Alaska Pulp Corporation *and* David B. Hiebert *and* Florian Sever *and* Mark W. Simmons *and* Robert Henry Kinville *and* Edward Reiner *and* United Paperworkers International Union, AFL–CIO. Cases 19–CA–19242, 19–CA–19377, 19–CA–19582, 19–CA–19322, 19–CA–19342, 19–CA–19564, 19–CA–19610, and 19–CA–20039

August 27, 1998

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

On September 27, 1995, Administrative Law Judge James M. Kennedy issued the attached Supplemental Decision. Thereafter, the Respondent, the General Counsel, and the Charging Parties each filed exceptions, supporting briefs, answering briefs, and reply briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Supplemental Decision and Order.[4]

[1] On January 18, 1996, the Respondent filed a motion to strike portions of the General Counsel's answering brief to the Respondent's exceptions on the grounds that they contain representations concerning factual matters not part of the record in this proceeding. We deny the Respondent's motion as lacking in merit because the record reasonably supports the factual assertions that the Respondent seeks to strike.

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

[3] In his exceptions, the General Counsel contends that the judge incorrectly calculated pension credit for a number of claimants and that the judge failed to calculate any pension credit for Larry Boozer or Florian Sever. The General Counsel also excepts to the judge's apparently inadvertent double deduction of Melody Owens' 1988 interim earnings. We find merit in the General Counsel's exceptions and correct these inadvertent errors. Modified pension credit and backpay figures are shown at the end of this supplemental decision.

The General Counsel has additionally excepted to the judge's failure to grant maternity benefits to Esther Ozawa. The judge found that Ozawa and another claimant, Bernice Hansen, were out of the work force for several quarters due to child birth and child care. He tolled their backpay during the quarters in which they were out of the workforce but, based on evidence that the Respondent had a policy of granting maternity benefits of $250 a week to its employees, he granted Hansen $250 per week for the time that her backpay was tolled. He failed to give maternity benefits to Ozawa, however. We correct this apparently inadvertent error and we find that Ozawa is entitled to maternity benefit of $250 per week during the period that she was out of the work force due to child birth and child care.

[4] Interest on backpay will be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

1. The Respondent has excepted to the seniority based method adopted by the judge to reconstruct the order in which economic strikers would have been reinstated pursuant to a lawful reinstatement plan. The Respondent contends that the method selected by the judge violates substantive principles of Board law and is contrary to the Board's ruling in the underlying unfair labor practice proceedings that the Respondent's reinstatement of strikers in order of merit ranking was lawful. We reject the Respondent's exception.

Between July 11, 1986, and April 7, 1987, the Respondent's production and maintenance employees engaged in an economic strike. The Respondent continued to operate with permanent replacements. On March 30, 1987, the employees voted to decertify the Union. On April 7, 1987, the Union communicated to the Respondent an unconditional offer for striking employees to return to work. The Respondent immediately implemented a plan for reinstating strikers. It ranked unreinstated strikers according to merit and placed them on a preferential hiring list. Thereafter, when a vacancy arose, the Respondent filled the position by promoting the most senior replacement employee, nonstriker, or crossover employee occupying the position immediately below. Other employees within the department moved up in order of departmental seniority until an entry level opening was created. The entry level job was then offered to the striker from the department with the highest merit ranking.

In the underlying unfair labor practice proceedings, the Board found, inter alia, that the Respondent's policy of reinstating strikers to entry level positions was inherently discriminatory.[5] The Board also found that the Respondent violated the Act by its treatment of certain named discriminatees. The Board concluded, however, that the question of whether the Respondent could lawfully use merit to determine the order in which strikers would be reinstated was not before it, as the Regional Director had previously dismissed similar charge allegations.[6]

Notwithstanding the absence of any finding that the Respondent's reinstatement of strikers by merit violated the Act, the General Counsel's amended backpay specification utilizes departmental seniority to calculate the date on which strikers would have been reinstated pursuant to a lawful plan. The amended specification also presents an alternate method of calculating the reinstatement dates of strikers which utilizes the merit rankings formulated by the Respondent in conjunction with its entry level reinstatement system.

The judge selected the seniority based method of calculating the reinstatement order of strikers, finding it "more fair" than the Respondent's merit rankings. He

[5] *Alaska Pulp Corp.*, 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991) (*Alaska Pulp I*); and, *Alaska Pulp Corp.*, 300 NLRB 232 (1990), enfd. 972 F.2d 1341 (9th Cir. 1992) (*Alaska Pulp II*).

[6] *Alaska Pulp I*, supra at fn. 3.

found that the Respondent's merit rankings perpetuated the inherently discriminatory effects of the entry level reinstatement system and were fraught with opportunities to further abuse strikers. We agree that departmental seniority is the correct method for calculating the order in which strikers would have been reinstated pursuant to a lawful plan, but only for the reasons stated below.

Our objective in compliance proceedings is to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would have existed had there been no unfair labor practices. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 194 (1941). Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Several equally valid theories may be available, each one yielding a somewhat different result. Accordingly, the General Counsel is allowed wide discretion in selecting a formula. This does not mean, however, that the Board will always approve the General Counsel's backpay formula even if it is reasonably designed to arrive at the approximate amount of backpay due. Rather, where the Respondent, as here, urges the Board to adopt an alternate formula, the Board will determine which is the "most accurate method" of calculating backpay, in view of all of the facts adduced by the parties.[7] If, due to the variables involved, it is impossible to reconstruct with certainty what would have happened in the absence of a respondent's unfair labor practices, we will resolve the uncertainty against the respondent whose wrongdoing created the uncertainty.[8]

Applying the above principles, we find that departmental seniority is the most accurate method for determining the order in which strikers would have been reinstated pursuant to a lawful plan. Seniority has been traditionally used as the basis for many job actions, e.g., promotions. Thus, this method has the virtue of being the procedure which the Respondent, prior to the unfair labor practices, agreed to apply to the bargaining unit, including the affected individuals, and which it chose to apply during and after the strike to determine job priorities among nonstrikers, crossovers, and permanent replacements. Moreover, it avoids the serious drawbacks discussed below of using the Respondent's merit rankings to determine the order in which strikers would have been recalled.

The Respondent's merit rankings were predicated on the assumption that strikers would be returning to entry level positions.[9] Accordingly, the Respondent's merit rankings may not approximate those it would have developed if it were planning to reinstate strikers to their prestrike or substantially equivalent jobs according to merit. This uncertainty renders the use of the merit rankings unreliable. The Respondent having failed to resolve the uncertainty, we find that the General Counsel appropriately turned to departmental seniority to determine the order in which strikers would have been reinstated pursuant to a lawful plan.

Contrary to the Respondent and our dissenting colleague, we do not view this result as inconsistent with our holding in *Lone Star Industries, Inc.*[10] In that case, the Board held that "[a]part from obligations imposed by unilateral practice or through the collective-bargaining process, there is nothing in the Act itself or in the Board's articulation of *Laidlaw* rights that establishes an individual economic striker's right to recall by seniority." Id. at 551. Accord: *Oregon Steel Mills*, 291 NLRB 185, 190 (1988), enfd. mem. 134 LRRM 2432 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990); *Caruthers Ready Mix*, 262 NLRB 739 (1982). The specific issue addressed in these cases was whether the respondent's failure to reinstate strikers in order of seniority violated the Act. That issue is not presented here. Rather, the issue is whether the merit rankings formulated by the Respondent accurately reflect the order in which the Respondent would have recalled strikers, under a lawful plan, to their prestrike or substantially equivalent positions. As explained above, we have found that the Respondent's merit rankings cannot reasonably be utilized because they were predicated on the unlawful assumption that strikers would be returning to entry level positions. In so finding, we most accurately remedy the unfair labor practices by approximating a lawful recall plan. We do not consider or decide whether the Respondent's reinstatement of strikers by merit violated the Act.

2. The judge found that strikers who resigned in order to obtain their pension funds did not effectively terminate their employment with the Respondent because the Respondent had induced the resignations as a scheme to rid itself of union members.[11] Although we adopt the

[7] *Woodline Motor Freight, Inc*., 305 NLRB 6 fn. 4 (1991), enfd. 972 F.2d 222 (8th Cir. 1992)*; Bechtel Power Corp.,* 301 NLRB 1066, 1072 (1991); *American Mfg. Co. of Texas*, 167 NLRB 520 (1967) (the judge's task is not to simply approve the General Counsel's formula if he finds it reasonable, but "to consider whether [that] formula is the proper one in view of all the facts adduced by the parties and to make recommendations to the Board as to *the most accurate method* of determining the amounts due") (emphasis added).

[8] *United Aircraft Corp.*, 204 NLRB 1068 (1973); *Kawasaki Motors Mfg. Corp., U.S.A.* v. *NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); *NLRB* v. *Madison Courier, Inc*., 472 F.2d 1307, 1321 (D.C. Cir. 1972); *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569, 572–573 (5th Cir. 1966); *Alfred M. Lewis, Inc*. v. *NLRB*, 681 F.2d 1154, 1157 (9th Cir. 1982) ("the employer should not be allowed to benefit from the uncertainty caused by its discrimination").

[9] Indeed, the Respondent's general manager, Jesse Cline, strenuously argued at the hearing in *Alaska Pulp I*, supra, that the merit ranking system was inseparable from its entry level reinstatement system.

[10] 279 NLRB 550, 551 (1986), enfd. in part 813 F.2d 472 (D.C. Cir. 1987), remand 298 NLRB 1075 (1990), vacated on other grounds 956 F.2d 317 (D.C. Cir. 1992).

[11] By letter dated May 1, 1987, mailed to the last known address of each striker, the Respondent advised strikers that they must individually request reinstatement by June 7, 1987, or they would be considered to have abandoned their jobs. In a letter of the same date, the Respondent offered all vested participants in its pension plan an opportunity be-

judge's conclusion that, under the circumstances of this case, strikers who resigned in order to receive their pension funds did not terminate their employment with the Respondent, we do so on the following basis.

There is a presumption that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements remain employees entitled to full reinstatement upon the departure of the replacements. *Laidlaw Corp.,* 171 NLRB 1366, 1369-1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). An employer, however, does not have an obligation to offer reinstatement to strikers who have abandoned their struck job. In order to establish an abandonment of employment sufficient to relieve the employer of its reinstatement obligation, the employer must present "unequivocal evidence of intent to permanently sever the employment relationship." *Harowe Servo Controls*, 250 NLRB 958, 964 (1980) (quoting *S & M Mfg. Co*., 165 NLRB 663 (1967)). The Board has consistently held that a striker's resignation in order to accept another job or to obtain pension funds will not of itself be evidence of abandonment of the struck job.[12] Rather, the Board will examine the relevant circumstances to determine whether the striker has expressed an unequivocal intention not to return to his former job.

In this case, the Respondent implemented an inherently discriminatory reinstatement system immediately after the strike ended and it did not thereafter remedy its unfair labor practices prior to closing the mill on September 30, 1993. Nearly all strikers who resigned to obtain their pension funds were aware when doing so that they would never be fully reinstated, regardless of whether or not they resigned. Even if other factors played a part in their decision, we find that it is reasonable to infer that the Respondent's failure to offer reinstatement other than at entry level contributed to the strikers' willingness to resign. Their choice may have been different if full reinstatement had not already been foreclosed. We are unable to find, therefore, that in accepting the Respondent's pension withdrawal offer, any striker who was aware of the Respondent's entry level reinstatement system and who was entitled under *Laidlaw* to reinstatement above entry level expressed a clear choice not to return to their prestrike or a substantially equivalent job.[13]

The Respondent claims that certain strikers' resignations could not have been influenced by its unfair labor practices. Specifically, the Respondent contends that a number of strikers who resigned would not have been harmed by its unfair labor practices because they held either unique positions or entry level jobs before the strike and would have been fully reinstated.[14] Without exception, however, the strikers in question held positions one step above the entry level position in their department and/or the positions to which they would have been reinstated under the Respondent's plan had varying shifts, and often involved different duties than their prestrike jobs. Accordingly, these strikers would not have been fully reinstated under the Respondent's entry level reinstatement system.[15]

The Respondent also contends that strikers formerly from its maintenance department who resigned would not have been adversely affected by its unfair labor practices because they would have been properly reinstated as journeymen maintenance mechanics.[16] However, the

tween May 1 and December 31, 1987, to receive a lump sum payment of their vested accrued pension benefit. The letter, which employees were to sign and return to accept the Respondent's offer, stated above the signature block, "I have read and understood the above and have elected to terminate and receive a single lump sum payment." The Respondent offered employees a second window of opportunity to obtain their pension benefits between June 13 and July 15, 1988.

The Respondent thereafter eliminated from the preferential hiring list strikers who failed to individually request reinstatement by June 7, or accepted the Respondent's offer of a lump sum payout of their accrued pension benefits. Approximately 91 strikers elected to resign in order to receive their pension funds.

The Respondent contends that the judge erred in awarding backpay to the following claimants because they voluntarily resigned in order to obtain their pension funds: Alan Gray, Roy Anderson, Lester Davis, Fred Dimaano, James Helfrich, Gary Hansen, Lloyd Dennis, Jim Phillips, Morris Brown, Bernice Hansen, Philip Nielson, Joelle Eimers, Carolyn Turner, Larry Boozer, Grant Smith, William Craig, Karen Mann, Roland Mears, Elaine Thomas, Michael Bagley, David Hiebert, Walter Jenny, John Potter, Leo Michaud, Chuck Williams, Jim Button, Calvin Carlson, Harold Frank, James Gardner, Keith Haas, James Lichner, August Nelson, Mike Ryman, Thomas Scheidt, and Doug Stevens.

[12] *Mississippi Steel Corp*., 169 NLRB 647, 663 (1968); *Coca-Cola Bottling Co*., 232 NLRB 794, 811 (1977); *Harowe Servo Controls,* supra; *Rose Printing Co*., 289 NLRB 252 (1988); *Augusta Bakery Corp.*, 298 NLRB 58, 59 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992).

[13] Carolyn Turner is the only striker identified in the Respondent's exceptions as unaware of the entry level reinstatement system when she resigned. The General Counsel has established that Turner was entitled to reinstatement on April 8, 1987. She credibly testified that she personally contacted the Respondent to request reinstatement on a number of occasions around that time but was told that there were no positions available. She resigned several months after she should have been reinstated. She testified that she believed that she would eventually be recalled to her former position even though she was resigning in order to obtain her pension. On these facts, we find in agreement with the judge that Turner did not intend to abandon her former position and she therefore remained entitled to reinstatement despite her resignation.

[14] The Respondent contends that Larry Boozer, Joelle Eimers, Leo Michaud, and Chuck Williams held either unique positions or entry level jobs prior to the strike, and thus would have been properly reinstated to their prestrike positions if they had not voluntarily terminated their employment by resigning.

[15] The Board has consistently found that employment on a different shift is not "substantially equivalent." *Harvey Engineering Corp.,* 270 NLRB 1290, 1292 (1984); *U.S. Mineral Products Co.,* 276 NLRB 140, 142 (1985).

[16] The Respondent contends that Jim Button, Harold Frank, James Gardner, James Lichner, August Nelson, Mike Ryman, Thomas Scheidt, and Doug Stevens would have been properly reinstated as journeymen maintenance mechanics if they had not terminated their employment by resigning. We find, however, that their reinstatement would have at least been unlawfully delayed due to the Respondent's

Respondent unlawfully reinstated four strikers who were formerly leadmen to entry level journeyman positions. This delayed the reinstatement of other strikers who were entitled to reinstatement as journeymen. Those strikers whose reinstatement was or would have been delayed due to the unlawful entry level reinstatement of former leadmen were clearly harmed by the Respondent's unfair labor practices.

Contrary to our dissenting colleague's assertion, the delay in the reinstatement of former maintenance department employees caused by the Respondent's improper reinstatement of leadmen was not inconsequential. The minimum delay that any striker would have experienced was 2 weeks, by Harold Frank. At the journeyman rate of pay, a two week delay in reinstatement would have resulted in a loss to Frank of approximately $1657 in wages. Other former maintenance department employees would have experienced an even greater delay in reinstatement and a correspondingly greater loss of wages. In the absence of these and the Respondent's other serious unfair labor practices, strikers formerly employed in the maintenance department may have made a different choice regarding resignation. We will hold any uncertainty in this regard against the Respondent, the wrongdoer here. We will thus find that these claimants' right to reinstatement was not affected by their resignations.[17]

3. The Respondent also contends that the judge impermissibly exceeded the scope of compliance by imposing a remedy for conduct which was neither alleged nor found to be an unfair labor practice in the underlying proceedings. Specifically, the Respondent argues that the judge erred in awarding backpay to strikers whom the Respondent eliminated from its preferential hiring list for failing to individually request reinstatement,[18] for resigning in order to obtain their pension funds,[19] or for refusing offers of entry level reinstatement.[20] The Respondent contends that its elimination of these strikers from the reinstatement list was known to the Charging Parties and the General Counsel prior to the hearing in *Alaska Pulp I*, yet no charges were filed over that conduct. We find no merit in the Respondent's exceptions.

Initially, we note that to sustain the Respondent's argument would allow it to escape liability for unfair labor practices which were fully and fairly litigated. This would certainly weaken our ability to enforce the Act. It would also reward, rather than deter, violations of the Act. Even aside from these policy considerations, however, the argument that claimants forfeited their right to a remedy for the Respondent's refusal to timely reinstate them to their prestrike positions by failing to file new charges over their removal from the preferential hiring list is simply wrong as a matter of law and logic.

The final adverse employment action which precluded most strikers from full reinstatement under *Laidlaw* was the Respondent's implementation of its entry level reinstatement system immediately after the strike ended. At that time, the Respondent clearly communicated that it did not intend to reinstate striking employees except to entry level positions. Thereafter, the prospect for full and timely reinstatement was nonexistent for most strikers, whether or not they individually requested reinstatement, resigned, or turned down entry level positions. The Respondent's subsequent elimination of strikers from the preferential hiring list, therefore, only affected their prospects for entry level reinstatement. Accordingly, their failure to file new charges over this entirely separate, arguably unlawful, conduct did not vitiate their right to a remedy for the Respondent's unlawful refusal to offer them *full reinstatement,* which was prosecuted with success in *Alaska Pulp I*.[21]

4. On January 1, 1989, the Respondent established for each employee then at work a 401(k) retirement plan and funded the plan with a one-time deposit of $401. Subsequent hires and returning strikers were entitled to open an account but were not given the initial $401 contribu-

reinstatement of former leadmen James Ryman, Frank Risteen, Earl Richards, and Larry Judy as journeymen.

[17] The Respondent maintains, and our dissenting colleague agrees, that we should examine the individual circumstances under which each striker resigned, according to the standards set forth in *Augusta Bakery Corp.*, supra, to determine if they manifest an unequivocal intention to abandon their employment with the Respondent. Though the instant case bears some similarity to *Augusta Bakery*, it differs in a legally dispositive sense. In *Augusta Bakery*, the strikers resigned to obtain their pension funds during the strike. Accordingly, their resignations could not have been influenced by the respondent's subsequent refusal to offer them full reinstatement under *Laidlaw*. In this case, however, the strikers resigned *after* the strike and *after* the Respondent implemented its unlawful reinstatement system. We are not finding, however, as our dissenting colleague suggests, that the Respondent's commission of unfair labor practices establishes per se that none of the strikers intended to sever their employment by resigning to obtain their pension funds. Rather, we are simply unable to determine, under the subjective standards set forth in *Augusta Bakery*, whether the strikers unequivocally intended to abandon their prestrike or substantially equivalent positions because the Respondent's refusal to offer full and timely reinstatement so tainted the atmosphere in which they resigned. We hold this uncertainty against the Respondent, the wrongdoer in these proceedings.

Although the Board sometimes tolls a respondent's backpay liability if it finds that the respondent relied in good faith on a striker's resignation, we find that tolling is inappropriate under the circumstances of this case, where the Respondent's unfair labor practices may have contributed to the strikers' willingness to resign.

[18] Esther Ozawa, Morris Brown, Bernice Hansen, Michael Bagley, and Harry Johnson.

Member Hurtgen expresses no view regarding whether the Union's unconditional offer to return to work on behalf of striking employees was valid despite the Union's decertification. He notes that the Respondent does not raise the issue in its exceptions.

[19] See claimants listed in fn. 11.

[20] Scott Foss, Larry Wright and Jack Salovan.

[21] Applying the same rationale, we find in agreement with the judge that the dismissal in *Alaska Pulp II* of a complaint allegation that the Respondent discriminatorily denied Babette Sisson adequate time to respond to its offer of reinstatement to an entry level job did not terminate her right to reinstatement to her proper job under *Alaska Pulp I.*

tion. The General Counsel's amended backpay specification alleged that the Respondent must compensate claimants for the lost opportunity to participate in the plan by establishing a plan for each claimant and paying all claimants who were entitled to reinstatement on or before January 1, 1989, the original $401 contribution with such growth as would have accrued if it had been invested in January 1989. The amended specification also alleged that claimants should be allowed to invest a portion of their backpay award in the plan in order to take advantage of the tax consequences.

The judge ordered the Respondent to pay $401 to each claimant who should have been recalled prior to January 1, 1989. He denied the remedy requested by the General Counsel in all other respects however, citing concerns that the Board would be seen as endorsing a particular retirement plan, the difficulty involved in administering such a remedy, and the possibility that it would exceed the Board's remedial authority. In their respective exceptions, the General Counsel and the Charging Parties contend that the remedy ordered by the judge fails to make discriminatees whole because it leaves them significantly less well off than if they had been properly reinstated with the opportunity to contribute to the plan. We find merit in the exceptions.

The remedy recommended by the judge fails to restore "'the economic status quo that would have obtained but for the company's [wrongdoing].'" *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 188 (1973) (quoting *NLRB* v. *Rutter-Rex Mfg. Co*., 396 U.S. 258, 263 (1969)). Although we agree with the judge that it would be inappropriate to allow claimants to invest retroactively in the plan with the benefit of hindsight, we find that the reasons proffered by the judge are insufficient to deny them full recovery of the lost $401 investment and the opportunity to participate in the plan. Contrary to the judge, we do not think the Board will be seen as endorsing a particular retirement plan if we grant a remedy which achieves these ends. In doing so, we are not choosing a retirement plan for claimants but rather are merely allowing claimants, at their discretion, to participate in the plan as they would have been able to do if properly reinstated. In our view, such an order is well within our authority in fashioning a remedy. The initial $401 contribution and the opportunity to participate in the 401(k) plan were offered to employees by the Respondent as a part of their compensation, and their loss was directly attributable to the Respondent's unfair labor practices. Accordingly, a remedy which fully restores to claimants the value of the $401 contribution and which allows them to participate in the 401(k) plan is necessary to effectuate the policies of the Act and well within our remedial authority, and is not punitive in nature.

The Board has recognized that an investment opportunity offered as a part of compensation is recoverable as backpay. In *Sav-On Drugs*, 300 NLRB 691 (1990), the Board ordered an employer to compensate an employee for the lost opportunity to participate in an employee stock option plan. As in this case, the Board in *Sav-On Drugs* was faced with the difficulty of determining whether and to what extent the claimant would have participated in the plan. The Board found that it would be unreasonable to allow the claimant, with the benefit of hindsight, to plot retroactively the dates on which he would have bought and sold stock. We shall therefore grant the remedy requested by the General Counsel and order the Respondent to establish a plan for each claimant, and to contribute for claimants who should have been reinstated by January 1, 1989, the value of the original $401 investment calculated at the time payment is finally made. We shall also allow each claimant to make an investment in the plan up to the maximum allowable plan limit for each year covered by his or her backpay period to the extent permissible under Internal Revenue Service (IRS) regulations. This will give discriminatees an opportunity to shield a part of their income from tax liability as they would have been able to do if the Respondent had not denied them reinstatement.

5. The judge declared certain strikers ineligible for backpay because he found that they had abandoned their interest in their employment with the Respondent before they were entitled to reinstatement. For the reasons set forth below, we find that the judge erred in denying backpay to claimants John Petraborg, Todd White, Karen Richie, Albert Bigley, Libby Mears, Denise Olson, Michael Ryman, Kit Andreason, Joseph Kilburn, and David Meabon.

In *Laidlaw Corp.,*[22] the Board concluded that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements are presumed to remain employees entitled to full reinstatement upon the departure of the replacements. An employer may rebut the presumption, however, and be relieved of its reinstatement obligation, if it can show that strikers have in the meantime acquired substantially equivalent employment or have otherwise abandoned their interest in their employment with the Respondent.[23] The nature of the evidence which will rebut the presumption that a striker remains an employee entitled to full reinstatement is determined on a case-by-case basis.[24]

John Petraborg

Petraborg was employed by the Respondent as a boom operator in the log handling department. Before the strike, he moonlighted as a commercial fisherman. He continued to engage in commercial fishing during the

[22] Supra , 171 NLRB at 1369–1370.

[23] *Lone Star Industries*, supra at 554; *Salinas Valley Ford Sales*, 279 NLRB 679 (1986); *Harowe Servo Controls*, supra, 250 NLRB 663, quoting *S & M Mfg. Co.,* supra, 165 NLRB 663.

[24] *Harowe Servo Controls,* supra; *Pacific Tile & Porcelain Co.,* 137 NLRB 1358, 1359–1360 (1962).

strike. In May 1987, shortly after the strike ended, he telephoned the Respondent's personnel department seeking reinstatement to his former position. He was informed that the Respondent was reinstating strikers to entry level positions only. Thereafter, he did not sign up for reinstatement and he accepted the Respondent's pension withdraw offer.

The judge found that Petraborg was not entitled to backpay because he abandoned his interest in his former job during the strike. In reaching this conclusion, the judge primarily relied on Petraborg's self employment as a commercial fisherman during the strike and his purchase of a new commercial fishing license several months after the strike ended which allowed him to expand his fishing operation. The judge also relied on his failure to sign up for reinstatement and his resignation in order to obtain his pension funds.

We find that the factors relied upon by the judge are insufficient to support the conclusion that Petraborg abandoned his interest in his former job. The Board has long recognized that the right to obtain alternate employment during a strike is an important adjunct of the right to strike. *Kaiser Steel Corp.,* 259 NLRB 643 (1981). Accordingly, the Board has consistently held that the mere taking of alternate employment (even on an ostensibly "permanent" basis) does not of itself constitute an abandonment of employment with the struck employer. *Pacific Tile & Porcelain Co.,* supra*; Akron Engraving Co.,* 170 NLRB 232, 234 (1968); *Harowe Servo Controls*, supra. Rather, unless it is substantially equivalent to the struck job, a striker does not forfeit his entitlement to reinstatement by accepting alternate employment. Self-employment is treated like any other employment in this respect.

The question of what constitutes "regular and substantially equivalent employment" is determined by an objective appraisal of many different factors, such as wages, fringe benefits, location, differences in working conditions, and the desire and intent of the employee concerned.[25] Although Petraborg apparently had considerable success as a commercial fisherman, it is evident from the record that it was not substantially equivalent to his former job–the wages, working conditions, and fringe benefits were far inferior.

We find further that Petraborg's purchase of a new commercial fishing license does not demonstrate that he abandoned his interest in his former job. He purchased the license after he learned that the Respondent was not reinstating employees to their former or substantially equivalent jobs. Moreover, if properly reinstated, he could have used his new license to moonlight or he could have resold the license. Accordingly, his purchase of a new fishing license does not demonstrate that he was irrevocably committed to commercial fishing and would not have accepted an offer of reinstatement.

