

AGRICULTURAL LABOR RELATIONS BOARD
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May 2, 1991

Mario Saikhon, Inc. and
United Farm Workers of America, AFL-CIO
Case Nos. 79-CE-7-EC, et al
17 ALRB No. 6 (8 ALRB No. 88)

TO ALL PARTIES:

We have departed from our standard practice of including the decision of the administrative law judge with the Board's decision due to the unusual length of both decisions. As is evident, the Board's decision is over 140 pages, while the administrative law judge's decision was over 600 pages. The reproduction and mailing costs associated with such a large volume are prohibitive. Should any interested party need to consult the administrative law judge's decision, arrangements can be made with the undersigned for utilizing it at the Board's offices or obtaining copies at reasonable cost.

Sincerely,

A handwritten signature in dark ink, appearing to read "Fred A. Slimp II", written over a horizontal line.

Fred A. Slimp II
Executive Secretary

Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC. ,)	Case Nos . 79-CE-70-EC
)	79-CE-170-EC
Respondent ,)	79-CE-178-EC
)	79-CE-248-EC
and)	79-CE-248-1-EC
)	80-CE-39-EC
UNITED FARM WORKERS)	80-CE-110-EC
OF AMERICA, AFL-CIO,)	
)	17 ALRB No. 6
Charging Party.)	
)	(8 ALRB No. 88)

SUPPLEMENTAL DECISION AND ORDER

On October 27, 1987, Administrative Law Judge (ALJ) Barbara D. Moore issued a Supplemental Decision and recommended Order in this proceeding. Thereafter, Respondent Mario Saikhon, Inc. (Respondent, Employer or Saikhon) and General Counsel filed exceptions to the ALJ's Decision along with supporting briefs, and Respondent, General Counsel and Charging Party United Farm Workers of America, AFL-CIO (UFW or Union) filed reply briefs.

The Agricultural Labor Relations Board (ALRB or Board) has considered the ALJ's recommended Decision in light of the record and the exceptions, responses, and briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions only to the extent consistent herewith.

Background and Procedural History

In Mario Saikhon, Inc. (1982) 8 ALRB No. 88, the Board found that Saikhon had discriminatorily discharged and refused to reinstate 56 striking employees, discriminatorily locked out all striking employees, and unlawfully instituted a change in its lettuce wrap operation.¹ The Board ordered immediate reinstatement and backpay for all discriminatees. On January 16, 1983, Respondent appealed the Board's decision in 8 ALRB No. 88 to the Fourth District Court of Appeal, Division One. On March 7, 1983, the Court of Appeal denied Saikhon's appeal as untimely; hearing was denied by the California Supreme Court on April 28, 1983.

While compliance hearings in the instant case were being conducted, the Court of Appeal issued its decision in Carl Joseph Maggio, Inc., et al. v. Agricultural Labor Relations Bd. (1984) 154 Cal.App.3d 40 (hereafter Maggio). The court's decision overruled the Board's findings in Admiral Packing Company (1981) 7 ALRB No. 43 (hereafter Admiral) that Saikhon and other lettuce growers had bargained in bad faith and declared a false impasse during 1978-79 lettuce harvest season negotiations.

Saikhon filed its first motion for reconsideration of 8 ALRB No. 88 based on the Maggio decision. On August 28, 1984,

¹Proceedings on further Board findings that Saikhon unlawfully engaged in surface bargaining and instituted unilateral wage increases were severed from the instant case into a separate case. (Mario Saikhon, Inc. (1986) 12 ALRB No. 4.)

the Board issued two Orders. The first Order granted reconsideration only for those portions of the Board's decision based upon Admiral. The Board found that the Employer's unilateral wage increases were justified by impasse, and dismissed those allegations. The Board severed the charge related to overall bad faith bargaining and consolidated it with another related case.

The second Board Order refused to reconsider the Board's findings regarding Saikhon's refusal to rehire returning strikers. The Board found that even if the employees were economic rather than unfair labor practice strikers, they were entitled to reinstatement as soon as jobs were available, once they had made unconditional offers to return to work.

On November 24, 1984, the Fourth Appellate District of the Court of Appeal dismissed Saikhon's appeal of the Board's Order denying reconsideration, and on January 3, 1985, the California Supreme Court denied Saikhon's petition for review without comment.

In February 1986 Saikhon filed a second request for reconsideration of 8 ALRB No. 88. On March 21, 1986, the Board denied the request as untimely and lacking a showing of extraordinary circumstances which would warrant reconsideration.

Motions

1. Saikhon's Motion for Reconsideration

In its exceptions brief, Saikhon presents its third request for reconsideration of 8 ALRB No. 88. Respondent advances no new legal arguments or facts, but alleges that the Board's underlying decision is not supported by substantial evidence.

The UFW argues in response that the appellate court order summarily denying Respondent's petition for review for untimeliness acts as a decision on the merits, and raises the bar of res judicata. Saikhon notes, however, that Labor Code section 1160.3 authorizes the Board to reconsider any Board finding or order provided the record in the case has not been filed in a court. Because the Court of Appeal denied review of 8 ALRB No. 88 on jurisdictional grounds, Saikhon contends that the case has never been filed with a court and therefore the Board can reconsider the decision at this time.

We decline to reach the res judicata issue because we find that it is not necessary for our determination of Respondent's motion. The substance of Respondent's argument is that it refused to reinstate strikers and locked out employees for a legitimate business justification, i.e., fear that returning strikers would engage in intermittent work stoppages. However, the Board has already addressed this argument in 8 ALRB No. 88, where the Board noted that Respondent had made no showing of how the strikers, if reinstated, would jeopardize production.

Moreover, the Board specifically found that Respondent had locked out employees and refused to reinstate strikers for discriminatory reasons.

Since Saikhon has merely raised arguments previously addressed by the Board and has failed to cite any extraordinary circumstances justifying reconsideration, Respondent's motion for reconsideration of 8 ALRB No. 88 is denied. (Cal. Code Regs., tit. 8, § 20286(c) .)

2. UFW's Motion to Strike Appendix 1 to General Counsel's Exceptions Brief

Title 8, California Code of Regulations, section 20282(a)(2), states that no brief in support of exceptions to an ALJ decision "shall exceed 50 pages in length, except that upon prior request the executive secretary may permit longer briefs when necessary." In the instant case, the 50-page limitation was expanded to 127 pages at Saikhon's request. General Counsel made no request for further expansion, but filed a brief of 220 pages, consisting of 30 pages of argument plus an appendix containing 190 pages of charts specifying the types of work each employee performed and whether a seasonal, quarterly or daily backpay formula was appropriate for each category of work.

The UFW has moved to strike General Counsel's appendix on the grounds that it causes General Counsel's exceptions brief to be well in excess of the 127-page limitation granted by the Board.

After looking at General Counsel's 'appendix, the Board has determined that it constitutes a compilation of data already

in the record, and was attached merely for the Board's convenience. The appendix contains a restatement of General Counsel's position regarding the appropriate backpay formula for each discriminatee, but the Board was able to examine General Counsel's specifications, as well as other evidence in the record, to make its own determination on those issues.

We conclude, therefore, that General Counsel's submission of an overlong brief was harmless since we do not need, and have not relied upon, the appendix in making our determinations.

3. Saikhon's Motion to Strike Claims of Discriminatees Who Refused to Provide Income Tax Records

Respondent filed a motion with the ALJ to strike the testimony and/or backpay claims of all discriminatees who refused to answer questions pertaining to their federal or state income tax returns and W-2 forms. Saikhon argued that backpay claimants cannot assert that tax forms are privileged information while at the same time claiming lost wages. Thus, Respondent argued, once a claimant raises any issue in a proceeding which places the contents of the person's tax return in issue, the claimant is precluded from claiming privilege. (Citing Wilson v. Superior Court of Sacramento County (1976) 63 Cal.App.3d 825 (hereafter Wilson) and Newson v. City of Oakland (1974) 37 Cal.App.3d 1050 (hereafter Newson).) Respondent's exceptions brief also cites George Lucas & Sons (1984) 10 ALRB No. 6, in which the ALJ excluded tax records after reviewing them in camera and determining them not to be probative. The Board found in the

latter case that absent a timely motion to quash the subpoena, there was no precedent for the in camera inspection or the ALJ's ruling that the records would not be probative. The Board concluded that it was prejudicial error for the ALJ to exclude the evidence.

In its exceptions brief, Saikhon requests that the Board remand the case and direct the ALJ to order all discriminatees to produce tax records upon request and allow Respondent to recall witnesses who testified after the ALJ's ruling on this issue, as well as those whose testimony was waived by Saikhon due to the ALJ's ruling.

The ALJ herein ruled that income tax records are privileged under California Revenue and Taxation Code section 19282 and California case law. The code section provides that it is a misdemeanor for the Franchise Tax Board to disclose information relating to tax returns. In Webb v. Standard Oil Company (1957) 49 Cal.2d 509, the California Supreme Court declared that the purpose of the statute is to encourage taxpayers to make full and truthful declarations on their tax returns. The court ruled that tax returns are privileged and that the privilege should not be nullified by permitting third parties to obtain the information.

The ALJ also found that the cases cited by Respondent were inapplicable. The Newson and Wilson cases stood for the proposition that a plaintiff cannot make a claim and at the same

time withhold the only evidence which will establish the claim. In the instant case, Saikhon was able to (and in fact did) subpoena interim employers' payroll records to establish interim earnings. The ALJ also found that discriminatees should not be forced to divulge privileged information to enforce a public right, and cannot be so forced when the information is available from other sources.

We affirm the ALJ's ruling on this issue. She correctly concluded that statutory and case law hold that tax returns and W-2 forms are privileged. Cases do hold that where the only evidence available to establish a private claim is tax records, the claimant must either produce the tax records or forego the claim. Here, however, there was alternative evidence of interim earnings: payroll records of interim employers, employee testimony and employee paycheck stubs.

George Lucas & Sons, supra, 10 ALRB No. 6, is distinguishable in that no party in that case timely filed a motion to quash the subpoena seeking tax records, and there was no precedent for the ALJ's in camera inspection. In the instant case, the privilege was timely asserted and does apply. Therefore, Respondent's request for remand is denied.

Exceptions on Evidentiary Issues

1. ALJ's Refusal to Allow Questioning of Witnesses for Periods Outside the Claimed Backpay Period

During the hearing, Respondent contended that it was prejudiced by not being permitted to ask discriminatees whether they worked during periods which were outside the backpay period and, if they did, whether they had unjustifiably quit or been fired for misconduct. The ALJ found that it was irrelevant whether a discriminatee was fired or unjustifiably quit employment during a time when gross backpay is not being sought. She cited National Labor Relations Board (NLRB) cases holding that during a period when no gross earnings are attributable to a discriminatee, no deductions are made either for interim earnings or willful loss of earnings. Besides finding the evidence excludable under NLRB case law, the ALJ found it should be excluded under California Evidence Code section 352, which states that a court may in its discretion exclude evidence which is speculative, unduly time consuming, and unlikely to lead to relevant evidence.

An employer may mitigate its backpay liability by showing that a discriminatee willfully incurred a loss of earnings during the backpay period. (Sioux Falls Stock Yards Company (1978) 236 NLRB 543 [99 LRRM 1316].) The employer does not meet its burden of proving a willful loss unless it affirmatively demonstrates that the employee neglected to make reasonable efforts to find interim work. (N.L.R.B. v. Miami Coca-Cola Bottling Company (5th Cir. 1966) 360 F.2d 569 [62 LRRM 2155].) In

determining whether an individual claimant has made a reasonable search for employment, "the test is whether, on the record as a whole, the employee has diligently sought other employment during the entire backpay period." (Sioux Falls Stock Yards Company, supra, 236 NLRB at 551.)

Because an employee has no opportunity to minimize his loss of earnings during a period when there would have been no earnings at the discriminatory employer, the employee's actions outside the backpay period are irrelevant. Saikhon excepted to the ALJ's ruling on this matter, but did not brief the issue. We see no reason to depart from the NLRB rule, and we therefore uphold the ALJ's ruling that Saikhon was not entitled to question claimants concerning their search for work or other conduct outside the backpay period.

2. ALJ's Striking of Saikhon's Summary Payroll Records

Respondent submitted exhibits purporting to be summaries of payroll records of an interim employer, Verde Produce. The ALJ held that the affidavit of Verde Produce's custodian of records failed to establish that the payroll records came within the business records exception to California's hearsay rule established by California Evidence Code section 1271. The ALJ relied upon People v. Doble (1928) 203 Cal. 510, where the court refused to allow summaries into evidence when it was not established that the entries from which the summaries were made were genuine, true or correct.

Saikhon excepted to the ALJ's ruling but did not brief the issue. We affirm the ALJ's ruling, which is consistent with applicable law. Summaries are hearsay, as they are offered to prove the truth of what the summaries contain. Saikhon failed to qualify the payroll records themselves as business records, thus rendering the summaries inadmissible hearsay.

3. ALJ's Refusal to Consider Testimony Given in Prior Litigation

The ALJ noted that Saikhon's post-hearing brief relied in part on testimony and the record from prior litigation involving Respondent to establish the steady nature of lettuce harvest work at Saikhon. She stated that such material is hearsay and that she did not consider it in making her rulings. Saikhon excepted to the ALJ's refusal to consider the prior testimony but did not brief the issue.

We agree with the ALJ's finding that the testimony from prior litigation is hearsay, since it consists of evidence of statements made other than by witnesses while testifying at the instant hearing that was offered by Respondent to prove the truth of the statements. (Evid. Code § 1200.) Thus, we find no error in the ALJ's refusal to consider such evidence.

Exceptions Related to General Legal Principles

1. Degree of Diligence Required in Search for Interim Employment

The ALJ stated that under NLRB case law, the duty to seek work diligently is measured by whether the discriminatee made adequate efforts over the backpay period as a whole. Thus, under NLRB policy, where backpay is usually calculated on a quarterly basis, a discriminatee will not necessarily be found to have incurred a willful loss of earnings simply because a search for interim employment was not made in each and every quarter of the backpay period. (Sioux Falls Stock Yards, supra, 236 NLRB at 551.)

Saikhon excepts to the ALJ's statement, and cites a number of NLRB cases wherein a particular discriminatee was denied backpay for part of or an entire quarter due to the claimant's failure to search for work during that quarter. In Carter's Rentals (1980) 250 NLRB 344 [104 LRRM 1529], for example, the claimant's status as a full-time college student coupled with a lack of effort to find employment led the NLRB to deny him backpay for certain quarters of the backpay period. In another case cited by Respondent, the claimant was found not to have made a sufficiently diligent search where, during a period of ten months, he made only three or four attempts to find a job. (Laredo Packing Co. (1982) 264 NLRB 245 [112 LRRM 1071].) The claimant in Rainbow Tours, Inc. dba Rainbow Coaches (1986) 280 NLRB 166 [124 LRRM 1099] experienced long periods of layoff from his

interim job; he was denied backpay for those periods of layoff because he failed to seek additional work.

Saikhon concedes that in determining whether a discriminatee made a sufficiently diligent search for work, the NLRB examines the claimant's search over the backpay period as a whole. Respondent argues, however, that the "period" during which a discriminatee must make a diligent search for work refers to the shortest period in which backpay is calculated. Thus, Respondent asserts, if backpay is calculated on a daily basis, the claimant is required to seek work each and every day.

The NLRB cases cited by Respondent do not support Saikhon's assertion that an employee's diligence in a search for work must be measured by the shortest increment in a backpay period. Rather, the national board holds that "the entire backpay period must be scrutinized to determine whether throughout that period there was, in light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss." (Sioux Falls Stock Yards, supra, 236 NLRB at 551, quoting Cornwell Company, Inc. (1968) 171 NLRB 342, 343 [68 LRRM 1200].) The ALRB, as well, assesses the diligence of a claimant's job search by examining his or her conduct throughout the backpay period as a whole. (George Lucas & Sons, supra, 10 ALRB No. 6 .)

We therefore affirm the ALJ's statement of the degree of diligence required in the search for interim employment.² AS

²We note that it would be difficult to conceive of finding reasonable diligence where a discriminatee failed to look for work throughout an entire quarter.

will be seen infra, however, we do not always agree with the ALJ's application of the standard to particular discriminatees.

2. Food Expenses Incurred While Searching For Work

The ALJ ruled that absent proof of costs for food incurred while a discriminatee worked at Saikhon, the entire claim for food costs incurred while traveling in search of work would be allowed. Saikhon excepted, arguing that expenses' for food while traveling in search of work should not be recoverable because the discriminatee would have incurred such expenses regardless of the discrimination.

In support of its argument, Respondent cites a case wherein a discriminatee was denied a claim for food expenses incurred while working for the same interim employer at a different location. (Matlock Truck Body & Trailer Corp. (1980) 248 NLRB 461 [104 LRRM 1102].) That case is not on point, however, because the claimant in Matlock would have incurred the same expenses even if he had not been transferred to a different location.

NLRB cases hold that expenses incurred in search for interim employment are recoverable to the extent they exceed any such costs the discriminatee would have incurred while working for the respondent. (East Texas Steel Castings (1956) 116 NLRB 1336 [38 LRRM 1470], enforced N.L.R.B. v. East Texas Steel Castings Company, Inc. (5th Cir. 1958) 255 F.2d 284 [42 LRRM 2109].) Expenses for meals are recoverable (Famet, Inc. (1976) 222 NLRB

1180 [91 LRRM 1473]) , and receipts or other documentation are not necessary if credible testimony establishes that the claimant's estimates are reasonable. (W.C. Nabors dba W.C. Nabors Company (1961) 134 NLRB 1078 [49 LRRM 1289] , enforced sub nom. Nabors v. N.L.R.B. (5th Cir. 1963) 323 F.2d 686 [54 LRRM 2259] .)

In examining the food expense claims of individual discriminatees herein, we will apply the general NLRB rule that expenses incurred while searching for interim employment are deductible from interim earnings to the extent they exceed such expenses incurred while the claimant was working for the respondent.

3. Method Used to Deduct Expenses From Interim Earnings

Under NLRB precedent, expenses incurred in seeking or maintaining interim employment are deducted from interim earnings on a quarterly basis. Thus, for any calendar quarter in which there were no interim earnings from which to deduct allowable expenses, the discriminatee is not reimbursed for expenses incurred in seeking interim employment. (Harvest Queen Mill & Elevator Co. (1950) 90 NLRB 320 [26 LRRM 1189] .)

The ALJ found that under ALRB precedent, interim expenses have been calculated by totaling the expenses for the entire backpay period and deducting them from interim earnings. (High and Mighty Farms (1982) 8 ALRB No. 100; Butte View Farms (1978) 4 ALRB No. 90 .) In practice, the ALJ noted, the Board has first offset interim earnings against gross backpay, and then added

expenses to net backpay. (Bruce Church, Inc. (1983) 9 ALRB No. 19; Maqqio-Tostado, Inc. (1978) 4 ALRB No. 36.) Thus, current ALRB law holds that even if a discriminatee has no interim earnings from which to deduct expenses incurred while searching for work, he or she is entitled to recover such expenses. (Kitayama Brothers (1984) 10 ALRB No. 47.)

Saikhon argues that the Board should follow the NLRB practice of deducting expense claims from interim earnings, and that the Board should not increase the amount of backpay due by expenses which are in excess of interim earnings during the backpay period.

We agree with Respondent that the ALRB should, as nearly as possible, follow NLRB precedent in this matter. We find, however, that it would not always be practicable for this Board to deduct interim expenses from interim earnings on a quarterly basis, because agricultural employment sometimes requires the computation of backpay on a seasonal or daily basis. We conclude that the ALRB can most closely adhere to the NLRB's practice by totaling all interim expenses for the season, quarter or day, depending on which backpay formula is being used. The expenses will then be deducted from interim earnings for the same period, and the net interim earnings figure will then be deducted from gross backpay for the period.³ This method of deducting expenses will be employed in the instant case, as well as all future cases.

³Under this procedure, a discriminatee will not be reimbursed for interim expenses incurred during a period (day, season or quarter) during which no interim earnings were acquired.

4. Employee Abandonment of Interest in Job Reinstatement

Respondent contended that a number of discriminatees decided not to return to Saikhon and that its backpay liability should be extinguished at whatever point such a decision was made. General Counsel contended that until a respondent makes a valid, unconditional offer of reinstatement, a discriminatee's attitude toward accepting reinstatement is irrelevant.

The ALJ cited the ruling in W.C. McQuaide, Inc. (1978) 237 NLRB 177 [98 LRRM 1595] that the NLRB will cut off backpay prior to a valid offer of reinstatement only if the board is satisfied that a discriminatee's desire not to return is clear, unequivocal, and made in circumstances showing no coercion. Saikhon excepted to the ALJ's "unduly limited reading" of what is necessary to demonstrate an abandonment of interest in reinstatement, but did not brief the issue.

