

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

**MARQUEZ BROTHERS ENTERPRISES,
INC.**

and

Case 21-CA-039581

**ALPHONSO MARES,
Charging Party**

and

Case 21-CA-039609

**JAVIER AVILA,
Charging Party**

Elvira Pereda, Esq.,

for the General Counsel.

Jonathan Siegel and Kymira St. Pierre, Esqs. (Jackson Lewis, PC),

for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

LISA D. ROSS, Administrative Law Judge.¹ This is a supplemental compliance proceeding to determine the amount of backpay Marquez Brothers Enterprises, Inc. (Respondent or Marquez) owes Alphonso Mares (Mares) and Javier Avila (Avila) based upon a December 16, 2014 Decision and Order by the National Labor Relations Board (NLRB or the Board).²

This case was tried before me on August 8–10, 2017, August 14–15, 2017, and September 6, 2017. On September 6, 2017, the hearing was held in abeyance pending the General Counsel’s special appeal of my Order of evidentiary sanctions against the General Counsel that specifically excluded Mares’ and Avila’s testimony concerning their interim earnings. The Board reversed my evidentiary sanction, so I reopened the record telephonically on February 1, 2018, then resumed the hearing to conclusion on February 28, 2018.³

¹ At the time of the trial, my name was Lisa D. Thompson, and I was referred to in all pleadings and correspondence as Judge Lisa D. Thompson. Since the hearing, I got married and have legally changed my name to Lisa D. Ross.

² See *Marquez Bros. Enterprises*, 361 NLRB 1375 (2014).

³ See *Marquez Bros. Enterprises*, 21-CA-039581, unpub. order issued Sept. 7, 2017 (2017 WL 3953408).

Both counsel for the General Counsel and Respondent presented witness testimony along with documentary evidence.⁴ After the trial, counsel for the General Counsel and Respondent timely filed their post-hearing briefs, which I have read and carefully considered. Based upon the entire record, including the testimony of the witnesses, my observation of their demeanor, and the parties' briefs, I make the following⁵

I. FINDINGS OF FACT

A. Background

The facts surrounding Mares' and Avila's employment history at Marquez are fully set forth in *Marquez Bros. Enterprises*, 358 NLRB 509, 510–511 (2012).⁶ Briefly, from January 17, 2005 until June 2, 2010, when Mares was terminated, Mares worked for Respondent as a perishable sales driver delivering perishable products. Mares delivered mainly perishable dairy products to various grocery stores using a refrigerated truck. Mares stocked the products on refrigerated shelves in stores for purchase by consumers.

While there was conflicting testimony in the record as to whether Mares' job duties were primarily driver/delivery-based or sales-based, I credit the testimony of Arturo Perfecto (Perfecto), Respondent's controller, who testified that, in addition to the delivery aspects of the job, Mares' duties as a perishable sales driver also included looking for sales opportunities at customer stores. To that end, and in accordance with Perfecto's testimony, I conclude that, as a perishable sales driver, Mares delivered perishable products to customer stores, removed expired items and replaced them with fresh products, assessed the store's inventory to search for new opportunities to sell product to the store, prepared invoices based on his assessment, provided customer service to help stores sell more product, and motivated stores to buy more product from Respondent.⁷

In fact, despite trying to downplay the sales aspects of his job, Mares ultimately admitted that he was a route salesman, where his duties included selling products, taking customers' orders,

⁴ I have based my credibility findings on multiple factors, including, but not limited to, the witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the weight of the evidence; the witness' demeanor while testifying; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Daikichi Sushi*, 335 NLRB 622, 633 (2001), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

⁵ Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt Exh." for Joint exhibits, "GC Exh." for the General Counsel's exhibits, "R. Exh." for Respondent's Exhibits, "GC Br." for the General Counsel's brief, and "R. Br." for Respondent's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review, and are not necessarily exclusive or exhaustive.

⁶ The Board's decision in *Marquez Bros. Ent.*, 358 NLRB 509 (2012) was vacated in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014) when the U.S. Supreme Court determined that two of the Board's members were invalidly appointed. The case was remanded back to the Board, and subsequently, the Board issued its decision in *Marquez Bros. Enterprises*, 361 NLRB 1375 (2014), affirming its initial Decision and Order.

⁷ Tr. 833, 835–838.

preparing sales invoices, having customers sign the invoices, meeting with customers to determine their needs and whether they had sufficient product to meet those needs. Mares further confirmed that his job duties were listed in Respondent’s job description for a perishable sales representative, including the duty to complete the sales process with customers.⁸ In short, Mares’ job encompassed deliveries *and* sales.

In any event, it is undisputed that Mares worked an assigned route and visited stores on a designated schedule. Mares ran the same assigned route for about four and a half years. For the larger stores on his route, Mares made deliveries three times a week; for other stores, twice a week; and for the smaller stores only once a week. Mares typically began work around 4 a.m. and typically ended work between 3 and 4 p.m., although sometimes he worked until 6 p.m.⁹ Mares earned approximately \$14 per hour while working for Respondent.

Avila also worked for Respondent as a perishable sales driver with his own designated route. While Avila also downplayed the “sales” aspects of his job,¹⁰ again I credit Perfecto’s testimony over that of Avila and find that Avila’s job duties comprised of delivery and sales components, as I described above.

Unlike Mares, Avila held a regular California class C driver’s license and drove a bobtail truck for Respondent. Avila worked full time, Monday through Friday, arriving between 3 a.m. and 5 a.m. and leaving when he finished all of his deliveries—typically around 5 p.m. Avila worked for Respondent from approximately May 2008 until December 2, 2010, when he was terminated.¹¹

On June 22, 2011, among other violations, Administrative Law Judge (ALJ or Judge) William Kocol found that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (NLRA or the Act) when Respondent: (1) terminated Mares for supporting and encouraging others to support the Teamsters Local 63, International Brotherhood of Teamsters (the Union); (2) coercively encouraged Mares and Avila (and other employees) to ask the Union to return the union authorization cards they signed, and (3) terminated Mares and Avila for supporting the Union.

Also on June 22, 2011, Judge Kocol ordered Respondent to reinstate Mares and Avila with backpay, pay any other lost earnings and benefits, and remove from its files any references to their unlawful discharges.¹² The Board affirmed Judge Kocol’s Decision and Order.¹³

⁸ Tr. 478–483.

⁹ See *Marquez Bros. Enterprises*, 358 NLRB at 510–511.

¹⁰ Tr. 576-579.

¹¹ Id. at 517.

¹² See 358 NLRB 509, 522–523.

¹³ Id., see also 361 NLRB 1375 (2014).

Respondent disputed the amount of backpay and other make-whole relief owed, and as such, failed to comply with the Board’s Order. On February 28, 2017, the Regional Director for Region 16 issued a compliance specification and notice of hearing (Specification).¹⁴ The compliance specification and notice of hearing was amended on May 31, 2017 (Amended Specification),
 5 alleging the amounts owed to Mares and Avila.

The General Counsel asserts that Respondent owes Mares \$105,538 in net backpay and \$45,476 in other make-whole relief from June 2, 2010 to August 23, 2016 (Mares’ backpay period). She also avers that Respondent owes Avila \$133,132 in net backpay plus \$19,467 in other make-whole relief from December 2, 2010 to August 8, 2016 (Avila’s backpay period).¹⁵
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Respondent filed its answer and amended answer, asserting approximately 18 affirmative defenses to the Amended Specification, including that:

15 1) Mares and Avila are not entitled to backpay because they both signed settlement agreements with Respondent which resolved their backpay claims;

2) Avila is not entitled to backpay because he admitted in his claim for unemployment benefits that he was discharged for performance issues; not for engaging in protected concerted activity;

20 3) Mares and Avila are not entitled to backpay because it is speculative whether they would have remained employed by Respondent until August 2016;

4) The Board lacks authority to bring proceedings against Respondent because the Board lacked a proper quorum, citing *NLRB v. SW General, Inc. dba Southwest Ambulance*, 137 S.Ct. 929 (2017);

25 5) Assuming Mares and Avila are entitled to backpay, the backpay period should end on October 2, 2010, for Mares and on April 2, 2011, for Avila, because substantially equivalent jobs were readily available in the relevant geographical area for them to have secured comparable work;

6) Backpay and interest should cease or alternatively be offset for Mares once he removed himself from the work force and started his own trucking company;

30 7) Backpay for Mares should cease or be tolled due to his incapacity to work due to an on-the-job injury;

8) Backpay for Mares should be cut-off or tolled during the period that Mares received workers’ compensation benefits;

35 9) Mares’ backpay should cease or be offset during the period he received unemployment benefits;

10) Avila is ineligible for backpay because he signed a general release with Respondent which released his claim for backpay;

40 ¹⁴ Due to the workload backlog in Region 31 in 2017, the case was transferred to Region 16 for processing. At some point after Respondent filed its Amended Answer to the Amended Specification, the case was returned to Region 31 for further handling.

45 ¹⁵ See GC Exh. 1(j), Exhs A-B. At the hearing, Avila testified that he declined Respondent’s offer of reinstatement on August 8, 2016. See Tr. 635. Based on that testimony, counsel for the General Counsel amended Avila’s backpay period to cover the period from December 2, 2010 to August 8, 2016, instead of ending on August 23, 2016. See GC Br. at 6, fn. 4.

11) Avila is ineligible for backpay or his backpay should be tolled when Avila left the country for at least six months and was not searching for work during that time;

12) Avila is ineligible for backpay or his backpay should be tolled when he resigned from interim employment and/or was terminated from other interim employment;

5 13) Avila’s backpay should cease or be offset during the period he received unemployment benefits;

14) Mares and Avila are ineligible for backpay between January 25, 2013 and November 18, 2014, when the U.S. Court of Appeals for the District of Columbia issued an independent stay of the initial unfair labor practice (ULP) case pending a U.S. Supreme Court ruling regarding whether the Board lacked quorum, see *NLRB v. SW General, Inc.*, supra;

10 15) Mares and Avila are ineligible for backpay and other damages because they failed to exercise reasonable diligence to mitigate their damages;

16) Mares’ and Avila’s backpay recovery is barred in whole or in part because they were at-will employees with a significant number of documented discipline with Respondent which remained unchallenged;

17) Mares and Avila are barred from collecting any interest on their backpay or the interest should be tolled because the Board unreasonably and excessively delayed these compliance proceedings; and/or that

20 18) Mares and/or Avila are ineligible for backpay or backpay should cease or cut off because neither accurately reported interim earnings and/or concealed their interim earnings.¹⁶

B. Mares’ Search for Work and Interim Earnings

25 Mares testified about his search for work and interim earnings. According to Mares, after he was terminated from Respondent on June 2, 2010, he was available to work at all times and maintained his commercial driver’s license (CDL) throughout the backpay period.