Finally, we find that Petraborg's failure to individually request reinstatement and his acceptance of the Respondent's pension withdrawal offer are entitled to little, if any, weight in determining whether he abandoned his former position. The Union made an unconditional offer to return to work on behalf of all employees. The offer was valid despite the Union's decertification.[26] Thus, Petraborg must be considered as having made an unconditional offer to return to work. Furthermore, Petraborg was aware that under the Respondent's entry level reinstatement system he would never be reinstated to his prestrike position regardless of whether or not he individually requested reinstatement or resigned in order to obtain his pension funds.

On the basis of the foregoing, we conclude that Petraborg was entitled to reinstatement on May 6, 1989, and his backpay period continued until the mill's closure on September 30, 1993.[27]

Todd White

White was employed in the Respondent's log handling department as a bundle deck operator. During the strike, he established an auto body business. The judge found that he abandoned his interest in his former job based on his self-employment, his testimony that he did not intend to return to work for the Respondent if his business was successful, and his failure after the strike to find out what the procedures were to obtain reinstatement.

We find, for reasons similar to those set forth with regard to Petraborg, that White did not lose his status as an employee of the Respondent by starting his own business during the strike. The Respondent has not shown that his self-employment was substantially equivalent to his mill job, or that he was so committed to his new pursuit that he would have turned down a valid offer of reinstatement.

We also find that the judge improperly relied on White's testimony in finding that he abandoned his interest in his former job. The Board has consistently discounted statements, prior to a valid offer of reinstatement, indicating a lack of interest in returning to work. Such statements are not a reliable indicator of an employee's intention to accept reinstatement, because they may reflect only a momentary state of mind and an employee might reconsider if faced with a valid offer.[28]

[25] *Little Rock Airmotive, Inc.,* 182 NLRB 666 (1970).

[26] See *United States Service Industries*, 315 NLRB 285, 286 (1994); *Marlene Industries Corp. v. NLRB,* 712 F.2d 1011, 1017-1018 (6th Cir. 1983).

[27] The inclusion of Petraborg as a claimant results in the elimination or delay of promotional opportunities for Rance Dailey, Shawn McLeod, and Randy Williams. Their net backpay, shown at the end of this supplemental decision, has been modified accordingly.

[28] *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1263 at fn. 50 (1982); *Heinrich Motors, Inc.,* 166 NLRB 783, 785-786 (1967), enfd. 403 F.2d 145, 150 (2d Cir. 1968); St*andard Materials, Inc.,* 237 NLRB 1136 (1978), enfd. 604 F.2d 449 (5th Cir. 1979);

Moreover, carefully considered, White's testimony does not support the judge's conclusion that he would not have accepted a valid offer of reinstatement. White testified that when he began his business he did not intend to return to work for the Respondent *if* his business was successful. On the relevant date for determining White's eligibility for reinstatement, his business was not successful by most measures. The General Counsel has shown that on March 13, 1988, when White should have been recalled, he was earning substantially less than he earned at his mill job and this condition persisted until the first quarter of 1990. White himself testified that his business did not become successful until nearly 2 years after he should have been recalled.

Finally, contrary to the judge, we find that White's failure to find out what the procedures were for obtaining reinstatement after the strike does not compel the conclusion that he had abandoned his interest in his former job. Under *Laidlaw*, once the union made an unconditional offer to return to work on behalf of all strikers, the burden shifted to the Respondent to seek out strikers as their prestrike or substantially equivalent positions became available to offer reinstatement. *Little Rock Airmotive, Inc.,* supra at 672–673. Thus, White was entitled to simply wait for a valid offer of reinstatement.

On the basis of the foregoing, we find that White was entitled to reinstatement on March 13, 1988, and his backpay period runs from that date until the mill's closure on September 30, 1993.

Karen Richie

At the time of the strike, Richie was employed in the Respondent's digester department as a second helper. During the strike, she relocated to Bend, Oregon, without notifying the Respondent. By letter dated May 1, 1987, mailed to Richie's last known address, the Respondent attempted to notify her that she must individually request reinstatement, or she would be considered to have abandoned her employment. The Respondent struck her name from its preferential hiring list when its May 1 letter was returned as undeliverable. The judge found that Richie abandoned interest in her former position when she relocated without providing the Respondent with a forwarding address. We disagree.

Richie was not obligated to keep the Respondent informed of her whereabouts in order to preserve her right to reinstatement. Rather, as stated above, under *Laidlaw*, after the Union made an unconditional offer to return to work, it became the Respondent's burden to make a good faith effort to locate strikers when jobs became available.[29] There is no evidence that the Respondent made any effort to locate Richie when her prestrike position became available. Although its May 1 letter was returned as undeliverable, it clearly had other available means, such as through the Union, to communicate with her. Moreover, any termination of her reinstatement rights based on her failure to respond to the May 1 letter would be premature, as no job vacancy existed at that time and the letter did not contain a valid offer of reinstatement. *Charleston Nursing Center*, supra. Further, it is undisputed that by June 18, 1989, the date on which Richie's prestrike job became available, she had informed the Respondent of her new address and of her interest in reinstatement. Accordingly, it need have looked no further than its files to determine her whereabouts.

Finally, contrary to the judge and our dissenting colleague, we are unwilling to speculate from Richie's earlier failure to provide the Respondent with a forwarding address that she had abandoned an interest in future employment with the Respondent. There are many possible explanations for her failure to notify the Respondent of her address change, other than that she abandoned interest in her job.[30] Under these circumstances, we find that Richie remained an employee entitled to reinstatement when her prestrike position or a substantially equivalent position became available on June 18, 1989. Her backpay period began on that date and continued until the mill's closure on September 30, 1993. We shall toll her backpay, however, from the first quarter of 1992 forward, because she was a full-time student and was admittedly not seeking work during that time.[31]

Albert Bigley

Before the strike, Bigley was an 18-year employee of the mill occupying the second most senior position in the power house. The judge found that he abandoned his job at the mill by accepting alternate employment, by failing to sign up for reinstatement and by resigning in order to obtain his pension funds. We disagree.

The Respondent has not shown that Bigley obtained substantially equivalent employment. It did not introduce any evidence concerning the hours, job opportunities, job security, working conditions, or benefits of Bigley's alternate employment. The General Counsel has shown, on the other hand, that the wages were only about two thirds of his earnings at the mill. Bigley testified, moreover, that he would have accepted reinstatement to his prestrike position if it was offered. Accordingly, we find that Bigley did not lose his status as an employee of the Respondent by accepting alternate employment. *Little Rock Airmotive*.

Arista Service, Inc., 127 NLRB 499, 500 (1960); *Pacific American Shipowners Assn.,* 98 NLRB 582, 603 (1952).

[29] *Little Rock Airmotive*, supra at 672–673; *Charleston Nursing Center*, 257 NLRB 554, 556 (1981); *Augusta Bakery Corp.*, supra at fn. 6.

[30] *Teledyne Industries,* 298 NLRB 982, 983 (1990), enfd. 938 F.2d 627 (6th Cir. 1991) (striker's delay of 21 months in contacting his employer cannot, by itself, be found to manifest abandonment of interest in the struck job, as there are many possible reasons for the delay other than abandonment).

[31] *Laurels Hotel & Country Club*, 193 NLRB 241, 247 (1971); *Schnabel Associates,* 291 NLRB 648, 653 (1988).

We find, further, for the same reasons set forth with respect to Petraborg, that Bigley's failure to individually request reinstatement and his resignation to obtain his pension funds do not establish that he abandoned his interest in his former job

Bigley was entitled to reinstatement on June 25, 1987, and his backpay period ran until October 15, 1993.

Libby Mears

Mears was a no. 3 boiler operator in the Respondent's powerhouse department. She obtained alternate employment during the strike at the Sitka Sentinel newspaper. Following the strike, she submitted a handwritten letter of resignation stating: "I am terminating my employment as of May 21, 1987. Be advised that this is my written two weeks notice of termination." Based on her employment during the strike and subsequent resignation from the mill, the judge found that Mears abandoned her interest in her former job and that she was not entitled to reinstatement or backpay.

Contrary to the judge, we conclude that Mears' resignation did not extinguish her right to reinstatement. Mears credibly testified that she resigned in response to the Respondent's May 1, 1987 letter advising strikers that they would be considered to have abandoned their jobs if they failed to individually request reinstatement by June 7. She testified that she was aware of the Respondent's entry level reinstatement system and was not willing to return to work at entry level. She understood, however, that if she "abandoned" her job by failing to sign up for reinstatement, or by turning down an offer for an entry level job, she would not be considered eligible for rehire to any position in the future. She instead decided to resign with two weeks' notice in order to preserve her eligibility for rehire to her former or an equivalent job as a new employee.

Mears' testimony, which was uncontroverted and corroborated by her husband, establishes that her resignation was in direct response to the Respondent's illegal entry level reinstatement system and its letter of May 1. We cannot find, under these circumstances, that Mears unequivocally intended to permanently sever her employment relationship with the Respondent by resigning.[32]

Finally, we find that the judge erred in relying on Mears' alternate employment to buttress his conclusion that she abandoned her interest in her former job. Mears' employment at the Sitka Sentinel was not substantially equivalent to her mill job. It paid less and the Respondent did not introduce any evidence comparing the hours, benefits, seniority privileges, or working conditions.

Mears was entitled to reinstatement on May 11, 1989, and her backpay period continued until October 22, 1993.

Denise Olson

Olson was employed by the Respondent as an inventory clerk in its stores department. During the strike, she obtained part-time employment in the personnel department of a hospital. The judge found that she was not entitled to reinstatement based on her employment during the strike; her statement on an NLRB compliance questionnaire that "I would have to start at the lowest position and I wasn't willing to start at the bottom and work with some ***SCABS***" (emphasis in the original); her testimony at the hearing that after June 1990 she no longer desired reinstatement; and her acceptance of the Respondent's pension withdrawal offer. The judge also found that Olson, unlike most strikers who resigned in order to obtain their pensions, was not harmed by the entry level reinstatement system because her prestrike job was unique. We disagree.

The General Counsel has shown that Olson's prestrike job became available on July 31, 1988. There is no contention that on that date her employment at the hospital was substantially equivalent to her struck job. Indeed, it is evident from the record that her earnings at that time were far inferior to her earnings at the mill, and there is no evidence comparing the working conditions or benefits. Although, by the date of her testimony, Olson had become more successful in her job, that evidence is not relevant to a determination of her status on July 31, 1988. Accordingly, we find that the judge erred in relying on Olson's employment at the hospital in finding that she was not entitled to reinstatement.

We find further that the judge erred in relying on Olson's statements on the NLRB compliance questionnaire and on her testimony at the hearing indicating a lack of interest in reinstatement. As set forth with respect to White, the Board has long considered statements made prior to a valid offer to be unreliable as an indicator of the employee's true interest in reinstatement. Such statements are in the nature of answers to hypothetical questions and, faced with a actual offer, an employee may change his mind. *Heinrich Motors,* supra, and case cited at fn. 28, supra. Moreover, they may have been made in the heat of dissatisfaction with treatment by the respondent.[33] Furthermore, Olson's testimony, on which the judge apparently relied, was that she would not have accepted reinstatement after June 1990 when she received a raise and began earning approximately what she would have earned at the mill. In July 1988, however,

[32] *Harowe Servo Controls, Inc.,* supra; *P.B.R. Co.*, 216 NLRB 602, 603 604 (1975); *Roylyn, Inc.,* 178 NLRB 197 (1969) (party challenging striker's employee status on the basis of a voluntary quit must prove by objective evidence that the striker unequivocally intended to permanently sever the employment relationship); *Mississippi Steel Corp.,* supra, 169 NLRB at 663 (an employer is not entitled to rely on a resignation which was involuntary, coerced, or caused by its own misconduct).

[33] See *Smyth Mfg. Co.,* supra at 680 (an employee's statement to a Board agent indicating a lack of interest in returning to work for the respondent could not constitute a waiver of his right to reinstatement).

the date on which she was entitled to recall, her earnings were less than half of her mill earnings. We therefore find that Olson did not waive her right to reinstatement by her statements to the Board or her testimony.

Finally, as with other strikers herein, we find that Olson did not forfeit her right to reinstatement by resigning to obtain her pension funds. At the time she resigned, she was well aware of the Respondent's inherently discriminatory reinstatement system and, as shown by her statement on the compliance questionnaire quoted above, she believed that she would not be fully reinstated. Even assuming, therefore, that the Respondent would have offered her full reinstatement, we find that she reasonably feared that the Respondent's unfair labor practices would extend to her. In any event, we find that the record does not support the judge's conclusion that she would not have been adversely affected by the entry level reinstatement system. Appendix B. X. of the amended specification alleges that Olson's prestrike position of "stores inventory clerk" was one step above the entry level "stores clerk" position in her department and that there was a clear line of progression from stores clerk to stores inventory clerk. The Respondent, in its answer to the specification, did not specifically deny that Olson would have been reinstated to the stores clerk position (rather than the stores inventory clerk position) under its entry level reinstatement system, nor did it contend that the two positions were substantially equivalent. In its posthearing brief to the judge, the Respondent asserted that Olson was not harmed by the entry level reinstatement system, but it failed to support that assertion with any argument or record evidence. Accordingly, the allegation in the amended specification is effectively uncontroverted. Contrary to the judge, therefore, we find that under the Respondent's entry level reinstatement system, Olson would have been reinstated to the stores clerk position, which was not substantially equivalent to her prestrike position of stores inventory clerk.

In sum, we find that Olson was entitled to reinstatement on July 31, 1988, and her backpay period continued until the mill's closure on September 30, 1993.

Kit Andreason

At the time of the strike, Andreason was a 10-year employee in the maintenance department. After the strike, he notified mill officials of his desire for reinstatement. He also applied for work with numerous other employers in Sitka. As with many claimants in this case, however, his employment search in Sitka was unsuccessful. He accepted a job with Scott Paper Company in Washington State in late October or early November 1987. In December 1987, he accepted the Respondent's pension withdrawal offer. He maintained his residence in Sitka until 1990. In 1991, he purchased a new home in Washington.

The judge found that Andreason abandoned his interest in his former job when he obtained substantially equivalent employment in Washington and purchased a home there. He also relied on Andreason's acceptance of the Respondent's pension withdrawal offer.

Contrary to the judge, we conclude that the record fails to establish that Andreason's job at Scott Paper was substantially equivalent to his position at the mill. There is no evidence in the record concerning the hours, working conditions, seniority rights or benefits at Andreason's new job. The wages were not equal to his earnings in his prestrike position as shown by the backpay claim of $24,445. Accordingly, we find that Andreason did not lose his status as an employee of the Respondent by accepting a job with Scott Paper. *Little Rock Airmotive*, supra.

We find further that Andreason's purchase of a new home in 1991 did not affect his right to reinstatement. On August 4, 1988, when the Respondent should have offered Andreason reinstatement, he still owned his home in Sitka and the move to Washington was easily reversible. Moreover, he testified that, even after purchasing his home in Washington, he would have considered moving back to Sitka to accept a valid offer of reinstatement. As of the hearing, some of his family still lived in Sitka and he retained strong community ties there.

Finally, we find that Andreason did not forfeit his right to reinstatement by resigning. He was aware of the Respondent's unfair labor practices when he resigned. Although, as the judge found, he would have been reinstated to his proper position of journeyman maintenance mechanic if he had not resigned, the Respondent's reinstatement of former leadmen to journeymen positions would have delayed his reinstatement. Thus, he would have been adversely affected by the Respondent's unfair labor practices.

Based on the foregoing, we conclude that Andreason was entitled to an offer of reinstatement, and his backpay period ran from August 4, 1988, until October 11, 1993.

Joseph Kilburn

Prior to the strike, Kilburn was employed in the Respondent's maintenance department as a journeyman pipefitter. In September 1987, he was hired by S&S General Contractors and Equipment Rental, a subcontractor of the Respondent, to perform welding work at the mill. He was employed by S&S for only one day. After learning that S&S had hired Kilburn, one of the Respondent's officials told S&S that it did not want him working at the mill. In November 1987, Kilburn filed charges alleging, inter alia, that the Respondent caused S&S to discharge him because of his support for the strike.[34] On December 28, 1987, Kilburn tendered a

[34] The charge was litigated in *Alaska Pulp I*, supra, and the allegation was dismissed because the judge found that S&S discontinued Kil-

written resignation to the company which stated that he had "been left with no alternative but to terminate" due to the incident "during the month of Sept[ember] 1987 when I worked only one day on Alaska Pulp Corp. Mill Property," and also because he would not be reinstated "for a few years, [or] if ever" based on his merit ranking.

The judge found that Kilburn had effectively terminated his employment relationship with the Respondent when he resigned. We disagree. On its face, Kilburn's letter establishes that his resignation was involuntary. He stated in the letter that he felt he had "no alternative" but to resign and he referred specifically to the events underlying his charge against the Respondent. Although Kilburn's charge was ultimately dismissed, his perception of unfair treatment was reasonable under the circumstances. Contrary to the judge and our dissenting colleague, therefore, we are not persuaded that Kilburn clearly and unequivocally desired to sever his employment relationship with the Respondent when he resigned. Moreover, we find that the Respondent was not entitled to rely on Kilburn's resignation because it was equivocal on its face.[35]

Kilburn's backpay period began on August 4, 1988, and continued until December 31, 1992.[36]

David Meabon

The judge found that Meabon was not entitled to reinstatement or backpay because he abandoned interest in his former job when he decided to attend diesel mechanic school in Washington during the strike. He found further that Meabon demonstrated that he had no intention of returning to Alaska by applying for and accepting an educational loan from the State of Washington which was only available to residents of that State. We disagree.

Prior to the strike, Meabon was employed in the Respondent's maintenance department. During the strike, he experienced difficulty obtaining alternate employment and he eventually encountered serious financial hardship. He decided to apply for admission to a diesel mechanic school in Washington during the strike in order to improve his chances of finding alternate employment, and he enrolled shortly after the strike ended. He attended school full time and worked part time from the fall of 1987 until June 1989. After graduating in June 1989, he worked full time as a diesel mechanic for approximately 1 year. In May 1990, he returned to Sitka. While in Washington, he continued to maintain a Sitka post office box and had his mail forwarded. He testified that he considered Sitka to be his home.

We find that Meabon was entitled to seek retraining in order to improve his prospects for finding suitable alternate employment, and therefore, contrary to the judge, we find that he did not forfeit his status as employee of the Respondent by doing so. Moreover, we are unwilling to conclude from his application for and acceptance of a loan from the State of Washington that he had no intention of returning to Alaska. Consequently, we find that Meabon was entitled to reinstatement on November 21, 1988, and his backpay period continued until October 11, 1993.

6. The General Counsel has excepted to the judge's tolling or termination of the backpay periods of Roland Mears, Michael Bagley, John Potter, Harold Frank, James Gardner, James Lichner, Michael Ryman, and Douglas Stevens. We find merit in the exceptions.

Roland Mears

Roland Mears was employed as a grader in the technical department. Following the strike, he wrote a letter to the Respondent, stating, "I . . . will be terminating my employment as of 5–6–87. Be advised that this is my written two weeks notice of termination." The judge found that Mears was entitled to reinstatement on April 26, 1987, but his backpay period ended with his May 6 resignation.

We find, for reasons similar to those set forth with regard to his wife, Libby Mears, that Roland Mears' resignation did not extinguish his right to reinstatement. Mears credibly testified that he resigned "out of frustration [in] that the only thing being offered was an entry level job," and he stated that he would not have resigned if the Respondent had been reinstating strikers to their proper jobs. He specifically testified, moreover, that he did not intend to give up his rights to his prestrike job. Mears' testimony, which is uncontroverted, establishes that his resignation was in direct response to the Respondent's illegal entry level reinstatement system. Accordingly, we find that his entitlement to backpay was not tolled as a result of his resignation. His backpay period ran from April 26, 1987, until September 30, 1993.[37]

Michael Bagley

Michael Bagley was a chief operator in the Respondent's power house. After the strike, he obtained employment as a pressman for the Sitka Sentinel newspaper. At the hearing, he testified, "I don't know if I would

burn's employment due solely to the quality of his work. 296 NLRB at 1277.

[35] *P.B.R. Co.*, supra; *Mississippi Steel Corp*., supra.

[36] Kilburn testified that he was disabled from working as of December 31, 1992. The General Counsel has not claimed backpay for him beyond that date.

[37] The extension of Mears' backpay period moves the date on which Ron Proctor was entitled to reinstatement back to August 18, 1987, and results in the elimination of the reinstatement opportunity for Amor Diego. Additionally, the extension of Mears' backpay period and the inclusion of Albert Bigley, discussed above in sec. 5, moves Walter Jenny's reinstatement date back to May 11, 1989; moves Harry Johnson's reinstatement date back to June 5, 1989; moves Martin Rudolpho's reinstatement date back to October 12, 1991; and results in the elimination or delay of promotional opportunities for Dave Hiebert, Burt Edenso, and Leroy Dabaluz. We have modified the pension credit and backpay figures of these individuals to reflect these changes.

go back [to the mill] if I had the opportunity or not." He stated that he began to lose interest in reinstatement around June 30, 1989.

The judge found that Bagley's backpay period began on December 7, 1987, but he tolled his backpay after June 30, 1989, based on his testimony at the hearing.

We do not agree that Bagley's testimony establishes that he would not, under any circumstances, have accepted reinstatement. His testimony indicates rather that he was uncertain. He was entitled to be put to a true test by a bona fide offer. *Heinrich Motors, Inc.,* supra. Notwithstanding his testimony, therefore, we find that Bagley's entitlement to backpay was not tolled, and his backpay period continued until the mills' closure on September 30, 1993.

John Potter

Potter was employed by the Respondent as an evaporator operator in the utilities department. After the strike, he accepted the Respondent's offer of entry level reinstatement. He quit in July 1988, however, and moved to Washington State.

The judge determined that Potter should have been reinstated to his prestrike or substantially equivalent position on November 11, 1987. The judge tolled his backpay after July 1988, however, based on his resignation with a present intention to move to Washington and his testimony that he would not be willing to return to accept reinstatement.

Initially, we note that Potter was never reinstated to his prestrike or a substantially equivalent job. The position from which he resigned in July 1988, therefore, was nonequivalent interim employment, which he was under no obligation to retain. *Glover Bottled Gas Corp.,* 313 NLRB 43 (1993), enfd. 47 F.3d 1230 (D.C. Cir. 1995), cert. denied 516 U.S. 816 (1995); *Newport News Shipbuilding Co.,* 278 NLRB 1030 (1986). Moreover, it is well established that a discriminatee may move from the vicinity of prior employment with a respondent without incurring a willful loss of earnings unless the move would have occurred even if the discriminatee had been properly reinstated. It is the respondent's burden to show that the move was for personal reasons and would have occurred even absent the respondent's unlawful conduct. *Sorenson Lighted Controls, Inc.,* 297 NLRB 282, 282–283 (1989); *Glover Bottled Gas Corp.,* supra.

Potter listed a number of factors which contributed to his decision to quit his interim employment and move to Washington. First among these was that he was not properly reinstated and was receiving less pay.[38] He also testified that if he had been working in his prestrike job in July 1988, he would not have resigned. His testimony in this regard was unshaken on cross examination and is consistent with an NLRB compliance questionnaire which he filled out in 1991. Accordingly, we find that the Respondent has not met its burden of proving that Potter would have moved, and that his employment with the Respondent would have terminated, even if it had properly reinstated him.

Finally, we find that the judge erred in relying on Potter's testimony that he would not have accepted reinstatement after he moved. As noted above, in the absence of a bona fide offer, the Board is reluctant to terminate backpay liability based on testimony indicating a lack of interest in reinstatement. Nor does Potter's testimony establish that he would not have accepted a valid offer of reinstatement under any circumstances. He testified that he was reluctant to return to his former job because the Respondent had not remedied its unfair labor practices and therefore the same conditions which caused him to leave still existed. He testified, further, that if the Respondent remedied its unfair labor practices he might be willing to return. Based on the foregoing, we find that the Respondent's backpay obligation to Potter did not end when he moved. Potter's backpay period continued until October 7, 1993.

Harold Frank

Frank was a 20-year employee of the mill. When the strike began, he was employed as an electrician in the maintenance department. In August 1987, he accepted a job as a mechanic with the Chatham School District in Angoon, Alaska. Shortly thereafter, he accepted the Respondent's pension withdrawal offer.

The judge found that Frank was entitled to reinstatement on January 26, 1988. He tolled his backpay, however, on May 31, 1989, because he found that Frank abandoned any interest in returning to work for the Respondent when he purchased a new home in Angoon on that date.

We do not agree that Frank's backpay should be tolled merely because he purchased a home in Angoon. Although the purchase may reflect that he was resigned to the permanency of his situation, it does not establish that he would have turned down a valid offer of reinstatement. Frank testified that he would have accepted such an offer. We note that his move was easily reversible, at least until the last day of 1992, when he sold his home in Sitka. We note further that Frank's earnings were only about two thirds of his earnings at his mill job throughout the backpay period. Based on the foregoing, we find that Frank's backpay period continued untolled until October 11, 1993.

James Gardner

The judge found that Gardner should have been reinstated on July 7, 1987. As with many other discriminatees, Gardner sought but was unable to obtain regular

[38] Other factors which Potter testified contributed to his decision were, in order, tensions among the strikers and nonstrikers, his ex-father-in-law crossed the picket line and worked during the strike, he was lied to and cheated by the Company, safety was a lower priority after the strike, he did not wish to contribute to either side of a failing situation, and the mental stress caused by all of these factors.

employment in Sitka. He accepted the Respondent's pension withdrawal offer in December 1987. In August 1988, he obtained a job as a millwright in Ketchikan, Alaska. Based on Gardner's testimony that his new position was basically the same as his prestrike job and that he probably would not have been willing to move back to Sitka to accept reinstatement after he completed his 60-day probationary period, the judge tolled his backpay as of October 31, 1988. For the reasons set forth below, we find that the judge erred in tolling Gardner's backpay.

Gardner was entitled to an offer of reinstatement on July 7, 1987. Accordingly, he was already a discriminatee in August 1988 when he obtained employment in Ketchikan. Principally for reasons of policy, discriminatees, unlike strikers, do not lose their right to reinstatement by accepting substantially equivalent employment.[39] This distinction between strikers and discriminatees is necessary in order to avoid penalizing discriminatees for seeking and obtaining equivalent employment since they are required to do so at the risk of incurring a willful loss of earnings. A contrary rule barring discriminatees from returning to the jobs of their choice would discourage mitigation. Thus, absent unusual circumstances not present here, in order to effectuate the purposes of the Act, the Board requires that workers who have been discriminated against be made whole with reinstatement and backpay, even if they have in the meantime acquired equivalent employment elsewhere.[40] Even assuming, therefore, that Gardner's job at the Ketchikan mill constituted substantially equivalent employment, Gardner continued to be eligible for reinstatement.

We also find that the judge erred in concluding that Gardner abandoned his interest in employment with the Respondent based on his testimony at the hearing. Absent a valid offer, Gardner's testimony indicating a lack of interest in returning to work could not constitute a waiver of his right to reinstatement. *Heinrich Motors, Inc.,* supra.

We find that Gardner's backpay period began on July 6, 1987, and it ended on October 11, 1993.

James Lichner

Lichner was employed at the mill for 24 years. When the strike began, he was working in the Respondent's maintenance department as a millwright. Prior to the strike, he sustained an injury to his knee. Although he was partially disabled, he continued to work until the strike. After the strike, he signed up for reinstatement. On December 23, 1987, he accepted the Respondent's pension withdrawal offer.

On several occasions after the strike, and even after he resigned to obtain his pension, Lichner contacted the mill and requested reinstatement to his former position or to be hired as a new employee. In June 1989, after an extensive but unsuccessful search for interim employment, Lichner enrolled in barber school, financed by a disability retraining loan from the state of Alaska. In August 1990, he began working as a barber in Sitka.

