reason for quitting his job at Neri would not affect his backpay.

After Neri, Castro got a job at Wendy's where his W2 shows that he earned \$4282 and worked for about 20 weeks. The General Counsel, based on the fact that Castro worked at Wendy's for the remainder of the year, allocated his interim earnings by designating \$1427 to the third quarter and \$2855 to the fourth quarter.

In light of the above; I calculate Castro's net backpay in 2000 as follows:

Q2. Gross Backpay \$4593 – Interim Earnings \$220.50 = Net Backpay \$4372

Q3. Gross Backpay \$6634 – Interim Earnings \$1839 = Net Backpay \$4795

Q4. Gross Backpay \$6634 – Interim Earnings \$2855 = Net Backpay \$3779

2001

Castro continued to work at Wendy's in 2001 when he was fired after he got into an argument with another worker. The evidence on this was that the argument involved his alleged inability to work fast enough and there is no evidence that it was due to any gross, outrageous, or deliberate misconduct. His W2 from Wendy's in 2001 shows that he earned \$7767. Based on his hours of work and his minimum rate wage, it appears that Castro's earnings from Wendy's came during the first and second quarters and part of the third quarter of 2001. Based on the fact that Castro worked a 35-hour week and earned the minimum wage, the General Counsel reasonably calculated that he earned \$2912 during each of the first two quarters and \$1945 during the third quarter.

The next job Castro obtained was at a McDonald's in Greenwich. And although he could not recall when he started, his W2 from that company shows that he earned \$2928 during 2001. Based on an application he gave to a supermarket, wherein he stated that he worked at McDonald's since October 6, 2001, it would appear that his earnings from McDonald's during 2001 were all earned in the fourth quarter.

While working at McDonald's Castro also obtained a cashier's job at the Food Emporium in Greenwich where he worked

¹⁷ For the year 2000, the General Counsel introduced into evidence a W2 from Pathmark showing earnings of \$220.50 and a W2 from Wendy's showing earnings of \$7230. Castro's Social Security record for 2000, of which I take official notice, was higher by \$412.13 than the sum of his earnings from Pathmark and Wendy's. So, the General Counsel reasonably calculated that Castro's interim earnings from Neri (which did not provide records), was \$412.13.

from 8 a.m. to 2 p.m. A W2 from that company shows that he earned \$626 during 2001 and I received into evidence a letter from his employer that stated Castro worked there from November 6 through December 20, and that his job was as a part-time cashier earning \$7 per hour. He was either laid off or fired from this job on December 20. There is no evidence as to the reason. Accordingly, all of his earnings from this job were in the fourth quarter of 2001.

Based on the above, I calculate Castro's net backpay for 2001 as follows:

- Q1. Gross Backpay \$6634 – Interim Earnings \$2912 = Net Backpay \$3722
- Q2. Gross Backpay \$6634 – Interim Earnings \$2912 = Net Backpay \$3772
- Q3. Gross Backpay \$6946 – Interim Earnings \$1942 = Net Backpay \$5004
- Q4. Gross Backpay \$6946 – Interim Earnings \$3553 = Net Backpay \$3393

2002

Castro worked at McDonalds for the entire year and his W2 shows that he earned \$9985. The General Counsel allocated \$2496 as interim earnings for each quarter.

Castro also obtained a part-time job at a plant nursery in Greenwich where, based on his W2 statement, he earned \$784. He could not state when he obtained this second job or when he left. Castro testified that he quit the job at the nursery because he experienced pain in his hip when he lifted a tree and did not want to chance an injury in a situation where he did not have health insurance. As there was no other evidence indicating his dates of employment at the nursery, the General Counsel reasonably divided \$784 by four and allocated \$196 to each quarter.