30 It is undisputed that Mares applied for, and was granted, unemployment benefits from the State of California from June 2010 to the end of December 2010.¹⁷ As part of the requirements for unemployment, Mares testified that, every two weeks, he certified his availability to work with the State. Mares also submitted a “Claimant Expense and Search for Work Report” to the Board, on which he listed multiple employers that he contacted to inquire about and apply for job openings.¹⁸

35 Mares testified that, after he was fired from Marquez, he and his wife went to Work Source, a state service that assisted Mares with finding employment and building his resume.¹⁹ Mares and

40 ¹⁶ Respondent also asserted that Mares was ineligible for backpay because he was not legally authorized to work in the United States during his backpay period. However, Respondent withdrew this affirmative defense at the hearing, and accordingly, this argument will not be addressed in this decision.

¹⁷ Tr. 182–184, 426, see also GC Exh. 9.

¹⁸ Tr. 427, see also GC Exh. 9.

¹⁹ Tr. 418, 420.

his wife went to Work Source about once or twice per month to search for work. According to Mares, due to his lack of English proficiency (Mares' primary language is Spanish and he speaks/understands little English), Mares' wife helped him fill out applications and posted his resume on social media sites.²⁰

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Mares visited approximately 36 different companies to apply for work. Mares testified that he and his wife often walked into businesses unannounced to ask if they were hiring.²¹ If they were, Mares, with his wife's help, filled out an application, left the application with the business, and awaited word on whether he would be called in for an interview or hired for a job. Mares also called employers by telephone to ask about job opportunities and learned about other available work by calling phone numbers he saw on company trucks.²²

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There was conflicting testimony on whether Mares worked as a delivery driver for a company called Nature's Own between August 2010, after he was terminated from Respondent, and January 2011, when he began employment with Pacific Foods. Mares testified that he never worked at Nature's Own but his wife wrote on his resume that he worked for this employer in order to show that Mares had more delivery experience and to better his chances of getting hired after he was fired by Respondent.²³ However, I do not find Mares' testimony credible based on the documentary evidence.

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Specifically, in his initial online resume, which Mares admitted he used, Mares listed that he worked for Nature's Own immediately after being terminated by Respondent.²⁴ Moreover, he described his employment with Nature's Own as follows:

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As of now [meaning after the date of his termination from Respondent] I'm working at **natures own** [*sic*] bread as a delivery driver doing the same thing as I did before with my other jobs I been [*sic*] in this job for 5 months . . .²⁵

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However, after he was employed by Pacific Foods, Mares never deleted this entry. Rather, in a second online resume he also admitted using to look for interim work, Mares updated his duties at Nature's Own, noting:

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I work [*sic*] at **natures own** [*sic*] bread as a delivery driver doing the same thing as I did before with my other jobs I been [*sic*] in this job for 5 months, **I fix and put bread on their shelf's** [*sic*] **check out of code items and also see if there is any sell items.**²⁶

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²⁰ Tr. 418–419, 424–425, 456.

²¹ Tr. 425, see also GC Exh. 6.

²² Tr. 425.

²³ Tr. 457.

²⁴ R. Exh. 10.

²⁵ Id. (emphasis in original).

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²⁶ R. Exh. 22 (emphasis added).

I find it difficult to believe, and it defies logic, that Mares, with 21 years of overall sales/delivery driver experience, would include such a detailed and specific job description for an employer to which he lied about working for then updated those duties, after he found interim employment, if he had never, in fact, worked for that employer.

5 Accordingly, I believe Mares worked for Nature’s Own during the five month period after being terminated from Respondent but he never provided evidence of his interim earnings for that employer.

10 Ultimately, after responding to a job-ad posted on a road truck, Mares was hired by Pacific Foods as a sales driver on January 17, 2011.²⁷ He remains employed by Pacific Foods to date.

15 As a sales driver, Mares performs essentially the same job duties as he performed while working for Respondent. Mares testified that, every morning when he arrived at Pacific Foods, he picked up his work truck, drove to various customers’ stores throughout the day where he removed expired perishable goods and replenished them with new product.²⁸ He works full time (i.e., 40 hours per week) and regularly works ten hours of overtime per week.²⁹

20 Although Mares’ compensation at Pacific Foods changed throughout the years, ranging from \$8.50 to \$11 per hour, sometime in the beginning of 2014, in addition to his hourly rate of \$8.50 per hour, Mares received a 1.75 percent commission on total sales, which was later reduced to 1.5 percent.³⁰

25 Although there was some testimony in the record on whether Mares owned a trucking company, I credit Mares when he testified that he never owned a trucking company and the Department of Transportation (DOT) number he was assigned may have been given to him when he worked for Mission Foods, prior to working for Respondent.³¹ Accordingly, I do not believe Mares owned a trucking company, prior to or during his employment with Respondent or after he was terminated by Respondent.

30 Respondent also pressed Mares about the fact that he never reported that he received monthly residential rental income of \$400 from his mother-in law, who lived with he and his wife during the backpay period.³² Although Mares never reported this amount to the Board, Mares received this rental income both prior to *and* after his termination from Respondent. Nevertheless, such rental income is generally not considered income included in the Compliance Specification.³³

²⁷ Tr. 429.

²⁸ Tr. 430–431.

40 ²⁹ Tr. 1014.

³⁰ Tr. 1013, see also GC Exh. 29 at 4.

³¹ Tr. 471–472, 506–508.

³² Tr. 1032–1033.

45 ³³ Although the Board’s Compliance Manual has no precedential value, since it can be persuasive, see Jt. Exh. 1, Sec. 10554 Supplemental Employment or Moonlighting, which states that when a discriminatee holds a second

Similarly, Respondent called into question several deposits made into Mares' bank account. First, Respondent asked Mares about a deposit made on or about August 8, 2011, in the amount of \$14,553.47, to which Mares testified that those monies resulted from a settlement on a separate matter with Respondent.³⁴ With regard to another deposit made on or about March 12, 2015, in the amount of \$3600, Mares explained that that deposit was his federal income tax refund for 2014.³⁵ Mares further explained two more deposits, for \$1,090.58 and \$1,071.18, were his wages from Pacific Foods that he received by paper checks.³⁶ I credit Mares' testimony regarding these cash deposits.

Lastly, there was conflicting testimony in the record as to whether Mares continued to search for comparable work after he was hired by Pacific Foods. Initially, Mares testified that, while working for Pacific Foods, he received an offer of employment from LA Specialty Produce but declined the job because it paid less than what he earned at Pacific Foods.³⁷

However, Mares later contradicted this testimony, by admitting he actually applied to LA Specialty Produce in October 2010, prior to beginning work at Pacific Foods.³⁸ To that end, a review of Mares' documented search for work efforts shows he applied for work at LA Specialty Foods in October 2010.³⁹ Although Mares eventually testified that he applied to LA Specialty Foods twice, in 2010 and 2015, unfortunately, Mares never definitely confirmed, to my satisfaction, whether he was offered employment at LA Specialty Foods before and/or after he began his employment at Pacific Foods; and as such, the record remains vague as to Mares' continued his search for comparable work.

Overall, I found Mares less than fully credible in certain aspects of his testimony. Specifically, I found Mares credible where noted in this decision and to the extent that the documentary evidence supported his testimony. However, I found that Mares was less than forthcoming concerning his interim employment and he was slow to produce documents in response to Respondent's subpoenas duces tecums (subpoenas).

With respect to not being forthcoming regarding his interim employment, I have already addressed earlier in this decision Mares' lack of credibility regarding his employment with Nature's Own. In addition, Mares was evasive in his description of his job duties with Respondent as a perishable sales driver, which he knew encompassed delivery *and* sales duties.

job prior to his termination and continues that second job after the termination, the earnings from the second job are not used to offset against gross backpay.

³⁴ Tr. 525–526, see also R. Exh. 25 at 3.

³⁵ Tr. 527, 1029, see also GC Exhs. 32, 34, R. Exh. 25 at 8.

³⁶ Tr. 528, 1015, 1046, see also R. Exh. 25 at 17, 56.

³⁷ Tr. 456, 497, 1013, see also GC Exh. 29 at 4.

³⁸ Tr. 501, see also GC Exh. 6.

³⁹ Tr. 425, 494–495, see also GC Exh. 6.

5 With regard to Mares' slow response to Respondent's subpoenas, despite the fact the Board reversed my evidentiary sanction against Mares for failing to timely and fully comply with Respondent's subpoenas, based upon the full testimony in the record, I conclude that Mares failed to timely provide Respondent with responsive documents; rather he dribbled out documents to Respondent's counsel which had the effect of preventing a full and complete examination (and calculation) of his interim earnings.

10 Specifically, Subpoena Duces Tecum B-1-VTWTK5 (Subpoena 1) was served on the PMK for Alfonso Mares' business on May 8, 2017. Subpoena Duces Tecum B-1-VTSNU5 (Subpoena 2) was served on the Custodian of Records for Mares' business on May 8, 2017. Subpoena Duces Tecum B-1-WJPXPR (Subpoena 3) was served on Mares individually on July 9, 2017.

15 Respondent served its subpoenas on Mares' and his business requesting 21 identical categories of documents. Those documents were supposed to be brought to the hearing which began at 9 a.m. on August 8, 2017.

20 At the hearing, Mares stated, under oath, that he produced some but not all documents responsive to all of the subpoena requests. When the undersigned questioned Mares further with respect to whether he had any documents responsive to specific subpoena requests, he testified that he did, in fact, have responsive documents.

25 After being ordered to produce the subpoenaed documents, Mares subsequently testified that he did not have responsive documents for subpoenas 1 and 2. Mares produced some, but not all of the documents responsive to Subpoena 3. Yet, in reviewing the documents Mares produced, mainly bank statements and the two resumes referred to earlier in this decision. I find no plausible explanation why Mares could not have produced those documents on the first day of the hearing. He had over three months to gather these documents and request clarification from Respondent counsel as to specific requests. Yet Mares did not bring many of the responsive documents on the first day of hearing.