In Kawano, Inc. (1983) 9 ALRB No. 62, the Board found no merit to an employer's claim that discriminatees were not entitled to backpay from the time they accepted employment at which they ultimately remained. Citing Heinrich Motors, Inc. (1967) 166 NLRB 783 [65 LRRM 1668], the Board reasoned that to toll the employer's backpay obligation prior to its offer of reinstatement would eliminate an incentive for compliance with Board orders.

We affirm the ALJ's ruling that only in cases where a discriminatee clearly states that he or she does not intend to return, and where circumstances show that the statement is

reliable and not tainted by the employer's actions, does such a statement terminate the employer's backpay liability. (Sioux Falls Stock Yards, supra, 236 NLRB 543; Kawano, Inc., supra, 9 ALRB No. 62.⁴

5. Escrow Period for Backpay Claims

(a) Missing Discriminatees

The ALJ ruled that missing discriminatees would have two years to claim their backpay, and that the two-year period could be extended if the Regional Director believed the missing discriminatees could be located. The ALJ noted that the NLRB had recently decided to limit escrow periods to one year (Starlite Cutting, Inc. (1986) 280 NLRB 1071 [122 LRRM 1313] as amended by Starlite Cutting, Inc. (1987) 284 NLRB 620 [125 LRRM 1254]) but she declined to follow the NLRB rule because of the mobility of the workers at Saikhon.

Saikhon argues that the NLRB rule, which provides a one-year escrow period for missing discriminatees with an additional one-year period allowed upon a showing of good cause, is applicable in the agricultural setting. General Counsel argues that because of the migrant nature of the agricultural work force, the escrow period for missing discriminatees should be extended to two years.

⁴We do, however, disavow the ALJ's overstatement of the NLRB 's rule at pages 84-85 of the ALJ Decision, where she states that "the mere fact that a discriminatee has obtained regular interim employment and declines an offer of reinstatement will not suffice to terminate Respondent's liability."

Because of the high mobility of agricultural workers and the attendant difficulty in locating discriminatees, we find that the one-year escrow period provided by the NLRB would not be sufficient. Therefore, we will adhere to this Board's prior practice of providing a two-year escrow period for missing discriminatees. (Ukegawa Brothers (1990) 16 ALRB No. 18; Mario Saikhon (1984) 10 ALRB No. 36.)

The two-year escrow period shall begin either upon Respondent's compliance by payment of the backpay for deposit into escrow, or upon the date the Board's second Supplemental Decision and Order (establishing the dollar amounts owed to each discriminatee) becomes final, including enforcement thereof, whichever is later. Thus, if Respondent pays the money into escrow and does not seek review of the Board's second Supplemental Order, the escrow period will end two years from the date the money is deposited. If Respondent seeks review and then deposits the money after court enforcement of the Board's Order, the escrow period will end two years after the money is deposited. Finally, if Respondent deposits the money and then seeks review, the escrow period will end two years after the Board's second Supplemental Order is final. (See Starlite Cutting, Inc., supra, 284 NLRB 620.)

(b) Potential Discriminatees

The ALJ ruled that potential discriminatees (those who did not testify and who were not stipulated by the parties to be

strikers) should have a maximum of two years to litigate their claims, either by hearing or deposition. Saikhon excepted, arguing that there is no precedent for establishing a period of time during which potential discriminatees can make claims for backpay.

The ALJ's establishment of an escrow period for potential discriminatees is not supported by precedent, nor did she give any rationale for providing one. We conclude that there should be no escrow period for potential discriminatees.

Exceptions Related to Specific Backpay Issues

1. Backpay for Lettuce Wrap, Melon Wrap & Broccoli Harvest Work

The ALJ noted that the backpay period ended the season preceding May 1983 when Saikhon made offers of reinstatement to the discriminatees. She rejected Respondent's argument that the issue of backpay for new work (i . e . , work created by Saikhon's new lettuce and melon wrap machines and the broccoli harvest operations) was a bargaining makewhole issue to be addressed in the Saikhon bargaining case which was severed from the instant case. Looking to the parties' collective bargaining agreement, she found that the employees with the most seniority would have been entitled to the new work. Article 4, section C of the contract provided that the filling of new jobs would be on the basis of seniority, provided that the worker was able to perform the work.

Regarding Saikhon's contention that the introduction of the lettuce wrap machine was a bargaining issue rather than a

backpay issue, the ALJ found that the issue was not the implementation of the wrap machine procedure, but rather the availability of work, which is a backpay issue. Under the contract, Respondent's seniority employees would have had first choice whether to work in the new operations, and the evidence did not establish that they would not have accepted the work.

Saikhon also argued that its broccoli harvest employees were found by the NLRB in 1986 to be non-agricultural employees. (Mario Saikhon, Inc. (1986) 278 NLRB 1289 [122 LRRM 1361].) However, as General Counsel has pointed out, the field pack operations found by the NLRB to be non-agricultural did not begin until October 1983, some six months after the end of the backpay period.

General Counsel contended that the new machine work should be included in backpay because machine work was held in 8 ALRB No. 88 to be a mandatory subject of bargaining (and thus constituted bargaining unit work). General Counsel included broccoli harvest work in his backpay calculations because Saikhon stipulated that some thin/weed employees actually crossed over to broccoli harvest work.

We affirm the ALJ's finding that the NLRB's decision in Mario Saikhon, Inc., supra, 278 NLRB 1289, is not controlling because the decision did not determine the agricultural status of Saikhon employees during the relevant backpay period. We also affirm her conclusion that the issue is one of backpay rather than

of bad faith bargaining. Because of Saikhon's failure to reinstate them, the discriminatees lost the opportunity to receive pay for new work instituted during the backpay period.

We therefore affirm the ALJ's conclusion that the discriminatees were entitled to backpay for new work that would have been available to them based on their seniority had Saikhon not discriminatorily refused to reinstate them.

2. Appropriate Backpay Formula

Under established Board precedent, any method of calculating backpay which is practicable and equitable can be used. (Butte View Farms, supra, 4 ALRB No. 90.) In prior cases, the Board has generally adhered to a daily backpay formula because of the sporadic and seasonal nature of agricultural employment. (High and Mighty Farms, supra, 8 ALRB No. 100.)

In Nish Noroian Farms v. Agricultural Labor Relations Bd. (1984) 35 Cal.3d 726, the California Supreme Court approved of the daily formula, while cautioning that a daily formula may be inappropriate where the agricultural employment is steady and regular rather than sporadic and irregular. In Verde Produce Company, Inc. (1984) 10 ALRB No. 35, the Board adopted the Nish Noroian court's reasoning that where a discriminatee finds "true substitute employment," interim earnings from such employment are deducted from gross backpay even if they were earned on days when the respondent employer would not have offered the discriminatee

work.⁵

a. ALJ Decision

The ALJ generally calculated backpay according to the daily formula for Saikhon's thin/weed, melon harvest and broccoli harvest employees. She found that Respondent had failed to produce evidence regarding those job classifications which would warrant departing from the daily formula as permitted in Verde Produce Company, Inc., supra, 10 ALRB No. 35.

Regarding lettuce harvesters, irrigators, sprinklers and tractor drivers, the ALJ applied the daily formula where the evidence did not establish "true substitute employment," or where the discriminatee did not testify. Where she found that a discriminatee had obtained "true substitute employment," the ALJ applied a "modified" seasonal formula. Under the ALJ's "modified" formula, only interim wages earned on days when the employee would have worked for Saikhon were subtracted from gross backpay.⁶ The

⁵The factors required for a finding of "true substitute employment" are:

(1) The discriminatee worked full-time with the respondent and the interim employer, and did not look for work elsewhere when the respondent employer had no work;

(2) The season at both employers covered the same time period;

(3) The work at both employers was lettuce harvest work;

(4) The work followed the same pattern (e . g . , same number of days each week);

(5) The work was piece rate at both employers; and

(6) The work was in the same geographical area. (Verde Produce Company, Inc., supra, 10 ALRB No. 35 at pp. 2-6 .)

⁶Under the true seasonal formula, all interim wages earned within the dates corresponding to the respondent employer's season are deducted from gross backpay.

ALJ gave no specific reason for modifying the seasonal formula but relied upon NLRB cases holding that interim earnings for periods when no gross backpay is accrued cannot be used to offset gross backpay in seasonal industries.

b. General Counsel's Exceptions

General Counsel excepts to the ALJ's refusal to apply a seasonal formula for thin/weed, lettuce, broccoli and melon harvest employees, as well as to her refusal to apply a quarterly formula to tractor drivers, irrigators and sprinkler employees. General Counsel urges the Board to adopt a new seasonal formula, whereby interim wages earned during a season of the same length as Saikhon's season would be deducted from gross backpay regardless of whether the dates of the two seasons exactly overlapped. However, General Counsel recognizes that some Saikhon employees worked sporadically or outside the traditional seasons, and thus should have their backpay calculated daily.

c. Respondent's Exceptions

Saikhon contends that its lettuce harvest employment constitutes regular seasonal employment, and that if a discriminatee would not have sought extra work while employed at Saikhon, then the seasonal formula must be applied regardless of the nature of the interim employment. Respondent also contends that because it offered tractor drivers work on a steady basis (although not a regular 40-hour week), a quarterly formula should be used since no evidence establishes that they looked for work when Saikhon had no work.

Regarding sprinkler and irrigator employees, Saikhon argues that if they were employed regularly throughout the year, a quarterly formula should be applied. If, however, such employees were offered work on a seasonal basis, then Respondent would find the seasonal formula appropriate. Saikhon acknowledges that if an employee was offered only sporadic work, then a daily formula should be applied.

Respondent contends that during the October-December thin/weed season, thin/weed employees are offered regular employment and thus a seasonal formula should apply (absent evidence that the employee looked for work elsewhere when Saikhon had no work to offer). For intermittent thin/weed work during the rest of the year, Respondent concedes that the daily formula would be appropriate.

Saikhon contends that the seasonal formula should be applied to its melon harvesters, because Respondent offers them regular, steady work during two identifiable seasons of six weeks to two months.

Finally, Respondent argues that any claim that interim wages are attributable to extra work (moonlighting or overtime) must be proven by the discriminatee, or else such wages should be assumed to be deductible interim earnings.

d. UFW's Response

In its response, the UFW argues that the daily formula is generally the correct method of calculating backpay for

agricultural employees. The Union contends that a majority of the discriminatees testified that without company seniority at their interim employers, they were forced to look for work elsewhere when laid off. Thus, the Union argues, most of the discriminatees did not find the "true substitute employment" which would have justified a departure from the daily formula. The UFW acknowledges that in instances where employees did find "true substitute employment," the ALJ correctly applied her "modified" seasonal formula.

e. Board's Conclusions

The evidence in this case demonstrates that employment patterns at a single agricultural employer may show extreme variations, depending upon the type of work involved, the particular crop and particular year, and the seniority of the individual discriminatee. Thus, the same employer may employ some workers on a yearly basis, some seasonally and some daily. Even in crops or types of work where most of the employer's workers are employed yearly or seasonally, some workers who have low seniority may be employed only on a daily, fill-in basis.

We find that as a general rule the formula chosen for calculating a discriminatee's backpay should be based upon the discriminatee's pattern of work at the respondent employer rather than the pattern of work at interim employment. Such a rule, we believe, will result in fewer inequities to both sides than the methodology applied by the ALJ herein.

Thus, for example, if an employee would have enjoyed full-time, steady work during all of Saikhon's lettuce seasons during the backpay period, that worker's backpay should be calculated according to a seasonal formula even if the worker was able to obtain only sporadic interim employment. A daily calculation for such an employee would mean that if she or he worked at an interim job on a specific day during the regular Saikhon season when Saikhon workers would not have worked, the earnings for that day would not be deducted from gross backpay. We believe it would be more equitable in that situation to deduct all interim earnings occurring during the normal Saikhon season because most workers employed full-time for an entire season would not seek outside employment with other employers on "off" days. Therefore, employment on such days most likely represents work in place of, rather than in addition to, the discriminatee's regular seasonal earnings at Saikhon.⁷

Similarly, a discriminatee who worked only sporadically at Saikhon performing thin/weed work should be reimbursed at a daily rate regardless of whether the employee obtained steadier

⁷The Board notes that no discriminatee found herein to be a regular seasonal employee would have begun his or her seasonal employment a significant length of time after Respondent started its season, nor would have ceased work a significant length of time before Respondent ended its season. Thus, this case presents no situation in which a regular seasonal employee's interim earnings might have accrued during a substantial portion of the season when no backpay would have accrued to that employee. In the future, the seasonal formula should be applied consistent with our result here, so that interim earnings are not offset against gross backpay if earned during a substantial portion of a season when the discriminatee would not have had regular work at the respondent employer.

work at an interim employer on different days. Such interim earnings should be deducted only if earned on days the employee would have worked at Saikhon, because on all other days the employee would have been available for work elsewhere even while employed at Saikhon.⁸

For employees who had a pattern of steady, year-round work at Saikhon, the quarterly backpay formula used by the NLRB for non-seasonal workers is appropriate. For employees who would have had full-time work for most of a season at Saikhon during the backpay period, a seasonal rate will be applied for that season.⁹ For employees who would have had sporadic work at Saikhon, a daily backpay formula will be applied.

The Board rejects the ALJ's proposed "modified seasonal" formula. Under the ALJ's proposal, even for seasonal employees, only those interim earnings earned on days when the employee would have worked for Saikhon would be deducted from backpay. This proposal amounts to a daily calculation of backpay for seasonal employees. We decline to use the proposed formula, which is not supported by NLRB or ALRB precedent.

⁸In recalculating backpay, no reliance will be placed on Attachment A to General Counsel's Post-Hearing Brief, which is not part of the record before the Board.

⁹That is, all interim earnings earned during that season will be deducted from gross backpay. Interim earnings earned outside the normal Saikhon season will of course not be deducted from gross backpay for the season, since they could have been earned by the discriminatee even while working at Saikhon.

It should be noted that under our analysis, some employees' backpay will be calculated according to different formulas for different crops in which they have worked at Saikhon. For example, a seasonal lettuce worker may have had sporadic thin/weed work during other portions of the year, for which a daily formula would be appropriate.

Individual Discriminatees

Part I: Discriminatees Addressed in Respondent's Brief

A. Tractor Drivers

1. Manuel BARBOSA

Prior to the strike, Barbosa had worked at Saikhon as a tractor driver since 1975 or 1976. He returned to work for Saikhon on June 30, 1980, where he remained until September 12, 1980. Barbosa testified that he was laid off on that date and was told it was because there was no work. He returned to work on January 8, 1982, but was laid off only two months later, with the stated reason again being lack of work.

In its exceptions brief, Respondent argues that the ALJ erred in failing to credit tractor foreman Jim Moffitt's testimony that Barbosa quit his job in September 1980 rather than being laid off. Respondent further argues that Barbosa's testimony establishes that he could not have worked as a tractor driver since early 1983, and that it is not required to make the futile gesture of offering him reinstatement. Respondent also excepts to the ALJ's refusal to apply a quarterly formula in calculating Barbosa's backpay.

We conclude that Respondent has not shown any error in the ALJ's crediting of Barbosa's testimony that he was laid off for lack of work in 1980 and 1982, and that he would not have been laid off on either occasion if he had been restored to his proper seniority. Thus, his backpay period continues to run until he receives an offer of full reinstatement.

However, we differ with the ALJ's analysis of Barbosa's testimony about his inability to perform tractor work because of kidney damage. He could not recall whether he had driven a tractor since early 1983, but indicated he would return to such work if he got well. On the basis of his testimony, we will toll his backpay from the end of March 1983 (that is, the end of the first quarter) until such time as he can establish his ability to return to tractor driving work.¹⁰

We uphold the ALJ's finding that 20,000 Mexican pesos per month was a reasonable estimate of Barbosa's interim earnings from self-employment.¹¹

We find the quarterly backpay formula appropriate for calculating Barbosa's backpay since tractor drivers worked

¹⁰Thus, Respondent has a continuing duty to offer full reinstatement to Barbosa, but no actual amount of backpay would be owing for any period after March 1983 unless Barbosa can show that he is (or was) able to perform tractor work.

¹¹Since Barbosa estimates his interim earnings only in Mexican pesos, the Regional Director will have to compute the equivalent dollar amount.

year-round at Saikhon.¹²

Barbosa's net backpay can be calculated from Joint Exhibit 8A.

2. Ramon Jose BURGOS

During January and February 1980 Burgos served on the picket line at Saikhon. He testified that when picketing ended early in the day, and also on days when no picketing was conducted, he would search for work. In March or April 1980, Burgos began to have serious problems with his eyesight. Burgos ceased looking for work around the middle of May, and applied for Social Security disability benefits in June 1980.

The ALJ found that Burgos had made a reasonable search for work even though he spent time on the picket line. However, she concluded that his backpay should terminate as of May 20, 1980, the approximate date when his doctor told him it was unsafe for him to drive.

Respondent excepts to the ALJ's finding that Burgos diligently searched for work during January and February 1980.

Picket line activity does not relieve the discriminatee of the obligation of making a reasonably diligent search for interim employment. (Sioux Falls Stock Yards, supra, 236 NLRB at

¹²We do not believe that Barbosa's testimony establishes that he worked more hours per week at his self-employment than he worked at Saikhon. Thus, there is no need to apply the daily formula so that "excess earnings" are not improperly deducted from gross backpay.

550.) In Sioux Falls Stock Yards, supra, the NLRB found that picket line activity did not prevent any of the discriminatees from searching for or obtaining interim employment. However, in that case the union's flexibility enabled discriminatees to walk the picket line only at nighttime and on weekends when employment opportunities were at a minimum. Contrarily, Burgos appears not to have been available for employment searches during the hours when employment opportunities were presumably at a maximum.

We therefore exclude January and February 1980 from Burgos' backpay period on the basis that he failed to make a diligent search for interim employment. His backpay period thus runs from March 1 to May 20, 1980, the date when his doctor told him it was unsafe for him to drive.

We also disallow Burgos' search-for-work expenses, since he had no interim earnings during the backpay period from which to subtract such expenses.

Since Burgos had steady, year-round work at Saikhon, the quarterly formula is appropriate.

Burgos' net backpay can be calculated from General Counsel's Exhibit 24(b).

3. Rufino CORTEZ Camacho

Cortez testified that he made numerous efforts to obtain work in the Imperial Valley during the first four months of the backpay period, but was mostly unsuccessful. In June 1980, and again in June 1981, he traveled with his family to the state of Washington to seek work harvesting strawberries.

The ALJ found that it was reasonable for Cortez to travel to Washington looking for work, and not unreasonable for him to take his family. She also found that his estimated costs were reasonable. However, she reduced his claim for commute-to-work expenses by \$3.50 per day because Cortez had paid between \$3 and \$4 per day to commute to work at Saikhon.

The ALJ applied the daily backpay formula.

Respondent argues that the expenses claimed by Cortez for his trips to Washington are not reasonable. In particular, Respondent asserts that the food expenses are not deductible as Cortez would have incurred such expenses at home. Respondent also excepts to the ALJ's refusal to apply the quarterly backpay formula.

We uphold the ALJ's findings that Cortez' travel expenses were reasonable. NLRB precedent holds that search-for-work expenses are recoverable to the extent they exceed any such costs the discriminatee would have incurred while working for Respondent. (East Texas Steel Castings, supra, 116 NLRB 1336.) Expenses may be recovered for seeking work in any area with comparable employment opportunities. (Colorado Forge Corp. (1987) 285 NLRB 530 [129 LRRM 1320].) Although Cortez estimated his expenses, his estimates appear to be reasonable and should therefore be allowed. (Famet, Inc., supra, 222 NLRB 1180.)

The ALJ correctly reduced Cortez' commute-to-work expenses by the \$3.50 per day he spent on commuting to work at

Saikhon. She also correctly allowed his traveling expenses for food and lodging, since Respondent failed to meet its burden of establishing an appropriate amount by which to reduce such expenses.

The quarterly backpay formula is appropriate because Cortez' employment at Saikhon was steady and year-round. Net backpay can be calculated from General Counsel's Exhibit 24(b) and Respondent's Exhibit 32.

4. Magdaleno Zuniga ESCAMILLA

Respondent argues that a quarterly backpay formula should be applied to Escamilla.

A comparison of Escamilla's employment pattern at Saikhon to the patterns of other tractor drivers does reveal that he worked fewer months (and fewer days within those months) than other drivers with more seniority. However, his employment pattern cannot accurately be described as "sporadic", and thus the quarterly backpay formula is appropriate.

Escamilla's commute-to-work expenses are disallowed since his commuting expenses at Saikhon were greater. His net backpay can be calculated from General Counsel's Exhibit 24(b) and Respondent's Exhibit 23 (m) .

5. R.C. KEMP

Kemp generally had regular work at Saikhon except during the slow months of April, May and June. On the basis of Kemp's employment pattern both at Saikhon and during the backpay period,

the ALJ concluded that a daily backpay formula should be applied. Finding that Kemp's commute-to-work expenses while employed at Saikhon were \$3 per day, the ALJ deleted all interim commuting expenses except those exceeding \$3 per day.