I therefore conclude that the net backpay for Castro during 2002 is as follows:

- Q1. Gross Backpay \$6946 – Interim Earnings \$2692 = Net Backpay \$4254
- Q2. Gross Backpay \$6946 – Interim Earnings \$2692 = Net Backpay \$4254
- Q3. Gross Backpay \$6946 – Interim Earnings \$2692 = Net Backpay \$4254
- Q4. Gross Backpay \$7258 – Interim Earnings \$2692 = Net Backpay \$4566

2003

At some point during the year Castro either quit or was fired from McDonalds after having some kind of argument with a coworker that was not resolved to his satisfaction by his supervisor. There is no evidence that he was fired for gross, outrageous, or deliberate misconduct. And even assuming that he quit, the evidence is that this job was clearly not equivalent to the job that he had at Cassone. Based on his W2 statement, his hours of work and his pay rate, the General Counsel concluded that all of Castro's earnings from McDonalds were in the first and second quarter. Accordingly, she reasonably allocated \$4992.50 to each of those two quarters.

Based on his credible testimony I conclude that Castro resumed his search for work after leaving McDonalds.

In the General Counsel's brief at page 58, she concedes that Castro worked at Sacred Heart during 2003.¹⁸ Based on the testimony that he earned the minimum wage (\$6.90 per hour), and worked 13 weeks at 25 hours per week, she calculated that he earned \$2242.50. Since Castro could not recall when he worked at this job and as there is no documentation about the job, the General Counsel divided that sum by two and allocated \$1225 for each of the third and fourth quarters of 2003.

Based on the above, I conclude that Castro's net backpay for 2003 is as follows:

- Q1. Gross Backpay \$7258 – Interim Earnings \$3140 = Net Backpay \$4118
- Q2. Gross Backpay \$7258 – Interim Earnings \$1401 = Net Backpay \$5857
- Q3. Gross Backpay \$7258 – Interim Earnings \$1212 = Net Backpay \$6046
- Q4. Gross Backpay \$7258 – Interim Earnings \$1212 = Net Backpay \$6046

2004

In 2004, Castro got a job at Pat Longo Construction Co., in Greenwich, Connecticut, where he was employed doing unskilled labor. He did not recall when he got this job, although a document Castro filled out for the Connecticut Department of Labor states that he began on May 20 and ended that year on December 13. Castro testified that for the first 3 months, he was paid off the books at the rate of \$100 per day. Thereafter, he requested and was paid on the books and his W2 form for 2004 shows that he earned \$6669. Since he resume working at Pat Longo in 2005, I am going to assume that it is probable that most of his earnings took place during the third and fourth quarters of 2004 and that most of his "off book" earnings took place during the second quarter of 2004. Castro credibly testified that his job at Pat Longo was sporadic and to a large degree, the amount of days he worked per week depended on the season.

In calculating Castro's 2004 interim earnings from Pat Longo, the General Counsel assumed that the earnings listed in his W2 of \$6669 should be allocated to the second, third, and fourth quarters of 2004. She also added approximately \$2000 of earnings, representing Castro's "off book" earnings in calculating his total year's earnings. These latter earnings were allocated to the first and second quarters of 2004 as it seems likely that Castro earned this money between about May 20 and mid-June 2000. In my opinion, the General Counsel reasonably calculated that Castro worked 6 weeks "off the books" during the first quarter and earned \$1380 based on his estimate/guess of how many days he worked per week. For the second quarter, the General Counsel estimated that Castro earned \$1610 for 7 weeks "off the books" and \$1380 for 6 weeks "on the books."

¹⁸ Castro, although acknowledging that he worked at Sacred Heart for a contractor who paid him "off the books," had no recollection of when he worked at this job. As there is no documentation, the General Counsel assigned these interim earnings to a period of time for which he had no documented earnings. Although done to some degree at random, the allocation of these earnings to 2003 seems as reasonable as any other allocation.

(Total = \$2990.) For the third quarter, the General Counsel calculated Castro's earnings at \$2990. And for the fourth quarter, in which Castro worked 10 weeks, the General Counsel calculated his interim earnings at \$2300.

When he was laid off by Pat Longo in mid-December, he resumed his job search in the manner described above.