30 Moreover, the record indicates that Mares consulted with counsel for the General Counsel on multiple occasions before and during the hearing regarding Respondent's subpoenas, and even after these consultations, Mares failed to timely produce responsive documents. While Mares complained to me at the hearing about the cost of copying these documents (as the reason he failed to produce the documents on the first day of the hearing), when I told him that cost was not a sufficient reason to ignore a subpoena, somehow cost no longer became an impediment and Mares produced the documents within days.

35 In short, I find that Mares had ample time and opportunity to comply with Respondent's subpoena. The record demonstrates that Mares understood what documents he was expected to provide to Respondent and/or sought guidance from counsel for the General Counsel when he needed clarification concerning responsive documents. Yet despite this, he failed to timely respond to Respondent's subpoena. Once some of the subpoenaed documents were finally produced, some of the documents (i.e., the two resumes) contradicted his testimony and made him less than fully

credible. As such, it left me with the impression that Mares delayed in producing responsive documents in order to prevent discovery of other interim earnings.

On balance, reviewing all of Mares’ testimony, I conclude that he was less than forthcoming and generally not fully credible.

C. Avila’s Search for Work and Interim Earnings

Like Mares, Avila testified about his search for work and interim earnings. According to Avila, after he was terminated from Respondent on December 2, 2010, he was available to work at all times. He initially applied for, and was denied unemployment benefits from the State of California in December 2010. However, after appealing the decision, he was granted unemployment in May 2011 and received benefits retroactive to December 2010. He remained on unemployment until June 2012 when he found his first interim employment.

Avila testified that, every two weeks, he certified his availability to work with the State. Avila also submitted a “Claimant Expense and Search for Work Report” to the Board, on which he listed multiple employers that he contacted to inquire about and apply for job openings.⁴⁰ Avila looked for driver positions similar to the work he performed for Respondent but also searched for “any job that would hire him.” He testified he asked friends and references about job opportunities and drove around to various businesses looking for work. In fact, the documentary evidence shows that, between December 2010 and June 2012, Avila contacted approximately 27 different employers to apply for work.⁴¹ He applied for jobs online and in person, although Avila could not remember how he applied for some of the jobs listed on the NLRB Search for Work form. Also, in some instances, Avila submitted job applications via company websites, but did not print-off the final application as proof of submission.

Nevertheless, Avila found interim employment at a number of companies, some jobs within his field; some outside of it.

1. Interim employment in 2012–2014.

Sometime in July 2012, Avila was hired by AT&T as a full-time telesales representative, working five-days a week.⁴² As a telesales representative, Avila worked at AT&T’s call center answering customer calls and promoting AT&T’s products and services to customers over the telephone.⁴³ Avila was responsible for meeting monthly and quarterly sales quotas, and if he did not meet those quotas, Avila could be disciplined, up to and including termination.⁴⁴

⁴⁰ GC Exhs. 14, 22.

⁴¹ GC Exh. 14 at 1-8.

⁴² Tr. 593–594, 1083, see also GC Exh. 14.

⁴³ Tr. 554-555, see also R. Exh. 53.

⁴⁴ Tr. 555.

At some point during his employment at AT&T, Avila took six weeks parental leave from work for which he was paid through California’s unemployment department. According to Avila, when he returned to work, due to the stress level of meeting sales quotas, the constant threat of discipline for being late for work and failing to meet the company’s sales quotas, he took Family Medical Leave Act (FMLA) leave on two occasions. Avila took three days FMLA leave sometime mid 2014 (which was paid by AT&T), and five days FMLA leave in October 2014. After his October 2014 FMLA leave, Avila never returned to the company.

While Avila testified that he resigned from his position at AT&T after his October 2014 FMLA leave, I do not find his testimony credible for several reasons. First, Avila was very evasive when asked whether he gave notice and resigned or abandoned his job at AT&T. However, Avila admitted he never resigned from AT&T. In fact, I note that on cross-examination, Avila admitted that, when he applied to work at his current job at Mel-O-Dee, an ice cream distributor, he wrote on his job application that he left AT&T because his department was closing; when in fact, he never gave AT&T notice or reassigned his job.

Accordingly, I find, based on Avila’s own admission, that he abandoned his job at AT&T without resigning or giving proper notice.⁴⁵

The record further reveals that, although Avila earned approximately \$16 per hour, plus commission when he left AT&T, he admitted that he never provided his W-2s from AT&T to the compliance officer.⁴⁶ Nevertheless, Avila’s earnings from AT&T were factored in in the compliance officer’s calculations.⁴⁷

In any event, one month later, in November 2014, Avila worked for Macy’s as a part-time sales associate. As a sales associate, Avila assisted customers with purchases and returns and maintained the store’s appearance. Avila worked approximately 10–15 hours per week, three days a week.

Although Avila earned approximately \$12 per hour, and he never provided his W-2 from Macy’s to the compliance officer, Avila’s earnings from Macy’s were factored in in the compliance officer’s interim earnings calculations.⁴⁸

Avila testified that, while working at Macy’s, he was referred to 24HR Personnel, a temporary staffing agency, that referred him to LA Corr. After working at Macy’s for only a few weeks, Avila ultimately left Macy’s to work at LA Corr.⁴⁹

2. Interim employment from 2015-present

⁴⁵ Tr. 559–560, 690–691, see also R. Exh. 29.

⁴⁶ Tr. 598, 1081–1082, see also GC Exh. 35 and R Exh. 15.

⁴⁷ GC Exh. 13.

⁴⁸ Tr. 317, 563–565, 569, 1089, see also GC Exh 13 and R. Exh. 16, see also GC Br. at 14 fn. 11.

⁴⁹ Tr. 566–567, 1091.

5 From about December 2014 to March 21, 2015, Avila worked at LA Corr as a full-time
button sheeter, earning \$11 per hour.⁵⁰ While I do not believe Avila was forthcoming in his
testimony regarding his income (since Avila admitted on cross-examination that he failed to
provide his W-2 or any documentary wage information from LA Corr to the compliance officer),
Compliance Officer Marene Steben (Steben) accepted Avila's oral representation of Avila's
earnings at LA Corr in her interim earnings calculations.⁵¹

10 Similarly, while Avila testified that he resigned his position at LA Corr after he applied for
and accepted a driver position at Helados La Tapatia (La Tapatia), his testimony is not fully
credible. In fact, Avila admitted that he stopped working at LA Corr because LA Corr asked him
not to return due to performance issues and after he missed one day of work.⁵² Avila's lack of
candor herein made him less than fully credible.

15 Nevertheless, Avila worked for La Tapatia, a Mexican ice cream distributor, as a full-time
sales driver from April 7, 2015 to June 12, 2015.⁵³ As a sales driver, Avila performed essentially
the same job duties as he performed while working for Respondent. Avila testified that he was
responsible for driving to the employer's customers' stores and delivering ice cream.⁵⁴ Avila was
a salaried employee, worked six days per week, and was paid \$80 per day plus a three percent
20 commission on total sales.⁵⁵ In addition, Avila also received \$80 for every new account that he
opened.⁵⁶ Although Avila verbally told Compliance Officer Steben about his earnings at La
Tapatia, Avila again admitted he never provided Steben with any W-2 or documentary wage
information to confirm those earnings.

25 Avila was ultimately recruited by employer Mel-O-Dee, another ice cream distributor.
Avila left his employment with La Tapatia and began working for Mel-O-Dee to earn higher
wages. He remains employed by Mel-O-Dee to date.⁵⁷

30 At Mel-O-Dee, Avila works as a full-time sales driver where he delivers ice cream to
multiple gas stations, privately owned supermarkets as well as various CVS, Walgreens, and Rite-
Aid locations. Similar to his employment with Respondent, Avila drives a specific route where he
removes and replenishes ice cream in the customer stores' freezers.

35 Avila testified that he earns approximately \$100 per day plus between \$500 and \$700 in
commission, although he could not recall whether he earned commissions each week or every pay

40 ⁵⁰ Tr. 207, 568, 1091, see also GC Exh. 14, p. 18 and R. Exh. 16.

⁵¹ GC Exh. 13, see also GC Br. at 14 fn. 11.

⁵² Tr. 569, 1108-1109, R. Exh. 30 at 21.

⁵³ Tr. 569–570, 627, see also GC Exh. 14 at 19.

⁵⁴ Tr. 569–570.

⁵⁵ Tr. 1092–1093, R. Exh. 11.

⁵⁶ Tr. 1093, R. Exh. 11.

45 ⁵⁷ Tr. 350–351, 570, 628, see also R. Exhs. 7, 8.

period. However, again, Avila provided no documentary wage information to confirm his salary or commission pay.

5 Like Mares, I found Avila less than fully credible in his overall testimony. Specifically, I found Avila credible to the extent that the documentary evidence supported his testimony. However, I found that Avila was less than forthcoming concerning his interim earnings and his slow response to Respondent’s subpoenas duces tecums (subpoenas).

10 With respect to Avila’s interim earnings, there was significant testimony brought out on cross-examination concerning multiple, and some sizeable, deposits into Avila’s bank account during the backpay period.⁵⁸ Although Avila explained some of the bank deposits⁵⁹, he could not recall whether other deposits were from interim earnings/employment that he had not reported or from some other source. For example, during one such exchange, when Respondent counsel asked Avila about two deposits in 2013, Avila testified as follows:

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Q: On page 11, period of 2013, there's a deposit for \$600 and \$1,720.63. What were those payments from?

A: I don't remember.

Q: Were those from payments from employers for your services?

20

A: No.

Q: How do you know, if you don't remember?

A: Well, I don't remember, so I'm pretty sure they're not.

Q: Well, if you don't remember, you don't remember. Either you know they're regarding—

25

A: I don't—

Q:—employers—

JUDGE THOMPSON: Wait.

THE WITNESS: I don't recall.

Q: BY MR. SIEGEL:—or you don't.

30

JUDGE THOMPSON: Wait. Wait. Let him finish, Mr. Avila, before you answer. Go ahead, Mr. Siegel.

Q: BY MR. SIEGEL: Either you don't remember or you do. So is your testimony you don't remember?

A: I don't remember.⁶⁰

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When asked multiple times about various electronic and/or cash deposits into his bank account, Avila either could not recall or did not remember the source of these payments.

40 In addition, there was significant, conflicting testimony about whether Avila earned approximately \$60,000-\$75,000 per year as a band promoter in 2011 that had not been reported as

⁵⁸ Tr. 650–654.