The judge found that Lichner was entitled to reinstatement on December 16, 1987. He tolled his backpay after June 30, 1989, however, because he inferred from Lichner's acceptance of a disability retraining loan that he was no longer capable of performing work as a millwright.

Contrary to the judge, we are not persuaded that Lichner's acceptance of a disability retraining loan meets the Respondent's burden of showing that he could not have performed his job at the mill. There is no evidence that a condition of his obtaining the loan was that he be totally disabled from performing work in his field. We note, further, that Lichner sustained his injury while working for the Respondent and he continued to work until the strike. There is no evidence that his injury worsened during or after the strike.

On cross-examination, the Respondent's counsel adduced testimony that during an unspecified portion of the backpay period Lichner's doctor placed him under a work restriction that he not stand for more than 4 hours at a time. Lichner testified without contradiction, however, that from July 1989, when he entered barber school, until June 1990, when he graduated, he regularly stood for 10 hours a day and experienced no difficulty in doing so. He further demonstrated his ability to stand for prolonged periods by working as a barber during the remainder of his backpay period. Under these circumstances, we conclude that the Respondent has not met its burden of showing that Lichner was unable to perform the duties of a general mechanic at the mill at any time during his backpay period.[41]

We find further that Lichner did not abandon his employment with the Respondent by seeking retraining in a different field. Given Lichner's extensive but unsuccessful job search, and the restricted job market in Sitka, it was appropriate for him to seek retraining in a field where employment was available and where he could meet his duty to mitigate. Moreover, he testified that he was at all times willing to return to work at the mill, explaining that he had no medical benefits or vacation time

[39] *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 193–194 (Sec. 2(3) of the Act does not limit the Board's power to order reinstatement of discriminatees who have obtained substantially equivalent employment if to do so would effectuate the purposes of the Act).

[40] *Daniel Construction*, 276 NLRB 1093 fn. 3 (1985).

We find, in any event, that the Respondent has failed to demonstrate that Gardner's Ketchikan job was substantially equivalent to his job with the Respondent. Gardner was required to give up seniority, retirement, and medical benefits, and the Respondent has not shown that the other terms and conditions of Gardner's interim employment paralleled those of his former job.

[41] *Canova Moving & Storage Co.* v. *NLRB*, 708 F.2d 1498, 1505–1506 (9th Cir. 1983) (discriminatee who worked for respondent after an injury and performed comparable work for an interim employer was not disabled, contrary to doctor's determination).

as a barber, and he was forced to give up 24 years of seniority. His earnings as a barber were approximately half what he would have earned if properly reinstated.

Based on the foregoing, we reverse the judge and find that Lichner's backpay period continued until October 11, 1993. Lichner testified that he was unavailable for employment from July 30, 1989, until July 1990 while attending school full time and studying for his licensing exam. We find, therefore, that he is not entitled to backpay for that period.[42]

Michael Ryman

The judge found that Ryman was entitled to reinstatement on June 15, 1987, but he tolled his backpay on July 7, 1989, when he found that Ryman obtained substantially equivalent employment at the Ketchikan Pulp Mill.

Like Gardner, Ryman was already a discriminatee when he accepted employment at the Ketchikan mill. Even assuming, therefore, that he obtained substantially equivalent employment, he continued to be eligible for reinstatement. *Phelps Dodge*, supra. Moreover, the record does not support the judge's conclusion that Ryman obtained substantially equivalent employment. He earned significantly less at the Ketchikan mill than he would have earned if properly reinstated, he was required to give up certain medical benefits and seniority, and he testified that he would have at all times been willing to accept an offer of reinstatement. Accordingly, we find that Ryman's backpay period continued until October 11, 1993.[43]

Douglas Stevens

The judge found that Stevens was entitled to reinstatement on January 23, 1988, and that his backpay period ended when he purchased a home in Vancouver, Washington, in June 1989. The judge inferred from his purchase of a home in Vancouver that he did not intend to return to the Respondent's employ.[44]

Consistent with our treatment of Andreason and Frank, we find that Stevens' purchase of a home in the vicinity of his alternate employment does not demonstrate that he would not have accepted a valid offer of reinstatement. In reaching this conclusion, we have considered that Stevens, unlike Andreason and Frank, purchased his home prior to the date on which he was entitled to reinstatement, but we find that this factor does not require a different result. The record demonstrates that Stevens' earnings from his alternate employment were less than two thirds of what he would have earned if properly reinstated. He credibly testified, moreover, that he was willing at all times to return to Sitka to accept a job as a general mechanic. Accordingly, we find that Stevens was entitled to reinstatement on February 27, 1989, and his backpay period continued until October 11, 1993.[45]

7. Contrary to our dissenting colleague, we find no merit in the Respondent's exceptions to the judge's failure to toll the Respondent's backpay liability to William Craig and August Nelson. For the reasons set forth below, we find, in agreement with the judge, that the Respondent has not established that Craig or Nelson neglected to make reasonable efforts to obtain interim employment.

Prior to the strike, Craig was a viscosity tester in the technical department. His testified that his efforts to obtain interim employment were hampered by the gradual deterioration of his sight and by other preexisting disabilities. (He was certified legally blind in 1993.) Between 1987 and 1992, he engaged in commercial fishing during at least one fishing season each year. He attempted to work in that industry again in 1993, but his vision had deteriorated too much. Craig testified that until 1993, he sought work "off and on" while he was not fishing. He testified further that he would have accepted any employment that he could perform and which would cover the cost of daycare for his children while he and his wife worked. The Respondent stipulated that it does not rely on Craig's disability to perform work at the mill as a defense to his backpay claim. He testified that he applied for reemployment at the mill on at least three occasions after the strike.

The judge found, and we agree, that Craig made a reasonable search for work in light of the limitations imposed by his partial blindness and other disabilities. It is well settled that an evaluation of the reasonableness of a discriminatee's efforts to obtain interim employment must take into account circumstances which limit opportunities or discourage efforts, such as the labor conditions in the area, the employee's skills, age, and personal

[42] *Laurels Hotel & Country Club*, supra, 193 NLRB 241; *Schnable Associates,* supra, 291 NLRB 648.

[43] We note that Ryman accepted the Respondent's pension withdraw offer in July 1987, after he was entitled to reinstatement. He testified that he did so because he needed the money and had not found regular interim employment.

The judge left open the issue of Ryman's backpay in the last three quarters of 1987 because his interim earnings for those quarters were not litigated at the hearing due to an error in the specification. The parties subsequently stipulated that Ryman had interim earnings of $1000 for the second quarter of 1987, $4500 for the third quarter, and $4500 for the fourth quarter.

[44] Initially, we note two factual errors in the judge's decision. First, the judge repeated an error from vol. II, App. C. XI. of the General Counsel's amended specification in reporting the year in which Stevens should have been reinstated. As reflected in vol. I, Appendix B. XI. of amended specification, Stevens should have been reinstated in 1989 rather than in 1988 as found by the judge. Second, the record reflects that Stevens purchased a new home in January 1989, and not in June as found by the judge. We correct these errors. We note, further, that the inclusion of Kit Andreason, David Meabon, and Joseph Kilburn moves Stevens' reinstatement date back from January 23 to February 27, 1989.

[45] We note that Stevens resigned to obtain his pension in December 1987. He testified that he did so because he had not found regular employment and he needed the money. Moreover, he advised the Respondent when he applied for his pension that he was still interested in reinstatement, and he continued to express an interest in reinstatement thereafter.

limitations. *Mastro Plastic Corp*., 136 NLRB 1342, 1359 (1962), enfd. in pertinent part 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). A discriminatee is only expected to make such efforts as a reasonable person might make in like circumstances. The Respondent bears the burden of proving that an employee "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.,* 360 F.2d 569, 575–576 (5th Cir. 1966). In contending that Craig failed to make reasonable efforts to find interim work, the Respondent apparently relies on Craig's statement that he sought work "off and on" and on his admission that he did not seek any work other than commercial fishing after he was certified legally blind in 1993. The Respondent, however, did not ask Craig about his search for work prior to 1993. Thus, the record is devoid of such essential details as what type of employment he applied for, how many contacts or applications he made, and when. The Respondent also failed to produce any evidence that there was suitable and comparable employment available at any time during Craig's backpay period that he could have had any expectation of success in obtaining.[46] As stated previously, the evidentiary burden is on the Respondent to demonstrate that Craig failed to engage in a reasonable job search. Contrary to our dissenting colleague, in the absence of specific evidence, we decline to infer that Craig's efforts were not adequate. At most, the evidence creates only an element of doubt which must be resolved in Craig's favor, and not the Respondent's.[47]

Nelson was a millwright in the maintenance department at the time of the strike. After the strike, he unsuccessfully sought employment for nearly 11 months. In late 1987 or early 1988, he was forced to move in with his parents in Craig, Alaska. In February 1988, he found employment as a deck hand on a commercial fishing vessel leaving from a port near Craig. He remained employed in that capacity throughout his backpay period. He testified that he was at sea approximately 4 months each year and he spent an additional 3 months in port performing maintenance work on the fishing vessels and other preparatory work. He experienced 5 months each year of down time during which he was not at sea or preparing to go to sea. Nelson testified that during the down times he sought work as a deck hand for the next fishing season but he did not seek work in other industries with the exception of inquiring about reemployment at the mill several times.

The judge found that Nelson was entitled to backpay as set forth in the specification. The Respondent excepts, contending that Nelson failed to meet his duty to mitigate by not seeking other employment during down times between fishing seasons. Contrary to our dissenting colleague, we find no merit in the Respondent's exception.

Given the limited availability of work in the region as a result of its isolated economy, strikers reasonably turned to commercial fishing, the region's predominate industry, to mitigate their damages. As the judge noted, Nelson's pattern of employment during his backpay period was typical. Thus, commercial fisherman work diligently during specific seasons with little or no time off and then experience a down time of several weeks before the next season begins. This is considered full-time employment in the commercial fishing industry. We do not require other discriminatees to seek part-time work during weekends and vacations if they are employed full time during the week. Similarly, we will not require a discriminatee who is employed full time in the fishing industry to seek part-time work between fishing seasons. As stated previously, Nelson reasonably turned to commercial fishing to mitigate his damages. To require him to seek part-time work while already employed full time would unjustly penalize him for his choice of interim employment.

8. The General Counsel has excepted to the judge's elimination of pension credit, severance pay, and the initial $401 401(k) contribution (where applicable) during quarters in which he found that discriminatees were not entitled to backpay. The General Counsel acknowledges that claimants Placido Castillo, Karen Mann, and Morris Brown are not entitled to the wages component of backpay during quarters in which they failed to mitigate. The General Counsel also acknowledges that claimants Scott Foss, Esther Ozawa, Morris Brown, Jose Rivera, and David Hiebert are not entitled to the wages component of backpay during any quarter of 1993 because they failed to supply information about their 1993 interim earnings. He argues, however, that all are entitled to severance and pension credit, and the $401 401(k) contribution (if applicable), during periods of tolling.

We find merit in the General Counsel's exception. When a discriminatee fails to make a reasonable effort to secure interim employment, the Board tolls the wages component of backpay because of the uncertainty involved in estimating what the discriminatee would have earned if he had met his duty to mitigate. Wages are also tolled during quarters in which a discriminatee fails to report interim earnings for substantially the same reason. In each case, the uncertainty is resolved against the discriminatee by assuming that their interim earnings would have equaled or exceeded their gross backpay. There is no similar justification, however, for excluding pension credit, severance pay or the 401(k) contribution during periods of tolling. It is well established that these are separate components of backpay which, as a general rule,

[46] We assume that our dissenting colleague is not suggesting that Craig was required to supplement his job search with knowingly futile acts in order to avoid incurring a willful loss of earnings.

[47] *NLRB* v. *Miami Coca-Cola Bottling Co.,* supra*; Southern Household Products Corp*., 203 NLRB 881 (1973).

are not offset by interim earnings.[48] Accordingly, we find that Castillo, Mann, Brown, Foss, Ozawa, Rivera, and Hiebert are entitled to severance, pension credit, and the 401(k) initial investment where applicable during periods in which their backpay has been tolled.

ORDER

The National Labor Relations Board orders that the Respondent, Alaska Pulp Corporation, Sitka, Alaska, its officers, agents, successors, and assigns, shall take the action set forth below.

1. Establish a 401(k) plan for each individual claimant who has been found in this proceeding to be entitled to backpay and allow each claimant to make an investment in the plan up to the maximum allowable plan limit for each year covered by his or her backpay period to the extent permissible under IRS regulations.

2. Contribute to the 401(k) plan of each claimant who has been found in this proceeding to have been entitled to reinstatement on or before January 1, 1989, the value of $401 calculated as if it had been invested in the plan since January 1, 1989, with such growth as has accrued at the time payment is finally made.

3. Pay to each claimant below the amount opposite their names with interest to be computed in the manner proscribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.

4. Grant each claimant below credit in the defined benefit retirement program in the amount shown opposite their names.[49]

Name	*Net Backpay*[50]	*Pension Credit (Years–Months)*
	I. Log Handling	
Rance Dailey	$52,861	5–6
Scott Foss Sr.	120,103	5–9
Marvin Grant	14,873	No new entitlement
Alan Gray	38,451	1–8
Robert Kinville	13,344	0–4
Shawn McLeod	12,668	No new entitlement
John Petraborg	124,760	4–4
Todd White	28,161	5–6
Randy Williams	6,455	No new entitlement
Larry Wright	130,369	6–2
	II. Woodroom	
RoyAnderson	35,737	5–6
Placido Castillo	30,044	3–11
David Chartrand	7,621	0–3
Lester Davis	198,526	5–3
Winifred Dimaano	110,549	6–5
James Helfrich	7,391	0–6
Henry Johnson	17,480	No new entitlement
Esther Ozawa	46,904	6–2
R. Primacio	7,459	No new entitlement
Mark Simmons	99,021	5–4
	III. Digesters	
Teophilo Agne	52,948	No new entitlement
Mar Castillo	6,936	No new entitlement
Gary Hansen	184,871	3–9
Fred Hope	54,335	No new entitlement
Karen Richie	82,550	4–3
Milan Rucka	78,515	0–5
Mathew Taylor	266	No new entitlement
	IV. Bleach Plant	
Lloyd Dennis	65,611	2–7
Deborah Harriman	126,751	5–8
Lonnie Loree	937	No new entitlement
Melody Owens	110,502	2–5
James Phillips	60,707	2–11
	V. Machine Room	
Morris Brown	49,504	6–1
William Burns	53,608	No new entitlement
Bernice Hansen	162,259	6–0
Gary Hinkle	107,688	4–10
Phillip Nielsen	13,745	0–3
Jullee Wright	92,849	5–0
	VI. Finishing Room	
Joelle Eimers	29,384	1–2
Daryl Howard	13,389	0–4
Lilia Martin	34,502	1–4
Jose Rivera	96,376	3–11
Jack Salovon	175,165	6–1
Daniel Thomas	18,681	No new entitlement
Carolyn Turner	135,670	6–5
	VII. Warehouse	
Larry Boozer	150,323	4–10
Michael Hornamen	5,084	No new entitlement
Andrew Roberts	925	No new entitlement
Grant Smith	135,732	5–9

[48] Pension and retirement fund contributions made on a discriminatee's behalf by an interim employer are generally not offset against similar contributions and credits which the discriminatee would have earned working for the respondent. See sec. 10535.3 (Pt. III), Compliance, of the NLRB Casehandling Manual. Unlike wages, retirement fund contributions and pension credits earned with an interim employer are not comparable on a dollar-to-dollar basis.

[49] Claimants who have already withdrawn their pension funds shall be given a reasonable time after receipt of their net backpay and interest and receipt of a notice setting forth the present actuarial value of the benefit terminated by the earlier withdrawal to make a payment in that amount to the fund in order to reinstate credit for the earlier accrued time, in accord with the parties' stipulation.

[50] Net backpay includes lost wages, medical and other expenses, maternity benefits, and severance pay where applicable.

We are unable to calculate severance pay for Kit Andreason, Joseph Kilburn, David Meabon, Michael Ryman, and Douglas Stevens. In addition to the net backpay amounts shown opposite their names, the Respondent shall pay them severance pay calculated in the same manner as for other claimants.

VIII. Technical Department		
William Craig	219,664	5–6
Karen Mann	35,914	3–10
Roland Mears	132,669	6–5
Ronald Proctor	1,117	No new entitlement
John Stokes	7,071	No new entitlement
Elaine Thomas	78,372	3–2
Brownell Turner	88,467	3–2
IX. Utilities		
Michael Bagley	143,839	5–9
Albert Bigley	106,307	6–3
Leroy Dabaluz	72,302	6–3
Bart Edenso	7,494	No new entitlement
David Hiebert	86,207	6–1
Walter Jenny	87,480	3–6
Harry Johnson	161,165	5–3
John Lawson Jr.	1,718	0–1
Rudolfo Martin	12,743	No new entitlement
Libby Mears	84,977	4–4
Theodore Mukpik	49,389	No new entitlement
James Patterson (Estate of)	8,860	No new entitlement
Patrick Paul Jr.	74,398	No new entitlement
John Potter	160,947	4–2
X. Small Departments		
Leo Michaud	19,613	3–9
Denise Olson	28,167	5–2
B. Sisson aka Kali Larson	90,878	5–5
Charles Williams	170,389	5–8
XI. Maintenance Department		
Kit Andreason	24,445	5–1
John Bartels	29,551	0–11
James Button	114,740	6–2
Calvin Carlson	105,188	3–9
Harold Frank	131,784	5–8
James Gardner	80,100	6–2
Keith Haas	33,869	4–6
Jesse Jones	239,024	5–7
Larry Judy	23,328	No new entitlement
Joseph Kilburn	145,531	4–4
James Lichner	173,379	5–9
Richard McKinney	8,047	No new entitlement
David Meabon	200,624	4–10
August Nelson	237,935	5–10
George Nichols	10,728	No new entitlement
Ron Owens	1,282	No new entitlement
Earl Richards	61,538	No new entitlement
James Ryman	25,983	No new entitlement
Michael Ryman	129,682	6–3
Tom Scheidt	144,606	5–5
Florian Sever	164,454	6–3
Jon Shennett	25,526	0–4
David Slate	6,314	0–3
Douglas Stevens	104,849	4–7
Leslie Sturm	8,915	No new entitlement
Bruce Whitcomb	23,333	No new entitlement
XII. Special Situations		
John Lawson Sr	182,651	5–1
Edward Reiner	10,243	No new entitlement
TOTAL	**$7,580,386**	

MEMBER HURTGEN, dissenting in part.

I disagree with the majority's resolution of two major issues affecting the Respondent's compliance obligations in this case. I also disagree with the majority's findings regarding the reinstatement rights of several individual strikers.

I agree that the Respondent violated the Act by failing to reinstate strikers to available positions, i.e., by promoting other employees to those positions and then offering the strikers only the positions thereby vacated. However, the issue in this case is determining *which* strikers would have been reinstated.

The majority adopts the judge's finding that seniority is the most appropriate method for reconstructing the order in which strikers would have been reinstated to their prestrike or substantially equivalent positions. In its exceptions, the Respondent contends that the judge's substitution of seniority for the merit ranking system (which the Respondent actually used to determine the reinstatement order of strikers) violates substantive principles of Board law and is contrary to the Board's ruling in the underlying unfair labor practice proceeding. I would grant the Respondent's exception.

It is well settled that apart from obligations imposed by past practice or through the collective-bargaining process, there is no requirement in the Act or in the Board's articulation of *Laidlaw* rights that an employer recall returning strikers on the basis of seniority. All that is required, rather, is that the employer recall employees on some nondiscriminatory basis. *Carruthers Ready Mix*, 262 NLRB 739 (1982); *Lone Star Industries*, 279 NLRB 550, 551 (1986), enfd. in part 813 F.2d 472 (D.C. Cir. 1987), remand 298 NLRB 1075 (1990), vacated on other grounds 956 F.2d 317 (D.C. Cir. 1992). Accordingly, the Respondent was unquestionably entitled to recall strikers in order of merit as long as it did not discriminate. As to the issue of possible discrimination, I note that, prior to the hearing in *Alaska Pulp Corp.,* 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991) (*Alaska Pulp I),* the Regional Director dismissed allegations that the Respondent's implementation of a merit recall system was discriminatory or otherwise unlawful. Accordingly, the Board in *Alaska Pulp I* explicitly held that the issue

of the legality of the merit recall system had been administratively resolved and was not before it. The judge *in Alaska Pulp I* held, moreover, that "the Respondent may utilize its merit recall system in a manner which is not inconsistent with this decision." In sum, my colleagues have substituted their judgment for that of the Respondent. Both the seniority system and the merit system are lawful. Accordingly, the Respondent had the right to choose its own lawful system. In addition, as noted above, the Agency led the Respondent to believe that its choice of a merit system was not unlawful or inappropriate.

I also disagree with my colleagues' adoption of the judge's blanket determination that strikers who resigned in order to obtain their pension funds did not effectively terminate their employment with the Respondent. In *Augusta Bakery Corp.*, 298 NLRB 58 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992), the Board held that an employer may refuse to reinstate strikers on the grounds that they have resigned to obtain their pension funds if it can present unequivocal evidence that the strikers intended to "permanently sever" the employment relationship. In determining whether that burden was met, the Board examined several factors, including: (1) whether the striker was motivated to resign by economic need; (2) whether he had obtained employment elsewhere; and (3) whether he subjectively intended to quit his employment. The Board engaged in a similar fact intensive inquiry in *Medite of New Mexico, Inc*., 316 NLRB 629 (1995). My colleagues have abandoned that approach in this case, however, in light of the Respondent's unlawful refusal to offer strikers full and timely reinstatement. Apparently, in their view, a failure to offer reinstatement to the strikers establishes per se that a severance of employment is not intended by the strikers. By contrast, I would continue to apply the multifactor test. It may be that, in an individual case, an employee would not have intended to sever his employment if an antecedent offer of reinstatement had been made. But, I would approach these issues by looking at all the factors and not simply one factor on a per se basis. Thus, I would find that the Respondent has met its burden in this case if it has shown, by all the evidence, that strikers who resigned to obtain their pension funds unequivocally intended to abandon their employment with the Respondent.

Based on my review of the record, I find that the Respondent has not met this burden with respect to any of the claimants who were entitled to reinstatement above entry level. Many of these claimants explicitly testified that they resigned because they were not willing to start all over again at bottom level jobs with reduced wages. Others testified that they were motivated to resign by pressing economic need and had no intention of abandoning their employment.

With respect to strikers formerly employed in the maintenance department, however, I find that the Respondent has shown that a number of them unequivocally intended to permanently abandon their employment with the Respondent.[1] Unlike the claimants discussed above who were aware when they resigned that they would otherwise have been unlawfully relegated to entry level positions, strikers formerly employed in the maintenance department (other than former leadmen) would have been fully reinstated had they not resigned. At most, they would have suffered an incremental delay in their reinstatement. Any such delay would have been monetarily remedied by the NLRB. Further, this is not a case where the evidence is ambiguous with respect to whether an employer's conduct caused the strikers to resign. Rather, there is no evidence of such causation. Indeed, even my colleagues can only speculate that the Respondent's conduct "may have" influenced the decision. But, such speculation cannot be a substitute for hard evidence.

Specifically, I find that the Respondent has shown that former maintenance department employees Jim Button, Harold Frank, James Lichner, and Thomas Scheidt unequivocally intended to permanently abandon their employment when they resigned to obtain their pension funds. The testimony of these claimants establishes that they were aware when they resigned that they were forfeiting their right to reinstatement. None except Lichner expressed any interest in reinstatement following their resignations. Further, it does not appear from their testimony that they were motivated to resign by pressing economic need. I note, for example, that Scheidt and Lichner both placed their pension funds in an IRA; Button testified that he took his pension funds in case of an unforeseen emergency somewhere down the line; and Frank had already obtained regular alternative employment when he resigned. Accordingly, I would find that these claimants intended to permanently sever their employment relationship when they resigned, and therefore they were not entitled to an offer of reinstatement or to backpay.

I would not grant the Respondent's exceptions pertaining to former maintenance department employees James Gardner, August Nelson, Mike Ryman, or Douglas Stevens, however, because I find that the Respondent has not met its burden of showing that these claimants intended to sever their employment relationship. Gardner testified that he resigned to obtain his pension funds only because he was unemployed and needed the money. Nelson credibly testified that he did not understand that a condition of obtaining his pension funds was that he re-

[1] In its exceptions, the Respondent contends that the judge erred in awarding backpay to former maintenance department employees Jim Button, Harold Frank, James Gardner, James Lichner, August Nelson, Mike Ryman, Thomas Scheidt, and Douglas Stevens because they effectively terminated their employment with the Respondent when they resigned to obtain their pension funds. For the reasons stated below, I would grant the Respondent's exceptions pertaining to Button, Frank, Lichner, and Scheidt.

sign his employment. He also testified that former plant manager, Jesse Cline, assured him that he would remain eligible for reinstatement if he took the funds. Furthermore, on two occasions after he obtained his pension funds, he contacted Cline to request reinstatement. Ryman, on the other hand, was aware when he resigned that he was forfeiting his right to reinstatement. He testified, however, that he was forced to do so by pressing economic need. After he resigned, he sent the Respondent two certified letters and spoke with mill officials on the telephone advising them that he remained interested in reinstatement. Stevens informed the Respondent by letter that he did not intend to give up his right to reinstatement when he resigned in order to obtain his pension funds, and he told them that he was resigning only because he was unemployed and needed the money. Subsequently, he provided mill officials with his telephone number and asked them to call him if a position became available. Based on the foregoing, I find that these strikers did not intend to terminate their employment with the Respondent by withdrawing their pension funds.

Contrary to my colleagues, I would also grant the Respondent's exceptions and reduce or eliminate the backpay awards to strikers William Craig and August Nelson. I find that the record establishes that Craig and Nelson failed to make a reasonable attempt to mitigate the effects of the Respondent's unfair labor practices. Thus, Craig admitted in his testimony that he made almost no effort to seek work during his backpay period, but rather, decided to care for his children while his wife worked. Although he indicated that he would have accepted employment which paid enough to cover the cost of day care, it does not appear from the record that he sought such work. Moreover, while he was hampered in his job search by the gradual onset of blindness, I would not find that this factor relieved him of the duty of at least seeking work which he was capable of performing with his disability.

My colleagues say that the record is insufficient to show that Craig failed to adequately search for work prior to 1993. However, as noted above, Craig *admitted* that he made almost no search for work during the backpay period. Concededly, he became legally blind in 1993. However, in our society (particularly under the ADA), persons without sight can, and do, become employed. Craig does not say that his blindness precluded such employment. Thus, although his condition provokes sympathy, it does not alter the law of the land (the ability to secure employment under the ADA and the duty to mitigate damages under the NLRA).

I would reverse the judge and toll Nelson's backpay. I find that the Respondent has shown that Nelson deliberately under employed himself throughout his backpay period. Nelson engaged in commercial fishing for 4 months each year, and worked on the vessels for 3 months each year. He made no effort to seek work during the other 5 months of the year. My colleagues appear to take the position that it is permissible for an employee to "loaf" for that 5-month period. They equate this 5-month period of inactivity to a weekend or a vacation. I would not do so. There may well be 5-months of nonwork in the fishing industry, but this is not to say that the fishermen typically take a 5-month holiday. I am unwilling to award backpay for this "holiday" period.