Based on the above, I calculate Castro's net backpay in 2004 as follows:

- Q1. Gross Backpay \$7569 – Interim Earnings \$1380 = Net Backpay \$6189
- Q2. Gross Backpay \$7569 – Interim Earnings \$2990 = Net Backpay \$4579
- Q3. Gross Backpay \$7569 – Interim Earnings \$2990 = Net Backpay \$4579
- Q4. Gross Backpay \$7569 – Interim Earnings \$2300 = Net Backpay \$5269

2005

Castro testified that he injured his hand in 2005 and could not work. Although he could not recall when this happened, the General Counsel was willing to concede that it was probable that it occurred during the first quarter of 2005. Therefore, the General Counsel postulated that Castro was not available for work for 3 weeks in the beginning of 2005 and calculated his gross backpay for the first quarter as being for 10 instead of 13 weeks.

Despite a search for work, Castro did not work until recalled by Pat Longo in April. His W2 from that Company shows that he earned \$5168 during 2005. As Castro could not state when he left this company and as there is no documentation regarding his dates of employment, the General Counsel reasonably assumed that it was probable that he was again laid off in December due to cold temperatures that hindered the type of work done by this contractor.¹⁹ The General Counsel reasonably calculated that Castro worked for Pat Longo for a total of 36 weeks during the second, third, and fourth quarters of 2005 and that he had no interim earnings during the first quarter of 2005. She therefore allocated the \$5168 to 13 weeks in the second quarter, 13 weeks in the third quarter and 10 weeks in the fourth quarter.

Based on the above, I calculate Castro's net backpay for 2005 as follows:

- Q1. Gross Backpay \$5822 – Interim Earnings \$0 = Net Backpay \$5822
- Q2. Gross Backpay \$7569 – Interim Earnings \$1866 = Net Backpay \$5703
- Q3. Gross Backpay \$7881 – Interim Earnings \$1855 = Net Backpay \$6026
- Q4. Gross Backpay \$7881 – Interim Earnings \$1436 = Net Backpay \$6445

2006

At some time before May 2006, Castro obtained an unskilled job with Compass Group, an enterprise that provided cafeteria services for the State University at Purchase New York. His W2 shows that he earned \$10,721 from this job in 2006. And

since he did not work or get paid when the school was not in session, the General Counsel computed his earnings as having been obtained by working 39 weeks and that his weekly earnings were \$275 per week. Because there was no way of determining when Castro began his employment at Compass Group, the General Counsel divided his W2 earnings of \$10,721 by 39 weeks (when school was in session) and allocated 13 weeks of those earnings to the first quarter (\$3574); 7 weeks of earnings to the second quarter (\$1925); 6 weeks of earnings to the third quarter (\$1650); and 13 weeks of those earnings to the fourth quarter (\$3573).

In addition to his earnings at Compass Group, the General Counsel attributed interim earnings of \$300 to the second quarter because Castro did some work for a neighbor. Also, based on his testimony that he did not search for work when he visited Texas, the General Counsel tolled Castro's backpay by 5 weeks during the second quarter of 2006. As the workers in the cafeteria are laid off in the second quarter of each year and may or may not be recalled during the third quarter, it is probable that Castro went to Texas during the second quarter of 2006.

The General Counsel also points out that Castro got a job at Neri Bakery working on bagels. Neri's payroll records show that Castro worked there for 2 weeks from late July to early August 2006. The records show that at Neri he earned \$6.75 per hour and that he earned a total of \$256.50.

When school reopened at SUNY, Castro was recalled to work for Compass and he left Neri to return to that job which had a higher rate of pay and was, no doubt, physically less demanding. Although not an equivalent job to Cassone in terms of pay, hours, or benefits, Castro continued to work at the SUNY cafeteria in 2007 and 2008.

Based on the above, I conclude that Castro's net backpay in 2006 is as follows:

- Q1. Gross Backpay \$7881 – Interim Earnings \$2260 = Net Backpay \$5621
- Q2. Gross Backpay \$5456 – Interim Earnings \$2904 = Net Backpay \$2552
- Q3. Gross Backpay \$5456 – Interim Earnings \$3160 = Net Backpay \$2296
- Q4. Gross Backpay \$7881 – Interim Earnings \$2904 = Net Backpay \$4977

2007

Castro's W2 shows that he earned \$12,667 from Compass Group in 2007. These earnings would have been made during only part of the year because, the workers are laid off without pay during the late spring and summer months of each year.