⁵⁹ Tr. 1084-1091, 1093–1094, 1101–1102; see also GC Exh. 38, R. Exh. 34 at 6.

⁶⁰ Tr. 653–654.

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interim earnings. The documentary evidence confirms that Avila wrote on his online MySpace page that he was a band promoter earning approximately \$60,000-\$75,000 per year.⁶¹ Yet Avila explained at the hearing that he was never paid as a band promoter, rather that he simply wrote that on his MySpace page in order to publicize the group. There was no documentation to prove or disprove this testimony. Avila’s testimony in this regard made him less than fully credible

Similarly, Avila provided conflicting testimony concerning whether he spent significant time in Mexico during the backpay period. First, Avila denied traveling to Mexico in 2011 during the backpay period.⁶² However, when he was shown a picture of a Sheraton Hotel in Mexico City (where Avila was staying) taken from his MySpace page, Avila testified that he visited Mexico City in 2008 during his dad’s illness. Yet, record evidence shows the date he posted the picture of the hotel on his Facebook and MySpace page was *August 31, 2011*.⁶³

However, at some point later in his examination, Avila admitted that he traveled to Mexico in February or March 2011 for a weekend and again in 2014 for two weeks. Even though on Avila’s MySpace page, beside the post of the Sheraton Hotel picture, Avila posted that he had not “been here in a while im [sic] back lol . . . [in] over 6 months lol,”⁶⁴ Avila ultimately testified that he was referring to the time since his last *login activity* on his MySpace page; not that he had been *out of the country* for six months.⁶⁵

Lastly, Avila was equally evasive in his description of his job duties with Respondent as a perishable sales driver, which he knew encompassed delivery and sales duties.

With regard to Avila’s slow response to Respondent’s subpoenas, despite the fact the Board reversed my evidentiary sanction against Avila for failing to timely and fully comply with Respondent’s subpoenas, based upon the full testimony in the record, I conclude that Avila failed to timely provide Respondent with responsive documents; rather, like Mares, he dribbled out documents to Respondent’s counsel which left me with the impression that Avila wanted to prevent a full calculation of his interim earnings.

I also find that Avila had ample time and opportunity to comply with Respondent’s subpoena. The record demonstrates that Avila understood what documents he was expected to provide to Respondent and/or sought guidance from counsel for the General Counsel when he needed clarification concerning responsive documents. Yet despite this, he failed to timely respond to Respondent’s subpoena. Once some of the subpoenaed documents were finally produced, many of the documents contradicted Avila’s testimony and made him less than fully credible. As such, it left me with the impression that Avila delayed in producing responsive documents in order to prevent discovery of other interim earnings.

⁶¹ R. Exh. 19(a) at 2.

⁶² Tr. 648–649.

⁶³ Id., see also R. Exh. 19(a)

⁶⁴ R. Exh. 19(a).

⁶⁵ Tr. 701, R. Exh. 19(a) at 4.

On balance, reviewing all of Avila’s testimony, I conclude that he was less than forthcoming and generally not fully credible.

D. Backpay Calculation

5 Compliance Officer Steben testified that she used three different sets of payroll records to calculate the backpay for Mares and Avila. The payroll records were provided by Respondent, which consisted of Mares’ and Avila’s payroll records prior to their termination, comparable perishable sales drivers’ payroll records, and sales employees’ payroll records.⁶⁶

10 First, in order to project the Charging Parties’ gross backpay, Steben relied on formula one of the Board’s Casehandling Manual Part 3, Compliance Proceedings (Compliance Manual).⁶⁷ Formula one uses a discriminatees’ average earnings (or hours) prior to the unlawful termination to project the gross backpay.⁶⁸ By using this method, Steben calculated Mares’ and Avila’s average earnings per pay period (excluding any pay period where no monies were reported or appeared to be outliers) and used this figure as the average amount of earnings Mares and Avila would have made from the date of their terminations through August 2011.⁶⁹

20 Second, in determining the gross backpay from September 1, 2011 through mid-May 2012, Steben used the comparable perishable sales driver’s payroll records provided by Respondent.⁷⁰ Again, Steben took the total earnings for this time period and divided the total earnings by the number of pay periods in this time period. This provided an average amount of earnings per pay period.⁷¹

25 Third, from about mid-May 2012 (when the perishable sales driver position split into two positions: driver and sales) through August 23, 2016 (the date the parties were required to respond to Respondent’s offers of reinstatement), Steben relied on the payroll records provided by Respondent for the comparable sales employee.⁷² In calculating the average earnings per pay-period, Steben took the total earnings for each year and divided that figure by the number of pay periods for the year (excluding pay periods for which no records were provided or appeared to be outliers). This provided the average earnings per pay period for both Mares and Avila.⁷³ Once the average earnings were calculated per pay period, Steben used these average earnings as the earnings for pay periods where the records were either missing or seemed to be outlier earnings.⁷⁴

35 _____
⁶⁶ Tr. 155–156, 195, see also GC Exhs. 3, 4, 11, 12.

⁶⁷ Tr. 165–166, 197–199, see also Jt. Exh. 1 Sec. 10540.

⁶⁸ Jt. Exh. 1 Sec. 10540.

40 ⁶⁹ Tr. 165–166, 197–199.

⁷⁰ GC Exh. 1(j), Exhs. E-F, see also GC Exhs. 3, 12.

⁷¹ Id.

⁷² Tr. 160-163, 200-201, see also GC Exhs. 4, 11.

⁷³ Id.

45 ⁷⁴ Id.

To calculate net backpay, Steben adjusted the gross backpay by subtracting the Charging Parties' interim earnings.⁷⁵ Furthermore, in order for Mares and Avila to be made whole for their losses, Steben also calculated any search-for-work expenses and/or mileage in accordance with the Board's Compliance Manual.⁷⁶ I found Steben's testimony regarding her backpay calculations credible.

E. Costs Incurred While Searching for Work

Both Mares and Avila claim only mileage costs while they searched for work and costs for extra mileage they incurred while they maintained interim employment.

Mares traveled a total of 1,277 miles round trip while searching for work from July 2 to December 10, 2010.⁷⁷ His mileage costs totaled \$350.⁷⁸ Mares incurred a total of approximately \$45,126 in extra mileage costs while maintaining interim employment during the backpay period.⁷⁹

Avila traveled a total of 160 miles round trip while searching for work from December 2, 2010, to approximately July 2012. His mileage costs totaled approximately \$180.⁸⁰ Deducting his mileage during the period when Avila was on paternity leave, Avila incurred a total of approximately \$19,287 in extra mileage costs while maintaining interim employment from July 2012 to August 8, 2016.⁸¹

F. Respondent's Evidence of Job Availability During the Backpay Period

Respondent presented evidence to show that, during the backpay period, there were comparable employment opportunities in the relevant geographic area for Mares and Avila. At the hearing, Respondent called June Hagen, Ph.D. (Hagen), a certified vocational expert, to testify about jobs in Los Angeles, Orange, San Bernardino, and Riverside counties in southern California during the backpay period.

Hagen testified that, after reviewing Mares' and Avila's job duties and payroll records, the Department of Labor's Bureau of Labor Statistics' salaries and California's Employment Development Department's (EDD) job salaries, she determined the job of sales route driver was the closest comparable position to that which Mares and Avila held when employed by

⁷⁵ GC Exh 1(j), Exh. A at 1–10 and Exh. B at 1–9.

⁷⁶ See Jt. Exh. 1 Sec. 10555 Reimbursement of Search for Work or Interim Employment Expenses; see also Tr. 175–176, 179–181, 369–370, 377–378, 1014, GC Exhs. 6, 8, 14–16 for Mares, and Tr. 204–206, 209–211, 214, 351, GC Exh. 1(j), Exh. B, GC Exh. 13 and R. Exhs. 7–8 for Avila.

⁷⁷ GC Exh. 6 at 1–7.

⁷⁸ GC Exh. 1(j), Exh. A at 1.

⁷⁹ GC Exh. 1(j), Exh. A at 2–9.

⁸⁰ GC Exh. 1(j), Exh. B at 1–3

⁸¹ Id. at 3–8. The record confirms that Avila did not incur additional mileage costs after he abandoned his job at AT&T in October 2014. See GC Exh. 1(j), Exh. B at 6–7.

Respondent. According to Hagen, there were over 9000 sales route driver jobs in 2011 and approximately 11,000 jobs in 2012 in Los Angeles County.⁸²

5 Hagen also conducted a detailed local labor analysis, looking specifically for sales route driver openings, and she contacted a sampling of employers during 2016 to inquire about qualifications, salary, and hiring frequency for this position. She also reviewed internet ads for a sales route driver job.⁸³

10 Hagen spoke with eight employers regarding their sales route driver positions. According to Hagen, during the backpay period, Arrowhead Water, for example, hired a sales route driver every year since 2010 and expected to continue hiring for this position every year. In addition, Frito-Lay, Giuliana Baker and HD Supply have hired sales route drivers every year during the backpay period.

15 Hagen further testified that, based on the Department of Labor’s Bureau of Labor Statistics, the median duration in which individuals with the same or very similar sale route driver position were able to find employment was between 22.1 to 26.1 weeks in 2010. In 2011, the median duration of unemployment was 21.8 to 26.9 weeks. Therefore, according to Hagen, if Mares and Avila engaged in a reasonable job search, they would have found comparable employment within
20 4.75 months after being terminated by Respondent.⁸⁴

II. LEGAL STANDARD

25 It is well established that the finding of an unfair labor practice is presumptive proof that some backpay is owed.⁸⁵ The General Counsel's burden in a backpay proceeding is limited to showing the gross backpay due to each discriminatee. The General Counsel has discretion in selecting a formula that will closely approximate backpay, and may use any formula that approximates what the discriminatee would have earned had s/he not been discriminated against, as long as the formula is not unreasonable or arbitrary under the circumstances.⁸⁶

30 Once the General Counsel meets its burden of showing the gross backpay owed, the burden shifts to the respondent to establish facts that negate or mitigate its liability.⁸⁷ Any uncertainty about how much backpay should be awarded to a discriminatee should be resolved in the discriminatee’s favor, and against the respondent whose violation caused the uncertainty.⁸⁸

⁸² Tr. 774–775, R. Exhs. 47, 49.

⁸³ Tr. 781–782.

⁸⁴ Tr. 785–786, see also R. Exhs. 48, 50–51.