Further, I disagree with my colleagues' reversal of the judge's findings that Karen Richie, Kit Andreason, and Joseph Kilburn had abandoned their interest in employment with the Respondent and hence were not entitled to an offer of reinstatement or to backpay. The judge found that Richie abandoned interest in her former job when she relocated during the strike. I agree. Richie admitted that she did not provide the Respondent with her new address until approximately a year after she moved and she did not make any effort to inquire about the status of the strike until well after it was over. Under these circumstances, I would infer that she intended to terminate her employment with the Respondent.

The judge found that Andreason abandoned his interest in his former job when he obtained substantially equivalent employment in Washington State and purchased a home there. In reversing the judge, my colleagues state that the Respondent has failed to demonstrate that Andreason's new job was substantially equivalent to his mill job. They also state that they would not find that his purchase of a new home in Washington demonstrated a lack of interest in reinstatement. I agree with my colleagues that the evidence is insufficient to show that Andreason obtained substantially equivalent employment. Contrary to my colleagues, however, I would infer from Andreason's purchase of a new home in another state that he had abandoned any interest in employment at the mill. I would also find that Andreason evinced an intention to abandon his employment at the mill when he resigned to obtain his pension funds. Andreason was employed in the maintenance department prior to the strike. Accordingly, he would have experienced a slight delay in reinstatement due to the Respondent's unlawful reinstatement of former leadmen as general mechanics, but he would otherwise have been unharmed by the Respondent's entry level reinstatement system. He testified that his resignation was not motivated by the Respondent's unfair labor practices or by pressing economic need. Furthermore, he never contacted the Respondent after withdrawing his pension funds to seek reinstatement. Accordingly, I would adopt the judge's finding that he was not entitled to an offer of reinstatement.

The judge found that Kilburn, a former maintenance department employee, abandoned his job when he submitted a holographic resignation. My colleagues reverse the judge because Kilburn was motivated to resign, at least in part, by an erroneous perception that the Respondent discriminatorily caused a subcontractor with

whom he had obtained alternative employment to discharge him. My colleagues discount the Board's determination in *Alaska Pulp Corp.,* 300 NLRB 232 (9th Cir. 1990), enfd. 972 F.2d 1341 (1992) *(Alaska Pulp II),* that the Respondent did not unlawfully discriminate against Kilburn. They also discount Kilburn's resignation to obtain his pension funds. In my view, both of these factors are entitled to significant weight. I note that Kilburn never attempted to advise anyone at the mill that he remained interested in reinstatement, even after the Board determined that the Respondent had not discriminated against him. On these facts, I agree with the judge that Kilburn was not entitled to an offer of reinstatement.

I also disagree with my colleagues' reversal of the judge's determination that James Gardner's backpay period terminated when he obtained substantially equivalent employment. In reversing the judge, my colleagues rely in part on their finding that Gardner had already been unlawfully bypassed for reinstatement when he obtained regular employment. They also find that the judge erred in concluding that Gardner's new job was substantially equivalent to his job with the Respondent. I disagree. Under the merit ranking system, Gardner was entitled to reinstatement on October 13, 1988.[2] By this date, he was already employed at the Ketchikan Pulp Mill. According to Gardner's own testimony, the job was the same as his former job. Contrary to my colleagues, I would find that Gardner's testimony is sufficient to establish that the new position was substantially equivalent to his old position. Accordingly, I would adopt the judge's finding that he was not entitled to an offer of reinstatement.

Finally, I disagree with my colleagues' reversal of the judge's determination that Douglas Stevens abandoned any interest in his former job when he purchased a new home in Washington State, near his alternative employment. Unlike my colleagues, I would infer from Stevens' purchase of a home in another state that he would not have been willing to accept reinstatement at the mill. Accordingly, I would adopt the judge's finding that he was not entitled to an offer of reinstatement.[3]

James C. Sand and *Patrick F. Dunham, Esqs*., for the General Counsel.
Alan Berkowitz and *Steven Blackburn, Esqs. (Schacter, Kristoff, Orenstein & Berkowitz)*, of San Francisco, California, for the Respondent.
Lynn C. Ivanick, of Nashville, Tennessee, for United Paperworkers International Union.

[2] This date assumes that Frank, Button, Andreason, and Scheidt, who were merit ranked above Gardner, were not entitled to reinstatement as a result of their resignation to obtain their pension funds.

[3] Assuming that former maintenance department employees Button, Frank, and Andreason, who were merit ranked above Stevens, were not entitled to reinstatement as a result of their resignation to obtain their pension funds, Stevens' earliest recall date would be February 29, 1988, more than a month after he purchased the home in Washington.

Terrance Reed and *Lauren Clingan, Esqs. (Asbill, Junkin & Myers, Chtd.)*, of Washington, D.C., for various individual Charging Parties and claimants.
David B. Hiebert, of Seattle, Washington, pro se.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. I heard this compliance proceeding in Sitka, Alaska, and Seattle, Washington, on 18 hearing days in 1993 and 1994.[1] It is based on the third and fourth compliance specifications issued by the Regional Director for Region 19 of the National Labor Relations Board. The specifications have also been modified by posthearing events. The specifications as amended and supplemented seek to provide backpay to approximately 107 individuals who allegedly have remedial rights arising from *Alaska Pulp Corp*., 296 NLRB 1260 (1989) (*AP I*)], and *Alaska Pulp Corp*., 300 NLRB 232 (1990) (*AP II*)]. Both Board orders have been enforced by the United States Court of Appeals for the Ninth Circuit in separate unpublished memorandum opinions, *AP I*, 944 F.2d 909 (1991), (text republished at 1991 WL 181760), and *AP II*, 972 F.2d 1341 (1992) (text republished at 1992 WL 203916).[2]

Background

Respondent, of course, operates, or until September 30, 1993, operated, a pulp mill in Sitka, Alaska. Its employees had been represented by Silver Bay Local 962 of the United Paperworkers International Union. All of the violations of the Act arose out of Respondent's treatment of strikers after an economic strike which ended on April 7, 1987. That was also the day which the union was decertified pursuant to an NLRB election.

Although both *AP I* and *AP II* involve some named discriminatees, and their rights to backpay are determined herein, the remedial orders with respect to those individuals are unremarkable and, except for discriminatees Barbette "Becky'' Sisson a/k/a Kayli Larson and John Lawson Sr., present no unusual issues. These situations will be discussed below.

The other strikers whose rights are under scrutiny here were, in general, found to be victims of a discriminatory recall system. Prior to the strike Respondent had, pursuant to its collective-bargaining agreement, a system of promotion within most of its departments known as "progression,'' often referred to as "prestrike progression.'' In essence, that was a system whereby employees were promoted over time within the department by virtue of departmental seniority. During the strike, Respondent had hired permanent replacement workers to perform those jobs. When the strike ended it created a preferential recall list which, instead of allowing strikers to return to the job which they had previously held (upon the departure of the incumbent), required each striker to start at the entry level job for that department, beginning once again at the bottom of the departmen-

[1] In fact the case was noticed for reopening on May 2, 1995, but that reopening was obviated by a stipulation of fact on April 26, 1995, and approved on April 27.

[2] Occasionally I refer to a third case, *AP III*. That is a reference to *Alaska Pulp Corp*., Case 19–CA–20552 heard by Judge Jay R. Pollack on February 27–28, 1990, and decided by him on February 8, 1991. No exceptions were taken to his decision. It is not part of this compliance proceeding except to the extent certain evidence adduced before him has been introduced here.

tal ladder. The Board found the entry level recall system to be a violation of Section 8(a)(3) of the Act and adopted Administrative Law Judge Gerald A. Wacknov's recommended Order against Respondent. It also modified his recommended Order against a co-respondent, S & S General Contractors and Equipment Rental. The court of appeals agreed. In footnote 1 of its decision, the Board characterized the *AP I* remedy as a "standard'' one.

The bound volume decision in *AP I*, 296 NLRB 1260 at 1278, however, inadvertently omitted from publication Judge Wacknov's remedy directed at Respondent and which the Board adopted, although it clearly appears in the slip opinion (296 NLRB No. 155). For that reason I shall restate it as it relates to its failure properly to reinstate strikers. It reads in pertinent part:

> 1. Cease and desist from
>
> a. Refusing to offer reinstatement to qualified employees on the preferential recall list to any and all positions in each department and each progression level thereof which have been available since the termination of the strike on April 7, 1987.
>
> [b., c., and d. omitted]
>
> 2. Take the following affirmative action which will effectuate the policies of the Act.
>
> a. Offer reinstatement to their appropriate positions and backpay to any strikers who, at the compliance stage of this proceeding, are determined to have been improperly reinstated, in the manner set forth in the section of [the] decision entitled "The Remedy.''

The remedy section of the decision which the Order incorporates is a little more detailed. It states that Respondent is "to make whole such [improperly reinstated] strikers . . . for any loss of pay and benefits they may have suffered by reason of Respondent's discrimination against them. . . .'' Thus not only does the compliance specification seek lost earnings, it also seeks reimbursement for lost fringe benefits as well. These include:

> 1. Crediting the pre-strike retirement plan on behalf of each striker with the amount of contributions which would have been made had the striker been properly recalled whether or not that striker had withdrawn his retirement money in a lump sum pursuant to two open periods which occurred post-strike.
>
> 2. Reimburse the striker for any out-of-pocket medical expenses he or she suffered which would have been covered by Respondent's health plan had the striker been properly recalled. In the event the striker purchased alternative insurance, reimburse him or her for the cost of such policy.
>
> 3. Pay the striker for vacation benefits which he or she would have received had the striker been properly recalled.
>
> 4. a. Retroactively, to the proper date of recall, create and pay into a § 401(k) [Internal Revenue Code approved] retirement plan on behalf of each improperly recalled striker the amount of money it paid into such a plan when the 401(k) plan was created January 1, 1989, for all of its other employees who should have been recalled before that date, i.e. $401.
>
> b. Plus the opportunity to retroactively invest in that fund as if they had been continuously employed from that date.
>
> c. For strikers whose proper date of recall was after January 1, 1989, the opportunity to invest in the § 401(k) plan effective upon his or her proper date of recall.
>
> 5. Severance pay.
>
> 6. The value of certain emoluments—watches and work shoes.

The Principal Issues

The case appears to raise several difficult issues. On careful reflection, however, it seems to me that some of the defenses raised are not all that weighty. For example, Respondent raises certain statute of limitations matters with respect to some of the remedies claiming that they amount to litigating new unfair labor practices in the guise of a compliance proceeding. It then characterizes such claims as a deprivation of procedural due process. Careful scrutiny reveals that is not the case.

The argument stems from the fact that until the third compliance specification was issued, the General Counsel had developed backpay calculations based upon one of Respondent's poststrike recall practices, the so-called "post-strike ranking'' system. Later, when Charging Party Sever complained about the use of this system as a remedy, the General Counsel decided a more appropriate way to calculate dates of recall was to use the "pre-strike progression'' method, following Respondent's promotion practices as they had existed under the collective-bargaining contract prior to the strike.

This switch resulted in some administrative appeals to the Board which eventually ordered the Regional Director to plead both theories as alternatives. Accordingly, in the third compliance specification, the "pre-strike progression'' recall system was pleaded and became known as "theory A,'' while the "post-strike ranking'' recall system was pleaded as "theory B.'' The General Counsel from that time forward has consistently argued that theory A was the most fair to the unrecalled strikers. Respondent has disagreed, urging acceptance of theory B.

Thus, the threshold issue is which of the two theories best satisfies the Board's remedial concern and which of them provides the most realistic effort at reconstructing the recall system to place unrecalled and improperly recalled strikers in the jobs to which each should have been placed. Judge Wacknov's order, quoted above, recognizes that Respondent's conduct exceeded the simple issue of discrimination based on the entry level recall system. He well knew Respondent's illegal and inherently destructive conduct took forms other than the easily described entry level issue. That is undoubtedly why his (and the Board's) order required Respondent to reinstate "improperly reinstated strikers.'' Indeed, it seems to me that all of the conduct for which the General Counsel seeks a remedy here was fully litigated. His order clearly is aimed at requiring Respondent to have complied with the law governing the proper reinstatement of economic strikers. See *Laidlaw Corp*., 171 NLRB 1366, enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). That Respondent's conduct was found to be of the "inherently destructive'' variety condemned by *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963), and *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), explains the breadth of the violation and makes a full *Laidlaw* remedy very compelling. Respondent's narrow reading of its requirements simply seeks to avoid its duties under that rule. No Section 10(b) or procedural due process concerns are at issue. The issue is, quite sim-

ply, only one of compliance with a clear Board order, one which is well imbedded in the administration of the Act and one which Respondent should have had no trouble understanding. Therefore, any conduct aimed at undermining a striker's *Laidlaw* rights is fairly reachable in this proceeding. Quite clearly that is a remedial issue, not a new unfair labor practice governed by a statute of limitations.

I might note in this regard, that at no time has Respondent ever acknowledged that it is obligated to comply with the Board's original order(s). It has, instead, somewhat disingenuously, awaited directions from the Board regarding how to do it. Until the plant closed on September 30, 1993, there was the distinct possibility that backpay periods would continue to run and that supplemental proceedings would have continued to be required. At this late stage all the Board can really do now is liquidate those moneys which can be reduced to a sum certain up through the plant closing (and for a few whose backpay periods may be considered to have extended into the post-September 30, 1993 plant shutdown work). Until it puts into place a lawful recall system its liability is technically ongoing, even though as a practical matter the plant has been mothballed.

a. The choice of theory A

The first issue which must be decided is which of the alternate theories of recall should be used. In my interlocutory determination of eligibility, I advised the parties that I had concluded that theory A was my choice. I reached that conclusion principally because it was the most fair. Indeed, after scrutinizing theory B I am forced to concluded that it simply perpetuates some of the worst features of the inherently discriminatory entry level recall system and must be rejected.

Clearly my duty is "to restore the discriminatees, as accurately as possible, to the economic situation they would have been in absent the illegal discrimination against them.'' *Anna Erika Home For Adults*, 307 NLRB 133 (1992). In this regard, the Board clearly has wide discretion in selecting the appropriate criteria for reconstructing what would have happened in a given case but for the discrimination, including the selection of a seniority formula. *NLRB v. Superior Roofing Co*., 460 F.2d 1240, 1241 (9th Cir. 1972). In general see *NLRB v. Brown & Root*, 311 F.2d 447, 452 (8th Cir. 1963).

As found by the Board, and referred to above, Respondent's normal method of recalling employees and assigning them jobs was by departmental seniority. Emboldened by the decertification of the Union, at the end of the strike Respondent decided to call strikers back according to a subjective "merit'' system. Under this system, its management decided to rank each striker according to its judgment about the relative worth of one employee over another. There may be nothing wrong with merit ranking in and of itself, but Respondent then combined it with the inherently destructive entry level recall system. That decision had remarkable effects. It forced long-term and therefore, older, employees to accept jobs requiring physical labor more suited to younger persons. It also required those persons, when recalled, to train less experienced employees on jobs which the more experienced trainer was fully capable of performing, but was barred from doing. Such a personnel practice is a poor way to run a business. One does not run a business efficiently by assigning the fully trained employee to the bottom jobs while having less experienced employees work on the jobs requiring more skills. Judge Wacknov recognized that fact in *AP I* based on his analysis of Personnel Director Jess Cline's testimony. Furthermore, the entry level recall system is somewhat inconsistent with the *Laidlaw* rule requiring an economic striker to be recalled when his or her old job reopened upon the departure of a replacement employee. Judge Wacknov said the merit system could be used so long as it was not inconsistent with his finding that the entry level system was not destructive of 7 rights. Unfortunately for Respondent, my analysis finds no circumstance where that can be accomplished. Besides, that ranking system is fraught with opportunities to further abuse strikers. There is the amazing circumstance where all the Union officials found themselves ranked so low that they had little realistic opportunity to return.[3] Is that simply chance or is that hidden discrimination? What were the bases for such ranking? Respondent never cited the factors which it used, nor are there any objective standards by which those standards can be measured. Cf. *Lehigh Metal Fabricators*, 267 NLRB 568 (1984).

Certainly, when Cline admitted that placing the merit ranked unreinstated strikers in jobs other than entry level would have the effect of destroying the merit recall system,'' he was admitting the system had no real business justification. It had become more important to have the strikers put to the bottom, rather than have their merit judged against junior strike replacements. That, of course, is a continuation of the inherently destructive system. I cannot countenance that. Accordingly, I conclude that the only proper way of recalling strikers is to utilize the system it had in place before the strike, prestrike progression–theory A. This has the dual advantage of placing persons in the position where they would be most valuable to the employer, their old jobs for which they needed no training, as well as satisfying the *Laidlaw* requirements. It is not only fair to the employees, it makes better business sense.

b. The lump sum "resignations''

A common job abandonment issue is Respondent's contention that a large number of employees, during two poststrike open periods, asked for and received lump sum payment of the money in their retirement accounts. As a condition of obtaining that money, the unrecalled striker had to "resign'' his or her employment with Respondent using a company adhesion form. Upon signing it, the employee lost his or her place on the preferential recall list. This is called the "lump sum issue.''

With respect to the so-called lump sum resignations, there are two types of employee affected by these resignations. First, there are those individuals whose recall was to entry level jobs. Those individuals were direct victims of the entry level job discrimination procedure and there is no question but that the lump sum issue is overridden by the need to remedy their circumstances. Second, there are victims of a discriminatory atmosphere designed, like the recall system, to eliminate union members from Respondent's work force. In each case, Respondent has taken steps to eliminate strikers from consideration for reemployment by inducing them to resign. That tactic was strongly condemned in *Big Sky Sheet Metal Co*., 266 NLRB 21 (1983); *Augusta Bakery*, 298 NLRB 58 (1990), enfd. 57 F.3d 1467 (7th Cir. 1992); *Rose Printing*, 289 NLRB 252 (1988); and most recently, *Medite of New Mexico*, 316 NLRB 629 (1995). Based on the holdings of those cases, together with the atmosphere created by the inherently destructive activity previously condemned, there is no doubt that Respondent's conduct

[3] For example, union officials in the 59-man maintenance department were ranked 46th, 49th, and 55th; ranked 8th of 12 in the log handling department; and 8th of 17 in the utility department.

here was simply a corollary of the inherently destructive scheme to rid itself of union members. It is most apparent as a direct effect upon the victims of the entry level recalls. Those people had been most severely treated. Most had been wounded by the entry level recall system and Respondent saw a way of inducing these individuals to leave with a most heartless carrot. It resulted in unrecalled strikers buying their job abandonment with their own money. The second group is smaller. Usually those persons are unreturned strikers who held jobs not clearly governed by the progression, or departmental seniority, system. Even so, they were unreturned strikers who were being induced to go away by what can now be clearly seen as Respondent's scheme to take advantage of a window of opportunity to get rid of the former strikers. In essence their inclusion was to mask the true purpose of the offer to the others. For that reason the two groups became intertwined and they are so inextricably connected it would be fundamentally unfair to treat them differently. Therefore, I have rejected wholesale Respondent's contention that the resignations induced by the proffer of their own retirement accounts are valid. They were simply a product of the continuation of the inherently destructive plan to rid itself of as many union members as it could.

c. The 401(k) issues

1. The 401(k) investment plan remedy raises questions about whether it is appropriate under the Act. The General Counsel asserts that the employees should be entitled to the same investment opportunities which active employees had been given as of January 1, 1989. I am troubled by that, however, though the idea is facially appealing. It raises troublesome questions of administration at a postcompliance stage, particularly where the Board has a specific policy in place providing for interest on net backpay and where there is a Board policy seeking to put a definitive end to its litigation.

In this regard, it may properly be asked if the Board should be in the business of providing investment opportunities after it has liquidated the actual backpay and required interest thereon. If it tells a Respondent it must then provide investment opportunities enabling discriminatees to take their full backpay and instantly parlay it into more, the Board is probably exceeding its statutory authority. In fact it is akin to an award of damages. Damages in tort clearly exceed the Board's make-whole authority under 10(c). *Graves Trucking*, 246 NLRB 344 (1979), enfd. as modified 692 F.2d 470 (7th Cir. 1982).

Moreover, the Board may well be seen as endorsing a particular retirement savings plan over another, an advocacy which seems inappropriate. The 401(k) plan may be a good investment; it may be a bad one. Why induce victims of unfair labor practices to invest in it when the outcome is unknown? And, if it does require Respondent to provide that opportunity, in doing so, does it not create a veritable nightmare of administration? It would require each employee to guess at how much money he or she would have invested during a pay period, allocate that amount from some portion of their net backpay and ask the administrator of the plan to parcel it out. Depending on the success rate of the plan during a given time period, the employees may wish to raise or lower their contributions during different time periods. Not only does it seem impossible to administer, it would provide the employees with 20/20 hindsight and allow them to pick and choose the best periods in which to invest. Presumably, Regional Office personnel would be asked to assist them in that endeavor and certainly would be asked to see that the allocations were proper. That does not put Board compliance employees in a position where they have any expertise. Moreover, if the discriminatees are unable to take advantage of the tax benefits a 401(k) plan can provide, because the Board will not countenance it, that seems to be of no concern for it is a consequence in the nature of damages, an eventuality for which the Act provides no remedy. All in all, it seems to me that the best practice would be to stop at the traditional remedy, full backpay with interest.

2. I do agree, however, that it is entirely appropriate to require Respondent to pay each unrecalled striker who should have been recalled before January 1, 1989, the day the 401(k) plan was put into effect, the amount of $401. Respondent had paid each employee on the active payroll that amount as seed money to start the savings plan. It is something the discriminatees who should have been recalled by that date to have in order to fully remedy their circumstances. Accordingly, that amount will be included as a separate line item for eligible discriminatees. Even so, it should be paid directly to the strikers, and not placed in a 401(k) account.

Lesser Issues

More subsidiary issues which are raised are the traditional ones, usually fact-based regarding the circumstances of individual employees. Thus, issues of ineligibility due to strike abandonment or job abandonment, issues of interim earning offsets, and issues of mitigation appear in the cases of various individuals.

Severance pay is really a nonissue for Respondent agrees that discriminatees who should have been recalled prior to the plant's closure in 1993 would have been entitled to severance pay based on years of service. Those figures are generally not in issue and are shown as a separate line item.

The issue of specific emoluments appears to have been dealt with by stipulation. At the outset of the hearing the parties agreed that Respondent will provide to eligible persons the value of certain watches, and $80 in lieu of unused work shoes if they accept reinstatement. The issue now appears moot since the plant has closed. Specifically, see General Counsel's Exhibit 2 for the specific applications of the agreement of the parties on these matters.

Vacation pay is apparently not in dispute, but the figures are based upon length of service. I am unable to determine what those amounts are since they have not been included in any backpay specification or dealt with in the liquidation documents which the General Counsel submitted in November 1994 and thereafter. If a supplemental proceeding is necessary with respect to that issue, the General Counsel may seek to satisfy that portion of the backpay specification later.

It would appear that a second supplemental proceeding is appropriate in any event since an error has been made with respect to employee Mike Ryman. His backpay period erroneously omitted three quarters. On June 26, 1995, the General Counsel moved to amend his specification; while there may be no real dispute over the gross backpay for the new period, Respondent has not had the opportunity to determine his interim earnings during that time. It is entitled to do so. I will nevertheless issue a partial backpay award for the original period. See the discussion below in section XI., Maintenance Department.

John Lawson and Barbette Sisson

The Alleged Reinstatement of John Lawson Sr.

Prior to the strike, John Lawson Sr. had been employed by the Mill since 1962. At the time the strike began he was the lead machinist in the machine shop and had been employed in that capacity for a long period of time. He is also an union official who was seen by Personnel Director/Corporate Vice President Jess Cline as a principal culprit in causing the strike. There was personal animosity between Cline and Lawson as well as between Cline and the other members of the Union's negotiating team and its officers. Lawson gave testimony in front of Judge Wacknov in *AP I* and was found in *AP II* by Judge Pannier to have been improperly bypassed for recall in September 1988. When Judge Pannier issued his decision in *AP II* on December 20, 1989, Respondent recognized that it had a problem on its hands. It was not certain that it could persuade the Board that Judge Pannier was wrong, so it decided to attempt to offer Lawson Sr., employment as a general mechanic.

It should be observed here that although both Lawson Sr. and Cline testified in front of me regarding the circumstances of what occurred in late September and October 1989, they had earlier given similar testimony before Judge Pollack in *AP III*. Judge Pollack determined that it was unnecessary to make findings with respect to what had happened to Lawson because it was not relevant to the determination of the case in front of him. Nonetheless, the record which was presented to Judge Pollack in *AP III*, insofar as it is relevant to Lawson's circumstances, has been packaged as an exhibit here. See specifically General Counsel's Exhibit 27. That exhibit consists of excerpts from the record in *AP III* as well as portions of the General Counsel's brief to Judge Pollack on the issue. The evidence taken before me, when put together with General Counsel's Exhibit 27 provides a very clear picture of what happened to Lawson Sr. in the fall of 1989. It leads me to conclude that Respondent did not take the appropriate steps to assure that its offer of reinstatement would lead to a true period of employment for Lawson. As a result, I must conclude that the offer was not a valid one and that it does not cut off the backpay period for him.

Specifically, the evidence shows that during the hearing in front of Judge Pannier in *AP II*, Cline listened to the testimony of both Lawson Sr. and pipefitter/union president Jesse Jones. Later, Lawson wrote a letter to Cline in which he advised that he was willing to give the general mechanic's job a try and requested reinstatement on that basis. There was such an opening and Cline made the judgment that he would call Lawson, even though Lawson was lower on the ranking system than Jones. That call to Lawson may have been triggered by Cline's assessment that an individual in the machine shop (Steinhoff) had recently separated from employment.

On September 29, Lawson met with Cline and they had a lengthy conversation about the nature of the general mechanic's job. During that conversation both expressed concern about the fact that there had been bad blood between some of the strike replacements and some of the returning strikers. Cline apparently assured Lawson that he knew Lawson would not be a troublemaker but Lawson told him that he was nonetheless concerned because he had received some secondhand threats to the effect that he might suffer some sort of accident after he returned. Cline denied Lawson said any such thing, but Lawson's secret tape-recording of the conversation demonstrates that the subject matter was at least discussed. The conversation ended when Cline agreed that Lawson should have about 2 weeks to make arrangements with his current employer, Prewitt Enterprises, and that he would report to work on October 16.

On October 16 Lawson returned to work but was not assigned to the machine shop. It should be observed here that the general mechanic's "system'' as operated by Respondent during and after the strike recognized that individuals who were highly skilled in one particular craft were expected to perform at a level of high competence in that craft, but were permitted to work as best they could if assigned to other duties. That practice certainly applied to traditional crafts such as carpenters, pipefitters, and millwrights, but is not as clear with respect to former machinists. Indeed, machinists Whitey Risteen and Jim Ryman were both directly assigned to the machine shop after the strike and had no other duties.

In any event, on October 16 Lawson reported for work and was assigned by his Foreman Earl Arnold to work at a job repairing the baling machine in the finishing room. He worked on that job all day without incident. He does say, however, that before he actually went to work that morning he had gone to the stores department to pick up some equipment and he had seen some individuals whose animosity toward him had been previously expressed, specifically one of the Ray brothers.[4] He says he deliberately avoided any contact with that individual, but concedes that his attitude may have been misinterpreted as rudeness.

In any event on the following day, Lawson again reported to the finishing room where his leadman, Woody Lancaster, told him after an hour or two that a call had come from the power house and they needed him to go over there to perform a job on a "expansion joint'' problem.