During the summer of 2007, Castro collected unemployment benefits and credibly testified that he looked for work as a laborer in the construction industry.²⁰

Based on the foregoing, I conclude that Castro's net backpay for 2007 is as follows:

- Q1. Gross Backpay \$8079 – Interim Earnings \$4222 = Net Backpay \$3857

²⁰ Under well established precedent, unemployment benefits are not construed to be an offset to gross backpay. *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951).

¹⁹ Basically, Pat Longo paves driveways at residences.

- Q2. Gross Backpay \$8452 – Interim Earnings \$2273 = Net Backpay \$6179
 Q3. Gross Backpay \$7967 – Interim Earnings \$1949 = Net Backpay \$6018
 Q4. Gross Backpay \$8224 – Interim Earnings \$4222 = Net Backpay \$4002

2008

Castro continued in his job at Compass until late May when the school summer break began. His W2 shows that he earned \$6671 from Compass during this year. During this period, the General Counsel calculated that Castro worked for Compass for 20 weeks during the first and second quarters and that his weekly earnings were \$334.

In late May, Castro went to Houston, Texas, to visit his mother who had suffered a stroke. He was unavailable for work until September 23. His testimony was that he resumed his search for work in later October while in Houston. Therefore, the evidence shows that Castro worked during the first 7 weeks of the second quarter and was thereafter unavailable for work for the remainder of that quarter and for the entire third quarter.

In early November 2008, Castro got a regular full-time job in Houston at a company called Pipeline Sear and Insulator where his rate of pay was \$7 per hour. His W2 shows that he earned \$2483 at Pipeline in 2008. Based on Castro's testimony that he did not resume looking for work until around the last week of October, it is concluded that he was unavailable for work during 3 weeks in the fourth quarter of 2008.

Based on the above, it is my conclusion that Castro's net backpay for 2008 is as follows:

- Q1. Gross Backpay \$7507 – Interim Earnings \$3942 = Net Backpay \$3565
 Q2. Gross Backpay \$4762 – Interim Earnings \$2729 = Net Backpay \$2033
 Q3. Gross Backpay \$0 – Interim Earnings \$0 = Net Backpay \$0
 Q4. Gross Backpay \$5208 – Interim Earnings \$2483 = Net Backpay \$2725

2009

During the first quarter, Castro continued at his job at Pipeline. He continued to work at that job until mid-February when he returned to New York. At Pipeline, Castro's W2 shows that he earned \$2417 during the first quarter. The General Counsel also concedes that he earned an additional \$60 when he returned to New York and did some work for his neighbor. He thereafter accepted Cassone's March 2009 reinstatement offer and returned to work at the Respondent. I therefore conclude that Castro's net backpay for 2009 is:

- Q1. Gross Backpay \$5018 – Interim Earnings \$2497 = Net Backpay \$2521

In addition to the above, the Respondent owes Castro, with interest, \$12,978 for vacation pay; \$3848 for sick pay and \$7419 for pension benefits.

(e) Adan Aguilar

Before coming to the United States, Aguilar worked as a farmer in Mexico. He has a grade school education and went to night school in the United States in order to learn English. His ability to speak English seems better than Macua, Flores, or Castro.

Based on his testimony as a whole and on demeanor grounds, I conclude that Aguilar was a truthful witness, attempting as best he could, given the passage of time, to recollect and relate his job search and job history since his illegal discharge by Cassone.

The backpay period for Aguilar runs from the date of his suspension on November 12, 1999, until the date that the Respondent discharged him on December 20, 1999.²¹ The General Counsel concedes that Aguilar did not qualify for pension, sick, or vacation benefits.

Although Aguilar did not immediately search for work when he was suspended, I would conclude that in the absence of an explicit discharge, he could reasonably expect to return to work within a reasonable time. I therefore would conclude that in circumstances where a discriminatee has not definitely been discharged and had a reasonable expectancy of recall, that a discriminatee is under no obligation to search for work.

In any event, the evidence is that Aguilar did begin to search for work around the third week of his suspension when he began to worry that he might not be recalled.