40 ⁸⁵ *Lorge School*, 355 NLRB 558, 560 (2010); *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1991), enf. 952 F.2d 1393 (3d Cir. 1991).

⁸⁶ *Lorge School*, supra; *Performance Friction Corp.*, 335 NLRB 1117, 1117 (2001) (noting that where the Board is presented with conflicting backpay formulas, the Board must determine the most accurate method for determining backpay).

⁸⁷ *St. George Warehouse*, 351 NLRB 961, 963 (2007); *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006), enf. 30 260 Fed.Appx. 607 (4th Cir. 2008).

45 ⁸⁸ *Lorge School*, supra.

III. ANALYSIS

A. *Compliance Specification*

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Using the analytical formula set forth in *The Lorge School*, supra, in this case, the General Counsel established that Mares' backpay period ran from June 2, 2010 to August 23, 2016. Similarly, Avila's backpay period ran from December 2, 2010 to August 8, 2016.

10

Compliance Officer Steben credibly testified that she used Formula One in the Board's Compliance Manual in order to calculate Mares' and Avila's gross backpay. Formula One required Steben to determine Mares' and Avila's average earnings (or hours) prior to the unlawful termination to project the gross backpay. By using this method, the evidence demonstrates that Steben calculated Mares' and Avila's average earnings per pay period (excluding any pay period 15 where no monies were reported or appeared to be outliers) and used this figure as the average amount of earnings Mares and Avila would have made from three different time periods: from the date of their terminations through August 2011; from September 1, 2011 through mid-May 2012, and from about mid-May 2012 through August 23, 2016. Steben then took the total earnings for each of the aforementioned time periods and divided the total earnings by the number 20 of pay periods. This provided an average amount of earnings per pay period. Steben added all of her calculations for each period to arrive at the gross backpay amount. Thus, Mares' gross backpay and interim earnings totaled \$151,014 and Avila's gross backpay and interim earnings totaled \$162,528.

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To arrive at Mares' and Avila's net backpay amount, the record shows Steben adjusted the gross backpay by subtracting the Charging Parties' interim earnings. Steben also calculated any search for work expenses and/or mileage in accordance with the Board's Compliance Manual. Thus, after withholdings, Mares' net backpay totaled \$105,538, and Avila's net 30 backpay totaled \$141,756.

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With the gross (and net) backpay figure established, the burden shifts to Respondent to establish facts that negate or mitigate its liability, with the caveat that any uncertainty will be resolved against Respondent, since its unlawful action against Mares and Avila would have caused the uncertainty.

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Although Respondent raised several objections and alternative calculations to the General Counsel's calculations, none of them demonstrated that the General Counsel's calculations were unreasonable. In sum, I credit the General Counsel's gross and net backpay calculations and the facts in the evidentiary record on which the General Counsel's calculations are based. Accordingly, I find that the General Counsel used a reasonable formula to calculate what Mares 45 and Avila would have earned had Respondent not discharged him unlawfully.

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B. Respondent’s Affirmative Defenses

Respondent asserts a number of other defenses to negate and/or mitigate liability. First, Respondent claims that backpay should cease or be tolled for Mares and Avila, because there were equivalent jobs readily available in the relevant geographical area for them to have secured work (affirmative defense #5).

“Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings.”⁸⁹ Thus, “[a] discriminatee must make reasonable efforts during the backpay period to seek and hold interim employment. This is known as the discriminatee’s obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate[.]”⁹⁰

To assert, as a defense to backpay liability, that a discriminatee conducted an inadequate job search and thus willfully failed to mitigate, Respondent has the initial burden of presenting evidence showing that there were suitable and substantially equivalent jobs available in the relevant geographic area for an individual with the discriminatee’s qualifications.⁹¹ The burden then shifts to the General Counsel to present evidence concerning the discriminatee’s job search. The General Counsel may meet this burden by producing the discriminatee to testify as to his efforts at seeking employment,” or by introducing other competent evidence regarding the discriminatee’s job search.⁹²

Once the General Counsel satisfies that burden of production, Respondent has the ultimate burden of proving that the discriminatee did not mitigate damages by using reasonable diligence in seeking alternate employment.⁹³ However, notably, the test for mitigation is not measured by a discriminatee’s success in gaining employment, but rather by the efforts made to seek work.⁹⁴

Turning to the facts at hand, I find that Respondent met its initial burden by presenting “evidence that there were substantially equivalent jobs within the relevant geographic area available for [Charging Parties] during the backpay period.”⁹⁵ Specifically, the record reveals that there were over 9000 sales route driver jobs in 2011 and approximately 11,000 jobs in 2012 in Los Angeles County. The record also shows that at least three companies in the area hired sales route drivers with CDL’s every year during the relevant period.

⁸⁹ *St. George Warehouse*, 351 NLRB 961, 963 (2007) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941)).

⁹⁰ *Id.* (quoting NLRB Case Handling Manual (Part Three) Compliance Sec. 10558.1).

⁹¹ *St. George Warehouse*, 351 NLRB at 963–964.

⁹² *Id.* at 964.

⁹³ *Id.*

⁹⁴ *Lorge School*, 355 NLRB 558, 560–561 (explaining that the reasonableness of a discriminatee’s search for work should be evaluated in light of all of the circumstances and over the backpay period as a whole).

⁹⁵ *Id.*

Having presented evidence that there were substantially equivalent jobs available, the burden shifts to the General Counsel to produce competent evidence showing the reasonableness of Mares’ and Avila’s job search.⁹⁶ The General Counsel met this burden.

5 Almost immediately after Respondent’s termination of Mares and Avila, they applied for, and were granted, unemployment by the State of California.⁹⁷ In California, an individual receives unemployment benefits only if he was actively seeking work for the period in question. Mares received unemployment for seven months in 2010, and Avila received unemployment (retroactively) from December 2010, all of 2011, and until June 2012, thereby satisfying the job search requirements set forth by the State of California during these periods. Moreover, Board precedent establishes that “[t]he receipt of unemployment compensation pursuant to the eligibility rules constitutes *prima facie* evidence of a reasonable search for interim employment.”⁹⁸

15 The General Counsel also presented sufficient evidence of the Charging Parties’ search for work efforts. Mares testified that he applied for work every two weeks and found out about potential jobs through Work Source, driving by advertisements, seeing business postings on commercial trucks, cold-calling potential employers, and by using internet sites. The evidence shows that, from mid to late 2010, Mares sought employment from: Shyders, Goya, Jelley Brown, Snacks R Us, El Dorado, La Tortilla, El Paraso Bimbo Bakery USA, La Sambrosa Bakery, Lorraine Bakery, Hara Lambos Beverage, Budweiser, Kellogg, Frito Lay, La Villita, Inc., Gayton Foods, and Wholesale Seafood.⁹⁹ He sought employment from many other companies in October, November and December 2010 that mainly employed commercial drivers.¹⁰⁰

25 Regarding Avila, in 2010, he inquired about work at Target, La Favorita Market, and Los Tarritos Restaurant. In 2011 and 2012, Avila sought employment with Finish Line, Big Saver, Best Buy, San Manuel Casino, the Elephant Bar, Avis Rent-a-Car, the Sheraton Suites, Costco, Wal-Mart, Toys-R-Us, Verizon and Frito Lay. While the documentary evidence shows he did not search for work after July 2012, when he began working for AT&T, Avila testified that, at various times during his backpay period, he made other job applications but did not write them down and could not remember all the applications he made during the backpay period. Although Avila could not remember any of the employers that he applied for in 2015, he testified that he used the same methods to search for work as he did in 2013 and 2014. Regardless, the fact that Avila could not remember all the names of the employers for which he sought interim work does not automatically disqualify him from backpay.¹⁰¹

⁹⁶ Id. at 967.

⁹⁷ *Synergy Gas Corp.*, 302 NLRB 130, 131 (1991) (in determining that the discriminatee made an adequate search for employment, the Board noted that the discriminatee registered for unemployment and began speaking with counselor about available positions within a few days of his termination)

⁹⁸ *NLRB v. KSM Industries*, 682 F.3d 537, 548 (7th Cir. 2012) (quoting *Taylor Machine Products*, 338 NLRB 831, 832 (2003)).

⁹⁹ GC Exh. 6–7.

¹⁰⁰ Id.

¹⁰¹ See *United States Can Co.*, 328 NLRB 334, 344 (1999).

5 Mares’ and Avila’s situations are similar to one of the individuals in *United States Can Co.*, 328 NLRB 334 (1999). In that case, the employer claimed that one of the workers did not mitigate damages because his search-for-work form showed only five to seven contacts per quarter in one year, and none for two consecutive years thereafter. However, the employee had credibly explained that his search-for-work form did not include all the job contacts he made during the backpay period.

10 The Board affirmed the trial judge who noted that “given that [the discriminatee] collected state unemployment benefits for at least 6 months following his layoff, it is reasonable to assume [the discriminatee] would have made at least three job contacts per week, as was required by the State of Illinois.”¹⁰² Moreover, the fact that the discriminatee, like Avila, was unable to recall more names of employers to include in his search forms “is neither unusual nor suspicious, and indeed readily understandable, and does not automatically disqualify him from receiving backpay.”¹⁰³ The same holds true for Mares and Avila.

20 Therefore, the General Counsel met her burden to establish the reasonableness of the Charging Parties’ job search and Respondent failed to sufficiently rebut this evidence. Accordingly, Respondent cannot toll/offset Mares’ or Avila’s backpay based on an inadequate job search.

25 Respondent next avers that Mares and Avila should not receive backpay during the period they received unemployment benefits (affirmative defense #9 and #13). However, Mares’ and Avila’s receipt of unemployment benefits does not disqualify them from receiving backpay.¹⁰⁴ Rather, it shows that both actively sought interim employment.

30 Although Respondent also claimed that Mares is ineligible for backpay, because he admitted in his claim for unemployment that he was discharged based on performance versus his protected, concerted activity (affirmative defense #2), the Board has never disqualified someone from receiving backpay for such a reason. Accordingly Respondent failed to present sufficient evidence to deny Mares and/or Avila backpay based on the Charging Parties’ receipt of unemployment or because they failed to adequately search for interim work.

35 Respondent next claims that Mares and Avila are not entitled to backpay because they both signed settlement agreements with Respondent which resolved their backpay claims in this matter (affirmative defenses #1, #10). According to Respondent, Mares signed a settlement agreement in August 2012 that resolved claims concerning an on-the-job injury. In the agreement, Mares

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¹⁰² *U.S. Can Co.*, 328 NLRB at 344.