Respondent excepts to the ALJ's refusal to apply a quarterly formula to the entirety of Kemp's backpay period.

We hold that because of the regularity of Kemp's employment at Saikhon, a quarterly formula is appropriate for the entire backpay period. Kemp's commute-to-work expenses are reduced as explained in the ALJ's Decision.

Kemp's net backpay can be calculated from General Counsel's Exhibit 24(b) and Respondent's Exhibits 24(a) , 36 and 58.

6. Guadalupe Funes PACHECO

Respondent excepts to the ALJ's refusal to apply the quarterly formula, as well as her finding that Pacheco did not willfully incur a loss of interim earnings during January, February and March 1980 when he was performing picket duty.

We find that Pacheco's picketing activities did not prevent him from making a reasonable search for work, and that the evidence supports the ALJ's conclusion that he did not incur a willful loss of earnings. We also uphold the ALJ's reduction in commute-to-work expenses by \$4 per day. However, the quarterly backpay formula should be applied since Pacheco had steady, year-round work at Saikhon.

Pacheco's net backpay can be calculated from General Counsel's Exhibit 24(b) and Respondent's Exhibit 33(a).

7. Juan Jose PLACENCIA Mesa

In the first four months of 1980, Placencia served on the picket line, but looked for work several days a week when he was not picketing. He obtained short-term work throughout the backpay period, working for eight different employers.

In May 1983 Placencia received a letter from Saikhon recalling all strikers. Placencia went to Saikhon's shop and explained to foreman Gene Smith that he was working for David Eggers who had promised him a 30% commission but 5% of it was payable only if Placencia in fact finished the season. Smith responded that he had enough workers for the time being, and would notify him when he needed him to return.

Placencia next received a letter from Respondent dated July 6, 1983, stating that he must report to work on July 8. Placencia called Respondent's office and was told that if he did not report as directed he would not get his job back.

The season at Eggers ended on July 16 or 17. Placencia then reported to Saikhon, but was told that Respondent had no vacant tractor driver positions.

Respondent excepts to the ALJ's findings that Placencia was available for work and made an adequate search for work. Respondent also excepts to the ALJ's refusal to offset Placencia's interim earnings between April and mid-July 1983, as well as to her failure to apply the quarterly formula.

Finally, Respondent excepts to the ALJ's refusal to find that Saikhon made a valid offer of reinstatement to Placencia.

We affirm the ALJ's finding that Placencia was available for work and made an adequate search for work while serving on the picket line.

Regarding Saikhon's offer of reinstatement, we note that what constitutes "reasonable time" to accept or reject an offer of reinstatement depends upon the individual employee's circumstances, (Fredeman's Calcasieu Locks Shipyard, Inc. (1974) 208 NLRB 839 [85 LRRM 1202].) We agree with Respondent, however, that Saikhon did give Placencia a reasonable time to consider and respond to its offer. His desire to finish the season at Eggers in order to collect his 5 percent bonus does not outweigh Respondent's need to accomplish its production work. (AVJ Graphics, Inc. d/b/a Manhattan Graphic Productions (1986) 282 NLRB 277 [125 LRRM 1159].) Thus, Placencia's backpay period ends July 8, 1983.

Placencia's own testimony that he earned between \$4,000 and \$5,000 between April and mid-July 1983 provided a basis for finding that he earned at least \$4,000; therefore, the latter amount will be offset against gross backpay for that period.

Since Placencia had steady, year-round employment at Saikhon, the quarterly backpay formula shall be applied. His search-for-work expenses, which were included by the ALJ and not contested by Respondent, should be subtracted from interim earnings of each quarter.

Placencia's net backpay can be calculated from General Counsel's Exhibit 24(c), Respondent's Exhibits 9, 15, 29, 43, and the claimant's above-mentioned testimony.

8. Lorenzo RAMIREZ Ojeda

Throughout the backpay period, Ramirez worked at Brinkman, a ranching company, six days a week. Some time in May 1983, the claimant was recalled to work at Saikhon. He testified that he did not make his decision not to return to Saikhon until several days after he received the offer.

The ALJ found that Ramirez had credibly testified that he did not decide to stay at Brinkman rather than return to Saikhon until some days after he received the reinstatement offer. The ALJ noted that the NLRB will not cut off backpay prior to a valid offer of reinstatement on grounds that the discriminatee is no longer interested in the job, unless the claimant's desire not to return is clear, unequivocal and made in circumstances showing no coercion. (Citing W.C. McQuaide, Inc., supra, 237 NLRB 177.)

The ALJ calculated Ramirez' backpay at the quarterly rate. Per the parties' stipulation, she also added medical expenses of \$620 to the net backpay.

Respondent argues that since Ramirez rejected the reinstatement offer the day after he received it, it should be assumed that he had no interest in returning to Saikhon and his backpay claim should consequently be stricken. (Citing Pacific American Shipowners Assn. (1952) 98 NLRB 582 [29 LRRM 1376].)

Pacific American Shipowners Assn., supra, does not support Respondent's position. In that case, a backpay claimant was denied backpay after the date that he indicated that, because of his poultry business, he had abandoned any desire to go back to work for the respondent. There is no evidence herein that Ramirez abandoned his interest in his Saikhon job before the reinstatement offer was made. Therefore, his backpay period runs until the date of Saikhon's reinstatement offer in May 1983.

We affirm the ALJ's application of the quarterly backpay formula to Ramirez. His net backpay can be calculated from General Counsel's Exhibit 24(c), including the stipulated \$620 in medical expenses.

9. Richard SANCHEZ Betancourt

In October 1981, Sanchez obtained steady, full-time work at H.E. Wiggins & Sons. However, he testified that he did not prefer the Wiggins job to his tractor driving job at Saikhon. Based in part on his demeanor, the ALJ discredited tractor foreman Jim Moffitt's testimony that Sanchez rejected offers of reinstatement.

On the basis of Sanchez' testimony that he spent \$8 per day commuting to work at Saikhon during March and April and \$3.50 to \$4 per day the rest of the year, the ALJ reduced his interim commute-to-work and search-for-work expenses accordingly. She applied a quarterly backpay formula for the period when Sanchez had steady, full-time work at Wiggins, but a daily formula for the remainder of the backpay period.

Respondent excepts to the ALJ's failure to credit the testimony of Jim Moffitt that Sanchez was offered reinstatement to his tractor driver position. Respondent also excepts to the ALJ's refusal to offset interim earnings for June 1980, as well as her failure to apply the quarterly backpay formula for the entire backpay period.

Respondent also asserts that Sanchez¹ backpay claim should be reduced by the amount of earnings he would have received if he had accepted a position as foreman at Saikhon. Finally, Respondent excepts to the ALJ's failure to find that Sanchez abandoned his interest in reinstatement.

The evidence amply supports the ALJ's finding that Moffitt did not offer Sanchez reinstatement to his tractor driver job.

Concerning Sanchez' interim earnings in June 1980 or 1981, his testimony sufficiently establishes that he had interim earnings of \$400 per week for two weeks of June 1980 and \$720 in July 1981. These wages should therefore be offset against gross backpay.

Sanchez' backpay should not be reduced by the amount he would have earned as a foreman at Saikhon. Sanchez was entitled to an offer of reinstatement to his former job unless it no longer existed, and Respondent has made no attempt to show that his former job did not exist. (Panoramic Industries, Inc. (1983) 267 NLRB 32 [113 LRRM 1152].)

Moreover, Respondent has not shown that Sanchez abandoned his interest in reinstatement by accepting interim employment at Wiggins. Respondent's backpay obligation cannot be tolled until it extends a valid offer of reinstatement to a specific position. (Sam Andrews' Sons (1990) 16 ALRB No. 6 .)

Since Sanchez had steady, year-round employment at Saikhon, a quarterly formula is appropriate.

Sanchez' net backpay through May 1983 can be calculated from General Counsel's Exhibits 24(c) and 25, and Sanchez' testimony concerning interim earnings. General Counsel will have to compute any backpay owing to Sanchez for the period subsequent to May 1983 after determining whether, or when, Sanchez received a valid offer of reinstatement.

B. Lettuce Harvest Employees

1. Rafael L. ALVARADO

Respondent excepts to the ALJ's finding that Alvarado made a diligent search for work during Saikhon's melon and thin/weed seasons, but makes no argument as to how Alvarado's search was deficient. Respondent also excepts to the ALJ's application of a "modified seasonal" formula for Alvarado's lettuce work.

Respondent's assertion that Alvarado did not diligently search for work is not supported by the record. A review of the transcripts establishes that Alvarado looked for work at all times during the backpay period, on every day except Sundays, and that he did in fact find interim employment.

Alvarado's backpay for lettuce work should be calculated according to the regular seasonal formula rather than the ALJ's modified seasonal formula. Alvarado's backpay for melon and thin/weed work should be calculated daily as in General Counsel's specification; the method of calculation for those categories of work was not challenged by Respondent.

Alvarado's net backpay can be calculated from General Counsel's Exhibit 52 and Respondent's Exhibits 35 and 40.

2. Antonio AYON

Respondent excepts to the ALJ's refusal to offset the interim earnings allegedly earned in February 1980, as well as to her allowance of Ayon's expenses for renting a residence in Chino, where he moved to accept interim work. Respondent also excepts to the ALJ's refusal to apply a seasonal calculation of Ayon's backpay.

Regarding any alleged interim earnings during February 1980, we affirm the ALJ's finding that Respondent has not met its burden of producing evidence that would permit an offset.

Ayon's backpay for lettuce work should be calculated seasonally since he would have had steady work at Saikhon throughout the lettuce season. His thin/weed backpay should be calculated daily except for the October-December 1982 period when he would have worked the entire season.

We affirm the ALJ's ruling that Ayon should recover his reasonable expenses for renting a house in Chino, where he

obtained interim employment. It is well established that a backpay claimant's additional expenses incurred during interim employment are deductible from gross backpay. (East Texas Steel Castings Company, Inc., supra, 116 NLRB 1336. Even if Ayon had rented out his Holtville house, Respondent would still have been liable for his reasonable rental expenses in Chino, which he would not have incurred but for Respondent's failure to offer him reinstatement. The rental expenses should be prorated to include only that portion of any month for which backpay is claimed.

Ayon's commute-to-work expenses of \$30 should be deleted as stipulated by the parties.

Ayon's net backpay can be calculated from General Counsel's Exhibit 26(a) .

3. Crisanto AYON

Ayon testified that he could not recall if he worked in February or March 1980. Respondent contended that its liability should be reduced by unspecified interim earnings in February and March 1980, and has excepted to the ALJ's refusal to offset any such earnings.

During the hearing, General Counsel agreed to obtain Ayon's check stubs for February and March 1980, if any existed, and to furnish them to Respondent. Presumably, no such check stubs exist, since none have been entered into the record. Therefore, Respondent has not met its burden of proving interim earnings in mitigation of its backpay liability.

Since Ayon has no interim earnings, the method of calculating his backpay makes no difference.

Ayon's net backpay can be calculated from General Counsel's Exhibit 26 (a) .

4. Gonzalo AYON Martinez

Respondent excepts to the ALJ's finding that Ayon made a diligent search for work throughout the backpay period, as well as to her refusal to use a seasonal formula in calculating his backpay.

An employer does not meet its burden of proving a willful loss of earnings merely by showing that the employee was unsuccessful in obtaining interim employment. Rather, the employer must affirmatively demonstrate that the employee failed to make reasonable efforts to find interim work. (NLRB v. Miami Coca-Cola Bottling Company, supra, 360 F.2d at 575-576.)

In reviewing the transcripts, we find that the record supports the ALJ's finding that Ayon made a diligent search for interim employment throughout the backpay period. We therefore find that the employer did not meet its burden of proving a willful loss of earnings.

However, we will apply the seasonal backpay formula since Ayon would have had steady work throughout Saikhon's lettuce seasons.

Ayon's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (c) .

5. Perfecto AYON Nunez

Respondent's only exception is to the ALJ's refusal to apply the seasonal method in calculating Ayon's backpay.

Ayon would have had steady work during all lettuce seasons of the backpay period, as well as during the summer 1982 melon season. Therefore, a seasonal calculation is appropriate for those periods. He would have had sporadic melon work during 1981, for which the daily calculation is more appropriate.

Ayon's net backpay can be calculated from General Counsel's Exhibit 38 and Respondent's Exhibit 35 (f) .

6. Juan BERUMEN

Respondent excepts to the ALJ's refusal to apply the seasonal formula in computing Berumen's backpay, and also to her refusal to delete his expense claim for the tires.

Since Berumen would have had steady work during both seasons of his backpay period, the seasonal calculation is appropriate.

We disallow his expense claim for new tires. Berumen testified that the tires lasted for two years; therefore, it appears unreasonable to allow their cost to be deducted for travel to a job that lasted only three weeks. Further, the expense is one the discriminatee would have incurred regardless of Saikhon's discrimination against him, since he eventually would have needed new tires to commute to work at Saikhon. (Matlock Truck Body & Trailer Corp., supra, 248 NLRB 461, 479.)

Berumen's net backpay can be calculated from General Counsel's Exhibit 26 (a) .

7. Cesar BEYAM

The ALJ found that Beyam credibly testified that he regularly looked for work during the entire backpay period, and she applied the daily rate for all classifications of Beyam's work. She recalculated Beyam's expenses, reducing the commute-to-work costs from \$5 per day to \$3 per day. She also corrected errors in the travel-to-work expenses found in General Counsel's Exhibit 26(a) , and found that the correct amount for his total expenses was \$951.

Respondent excepts to the ALJ's refusal to strike Beyam's backpay for the melon seasons when he found no interim employment. Respondent also excepts to her application of the daily backpay formula.

The seasonal formula is appropriate for Beyam's lettuce work, since he would have had steady work during every lettuce season. The seasonal formula should also be applied for the summer 1980, winter 1981 and summer 1982 melon seasons, when Beyam would have had steady work. However, the daily formula is appropriate for Beyam's sporadic thin/weed work, as well as for the summer 1981 and winter 1982 melon seasons.

Beyam's testimony demonstrates that he made a diligent search for work throughout the backpay period. Because Respondent has not affirmatively demonstrated that Beyam failed to make

reasonable efforts to find interim employment, his backpay claim should not be denied on that basis. (N.L.R.B. v. Miami Coca-Cola Bottling Company, supra, 360 F.2d 569.)

Beyam's net backpay can be calculated from General Counsel's Exhibit 26(a), Joint Exhibit 6, and Respondent's Exhibits 11 and 18(a).

8. Luis CONTRERAS

Respondent excepted to the ALJ's refusal to deduct interim earnings for June 1980. Respondent also argues that the ALJ should have applied the seasonal method of calculation.

Contreras testified that in June 1980 "[i]t could be" he worked approximately seven to ten days, and that he earned about \$30 on the days when he did work. Since Contreras asserted his privilege not to disclose his tax records, and there is no alternative evidence of his interim earnings for that month, the Board will deduct \$300 for ten days' interim earnings in June 1980.

Contreras also testified that he worked for J.R. Norton "the whole month of May" and the "first week of June, 1982." Thus, interim earnings of \$200/week will be deducted for the first three weeks of May, as well as the \$200/week deducted by the ALJ for the period from May 25 to June 5, 1982.

For his lettuce and melon work, Contreras would have had steady employment at Saikhon; thus, the seasonal rate is appropriate for those crops. Contreras would have had sporadic work in thin/weed, for which the daily rate will be applied.

Contreras' net backpay can be calculated from General Counsel's Exhibit 26 (a) and Respondent's Exhibits 47 (b) and 51 (b) . An additional \$300 in interims should be deducted for June 1980 and an additional \$600 for May 1982 .

9. Gilberto CORREA Roldan

Respondent excepts to the ALJ's refusal to delete backpay for the period from December 15, 1979 through January 9, 1980, and to her application of the daily backpay formula.

Correa testified that during the month of December 1979 he didn't go out looking for work because he was going out to the fields to strike. We believe that Correa's testimony is sufficiently certain that backpay should be struck for the 3\$-week period.

Correa would have had steady work at Saikhon during all the lettuce seasons of his backpay period, and therefore the seasonal backpay formula should be applied.

Correa's net backpay can be calculated from General Counsel's Exhibit 13 and Respondent's Exhibit 47(g) . Backpay for the period December 15, 1979 through January 9/ 1980 should be deleted, and net expenses should be reduced by \$205, the amount by which Correa's expenses were reimbursed.

10. Javier CORTEZ Martinez

Respondent excepts to the ALJ's finding that Cortez made an adequate search for work during the backpay period. Respondent asserts that Cortez looked for work too late in the day and only a

couple of times a week, thus effectively removing himself from the labor market.

A number of factors indicates that Cortez' search for work was only half-hearted. During a backpay period over three years in length, he was able to obtain a total of only four days' interim earnings. Although other discriminatees testified that they would begin looking for work at 2:30 or 3:00 in the morning, Cortez testified that he typically began his search at 5:00 a.m. For most of the backpay period, he looked for work only one or two times a week. The evidence shows that Cortez did not make a reasonably diligent search for work during the backpay period, and that he therefore incurred a willful loss of earnings. His claim for backpay should consequently be denied. (Sioux Falls Stock Yards Company, supra, 236 NLRB 543.)

11. Julian DE LUCAS

Respondent excepts to the ALJ's refusal to eliminate De Lucas' backpay claim for melon or thin/weed work. Respondent also excepts to the ALJ's failure to offset interim wages for periods when De Lucas testified that he probably worked. Further, Respondent asserts that De Lucas' backpay should be calculated at the seasonal rate.

Since General Counsel's Exhibit 26(a) was represented to be a complete amended specification, De Lucas' backpay should be limited to the lettuce and melon work contained in that exhibit.

For those months when De Lucas testified he probably worked and was able to estimate how much he earned, we will deduct

the estimated earnings from gross backpay. Thus, interim earnings of \$1,150 will be deducted for February 1980, \$1,250 for January 1982, \$1,750 for February 1982, \$2,000 for February 1983, and \$1,000 for March 1983. Regarding the other months involved, Respondent failed to meet its burden of proving that De Lucas had any interim earnings beyond those specified.

Because De Lucas would have had steady, seasonal employment at Saikhon, his backpay should be calculated at the seasonal rate. His net backpay can be calculated from General Counsel's Exhibit 26(a) as amended by General Counsel's Exhibit 33 and Respondent's Exhibit 16, with the interim earnings adjustments mentioned in the previous paragraph.

12. Guillermo DURAN Rodriguez

Respondent excepted to the ALJ's application of the daily formula and to her refusal to offset interim earnings for January and February 1982.

Although Duran could not specifically recall whether he had worked during January or February 1982, neither General Counsel's specification nor the payroll records subpoenaed from West Valley show any earnings for that period. Therefore, we conclude that Respondent has not met its burden of establishing that Duran had any interim earnings during those two months.

Duran would have had steady earnings throughout Saikhon's lettuce seasons during the backpay period; therefore, the seasonal backpay formula is appropriate for that work. The method of

calculation makes no difference for the three days of thin/weed backpay he is claiming for October 1981.

Duran's net backpay can be calculated from General Counsel's Exhibit 37 and Respondent's Exhibit 16 (b) .

13 . Ramon DURAN Fernandez

Respondent excepts to the ALJ's refusal to offset interim earnings for October 1982, as well as to her application of the daily backpay formula.

We will apply the seasonal backpay formula for Duran's lettuce work, which would have been steady throughout Saikhon's lettuce seasons, and the daily formula for his thin/weed work, which would have been sporadic.

Since Duran could not recall what part of October 1982 he might have worked, and since his backpay period covers only the last week of that month, we will not offset any alleged interim earnings for October 1982.

Duran's net backpay can be calculated from General Counsel's Exhibit 26 (a) , Respondent's Exhibits 23 (e) and 40 (b) . His interim earnings for November 1982, as well as his interim expenses, are accurately calculated in the ALJ Decision, Section B, Part I, pages 43-44.

14 . Juan ESTRADA Cadera

Respondent excepts to the ALJ's refusal to eliminate backpay for March 14 and 15, 1983, and to her application of the daily formula. Respondent cites no case law to support its

contention that backpay should be eliminated for those two days, when Estrada left his interim employment to attend his mother's funeral. We affirm the ALJ's conclusion that since he would have been paid for these days under Saikhon's bereavement leave policy, Estrada is entitled to reimbursement for the loss of the two days' pay.

We will apply the seasonal formula to Estrada's lettuce work, which would have been regular throughout the backpay period, and the daily formula for his sporadic melon work.

We also affirm the ALJ's denial of the \$12 expense for gasoline.

Estrada's net backpay can be calculated from General Counsel's Exhibit 63.