Although he collected workers compensation benefits during his suspension, the evidence does not show that Aguilar was unavailable to work and he credibly testified that he did look for work during this period. In this regard, the General Counsel construed Aguilar's worker compensation pay of \$1700 as interim earnings and subtracted this from his gross backpay.

In light of the above, I conclude that Aguilar's net backpay is \$2904 – \$1700 = \$1204. There is no money owed for vacation or sick pay or for pension benefits.

(f) Cesar Calderon

Calderon was illegally discharged on November 3, 1999, and the General Counsel asserts that his backpay runs until March 31, 2000. As amended at the hearing, the General Counsel contend that instead of being entitled to backpay in the fourth quarter of 1999 (when he was discharged), Calderon is only owed backpay for the first quarter of 2000.²²

As noted in the underlying case, Calderon began his employment at Cassone on August 4, 1999. He sought and obtained this job while he was a paid union organizer. That is, his primary purpose in getting the job was to assist the Union in organizing the employees. In this regard, the union had been involved in five or six previous organizing attempts and although unsuccessful, one cannot help but reflect on its persistence.

²¹ The Board overturned the ALJ's conclusion that the Respondent had illegally discharged Aguilar. However, the Board also held that his suspension violated the Act.

²² It seems to me that the General Counsel essentially is conceding that Calderon did not begin his search for alternative work until January 1, 2000.

When Calderon was hired, neither he nor the Union had any specific plan regarding how long he would continue to work. But it seems obvious to me that his employment with Cassone would probably have continued during the pendency of any election proceedings had it not been cut short by his illegal discharge. At the time of his discharge on November 3, 1999, a Board election had been held but the ultimate outcome was still in doubt because there were pending objections to the election.²³ That is, if the union's objections were upheld, a new election would be ordered and it would be extremely helpful to the union to have its own employee working inside the company to continue the organizing efforts.

In *Oil Capitol Sheet Metal*, 349 NLRB 1348, 1349 (2007), the Board, with Liebman and Walsh in dissent, concluded:

Given the different considerations applicable where the discriminatee is a union salt, we decline to apply a presumption of indefinite employment and instead shall now require the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification. Such evidence may include, but is not limited to, the salt/discriminatee's personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment and historical data regarding the duration of employment of salt/discriminatees and other salts in similar salting campaigns.

As Calderon was the Union's first salt, there is no prior history regarding the duration of employment by salts. Also, there is no evidence of any agreement between him and the Union that would indicate that they intended to limit the duration of his employment at Cassone. In fact, in light of this union's remarkable persistence in attempting to organize the employees of this company, it is more than reasonable to assume that Calderon would have continued his employment until either the Union won or perceived that its chances were nonexistent. I therefore conclude that had Calderon not been illegally discharged, he would have continued to work at this company past the date for which backpay is claimed.

Both parties cited *Contractor Services*, 351 NLRB 33, 36 (2007). In that case, the Board held that a union salt did not mitigate his damages after being illegally discharged because he only sought work at nonunion employers. The Board stated:

In *Ferguson Electric*, . . . the Board considered whether a professional union organizer-discriminatee reasonably mitigated

²³ As noted in the underlying case, the union's organizing campaign began in September 1999 when Calderon passed out union authorization cards. Pursuant to a petition filed on November 2, 1999, an election was held on December 21, 1999. The Union lost the election but filed objections which were consolidated with the underlying unfair labor practice case. Based on conduct found to have interfered with the employees' free choice, the election was set aside and a new election ordered.

his loss of earnings by searching for work only with nonunion employers that the union had targeted for organizing. . . . The Board rejected the employer's argument for a per se rule that a failure to mitigate damages will be found in any case where the union placed limitations on the universe of employers to whom a paid organizer could apply for work. The Board reasoned that "[b]y propounding its bare argument, without supporting facts or evidence, the [employer] failed to satisfy its burden." . . . The Board also made clear, however, that if the record had shown that the organizer failed to make a good-faith effort to follow his usual method of seeking employment, the union's policies unreasonably limited the organizer's job search, or the organizer otherwise unreasonably failed to mitigate his loss of earnings, that evidence "would favor our finding merit in the [employer's] contentions."