¹⁰³ *Id.*

¹⁰⁴ See *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *Paint America Services*, 353 NLRB 973 (2009) (unemployment benefits are deemed collateral benefits (rather than interim earnings), therefore are not used to offset gross backpay).

purportedly released all employment claims against Respondent and agreed never to return to work for Respondent.¹⁰⁵

5 Similarly, Avila signed a separate settlement agreement in 2016 to resolve a prior wage and hour class action dispute with Respondent that purportedly released all employment related claims against Respondent, including the initial ULP case.¹⁰⁶ According to Respondent, both settlements had the effect of eliminating Mares' and Avila's backpay claims in this case.

10 However, Respondent argument fails. First, both Mares' and Avila's private settlement agreements were *unrelated* to the initial ULP case and the instant compliance matter. Moreover, Respondent failed to cite to any Board precedent to support its contention that private settlement agreements that resolve *non-ULP/NLRA* disputes somehow toll backpay in this compliance case.

15 Nevertheless, Respondent contends that the undersigned should give effect to the settlement agreements between Respondent, Mares and Avila, which afforded both Charging Parties with damages, and in doing so, determine that the private settlement agreements toll Mares' and Avila's backpay claim in this matter. I disagree.

20 The Board dealt with the issue of whether private settlements can effectively resolve disputes arising under the NLRA in *Independent Stave Co.*, 287 NLRB 740 (1987). In *Independent Stave*, the Board not only reiterated its guiding principles in analyzing settlements, but it also set out various factors to determine whether private settlements effectuate the purposes of the Act. The Board acknowledged its longstanding policy of encouraging the peaceful, nonlitigious resolution of disputes and its policy of encouraging parties to resolve disputes without resort to the Board's processes. However, notwithstanding this strong commitment to settlements, the Board is not required to give effect to all settlements reached by the parties to a dispute whether the settlement is reached with or without the General Counsel's approval.¹⁰⁷ Rather, the Board's power to prevent unfair labor practices is exclusive, and its function is to be performed in the public interest and not in vindication of private rights. Additionally, the Board made it clear that the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.¹⁰⁸

35 Thus, in order to analyze whether a private settlement resolves ULP disputes and effectuates the purposes of the Act, the Board examines all the surrounding circumstances, including, but not limited to: (1) whether the charging party or parties, the respondent(s), and any of the individual discriminate(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and

40 ¹⁰⁵ R. Exh. 14.

¹⁰⁶ R. Exh. 17.

¹⁰⁷ *Independent Stave*, 287 NLRB at 741.

¹⁰⁸ *Id.*

(4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.¹⁰⁹

5 Almost all of these factors weigh in favor of rejecting Mares’ and Avila’s private settlements as a means to toll backpay. Specifically, while the Charging Parties were represented by private counsel and they and Respondent agreed to be bound by the private settlements, the General Counsel knew nothing about the agreements, and as such, had no input and could not take a position regarding them. As such, the first factor weighs against Respondent.

10 Similarly, the private settlements were completely unrelated to the initial ULP violations and the instant compliance matter. More importantly, nothing in the language of Mares’ workers’ compensation settlement addressed or resolved the initial ULP violations or this compliance matter.¹¹⁰

15 Although Avila’s class action settlement specifically stated that he could not recover “any individual monetary relief or other individual remedies” from any administrative tribunal, including the NLRB¹¹¹ and resolved all outstanding claims against Respondent,¹¹² the terms of the settlement do not include language resolving this instant matter. In fact, Respondent, as did Avila, knew that this compliance matter was outstanding, and as such, could have drafted language
20 in the settlement to resolve this litigation. It did not. This factor goes against Respondent.

Moreover, even if the Charging Parties’ lawyers in the other matters knew of the initial ULP case and subsequent compliance matter, there is nothing in evidence that suggests that the parties contemplated settling the initial ULP violations or this compliance matter. This factor also
25 weighs against Respondent.

Lastly, although I cannot ascertain whether there was any fraud, coercion or duress in reaching the private settlements, Respondent has already been found to have engaged in violations of the Act as it relates to the Charging Parties in this case. This factor militates against Respondent.
30

Accordingly, on the basis of the entire record, I find the private settlement agreements signed by Mares and Avila do nothing whatsoever to effectuate the policies and purposes of the Act; thus, are woefully insufficient to toll backpay for Mares and Avila.

35 Respondent claims that Mares and Avila should be denied backpay, because it is speculative whether either would have remained employed by Respondent until August 2016 (affirmative defense #3). However, Respondent presented no evidence to support its assertion.¹¹³ Without cogent and competent evidence to the contrary, backpay is calculated based on the date

40 ¹⁰⁹ Id. at 743.

¹¹⁰ See R. Exh. 14.

¹¹¹ Id. at 5.

¹¹² Id. at 11.

45 ¹¹³ See *Weldun International*, 340 NLRB 666, 674 (2003) (respondent has the burden of proving with certainty when the discriminatee would have been laid off had there been no discrimination).

Respondent offers the discriminatees reinstatement. In this case, Respondent offered to reinstate Mares on August 23, 2016 and it offered Avila reinstatement on August 8, 2016, which Avila declined. Accordingly, backpay runs from Charging Parties' termination dates until the offer of reinstatement date.

5

Similarly, Respondent failed to present any evidence to suggest that backpay should be tolled or offset because Mares removed himself from the workforce by starting his own trucking company (affirmative defense #6). This is factually incorrect. In fact, Mares credibly testified, and I specifically found, that Mares never owned a trucking company after he was terminated by Respondent. Even if he had started his own company, "self-employment is an adequate and proper way for the injured employee to attempt to mitigate his loss of wages."¹¹⁴ Accordingly, Respondent cannot toll or offset Mares' backpay on this ground.

10

However, I find that Mares' backpay should be tolled/offset because, based on the evidence, he, in fact, worked for Nature's Own for the five months between the time he was terminated by Respondent on June 2, 2010, and when he was hired by Pacific Foods in January 2011. Because I found Mares was less than forthcoming about this interim employment, and he failed to produce evidence of the interim earnings at Nature's Own in response to Respondent's subpoena, I must draw an adverse inference that Mares earned comparable wages to those he earned with Respondent.¹¹⁵ Accordingly, I will offset five months of backpay from any backpay award.

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Respondent also avers that backpay for Mares should be cut off or tolled because he was incapacitated due to an on-the-job injury and/or received workers' compensation benefits (affirmative defenses # 7 and #8). However, again, Respondent failed to submit any evidence in support of this defense. Even if Respondent had, I agree with counsel for the General Counsel that, to the extent that Mares received any workers' compensation benefits, permanent disability benefits are not deemed interim earnings.¹¹⁶ The evidence demonstrates that Mares and Respondent entered into a settlement which clearly resolved his permanent disability, to wit: ". . . this Compromise & Release includes an allocation of \$10,637 in consideration for the *applicant's permanent disability* . . ."¹¹⁷ Respondent cannot toll or offset backpay on this ground.

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In affirmative defense #4, Respondent asserts that the Board lacks authority to bring these proceedings against it, because the Board lacked a proper quorum, citing *NLRB v. SW General, Inc. dba Southwest Ambulance*.¹¹⁸ Respondent's argument is misplaced.

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¹¹⁴ *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 148 (2d Cir. 1968).

¹¹⁵ See *McAllister Towing & Transp. Co.*, 341 NLRB 394, 396 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005) (Board may impose a range of sanctions for subpoena noncompliance, "including...precluding the noncomplying party from rebutting that evidence . . . and drawing adverse inferences against the noncomplying party).

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¹¹⁶ While I note that the Board's Compliance Manual has no precedential value, since it can be persuasive, see Jt. Exh. 1, Sec. 10554.1 Unearned Income and Collateral Benefits Not Deductible; Fringe Benefits Not Deductible: "To the extent the unemployment insurance benefits constitute permanent disability benefits, they are considered as reparations for the physical injury suffered, and do not constitute interim earnings." (emphasis added).

¹¹⁷ R. Exh. 14 at 12 (emphasis added).

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¹¹⁸ 137 S.Ct. 929 (2017).

In *SW General, Inc.*, the U.S. Supreme Court held that Lafe Solomon (Solomon) was ineligible to serve as the Board’s acting general counsel while at the same time being nominated to serve as the General Counsel for the Board. As such, Solomon (or anyone acting on his behalf) lacked the authority to issue ULP complaints on behalf of the Board. The result of this meant that the Supreme Court effectively invalidated ULP complaints issued during Solomon’s tenure: from January 2011 to October 2013.

However, this instant compliance matter was issued on *February 26, 2017*, well outside the period in which Solomon’s tenure was invalidated. As the Supreme Court noted, President Obama nominated Richard Griffin, Jr. to serve as General Counsel, whom the Senate confirmed in *October 2013*. Accordingly, even a cursory reading of *S.W. General, Inc.* would lead to the conclusion that any ULP complaints issued *after October 2013* on behalf of General Counsel Griffin (which includes this compliance matter) were legally valid. Accordingly, the Board retains full, legal jurisdiction and authority over the instant case. Respondent’s argument in this regarding is completely frivolous.¹¹⁹

Similarly, Respondent’s argument that Mares and Avila are ineligible for backpay when the U.S. Court of Appeals for the District of Columbia stayed the initial ULP case pending the Supreme Court’s decision in *S.W. General, Inc.* (affirmative defense #14) also fails the reasons set forth above.¹²⁰ Respondent cites no Board authority for the proposition that backpay awards must be offset/tolled when a court holds a case in abeyance.

Respondent next contends that Mares and Avila should be barred from collecting backpay or interest on their backpay, because the Board unreasonably and excessively delayed these compliance proceedings (affirmative defense #17). Here, Respondent resurrects its argument regarding the Board’s lack of authority in a different way; this time, asserting that, because the Supreme Court’s decision in *S.W. General, Inc.* found the Board lacked authority to issue complaints due to acting General Counsel’s Solomon’s invalid appointment, and the U.S. Court of Appeals for the D.C. Circuit held the case in abeyance between January 25, 2013 and November 18, 2014, the backpay and interest clock should be tolled during the aforementioned period.