When Lawson arrived at the power house, he met with a leadman named Larry Kile, advising Kile that he had been sent to work on the expansion joint. He testified Kile appeared to think the matter over for a moment and then said, "I got another job for you.'' Kile did not describe the job but told Lawson to follow him. They went up two flights of stairs, outside one of the large recovery boilers to a platform on the outside of the vessel.[5] The boiler itself had been shut down several days earlier as part of a routine maintenance program. Kile introduced Lawson to an individual who was described as a (boiler) factory representative from Babcock & Wilcox. Kile simply told the representative (whose name was Hess), "This is the man that I brought you to do the job.'' Kile then left "to go to coffee'' leaving Hess to explain what he wanted.

It should be observed here that despite the number of years which Lawson had spent in the plant, he had never before worked inside a boiler. Indeed, he was unfamiliar with the safety procedures and did not even know what the inside actually looked like. From his point of view he was now standing

[4] One of the Rays has been singled out by Judge Wacknov *AP I* as a provocateur who started a fight in a bar in which resulted in another Ray brother causing the discharge of a contractor's employee (and backpay claimant here), Edward Reiner.

[5] Respondent's plant operates five huge boilers. Two of them are known as power boilers and three are known as recovery boilers. Each consists of a vessel which is several stories high. In essence, the firebox in the bottom of these vessels heats water to produce live steam. The power boilers apparently operate electric turbines while the recovery boilers are used in the production process.

outside the vessel at a level which he knew to be between 30 and 60 feet above ground level.

Hess explained that he wanted some pipes brushed with a wire wheel so that some nondestruct tests could be run on them. It is not clear from Lawson's testimony that Hess explained what the nature of that test would be. He only told Lawson that he needed certain pipes or "tubes,'' as they are known, to be cleaned. Elsewhere in the record, the manager of that department, Markegard, explained that the vessel had earlier been cooled and washed and that loose soot and dirt had been power-sprayed from the interior of the vessel.

Lawson asked the factory representative how to do that job. He says Hess told him that he should enter the "hole,'' referring to a manway about waist high as they stood on the platform. Lawson says he looked and saw a "dropboard'' hanging there and asked how he was to get down through the hole. He says the factory representative said, "Well, if you stick your head in the hole_once you wiggle through the hole you can stick your feet back again. Then you can get on that ladder and then you climb down into it.'' Lawson looked inside and observed that the area was dimly lit by a "trouble'' light. This light was apparently low wattage and did not fully illuminate the area. Indeed, he said that beneath him it appeared to be total blackness. I observe here that Markegard testified that when he looked into the hole shortly after the incident was over, he observed that a second light which had been placed in that location was not lit. Had the area been better illuminated, Lawson would have seen that instead of a black hole descending sixty feet to the ground, there was in fact a "floor'' of interlaced piping approximately 8 feet beneath him. In that light he was only able to see what he described as a "4 x 4'' board, which the factory representative told him to stand on; even so, he could not see what was supporting it. To his eyes the entire area looked like a death trap.[6]

Lawson, already fearful because of the threats which he had earlier received and unhappy with the earlier greeting given him by one of the Ray brothers, suffered a panic attack and rather quickly concluded that he was being set up for an injury.[7] Lawson did not know it, because he was unfamiliar with the boiler entry rules, but a safety watch had in fact been assigned to him. That individual, believed to be Jim Ryman, had not yet arrived on the scene. In retrospect, it is apparent that no one expected Lawson to enter the manway at that particular moment. Instead, he would have been obligated to go get the appropriate tools and assure himself that he was accompanied by the safety watch.

The problem was that no one had told him what the proper procedures were. He therefore looked around, saw that he had no assistance, believed he was being placed in a dangerous area where a slip could cause his death and decided, not totally unreasonably, to get out of there. He then looked for both his foreman and his leadman. He found the leadman but was able to say only that he was "not going to go in the hole.'' He went on and looked for the foreman but could not find him, eventually ending up in Cline's office. He could not really explain his concerns to Cline, saying only that he hadn't understood what the general mechanic's job entailed and he wasn't going to go into that hole, but was going to quit. He and Cline discussed that decision for a moment, but he was adamant and told Cline that he was not coming back.

A few days later, on October 24, Lawson hand-delivered a three-page letter to Cline more clearly explaining what had happened, advising that he had not been told any of the safety procedures until he discussed it with others after he had quit. Cline signed a copy of the letter saying that he disagreed with Lawson's characterization of what had transpired.

Aside from the question of whether or not Lawson properly described what had happened in the letter, whether his quit was appropriate, or whether his failure to enter the hole was a refusal to perform the work, one thing is quite clear: at no time had this former machinist ever been inside a company boiler before; he had no training with respect to the safety procedures, including the requirement of a safety watch, and he had no knowledge of what to expect once he got inside the boiler. Furthermore, Respondent's own department manager, Markegard, acknowledges that the work area should have been better illuminated. Had the lighting been set up properly, Lawson could have seen that he was not being led into some sort of trap. In those circumstances, it is not unreasonable to conclude that Respondent had not taken sufficient steps to guarantee that Lawson would have be able to succeed in his new assignment. Although Cline attempted to explain his belief that Lawson had acted unreasonably, he never disagreed with Lawson's assertion that proper training had not taken place. The job itself, cleaning pipes with a wire wheel, was certainly not a difficult job. It could have easily been done by a laborer or anyone with higher skills.

The real issue to be decided here is whether or not an employer who has committed extensive and inherently destructive violations of the Act, in circumstances where it has never taken any real steps to remedy them, and has specifically discriminated against the individual in question, can honestly contend that the employee was given full opportunity to succeed where his job had changed and when it took no steps whatsoever to ensure success. Indeed, the contrary appears to be true; it assigned Lawson to a new job, telling him to perform the best that he could. Cline must have known, because the boiler was shut down, that there was at least some likelihood that Lawson would be assigned to work in the boiler. He also knew that as a machinist Lawson had never worked there before. Some sort of advice to Lawson's immediate supervisors about his lack of experience in certain areas and with respect to boiler safety procedures does not seem unreasonable. Indeed, the failure to alert Lawson's immediate superiors seems more than mere dereliction; its smacks of trolling for Lawson's failure. Accordingly, I conclude that Respondent's apparent effort to reinstate Lawson on October 16–17, 1989, failed to meet the requirements of a proposed Board order (as initially recommended by Judge Pannier) and that backpay shall continue until such time as a proper offer of reinstatement is made.

Sisson's Loss in *AP II* Does not Bar Recovery Under *AP I*

When the strike began, Sisson was a secondary treatment operator in the environmental department. The General Counsel

[6] Objectively, the facts do not demonstrate anything of the sort. The 4-by-4 was a 4-by-10 inch plank which had been placed upon a relatively horizontal ladder which was in turn triangulated against the side of the vertical piping which was nearby. It was apparently quite safe had one the experience to know it.

[7] In fact, Cline testified that one of the Rays had accused Lawson of making an aggressive, obscene remark on the first day Lawson had returned. Thus, assuming that Ray reported something close to the truth to Cline, both Ray and Lawson Sr. had had some sort of mutual animosity pass between them on that day.

asserts that Sisson's backpay begins May 25, 1988. Respondent defends on the ground that Sisson had declined an offer of reinstatement and that her case has been dismissed by Judge Pannier, with the Board's affirmance, in *AP II*. It argues therefore that *AP II* extinguished any right she had to reinstatement and backpay. The General Counsel asserts, and I find myself in agreement with him, that *AP II*, insofar as Sisson is concerned, dealt only with an intermediate offer Respondent made offering her the relief position. Judge Pannier adverts to such an offer and it is in evidence here as Respondent's Exhibit 54(a)–Cline's letter of February 24, 1988, offering her reinstatement in "[her] pre-strike department.'' That offer, of course, came some 3 months before her own job actually opened up. She was well aware, as was the entire community by that time, that Respondent was offering only entry level jobs. She was also aware that letters of this sort were transmitting only entry level job offers. Simultaneously, as further explicated by Judge Pannier, Respondent also posted the relief operator job for intraplant bid, promoting the relief operator from "the bottom of the progression ladder'' to regular operator. Judge Pannier found that Sisson did not timely file an unfair labor practice charge regarding her treatment with respect to Respondent's handling of that job opening. In any event it was an offer of an opening which fell into the inherently discriminatory category as defined in *AP I*. It was not her old job. As the Board held in *AP I*, "relief'' jobs are not the same as the permanent version of that job. "Reliefs'' have no regular schedule and are often used in more menial tasks.

The General Counsel's contention here does not deal with that particular circumstance, but instead with her own job, which became available for Sisson on May 22, 1988, and which is clearly encompassed by Hiebert's original charge in *AP I*. Sisson, like everyone else who had a progression system in his or her department, was a victim of the inherently destructive recall system. Her old job became available on May 22, but she was never offered it. Indeed, by that time Respondent had stricken her name from the preferential recall list on the grounds that she had failed to accept its offer of February. That it had no right to do with respect to her own job.

Accordingly, I conclude and am in agreement with the General Counsel, that Sisson's circumstances are fully encompassed by *AP I* and that *AP II* does not serve as a bar to recovery. Even a striker's acceptance of a position which is not substantially equivalent to his prestrike job does not extinguish his entitlement to full reinstatement. *David R. Webb Co*., 291 NLRB 236 fn. 3 (1985), enfd. 888 F.2d 501 (7th Cir. 1989), cert. denied 495 U.S. 956 (1990). Indeed, *AP II* sought to begin her backpay period in February, some 4 months before any entitlement became available to her under *AP I*. The claims do not even compete with one another. She was always a victim under *AP I*, and the fact that she had a cause of action as a second-time victim in *AP II*, which she was unable to perfect, has no impact on remedying the first.

Overview of Backpay Eligibility for Backpay

Due to the somewhat fluid nature of this case, for the most part a necessary result of the General Counsel's attempt here to reconstruct the recall system in the way which Respondent should have, it became necessary to make certain preliminary determinations of eligibility for recall. In that regard, I issued, on November 14, 1994, a document entitled "Interlocutory Determination of Eligibility for Backpay.'' In that document I determined that approximately 13 individuals were not eligible for backpay for various reasons. In addition there were others whose backpay periods were determined to have been shorter than alleged. This resulted in other individuals "stepping in'' to the backpay periods which the General Counsel had earlier alleged belonged to the now determined to be ineligible individuals. The General Counsel then issued on November 21, 1994, a document entitled "Liquidation of Backpay Claims Pursuant to the Interlocutory Determination.'' In that document the General Counsel tracked my findings of ineligibility and adjusted the backpay claims for individuals whom the General Counsel had determined would step into the shoes of the ineligible persons. A review of that document led me to conclude that I had made some inadvertent errors in my initial interlocutory determination and accordingly, on January 13, 1995, I issued a revised interlocutory determination of eligibility for backpay. This document corrected certain errors and also updated the new backpay periods for those individuals who had "stepped in.''

At this point it is appropriate to discuss the reasons for declaring those individuals to be ineligible for backpay. Each of them will be discussed in turn.

In general, there are three categories of individuals which relate to either eligibility or subsequent cutoff. These are discussed in the initial interlocutory determination of eligibility of backpay but I repeat them here. They are: (1) a person who, before the strike ended, took such action which would arguably cause him or her to lose employee status under Section 2(3) of the Act. Specifically, see Justice Fortas' observation in *Fleetwood Trailer Co*., 389 U.S. 375, 378 (1967). (2) A person who is a victim of the unlawful entry level recall system. See *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963). Those individuals are treated as discriminatees under the doctrine of *Abilities and Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). (3) A person whose prestrike job was not governed by Respondent's job progression promotion system. That category includes journeymen in the maintenance department and certain persons in the so-called small departments section. These individuals are regarded and treated as true victims under *Laidlaw Corp*., 171 NLRB 136, enfd. 414 F.2d 99 (7th Cir. 1969), cert. den. 397 U.S. 920 (1970). Seniority in recall has been applied to them.

Respondent and General the Counsel have treated the "lump sum'' employees as a separate category. I do not regard them as a separate category at all but simply a part of category number 2 above. As I observed, supra, each of them had been placed on the recall list but was subject to the inherently destructive system of recall. At the time each of those individuals chose to take the lump sum from the retirement plan, none had been properly offered reinstatement; all were subject to the entry level job recall system. Therefore, when they elected to take the lump sum, they were already unfair labor practice victims, severely damaged by Respondent's inherently destructive conduct. Respondent uniformly insisted that each sign a boilerplate form to obtain his or her retirement money and conditioned getting that retirement money upon its adhesion language requiring them to resign. It seems clear to me that the offer is simply a continuation of the previous unfair labor practice–conduct designed to prevent these individuals from ever returning to work. Accordingly, I reject Respondent's defense that those resignations were free and uncoerced. As a result, each of those individuals who signed Respondent's form is entitled to reinstatement with backpay.

It is true that there are other resignations that occurred during that same period which appear to be voluntary. Those will be dealt with on an individual basis below.

The backpay specifications recognize that there are 12 "departments'' in which Respondent's employees are entitled to reinstatement. In actuality there are ten true departments and two other smaller categories including what have been designated as "small departments'' and "special situations.'' Each of these groupings will be discussed seriatim, taking each discriminatee by name. At the end of the discussion with respect to each individual, a dollar figure is shown in the right hand column. That dollar figure represents a total backpay figure. In any instance where the total backpay figure is not in dispute, the underlying specification has been omitted. For the most part the specification for each individual person is found in the fourth amended consolidated compliance specification, volume II, Appendix C, or as revised in the November 21, 1994 liquidation document. There are, however, other corrected versions which were made at other times. A specific exception to that is Edward Reiner, whose backpay specification appears in Appendix D. The appendix is large, it has been amended and modified on several occasions. It will serve no purpose to reproduce those portions of that appendix which are not in significant dispute. I do reproduce certain specifications, particularly where certain quarters of interim earnings are in dispute and/or have been modified by the discussion. I have also chosen not to reproduce certain specifications even though they have been modified, usually as a result of a changed eligibility period, if there is no dispute over the calculation.

Each of these individuals will be discussed by department. As noted there are 10 departments and 2 special categories. These departments are numbered I through XII and are in accordance with the tab and organizational system utilized by the General Counsel throughout. They are:

I. Log Handling
II. Woodroom
III. Digesters
IV. Bleach Plant
V. Machine Room
VI. Finishing Room
VII. Warehouse
VIII. Technical Department
IX. Utilities
X. Small Departments
XI. Maintenance Department
XII. Special Situations

Each individual will be discussed in the same order in which his or her name appears in the Revised Interlocutory Determination of Eligibility for Backpay which I issued on January 13, 1995.

Individual Cases–Discussion

I. LOG HANDLING

Rance Dailey

Dailey's most recent backpay specification appears in the General Counsel's errata of August 1, 1995. Respondent's principal defense is that Dailey failed to respond to an offer of reinstatement followed by a claim that he abandoned any interest in his job by taking a full-time position with the United States Postal Service. Dailey had been a sorting crane operator at the time of the strike. The offer which Respondent made in November 1987 was to an entry level job in the log handling department. Dailey simply did not respond. I find that he was not obligated to do so and that the offer can be ignored as legally insufficient, the offer was part of the inherently destructive recall system.

The specification asserts that Dailey's backpay period begins on March 6, 1988, and ends in the third quarter of 1993 when the plant closed. He says that he had applied for work with the Postal Service in June 1987 and was notified of their decision to hire him in December 1987. He describes his job as a building maintenance employee and beginning in January 1988 it had became regular employment. Thus, at the time Respondent made its offer of an entry level job on November 25, 1987, Dailey became an immediate victim of a discriminatory job offer. He was entitled to ignore it and wait for a proper offer.[8] A proper offer should have come in March 1988, but did not. At that time he was employed by the Postal Service and remained employed there at the time of the hearing.

It may well be true that if given the choice between returning to the mill or staying at the Postal Service, Daily might have chosen to remain with the Postal Service. However, Respondent never put him to the test and there is no showing that by accepting and remaining with the Postal Service that he abandoned his interest with Respondent. Accordingly, I conclude that Dailey is entitled to backpay pursuant to the specification as set forth in an August 1, 1995 errata. The errata also corrects the severance pay figure as well.

1. Total Backpay		$48,849
2. Pension Credit	5.57 years	
3. 401(k) Matters		401
4. Severance Pay		3,856

Scott Foss Sr.

The most recent backpay specification for Foss is found in the General Counsel's liquidation document dated November 21, 1994. Respondent defends on the ground that he refused a November 12, 1987 job offer and was thereafter removed from the recall list. It also asserts that he was permanently employed elsewhere. At the time the strike began, Foss was a boom operator, the third highest job in the department. Respondent's November 12, 1987 letter prompted Foss to speak to Personnel Director Jess Cline. He learned from Cline that the job being offered was an entry level job, relief bundle deck person. On November 11, Foss responded by letter saying that he was willing to return to work if he could be reinstated to his old job, mill boom man and assistant boat operator. Respondent then struck him from the list by its letter of November 13, 1987, and Foss responded with a letter dated November 24, 1987, asking that his name be left on the list for his old job. Respondent did not put him back on the list as he would not accept the entry level job. Clearly Foss is a direct victim of the unlawful and discriminatory recall system and was entitled to ignore the offer of the entry level job.

Foss is married to a native American whose family is in a Indian village known as Klawock. That village is located on Baranof Island (the same island as Sitka), but is accessible only

[8] Moreover, even under *Laidlaw*, an economic striker is entitled to refuse to accept jobs which are not substantially equivalent to his old job and await the offer of his prestrike job. *Rose Printing Co*., 304 NLRB 1076, 1078 (1991).

by air or boat. He testified that in June or July 1987 his family left Sitka for Klawock, principally for financial reasons. He followed them in December and found it easier to get by on subsistence there as her family helps out for they "share what we catch,'' i.e., subsistence fishing. He has maintained his home in Sitka and he has a son who lives it Sitka as well. He testified that he occasionally finds work with South East Stevedore Co., first getting on their casual list as a longshoreman in March 1988. He has worked for them on and off since that time. He has also been employed by Klawock Timber, worked for an apartment house, for a construction company and as a dormitory manager. In addition, he has worked at odd jobs through the state job service. He has also found work with Phoenix Logging and the Catholic Community Services.

Respondent contends that his removal to a native village and his intermittent employment amounts to a self-removal from the job market. I disagree. Had Respondent offered him his old job, he clearly would have taken it. It had the opportunity to do so beginning February 24, 1988, a time when his move to Klawock was easily reversible. Furthermore, there is no showing that he did not seek work under the circumstances. Indeed, the evidence shows the contrary. However, the General Counsel has agreed to strike his 1993 gross backpay claim for he has not provided any interim earnings data. The backpay specification ends with the fourth quarter of 1992. I conclude that Respondent has not shown that Foss deliberately withheld his services from the job market. Accordingly, Foss is entitled to full backpay as set forth in the job specification. He is therefore entitled to pension credit from February 24, 1988, to December 31, 1992. The ending date is consistent with the date on which his backpay period was cut off.

1. Total Backpay		$104,033
2. Pension Credit	4.75 years	
3. 401(k) Matters		401
4. Severance Pay		16,070

Marvin Grant

Grant had been employed in the log handling department for over 15 years prior to the strike. He was a mill boom man, the third highest job in that department. After the strike was over, he signed up to return to work. In July 1987 he accepted Respondent's offer to the entry level job of relief band cutter despite the fact that he had not done that job since about 1970 when he had been hired and despite the fact that it is one of the most dangerous jobs in the mill. In November 1987 he learned of an interdepartment bid, and decided to bid for the cleanup job in the Woodroom. That too, is a entry level job and pays $3–per–hour less than his old job of mill boom man.

Respondent argues that by accepting the interdepartment bid, Grant waived his right to any claim on the mill boom job. I reject that contention. By offering him only an entry level job in his old department, rather than his old job, Respondent made him a victim of the discriminatory entry level recall system. He is clearly entitled to an offer to return to his old job. That job in fact opened up on May 31, 1988, only 6 months after he bid into the Woodroom. Respondent's argument that he somehow waived his claim to that job is without factual support. The mere fact that he chose to try another line of work while awaiting recall to his proper job is simply evidence that he was attempting to meet his obligation of mitigating backpay and to get away from a dangerous job which had been improperly given him.[9] Grant is entitled to backpay as alleged in the specification found in General Counsel's liquidation document of November 21, 1994. That takes into account the fact that he would have been promoted to assistant boat operator in June 1992. Since Grant was employed at the time the mill closed, he did receive a severance payment of $11,730. However, since he was employed on the wrong job, rather than his proper job as assistant boat operator at the time the mill closed, he is entitled to an additional $4340 severance pay.

1. Total Backpay		$10,533
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay		4,340

Alan Gray

Gray's backpay specification is found in the General Counsel's liquidation document of November 21, 1994. Prior to the strike Gray had been a deck transfer man, the fourth highest job in that department. Due to a revision in staffing in November 1988, that job became known as the bundle crane job. According to the backpay specification, under theory A Gray would not have been recalled to his job until January 12, 1992. When the strike ended on April 7, 1987, his job had been filled by a permanent replacement. Gray is the first individual who we address whose backpay claim is defended by Respondent's contention that he resigned in order to take his retirement account in a lump sum. The lump sum issue is addressed above in much more detail. Gray's situation differs little from the general decision made above in which I reject the lump sum resignations as a defense. The only complication to Gray's circumstance is that after taking his lump sum in June 1987, he left Sitka to take a job with his brother-in-law's company in Spokane, Washington. At the time he took that job he did not know whether it would be permanent, but he has resided there since. He is a member of the Shee Atika (Sitka) Indian Tribe and has family roots in Sitka. It is also true that he sold his home in Sitka in October 1987 when he moved to Spokane, but says that the sale was principally due to a divorce which had occurred shortly before. None of these circumstances, including Gray's knowledge that he was risking his job by signing the resignation form, assists Respondent here. The law is quite clear that resignations in these circumstances are not a defense. Accordingly, Gray is entitled to backpay as alleged in the specification.

1. Total Backpay		$32,392
2. Pension Credit	.75 years	
3. 401(k) Matters	None	
4. Severance Pay		6,059

Robert Kinville

Kinville is one of approximately 35 individuals for whom there is really no dispute with respect to the calculation. His circumstance is remarkable only because he is a named discriminatee in *AP I.* At the end of the strike his job was mill boom operator, the third highest job in the log handling department. He had accepted an entry level job after the strike ended. Judge Wacknov found that he was unlawfully discharged on November 23, 1987. However, Kinville was also a discriminatee under theory A. Under that theory he should have been recalled on December 10, 1987, as mill boom operator. In

[9] *David R. Webb*, supra.

the spring of 1989, he was actually reinstated as a tug boat operator and his backpay period ended. Accordingly, the parties are in agreement that his backpay period begins in the fourth quarter of 1987 and ends in the second quarter of 1989. The General Counsel asserts that he is entitled to additional pension credit for a time period beginning November 23, 1987, and ending March 14, 1988, as he had taken his lump sum retirement in May 1994. In accordance with the General Counsel's allegation, he shall be credited with an additional .3 years' retirement credit. As Kinville remained employed until the mill closed, he has already received his full severance pay.

1. Total Backpay		$13,344
2. Pension Credit	.3 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Shawn McLeod

McLeod is a named discriminatee who had been stricken from the recall list because of alleged strike misconduct. Judge Wacknov rejected the contention and found Respondent had no justification to bar him from reinstatement. His backpay specification is found in the General Counsel's liquidation document of November 21, 1994, Appendix III. There is no dispute with respect to the calculation. Before the strike he operated the bundle crane and he should have been reinstated on April 4, 1988. His net backpay has been adjusted due to my finding that Petraborg is ineligible for recall. This results in a promotion for McLeod as shown in the most current backpay specification. McLeod's interim employment was with Respondent in another job. There is no dispute with respect to the accuracy of that calculation. As a result, there is no need to adjust his pension credit or his severance pay, for he received the proper amount.

1. Total Backpay		$13,591
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

John Petraborg

Petraborg had been employed by the mill for 11 years prior to the strike which began in July 1986. Even before the strike Petraborg had purchased a commercial fishing boat and borrowed from his family several thousand dollars in order to purchase a commercial fishing license. He used that license during the strike to engage in commercial fishing. Subsequently, after the strike was over, he decided not to request recall and did not place his name on the list of employees seeking recall. In October 1987 he applied for the lump sum retirement money, sold the commercial fishing license he had and bought a better one for $22,000. Since the beginning of the strike up to the present time he has been self-employed as a commercial fisherman. It is true that at various points in his testimony he asserted that he wanted to go back to work for Respondent. Frankly, however, based on his testimony over a 2-year period, his actions inconsistent with wanting to return to work, and his financial commitment to a new career, I conclude the truth is that during the strike in 1986 he decided to become a commercial fisherman. He did so and has had considerable success in that endeavor. I therefore find that during the strike Petraborg abandoned any interest he had in returning to his job as a mill boom man or in any other capacity. Accordingly, I conclude, as I did in the interlocutory determination of eligibility, that Petraborg is ineligible for backpay in this matter. See *NLRB v. Fleetwood Trailers Co.*, 389 U.S. 375 (1967).

Todd White

At the time of the strike in July 1986, Todd White had been employed by Respondent for only about 6 months. He had been hired as a relief bundle deck operator and had become a bundle deck operator at the time the strike began. In fact he was working semiregularly on the sorting crane. The loss of income due to the strike concerned him greatly and impelled him to follow a dream which he had. Accordingly, he took $5000 which he had saved and established an automobile body shop business. He testified that he intended to stay in that business if it was successful, and he had no intention of returning to Alaska Pulp if the business succeeded. The business succeeded well enough so that by the spring of 1987, when the strike ended, it was paying his bills and he was quite busy performing the duties that the business required. He testified in 1993 that the business became successful in 1989 and he currently employs two full-time individuals and a high school student. One of those employees, Hinkle, has worked for him since 1987 and has been full time since 1988. In addition, his wife runs the office and serves as a parts runner.

It is clear to me that the strike was a significant event in White's determination of his own future. He lived with the strike for several months and decided that he would be better off establishing and running his own business. Accordingly, in October 1986, he started that business with no intention of returning to Alaska Pulp. Indeed, he said that he was so busy that he did not even concern himself when the strike ended with finding out what the procedures were to go back to work at the mill. He simply had no interest in doing so and never did. Therefore, I conclude that White abandoned the strike when he established his auto body repair business in October 1986. *NLRB v. Fleetwood*, supra. Accordingly, he is ineligible for backpay.

Randy Williams

At the beginning of the strike, Williams was a deck transfer man. He should have been recalled to that job on November 30, 1987. In fact, he accepted an entry level job, eventually working back to his original job in the third quarter of 1991. There is no dispute with respect to the backpay calculation for Williams, except that, like McLeod, he benefited from the ineligibility of Petraborg. He would have been promoted a little bit earlier than he actually was. The loss of those promotions has been taken into account in the most recent specification found in Appendix III of the General Counsel's November 21, 1994 liquidation document.

1. Total Backpay		$17,831
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Larry Wright

Both Larry Wright and his wife, Jullee, are discriminatees in this matter. The discussion here with respect to Larry applies equally to the subsequent discussion of Jullee. On May 4, 1987, about a month after the strike ended, they went to see Respondent's personnel manager, Cline. Both were long term employees. Larry had worked for Respondent for over 10 years and was a bundle crane operator, the fourth highest job in that department. Jullee had worked in the machine room as back ten-

der, having worked 8 years to get to that job, the second highest in that department. They asked Cline when they could expect to get their jobs back but were told that the only jobs which were available would be the entry level job in their respective departments. They told him that they would be willing to return to work in their old jobs, but were not willing to wait for an entry level job and start all over again at the bottom of their department.