In my opinion, the facts of the present case are substantially different from those in *Contractor Services*. It would be one thing if the number of nonunion bakeries in the New York Metropolitan area was small. But this is not the case at all. The evidence is that there are many such bakeries in New York City, Long Island, Westchester, and New Jersey. Thus, the universe of nonunion bakeries to which Calderon sought employment was quite large. Starting in January 2000, Calderon applied to more than 25 bakeries during an 11 week period. This contrasts with the fact that in *Contractor Services*, the discriminatee (Landers) was found to have applied at 23 employers over a 46 month period and that in seven quarters during the backpay Landers made no applications for work at all.

I am convinced that the credited evidence demonstrates that Calderon made a reasonable and adequate search for work during the backpay period. I therefore conclude that his net backpay is gross backpay of \$5214 – interim earnings of \$0 = net backpay of \$5214. As amended, the General Counsel calculated the vacation pay at \$66 and the sick pay at \$39.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, J.J. Cassone Bakery, Inc., its officers, agents, successors, and assigns, shall make payments to the following individuals in the following amounts:

Lorenzo Macua

Total net backpay of \$81100.00 plus interest.
Vacation pay of \$7279.00 plus interest.
Sick pay of \$3233.00 plus interest.
Pension benefit of \$5430 plus interest.
Total = \$97042.00 plus interest

Carbilio Flores

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Total net backpay of \$128126.00 plus interest.
 Vacation pay of \$10473.00 plus interest.
 Sick pay of \$3442.00 plus interest
 Pension benefit of \$7172.00 plus interest.
Total = \$149213 plus interest

Jose Castro

Total net backpay of \$160088.00 plus interest.
 Vacation pay \$12978.00 plus interest.
 Sick pay of \$3848.00 plus interest.
 Pension benefit of \$7419.00 plus interest.
Total = \$184333 plus interest

Adan Aguilar

Total net backpay of \$1204 plus interest.
Total = \$1204

Cesar Calderon

Total net backpay of \$5214 plus interest.
 Vacation pay \$66 plus interest.
 Sick pay of \$39 plus interest.
Total = \$5319

Dated at Washington D.C., September 7, 2010.

APPENDIX
 ORDER DENYING APPLICATION
 TO REOPEN THE HEARING

On June 21, 2010, the Respondent's counsel requested that I keep the hearing open so that he could obtain and offer additional evidence regarding his contention that discriminate Lorenzo Macua had resigned from an interim job at the Rye City School District. The General Counsel opposed any further adjournments and I agreed that the hearing should be closed. I did, however, permit the Respondent to later submit an applica-

tion regarding a request to reopen the hearing for good cause. Among other things, Respondent's counsel indicated that he might seek to engage a handwriting expert.

To briefly review the state of the record, the Respondent produced a witness who testified that a "letter of resignation" purportedly signed by Macua was contained in his personal file. This document was received into evidence as a business record, but the witness could not testify that this was Macua's signature and could not testify as to the circumstances under which he allegedly signed the document.

The General Counsel then called Macua as a rebuttal witness and he testified that the signature on the document was not his and that he did not authorize his supervisor, John Rubbo, to sign for him. He testified that he never resigned his position at the school and that he was told in substance, that he was laid off because the school had hired another person to replace him.

Before the last day of the hearing, the General Counsel and the Respondent's counsel were aware that there was a dispute regarding whether Macua had resigned his position at the school. And in this respect, the General Counsel had notified the Respondent that she would not stipulate to the document that purported to be Macua's resignation. As it is clear from the testimony from the witness who identified the document as a business record, that similar "resignations" had been obtained by Rubbo from other employees with essentially identical language, it should have been obvious to the Respondent that in the absence of a stipulation from the General Counsel regarding the alleged resignation, that the Respondent would need to call the person who either solicited or was present when Macua allegedly signed the document that purports to be his resignation.

As the Respondent has not shown that the evidence it seeks to offer would qualify as newly discovered or that Rubbo was not available to testify on June 21, 2010, or that it made any efforts to obtain his testimony prior to that date, I shall deny the Respondent's request to reopen this record.

Dated: July 14, 2010