Yet the case that Respondent cites, *NLRB v. Rutter-Tex Mfg. Co.*, 396 U.S. 258 (1969), to support its argument actually supports the opposite position. In fact, the Supreme Court, in *Rutter-Tex Mfg.*, held that an excessive administrative delay in the proceedings of a compliance matter should not toll the discriminatee’s backpay or interest award.¹²¹ While Respondent asserts that

¹¹⁹ To the extent Respondent claims that the Board lacked quorum/jurisdiction regarding the initial ULP complaint based on the Supreme Court’s decision in *S.W. General, Inc.*, supra or *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board addressed both assertions in *Marquez Bros. Enterprises*, 361 NLRB 1375, 1377 (2014). See also fn. 6.

¹²⁰ See also fn. 119, supra.

¹²¹ *Rutter-Tex Mfg.*, 396 U.S. at 420–421 (Supreme Court reversed the Fifth Circuit Court of Appeals’ decision to modify the discriminatees’ backpay award due to the Board’s approximately three year delay between the time the employer informed the Board of its partial compliance with the Board’s order and when the

the delay in this case was overly excessive and unreasonable, other than that argument, Respondent cites no other case where the Board tolled backpay due to an extremely lengthy administrative delay. Accordingly, Respondent fails to toll or offset backpay on this ground.

5 Respondent next contends that Mares’ and Avila’s backpay award is barred because they were at-will employees with prior discipline that remained unchallenged (affirmative defense #16). However, again, Respondent cites no Board authority to support its contention. Accordingly, I find no reason to bar Mares’ and Avila’s backpay on this ground.

10 Respondent proffers several defenses centering on the general argument that Mares and Avila are ineligible for backpay, because they failed to exercise reasonable diligence to mitigate their damages (affirmative defense 15). The General Counsel contends that both Charging Parties made reasonable efforts to find interim work, and based on the evidence in the record, backpay cannot be tolled or offset based on any of Respondent’s arguments.

15 An employee who was discriminatorily laid off or discharged need not seek interim work immediately. Rather, the test is whether, looking at the entire record, the employee diligently sought other employment during the entire backpay period.¹²² However, a discriminatee's unreasonable delay in commencing an initial search for interim work will not be excused simply because s/he thereafter diligently sought work. Rather, if the discriminatee unreasonably delays an initial search, the Board will toll backpay for that period, and will commence it if /when a reasonably diligent search begins.¹²³

20 As I set forth earlier in this decision, the evidence demonstrates Mares and Avila made reasonable efforts to search for interim work. Specifically, Mares began searching for work almost immediately after he was terminated by Respondent. He received unemployment from about July 2010 through December 2010, which is *prima facie* evidence of a reasonable search for employment. Mares applied for countless jobs, filled out numerous applications, and inquired of businesses hiring for delivery drivers. While I believe Mares also worked for Nature’s Own during this same time period, he did not unreasonably delay in trying to find interim work.¹²⁴

25 Although Mares may have been less than diligent in searching for work after he began employment with Pacific Foods (which paid him less than what he earned with Respondent), the

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compliance specification was issued. In reversing the Fifth Circuit and allowing a full backpay award, the Court reasoned that the consequences of lengthy delays must be resolved in favor of the employees receiving a full backpay award in order to make them whole for the company’s violation of the NLRA. Moreover, the Court noted that it “. . . has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers,” citing *NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 698 (1942); *National Labor Board v. Katz*, 369 U.S. 736, 748 fn. 16 (1962)).

40 ¹²² *Saginaw Aggregates*, 198 NLRB 598 (1972), enfd. 482 F.2d 946 (6th Cir. 1973) (backpay awarded despite that employee did not seek interim work for initial two weeks).

¹²³ See *Marlene Industries Corp.*, 183 NLRB 50, 54–55, 59 (1970) (backpay tolled for initial six-week period, despite subsequent successfully diligent job search efforts).

45 ¹²⁴ See *Avery Heights*, 349 NLRB 829, 834 (2007) and *Bauer Group*, 337 NLRB 395, 399 (2002).

fact that Mares stayed with Pacific Foods during the entirety of his backpay period has no bearing on Mares' backpay claim.¹²⁵ The only job offer Mares declined during the backpay period was an offer for a lower paying position. However, Mares had no obligation to resign his position with Pacific Foods to accept a lower paying job.¹²⁶

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On balance, Mares' efforts based on the record shows he diligently searched for interim work.

Avila also received unemployment for approximately one-and-a-half years, which is *prima facie* evidence of a reasonable search for interim employment. Although Avila failed to find interim work for about a year and a half (which Respondent argues is because he unreasonably delayed in searching for work since he was receiving unemployment benefits and only sought interim employment when Avila knew his benefits were ending), his failure to obtain interim employment does not mean he unreasonably failed to search for interim work.¹²⁷

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Rather, the record reveals that, during the time he received unemployment, Avila applied for various jobs, both in person and online, submitted job applications via company websites, asked friends and references about job opportunities and drove around to various businesses looking for work. Although Avila admitted that he could not recall every employer/job for which he applied, his lapse of memory is "neither unusual nor suspicious, and indeed readily understandable;" and as such, does not lead to the conclusion that Avila failed to reasonably search for work.¹²⁸

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Avila also continued his search for work once he found interim employment. The record reveals that Avila worked for five different interim employers during the backpay period. He only quit his interim employment when he found a job paying higher wages.¹²⁹ Accordingly, based on the record as a whole, I conclude Mares and Avila did not unreasonably delay in searching for interim employment.

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Respondent also claims that Avila's backpay should cease/toll when he resigned from his interim employment at AT&T and when he was terminated from his interim employment at LA Corr (affirmative defense #12).

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¹²⁵ *Associated Grocers*, 295 NLRB 806 (1989) (acceptance of interim employment which pays less than a discriminatee's former employment does not necessarily establish that a discriminatee incurred a willful loss that stops/tolls backpay).

¹²⁶ See e.g., *Delta Data Sys. Corp.*, 293 NLRB 736, 738 (1989) (if a discriminatee accepts a lower paying job too soon it may be held as having incurred a willful loss of earnings because s/he accepted unsuitable work).

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¹²⁷ See *Midwestern Pers. Services*, 346 NLRB 624, 627 (2006) (fact that the employee was unsuccessful in his initial search for interim employment does not establish that s/he failed to conduct that search with reasonable diligence").

¹²⁸ *United States Can Co.*, 328 NLRB at 444.

¹²⁹ See *Winn-Dixie Stores*, 170 NLRB 1734, 1744 (1968) (a voluntary quit does not toll the backpay period when employee makes an earnest search for a better paying job).

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It is well established that when a discriminatee voluntarily quits interim employment, the burden shifts from Respondent to the General Counsel to show that the decision to quit was reasonable.¹³⁰ If the decision to quit was unreasonable, then Respondent may (depending on what happened during the rest of the backpay period) be entitled to an offset for the interim earnings that the discriminatee would have earned had he or she not quit the job in question.¹³¹

Turning to the facts of this case, I find that Avila’s backpay should toll/be offset when he abandoned his position at AT&T. Specifically, Respondent met its burden by showing that Avila voluntarily abandoned his job at AT&T. Respondent elicited testimony from Avila that he took FMLA leave from his job and after completing his leave, he admitted he never returned, never explained to AT&T why he could not return, and never notified AT&T that he did not intend to return.

Once Respondent presented such evidence, the burden shifted to the General Counsel to prove that Avila’s action in quitting his position was reasonable. The General Counsel did not meet her burden.

The General Counsel asserts that Avila was forced to resign due to the stressful nature of the job. Citing *Lundy Packing Co.*, 286 NLRB 141 (1987), the General Counsel argues that Avila’s voluntary resignation is not a willful loss of employment “if the interim job is substantially more onerous, is unsuitable, threatens to become so... [or] when it is prompted by unreasonable working conditions.” However, that is not what happened here.

General Counsel also cited to *Minette Mills*, 316 NLRB 1009 (1995), to support her argument that Avila voluntarily quit his position with AT&T due to the stressful working conditions. In *Minette Mills*, the ALJ found that the discriminatee reasonably quit her interim job when she suffered anxiety attacks after her supervisor, on several occasions, publicly criticized her in a rude, unprofessional fashion, in front of her coworkers because of her slow rate of progress in learning the operation of the job.¹³² When the supervisor criticized the discriminatee in a very strong fashion over the last few days before she quit, the judge found that the discriminatee “had withstood all she could and, fearing for her health, quit . . . because of the stress created by the nature of the job and [her supervisor’s] unprofessional method of supervision.”¹³³

Although Avila testified that he took FMLA leave and ultimately quit his job with AT&T due to the stress of the sales quotas he was required to meet, the General Counsel never presented evidence that Avila’s job stress was so severe that he suffered an adverse medical condition as a result. In fact, unlike the discriminatee in *Minette Mills*, there was no evidence presented to describe how unreasonable Avila’s work environment was, i.e., that Avila’s supervisor said or took action against Avila that made his working conditions unbearable because of his inability to

¹³⁰ *First Transit, Inc.*, 350 NLRB 825, 826 (2007).

¹³¹ *Id.* at 827; see also *Grosvenor Resort*, 350 NLRB 197, 1201 (2007).

¹³² *Minette Mills*, 316 NLRB at 1016–1018.

¹³³ *Id.* at 1018.

maintain his sales quotas or that he was constantly threatened with discipline for failing to meet his sales quotas. Rather, all that was presented was *Avila's* self-serving explanation that he could not always meet his sales quotas and he feared discipline as a result.

5 I find *Avila's* explanation as to why he abandoned his job with AT&T similar to the Board's decision and rationale in *Big Three Industrial Gas*, 263 NLRB 1189 (1982).¹³⁴ In that case, the Board found that the respondent met its burden of establishing that the discriminatee "unreasonably" quit his interim employment, by extracting testimony from the employee that he quit because he "didn't get along with the supervisor." The Board noted that the surrounding
10 circumstances of the decision to quit were within the particular knowledge of the backpay claimant, and thus, it would be unreasonable to require the respondent to prove the absence of the various circumstances that conceivably could make the decision to quit a "reasonable" one. As such, the Board found that "once [r]espondent showed that [the discriminatee] had quit the equivalent [interim job], it fell to the General Counsel to demonstrate that the decision to quit was,
15 in the circumstances, 'reasonable.'" Absent such a showing by the General Counsel, the Board concluded that the quitting amounted to a willful forfeiture of equivalent interim earnings.¹³⁵

20 In my view, and without other evidence corroborating that *Avila* suffered any adverse medical effects from the job stress, I find that the General Counsel failed to meet her burden to prove that *Avila's* working environment was so stressful that quitting his job with AT&T "for fear of his health" was reasonable. Accordingly, *Avila's* backpay must be offset by three weeks which represents the time he unreasonably quit his job with AT&T and when he was hired by *Macy's*.