They were aware of a company rule that said that Respondent would not rehire former employees who had resigned without giving notice. They told Cline that they did not want to accept entry level jobs, so they might as well quit. Even so, they did not want to be penalized if they reapplied later for failing to have given 2 weeks' notice. Cline told them that they would not be recalled that soon anyway. Cline asked his assistant, Karla Parrish, to prepare resignation forms. She did so and both of them signed such forms that day. Each form stated "It is my intention to terminate my employment with Alaska Pulp Corporation effective 5–4–87.''

Despite that clear intention to resign, it is equally clear that they would not have done so, had they not had been faced with the illegal entry level recall system. I therefore do not regard these resignations as bars to reinstatement with backpay. Respondent's entry level recall system has clearly been found to be illegal and these two individuals are direct victims of that system. In many respects these resignations are identical to the lump sum resignations which I have earlier found Respondent cannot rely upon.

The figures for Larry Wright are set forth in the liquidation document of November 21, 1994, Appendix III. They are not in significant dispute. The only comment to be made is that he should have been called to his job as a bundle crane operator on July 14, 1987, and would have been promoted to mill boom operator in December 1987. He did have significant interim earnings, demonstrating his willingness to work during the backpay period.

1. Total Backpay		$120,312
2. Pension Credit	6.15 years	
3. 401(k) Matters		401
4. Severance Pay		10,057

II. WOODROOM

Roy Anderson

Anderson was hired by the Company in 1978 and by the time of the strike in 1986 had worked his way up to become the cutoff saw operator in the woodroom. That is the fourth highest job in the department. It had taken Anderson 8 years to reach the cutoff saw job. He struck with the others and at the end of the strike, signed up to return to work. In the meantime he had taken a part- time job with the City of Sitka as a janitor and light maintenance man. In mid-July, Personnel Director Cline called him in for a discussion about a recall. Cline told him that an entry level job was available and asked if Anderson was "interested.'' Anderson told him that he wanted his old job back but Cline replied that at the time there were only entry level positions available. Anderson declined to take the entry level job in his department. He says Cline told him at that point he was "terminated'' from the mill and then they had a discussion about whether it was appropriate for Anderson to withdraw his pension money pursuant to the lump sum open period. Eventually, on December 16, 1987, Anderson did withdraw his lump sum.

Respondent defends on the ground that Anderson declined the job offer and later resigned when he took his lump sum. The documentation shows that Anderson was indeed terminated on July 15, 1987, but it is recorded as a "quit,'' taking another job locally. Anderson says that he never did that, but he may have said to Cline that he preferred his city job to that of an entry level mill job. He asserts that he would have taken his old job back.

I conclude that Anderson, too, is a direct victim of the entry level job recall system. He was entitled to await the opening of his old job as cutoff saw operator.

He is entitled to full backpay as alleged in the specification which is found Appendix II of the November 21 liquidation document. He should have been recalled on April 27, 1988. He would have been employed through September 30, 1993, receiving a promotion to A-1 operator at the end of October 1988.

1. Total Backpay		$28,046
2. Pension Credit	5.5 years	
3. 401(k) Matters		401
4. Severance Pay		7,691

Placido Castillo

Castillo's circumstance truly highlights the cruelty of the entry level recall system. At the time the strike began, Castillo was a senior employee who had worked his way from the bottom of the woodroom progression system to the top job, head sawyer. In 1987 when the strike ended, he was 53 years old, intending to work until he retired at age 65. The head sawyer's job is an automated one requiring little physical labor but a great deal of experience. The entry level job, relief spudder,[10] requires physical exertion suitable for a much younger person. That circumstance is generally true throughout the plant. The entry level jobs usually require physical effort while the more highly paid senior jobs in the progression are more automated and require knowledge and skill.

He accepted a recall to the spudder/hog tender job shortly after the strike was over. He found it to be grueling, physical work which he is no longer capable of performing. As a result he sought and obtained a transfer to the finishing room as a scaler, apparently first as a relief scaler. Again, he found that work to be physically demanding. While working as a scaler he was able to progress one step in the finishing room to restacker. He tried those jobs for approximately 19 months until November 1, 1988, when he determined he could not perform work requiring that amount of physical effort although he was still in good health. Accordingly, he decided to take early retirement. Respondent does not quarrel with the contention that Castillo is eligible for backpay but asserts that his retirement in November 1988 is the cutoff of any backpay entitlement.

It should be observed here that in 1987, Castillo's wife retired from her job as custodian at a local school. He admits that since his retirement in November 1988, he has not worked for anyone else nor has he sought to work for anyone. He has in all respects regarded himself as retired. That failure raises serious questions of mitigation under Board law.

[10] In November 1988 the woodroom was reorganized and the entry level job became known as hog tender.

Castillo admits that he is not disabled and is capable of performing his job as head sawyer. Board law clearly requires a backpay claimant to make efforts to obtain some sort of interim employment in order to mitigate the amount of backpay due him. Castillo, since the beginning of 1989 has made no such effort. He has simply considered himself retired. I conclude, based on his testimony that he has voluntarily removed himself from the job market as of that date. *Roman Iron Works*, 292 NLRB 1292 fn. 3 (1989). Therefore, although I find that he would have been entitled to backpay up through the plant closing had he sought employment during that period, I find that since that he did not, his backpay entitlement should cease with the fourth quarter of 1988. Accordingly, his backpay specification is modified to strike all quarters beginning with the first quarter of 1989 and thereafter. A copy of Castillo's backpay specification as proposed by the General Counsel is attached as appendix. It can be seen from that exhibit that the General Counsel contended that his net backpay was $184,098. However, because I have stricken all amounts claimed beginning with the first quarter of 1989, I conclude that his net backpay is the sum of the quarters beginning with the second quarter of 1987 and ending with the fourth quarter of 1988, $13,974.

1. Total Backpay		$13,974
2. Pension Credit	Not applicable	
3. 401(k) Matters	Not applicable	
4. Severance Pay	None	

David Chartrand

There is general agreement with respect to Chartrand's backpay. He had been a spudder, one step above the entry level job of relief spudder. He should have been recalled on April 13, 1987, but was actually recalled in the third quarter of that year. He reached full reinstatement on March 21, 1988. Indeed, his interim earnings in two quarters exceeded those of his gross backpay. The General Counsel has conceded that Chartrand was lawfully terminated on May 11, 1988, a month and a half after he reached full reinstatement. There is no dispute regarding the calculation.

1. Total Backpay		$7,621
2. Pension Credit	.25 years	
3. 401(k) Matters	Not applicable	
4. Severance Pay	None	

Lester Davis

At the time the strike began Davis operated the Bellingham Barker machine, the third highest job in the woodroom. In November 1988, the third highest job in the department was redesignated as the A-1 operator. He had been employed at the mill for 8 years, eventually rising to the job he held at the time of the strike. He signed up to return to work at the end of the strike but was not willing to take an entry level job. The General Counsel asserts that he should have been recalled on June 19, 1988, about 14 months after the strike ended. He also asserts that Davis would have been redesignated as the A-1 operator in October 1988 and would have been promoted to the cutoff saw job in February 1989. Those figures are reflected in the backpay specification which is found in Appendix II of the November 21, 1994 liquidation document. Davis took advantage of the lump sum offer on June 5, 1987.

Davis, like others, is a direct victim of the illegal entry level recall system and Respondent may not rely on the lump sum resignation as a justification for refusing to call him back to his old job. Therefore, the General Counsel's backpay period appears to be correct, beginning with the second quarter of 1988 and ending with the third quarter of 1993.

Respondent, however, points to several periods of unemployment asserting that there are periods of time where Davis failed to seek employment and failed to mitigate his backpay claim.

The testimony shows that Davis is a member of the Shee Atika Indian Tribe who has a "police record.'' He does not describe what crimes he has been convicted of, if any, but apparently that record hinders him from being employed by employers who will not hire persons with such records. He testified that as the strike ended, he was then employed as a dispatcher for a local taxi company. He continued performing that work until April of the following year when he quit and went to work for a cold storage operation at Pelican, a small village located on Chichagof Island, north of Baranof Island where Sitka is located. He says that he worked there for two seasons (apparently three), April through December 1989, 1990, and 1991. Even so, those dollar figures are not substantial. His backpay specification is attached as an appendix. During the 5-year backpay period, he had zero interim earnings in 11 quarters. Nonetheless, he testified during all of those quarters he was either between jobs in Pelican or attempting to seek work, registering with the state unemployment office and filing affidavits that he was seeking work during those periods.

He admits during the fourth quarter of 1991 he was not seriously looking for a job at that time although he was drawing unemployment benefits. In January 1992, however, he was in Sitka seeking work through the Mt. Edgecumb Hospital, the Sitka Tribal Council, the Sitka Community Hospital and other jobs. He also went to Juneau to look for work during June 1992. He says the only job he was able to find in 1992 was with the cold storage company in Pelican. He admits he was not employed at all in 1993 although he applied for work with the cold storage company in Pelican, the Southeast Alaska Regional Health Center in Sitka, the Shee Atika Hotel, and other places. He says that he applied at the Hotel on a monthly basis as he was under instructions to do so from the Sitka Tribal office.

Frankly, while I believe that Davis could have done a better job of searching for work, I do not believe Respondent has proven that he deliberately withheld himself from the job market during those periods of time when he was unemployed. Work in this part of Alaska is difficult to find in any event and Davis has appears to have done at least the minimum amount of searching for work to satisfy his duty to mitigate. Even the quarter where he admits that he was not looking too hard, the fourth quarter of 1991, it would appear that cold storage work in Pelican was not available due to a seasonal downturn. These are factors beyond his or anyone's control. Accordingly, I conclude that Respondent has not demonstrated that Davis failed to meet his duty to mitigate. Therefore, Davis is entitled to the full amount claimed by the General Counsel.

1. Total Backpay		$189,812
2. Pension Credit	5.25 year	
3. 401(k) Matters		401
4. Severance Pay		8,714

Fred Dimaano

At the time the strike began, Dimaano was a transfer operator in the woodroom, the second highest job in that department.

He had been employed by Respondent for 9 years. When the strike ended he accepted Respondent's offer of an entry level job, immediately becoming a spudder. During the strike he had decided that he needed to look for work and so had applied with the Alaska State Ferry System as he wished to become a steward. That job involves housekeeping and kitchen work aboard the ferries. While he was serving as a spudder, the Ferry System called to offer him a temporary job. It appears that the Ferry System, like many employers, first hires individuals on an "on-call'' basis, allowing them to accumulate sufficient seniority to become permanent. Dimaano says that on April 22 or thereabouts the Ferry System called him for an "on-call'' job. He informed his supervisor that he was going to do so and he worked for 3 days, but learned that stewards were on call from Juneau or Ketchikan, not Sitka. As a result he decided the job was not steady enough and involved travel to get to it, so he returned to Sitka. Upon his return, he asked Personnel Director Cline if he could return to his job. Eventually Cline told him that he could not come back, apparently because, according to the Company, he had not given sufficient notice of quitting. Later, on June 9, 1987, he took advantage of the lump sum offer and signed the form requiring him to resign in order to obtain the lump sum payment of his retirement account.

I conclude that neither of these circumstances is a bar to Dimaano's entitlement to backpay. In accepting the entry level job as spudder, he did not waive any right to the job he had held before the strike. Furthermore, his quitting that job without notice is not a bar to proper reinstatement either. It was Respondent's duty under the law to offer him the correct job; it has never done so. Attempting to divert him to the entry level job was specifically found to be an unfair labor practice and if Dimaano chose to try to weather that hardship, he can hardly be faulted for trying to do better with the Ferry System. Both jobs were only interim employment in any event. Respondent cannot take advantage of its misconduct to bar him from the job to which he was entitled by law. Accordingly, I conclude that Dimaano is entitled to full reinstatement with backpay as alleged in the backpay specification. In this regard, Dimaano has sought and obtained interim employment throughout the backpay period. There is really no dispute about the appropriate calculation.

1. Total Backpay		$101,213
2. Pension Credit	6.5 years	
3. 401(k) Matters		401
4. Severance Pay		9,336

James Helfrich

Except for the defense that Helfrich took the lump sum on June 30, 1987, there is no dispute with respect to his entitlement to backpay or to the calculation. Helfrich had been a ringbarker prior to the strike, the fifth highest job in the woodroom. He, too, was a direct victim of the entry level recall system and as such, falls within the general category of persons where the lump sum resignation defense has been rejected. The General Counsel asserts that his backpay period begins on September 4, 1988, and the parties have agreed that he left the work force in order to retire on April 1, 1989. Accordingly, he is only entitled to two quarters of backpay as follows.

1. Total Backpay		$7,391
2. Pension Credit	.85 years	
3. 401(k) Matters		401
4. Severance Pay	None	

Henry Johnson

Henry Johnson had been a Bellingham barker operator, the third highest job in the department and which later became the A-1 operator job. The General Counsel asserts that his backpay begins on August 25, 1988, and runs through the entire backpay period. Respondent does not offer a defense with respect to him. He had substantial interim earnings during that period, apparently because he took a job with Respondent.

1. Total Backpay		$17,480
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Esther Ozawa

Ozawa had been hired 9 months before the strike and worked her way up to screen tender job, the third from the bottom. In fact, she had been trained on two jobs above her, ringbarker and cutoff saw. At the time the strike ended, she and her husband were engaged in commercial fishing. She did say that at one point she went to the union hall and learned from Bill Burns, another striker, that Respondent was only recalling individuals to entry level jobs. She did not like that idea and decided that she did not wish to do that.

Respondent defends its failure to recall her on the ground that she never signed up on the recall list. It appears that on about May 1, 1987, Respondent sent a letter requesting strikers to advise it whether they wanted to return to work.[11] However, in my view whether Ozawa took steps to place her name on the *Laidlaw* list or not, Respondent should have treated her as if she had been on the *Laidlaw* list. Respondent acknowledges in its letter of April 13, 1987, to Jesse Jones, the Union's president, that it would not honor his letter requesting unconditional reinstatement of all the strikers, giving the recent decertification election as its reason. In my view, the Union's decertification is irrelevant with respect to a request for reinstatement (R. Exh. 34(a)). See *United States Service Industries*, 315 NLRB 285, 286 (1994), and the case cited therein, *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1017–1018 (6th Cir. 1983). Thus, Ozawa will be considered as having made an unconditional offer of reinstatement and should have been on the recall list.

Moreover, as the General Counsel points out, even if she neglected to place her name on the list, she had learned by that

[11] An exemplar in evidence is R. Exh. 4. It reads as follows:

> Dear :
>
> Our records indicate you have not requested preferential reinstatement. If you do not do so by June 7, 1987 we will consider you to have abandoned your job.
>
> To request preferential reinstatement you may telephone or write a letter to our office.
>
> Those employees who are eligible for preferential reinstatement will be offered reinstatement to their pre-strike department when a permanent vacancy exists.
>
> Such offers will be made based upon a merit system as evaluated by the Company on prior performance.
>
> If you have any questions, please advise.
>
> Sincerely,
>
> /s/ Jess Cline
> Jess Cline
> Industrial Relations/
> Personnel Manager

time that Respondent was utilizing a recall system which was certainly unfair and ultimately found to be inherently destructive of employee Section 7 rights. Therefore, in a real sense, there is no reason to require her to actually put her head into the noose in order to be discriminated against. It would have been a futile act for her to have done so. Accordingly, I am of the view that she is entitled to backpay for the entire period as alleged in the backpay specification. In this regard, I note that the General Counsel has taken into the account the fact that for four quarters, beginning with the fourth quarter of 1987, she was involuntarily out of the job market due to a pregnancy and postbirth child care. That temporary absence from the work force does not in any way disqualify her from the rest of the backpay period. During that time she had a great deal of interim employment. With respect to determining her retirement credit, I am uncertain what the retirement plan rules are with respect to credited time for persons off work due to pregnancy. Accordingly, I award the full 5 years' credit to which she would ordinarily be entitled. In the event the rules prohibit her from being credited for the 1 year that she was off, the rule will govern. With that exception, I adopt the backpay specification as drafted by the General Counsel and found in Appendix II of the liquidation document of November 21, 1994. It provides:

1. Total Backpay		$30,090
2. Pension Credit	5.0 years	
3. 401(k) Matters		401
4. Severance Pay		3,000

R. Primacio

Primacio was a transfer operator at the beginning of the strike. Respondent acknowledges that it should have recalled him and there is no dispute with respect to the backpay period under theory A. The parties are also in agreement that his injury on February 1, 1989, terminated backpay liability on that date. The General Counsel's backpay specification takes into account the fact that his job was redesignated as cutoff saw operator in October 1988. Primacio had in fact accepted an entry level job with Respondent during this period of time.

1. Total Backpay		$7,459
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

Mark Simmons

Simmons is a named discriminatee specifically found to have been discriminated against by Judge Wacknov in *AP I.* Judge Wacknov found that about a week before the strike ended Respondent offered him a job in a different department which he declined on the grounds that others needed it more. Respondent then decided he had quit and did not even send him the May 1 letter establishing a June 7 deadline for notification of intent to be placed on the recall list. Judge Wacknov found that Simmons wrote a letter requesting to be placed on the list and that it was timely. Respondent nonetheless declined to do so. The Board adopted Judge Wacknov's finding that such conduct violated Section 8(a)(3) and (1).

After Simmons testified before Judge Wacknov, he and Respondent's Cline had a telephone conversation which resulted in Cline writing him a letter dated March 22, 1988. In that letter, Cline stated that he had placed Simmons' name on the preferential reinstatement list and that a job was available in his "pre-strike department.'' It directed him to report to work no later than March 29. On March 29, Simmons wrote back saying that he declined the offer to come back to work because he understood that it was for a job that was "inferior to my prestrike job.''

Respondent asserts that the job in fact was the same as his prestrike job, but I find as a matter of law that it was not. Simmons had been a spudder which was the second lowest job in the department, the lowest being "relief spudder.'' While the jobs are not a great deal different in terms of the work to be performed, the relief spudder is not guaranteed a shift or a schedule, but is an on-call employee. Simmons had long since gone beyond that level. Had Respondent actually offered him the job of spudder, rather than the vague phrase "reinstatement to your pre-strike department,'' a clear reference to the entry level job which everyone including Simmons knew, I might be persuaded. However, if Respondent wished to offer him his old job, it could have said so. It did not. Accordingly, I conclude that Simmons was entitled to the job of spudder, rather than relief spudder.

Simmons' case raises no other issues and I accept the General Counsel's backpay specification with respect to him.

1. Total Backpay		$96,777
2. Pension Credit	5.5 years	
3. 401(k) Matters		401
4. Severance Pay		2,244

III. DIGESTERS

Teophilo Agne

At the time the strike began Agne was the 1st helper. That job is the third from the bottom (or third from the top) in that department. The backpay specification asserts that Agne should have been recalled on May 16, 1987. Respondent acknowledges that Agne is entitled to backpay and there is no dispute about the calculation under theory A. Accordingly, Agne is entitled to backpay as asserted in the backpay specification found in Appendix II of the November 21, 1994 liquidation document. The extensive amount of interim earnings which is shown in that document represents employment by Respondent as Agne did accept an entry level job. It also reflects that had he been put in his proper job in May 1987, he would have been promoted to acid maker on February 21, 1989.

1. Total Backpay		$52,948
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

Mar Castillo

Castillo, like Agne, had been a 1st helper in this department. The specification alleges that he should have been called to his previous job on September 20, 1987. Sometime in the third quarter he accepted an entry level job in the digesters department. Respondent acknowledges that Castillo is entitled to backpay under theory A and there is no dispute with respect to the calculation. He also had substantial interim earnings and worked for Respondent in a lower level job than he was entitled to until he retired about December 1, 1989. Accordingly, he is entitled to backpay set forth in the specification found in Appendix II of the November 21, 1994 liquidation document.

1. Total Backpay		$6,936
2. Pension Credit	None	
3. 401(k) Matters	None	

4. Severance Pay	None	

Gary Hansen

In a sense, Gary Hansen and his wife, Bernice Hansen, should be processed together because of their common conduct after the strike. However, they held different jobs in different departments and their backpay periods are different. I therefore choose to process them separately, although there are overlapping facts and family concerns which would warrant looking at both together.

At the beginning of the strike, Gary Hansen held the top job in the digester department, that of cook. He earned $15.35 per hour. Both he and his wife were full-term strikers. After the strike was over, Gary put himself on the recall list. He eventually took his lump sum retirement money in early July 1987, approximately 2 months after his wife had taken her lump sum. It is true that both Hansens understood that in signing the lump sum agreement they were obligated to "terminate'' their employment with Respondent. Respondent, of course, argues that by taking the lump sum and signing that form, each abandoned any interest in returning to work. I have earlier concluded that this is not the case as both of these individuals, like all of the others in the lump sum group, are victims of the inherently destructive act of requiring returning strikers to take entry level jobs.

By the time Gary's backpay period begins to run under theory A, December 17, 1989, both he and his wife had moved to Angoon, Alaska, a native village some 90 miles north of Sitka. Hansen's wife is a native American and they had determined that it would be best to move to her Indian village in order to survive their financial straits. Gary had, in the meantime, acquired construction skills and had worked for several firms in Spokane, Washington where they had moved immediately after the strike was over. He also had experience in commercial halibut fishing, a type of work which he could obtain in Angoon. There they were able to live rent-free with her family. Since he has lived in Angoon, he has fished commercially and is currently employed at a hardware store, Angoon Trading. He does house painting, construction work and works for the United States Forest Service. He says in April 1992 he even looked for work in Sitka and he has filed job applications through the state unemployment service. He has worked at a local school in Angoon during the first part of 1990. He has also had construction jobs with the Alaska Community Association. Most of these jobs are of intermittent length or are not full time. For example in 1993, he was only able to obtain 20 hours per week of work at the hardware store during the winter months and 30 hours per week during the summer.

Respondent asserts that Hansen has deliberately taken himself from the job market by moving to the Indian village. It should be noted that he and his family did so only after attempting to find regular work in Spokane in 1987 and 1988. Moreover, his efforts to obtain work and the enhancement of his skills by becoming proficient in construction are evidence that he has indeed sought work as available. Even if he had stayed in Sitka, his work opportunities would have been limited. Indeed, the entry level job in this department only paid $8 per hour. Respondent's assertion that he deliberately removed himself from the job market is not supported by the evidence. Accordingly, I conclude that at all times during his backpay period, Gary Hansen met his obligation to mitigate damages by seeking work. Therefore, I conclude that the backpay specification found in the General Counsel's liquidation document of November 21, 1994, is an appropriate measure of the backpay to which Gary Hansen is entitled.

1. Total Backpay		$171,305
2. Pension Credit	3.75 years	
3. 401(k) Matters		401
4. Severance Pay		13,566

Karen Richie

At the end of the strike Richie was a 2d helper in the digester department. She is a young woman who at that time had only a high school education. In October 1986 during the height of the strike, she left Sitka and relocated in Bend, Oregon. It does not appear that she told anyone in Sitka where she had gone. Indeed, up through the time of the hearing, she continued to reside in Bend. She did not even advise the Union where she had relocated. She testified that she went to work in Bend in 1986 and has held a variety of jobs in that city since then. Respondent on May 1, 1987, sent her the letter setting a deadline for June 7 to advise if she requested reinstatement. She did not get that letter as she had not changed her address with the Sitka Post Office. It was returned to the sender. Respondent did not put her on its preferential recall list as a result. It is true that one could consider her as encompassed by the Union's unconditional request for reinstatement of its strikers.

However, the evidence suggests that she did not intend to return to Sitka. She made no effort whatsoever to inquire about the status of the strike and did not even know the strike had ended. She appeared to be perfectly content to live and work in Bend. In view of the fact she made no effort to contact the Union or to determine the status of the strike, I conclude that when she moved to Bend, Oregon, she abandoned the strike and thereby abandoned any interest in returning to work at the plant. It is true that in February 1988 she telephoned Respondent's personnel department and spoke to a clerk named Elaine Strelow. She advised Strelow of her mailing address in Oregon and appears to have inquired about the possibility of work with Respondent. Despite that effort, coming some 10 months after the strike ended, she took no further steps to seek employment with Respondent.

I think it is fair to conclude that as a young person holding the second level job in that department, being relatively mobile and facing a strike, she simply decided that opportunities were better elsewhere and she left. That, in my view, constitutes an abandonment of strike and subsequent abandonment of the job. See, *Fleetwood Trailers*, supra. She simply was not an employee; indeed she was not even an discriminatee.

Fred Hope

Hope was a cook in the digester department at the time the strike began. There is no real dispute with respect to his circumstances. Under theory A he is entitled to have been recalled to his job as a cook on July 7, 1988. However, beginning in the third quarter of 1988 he took an entry level job and remained employed in the plant at lesser jobs until it closed in September 1993. There is no dispute with respect to the calculation of his backpay. The only variation of any concern is the fact that when the mill closed, Respondent paid him $16,070 in severance money. Had he remained as cook the entire time, his entitlement would have been $17,850. Accordingly, he is entitled to the difference of $1780. See the supplement to the liquidation report (dated November 23, 1994).

1. Total Backpay		$52,555
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay		1,780

Milan Rucka

When the strike began, Rucka was a 1st helper in the digester department. Sometime in the fourth quarter of 1987 he accepted an entry level job and continued to work until the mill closed on September 30, 1993. There is no dispute with respect to the amount of backpay owed Rucka. The backpay specification does take into account a probable promotion to acid maker in May 1987. At the time of the closure, Rucka was paid $7160 in severance pay. Had he been timely recalled to his old job, he would have been entitled to $7714. Accordingly, he is entitled to the difference, $554. See the supplement to liquidation report dated November 23, 1994.

1. Total Backpay		$77,961
2. Pension Credit	.4 years	
3. 401(k) Matters	None	
4. Severance Pay		554

Matthew Taylor

At the time of the strike, Taylor was a 2d helper. The General Counsel concedes that he was rehired in another job, which he had bid for across department lines. He also concedes that Taylor was discharged on June 30, 1989, for good cause, an event which terminated his backpay period. There is no dispute with respect to his calculation.

1. Total Backpay		$266
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

IV. BLEACH PLANT

Lloyd Dennis

At the beginning of the strike, Dennis had been employed by Respondent for about 10 years, and in the bleach plant for 9 years. He had risen to the highest job in that department, bleacherman, and was earning more than $15 per hour. When the strike ended he was working for Samson Tug and Barge as a cook and unlicensed deck hand. He had become employed by that firm about a month before the strike ended. He only worked for it through October 1987. On May 8, at the very beginning of the lump sum open period, he accepted his lump sum retirement money, signing the company form and mailing it to the personnel department. He had also learned in early May 1987, through a conversation with Charging Party David Hiebert and Union Officials Jones and Sever, that Respondent was recalling employees to entry level jobs only. He said that he had no interest in accepting such a job, as he had already risen to the top job in the department. Respondent's only defense to its refusing to reinstate Dennis is that he signed the form to receive his lump sum retirement account and had thereby resigned. Consistent with my ruling on this issue, I conclude that he is a direct victim of the unlawful entry level recall system and that resigning to obtain his lump sum is not a defense to Respondent's action here. Accordingly, Dennis is entitled to the full amount of backpay as set forth in the backpay specification found in Appendix II of the liquidation document dated November 21, 1994.

1. Net Backpay		$56,329
2. Pension Credit	2.61 years	
3. 401(k) Matters		401
4. Severance Pay		9,282

Deborah Harriman

When the strike began, Harriman was employed as a screen tender in the bleach plant. That is the second lowest job in the department, above only "relief screen tender.'' As noted elsewhere, while the duties of the person performing the screen tender task are identical, the relief screen tender does not have a steady shift and is an on-call employee. Harriman says that she had actually worked her way up to assistant bleacher by the time of the strike started. I think she is mistaken here, but it is clear that she had been trained on that job and had actually performed it on a fairly regular basis. Harriman is a named discriminatee whose name had been stricken from the recall list by Personnel Director Cline upon the allegation that she had engaged in some strike misconduct. Judge Wacknov, in *AP I*, found that allegation to be without factual support and determined that it was unlawful of Respondent to have stricken her from the recall list.