15. Jose GALLEGOS Cano

At the beginning of the backpay period, Gallegos had interim employment at Alex Abatti. His work there ended in February 1980, but he incurred medical expenses of \$512.50 in March 1980. He paid the bill and presented an insurance claim in April 1980, but was told that he was no longer covered. Respondent contends that Gallegos was negligent in presenting his claim, and that therefore it is not liable for the expenses.

Respondent also excepts to the ALJ's application of the daily formula, as well as to her finding that even under a seasonal theory it is inappropriate to offset earnings for work outside the backpay period.

Respondent has not shown that Gallegos was negligent in presenting his insurance claim in April for expenses that were incurred only one month previously, especially because Saikhon's own policy allowed 90 days to file a claim. Therefore, Respondent is liable for the expenses.

Gallegos' predicted gross earnings for the 1979-80 season were sporadic, and thus a daily calculation is appropriate for that period. He would have worked full seasons during the following three years, however, and therefore we will apply the seasonal formula for those years.

We affirm the ALJ's conclusion that interim earnings outside the backpay period should not be deducted from gross backpay under the seasonal formula. We affirm her inclusion of \$83.49 in interim earnings for 12/31/80 since Gallegos claimed gross backpay for that date.

Gallegos' net backpay can be calculated from General Counsel's Exhibits 5 and 5 (c) and Respondent's Exhibit 5 0 (b) .

16. Higinio GALLO

Respondent excepts to the ALJ's application of the daily rather than the seasonal rate, and to her refusal to offset interim earnings for November 1980.

Growers Exchange payroll records (see Respondent's Exhibit 33(d)) indicate that Gallo worked there in October and December 1980, but not in November 1980. Therefore, no interim earnings will be offset for that month.

The specifications support application of the seasonal rate for all of Gallo's lettuce work and for his thin/weed work in the October-December 1980, 1981 and 1982 seasons. The daily rate will be applied for his sporadic, non-seasonal thin/weed work during other parts of the backpay period.

Gallo's net backpay can be calculated from General Counsel's Exhibit 55 and Respondent's Exhibits 33(d), 44(b) and 24(d).

17. Domingo GONZALES Zuniga

The ALJ rejected Respondent's contention that Gonzales' claim for backpay and expenses for the 1979-80 season and for December 1980 should be deleted because he was picketing at that time. Respondent excepts to her findings on the issue, as well as to her application of the daily formula.

We affirm the ALJ's finding that backpay and expenses for the 1979-80 season and December 1980 should not be deleted. Gonzales' testimony does not support a finding that he was on strike and picketing during the year after the Saikhon strike ended.

Gonzales' specification supports application of the seasonal rate since he would have had steady work throughout Saikhon's lettuce seasons.

Gonzales' net backpay can be calculated from General Counsel's Exhibits 5 and 5(a).

18. Arturo GONZALEZ Gonzalez

Respondent excepted to the ALJ's refusal to calculate all of Gonzalez' lettuce and melon work at the seasonal rate. Respondent also excepted to the ALJ's refusal to offset interim earnings for February 1980, November 1980 and the 1981 lettuce season.

Subpoenaed payroll records indicate that Gonzalez did not work at all during February 1980, and thus no offset should be made.

We affirm the ALJ's decision not to offset interim earnings for the early part of November 1980, since they occurred outside the normal lettuce season. However, interim earnings earned during the 1981 lettuce season will be offset even though they occurred on days for which no gross backpay is claimed.

We will apply the seasonal rate to both lettuce and melon work since Gonzalez would have had regular work at Saikhon in both crops throughout the backpay period.

Gonzales' net backpay can be calculated from General Counsel's Exhibit 65 and Respondent's Exhibit 47(e) .

19. Antonio HARP Salas

Respondent excepts to the ALJ's refusal to include interim earnings for June 1980, as well as to her refusal to offset the Verde Produce wages which were excluded from evidence. Respondent also excepts to the ALJ's application of the daily formula.

Haro initially testified that he worked with a contractor in melons in June 1980. Later, he said he could not remember whether he had worked there two or three seasons but he believed the first season was June 1980. His testimony is sufficiently certain to justify offsetting wages for June 1980 in the same amount as his estimated earnings for the two later seasons (\$225/week for 3 weeks). However, there is no basis for offsetting alleged interim earnings at Verde Produce which were excluded from evidence.

On the basis of General Counsel's specification, we will apply the seasonal formula to all of Haro's lettuce and melon work. The sporadic pattern of Haro's thin/weed work, however, justifies application of the daily rate.

Haro's net backpay can be calculated from General Counsel's Exhibits 26 (b) and 51 and Respondent's Exhibit 55 (d). Interim earnings of \$675 for June 1980 will be deducted.

20. Amador HERNANDEZ Quintana

Respondent contends that Hernandez' claim for backpay for December 1979 through February 18, 1980, and for October and November 1980 should be struck because he testified that he was on the picket line and did not look for work when he was picketing. However, the ALJ found that Hernandez was thoroughly confused as to when the strike at Saikhon began. Because of Hernandez' repeated confusion and contradictions, the ALJ was not persuaded that he was picketing during those periods, and she declined to strike his backpay on that basis. We affirm the backpay award.

The ALJ reduced Hernandez' expenses for October 1980 to \$230 and for October 1981 to \$273.45.

Respondent also excepted to the ALJ's application of the daily backpay formula. General Counsel's specification shows that Hernandez would have had steady work during the lettuce seasons and October-December thin/weed seasons throughout the backpay period; therefore, the seasonal backpay formula is appropriate for those categories of work. Hernandez would also have performed some sporadic thin/weed work during other parts of the year, for which the daily rate is appropriate.

Hernandez' net backpay can be calculated from General Counsel's Exhibits 26(c) and 58. The claimant's expenses are reduced as described in the ALJ Decision, Section B, Part I, pages 68-69.

21. Jesus Abundio HERNANDEZ Cruz

Although Hernandez had no interim earnings during the backpay period, the ALJ found that he gave a very detailed account of an extensive search for work. The ALJ concluded that Hernandez' account was credible and his efforts sufficiently diligent.

Respondent argues that if the daily formula is applied, then the record should be reopened to permit Respondent to question Hernandez regarding his search for work on each and every day for which gross backpay is claimed. Respondent concedes, however, that under a seasonal formula Hernandez' testimony, if

credited, permits a finding that he made an adequate search for work over the seasons for which he is claiming backpay.

The record supports the ALJ's finding that Hernandez made a diligent search for work throughout the backpay period. Since Hernandez would have had steady work during Saikhon's lettuce seasons, the seasonal formula is appropriate.

Hernandez' net backpay can be calculated from General Counsel's Exhibit 12.

22. PablQ IBANEZ

Respondent excepts to the ALJ's exclusion of payroll summaries of alleged interim earnings in December 1981 at Verde Produce, and to her finding that Ibanez made a diligent search for work during the 1982-83 season. Respondent also excepts to the ALJ's refusal to apply the seasonal backpay formula.

The ALJ's exclusion of the payroll summaries for December 1981 is no longer an issue, since all relevant payroll records of Ibanez' work at Verde are now in evidence (Respondent's Exhibit 55).

Ibanez' testimony supports the ALJ's finding that he began searching for work at the beginning of the 1982-83 lettuce season and continued to do so throughout the season. Respondent has not pointed to any evidence showing a less than diligent search for work.

The specification shows that Ibanez would have had regular work at Saikhon during all seasons, except for the summer

1980 melon season when his work would have been sporadic. Therefore, we will apply a daily rate for the 1980 summer melon season and a seasonal rate for the remainder of the backpay period.

Ibanez' net backpay can be calculated from General Counsel's Exhibit 36 and Respondent's Exhibit 55.

23. Arturo JARAMILLO

Respondent excepts to the ALJ's refusal to offset certain alleged interim earnings contained in payroll summaries (for Verde Produce) which the ALJ excluded from evidence. The ALJ's exclusion of payroll summaries is no longer an issue, since Respondent's Exhibit 55(c) contains all relevant payroll records of Jaramillo's employment at Verde Produce during the backpay period.

Respondent also excepts to the ALJ's refusal to strike backpay for December 1982, and to her application of the daily formula.

The pertinent case law supports the ALJ's conclusion that Jaramillo did not incur a willful loss of interim earnings in December 1982. Since Jaramillo had a reasonable expectation of recall at Verde, and because steady lettuce work was so difficult to obtain without company seniority, his delay in searching for other work until January 1983 was reasonable. (George Lucas & Sons, supra, 10 ALRB No. 6; Keller Aluminum Chairs Southern, Inc. (1968) 171 NLRB 1252 [69 LRRM 1348].)

The seasonal backpay formula is appropriate for all of Jaramillo's backpay period except for the 1979-80 lettuce season, when he would have worked only a few days in February and March 1980. For that season alone, we will apply the daily rate.

Jaramillo's net backpay can be calculated from General Counsel's Exhibit 5 (a) and Respondent's Exhibit 5 5 (c) .

24. Jose LEON Rivera

Respondent excepts to the ALJ's refusal to strike backpay for the third week of February 1980, the 1980-81 season, and December 1981. Respondent also excepts to the daily method of calculation.

Leon testified consistently that he did not search for work during the third week of February 1980 although he had trouble remembering the reason. We conclude that his testimony justifies striking backpay for that week.

As for the 1980-81 season, Respondent has not met its burden of establishing interim wages for that period. Leon stated that he had turned all of his check stubs over to General Counsel, who represented that he had turned over all such evidence to Respondent.

Leon's backpay for December 1981 shall not be reduced since he had a reasonable expectation of recall at Maljan (George Lucas & Sons, supra, 10 ALRB No. 6; Keller Aluminum Chairs Southern, Inc., supra, 171 NLRB 1252) and in fact was recalled near the end of the month.

Except for the 1979-80 season when he would have worked sporadically, Leon would have had steady work throughout the lettuce seasons during the backpay period. Therefore, we will apply the daily rate for the 1979-80 season and the seasonal rate for all remaining seasons.

Leon's net backpay can be calculated from General Counsel's Exhibit 5 (b) (omitting the third week of February 1980 therefrom).

25. Atilano LEYVA Duarte

The ALJ concluded that, considering the backpay period as a whole, Leyva made sufficiently diligent efforts to find work. She denied backpay for certain brief portions of the backpay period when Leyva was out of the country and unavailable for work.

Respondent excepts to the ALJ's finding that Leyva made a sufficiently diligent search for work, and to her refusal to offset interim earnings for March 1983.

We affirm the ALJ's finding that Leyva's search for work (generally 3 to 5 days a week but occasionally 2 or 3 days a week) was sufficiently diligent to demonstrate that he did not incur a willful loss of earnings. NLRB cases do not require a daily search, but only that the claimant make reasonable efforts to find interim work. (N.L.R.B. v. Miami Coca-Cola Bottling Company, supra, 360 F.2d 569, 575-576.)

However, we overrule the ALJ's finding that Leyva's testimony regarding March 1983 was too imprecise to warrant adding

interim earnings. Leyva testified that he earned between \$40 and \$50 per day during the third week of that month. His testimony was certain enough to justify a deduction of \$214 (\$45 per day for five days).¹³

Leyva would have had sporadic work during the 1979-80 and 1980-81 lettuce seasons, for which a daily backpay formula is appropriate. He would have had steady work throughout the 1981-82 and 1982-83 seasons, for which the seasonal formula should be applied.

Leyva's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (c) .

26. David MARQUEZ Marquez

Respondent excepts to the ALJ's refusal to delete backpay for the summer 1982 melon season, as well as to her application of the daily method of calculating backpay.

Marquez' testimony supports the ALJ's conclusion that he made a diligent search for work throughout the backpay period, and Respondent has made no showing that his search was less than diligent during the summer 1982 melon season.

Marquez would have had steady work at Saikhon during all relevant lettuce seasons, as well as during the summer 1980 and

¹³Leyva's search-for-work expenses for the 1982-83 lettuce season must be deducted from his March 1983 interim earnings before the net interims are deducted from gross backpay. His search-for-work expenses were \$9 for each week of the season except for March 1983 for which there is a \$30 claim. (See ALJ Decision, Part I.E., p. 82.)

summer 1982 melon seasons and the October-December 1980 thin/weed season. Therefore, the seasonal backpay formula is appropriate for those seasons.

Marquez would have had sporadic work during the remaining melon and thin/weed seasons of the backpay period, for which the daily formula is appropriate.

Marquez' net backpay can be calculated from General Counsel's Exhibit 26(b). The claimant is entitled to commuting expenses as specified in the ALJ Decision, Section B, Part I, pages 86-87.

27. Rodolfo MARQUEZ Marquez

During the backpay period, Marquez would typically arrive in Calexico at 5:00 or 5:30 in the morning and go from bus to bus seeking work. He also sought work at the UFW office in Calexico and with Saikhon in Tacna, Arizona. The ALJ found Marquez entitled to backpay at the daily rate.

Respondent excepts to the ALJ's finding that Marquez made a sufficiently diligent search for work throughout the backpay period. Respondent asserts that Marquez limited his search to times of the day when no employment would be available.

Payroll records subpoenaed from Merrill Farms (Respondent's Exhibit 28) reveal that Marquez had interim employment at Merrill during every year from 1979 through 1983. Regardless of whether it coincided with the Saikhon lettuce season, his employment at Merrill demonstrates that the nature of

Marquez' search did not preclude him from finding work. Therefore, we affirm the ALJ's conclusion that Marquez did not incur a willful loss of earnings.

Since Marquez would have had steady work during all lettuce seasons throughout the backpay period, the seasonal formula is appropriate.

Marquez' net backpay can be calculated from General Counsel's Exhibit 5 and Respondent's Exhibit 28.

28. Adrian MARTINEZ Fernandez

Respondent excepts to the ALJ's finding that Martinez made a sufficiently diligent search for work although he did not begin looking for work until 5:00 or 6:00 in the morning. Respondent also excepts to application of the daily formula.

Martinez testified extensively and credibly about the good faith efforts he made to find interim employment. We affirm the ALJ's conclusion that Respondent did not meet its burden of proving a willful loss of earnings.

Martinez' regular pattern of work at Saikhon justifies application of the seasonal backpay formula.

Martinez' net backpay can be calculated from General Counsel's Exhibits 5, 5(c) and 22.

29. Jesus MARTINEZ Ramirez

Respondent excepts to the ALJ's refusal to offset interim earnings for two days during February 1983, as well as to her application of the daily method of calculating backpay.

Payroll records subpoenaed from Verde Produce (Respondent's Exhibit 55(e)) establish that Martinez did not work at Verde during any part of February 1983. Therefore, no earnings for that month are deductible from gross backpay.

Martinez' steady work during Saikhon's lettuce seasons makes the seasonal backpay formula the most appropriate.

Martinez' net backpay can be calculated from General Counsel's Exhibits 5(c) and 7 and Respondent's Exhibit 55(e).

30. Nazario MENDEZ Lopez

Respondent excepts to the ALJ's refusal to offset interim earnings for portions of 1981 and 1982, to her failure to reduce Mendez' claim for medical expenses, and to her failure to strike his backpay claim for May 1982. Respondent also excepts to the ALJ's refusal to apply the seasonal formula for the entire backpay period.

Payroll records submitted after the hearing demonstrate that Mendez did have some interim earnings in May-June 1982, and these will be deducted from gross backpay. Mendez' testimony does not support a further deduction beyond what is described in the specification and the payroll records. There is also no basis for striking the backpay claim for May 1982 since the payroll records indicate that Mendez did work (and thus was available to work) during the latter half of May 1982.

Since Respondent failed to submit any insurance information regarding Mendez' claim for medical expenses, there is no basis for reducing the claim.

The seasonal formula is appropriate for Mendez' steady lettuce work. However, the daily rate is appropriate for his melon and thin/weed work, which would have been sporadic.

Mendez' net backpay can be calculated from General Counsel's Exhibit 26 (b) and Respondent's Exhibits 18 (c) and 47.

31. Juan Manuel MONTANO Silva

Montano obtained interim employment with Jack T. Baillie in the spring of 1980 and returned there for the next two lettuce seasons. In January 1982 he left to go to work at Hansen Farms because that company had better benefits.

Montano's crew at Hansen was laid off after two weeks. He was unable to find any work during the remainder of the 1981-82 season or the following season.

The ALJ found that Montano had left his interim job at Baillie for a justifiable reason and concluded that he had not willfully incurred a loss of earnings. She applied a daily calculation of backpay.

Respondent excepts to the ALJ's finding that Montano did not incur a willful loss of earnings when he quit his job at Baillie. Respondent also excepts to her application of the daily formula.

NLRB case law holds that a discriminatee is entitled to quit one interim job in order to take another with improved earnings or conditions. (Alamo Express, Inc. (1975) 217 NLRB 402, 404 [89 LRRM 1543].) We affirm the ALJ's conclusion that Montano

did not willfully incur a loss of earnings since he had a justifiable reason to leave Baillie and had no reason to anticipate that he would be laid off after two weeks. The cases cited by Respondent (Shell Oil Company (1975) 218 NLRB 87 [89 LRRM 1534] and Alamo Express, Inc., supra, 217 NLRB 402, are not analogous, since in both cases the employee prematurely quit his interim employment with only a hope of employment at another company.

Since Montano would have had steady work at Saikhon during all lettuce seasons of the backpay period, the seasonal formula is applicable.

Montano's net backpay can be calculated from General Counsel's Exhibits 5, 5(b) and 8, and Respondent's Exhibits 42(h) and 46.

32. Margarito MORALES Macias

Respondent excepts to the ALJ's conclusion that Morales did not incur a willful loss of earnings by quitting his interim job with Hansen Farms. Respondent also excepts to the daily calculation of backpay.

NLRB cases hold that an employee who voluntarily quits interim employment without sufficient reason is not entitled to backpay for the period she or he is off work as a result of the quit. (Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 117 [8 LRRM 439].) In United Farm Workers of America, AFL-CIO (Odis William Scarbrough) (1986) 12 ALRB No. 23, the ALRB adopted the NLRB's

guidelines for determining what is sufficient for voluntarily leaving interim employment, as outlined in Knickerbocker Plastic Co.

(1961) 132 NLRB 1209 [48 LRRM 1505]. Knickerbocker held that a discriminatee may be justified in quitting interim employment if the interim job is more burdensome than the job with Respondent, or is unsuited to persons of the claimant's skills and experience. However, where claimants "appear to have been motivated more by personal convenience, preference, or accommodation than by necessity or difficulties inherent in the jobs which they quit," the voluntary relinquishment of such jobs will be held to constitute a willful loss of earnings for the period subsequent to their quitting.

(Knickerbocker, at pp. 1214-1215.)

In Scarborough the claimant left his interim job because of a personal dispute between himself and another employee. The Board found that the sole reason for Scarborough's departure was simply a personal dispute with another employee which was not related to any problem inherent in the job. Therefore, the Board concluded, Scarborough willfully incurred a loss of work by quitting his interim employment for reasons not based on necessity or difficulties inherent in the job. (Scarborough, 12 ALRB No. 23 at pp. 5-6.)

In the instant case, the claimant Morales testified that he did not return to work at Hansen in December 1981 because of a fight with a coworker named Choco during after-work hours in the 1980-81 Salinas lettuce season.

Unlike the ALJ, we do not find that Morales' failure to return to Hansen was motivated by necessity or difficulties inherent in the interim job. The fight with Choco did not occur during working hours and thus was not within the employer's sphere of control. Moreover, Morales never discussed his fear of his personal safety with his foreman or other company personnel, and never requested a transfer of himself or Choco to another crew. We find Morales' situation indistinguishable from that in Scarborough, and consequently hold that Morales willfully incurred a loss of earnings by failing to return to Hansen in December 1981. His backpay claim is thus denied for the 1981-82 and 1982-83 lettuce seasons.

We will apply the seasonal rate for calculating Morales' backpay for the 1980-81 lettuce season. His employment for the 1979-80 Saikhon season would have been sporadic, and thus justifies a daily calculation.

Morales' net backpay can be calculated from General Counsel's Exhibit 5.

33. Adolfo OROZCO Y Lopez

Orozco testified at length about his efforts throughout the backpay period to find work. Although Orozco sought work almost every day during February 1980, he did not look for work during the first few days of March 1980. The ALJ concluded that Orozco's failure to seek work during the very end of one lettuce season was not sufficient to warrant striking any of his backpay.

Because his interim work was substantially less than his predicted gross employment, the ALJ calculated backpay on a daily basis.

Respondent excepts to the ALJ's daily calculation of backpay. It also argues that if the daily formula is used, then Orozco's backpay claim for the first week of March 1980 should be stricken.

Since Orozco would have had steady work at Saikhon, his backpay should be calculated seasonally. His testimony well supports the ALJ's conclusion that he made a diligent search for work throughout the backpay period as a whole.

Orozco's net backpay can be calculated from General Counsel's Exhibits 5, 5 (c) and 14 and Respondent's Exhibit 35 (i) .

34. Carlos OROZCO

During the backpay period, Orozco obtained various interim jobs in Salinas and the Imperial Valley. When seeking work in Calexico, he would usually arrive about 3:30 a.m. and remain until he got work or until there was no possibility of obtaining employment. The ALJ concluded that he had made a reasonable search for interim employment.