25 However, *Avila's* backpay should *not* toll or be offset when he was asked not to return to his position with LA Corr due to performance issues and when he missed one day of work. Here, for all intents and purposes, I find that *Avila* was terminated from LA Corr involuntarily, and Respondent failed to set forth the circumstances describing *Avila's* performance issues or that those issues rose to the level of gross or deliberate misconduct. As a result, backpay cannot toll or be offset under these circumstances.¹³⁶

30 Similarly, *Avila's* backpay cannot be tolled due to *Avila's* time in Mexico (affirmative defense #11). When a discriminatee becomes unavailable for employment or withdraws from the labor market, gross backpay is generally tolled for the period of unavailability.¹³⁷ When
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40 ¹³⁴ *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982) (overruled on other grounds in *American Navigation Co.*, 268 NLRB 426, 427 (1983)).

¹³⁵ *Id.* at 1199.

¹³⁶ See *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981), *enfd. mem.* 718 F.2d 1104 (7th Cir. 1983), *cert. denied* 469 U.S. 982 (1984) (the discharge of an employee for cause by an interim employer does not constitute a willful loss of earnings by the discriminatee in the absence of proof of gross or deliberate misconduct).

¹³⁷ See *Jt. Exh. 1*, Section 10560 Unavailability for Employment or Withdrawal from Labor Market.

discriminatees take vacations, travel, attend to personal concerns or otherwise appear to be unavailable for employment, the circumstances of the case must be evaluated.¹³⁸

5 Pointing to Avila’s online login comments that he had been away for six months accompanied by pictures of a hotel in Mexico he uploaded to his MySpace account, Respondent argued that Avila was unavailable for work because he traveled to Mexico for six months. However, I found that Avila was referring to the fact that he had not been on *his MySpace account* for six months, not that he had been *in Mexico* for six months. Respondent’s argument falls flat.

10 Contrary to Respondent’s assertions, the record reveals that, during the backpay period, Avila traveled to Mexico twice: once was a five-day trip around February or March of 2011 and the second was a two-week trip in 2014. The five-day trip in 2011 occurred while Avila was unemployed and receiving unemployment. Because of this, the Board treats receipt of unemployment as *prima facie* evidence of a reasonable search for employment.

15 The evidence further demonstrates that Avila’s two-week trip to Mexico in 2014 occurred while Avila was employed at AT&T. Thus, leaving the country on vacation is insufficient to establish that Avila withdrew himself from the labor market. Accordingly, based on the evidence in the record, I conclude that backpay cannot be tolled since Respondent failed to present any
20 evidence proving Avila was in Mexico for so long that he became unavailable for work during the backpay period.

25 Respondent argues that Mares and Avila are ineligible for backpay or backpay should be offset/tolled because neither accurately reported interim earnings and/or concealed their interim earnings (affirmative defense #18). While I found that Avila was less than forthcoming about the circumstances surrounding his departures from several interim employers, and despite my original evidentiary sanction against Avila for failing to produce to Respondent subpoenaed documents verifying his interim employment (which was reversed by the Board), there is little evidence that Avila *deliberately* failed to disclose his interim earnings. Although I note that Avila was slow to
30 produce documents responsive to Respondent’s subpoena and his interim earnings were based on his oral representations (which were sketchy at best); ultimately, however, the evidence demonstrates that Avila’s interim earnings were accounted for and he explained most of the cash and other deposits into his bank account.

35 However, I find that Mares misrepresented and/or failed to disclose that he worked for Nature’s Own for five months prior to his employment with Pacific Foods. Specifically, I found that he misled the tribunal about the fact that he wrote on his resume that he worked for Nature’s Own then updated his job duties with that employer. This evidence came to light only after Mares was shown his resume on cross-examination by Respondent.

45 ¹³⁸ See *L’Ermitage Hotel*, 293 NLRB 924, fn. 2 (1989) (deducted one week’s pay from the discriminatee’s backpay claim when she travel outside the state and did not submit any job applications that week; as such, the discriminatee was deemed unavailable to work during that week).

Although Mares testified that he included this position in order to make himself “look better” to prospective employers, I do not find his explanation credible in light of the fact that he updated those duties *after* he obtained employment with Pacific Foods. Because Mares failed to disclose that he worked for this interim employer, I draw an adverse inference that Mares earned comparable wages as he did while working for Respondent, and I offset five months of those wages from his backpay claim.¹³⁹

Aside from finding that Mares worked for Nature’s Own, there is no other evidence that Mares failed to disclose his interim earnings. In fact, Mares credibly explained all of the cash deposits and transfers into his bank account, and he accounted for the rental monies he received from his mother-in-law. Moreover, at no point during the backpay period did Mares work for any other employer after being hired by Pacific Foods and he did not receive cash payments for other interim work performed. In fact, Mares was able to fully explain the cash deposits/transfers that appear on his (and his wife’s) bank account. On balance, I find no evidence that Mares concealed any interim earnings.

Lastly, Respondent contends that both Mares’ and Avila’s backpay claim should be barred because they intentionally concealed interim earnings. Here, Respondent resurrects its argument that the Charging Parties failed to produce or were slow in producing documents in response to Respondent’s subpoenas in order to deliberately conceal interim earnings. While I initially agreed with Respondent and issued an evidentiary sanction during the hearing against the General Counsel and Charging Parties, the Board reversed my sanction as being overly harsh.¹⁴⁰

After allowing the Charging Parties an opportunity to explain their efforts to comply with Respondent’s subpoenas (per the Board’s reversal), I nevertheless find, as set forth earlier in this decision, that Mares and Avila failed to timely provide Respondent with responsive documents; rather, they dribbled out documents to Respondent’s counsel which appeared, in my view, to be done to prevent a full and complete examination (and calculation) of their interim earnings. Despite this, however, and in keeping with the Board’s view that my original evidentiary sanction was overly harsh, I find the more appropriate sanction for the Charging Parties’ conduct is to make the necessary credibility finding against Mares and Avila and/or draw an adverse inference as noted earlier in this decision.

While I made and used the above finding as evidence of Mares’ and Avila’s lack of credibility, and I believe they thwarted Respondent’s efforts to rebut their search for work efforts and interim earnings, based on the entire record, I cannot conclude that the Charging Parties *deliberately* withheld/concealed their interim earnings. Accordingly, unless otherwise noted in this decision, none of Respondent’s affirmative defenses have merit to toll/offset Mares’ and/or Avila’s backpay.

¹³⁹ See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005) (Board may impose a range of sanctions for subpoena noncompliance, “including . . . precluding the noncomplying party from rebutting that evidence . . . and drawing adverse inferences against the noncomplying party).

¹⁴⁰ See *Marquez Bros. Enterprises*, 21–CA–039581, unpub. order issued Sept. 7, 2017 (2017 WL 3953408).

C. Other Make Whole Relief

5 The General Counsel further seeks reimbursement for mileage costs of \$45,476 for Mares from July 2010 to August 23, 2016, and a total of \$19,467 for Avila from December 2, 2010 to August 8, 2016 (after deducting \$900 during time when Avila was on paternity leave and \$405 from August 8 through August 23, 2016).

10 However, because I found Mares worked for Nature’s Own for five months prior to finding interim employment at Pacific Foods, and he failed to disclose this interim employer and his interim earnings, I deduct Mares’ mileage costs of \$350 which represents his mileage expenses from July 2, 2010 to January 2011.

15 Similarly, because I found Avila unreasonably abandoned his position with AT&T, I must deduct \$225 which represents three weeks of mileage costs between the time he unreasonably quit AT&T and when he found work at Macy’s.¹⁴¹

20 Accordingly, after deducting Mares’ mileage costs, I find that Respondent owes Mares \$45,126 in extra mileage costs while Mares maintained interim employment during the backpay period.

25 After deducting Avila’s mileage costs, Respondent owes Avila a total of \$19,242 in mileage costs in searching for work and in extra mileage while Avila maintained interim employment during the backpay period.

Accordingly, based on the above findings and the record as a whole, I issue the following supplemental

ORDER

30 Respondent, Marquez Brothers Enterprises, Inc., City of Industry, CA, its officers, agents, successors, and assigns, shall make whole Alphonso Mares as follows:

35 1. Pay to Mares the following amounts:

Net backpay: \$66,565¹⁴²

Mileage expenses: \$45,126

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¹⁴¹ See GC Exh. 1(j), Exh. B at 6 (deducted \$75 x 3 weeks from 10/2014 through Nov 2014=\$225).

45 ¹⁴² See GC Exh. 1(j), Exh. A at 1 (deducted backpay of \$38,973 [\$4,289+\$16,008+\$18,676] from June 2010 to January 2011 because I found Mares worked for Nature’s Own).

plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law;

- 5 2. Pay Mares \$20,432 for the adverse tax consequences of the multiyear lump sum backpay award, as prescribed in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014);¹⁴³ and

10 Respondent, Marquez Brothers Enterprises, Inc., City of Industry, CA, its officers, agents, successors, and assigns, shall make whole Javier Avila as follows:

- 15 1. Pay to Avila the following amounts:

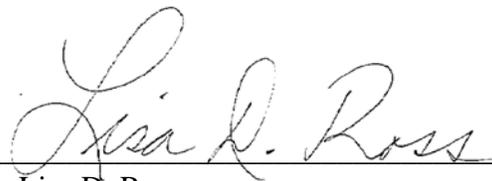
Net backpay: \$131,011¹⁴⁴

Mileage expenses: \$19,242

20 plus interest computed and compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), accrued to the date of payment, minus tax withholdings required by Federal and State law;

- 25 2. Pay Avila \$22,599 for the adverse tax consequences of the multiyear lump sum backpay award, as prescribed in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).¹⁴⁵

30 Dated: Washington, D.C., April 12, 2019



Lisa D. Ross
Administrative Law Judge

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¹⁴³ See GC Exh. 1(j), Exh G.

¹⁴⁴ See GC Exh. 1(j), Exh. B at 6 (deducted \$2,121 in wages earned during the week of Oct. 25, 2014).

45 ¹⁴⁵ Id. at Exh. H.