The General Counsel contends, in the backpay specification found in Appendix III of the liquidation document of November 21, 1994, that Harriman is entitled to backpay beginning in the third quarter of 1987 and ending with the third quarter of 1993. Respondent argues that she turned down an offer to her previous job and that she terminated her backpay period by relocating for personal reasons. I find that there is merit in the latter contention.

In April 1993, Harriman was living in Juneau. The parties have stipulated that in the spring of 1993 Harriman left Juneau after attending the University of Alaska, giving up her job and moving to Bend, Oregon. The parties stipulated that she did so because her daughter was undergoing alcohol rehabilitation in Washington State and had been advised not to return to Alaska where adequate treatment facilities were unavailable. Thus she specifically stated she moved from Juneau to Bend for her daughter's health. She did testify that she sought work in Oregon during that period. However, I conclude that by engaging in this permanent move from locations near Sitka to Oregon for reasons of a family member's health that she has abandoned any interest in returning to Respondent in any capacity whatsoever. This decision falls under the "hazards of living'' rule set forth in *American Mfg. Co. of Texas*, 167 NLRB 520, 522 (1967). Accordingly, her backpay periods ends at the end of the first quarter of 1993. Her backpay specification is attached and has been amended accordingly.

The remainder of Respondent's defenses are without merit. It is true that in March 1988, Cline wrote her a letter advising that a job was available in her department and directed her to report for work no later than March 29. On March 29, she, with the assistance of some union officials, wrote a letter responding that she believed that the job was not her prestrike job and that she wanted the prestrike job or a substantially equivalent job. There is some debate with respect to whether or not she actually mailed the March 29 letter (R. Exh. 39), but frankly I do not think the issue is worth pursuing. Whether she mailed it or not, Respondent did not offer her the screen tender's job, but only the relief screen tender's job. Since the offer was not valid, she was free to ignore it and await the correct job. Her old job should have been offered to her in the third quarter of 1987, but never was. Accordingly, she is entitled to backpay from the

third quarter of 1987 through the first quarter of 1993. During this entire period, Harriman had substantial interim earnings, although they were regularly less than she would have earned had she been called back to work.

1. Total Backpay		$121,447
2. Pension Credit	5.75 years	
3. 401(k) Matters		401
4. Severance Pay		5,304

Lonnie Loree

At the beginning of the strike, Loree was a screen tender, the second lowest job in the department. There is no dispute with respect to his entitlement to backpay. The General Counsel alleges that his backpay period begins on October 19, 1988, and is cut off in the first quarter of 1991 when he transferred to the maintenance department. He had accepted an entry level job in the woodroom and later bid to maintenance. It appears that his interim earnings with Respondent in large part offset his entitlement to any net backpay. Under this theory he is entitled to only the difference between his gross backpay and his interim earnings in only one quarter, the fourth quarter of 1989.

1. Total Backpay		$937
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Melody Owens

When the strike began Melody Owens was the assistant bleacher. She was hired in 1980 and says it had taken her about 5 years to move up to the assistant bleacher position. In April 1987, about the time the strike ended, she gave birth to a child. According to the General Counsel, she was entitled to be recalled to that job on March 16, 1988. However, earlier, in August 1987, Respondent offered her the entry level job of fourth relief screen tender. That job paid approximately $8 per hour less than her previous job and had a very erratic schedule. The assistant bleacher job, although it had a rotating schedule, at least was predictable. She discussed the matter both with Personnel Director Cline and his assistant Karla Hubbell and advised that she would be interested in returning to her old job, but could not accept the entry level job as it paid too little and had an unpredictable work schedule.

Respondent asserts that she is not entitled to backpay because she had turned down the entry level job. However, since that entry level job was not substantially equivalent to her previous job and because it was inherently discriminatory, she was entitled to ignore the offer.

Respondent also asserts that she failed to mitigate her damages. That is clearly not the case. Owens had, beginning in 1983, operated, on a cottage basis, a cake decorating business. After the strike ended, she attempted to expand this business to assist enhancing her income. In addition, because she had the baby as well as a 10-year old, she decided to convert her home to a day care operation. The General Counsel did not include the cake decorating business as interim earnings, regarding it as a moonlighting operation. There is no evidence that the child care aspect of her efforts have been included. She admits engaging in that activity, but there is no proof that this business earned any money beyond a break-even basis. Later, in 1988, she began working part-time at the Sheldon Jackson College incinerator. She worked that job off and on until 1990 when, after being referred to Respondent by the Sitka Employment Center, Respondent hired her as an entry level laborer. She also explained that one of the reasons that she was unable to justify employment in other Sitka jobs during her periods of unemployment in 1988 was the fact that jobs principally paid about $6 per hour, but she was obligated to pay $3 per hour for babysitting. The trade-off simply wasn't worth it. She also says that she did obtain some housekeeping work at a chiropractic clinic in 1988, earning about $1000. That sum is not shown in the backpay specification. I will make an adjustment, dividing that $1000 evenly between the third and fourth quarters of 1988 and adjusting the specification accordingly.

Eventually, after taking the entry level job which Respondent offered her in 1989, she transferred to the secondary treatment facility where she worked up through the closing of the plant.

Except for the $1000 adjustment described above, Melody Owens is entitled to backpay consistent with the specification set forth in Appendix II of the liquidation document of November 21, 1994. With respect to her retirement credit, it appears that she is entitled to 3.33 years credit beginning with the first quarter of 1988 and going through her being hired as a new employee in 1990. I assume that her account was probably credited with time worked after she was rehired. The severance pay figure is calculated based upon the difference between the severance pay she actually received, $2203, as opposed to the amount she should have received had she been brought back properly, $6846. The difference is $4643.

1. Total Backpay		$104,859
2. Pension Credit	3.08 years	
3. 401(k) Matters		401
4. Severance Pay		4,643

James Phillips

When the strike began, Phillips was an assistant bleacher. The General Counsel asserts that his backpay begins on October 6, 1990. Respondent defends on the ground that Phillips took his lump sum retirement on August 6, 1987, and resigned.

In fact, in late July 1987, Respondent allowed him to return at an entry level job. He accepted that job but worked only 2 weeks, taking his lump sum on August 19 and quitting his entry level job.

Phillips, like many others, is a direct victim of the discriminatory recall system. He was entitled to await recall to his former job, and not be penalized by being recalled to an entry level one. The pay was significantly less than his previous job, the work was significantly harder and the scheduling was much more erratic.

Thereafter, Phillips took interim employment as a commercial fisherman. Respondent asserts that his resignation from the entry level job constitutes a failure to mitigate, but mitigation was not required until his prestrike job reopened. It is quite clear that since then he has obtained substantial interim employment as demonstrated by the backpay specification found in Appendix II of the November 21, 1994 liquidation document. Phillips testified that in 1993 he earned $11,482 during the black cod and halibut openings which involved 8–10 days in May and 1 day in June. He was also employed throughout the year by the State of Alaska Pioneer Home. One could reasonably allocate the fishing earnings to the second quarter or do what the General Counsel has done, spread those earnings equally throughout all four quarters, since fishing is in essence an annual occupation. At the hearing I advised that I felt it should be appropriately allocated to the second quarter of 1983.

However, upon reflection I conclude that General Counsel's treatment is correct and more equitable.

1. Total Backpay		$55,728
2. Pension Credit	3.00 years	
3. 401(k) Matters	Not applicable	
4. Severance Pay		4,979

V. THE MACHINE ROOM

Morris Brown

At the beginning of the strike Brown was a back tender in the machine room and had "frozen'' in that position. The back tender job is the second highest job in the department, but Brown did not want to work in the highest level job, machine tender. The General Counsel asserts that Brown's backpay period begins on August 7, 1987, only 4 months after the strike ended. Respondent argues that he is not entitled to backpay on three grounds: he took his lump sum, he did not attempt to place his name on the recall list and he did not mitigate his backpay. With respect to the first two, it is clear that Brown is a direct victim of the entry level recall system and was not obligated to accept any entry level job if it had been offered. Of course, since he did not place his name on the recall list he was not considered. Nonetheless, he is eligible for consideration based upon the Union's unconditional offer which it made on behalf of all its strikers.[12] The principal problem with Brown is that he really has not sought or obtained work throughout the backpay period. Indeed, his cooperation with the Regional Office is less than exemplary.

Brown is an Alaska native, a member of the Shee Atika tribe, who has been receiving benefits from the tribe throughout the backpay period. Nonetheless, he has made no effort to seek work. He did not respond to any of the three questionnaires which the Regional Office sent him in order to assist with the compilation of backpay data and he failed to provide interim earnings data for 1993, prompting the General Counsel to strike all claims for that period.

It appears that the only year in which he had any earnings exceeding the insignificant is 1990. The General Counsel has admitted the earnings for that year and it would appear that that is the only year in which Brown made any significant effort to become and remain employed.

Brown testified that he survives by engaging in barter. He "scrounges'' items and tries to sell them. He points out that he does not have a high school education and is therefore ineligible for jobs with the city of Sitka.

However, my impression is that after the strike, Brown has had no real interest in becoming employed in any capacity whatsoever. Indeed, even after the strike was over, he admits that he did not seek work until about 9 months later, but can't remember where. He claims that he sought work as a bus driver by a local transportation company, Prewitt Enterprises, but did not get it. He also admits that he never applied at any of the canneries, although seasonal work is often available there. Despite his lack of a high school diploma, he made no effort to obtain schooling to obtain the diploma equivalent in order to meet the minimum eligibility requirements of the city.

Frankly, I conclude that his desultory efforts to obtain employment warrant the conclusion that he was not really seeking employment at any time except for his earnings in 1990 which the General Counsel has spread through the four quarters. Accordingly, I find that Brown failed to mitigate his damages between the third quarter of 1987 and the fourth quarter of 1989 and the first quarter of 1991 through the fourth quarter of 1992. He is entitled to backpay for only 1 year, 1990. Using the figures which appear on his backpay specification, attached hereto, Brown's gross backpay for that year totaled $42,344. His interim earnings were $7120 for a total backpay claim of $35,224. He is entitled no other net backpay. Furthermore, he is entitled to only an additional 1-year credit toward his retirement and, under these circumstances, I do not believe that he is entitled to either the $401 as a contribution toward the 401(k) plan nor any severance pay.

1. Total Backpay		$35,224
2. Pension Credit	1.00 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

William Burns

When the strike began, Burns held the highest job in the machine room, that of machine tender. The General Counsel asserts that he would have been recalled to that job on May 26, 1988. However, Burns accepted an entry level job in the machine room in 1987 and stayed there until May 1988 when he transferred to the secondary treatment department. He worked in that department until March 1989 when he transferred back to the machine room. He eventually worked his way back up to machine tender in April 1992.

Respondent asserts that Burns' backpay should be cut off when he determined to transfer to the secondary treatment department. That department, of course, involves the environmental cleanup of plant waste water and chemicals. Burns' job as the machine tender was a control room job. The secondary treatment job was, in large part, a laboratory job. Neither involved the physical labor that lesser jobs in the machine room required. Thus, initially, the secondary treatment job had appeal because it took him from physical labor to a laboratory. However, Burns did not advance as rapidly as he thought would and he actually became subject to certain disciplinary proceedings because of his inability to perform that job as well as he had hoped. Respondent argues that he deliberately chose to abandon his interest in the machine tender job by seeking the secondary treatment training, suggesting that he intended to change the direction of his work career. However, that is clearly not the case.[13] He was a direct victim of the unlawful recall system and was entitled to await an offer to return to his old job. It did not come in May 1988 when it should have. Accordingly, he is entitled to backpay as alleged in the backpay specification found in Appendix II of the November 21, 1994 liquidation document.

1. Total Backpay		$53,608
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Bernice Hansen

Bernice Hansen was the third hand in the machine room at the time the strike began. It will be recalled that she is the wife

[12] *United States Service Industries*, supra, 315 NLRB 285 (1994); *Marlene Industries Corp. v. NLRB*, supra, 712 F.2d 1011 (6th Cir. 1983).

[13] Lack of success in the interim job does not affect his right to his prestrike job. *David R. Webb Co*., supra.

of Gary Hansen and the circumstances of the Hansen family have been explained in some detail in the section involving him. Her backpay period, however, begins more than 2 years before his does. The General Counsel asserts that she should have been called back on September 6, 1987. Respondent argues that she did not sign up for recall and resigned to take her lump sum shortly after the strike ended on May 11, 1987. She, like her husband, was a victim of the entry level recall system. The third hand job was the third of five levels in that department. As noted, due to the uncertain circumstances caused by the entry level recall system, the family had moved to Spokane, Washington, in July 1987, eventually returning to Alaska and going to the Indian village of Angoon in July 1989. Those efforts were designed to obtain employment opportunities. They were not particularly successful although in Angoon she found some work. Moreover, her efforts in Spokane to find employment were significant. She sought work with a lighting company, a plywood manufacturing plant and an aluminum plant as well as clerical jobs through the Washington State unemployment office.

In about October 1988, she became unable to work due to a pregnancy. She gave birth in December 1988 and was unable to work through the second quarter of 1989. The General Counsel has agreed, although it did not originally appear on the backpay specification appearing in Appendix II of the liquidation document of November 21, 1994, that Hansen was not available for work from the third quarter of 1988 to the end of the first quarter of 1989. By errata of August 1, 1995, he has corrected the error.

Even so, he does wish to take advantage of a company policy which would have paid her a sum of money during her pregnancy. It is my understanding, from a representation on the record, that that sum is $250 per week during that time. That of course works out to 39 weeks times $250 which equals $9750. The General Counsel's documentation has not taken that amount into account, and the sum of $9750 will be added as shown below. That sum is not subject to offset by interim earnings (of which there are none) or by a claim that she was unable to work during the confinement. With that modification her net backpay total is $145,040 plus the pregnancy allowance for a total sum due of $154,790. Furthermore, there is nothing in the record by which one can determine whether or not that period of time is entitled to credit under the pension plan. I am, therefore, exercising my discretion in assuming that a person in that status would be entitled to full credit for those quarters. That, of course, does not require any adjustment in the calculation of the pension credit, because it is already included.

During the hearing Hansen acknowledged a receipt of $300 income during the third quarter of 1989, the same quarter in which the family moved from Spokane to Angoon. Although she has not shown how much it has cost the family to move from Spokane to Angoon, it would obviously be far more than the $300 which she earned. Under Board calculations, the cost of searching for work is an offset against interim earnings. Obviously, the $300 would be entirely offset by the cost of moving from Spokane to Angoon where she and her husband did find work. There is no advantage to spelling out the calculation, as it simply totals zero.

1. Net Backpay		$145,040
Pregnancy Allowance		9,740
Total Backpay		$154,790
2. Pension Credit	5.0 years	
3. 401(k) Matters		401
4. Severance Pay		7,469

Gary Hinkle

When the strike began, Hinkle was a back tender in the machine room. That job is the second highest job in that department. The General Counsel asserts that his backpay begins on November 29, 1988, approximately a year and a half after the strike ended. During the strike Hinkle had found employment at a local auto garage. Eventually he became an employee at TMW Body Shop, operated by Todd White, a former employee at the mill. (White's circumstances are discussed in Log Handling.) On June 30, 1987, almost 2 months after the strike ended, Cline offered Hinkle an entry level job. Hinkle declined and was terminated at that point. Respondent defends the backpay claim for Hinkle on the ground that he had acquired permanent employment elsewhere. However, the evidence shows only that Hinkle, in order to survive the economic effects of the strike had taken a job in an auto garage. There is nothing to suggest that by that action he had any intention of abandoning the strike before it ended. Accordingly, I conclude that Hinkle did nothing to abandon the strike or his claim for his prestrike job. He was clearly a victim of the illegal entry level recall system. Accordingly, he had no obligation to take the entry level job which was offered him and he is entitled to backpay according to the specification issued in the liquidation document of November 21, 1994. He remained employed or seeking work throughout that period and experienced no time when he was not looking for work. The 3 months of unemployment which occurred in March–June of 1989, when he temporarily quit TMW over the loss of a wage increase does not affect that conclusion. He had substantial earnings during those quarters and the *Woolworth* formula clearly incorporates such hiccups in employment.

1. Total Backpay		$100,447
2. Pension Credit	4.8 years	
3. 401(k) Matters		401
4. Severance Pay		6,846

Rickey Mayville

Mayville had been a relief beater in the machine room. The General Counsel originally listed him as a backpay claimant, but during the hearing he eliminated Mayville's claim based upon his lack of cooperation. He is listed here simply for the purpose of observing that his case has been considered and withdrawn.

Phillip Nielsen

Nielsen did not initially appear in the backpay specification as a claimant because his job had not come open before the June 1993 hearing. He was nonetheless called as a witness and gave testimony with respect to Respondent's defense in the event that his job came open. In fact, it did come open in July 1993 and the General Counsel has now put forward a claim for one quarter's backpay, the third quarter of 1993. At the beginning of the strike he had been a machine tender and had taken his lump sum in June 1987, signing Respondent's boilerplate form which required him to resign. He actually used the lump sum in order to go to a vocational/technical school in Seattle where he became skilled in carpentry, plumbing and other trades. He worked in those trades for quite a bit of time during the years before his backpay began to accrue. However, by the time his backpay period actually began, he had become a social

worker for the Shee Atika Indian Tribe, working about 37-1/2 hours per week. He had worked for the tribe for about 3 years by then. Respondent defends simply on the grounds that he had taken his lump sum in 1987 and had resigned his employment at that time. However, again he is a direct victim of the entry level recall system.

A particular problem with Nielsen is that by the time his job came open, he knew, due to a public announcement, that the mill was going to close at the end of September. However, there is no evidence that Respondent ever actually offered him his old job when it came open on July 2. Accordingly, there is no reason to speculate whether he was entitled to backpay had he turned it down at that time. It was not offered, so he was not given the opportunity to choose. Accordingly, I conclude that he is entitled to backpay according to the specification found in Appendix III of the November 21, 1994 liquidation document.

1. Total Backpay		$7,319
2. Pension Credit	.25 years	
3. 401(k) Matters	Not applicable	
4. Severance Pay		6,426

Jullee Wright

Jullee Wright is the wife of loghandling department discriminatee Larry Wright. Their circumstances have been discussed supra in the section dealing with him. Specifically, I rejected Respondent's defense that these individuals voluntarily resigned. They were both direct victims of the illegal recall system. Respondent's only other defense with respect to Jullee is a claim that she did not properly mitigate her damages. However, the evidence shows to the contrary. During the entire backpay period she sought and obtained employment at the Sitka Credit Bureau, later known as the Northern Credit Services Bureau, as the office manager. It is true that some of her earnings went down in 1993, but that seems to be due to the loss of clients, rather than through any failure of effort on her part. She is entitled to backpay for the entire period as set forth in the backpay specification set forth in the November 21, 1994 liquidation document, Appendix II.

1. Total Backpay		$87,870
2. Pension Credit	5.0 years	
3. 401(k) Matters		401
4. Severance Pay		4,979

VI. FINISHING ROOM

Joelle Eimers

At the beginning of the strike, Eimers was a scaler, the second from the bottom job in the finishing room. The General Counsel asserts in its modified backpay specification found in Appendix III of the liquidation document of November 21, 1994, that she should have been called back on April 9, 1987, only 2 days after the strike ended. Eimers was not called back but did take her lump sum retirement money on May 11. She, too, is a victim of the illegal recall system and therefore her resignation to take the lump sum is not a defense. Initially, the General Counsel asserted that Eimers was entitled to backpay for the entire period, but I determined in the Interlocutory Eligibility Determination that she permanently left Sitka in June 1988 due to the health of a family member. Later, in July 1989, she and her family moved to Nampa, Idaho, where they currently reside.

The facts are that her daughter had become ill, forcing the family to seek outside treatment in Seattle beginning in June 1988. It was at that point that the family determined it could not return to Sitka and, in fact, it never has. Her circumstance falls within the "hazards of living'' rule of *American Mfg. Co. of Texas*, supra. Accordingly, I formalize the conclusion that I earlier reached, that she abandoned any interest in the job at the end of June 1988. There is no dispute with respect to the calculations for those five quarters.

1. Total Backpay		$29,384
2. Pension Credit	1.2 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Daryl Howard

There is no dispute with respect to Howard's backpay period or his entitlement to backpay. At the beginning of the strike he was a restacker and the General Counsel asserts that his backpay period begins on May 17, 1987, and ends on June 13, 1988.

1. Total Backpay		$13,389
2. Pension Credit	.35 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Lilia Martin

There is no dispute with respect to Martin's entitlement to backpay. At the beginning of the strike, she was a senior bale wrapper, the fourth highest of eight jobs in the department. The General Counsel asserts that her backpay period begins on May 1, 1987. It appears that she accepted an entry level job on August 9, 1988, eventually working her way back to her original job in the first quarter of 1990 when her backpay period was cut off. There is no dispute with respect to the calculation.

1. Total Backpay		$34,502
2. Pension Credit	1.25 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Jose Rivera

At the time the strike began Rivera was working on the scales, the second lowest job in the finishing room. He returned to work after the strike as a yard laborer. Eventually, he was moved over to the power house where he raked boilers, first as a relief utility person, then as a utility person. Eventually, on September 26, 1989, he resigned giving as his reason, "marriage problem.'' Based on that history, the General Counsel initially did not include him as a back pay claimant after that date. Later, having had a chance to interview him the day before he testified, June 17, 1993, the General Counsel determined that it was inappropriate to have cut him off on that date. It moved to extend his backpay claim through fourth quarter of 1992. There is no claim for 1993 as Rivera has not provided interim earnings information to the Board for that period. Respondent opposed the amendment, but I granted it on the ground that it was appropriate to hear Rivera's testimony, rather than rely simply on the business records which Respondent maintained.

Rivera explained that the powerhouse job was both physically demanding and involved a very erratic schedule. That schedule wreaked havoc upon his personal life and he was unable to sustain his marriage. He testified that he was working a 12-hour day with split shifts ".just four on and four off, some-

times somebody had to call in sick and I have to work six, seven days, five days, you know, for those twelve hours . . . It was long hours and I didn't have time to spend with my family and, I just, I wasn't comfortable with it.'' Later he explained: "Because my [now] [ex-wife] . . . I'm just beginning a new family, you know, I got married in '87 and at the finishing room I spent more time with her, I wanted to spend more time with my new kid and she told me that you come home, I don't see you, . . . you put in twelve hours and then you sleep almost eight–ten hours, you see us for two hours and sometimes you don't come home, you work seven days or six days, straight twelve hours and then you aren't spending any time with us. Sometimes you have four days off, you sleep most of the time. And she didn't get the picture that I, we, need the money and then, have to give up.''

Respondent attacks Rivera's credibility on the question, asserting that he had testified in such a fashion because he knew that would be the only way to sustain the backpay claim. However, it is clear that he attempted to explain his position in a 1991 questionnaire which the General Counsel had overlooked, but in which he had made a statement consistent with the testimony he gave on June 17, 1993. Frankly, I do not believe Respondent has prevailed in its attempt to show that Rivera prevaricated on the point.

The essential issue is whether or not Respondent ever offered him his prestrike job of scales in the finishing room, and the fact is that it did not. That job, too, involved some physical labor but was not as difficult and did offer a more consistent work schedule. Quite clearly the boiler raking and the scales job were not equivalent. He is definitely a victim of the illegal recall system and was entitled to an offer to his old job. When that did not occur, whether Rivera went through the appropriate analysis or not, he was entitled to look for interim earnings, whether with Respondent or with anyone else, which would be a better job. Indeed, when he quit in 1989, he sought work which would pay more. That he in fact he failed to find better paying work is not a reason to conclude that he was not seeking to mitigate his damages.

The General Counsel asserts that his backpay period begins on May 5, 1987, when he should have been offered his scales job. That job has never been offered to him and there is no dispute about the amount of backpay due.

The General Counsel says Rivera has been given retirement credit for 2.4167 years for the period of work between 1987 and 1989. I have taken that figure and subtracted it from the backpay period ending in the fourth quarter of 1992, a result of 3.25 years, the figure shown here.

1. Total Backpay		$92,876
2. Pension Credit	3.25 years	
3. 401(k) Matters	None	
4. Severance Pay		3,500

Jack Salovon

When the strike began, Salovon held the job of backstand, in the finishing room. That was the second highest job in that department. He is also a former union negotiating team member. Respondent asserts that Salovon's entitlement to reinstatement was extinguished when an earlier unfair labor practice charge involving him was withdrawn. Specifically, Salovon is a direct victim of the illegal recall system. Indeed, he was stricken from the recall list when he turned down an entry level job which Respondent offered him on September 6, 1988. In his letter of September 8, 1988, turning that job down, he told Personnel Manager Cline that he specifically wanted his name to remain "on the recall list for my pre-strike job or a substantially equal job.'' That letter resulted in Cline striking him from the recall list on September 12, 1988. When Respondent offered him that entry level job Salovon had become employed at the State of Alaska Pioneer Home (a retirement center run by the State for native-born Alaskans) as a nurses' aide. Eventually Salovon found that job depressing as he was unable to deal with the deaths of the retirees at that home. In April 1989 he and his wife left Alaska and relocated in Tillamook, Oregon, where they hoped to be able to find better employment opportunities. It is true that he admits that he intended to permanently relocate at that time. In Oregon he purchased a one-hour photo finishing business which he kept until he sold it in October 1992. Although that job required his presence 13–14 hours a day, he also sought work in the wood products industry, working for Hampton Lumber in Tillamook on a graveyard shift. Eventually a divorce ensued and he moved to Texas where he entered a truck driving school in November 1992, finishing in the end of January 1993. Since that time he has been employed as an over-the-road truck driver.

Aside from his admission that he permanently relocated to Tillamook in April 1989, the fact is that he is a specific victim of Respondent's unfair labor practice. Had Respondent offered him the job to which he was entitled on the day he became entitled to it, August 28, 1987, he would have faced none of those decisions. Accordingly, his admission is discounted and I find that he was at all times entitled to an offer to his prestrike job. It never came. Moreover, there is no showing that he ever voluntarily removed himself from the job market. Even his short period of time of going to school to learn the truck driving trade falls well within *Woolworth* quarterly rule. He is therefore entitled to backpay as asserted in the specification appearing in Appendix II of the November 21, 1994 liquidation document.

1. Total Backpay		$168,005
2. Pension Credit	3.25 years	
3. 401(k) Matters	None	
4. Severance Pay		7,160

Daniel Thomas

When the strike began, Thomas was the cutter in the finishing room, the highest job in the department. The General Counsel asserts that his backpay begins on September 15, 1991, and Respondent acknowledges that he is entitled to backpay. Elsewhere, there is testimony that Thomas returned to the plant in an entry level job shortly after the strike ended. There is no dispute with respect to the backpay calculation. The only adjustment is with respect to the fact that Thomas had actually taken another job within the company at a date not shown in the record and he received severance pay when the plant closed of $13,770. Had he been in the proper job at the time, he would have been entitled to $15,560. Accordingly, he is entitled to the difference of $1790.

1. Total Backpay		$16,891
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay		1,790

Carolyn Turner

Carolyn Turner is the wife of Brownell "Bill'' Turner, another striker and a discriminatee who worked as a viscosity

tester in the technical department. In a sense these two individuals are tied together; however, they did take different steps. When the strike began Carolyn Turner was a bale wrapper in the finishing room, the fourth of eight jobs in that department. During the strike she decided it was appropriate to take some clerical training at the local community college. Four days before the strike ended, she was hired by a local insurance agent, Steadman Insurance Co., as a clerical employee. She remained employed by Steadman, earning significantly lower wages than she would have if she had been recalled to her former job as she should have been on April 8, 1987, one day after the strike ended.