The ALJ directed the parties to determine whether backpay was owed for work in the thin/weed classification, which was omitted from General Counsel's amended specification. The ALJ applied a seasonal calculation for the 1981-82 lettuce season and a daily calculation for the remainder of the backpay period.

Respondent excepts to the ALJ's failure to delete any claim for thin/weed work, as well as to her application of the daily formula. Respondent also excepts to the ALJ's finding that Orozco made a sufficiently diligent search for work.

We affirm the ALJ's finding that Orozco made a diligent search for work. Respondent did not refute Orozco's contention that most buses left after 3:30, and in fact he did obtain some interim jobs by arriving at that time.

However, we find that the ALJ erred in failing to delete any claim for thin/weed work. The Board accepts General Counsel's representation that Exhibit 57 constitutes a complete amended specification.

We will apply a seasonal calculation for all of Orozco's backpay since he would have had steady work during all seasons of the backpay period.

Orozco's net backpay can be calculated from General Counsel's Exhibit 57 and Respondent's Exhibits 12(c) and 30.

35. Ernesto OSUNA

Respondent excepts to the ALJ's conclusion that Osuna made a sufficiently diligent search for interim work, as well as to her utilization of the daily method of calculating backpay.

In describing the procedure for obtaining work in Calexico, Osuna testified that when you hear among other workers that a company is going to need laborers, "you notice the vans when they arrive. You run over there yourself to check and see if

you might get in -- a job." This statement indicates that Osuna understood it was important to ask for work as soon as a company's buses arrived at the pickup point.

Osuna admitted that on occasion when he sought work from a foreman, "sometimes I would look and the company would already be gone." He also acknowledged that although he would not look for work until about 5:00, 6:00 or 7:00 a.m., that was the very time that the buses usually leave the area to start work for the day.

On the basis of Osuna's own testimony, as well as the evidence that he obtained very little interim employment during the three-year backpay period, we find that he neglected to make reasonable efforts to find interim work. We therefore conclude that he incurred a willful loss of earnings and his backpay claim is consequently denied. (N.L.R.B. v. Miami Coca-Cola Bottling Company, supra, 360 F.2d 569.)

36. Lucio PAPILLA

Respondent excepts to the ALJ's refusal to offset interim earnings for April 1981, and to her failure to find that Padilla incurred a willful loss of earnings by not following up on potential job opportunities. Respondent also excepts to utilization of the daily method of calculating backpay.

Payroll records submitted by Respondent (Exhibit 51(f)) do not reveal any interim earnings by Padilla during April 1981. Therefore, there are no earnings to offset against gross backpay for that month.

The burden is on the employer to show that a discriminatee willfully incurred a loss by a clearly unjustifiable refusal to take desirable new employment. (Aircraft and Helicopter Leasing and Sales, Inc. (1976) 227 NLRB 644, 646 [94 LRRM 1556].) Since Padilla had no assurance of a job with either Eckel Produce or D'Arrigo in Salinas, and Salinas was a substantial distance from his home, we uphold the ALJ's finding that Padilla did not incur a willful loss.

A seasonal backpay rate is appropriate for Padilla's steady employment in Saikhon's lettuce season and the October-December thin/weed season. Padilla also would have performed sporadic thin/weed work during other parts of the year, for which a daily rate will be applied. We affirm the ALJ's adjustments to interim wages for October-November 1980, as well as her adjustments to Padilla's expense claim. (ALJ Decision, Section B, Part I, pp. 124-125, 128-129.)

Padilla's net backpay can be calculated from General Counsel's Exhibit 26(c) and Respondent's Exhibit 51(f).

37. Francisco Cid PEREZ

Perez sought backpay for both lettuce and melon work. Respondent contended that since Perez obtained only one day of interim work during three melon harvests, he must not have diligently sought work.

Perez was able to recall specific places he sought work and described his routine of going to Calexico about 2:00 or

2:30 a.m. and remaining until about 5:00 a.m. He sometimes went beyond Calexico to areas such as Holtville seeking work. The ALJ concluded that Perez had made a diligent search for work in each of the melon seasons as well as over the backpay period as a whole. She applied a daily backpay rate for some seasons and a seasonal rate for others.

Respondent excepts to the ALJ's finding that Perez is entitled to backpay for each melon season, as well as to her use of the daily formula.

There is no presumption that simply because a discriminatee was unsuccessful in finding interim work, she or he must not have made a diligent search. Perez¹ testimony well supports the ALJ's finding that he made a diligent search for both lettuce and melon work throughout the backpay period.

Perez would have had steady work during all lettuce and melon seasons of the backpay period. Therefore, the seasonal backpay rate is appropriate for both categories of work. Perez¹ net backpay can be calculated from General Counsel's Exhibits 26(c) and 32 and Respondent's Exhibit 55(g).

38. Joab PEREZ Acevedo

Respondent argues that Perez would have had regular employment with Saikhon during the entire backpay period, and that the seasonal rate should be applied throughout.

Perez' specification shows that he would have worked only four days during the 1979-80 lettuce season, and only four days

during the summer 1980 melon season. A daily rate is therefore appropriate for those two seasons. During the remainder of Saikhon's lettuce and melon seasons Perez would have had steady work, for which the seasonal backpay rate will be applied.

Perez's net backpay can be calculated from General Counsel's Exhibit 34 and Respondent's Exhibit 35 (c) .

39. Jonathan PEREZ Azevedo

Respondent argues that Perez' backpay should be calculated seasonally for every season of the backpay period.

Perez' specification shows that he would have worked only eleven days during the eleven weeks of Saikhon's 1979-80 lettuce season. We find that his work pattern was sporadic for that season, and a daily rate will be applied. For the remainder of the backpay period Perez would have enjoyed steady work at Saikhon, and a seasonal rate is therefore appropriate.

Perez' net backpay can be calculated from General Counsel's Exhibits 5, 5 (a) and 21.

40. Jose QUIJAS Chavez, Sr.

Quijas had interim employment with D'Arrigo during the 1979-80 and 1980-81 lettuce seasons. On March 5, 1981, it was raining hard when Quijas and the other workers reported for work. The crew foreman told them to wait for the rain to stop. After waiting half an hour to an hour in his car, Quijas decided to return home because it was still raining hard.

The foreman testified that employees were not free to decide on their own to leave but were supposed to wait for his

instructions. When Quijas returned to work the next day, the foreman fired him.

The ALJ, citing NLRB cases, found that Quijas' behavior did not rise to the level of a willful loss of earnings. She calculated Quijas¹ backpay daily except for the 1980-81 season, which she calculated seasonally.

Respondent excepts to the ALJ's finding that Quijas' termination from D'Arrigo did not constitute a willful loss of earnings. Respondent also excepts to the ALJ's refusal to calculate all of Quijas' backpay seasonally.

Although in a number of cases the NLRB has considered whether an employee discharged from interim employment has engaged in conduct amounting to a willful loss of earnings, there apparently are no NLRB cases in which an employee's backpay claim actually has been diminished because the claimant was discharged by an interim employer for cause. (Cf. Newport News Shipbuilding (1986) 278 NLRB 1030, 1033 [122 LRRM 1285]; Sylvan Manor Health Care Center (1984) 270 NLRB 72, 75 [116 LRRM 1048].)

Sylvan concerned a nurse's aide who was discharged for allegedly pushing or shoving an elderly patient whom she was attempting to hurry along a corridor. In Newport the employee had been fired from various interim jobs for such reasons as poor customer rapport, excessive illness, and lying on a job application. In another NLRB case an employee was terminated by an interim employer for excessive absenteeism. (Aircraft and

Helicopter Leasing and Sales, Inc., supra, 227 NLRB 644.) All three cases involve behavior more serious than Quijas' leaving the worksite in heavy rain without permission, and yet the NLRB did not find willful loss of earnings in any of them.

We conclude that Respondent has not met its burden of showing a willful loss of earnings.

Quijas would have enjoyed steady work at Saikhon throughout the backpay period. Thus, the seasonal backpay formula is appropriate.

Quijas' net backpay can be calculated from General Counsel's Exhibit 5 (c).

41. Jose M. QUINTERO

Quintero claimed \$458.33 in medical expenses for a tonsillectomy performed on him in Mexicali during the backpay period. Quintero estimated the amount, and stated that he believed the operation was in October or November 1981. The ALJ allowed the expense.

The ALJ calculated Quintero's backpay at the daily rate for all seasons of the backpay period.

Respondent excepts to the ALJ's refusal to delete Quintero's claim for medical expenses, as well as her daily method of calculating backpay.

NLRB caselaw allows the recovery of interim expenses based on a reasonable estimate. (Famet, Inc., supra, 222 NLRB 1180 [91 LRRM 1473].) Since Respondent has not met its burden of

showing Quintero's medical expenses were unreasonably large, nor that the expenses would not have been covered by Saikhon's medical plan, the claim is allowed.

A seasonal calculation is appropriate for Quintero's lettuce and summer melon work, which would have been steady during all seasons. A daily calculation is more appropriate for his sporadic thin/weed and winter melon work.

Quintero's net backpay can be calculated from General Counsel's Exhibit 26 (d) and Respondent's Exhibits 16 (g), 51(a) and 47(c).

42. Andres REYES Cortes

Respondent excepts to the use of the daily formula for all lettuce seasons. Respondent also contends that because Reyes testified he worked at Lu-Ette the first half of December 1980, \$500 in interim earnings should be deducted. Respondent further contends that Reyes quit interim employment in March 1983 and did not return to Saikhon until June 1983, thus voluntarily removing himself from the market for three months.

The record clearly establishes that Reyes quit work at Lu-Ette because Mario Saikhon Company called him back to work. Thus, backpay continued to accrue until his recall. Although the sometimes confused testimony of Reyes appears to indicate that he worked for Lu-Ette for the first half of December 1980, the payroll records constitute sufficient proof that he did not begin working there until December 15, 1980.

Reyes was predicted to have worked less than one-half of the 1979-80 lettuce season, but every day of all other lettuce seasons. Thus, a daily and seasonal formula will be applied respectively.

Reyes' net backpay can be calculated from General Counsel's Exhibit 5.

43. Felix REYES Cortes

Respondent excepts to the ALJ's use of a daily formula for all lettuce season work and to the refusal to credit Reyes' oral testimony about interim employment during November 1980.

Reyes was expected to work less than one-half of the 1979-80 lettuce season but every day of all other lettuce seasons. Thus, a daily and seasonal formula will be applied respectively. The ALJ appropriately considered the backpay specification prepared from daily payroll records as more accurate than Reyes' oral testimony. The specification shows that Reyes did not have any November 1980 interim earnings. Therefore, no interim earnings for that month will be deducted.

Reyes' net backpay can be calculated from General Counsel's Exhibit 5 and Respondent's Exhibit 51(e).

44. Salvador REYES Cortez

Respondent excepts to the ALJ's application of a daily rather than seasonal formula to any of Reyes' backpay and to the ALJ's finding that supervisor Munoz was hit by Reyes after he was fired rather than before he was fired. Respondent asserts that

Reyes incurred a willful loss of earnings because of this alleged misconduct.

Respondent has failed to meet its burden of proof that the physical assault occurred before rather than after Reyes was terminated. We affirm the ALJ's finding that Reyes was terminated as a result of his verbal dispute with Munoz. The NLRB has consistently held that discriminatees do not incur a willful loss of earnings when they are terminated by an interim employer for engaging in a verbal argument with a supervisor. (United Aircraft Corporation (1973) 204 NLRB 1068 [83 LRRM 1616]; Artim Transportation System, Inc. (1971) 193 NLRB 179 [78 LRRM 1607].)

Reyes was expected to work only two days during the 1979-80 lettuce season and on an irregular basis for the 1980-81 and 1981-82 seasons. Thus, a daily formula will be applied for these seasons. However, a seasonal formula is appropriate for the 1982-83 lettuce season when Reyes would have worked regularly.

Reyes' net backpay can be calculated from General Counsel's Exhibits 5 and 5c.

45. Efrain ROBLES Arroyo

Respondent excepts to the ALJ's use of a daily formula. Additionally, Respondent excepts to the ALJ's refusal to find any interim earnings in December 1981 from Grower's Exchange.

Robles was predicted to have worked only the last few weeks of the 1979-80 lettuce season, but every day, except one, of all other lettuce seasons. Thus, a daily and seasonal formula will be applied respectively.

Robles testified that a paycheck stub for December 1981 from Grower's Exchange represented vacation pay. Vacation pay is deducted as interim earnings only if the respondent employer establishes that it paid vacation benefits. (Miranda Mushroom Farm, Inc. (1982) 8 ALRB No. 75.) Since Respondent has cited no evidence that it provided vacation benefits, Respondent has failed to meet its burden to establish that the vacation pay should be deducted as interim earnings. (N.L.R.B. v. Brown & Root, Inc. (8th Cir. 1963) 311 F.2d 447 [52 LRRM 2115].)

Robles' net backpay can be calculated from General Counsel's Exhibit 61.

46. Carlos RODRIGUEZ Madrigal

Respondent excepts to the ALJ's refusal to deduct alleged interim earnings in June and December 1980 and June 1981 and her application of a daily formula to all of Rodriguez' backpay.

Rodriguez testified explicitly after much questioning that he did not remember if he had worked in June of 1980 and 1981 or December 1980. Respondent has failed to meet its burden of proof that Rodriguez had interim earnings during the months in question. (Brown & Root, Inc., supra, 311 F.2d 447.)

Rodriguez was predicted to have worked every day, but two, of all three lettuce seasons, so a seasonal formula is appropriate for calculating all lettuce work. Rodriguez was also expected to work regularly in the 1981 and 1982 melon harvests, but only sporadically in the 1981 melon harvest. Thus, a seasonal and daily calculation will be applied respectively.

Rodriguez' net backpay can be calculated from General Counsel's Exhibit 56 .

47. Carlos Ignacio RODRIGUEZ Marquez

Respondent excepts to use of the daily formula to calculate backpay and the ALJ's refusal to offset interim earnings for June 1980 and May 1981.

Rodriguez testified that he could not be certain if he had interim earnings in June 1980 or in May 1981, and that he would have to look at check stubs he kept at home. Respondent could have issued a subpoena duces tecum requiring Rodriguez to bring his check stubs to the hearing. Respondent failed to do so and thus failed to meet its burden of proof that any amount of interim earnings should be deducted for the time in question. (Brown & Root, Inc., supra, 311 F.2d 447.)

Rodriguez was expected to work irregularly for the 1979-80 lettuce season, but regularly for all other lettuce seasons. Thus, a daily and seasonal formula will be applied respectively. All of Rodriguez' expected thin/weed work was sporadic, thus indicating a daily calculation of backpay is appropriate. Rodriguez' expected melon harvest work was irregular for all years, except 1982 when it was regular. Thus, a daily and seasonal formula will be applied respectively.

Rodriguez' net backpay can be calculated from General Counsel's Exhibit 53 and Respondent's Exhibit 50 (a) .

48. Santiago RONQUILLO Alva

Respondent excepts to the ALJ's daily calculation of backpay. Additionally, Respondent believes Ronquillo abandoned interest in his job at Saikhon because Ronquillo refused to take a lettuce harvester job at Jack T. Baillie while he had interim employment at Holly Sugar.

Ronquillo testified that he did not abandon interest in the job until he was made an offer of reinstatement and then considered whether he should return despite the strike-related problems. Respondent failed to prove that Ronquillo abandoned interest in the Saikhon job simply by refusing other lettuce harvest work in favor of his work at Holly Sugar.

Ronquillo would have worked regularly for all lettuce seasons at Saikhon and thus a seasonal calculation for backpay is appropriate.

Ronquillo's net backpay can be calculated from General Counsel's Exhibits 5 and 9 and Respondent's Exhibits 39 and 55(h) .

49. Jose L. SAAVEDRA

Respondent excepts to the ALJ's application of a daily formula.

Saavedra was expected to work sporadically during the 1979-80 lettuce season, but on a regular basis for all other lettuce seasons. Thus, a daily and seasonal formula will be applied respectively. Saavedra would have worked regularly for both the 1981 and 1982 melon seasons and thus a seasonal formula will be applied for that work.

Saavedra's net backpay can be calculated from General Counsel's Exhibit 48 and Respondent's Exhibits 35(a) and 45.

50. Jesus SOLANO Esqueda

Respondent excepts to the ALJ's finding that Solano did not abandon interest in his job at Saikhon until December 1983. Respondent also excepts to the ALJ's refusal to apply the seasonal formula to all of Solano's backpay.

Respondent's contention that because Solano took a job as a mechanic he abandoned any interest in his job as a lettuce harvester at Saikhon is not supported by the record. Solano testified that he did not abandon interest in his job until he received a raise at his interim employer, and Respondent failed to prove *otherwise*.

(N.L.R.B. v. Brown & Root, Inc., supra, 311 F.2d 447.)

Solano was predicted to have worked regularly throughout the backpay period, except for two weeks during the 1980-81 lettuce season and a few days during the 1982-83 season. A seasonal formula is therefore applicable.

Solano's net backpay can be calculated from General Counsel's Exhibits 5, 5(c) and 10.

51. Ramon TORRES Rodriguez

Respondent excepts to the application of the daily formula because Torres was expected to have enjoyed steady employment at Saikhon. Respondent also excepts to the ALJ's refusal to deduct interim earnings for more than one season at Native American Farms.

Since Torres was predicted to have worked steadily in all seasons, a seasonal formula is appropriate.

Torres testified at least twice that he worked only one season at interim employer Native American Farms, but he was confused as to whether the season he worked was 1980-81 or 1981-82.

Respondent agreed that General Counsel would review the backpay specification to determine if there was an error and that Torres would be subject to further examination to resolve the issue. Respondent failed to recall Torres or introduce any additional evidence. Thus, no interim earnings other than those indicated in the backpay specification will be deducted.

Torres' net backpay can be calculated from General Counsel's Exhibit 69.

52. Esteban TRUJILLO Galvan

Respondent excepts to the ALJ's finding that Trujillo was sufficiently diligent in searching for work throughout the backpay period. However, Respondent utterly fails to state any grounds upon which the exception is based or cite to any portion of the record in support of the exception. Therefore, the exception is overruled.

We affirm the ALJ's application of a seasonal formula.

Trujillo's net backpay can be calculated from General Counsel's Exhibit 59.

53. Jorge VALDEZ Ibarra

Respondent excepts to application of the daily method of calculating backpay and to the ALJ's finding that Valdez was sufficiently diligent in his search for work.

Respondent made no legal arguments in support of its position that Valdez did not adequately search for work and again failed to state any grounds for the exception or cite any portion of the record in support. Thus, Respondent has failed to meet its burden of proof and the exception is overruled.

Since Valdez was predicted to have worked regularly during lettuce seasons throughout the backpay period, the seasonal backpay formula is appropriate.

Valdez' net backpay can be calculated from General Counsel's Exhibits 5, 5(a), 5(c) and 15 and Respondent's Exhibits 12(d), 42(e) and 46(e).

Part II; Discriminatees Who Testified and Were Not Challenged in Respondent's Brief

There are 42 discriminatees who are not addressed in Respondent's brief and regarding whom Respondent filed no specific exceptions. Since Respondent has not raised issues specific to these discriminatees, such as the diligence of their search for work or legitimacy of interim expenses, we will not review the ALJ's findings and conclusions concerning those issues.¹⁴

¹⁴Exceptions which require the Board to engage in its own attempt to determine what errors, mistakes or oversights the ALJ may have committed are inadequate and need not be considered by the Board. (Bonanza Sirloin Pit (1985) 275 NLRB 310 [119 LRRM 1095].)

However, we find that Respondent's broad exceptions to the ALJ's rationale for applying the daily, quarterly, seasonal or "modified seasonal" backpay formula sufficiently raise that issue with regard to these 42, as well as the other, discriminatees. Moreover, we wish to ensure consistency in application of the appropriate backpay formula to all discriminatees throughout our Decision. Therefore, we will decide the single issue of the appropriate backpay formula to be applied to each of the 42 discriminatees not addressed in Respondent's brief.

1. Jose Rosalio Santiago ARREDONDO Mesa

Because Arredondo's work pattern was expected to be regular for 1980-81 and 1981-82, we will apply the seasonal formula. However, because Arredondo worked only a short time in the 1979-80 lettuce season, a daily formula will be applied for that season.

Arredondo's net backpay can be calculated from General Counsel's Exhibits 5, 5 (c) and 19 and Respondent's Exhibit 27 (b) .

2. Ernesto AVILA Magdaleno

Avila's expected employment pattern with Saikhon for all three lettuce seasons is regular seasonal work. Therefore, backpay for all three seasons will be calculated on a seasonal basis.

Avila's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (b) and Respondent's Exhibits 31, 42 and 46(h) .

3. Gregorio CASTELO Anqulo

We affirm the ALJ's application of the daily formula for the 1979-80 lettuce season and the seasonal formula for the remaining lettuce seasons. The ALJ's decision not to rule on whether thin/weed backpay was owing because the figures were contained in another specification appears unreasonable. Castelo will be awarded thin/weed backpay on a daily basis because he worked sporadically.

Castelo's net backpay can be calculated from General Counsel's Exhibits 26(c) and 28.

4. Guillermo CORRALES

A seasonal formula for calculating the 1981-82 and 1982-83 lettuce season is appropriate given that Corrales was expected to work both lettuce seasons entirely. A daily formula is appropriate for the 1980-81 lettuce season as Corrales was expected to work only the very end of that season.

However, because Corrales was expected to work regularly for all of the 1980, 1981 and 1982 melon harvest season, a seasonal formula will be applied. The only specification for thin/weed work submitted indicates that Corrales would have worked only three days in October 1981. With such minimal expected work, we will apply a daily formula.

Corrales' net backpay can be calculated from General Counsel's Exhibits 40 and 43 and Respondent's Exhibits 17 and 37.

5. Santiago COVARRUBIAS Vidrio

As a lettuce loader and as a melon harvester, Covarrubias was expected to work steadily for all years. Therefore we will apply a seasonal formula for both crops. Covarrubias' expected thin/weed work was regular for the 1980 and 1981 October-December season and thus a seasonal formula is appropriate. However, the expected thin/weed work for the rest of 1981 and all of 1982 and 1983 was irregular thus indicating that a daily formula is more appropriate.

Covarrubias' net backpay can be calculated from General Counsel's Exhibit 26 (a) .

6. Jose Jesus CUEVAS Ortiz

Cuevas was expected to work regularly every day of the lettuce season for all years except the 1979-80 season wherein he was expected to work less than half the season. Therefore, we will apply a seasonal formula to each year except 1979-80, for which a daily formula will be applied.

Cuevas' net backpay can be calculated from General Counsel's Exhibits 5, 5(a) and 18 and Respondent's Exhibit 27.

7. Jose A. FRANCO

The ALJ did not award any backpay for melon work because the days on which backpay is claimed are also claimed for thin/weed work. Since thin/weed paid more, the ALJ assumed that Franco would have worked the job that paid the higher wage.

A seasonal formula for all lettuce season work is appropriate because Franco would have worked regularly in that

crop. Because his thin/weed work was sporadic, a daily formula will be used for thin/weed. The ALJ's assumption that Franco would have worked the job which paid the higher wage is reasonable.

Franco's net backpay can be calculated from General Counsel's Exhibit 26(a), Joint Exhibit 7(A) and Respondent's Exhibit 47(h).

8. Inocencio GOMEZ Barajas

Gomez was expected to work sporadically in thin/weed; thus, backpay calculated daily is appropriate. However, Gomez was expected to work regularly for all lettuce seasons, except for 1979-80 when he would have worked for less than half the season. Thus, we will apply a daily formula for 1979-80 and a seasonal formula for all other seasons.

Gomez' net backpay can be calculated from General Counsel's Exhibit 26(a) and Respondent's Exhibits 42(c), 46(g) and 55(m).

9. Elias GONZALEZ

Gonzalez was expected to work regularly throughout the backpay period. Therefore, a seasonal formula is appropriate for calculating all backpay.

Gonzalez' net backpay can be calculated from General Counsel's Exhibits 5, 5(a) and 5(c) and Respondent's Exhibit 55(k).

10. Jose GUZMAN

A seasonal formula will be applied for all of Guzman's lettuce work, which would have been steady throughout the backpay period. We will apply a seasonal rate for his expected steady thin/weed work in October-November 1980 and November-December 1981, but a daily formula for the remainder of his thin/weed work. A daily rate is appropriate for all of his melon work except for 1983, when his predicted steady work justifies use of a seasonal formula.

Guzman's net backpay can be calculated from General Counsel's Exhibits 26(a) and 47.

11. Eliseo HERRERA Rios

A seasonal formula will be used for Herrera's predicted steady lettuce work. For his sporadic thin/weed work, a daily formula will be applied. Since Herrera would have worked most of the 1980 and May-July 1982 melon harvests, a seasonal formula will be applied for those seasons. However, a daily formula will be used for the 1981 and October-November 1982 melon seasons, when his work would have been sporadic.

Herrera's net backpay can be calculated from General Counsel's Exhibit 26(b) and Respondent's Exhibits 16(a), 18, 47(a) and 51.

12. Ismael LARIOS

Because Larios was expected to work less than a third of the 1979-80 lettuce season, the daily formula will be applied for

that season. For all other lettuce, seasons the seasonal formula is appropriate for his predicted steady work. A daily formula will be applied for all of Larios' melon work except for 1982, when his predicted steady work justifies use of the seasonal formula.

Larios' net backpay can be calculated from General Counsel's Exhibit 26 (c) and Respondent's Exhibit 10 (a).

13. Jose Jesus LEM Flores

A seasonal formula is appropriate for the 1980-81, 1981-82 and 1982-83 lettuce seasons, when Lem would have had steady work. A daily formula will be used for the 1979-80 season, when his work would have been sporadic. The daily formula is appropriate for all of Lem's melon work except for 1982 when his predicted steady work makes a seasonal calculation appropriate.

Lem's net backpay can be calculated from General Counsel's Exhibit 26 (b).

14. Vidal LOPEZ Lopez

Lopez' expected work pattern during all lettuce seasons except 1979-80 was regular, making a seasonal formula appropriate. A daily calculation is appropriate for 1979-80, when his work would have been sporadic. A daily calculation is also appropriate for Lopez' sporadic thin/weed work.

Lopez' net backpay can be calculated from General Counsel's Exhibit 46.

15. Antonio G. MARTINEZ

Martinez was expected to work every day of all the lettuce seasons, and thus a seasonal formula is appropriate. However, a daily formula will be applied for his sporadic thin/weed work.

Martinez' net backpay can be calculated from General Counsel's Exhibit 49.

16. Enrique MARTINEZ Perez

Martinez was expected to work every day of all lettuce seasons. Therefore, a seasonal calculation will be applied. However, Martinez was expected to work only sporadically in thin/weed. Thus, a daily calculation is more appropriate for that work.

Martinez' net backpay can be calculated from General Counsel's Exhibit 26(b) and Respondent's Exhibits 16(k) and 50(o).

17. Ignacio MARTINEZ Gomez

Martinez was expected to work every day of all lettuce seasons at Saikhon, and thus a seasonal formula should be applied. However, Martinez was expected to work only 2-7 days in any of the thin/weed seasons. Such minimal and sporadic expected work warrants a daily calculation for backpay.

Martinez' net backpay can be calculated from General Counsel's Exhibit 26(b) and Respondent's Exhibit 55(b).

18. Jose Guadalupe MARTINEZ

The daily backpay formula is appropriate for the 1979-80 lettuce season where Martinez was expected to work less than half of the season. Backpay will be calculated seasonally for all other lettuce seasons, when Martinez would have had steady work.

Martinez' net backpay can be calculated from General Counsel's Exhibits 5, 5 (c) and 17 and Respondent's Exhibits 21, 23 (j) and 60.

19. Jose MARTINEZ Gomez

For the 1980 lettuce season a daily formula will be applied, as Martinez was predicted to have worked less than 1/3 of the season. For all other years of lettuce season work, a seasonal formula is appropriate. Martinez' expected thin/weed work was regular for only October-November 1980, October 1981, and October, November and December 1982. The rest of his expected thin/weed work was sporadic and minimal. Therefore, a seasonal and daily formula will be applied respectively.

Martinez' net backpay can be calculated from General Counsel's Exhibits 26 (b) and 35 and Respondent's Exhibit 55 (1) .

20. Jose MARTINEZ Guerra

Martinez' work at Saikhon for 1980-81, 1981-82, and 1982-83 was predicted to be regular. Therefore, for those years a seasonal formula is appropriate. However, Martinez was predicted to work only four days in the 1979-80 season, and thus a daily calculation is more appropriate for that year.

Martinez' net backpay can be calculated from General Counsel's Exhibits 5 and 5 (a) and Respondent's Exhibits 16 (c) and 35 (h) .

21. Ladislao MARTINEZ

A seasonal formula is appropriate to calculate Martinez' backpay, since he was expected to work at Saikhon every day of each lettuce season.

Martinez' net backpay can be calculated from General Counsel's Exhibit 39 .

22. Guillermo MONTEJANO Maldonado

A seasonal formula for all years should be applied, except for the 1979-80 season where a daily formula is more appropriate given the short-time period in which Montejano was expected to work. In thin/weed work, in October and November of 1980 and 1981 Montejano was predicted to have worked regularly. Therefore, a seasonal formula will be applied. In 1982 and 1983 Montejano was expected to work sporadically. Thus, a daily formula is appropriate there.

Montejano's net backpay can be calculated from General Counsel's Exhibits 26 (b) and 42 .

23. Rafael MONTEJANO Garcia

Montejano was expected to work less than half of the 1979-80 season but was predicted to work every day of all other seasons. Thus, a daily formula for the 1979-80 season and a seasonal formula for all other years are appropriate.

Montejano's net backpay can be calculated from General Counsel's Exhibit's 5 and 5 (b) and Respondent's Exhibit 23 (k) .

24. Ismael MUNOZ

Munoz would have had steady work in the 1980-81 lettuce season, the 1980 summer melon season, and the 1981 and 1982 winter melon seasons. Therefore, a seasonal formula will be applied to those seasons. For Munoz' predicted irregular work in the 1981-82 and 1982-83 lettuce seasons and the 1981 and 1982 summer melon seasons, the daily formula will be applied.

Munoz' net backpay can be calculated from General Counsel's Exhibit 50 and Respondent's Exhibits 42 (b) and 46 (f) .

25. Santos B. MURILLO

Murillo was expected to work all but 2 days of the 1980-81, 1981-82 and 1982-83 lettuce seasons. Thus, a seasonal formula for these seasons is appropriate. However, since Murillo was expected to work less than one-half of the 1979-80 lettuce season, a daily formula is more appropriate for that year. As for the melon work, Murillo was expected to work all but two days of both the summer 1982 and winter 1981 and 1982 seasons; thus a seasonal formula is appropriate. However, Murillo's summer 1981 melon work was expected to be very sporadic, so a daily formula is appropriate for that time period. Since Murillo 's expected thin/weed work was sporadic in 1981, 1982 and 1983, a daily formula will be used. In October and November of 1980 Murillo was expected to work all but 10 days of a two-month thin/weed season, and thus a seasonal formula is appropriate.

Murillo's net backpay can be calculated from General Counsel's Exhibit 26(c) and Respondent's Exhibit 50(n).

26. Jose Alvaro NAVARRO

Navarro was not expected to work for more than one-half of the 1979-80 lettuce season and thus a daily formula for that work is appropriate. A seasonal formula will be applied for all other lettuce seasons. Navarro was expected to work every day in all melon work, so a seasonal formula is appropriate for that work. Navarro's expected thin/weed work was minimal and sporadic. Thus, a daily formula will be applied to all thin/weed work.

Navarro's net backpay can be calculated from General Counsel's Exhibit 26(c) and Respondent's Exhibits 16(i) and 50(d).

27. Carlos Antonio OSUNA Saucedo

In the 1979-80 lettuce season, Osuna was expected to work less than half the season. Therefore, a daily formula will be applied for that year. However, for the other three seasons Osuna was expected to work all but a total of three days, so that a seasonal formula is appropriate.

Osuna's net backpay can be calculated from General Counsel's Exhibit 64.

28. Marcelino PALACIOS Vigil

Palacios was expected to work every day of all four lettuce seasons, 1979-80 through 1982-83. A seasonal formula is thus appropriate for all lettuce work backpay.

A daily rate is appropriate for every thin/weed season except the October to December 1980 and 1981 seasons, when a seasonal formula is appropriate.

Palacios' melon season work was irregular and sporadic, making the daily formula appropriate, except for 1980 and 1982 when his predicted regular work makes the seasonal formula appropriate.

Palacios' net backpay can be calculated from General Counsel's Exhibit 26 (c) .

29. Elias PICENO Cruz

All of Piceno's expected work' in the lettuce seasons was sporadic and irregular. Thus, lettuce backpay should be calculated on a daily basis. Given his expected sporadic pattern of work, a daily formula will be used to calculate Piceno's melon work, with the exception of the 1982 summer melon work which should be calculated seasonally. Piceno was expected to work every day of the 1980 October to December thin/weed season and a seasonal calculation for that work is appropriate. However, since Piceno was expected to do thin/weed work only sporadically in 1981, 1982 and 1983, a daily calculation is more appropriate for those years.

Piceno's net backpay can be calculated from General Counsel's Exhibit 26(c) .

30. Briqido QUINTERO

Quintero was expected to work less than one-half of the 1979-80 lettuce season, but every day (except one) of the 1980-81, 1981-82 and 1982-83 lettuce seasons. Thus, application of a daily and seasonal formula respectively is appropriate.

Quintero's net backpay can be calculated from General Counsel's Exhibit 66 and Resoondent's Exhibit 24(c) .

31. Alvino Sosa RAMALES

Since Ramales was expected to work less than one-half of the 1979-80 lettuce season, a daily formula is appropriate for that season. However, a seasonal formula is appropriate for Ramales' predicted regular work during the remaining seasons.

Ramales' net backpay can be calculated from General Counsel's Exhibits 5, 5 (a) and 5 (c) and Respondent's Exhibit 35(d) .

32. Roberto REYES Yanez

Because Reyes was expected to work less than one-half of the 1979-80 lettuce season, a daily formula is appropriate for that year. However, Reyes was expected to work steadily the entire 1980-81 and 1981-82 seasons, as well as the two weeks of the 1982-83 season that he was available for work. Therefore, for these three lettuce seasons, a seasonal formula is appropriate. Reyes was expected to work in thin/weed only three days of 1981, for which a daily formula is appropriate.

Reyes net backpay can be calculated from General Counsel's Exhibit 26(d) .

33. Jesus REYNA

Reyna would have worked steadily during every lettuce season, as well as the 1981 and 1982 winter melon seasons and the 1980 and 1982 summer melon seasons; thus, a seasonal calculation

is appropriate for those seasons. However, Reyna's predicted work in the 1981 summer melon season, as well as all of his thin/weed work, was sporadic, justifying a daily calculation.

Reyna's net backpay can be calculated from General Counsel's Exhibit 45 and Respondent's Exhibits 22 (a) , 48 (a) and 50.

34. Manual G. RIVERA

Rivera was expected to work all but two days of the 1979-80, 1980-81 and 1981-82 lettuce seasons. While it appears that Rivera was expected to work all of the 1981-82 lettuce season, for personal reasons he was unavailable for such work. Therefore, we will apply a seasonal formula to all of Rivera's backpay claim.

Rivera's net backpay can be calculated from General Counsel's Exhibits 5, 5 (a) and 5 (c) and Respondent's Exhibit 50 (k) .

35. Antonio SANCHEZ Mariscal

Sanchez' backpay specifications demonstrates that he was not expected to work regularly during any of the lettuce seasons. Thus, a daily formula will be used to calculate all of his backpay.

Sanchez' net backpay can be calculated from General Counsel's Exhibit 20 and Respondent's Exhibits 22 and 24 (e) .

36. Vicente SAUCEDO Floras

Saucedo was expected to work only about the last third of the 1979-80 lettuce season; therefore, a daily formula is appropriate. However, Saucedo was predicted to work steadily every other lettuce season, and every melon season for all years, so a seasonal formula is most appropriate for all those seasons. Saucedo's thin/weed work was sporadic for all but the 1980 October-December season. Thus, a daily formula and seasonal formula will be applied respectively for such thin/weed work.

Saucedo's net backpay can be calculated from General Counsel's Exhibit 26 (d) and Respondent's Exhibits 18 (b) and 50 (i).

37. Ramon SEPULVEDA Saldivar, Sr.

Sepulveda would have had steady work during all lettuce seasons except 1979-80, where he was expected to work only the last third of the season. Thus, a seasonal formula is appropriate for all seasons except 1979-80 wherein a daily formula is appropriate. For Sepulveda's steady melon season work, a seasonal formula is appropriate. Only in the 1980 and 1981 October to December thin/weed work was Sepulveda expected to work every day. In all other thin/weed work, Sepulveda was predicted to work sporadically. Therefore, a seasonal formula is appropriate for 1980 and 1981 October to December, and a daily formula will be applied to all other thin/weed work.

Sepulveda's net backpay can be calculated from General Counsel's Exhibit 26 (d) and Respondent's Exhibit 16 (h).

38. Jose SILVAS Camargo

Silvas was predicted to work steadily as a lettuce closer every year except 1979-80 when he would have worked less than 1/3 of the season. Therefore a seasonal and daily formula will be applied respectively. For Silvas' predicted steady work during the 1980, 1981 and summer 1982 melon seasons, a seasonal calculation is appropriate. However, for the winter 1982 season, Silvas was predicted to work irregularly and thus a daily formula is appropriate. As for his thin/weed work, only in the October to December 1980 season was Silvas expected to work the entire season. For all other thin/weed work Silvas was expected to work sporadically. Thus, a seasonal formula will be used to calculate the 1980 thin/weed backpay, but a daily formula will be applied to the remainder of his thin/weed work.

Silvas' net backpay can be calculated from General Counsel's Exhibit 26(d) and Respondent's Exhibits 35(g), 37(a) and 40(a).

39. Alfonso TORRES Rodriquez

Torres' predicted irregular work during the 1979-80 and 1980-81 lettuce seasons indicates that a daily calculation of backpay is appropriate. However, during 1981-82 and 1982-83, Torres was expected to work all but six and seven days of each season so that a seasonal calculation is appropriate for those two years.

Torres' net backpay can be calculated from General Counsel's Exhibits 5, 5(a) and 16 and Respondent's Exhibit 35(e).

40. Jesus VALENCIA Chavez

Backpay for lettuce season work is claimed for the years 1980-81, 1981-82 and 1982-83. Valencia was expected to work irregularly for all three seasons. Therefore, a daily formula will be applied to all lettuce season backpay. Likewise, all thin/weed work was irregular and usually minimal. Therefore, a daily formula for calculating all thin/weed work is appropriate.

Valencia's backpay can be calculated from General Counsel's Exhibit 26 (d) and Respondent's Exhibit 49 (b).

41. Pedro VASQUEZ Ramos

A seasonal formula will be applied to every lettuce season, except the 1979-80 season where it appears that a daily formula is more appropriate given the minimal expected work Vasquez would have had. A daily formula is appropriate for all melon and thin/weed backpay except for the 1982 summer melon backpay, which is more appropriately calculated seasonally since Vasquez would have worked almost the entire season.

Vasquez' net backpay can be calculated from General Counsel's Exhibit 26 (d) and Respondent's Exhibit 50 (g).

42. Cecilio ZUNIGA Vasquez

For Zuniga's predicted steady lettuce work, a seasonal calculation is appropriate. On the other hand, all of Vasquez¹ thin/weed expected work every year was irregular, and thus a daily calculation is appropriate. Zuniga's predicted work in melons was sufficiently regular for all seasons to make a seasonal calculation appropriate.

Zuniga's net backpay can be calculated from General Counsel's Exhibits 26 (d) and 44 and Respondent's Exhibits 16 (e) and 38.

Part III: Discriminatees Who Did Not Testify

A. Discriminatees Whose Testimony Was Waived by Respondent

(1) Lettuce Crew

There are 47 discriminatees in the lettuce worker classification whose testimony was waived by Respondent. Some of these employees worked only in the lettuce, while others also worked in melons and/or thin/weed.

The Respondent excepts only to the ALJ' s calculation of backpay on a daily basis for most of these discriminatees.

1. Jesus ARREDONDO

The ALJ calculated backpay at the daily rate. We will apply the seasonal formula since Arredondo would have had steady, full time work during the lettuce season.

Arredondo's net backpay can be calculated from General Counsel's Exhibit 54.

2. Arnoldo BARRAZA

The ALJ applied the daily formula, as calculated in General Counsel's specification. However, since Barraza had steady, full time lettuce work throughout the lettuce season, we will apply the seasonal formula.

Barraza's net backpay can be calculated from General Counsel's Exhibit 5 (b) .

3. Ramon BRAVO

The ALJ applied the daily formula, but we will apply the seasonal formula since Bravo worked steadily throughout the lettuce season.

Bravo's net backpay can be calculated from General Counsel's Exhibits 5, 5 (c) and 11, and Respondent's Exhibits 23(a) and 49.

4. Lydia BUZO

We will apply a seasonal rate for the October-November period when Buzo had steady, full time thin/weed work, and a daily formula for the remaining months of the year when Buzo worked sporadically in thin/weed and as a lettuce waterperson.

Buzo's net backpay can be calculated from General Counsel's Exhibit 67.

5. Jesus CABRERA

Cabrera is predicted to have worked steadily in the lettuce season at Saikhon, and sporadically in melons and thin/weed. The ALJ calculated all of Cabrera's backpay under the daily formula.

We will apply the seasonal formula for Cabrera's lettuce backpay and the daily formula for his work in the melons and thin/weed.

Cabrera's net backpay can be calculated from General Counsel's Exhibit 26 (a) and Respondent's Exhibit 25 (a) .

6. Marcellno CANALES

Although Canales had full time, steady work in the lettuce at Saikhon, the ALJ applied the daily backpay formula. We will apply the seasonal formula.

Canales' net backpay can be calculated from General Counsel's Exhibits 5 and 5 (b) .

7. Amador Guzman CASIMIRO

Casimiro's employment as a lettuce worker at Saikhon was less regular than that of many discriminatees. He often worked only 1 to 3 days per week, and only occasionally 4 or 5 days per week.

We affirm the ALJ's application of the daily formula to calculate Casimiro's backpay.

Casimiro's net backpay can be calculated from General Counsel's Exhibit 70 and Respondent's Exhibit 8.

8. Jesus CASTRO

Castro was predicted to have steady, full time lettuce work, throughout the backpay period. Therefore, we will apply the seasonal formula rather than the daily formula applied by the ALJ.

Castro's net backpay can be calculated from General Counsel's Exhibit 26 (a) and Respondent's Exhibits 42 (d) and 46 (a) .

9. Manuel CORRALES

The ALJ applied a daily formula although Corrales worked steadily throughout the lettuce season at Saikhon. We will apply the seasonal formula.

Corrales' net backpay can be calculated from General Counsel's Exhibit 5 and Respondent's Exhibits 23 and 55 (j) .

10. Rigoberto DELGADILLO

The ALJ used a daily formula to calculate Delgadillo's backpay because his interim earnings were low. However, since Delgadillo's work pattern at Saikhon was steady and full time during the lettuce season, we will apply the seasonal formula.

Delgadillo's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (a) and Respondent's Exhibit 49 (a) .

11. Joaquin FLORES

Although the ALJ calculated Flores' backpay daily, we will apply a seasonal rate since he had steady, full time work during the Saikhon lettuce season.

Flores' net backpay can be calculated from General Counsel's Exhibit 5 (c) .

12. Ramon Haro FLORES

Flores was reinstated in December 1980, and claimed backpay only for 5 weeks of the 1979-80 lettuce season. The ALJ calculated backpay daily, but we will apply the seasonal formula since Flores was predicted to work full time during the 5-week period.

Floras' net backpay can be calculated from General Counsel's Exhibit 71.

13. Ascencion GALAVIZ

Because Galaviz' interim employment was sporadic, the ALJ applied the daily rate in computing both the lettuce and melon backpay. We find his predicted employment in both crops steady enough to make the seasonal backpay formula appropriate.

Galaviz' net backpay can be calculated from General Counsel's Exhibit 26 (a) and Respondent's Exhibit 16 (j) .

14. Ramon GALICIA

The ALJ applied the daily backpay formula on the basis of Galicia's intermittent interim employment. However, we find his employment pattern at Saikhon regular enough to justify application of the seasonal formula.

Galicia's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (a) .

15. Adolfo GONZALEZ

Gonzalez would have worked steadily in the Saikhon lettuce seasons in 1980 and 1981. Gonzalez' backpay for lettuce work will be calculated seasonally since he had steady, full time work at Saikhon during that season.

Gonzalez also performed thin/weed and melon work at Saikhon. However, because no interim wages were listed for those seasons, the method of calculation makes no difference.

Gonzalez' net backpay can be calculated from General Counsel's Exhibit 26 (a) .

16. Marcos HERMOSILLO

Hermosillo would have worked steadily throughout most of the December 1980 through March 1983 lettuce seasons at Saikhon. We will apply the seasonal rate, because Hermosillo would have had steady work except for his apparent unavailability in March and December 1981.

Hermosillo's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (b) and Respondent's Exhibits 42 (a) and 46 (i) .

17. Alvaro HERNANDEZ

The ALJ applied the daily backpay formula because of the irregular pattern of Hernandez' interim employment. However, because he generally had steady work at Saikhon during most of the lettuce season, we will apply the seasonal rate.

Hernandez' net backpay can be calculated from General Counsel's Exhibits 5, 5 (a) and 5 (b) and Respondent's Exhibits 50 (p) and 55 (a) .

18. Andres HUERTA

We affirm the ALJ's finding that the daily rate should be applied for the 1979-80 season, when Huerta would have worked sporadically. However, the seasonal rate is appropriate for the remainder of the backpay period, when Huerta would have worked steadily.

Huerta's net backpay can be calculated from General Counsel's Exhibit 5.

19. Oscar IBANEZ

Ibanez' backpay claim is essentially for only one lettuce season, December 1979 through the first half of March 1980 (plus 5 days of December 1980 prior to his reinstatement). The backpay specifications show a pattern of sporadic employment at Saikhon, and thus the daily formula will be applied.

Ibanez' net backpay can be calculated from General Counsel's Exhibits 5 and 5 (c) .

20. Irineo JIMENEZ

Jimenez was predicted to have worked steadily throughout the Saikhon lettuce season. The seasonal formula is therefore appropriate.

Jimenez' net backpay can be calculated from General Counsel's Exhibits 5 and 5(a) .

21. Juan JIMENEZ

The ALJ applied the daily formula throughout the backpay period. We will apply the daily formula for the 1980-81 and 1981-82 seasons when Jimenez¹ predicted work pattern was irregular, but the seasonal formula for the 1982-83 season when he would have worked steadily during the entire season.

Jimenez' net backpay can be calculated from General Counsel's Exhibit 5.

22. Sixto JIMENEZ

Although Jimenez would have had steady, full time work in Saikhon's lettuce season throughout the backpay period, the ALJ applied the daily backpay rate. We will apply the seasonal rate.

Jimenez' net backpay can be calculated from General Counsel's Exhibits 5 and 5(a) .

23. Jose Angel LOPEZ

The ALJ applied the daily formula because of the pattern of Lopez' interim employment, as well as the fact that for brief portions of the backpay period his employment would not have been steady. We will apply the seasonal formula throughout the backpay period, since Lopez generally would have had steady work.

Lopez' net backpay can be calculated from General Counsel's Exhibit 5.

24. Armando MARTINEZ

Martinez worked both in lettuce and in thin/weed at Saikhon. In lettuce, he would have worked steadily throughout the backpay period. We find the seasonal formula appropriate for this work.

In thin/weed, Martinez would have worked full time for only 5 months of the entire 4-year backpay period, and intermittently during other months. On the basis of Martinez thin/weed employment as a whole, we will apply the daily formula.

Martinez net backpay can be calculated from General Counsel's Exhibit 26 (b) and Respondent's Exhibit 51 (h) .

25. Hector MARTINEZ

Martinez would have worked steadily in lettuce during most of the backpay period, and sporadically in melons. Therefore, we will use the daily formula for Martinez' melon work but the seasonal formula for his lettuce work.

Martinez' net backpay can be calculated from General Counsel's Exhibit 26(c) .

26. Julian MARTINEZ

Martinez was predicted to have had steady, full time work during Saikhon's lettuce seasons throughout the backpay period. We will apply the seasonal rate.

Martinez' net backpay can be calculated from General Counsel's Exhibits 5 and 5 (c) and Respondent's Exhibit 50 (L) .

27. Pedro G. MARTINEZ

General Counsel's backpay specification demonstrates that Martinez would have had steady, full time work during Saikhon's lettuce season, and therefore the seasonal rate is appropriate.

Martinez net backpay can be calculated from General Counsel's Exhibit 5 (a) and Respondent's Exhibit 35 (b) .

28. Raul MARTINEZ

The ALJ applied the daily formula for Martinez because she could not determine whether he worked longer hours at his interim employer than at Saikhon.

Martinez generally would have worked full time during the lettuce season at Saikhon throughout the backpay period. No showing was made that Martinez worked longer hours at his interim employment than at Saikhon, and so no offset for "excess overtime" is appropriate. Thus, we will apply the seasonal formula for the entire backpay period.

Martinez' net backpay can be calculated from General Counsel's Exhibit 5.

29. Cleofas MORALES

Morales would have worked sporadically during the 1979-80 Saikhon lettuce season, but would have had steady, full time work for the remainder of the backpay period. We will apply the daily formula for the 1979-80 season, and the seasonal formula thereafter.

Morales' net backpay can be calculated from General Counsel's Exhibit 5 and Respondent's Exhibit 25.

30. Jose MORALES

Morales was predicted to have had full time work in Saikhon's lettuce season throughout the backpay period, except for two months (December 1979 and January 1980). Since no interims were earned during those two months, the method of calculation for those months would not affect the net backpay. Therefore, we will apply the seasonal formula for the entire backpay period.

Morales' net backpay can be calculated from General Counsel's Exhibits 5, 5 (b) and 5 (c) and Respondent's Exhibit 50 (c).

31. Juan MORALES

Morales worked in lettuce, melons, and thin/weed at Saikhon. The ALJ calculated backpay at the daily rate for all three types of work.

Since Morales had steady, full time work at Saikhon during the lettuce season, we will apply the seasonal rate for his lettuce work. Morales had somewhat less regular work in the melon

season (4 to 29 days per month); however, his work pattern was not uneven enough to be considered sporadic, and therefore we will apply the seasonal formula for this work as well. In thin/weed, Morales often would have worked only 1 to 5 days per month, and only once would have worked more than 13 days in a month; therefore, we will apply the daily rate for this work.

Morales' net backpay can be calculated from General Counsel's Exhibit 26 (b) and Respondent's Exhibits 23 (b) and 47 (f).

32. Jose MORALEZ

Since Morales would have had steady, full time lettuce work throughout the backpay period, we will apply the seasonal rate.

Morales' net backpay can be calculated from General Counsel's Exhibits 5 and 5 (b) .

33. Aniceto MURGUIA Briceno

Murguia would not have worked at all in the first week of March 1981, and would have worked only about half the available days in February 1980 and the first week of March 1980. Despite these brief gaps, the steady pattern of Murguia's expected work during the remainder of the backpay period is sufficient to justify use of the seasonal formula throughout.

Murguia's net backpay can be calculated from General Counsel's Exhibits 5 (a) and 5 (c) .

34. Jesus NAVARRO

We will apply the seasonal rate because Navarro would have had steady work as a loader throughout Saikhon's lettuce season.

Navarro's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (c) and Respondent's Exhibit 5 0 (m) .

35. Domingo NUNEZ

Nunez would have had steady, full time work at Saikhon only during January 1981. For the remainder of the backpay period, his predicted employment ranged from zero to 15 days per month. Nunez' gross employment pattern justifies the ALJ's application of the daily formula.

Nunez' net backpay can be calculated from General Counsel's Exhibit 5 and 5 (a) .

36. Juan ORTEGA

Juan Ortega is deceased. Since his estate's backpay claim is for only part of one season (February to mid-March 1980) , we uphold the ALJ's use of the daily backpay formula.

Ortega's net backpay can be calculated from General Counsel's Exhibit 5 and Respondent's Exhibit 27(a) .

37. Santos PATINO

During the 1979-80 lettuce season, Patino is predicted to have worked only 2 days in February and 2 days in March. For the remainder of the backpay period, he would have had steady, full time lettuce work at Saikhon.

The ALJ calculated backpay daily for the entire backpay period. We will use the daily formula for the 1979-80 season and the seasonal formula for the remainder.

Patino's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (b) .

38. Jose PLACENCIA

Since there was no showing that Placencia's higher interim earnings resulted from overtime work, we will apply the seasonal formula for his lettuce work. We will also apply the seasonal rate for the October-December thin/weed work, but a daily rate for the sporadic thin/weed work during other months of the year.

Placencia's net backpay can be calculated from General Counsel's Exhibit 26 (c) and Respondent's Exhibits 47 (d) and 51 (g) .

39. Jose QUIJAS, JR.

Quijas would have had steady, full time work in the lettuce season at Saikhon throughout the backpay period. We will apply the seasonal formula.

Quijas¹ net backpay can be calculated from General Counsel's Exhibits 5 (a) and 5 (c) and Respondent's Exhibit 23 (c) .

40. Raul RESENDIZ

Resendiz is predicted to have had steady, full time work during the lettuce season throughout the backpay period. Therefore, we will apply the seasonal rate.

Resendiz¹ thin/weed employment, however, would have been sporadic even during the usual October-November season.

Therefore, we affirm the ALJ's application of the daily formula for this work.

Resendiz' net backpay can be calculated from General Counsel's Exhibit 26 (d) .

41. Manuel RODRIGUEZ

Rodriguez would have worked sporadically in the 1979-80 lettuce harvest, but would have had full time work during the remaining lettuce seasons of the backpay period. We will apply the daily formula for the 1979-80 season but the seasonal rate for the remaining seasons.

Rodriguez' net backpay can be calculated from General Counsel's Exhibit 5 (b) .

42. Baltazar ROJAS

We will apply the daily rate for the 1979-80 season, when Rojas would have worked a total of 5 days the entire season. For the remaining seasons, when his work would have been steady, we will apply the seasonal rate.

Rojas' net backpay can be calculated from General Counsel's Exhibit 5 and Respondent's Exhibit 50 (j) .

43. Luis M. Arias SANDOVAL

Sandoval would have had sporadic work during the 1979-80 lettuce season at Saikhon, but would have worked steadily throughout the remainder of the backpay period. We will apply the daily rate for the 1979-80 season and the seasonal rate for the remainder.

Sandoval's net backpay can be calculated from General Counsel's Exhibits 5 and 5 (b) .

44. Efrain SEPULVEDA

Since there was no showing that any of Sepulveda's interim earnings were due to extra work, they will all be deducted from gross backpay. We will apply the daily rate for the 1979-80 season (Sepulveda would have worked only 3 days during the entire season) and the seasonal rate for the remainder of the backpay period.

Sepulveda's net backpay can be calculated from General Counsel's Exhibits 5 and 5(a) .

45. Miguel SOSA Ramales

Although Sosa would have had no work at Saikhon in December 1979 or January 1980, he would have had steady work during all lettuce seasons for the remainder of the backpay period. Therefore, the seasonal rate is appropriate.

The ALJ states that Sosa also performed thin/weed work, and that his specification for this work is contained in General Counsel's Exhibit 27. However, we find no thin/weed specification for Sosa in that exhibit or any other. Therefore, we conclude that Sosa did not perform thin/weed work for which he is owed backpay.

Sosa's net backpay for lettuce work can be calculated from General Counsel's Exhibits 5, 5 (a) and 5 (c) .

46. Pedro SOTO

We will apply the seasonal rate since Soto generally had full time, steady work during Saikhon's lettuce season. Although he would not have worked at all during December 1979 and January 1980, he had no interim earnings during that time, either; thus, the method of calculation for those two months makes no difference.

Soto's net backpay can be calculated from General Counsel's Exhibits 5, 5(a) and 5(c) and Respondent's Exhibits 23(h) and 40.

47. Jesus TORRES

We will apply the seasonal rate since Torres would have had full time, steady work during Saikhon's lettuce seasons. Like Pedro Soto, Torres would not have worked at all during December 1979 and January 1980, but the method of calculation for those two months makes no difference because he had no interim earnings during that time.

Torres' net backpay can be calculated from General Counsel's Exhibits 5 and 5(a) and Respondent's Exhibits 51(c) and 24(b).

(2) Melon Crew

There are 17 discriminatees in the melon crew classification whose testimony was waived by Respondent. Some of these employees worked only in the melons, while others also worked in broccoli and/or thin/weed. Respondent excepts only to the ALJ's calculation of backpay on a daily basis.

1. Miguel CARRILLO

Carrillo worked in thin/weed, melons and broccoli. His employment in all three types of work would have been mostly sporadic. During the few months when Carrillo was expected to have worked full time at Saikhon, his interim earnings were generally lower than his expected gross; thus, the method of calculation makes little or no difference. Therefore, we will use the daily formula throughout the backpay period.

Carrillo's net backpay can be calculated from General Counsel's Exhibit 67.

2. Donato CASTRO

Castro would have had steady work in broccoli seasons, the October-December thin/weed season, and the summer and winter melon seasons. He also would have performed sporadic thin/weed work during other months of the backpay period. We will apply the seasonal rate for all of his work except the sporadic thin/weed work, for which the daily rate is more appropriate.

The ALJ found that although Exhibit 67 is supposed to be a complete amended specification, it appeared that the pages of Exhibit 28 from January 1983 through May 1983 were inadvertently omitted from Exhibit 67. We uphold her analysis, since the amount listed in the summary sheet in the front of Exhibit 67 includes backpay for Castro through May 1983.

Castro's net backpay should therefore be calculated from General Counsel's Exhibits 28 and 67.

3. Margarito DE LA TORRE

We find that De La Torre's expected work pattern for the summer 1980 and summer 1982 melon seasons was regular enough to justify use of the seasonal backpay rate. However, the daily rate will be applied for the summer 1981 season, when De La Torre would have worked only 11 days at Saikhon.

De La Torre would not have worked at all in the winter 1980 melon season, and thus no backpay is owing for that period. He would have worked only 15 days during the winter 1981 season, for which we will apply the daily rate.

De La Torre's net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibit 12.

4. Antonio FLORES

Flores would have had very sporadic gross earnings during most of the backpay period and had no interim earnings at all. Thus, the method of calculation makes no difference.

Flores' backpay is accurately computed in General Counsel's Exhibit 67.

5. Cruz FLORES

Flores would have had steady work during most of the summer and winter melon seasons at Saikhon. He was not predicted to work during the winter 1980 season, and thus no backpay is owing for that period. We will apply the seasonal rate for the remaining seasons of the backpay period.

Flores' net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibits 13, 61(a) and 61(b).

6. Ignacio FLORES

Because of Flores' generally sporadic work pattern, the daily rate is the most appropriate.

Flores' net backpay can be calculated from General Counsel's Exhibit 67.

7. Jorge PELAYO

Pelayo would generally have had steady work during the summer and winter melon seasons of the backpay period. Therefore/ the seasonal backpay rate is the most appropriate formula.¹⁵

Pelayo's net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibits 12(a), 23(g) and 55(f).

8. Jesus V. PEREZ

Perez' thin/weed work would have been irregular during the backpay period, varying from one day to 19 days per month. Because there is no regular pattern to his predicted work, we will apply the daily formula for his thin/weed work. However, Perez would have had regular work during the summer and winter melon seasons and the broccoli season at Saikhon, and thus the seasonal rate is appropriate for those two crops.

¹⁵It should be noted that Pelayo's alleged interim earnings at Verde Produce were excluded from evidence by the ALJ because the submitted documents consisted of summaries of Verde's payroll records. The Board affirms the ALJ's exclusion of the summaries as hearsay evidence not falling within the business records exception to the rule. Thus, Respondent's Exhibit 55(f) will not be used in the calculation of Pelayo's backpay.

Perez' net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibits 23(L), 16(d), 20, 24 and 50(e).

9. Felipe PRADO

Prado worked only in the melons at Saikhon, and would have worked regularly throughout the winter and summer melon seasons of the backpay period. His backpay should therefore be calculated according to the seasonal formula.

General Counsel's backpay specification for Prado indicates that he "returned to Saikhon" in the last week of October 1981. We find that General Counsel inadvertently failed to remove specification sheets for later months, and that Prado was reinstated in the latter part of October 1981. We overrule the ALJ's conclusion that Prado was entitled to backpay through November 1982.

Prado's net backpay (through October 1981) can be calculated from General Counsel's Exhibit 67.

10. Jose RIVERA

Rivera would have had steady work in the summer and winter melon seasons at Saikhon except for October-November 1980 when he would not have worked at all. Since he also had no interim earnings during those months, application of the seasonal formula throughout the backpay period is appropriate.

Rivera's net backpay can be calculated from General Counsel's Exhibit 67.

11. Encarnacion SALAS

Salas is deceased. His claim is for only two days of backpay in July 1980. No interim earnings or expenses are listed.

Salas' backpay is calculated in General Counsel's Exhibit 67.

12. Alfredo SANCHEZ

Sanchez would have had steady work during the 1981-82 and 1982-83 broccoli seasons, and his backpay will be calculated seasonally for that crop.

Sanchez would have worked sporadically in the summer 1980 and 1981 melon seasons but would have worked most of the available days in the summer of 1982. We will apply the daily rate for the first two seasons and the seasonal rate for 1982.

The only year that Sanchez had steady thin/weed work during the October-December season was 1980. We will apply the seasonal rate for that period, but the daily rate for the remainder of the backpay period when his work days were scattered throughout the calendar year.

Sanchez' net backpay can be calculated from General Counsel's Exhibit 67.

13. Domingo SOLIS

Solis would have worked steadily during the melon and broccoli seasons. The seasonal formula is therefore appropriate for both crops.

Soils also would have had steady work in the October-December 1980 thin/weed work, for which the seasonal formula is applicable. Solis would have had non-seasonal thin/weed work during 1981, 1982 and 1983, for which the daily rate will be applied.

Solis' net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibits 12(b) and 23(i).

14. Simon TALABERA (TALAVERA)

Talabera worked only in melons at Saikhon. He would have had steady work in both the summer and winter seasons except for June 1981 when he would have worked about six days less than the norm.¹⁶ Because of his overall expected work pattern, we will apply the seasonal rate.

Talabera's net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibit 14.

15. Valentin VALDEZ, JR.

We will apply the seasonal formula for the October-December 1980 thin/weed season, when Valdez would have had steady work. For his non-seasonal thin/weed work during the remainder of the backpay period, the daily rate is appropriate.

Valdez' predicted broccoli work (1981-82 and 1982-83), as well as his summer 1980 and summer and winter 1982 melon work, are steady enough to justify the seasonal rate. However, for his

¹⁶Since no interims corresponded to those days, the method of calculation makes no difference.

predicted sporadic melon work in summer 1981 we will apply the daily rate.

Valdez' net backpay can be calculated from General Counsel's Exhibit 67.

16. Juan VALDOVINOS

Valdovinos would have had steady work in the melons at Saikhon in the summer and winter seasons throughout the backpay period, until he was reinstated in October 1982. The seasonal formula is therefore appropriate.

Valdovinos' net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibit 23(f) .

17. Alfredo VILLEGAS

Villegas worked only in the melons at Saikhon. His predicted work pattern was very sporadic except for summer 1982 when he would have worked steadily the whole season. We will apply the seasonal rate for summer 1982 but the daily rate for the remainder of his backpay period.

Villegas' net backpay can be calculated from General Counsel's Exhibit 67.

(3) Thin/Weed

There are 9 discriminatees in the thin/weed classification whose testimony was waived by Respondent. Some of these employees worked only in thin/weed, while others also worked in broccoli.

The ALJ calculated backpay at the daily rate for all of these discriminatees. Respondent excepts only to the use of the daily formula.

1. Angel ESPINO

Espino's specification indicates that he returned to Saikhon in October 1980, and yet the specification contains pages for later months of broccoli work as well as thin/weed work. The ALJ concluded that he was not reinstated, but merely returned to work at Saikhon during October 1980. Consequently, she calculated backpay beyond that date, using the daily formula.

In his exceptions brief, General Counsel took the position that Espino's return to Saikhon in October 1980 terminated Respondent's backpay liability. General Counsel asserts that the specification pages for months subsequent to October 1980 were inadvertently included in the amended specification. Since there is no testimony on the issue, we accept General Counsel's contention that Espino was validly reinstated in October 1980.

Espino's backpay should be computed daily, since his thin/weed work was non-seasonal.

Espino's net backpay can be calculated from General Counsel's Exhibit 67.

2. Gloria MARTINEZ

Martinez' specification indicates that she would have had sporadic thin/weed work at Saikhon in June and July 1980, and that she was reinstated in October 1980. Her backpay for the two months will be calculated at the daily rate.

Martinez' net backpay is accurately computed in General Counsel's Exhibit 67.

3. Delia MESTAS

Mestas was unavailable for work from May to mid-November 1980 and from January to mid-October 1981; thus, no backpay is owing for those periods. Mestas would have performed sporadic thin/weed work during the backpay period, for which the daily formula is appropriate. She would also have performed seasonal work in the 1981-82 and 1982-83 broccoli seasons, to which the seasonal formula will be applied.

Mestas' net backpay can be calculated from General Counsel's Exhibit 67.

4. Susana MONTOYA

Montoya would have had steady work in the 1981-82 and 1982-83 broccoli seasons, as well as the October-December 1982 thin/weed season; therefore, the seasonal backpay formula is appropriate for these three portions of the backpay period. Montoya also would have performed sporadic thin/weed work from 1980-83, for which the daily formula is appropriate.

Montoya's net backpay can be calculated from General Counsel's Exhibit 67.

5. Marcos REYES

Even during the regular October-December season, Reyes' thin/weed work would have been sporadic; thus, the daily rate is appropriate for thin/weed. He is claiming backpay for only two broccoli seasons, 1981-82 and 1982-83. Since he would have had steady work throughout both seasons, the seasonal rate will be applied.

Reyes' net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibit 23(d) .

6. Jorge SAN JUAN

San Juan was reinstated at Saikhon in October 1980. His only backpay claim is for sporadic thin/weed work in May, June and July 1980. The daily rate is appropriate.

San Juan's net backpay is computed in General Counsel's Exhibit 67.

7. Elva URIBE

Uribe worked only in thin/weed, and would have had very sporadic earnings during the backpay period. Therefore, the daily backpay formula will be applied.

Uribe's net backpay is computed in General Counsel's Exhibit 67.

8. Valentin VALDEZ, SR.

Valdez worked only in thin/weed. He would have had steady work only in the October-December 1980 season, for which the seasonal formula should be applied. The daily rate is appropriate for the remainder of his thin/weed work.

Valdez¹ net backpay can be calculated from General Counsel's Exhibit 67.

9. Angelina (Angelica) VASQUEZ

Vasquez would have had steady work during all broccoli seasons at Saikhon. Since Vasquez had high interim wages during the 1982-83 season, the ALJ refused to apply the seasonal rate.

Because there is no evidence that the high earnings were due to extra work, we will apply the seasonal rate for that period as well as the other broccoli seasons.

The seasonal formula is also appropriate for Vasquez¹ steady work in the October-December thin/weed seasons. For her expected sporadic thin/weed earnings during the remainder of the backpay period, we will apply the daily rate.

Vasquez' net backpay can be calculated from General Counsel's Exhibit 67 and Respondent's Exhibit 50 (h).

(4) Irrigators and Sprinklers

There are six discriminatees in the sprinkler classification and nine discriminatees in the irrigator classification.

The only issue regarding these claimants is the applicable rate of backpay. General Counsel and Respondent have argued that irrigators and sprinklers are year-round, steady employees, and that a quarterly calculation is therefore appropriate.

1. Antonio BANUELOS

The specification demonstrates that it would be inequitable to apply a quarterly formula in computing Banuelos' backpay, primarily because of the extreme fluctuation in his daily earnings at Saikhon. For example, in April 1981 his predicted daily earnings ranged from \$8.24 to \$98.88, whereas his interim earnings during the month were mostly in the \$45-\$58 per day

range. If a quarterly formula were applied, Banuelos would in effect be penalized for earning regular wages on a day when his Saikhon wages would have been negligible.

The remainder of Banuelos' specification further supports a finding that his employment pattern at Saikhon was sporadic, both in terms of the number of days per month and the amount of wages per day. Therefore, we will apply a daily backpay formula.

Banuelos' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibit 54.¹⁷

2. Javier BANUELOS

Banuelos would have worked only 46 days at Saikhon during the 9 months of 1980 that form the backpay period for that year. In 1981, he would have worked only 83 days at Saikhon for the entire year. In 1982 and 1983, Banuelos would have worked more regularly at Saikhon, from 16 to 31 days per month.

Finding that Banuelos was not a steady, year-round worker with a work pattern similar to employees in the industrial sector, the ALJ concluded that a daily backpay formula should be applied.

We will apply a daily formula for the years when Banuelos' employment at Saikhon would have been sporadic (1980 and 1981) and a quarterly formula for the years when he would have worked more regularly (1982 and 1983).

¹⁷When interim payroll records show only weekly totals of Banuelos' earnings, they will have to be divided by the number of days in the week so that they can be subtracted from predicted daily backpay earnings.

Banuelos' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibit 54 (a) .

3. Lorenzo CONTRERAS

Contreras is predicted to have worked about 80 percent of the available days at Saikhon in 1980 and even more regularly in 1981, 1982 and 1983. However, because there was no evidence that Contreras' interim jobs showed comparable work patterns, the ALJ applied a daily backpay formula.

Since Contreras had steady employment for most of the year at Saikhon, we will apply a quarterly backpay formula.

Contreras' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibits 33 (b) , 44 and 53.

4. William GARCIA

When Garcia worked at Saikhon, he typically worked 6 or 7 days per week. Throughout the backpay period, he typically worked only 5 days per week. Finding that a quarterly offset of his interim earnings could result in penalizing him for additional work, the ALJ applied a daily backpay formula.

No showing has been made that Garcia worked "excess hours" at his interim employment. Further, although there were some months when his gross employment was not regular, for the most part his employment at Saikhon was steady. Therefore, we will apply a quarterly backpay formula.

As noted in General Counsel's brief, under a quarterly method of calculation Garcia's net backpay is -0-.

5. Gilberto HERNANDEZ

Hernandez would have had irregular work as an irrigator and a melon harvester, for which the ALJ applied a daily formula.

For Hernandez' lettuce work, the ALJ noted that his interim earnings exceeded his predicted gross earnings only on those days when he worked 20 hours per day at his interim job. The ALJ employed a daily calculation since the high interim earnings were obviously due to the exceedingly long hours he worked.

For Hernandez' sporadic irrigator and melon work, we will apply a daily formula. However, since Hernandez had steady, work during the lettuce season, a seasonal formula is appropriate for that period. As is consistent with NLRB practice, the interim wages attributable to excess overtime hours will not be deducted from gross backpay.

Hernandez' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibit 56 .

6. Antonio MARTINEZ Duran

The ALJ applied the daily formula for Martinez' work as a sprinkler and as a lettuce closer.

The backpay specifications show that Martinez' work as a sprinkler was sporadic, and thus a daily backpay formula is appropriate. We will apply a daily formula for Martinez' lettuce work also, because he is not predicted to have worked regularly throughout each lettuce season.

Martinez' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibits 42(i) and 46(d).

7. Salvador MARTINEZ

The ALJ applied a daily formula in computing Martinez' irrigator backpay, concluding that his widely fluctuating interim earnings probably indicated that he sometimes worked extra hours at the interim employer.

No showing was made that Martinez worked excess overtime hours at his interim employment. Because his work pattern at Saikhon was regular, we will apply a quarterly backpay formula.

Martinez' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibit 19.

8. Manuel NAVARRO

Navarro claimed backpay for only the first three months of 1980. Since he had no interim earnings, use of the daily or quarterly formula yields the same net backpay.

Backpay and expenses are awarded to Navarro in the amounts specified in General Counsel's Exhibit 68.

9. Jose M. ORTEGA

Ortega was unavailable for work for much of the backpay period. When he was available, his predicted earnings would have been sporadic. Thus, a daily backpay formula is appropriate.¹⁸

Ortega's net backpay can be calculated from General Counsel's Exhibit 68.

¹⁸For the period that Ortega was unavailable for work, no backpay is owing (nor was it requested).

10. J. Isabel PEREZ

Perez would not have had steady, year-round work as an irrigator, and he would have had steady work in melons for only one month of the entire backpay period. Therefore, for those two categories of work we affirm the ALJ's application of the daily formula.

In lettuce, Perez generally would have had steady work in January and February and the latter half of December, but less steady work in the first half of March. We find, however, that his predicted employment in lettuce was regular enough to justify application of a seasonal formula for the entire lettuce season.

Perez' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibits 16 (f) , 48 (b) and 51(d).

11. Alberto RAMIREZ

Respondent excepts to the ALJ's application of the daily method of calculation. Because Ramirez' employment at Saikhon was steady and year-round, we will apply a quarterly formula.

Ramirez' net backpay can be calculated from General Counsel's Exhibit 68.

12. Felipe RIPS

Respondent excepts to the ALJ's application of the daily formula.

Rios' employment pattern at Saikhon was sporadic, in that he did not work at all during some months, and the number of days

he was predicted to work in other months varied from 3 to 31. Therefore, we will apply a daily formula.

Rios' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibits 33(c) and 44(a).

13. Hilario SIERRA

Respondent excepts to the ALJ's finding that higher interim earnings were probably due to extra work by Sierra, and to her application of the daily method of calculating backpay.

We do not rely on the ALJ's statement that Sierra's higher interim wages were "probably" due to extra work. Nevertheless, because Sierra's employment pattern at Saikhon was sporadic, and there were significant periods during the year when he would have had no work at all at Saikhon, the quarterly or seasonal backpay formula is not appropriate. Therefore, we will apply the daily formula.

Sierra's net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibits 42(f), 46(b) and 50(f).

14. Carlos SOTO

Soto had 11 different jobs with interim employers and also had substantial periods of unemployment during the backpay period. The ALJ therefore used the daily formula.

Because Soto would have had steady, year-round employment at Saikhon, the Board will apply the quarterly backpay formula.

Soto's net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibits 10, 26, 33 and 41.

15. Elias J. TORRES

Because of the pattern of Torres' interim employment, the ALJ applied the daily formula for portions of his backpay.

Although Torres did not always work full time for Saikhon, his employment there was regular and cannot be characterized as sporadic. Therefore, we will apply the quarterly formula throughout his backpay period.

Torres' net backpay can be calculated from General Counsel's Exhibit 68 and Respondent's Exhibits 30 (a) , 34 and 55(i).

B. Discriminatees Not Located

There are nine discriminatees who were not located. As stated previously in this Decision, the escrow period for missing discriminatees shall be two years.

The only issue remaining to be addressed is the appropriate backpay formula for each discriminatee.

1. Ruben ARAIZA

A seasonal formula is appropriate for Araiza's predicted steady work in the lettuce season and steady work during the October-November thin/weed season. From mid-March through September he would have worked sporadically or not at all. Thus, a daily formula is appropriate for those months of the year.

Araiza's net backpay and expenses can be calculated from General Counsel's Exhibit 26(a) .

2. Manuel BARRERA

Since Barrera had no interim wages or expenses, there is no monetary difference between applying a quarterly or a daily formula. Therefore, backpay will be awarded in accordance with General Counsel's specification.

Barrera's backpay is calculated in General Counsel's Exhibits 5, 27 and 28.

3. Marcos ESQUIVEL

Esquivel had no interim wages or expenses and thus, as with Barrera, there is no monetary difference between applying a quarterly or a daily formula.

Backpay will be awarded as set forth in General Counsel's Exhibit 5.

4. Baltazar GARCIA

Since Garcia had no interim earnings or expenses, there is no monetary difference between applying a quarterly or a daily formula.

Backpay will be awarded as set forth in General Counsel's Exhibits 5, 27 and 28.

5. Manuel HERNANDEZ

As Hernandez had no interim wages or expenses, application of a quarterly or a daily formula would result in the same amount of backpay.

Backpay will be awarded as specified in General Counsel's Exhibit 62.

6. Mario LARIOS

Since Larios would have had full time employment at Saikhon during the lettuce season, it is appropriate to apply a seasonal formula for this work. However, because Larios would have had only sporadic employment in the melons at Saikhon, the daily formula will be applied for this work.

Larios' net backpay can be calculated from General Counsel's Exhibit 26(b).

7. Albert M. LOPEZ

Since no interim earnings or expenses are listed in Lopez' backpay specification, it makes no difference whether his backpay is calculated at a daily, seasonal or quarterly rate.

Backpay will be awarded as claimed in General Counsel's Exhibit 5.

8. Enrique LOPEZ

Lopez would have had steady work during the lettuce season at Saikhon. However, because he had only sporadic interim employment, the ALJ calculated Lopez' backpay at the daily rate.

The pattern of Lopez' interim employment is irrelevant. Lopez' backpay will be calculated according to the seasonal formula.

Lopez' net backpay can be calculated from General Counsel's Exhibits 5 and 5 (c) .

9. Arturo MENDEZ

Since no interim wages or expenses are listed in his specification, it makes no difference which formula is used to calculate Mendez' backpay.

Backpay will be awarded as claimed in General Counsel's Exhibit 5.

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that:

1. This matter be remanded to the Regional Director of the El Centre Regional Office (Regional Director) of the ALRB for recalculation, according to the findings and conclusions of the Board in the attached Decision, of the net amount of backpay owed to each discriminatee. The Regional Director shall within 30 days submit his recalculations to the Board for review, and the Board will thereafter issue a supplemental Order directing Respondent Mario Saikhon, Inc., its officers, agents, successors and assigns to make the employees involved in this proceeding whole by paying the amounts specified in said Order, plus interest thereon computed in accordance with the Board's Decision in E. W. Merritt Farms (1988) 14 ALRB No. 5.

2. Respondent shall offer tractor driver Manuel Barbosa (Soc. Sec. #571-38-9198) immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other employment rights and privileges. In

calculating Barbosa's net backpay, the Regional Director shall determine the date of any bona fide offer of reinstatement by Respondent, as well as whether Barbosa was unable to perform tractor driving work for any period after March 1983.

3. Respondent shall *offer* tractor driver Richard Sanchez Betancourt (Soc. Sec. #566-58-5691) immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other employment rights and privileges. In calculating Sanchez' net backpay, the Regional Director shall

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determine the date of any bona fide offer of reinstatement by Respondent.

DATED: May 2, 1991

BRUCE J. JANIGIAN, Chairman¹⁹

IVONNE RAMOS RICHARDSON, Member

JIM ELLIS, Member

JOSEPH C. SHELL, Member

¹⁹The signatures of Board Members in all Board decisions appear with the signature of the Chairman first, if participating, followed by the signatures of the participating Board members in order of their seniority. Member Nielsen did not participate in this matter.

CASE SUMMARY

Mario Saikhon, Inc.
(UFW)

17 ALRB No. 6
Case Nos. 79-CE-70-EC
79-CE-170-EC 79-CE-248-1-EC
79-CE-178-EC 80-CE-39-EC
79-CE-248-EC 80-CE-110-EC
(8 ALRB No. 88)

ALJ Decision

In Mario Saikhon, Inc. (1982) 8 ALRB No. 88, the Board determined that Saikhon had discriminatorily discharged and refused to reinstate striking employees, in violation of sections 1153(c) and (a) of the ALRA. A backpay hearing was held during the spring and summer of 1984.

The ALJ denied Saikhon's motion to strike backpay claims of discriminatees who refused to disclose their income tax records or W-2 forms, ruling that income tax records are privileged. She excluded from evidence certain payroll record summaries and testimony given in prior litigation as inadmissible hearsay.

In analyzing the diligence of each discriminatee's search for interim work, the ALJ applied the NLRB and ALRB rule that the sufficiency of the search is measured by whether the discriminatee made adequate efforts over the backpay period as a whole.

The ALJ held that in accordance with prior Board practice, expenses incurred while searching for work should be added to total net backpay due after offsetting interim earnings against gross backpay. The ALJ also held that backpay would be cut off prior to a valid offer of reinstatement only if a discriminatee's desire not to return was clear, unequivocal, and made in circumstances showing no coercion.

The ALJ held that missing discriminatees would have a 2-year escrow period in which to claim their backpay. She also established a 2-year escrow period for potential discriminatees (those who did not testify and who were not stipulated to be strikers).

The ALJ found that claimants were entitled to backpay for new work that would have been available to them based on their seniority had Saikhon not refused to reinstate them.

The ALJ generally calculated backpay according to the daily formula for thin/weed, melon harvest and broccoli harvest employees. For lettuce harvesters, irrigators, sprinklers and tractor drivers, the ALJ applied the daily formula where the evidence did not establish "true substitute employment." Where a discriminatee had obtained "true substitute employment," the ALJ applied a "modified" seasonal formula, under which only interim wages earned on days when the employee would have worked for Saikhon were subtracted from gross backpay.

Board Decision

The Board denied Respondent's third motion for reconsideration of 8 ALRB No. 88, raised in its exceptions brief, on the grounds that it raised no new issues and cited no extraordinary circumstances. The Board affirmed most of the ALJ's evidentiary rulings and general statements of legal principles.

Regarding deduction of interim expenses, the Board determined that it would follow the NLRB practice of deducting expenses from interim earnings before deducting net interims from gross backpay.

The Board adhered to its prior practice of providing a 2-year escrow period for missing discriminatees. However, the Board overruled the ALJ in concluding that there should be no escrow period for potential discriminatees.

The Board affirmed the ALJ's conclusion that discriminatees were entitled to backpay for new work that would have been available to them based on their seniority in the absence of Saikhon's refusal to reinstate them.

The Board concluded that as a general rule the formula chosen for calculating a discriminatee's backpay should be based upon the discriminatee's pattern of work at the respondent employer rather than the pattern of work at interim employment. Thus, for employees who had a pattern of steady, year-round work at Saikhon, the Board held that a quarterly backpay formula would be used. For employees who would have had steady work throughout a Saikhon season, the Board held that a seasonal formula would be used, with all interim wages earned within that season deducted from gross backpay for the season. For discriminatees who worked only sporadically at Saikhon, the Board held that a daily rate would be applied, with interim earnings being deducted only if earned on days the employee would have worked at Saikhon.

The Board remanded the case to the Regional Director for recalculation of backpay in accordance with the Board's findings and conclusions. The Board ordered that the recalculations be submitted to the Board within 30 days for review, after which the Board will issue a supplemental order specifying the amounts due to each discriminatee.

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

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