She says that she spoke to both personnel officials, Cline and Parrish, on three different occasions shortly after the strike ended. In the first two she asked for finishing room openings but was told there was nothing available and that they would contact her. On the third occasion she spoke with Parrish asking for any work at all. Again, she was rebuffed.

The Turners were particularly hard hit by the strike, and as early as February 1987, during the middle of that strike, she began looking into acquiring the money from her retirement account. Eventually, she did take the lump sum payment on April 20, 1987. (Although her husband did not.) The sum was small, only $786, although she had worked for the mill for about 10 years. Moreover, she took that lump sum before the open period which was not announced until a few weeks later. Nonetheless, she signed a document stating it was "my intention to terminate my employment with Alaska Pulp Corporation effective 4–20–87.'' She asserts that no one explained to her that she was actually removing herself from consideration for recall when she signed that document. Whether or not she should be credited is essentially beside the point. She was entitled to have been recalled to her old job the day after the strike ended, April 8. She never was. Furthermore, had she been called at all, she would have been offered only an entry level job. She was therefore a direct victim of the entry level recall system.

There is some evidence, specifically General Counsel's Exhibit 5, which shows that both Carolyn and Bill Turner took some sort of steps to have their names placed on a recall list in February 1987 during the height of the strike. She did not testify about it, but Respondent makes the argument that she abandoned the strike when she did so. Curiously, however, the copy of the document in evidence shows that her name is stricken without any explanation for the strike-through. Given the fact that Respondent never called her to a job during the course of the strike and never tested her actual willingness to return, it is difficult to conclude based on that document alone that she abandoned the strike. What is clear is that the strike caused the Turners sufficient financial hardship to induce her to seek additional schooling; she did so and later obtained another job. There is no suggestion that job involved a permanent career change during the course of the strike. It is true that she took the Steadman Insurance job days before the strike ended (between the decertification election and the issuance of the certification itself).

Later, as more detailed below, her husband Bill, took an entry level job, but because the wages of her insurance company job and his entry level job were significantly less than they had been, the couple ultimately made the decision that they were not making it financially in Sitka. In September 1989, Bill resigned his job and they determined to move to Las Vegas, Nevada where family support was available and where they believed financial opportunities were better. Since that time they have resided in Las Vegas. She has been employed at Allstate Insurance Company and, subsequently, the Excalibur Hotel which paid even better.

These facts merely suggest that she and her husband had suffered financial hardship throughout the strike and that the financial hardships were irremediable without her being called to her prestrike job. She did take her lump sum a bit earlier than the others, but whether she took it then or later is irrelevant. She was a direct victim of the illegal recall system, although simply a little more vulnerable than some others might have been. Moreover, being married to Bill, she was inextricably intertwined with his circumstances. She is entitled to full backpay.

1. Total Backpay		$129,060
2. Pension Credit	6.31 years	
3. 401(k) Matters		401
4. Severance Pay		6,610

VII. WAREHOUSE

Larry Boozer

At the time the strike began Boozer was the head trucker in the warehouse department. He had been employed by Respondent for about 16 years and had been head trucker for the past 5 or 6 years. His wife was disabled and the strike proved to be a financial crippler for him, causing them to be unable to meet payments on a house which they had purchased in Sitka. He also had an adult son who had taken a job with a firm in Kent, Washington, in early 1987. Although his testimony is a bit unclear, Boozer said that in April or May 1987 he determined that it was appropriate to move himself and his wife to Kent to obtain employment with the same firm which employed his son. In this regard, it appears that his decision to leave Sitka occurred after the strike ended and at a time when Respondent was applying the unlawful entry level recall system. It is true that on cross-examination, he admitted that it was his intention to permanently relocate to Kent at the time. Indeed, on May 26, he applied for the lump sum payment of his retirement money, signing Respondent's form to do so. He recalls that he signed that document after moving to Kent.

The hoped-for employment situation in Washington State did not materialize and in late July or early August, Boozer and his wife returned to Sitka, using some of the lump sum money to do so. Other portions of that money were used to assist in the purchase of medications for his spouse. When he returned to Sitka he was able to find employment with a contractor providing dormitory management services to the state-operated Mt. Edgecumb High School, a residential high school located in Sitka.

The General Counsel asserts that Boozer should have been recalled to his prestrike job on February 1, 1989. Respondent contends that Boozer is not entitled to reinstatement because he had resigned in order to take his lump sum. I have already held that the resignation to obtain lump sum payments of the retirement fund is not a valid defense to the failure to reinstate. Boozer was a direct victim of the unlawful recall system and was entitled to await his prestrike job. Moreover, there is no evidence that he abandoned the strike or that his wife's condition was such that he was obligated to leave Sitka on a permanent basis. I recognize that he testified that it was his intent to

permanently relocate to Kent, Washington shortly after the strike ended, but at that moment he was a discriminatee entitled to await a proper offer. He demonstrated that his intention was less than perfect when he turned around, 2-1/2 months later, and returned to Sitka. Furthermore, Respondent has not demonstrated that he failed to seek work during any of the actual backpay period. Indeed, in at least two quarters his interim earnings exceeded what he would have earned at Respondent.

However, it is necessary to make some adjustments with respect to certain items. With respect to the $401 entitlement for those who were employed on January 1, 1989, it is clear that he would not have been so employed despite the General Counsel inclusion of his name on that list. He would not have returned to work until a month later, February 1, 1989. Furthermore, although the General Counsel believes that Boozer is one of the individuals, who, had he been properly reinstated, would have worked through the fourth quarter of 1993, during the shutdown mode, he has determined to exclude him from the fourth quarter as Boozer did not supply any fourth quarter interim earnings data. Thus, not only is he not entitled to fourth quarter interim earnings, neither is he entitled to severance pay or pension credit through that date. Those adjustments have been made below.

1. Total Backpay		$137,467
2. Pension Credit	4.66 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Michael Hornamen

At the time the strike began Hornamen was a warehouse trucker. He was in fact rehired to an entry level job and on August 8, 1988, the department was reorganized resulting in his being made a "Trucker A.'' That event terminated his backpay liability. There is no dispute over the amount which he is owed.

1. Total Backpay		$5,084
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

Grant Smith

At the time the strike began, Smith was a warehouse trucker, the second highest job in the warehouse. He had worked for 4 years in the warehouse and had 9 years of experience in the mill. He was initially hired under a program in which Respondent hired disabled persons. He suffers from a back condition which prevents him from doing heavy lifting. Indeed, he receives a disability annuity from the military. When he was hired, he was assigned to jobs which avoided physical labor stressing his back, both in the wood room and the finishing room. Eventually, he bid to the warehouse as a strap and wire worker, the lowest job in that department, and a job which he was capable of performing. For 4 years before the strike he had, as noted, been a warehouse trucker. Respondent asserts that he is not entitled to any backpay or reinstatement because he had taken his lump sum in September 1987. It also contends that Smith's physical limitations would have limited him with respect to the types of jobs he could do and also limited his ability to mitigate his damages. The General Counsel asserts that Smith's backpay begins on December 21, 1987, when a warehouse trucker slot opened.

Smith testified that he did not attempt to obtain his lump sum until his credit union began taking steps to foreclose on the mobile home which his wife and four children used as their residence. By that time, of course, he was already a victim of the entry level recall system. Even then, when he signed his resignation form to obtain the lump sum, he told Cline that he wanted to work and didn't want to take the lump sum if Cline would give him a job. Cline told him that he would "keep him in mind.'' However, later on, when Respondent began to advertise for employees through the Alaska State unemployment office, and Smith responded to those ads, Respondent declared him to be unemployable. Indeed, in late 1988 Respondent wrote him a letter saying he was "ineligible for rehire'' and later stated in other applications that he didn't qualify for entry level jobs. Curiously, however, the strap and wire job is the lowest job in that department and is a job which Smith had done and no doubt could have done again.

Smith obtained and sought employment during his backpay period, working as a janitor for various firms, driving a taxi, washing dishes at a restaurant, and working for a seafood packing operation. He does agree that his disability caused some employers to avoid hiring him, but others were unconcerned. In any event, to the extent Respondent declined to consider him due to his disability, it was a disability which had not concerned it when he was actually employed there. Accordingly, Respondent's raising this defense at this stage does not help it.

Board law in this area is quite clear. An employer may not subject returning strikers to new conditions upon their reinstatement. A returning striker is simply an employee who is returning to work and, if circumstances have changed during his absence giving rise to the suggestion that the returning striker might not be able to perform the job to which he is returning, he or she is nonetheless entitled to attempt to perform that job. It is not until the returning striker demonstrates an inability to do the work that the employer may take steps to assure itself that the incumbent needs some sort of special scrutiny. That scrutiny cannot come in advance of the recall. Judge Pannier in *AP II* cited the appropriate rule relying on *Brooks Research & Mfg*., 202 NLRB 634, 637 fn. 13 (1973).

Moreover, it cannot assert that it should benefit from his disability in the sense that other employers did not hire him. It should have recalled him in December 1987 and it did not do so. Had it done so, this issue would not have been presented. Accordingly, I conclude that Smith is entitled to backpay as set forth in the specification found in Appendix II of the November 21, 1994 liquidation document.

1. Total Backpay		$127,470
2. Pension Credit	5.79 years	
3. 401(k) Matters		401
4. Severance Pay		8,262

Andrew Roberts

At the time the strike began Roberts was a line trucker, the third highest job in that department. There is no dispute with respect to his entitlement to backpay or the amount to which he is entitled. His is a short backpay period beginning on August 4, 1987, and ending on December 11, 1987. He had come back to work in a different job and on December 11 was properly demoted to his prestrike position.

1. Total Backpay		$925
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Warren Vaughn

At the time the strike began Vaughn was a line trucker whose proper recall date was alleged to be February 19, 1989. However, on February 6, 1988, he accepted an entry level job on the log deck, later bidding to the bleach plant on October 31, 1988, which paid more than either the trucker or log deck jobs. It appears that he made a deliberate decision to go to the higher paying job with a schedule which he preferred. Accordingly, I conclude that he is not entitled to any backpay or other remedy under the order.

VIII. TECHNICAL DEPARTMENT

William Craig

At the time the strike began, Craig had been a viscosity tester for 7 years in the technical department. He is a native Sitkan, a member of the Shee Atika Tribe and a 10-year plant employee. As a viscosity tester he worked in the laboratory reading test equipment. He had "frozen'' himself in that job. At the time of the hearing in 1993 he was 38 years old, was married and had children.

After the strike ended he signed up to return to work. When Respondent offered the lump sum retirement opening, he accepted in July 1987, but did so only after discussing the situation with both Parrish and Cline. He learned from Parrish that it would not be possible to be recalled to his old job, but only an entry level job and that it would take 5 to 6 years before even that would be offered because his "merit rating'' was very low.

Although he knew he had to give up his right to his old job to get the money, he came to believe it was necessary to do so. At that time his wife was employed at a local hospital; later she took some additional schooling and by 1993 was employed by a building supply company.

The General Counsel asserts that Craig's backpay period begins on March 30, 1988, and ends with the plant's closure on September 30, 1993. Respondent argues that he resigned to take his lump sum and that even if the resignation is not honored, Craig failed to mitigate his damages by seeking interim employment.

Respondent's lump sum argument is rejected, for the usual reason. However, the failure to mitigate defense requires some discussion.

Craig admits that beginning in 1987 or 1988 he and his wife engaged in a "role reversal.'' He stayed home to watch the children and she became the principal source of income. He explains that situation on medical grounds. Although in the past he has undergone extensive neurosurgery, his most pressing problem has been the onset of gradual blindness. He says, however, that would not have affected his ability to perform the viscosity tester job.[14] Even so, this medical history made him undesirable as a prospective employee during the backpay period. He says many employers' health insurance carriers will not permit him in their groups because he is considered too high a risk.

Despite that, he says, he has sought work, but he was unsuccessful. He only found a short period of employment with a local hotel and in 1993 he earned a mere $79 in a commercial fishing effort.

[14] Respondent has stipulated that it does not rely on disability to perform work at the mill in 1993 when Craig became legally blind as a defense to backpay, arguing that Craig was ineligible for recall and failed to mitigate (Tr. 1025).

Respondent, of course, had employed Craig throughout his medical travails. It knew he could perform the work of viscosity tester at least up through 1992 and perhaps even after he became legally blind in 1993. However, it made him a victim of the inherently destructive recall system and declined to recall him, knowing that he was not as readily employable elsewhere as a healthy person might have been. It knew Craig's search for work might be futile.

Therefore, I find that Craig is entitled to backpay at the rate set forth in the backpay specification found in Appendix III of the November 21, 1994 liquidation document. He became a house husband essentially because Respondent discriminated against him and would not recall him to his old job. It did that with full knowledge that his opportunities for interim employment were virtually nil. It cannot rely on his disability to shield it from liability. Had it recalled him in March 1988, when it should have, he would not have been unemployed and without prospects.

1. Total Backpay		$211,664
2. Pension Credit	5.53 years	
3. 401(k) Matters		401
4. Severance Pay		8,000

Amor Diego

Diego was a grader in the technical department at the time the strike began. When the strike was over he took an entry level job in another department and was initially believed to be entitled to no backpay because his prestrike job would not have opened until April 13, 1990. He actually terminated voluntarily on May 14, 1990. However, due to the declaration of ineligibility of Roland Mears in May 1987, as set forth in the Interlocutory Determination of Eligibility as well as more fully developed below, Diego's proper recall should have been on August 16, 1987. This created a 3-year backpay period which had not been contemplated in the earlier specifications. Diego's new specification is found in Appendix III of the liquidation document of November 21, 1994. Even so, there is no real dispute about the calculation. Accordingly, his backpay is determined as set forth in that new specification.

1. Total Backpay		$5,016
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Karen Mann

When the strike began, Mann was a viscosity tester. She is well qualified to perform all the jobs in the technical department. At one time she had worked her way up to the highest job there, tech I, but had lost it in a departmental reduction in force. Her backpay period has been adjusted as a result of Villarias' ineligibility as discussed infra. Under the adjustment her backpay period begins on November 24, 1989, and ends when the plant closed on September 30, 1993. Respondent offers two defenses: The lump sum resignation argument and a failure to mitigate damages between the fourth quarter of 1989 and the second quarter of 1991.

In July 1989 Mann did sign one of Respondent's lump sum/resignation forms. She is a well-educated individual and acknowledges that she knew the form required her to resign. Like most of the others, however, she is a direct victim of the unlawful entry level recall system and at the time the offer was made Respondent was still attempting to rid itself of its union

members. For that reason, I find, as with the others, such resignations to be without effect for remedy purposes.

Insofar as her failure to mitigate is concerned, Respondent fares somewhat better. During her employment with Respondent, including the strike, Mann was married to a lawyer who practiced in Sitka. During the strike she often performed clerical tasks at his law office, but without remuneration. That circumstance continued on and off at least until the two separated in August 1989, about 3 months before she became entitled to reinstatement in November. It may have continued thereafter as well.

During the disputed quarters, Mann had no interim earnings whatsoever. The parties in their stipulation of April 25, 1995, agree that during the period between November 24, 1989, and July 7, 1990, she made no search for work in Sitka. That inaction may have been impelled by the fact that she was mother of two preteen children. Sometime during the fall of 1990 she began taking courses in 10-key calculator, Word Perfect and medical terminology to enhance her job marketability. She had found that her experience as a viscosity tester was useless in the job market. She testified she had no income at all in 1990, nor does she claim she searched for work in 1989–1990.

In January 1991 she moved to Anchorage and continued her schooling for one semester, doing sufficiently well to seek work as a paralegal. On June 15, 1991, Mann, was hired by a law firm in Anchorage called the Native American Rights Foundation where she continues to be employed. She testified in June 1993 that if her old job had been offered her, she would have taken it.

Based on those facts, I conclude that between November 24, 1989 and December 31, 1990, Mann made no effort to seek interim employment whatsoever. She had taken herself out of the job market during that period. Accordingly, she is not entitled to claim backpay for the fourth quarter of 1989 through the third quarter of 1990. Her gross backpay claim for that period is therefore denied.

However, in the last quarter of 1990 she began taking classes to train for work in another field. As a result the General Counsel has halved her fourth quarter 1993 claim to allow for part-time availability while she was in school, or at least as evidence that she was attempting to re-position herself to find work. While her effort at retraining is commendable, there is no evidence that she actually sought work in Sitka during that quarter. Had she done so, I would be more inclined to agree with the General Counsel. Since she did not, I conclude that even the claim for that period must be denied. Accordingly, the amount of the denied claim for those five quarters is $44,437.

I reach a different conclusion beginning with the first quarter of 1991. At that time she moved to Anchorage to take training as a paralegal. During that time she did begin seeking work even though she was in school. In June she became successful. On that basis, I find that her full claims for the first two quarters of 1991 are sustainable and shall allow them to stand. As there are no other issues with respect to those or succeeding quarters her total backpay becomes $29,914.

This adjustment also affects her pension credit and her severance pay claims. In that situation she is entitled to 11 years credit, not 12 as claimed in the liquidation document. Her severance pay therefore is $5500. Likewise her additional pension credit is 2.25 years instead of 3.25 years. The amounts are:

1. Total Backpay		$29,914
2. Pension Credit	2.25 years	
3. 401(k) Matters	None	
4. Severance Pay		5,500

Roland Mears

Roland Mears and his wife, Libby, were each employed by Respondent at the time of the strike and are each subjects of this compliance proceeding. Due to their individual circumstances, however, they will be treated a little bit differently. Roland was a grader in the technical department at the time the strike began. He had "frozen'' in that job but was somewhat dissatisfied with it. The General Counsel asserts that his backpay begins on April 26, 1987. At that time he had taken a job with a local business supply company, Yukon Office Supply. On May 6 he wrote a note to Respondent, witnessed by Union Official Jesse Jones, saying "I . . . will be terminating my employment as of 5–6–87. Be advised that this is my written two weeks notice of termination.'' That decision was a deliberate one, not induced in any way by Respondent's offer of a lump sum or using any company form which he may not have understood.

The job, which he was abandoning, was the next to the bottom job in the department, and since he had voluntarily frozen himself, it may properly be assumed that he did not wish to advance. Obviously, the opportunity at Yukon Office Supply was a significant inducement for him to do what he did. Accordingly, I conclude that his backpay period begins as alleged by the General Counsel, but ends with his May 6, 1987 resignation.

1. Total Backpay		$600
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Ronald Proctor

At the time the strike began Proctor was also a grader in the technical department. Sometime in the third quarter of 1987 he accepted the job of relief beater in the machine room, an entry level job. According to the General Counsel, he was entitled to his grader job as of May 13, 1987, as if called when Mears resigned. It should be noted here that the backpay specification found in Appendix III of the November 21, 1994 liquidation document contains an error with respect to the date backpay begins. It erroneously cites April 26, 1987, as the correct date. In Appendix I, however, the correct date is shown, and the body of the specification does indeed reflect the May 13 date. Aside from that observation, there is no other concern with respect to his backpay. He eventually moved on to other jobs in the machine room at rates higher than he would have earned as a grader. Beginning with the fourth quarter of 1987, his net interim earnings exceeded his gross backpay. Thus, his actual net backpay is quite small, covering only 1987, quarters two and three.

1. Total Backpay		$7,128
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

John Stokes

Stokes had been a tech II, the second highest job in the department at the time the strike began. When the strike ended he took a job in the secondary treatment department and continued to work for Respondent thereafter. On April 1, 1992, he de-

clined to transfer to the tech I job and that decision resulted in the General Counsel's conclusion that his backpay entitlement was cut off at that point. I concur. His interim earnings in other jobs in the other departments in general exceeded his gross backpay. Accordingly, there is no dispute with respect to the proper calculation.

1. Total Backpay		$7,071
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Elaine Thomas

Thomas was a viscosity tester at the time the strike began. As a result of the ineligibility of Villarias, referred to below, her backpay period has been extended to begin on August 1, 1990. The adjusted backpay specification is found in Appendix III of the November 21, 1994 liquidation document. There is really no dispute with respect to the backpay calculation itself. Respondent's principal defense is that she resigned in order to take her lump sum retirement money and that her backpay claim should be mitigated due to the fact that beginning in 1990, she began attending school to become a pharmacy technician and that her only employment since then has been in connection with that schooling.

The facts, however, are a little different. To survive the strike she had taken a part-time job at Island Community College in Sitka (which later became the Sitka branch of the University of Alaska Southeast). She did take the lump sum in June 1987 and was aware that she was resigning from the company when she did so. Nonetheless, her prestrike job was the third highest job in the technical department. Moreover, she had about 10 years experience with the Company at that time. She is clearly a victim of the illegal recall system and was entitled to await her prestrike job. The General Counsel asserts that job should have come open on August 1, 1990 (an adjustment due to the elimination of Villarias as discussed below).

In December 1989, as the single mother of a 4-year-old son, she concluded that she was not surviving financially. She therefore determined to leave Sitka and move back to her family home in Moreno Valley, California, which is located about 15 miles east of Riverside in Riverside County. She discovered that her experience and training as a viscosity tester and mill employee did not lead her to other jobs. She therefore studied for, and passed, a real estate examination, becoming a licensed real estate salesperson. She had limited success in that field and decided to attend the California Paramedical Technical College, apparently between October 1990 and July 1991. As a result of that training she was able to obtain work as a pharmacy technician. Subsequently she determined that she liked the pharmacy business and decided to pursue the appropriate education to become a pharmacist. That, of course, required that she obtain a bachelor of science degree as well as admission to pharmacology school. She enrolled at Riverside Community College to begin a 2-year course preliminary to transferring to a 4-year school. However, while she was attending the community college she was able to work 20 hours per week as a pharmacy technician at Hemet Valley Hospital. Furthermore, she continued to attempt to earn money in the real estate field. At the time of the initial hearing in this matter she was still attending the community college.

Respondent argues these facts suggest that she removed herself from the job market in order to attend school full time. Therefore, it argues, she is entitled to no gross backpay during those periods. The General Counsel, of course, has shown interim earnings in the third quarter of 1990 and all quarters thereafter beginning with the third quarter of 1991. The only period of time it has found no interim earnings is the fourth quarter of 1990 and the first and second quarters of 1991. The General Counsel argues that she is entitled to her full gross backpay during those quarters even though she had no interim earnings. I agree.

There is no question that her work experience with Respondent did not provide her with a portable and readily salable skill. That being the case, it was entirely appropriate for her to have sought training and education in fields where employment is available and where she can meet her duty to mitigate damages. She did that by training to become a real estate salesperson and by training to become a pharmacy technician. Respondent's argument that she had removed herself from the work force in order to accomplish those goals, if sustained, would simply amount to a disincentive for an discriminatee to obtain employment. That, in my view, is contrary to the policies of the Act. Discriminatees should always be urged to acquire the skills necessary to support themselves, not only for mitigation purposes but as a general social policy.

In any event, it is clear that while she was at Riverside Community College she was able to maintain a modicum of employment while still carrying a full schedule at the school. The Board has frequently held that attending school while still looking for work or actually having work does not negate the contention that the employee is not available for work, particularly where school time and work do not interfere with one another. See *J. L. Holtzendorff Detective Agency*, 206 NLRB 483, 484–485 (1973), and *American Compress Warehouse,* 156 NLRB 267 at 275 (1965).

Respondent makes one other argument. It notes that in a questionnaire submitted to her by the Regional Office, she stated, "No, thank you!'' when asked if she would go back to work if her position were offered. First, the question was put to her only in the context of settlement and in the question itself, the Regional Officer said that she would not be held to that answer. Even so, it is clear that she was a discriminatee from the outset. She is not obligated to make a decision until proper reinstatement is offered to her. Her answer to the questionnaire is speculative and should not be accorded any significance with respect to an abandonment argument.

Aside from the matters discussed above, Respondent does not dispute the actual calculation of backpay for Thomas. Having rejected its other defenses, I conclude that the backpay specification as set forth in the liquidation document of November 21, 1994, found in Appendix III, is accurate.

1. Total Backpay		$72,372
2. Pension Credit	3.16 years	
3. 401(k) Matters	None	
4. Severance Pay		6,000

Brownell Turner

Brownell Turner was a viscosity tester at the time the strike began. Due to the ineligibility of another person in the technical department (Villarias), his backpay period has been adjusted. It now begins on July 7, 1990. As discussed in the finishing room position of this decision, his wife is discriminatee Carolyn Turner. Carolyn should have been recalled on the day after the

strike ended, but was not. Respondent's failure to recall her has clear ramifications insofar as Brownell is concerned.

She took a job with a local insurance agent and he eventually accepted an entry level job. Nonetheless, these two jobs, even together, failed to meet the family's financial needs. In September 1989, they decided to seek better opportunities elsewhere and moved to Las Vegas, Nevada, where they continue to reside.

Respondent asserts that Brownell's decision to quit and move to Las Vegas terminated its obligations to him. I disagree. First, I note that had Respondent offered Carolyn her old job in April 1987 when it should have, the family would have survived better than it did. The need to move elsewhere may not have arisen. Second, Brownell was under no obligation to stay with the entry level job or its progression to grader. He was always entitled to await his old job. Thus quitting in 1989 did not affect his right to recall in July 1990. He did not become a discriminatee until then, so he was under no obligation to mitigate prior to July 1990. His right to recall to his former job is not affected by his employment decisions. Therefore, his decision to quit, in the wake of Respondent's unlawful refusal to reinstate his wife, and in order to increase the family's income can hardly be said to be an abandonment of the job. Indeed, he testified that if both were offered reinstatement to their old jobs, they would have returned.

I find, therefore, that Brownell Turner's decision in 1989 to quit his progression level not to have been an act which barred him from reinstatement in 1990. The defense is rejected.

No other issues have been raised with respect to Turner. I therefore accept the backpay specification found in the liquidation document of November 21, 1994.

1. Total Backpay		$83,467
2. Pension Credit	3.23 years	
3. 401(k) Matters	None	
4. Severance Pay		5,000

Daniel Villarias

At the time the strike began, Villarias was a tech II in the technical department. The General Counsel asserted in the initial backpay specification that Villarias was entitled to recall as of March 20, 1988. However, on August 10, 1987, he wrote a letter to Personnel Director Cline which reads in its entirety: "Circumstances have arisen which make it necessary for me to leave Alaska Pulp Corporation. I am therefore submitting my resignation effective 2 weeks from this date. August 10, 1987. My employment with Alaska Pulp has been very pleasant and I regret the necessity of this change. I am grateful for the many courtesies that have been shown me. It was a privilege to have been employee of Alaska Pulp Corporation. I do hope if the circumstances change, I could submit for employment at a later date.''

This resignation was not solicited in any way by Respondent and therefore must be regarded as the personal decision of Villarias. Although it is not absolutely discernible from the record it appears that he was aware that his wife was seeking work in Washington State. Shortly thereafter she did accept employment at a hospital in Enumclaw, Washington, and although he stayed in Sitka for a short period of time after that, quickly followed her there.

Since he voluntarily resigned any interest in returning to his job and his that resignation was not effected by any unfair labor practice, I conclude that he removed himself from consideration for recall on that date.

IX. UTILITIES

Michael Bagley

At the beginning of the strike, Michael Bagley was the chief operator in the power house, the highest job in that department. There was a total of nine jobs in that department, counting relief utility worker. Respondent defends his circumstances, first on the ground that he resigned to take his lump sum and second, that he had failed to sign up for reinstatement. Both of these issues have been dealt with elsewhere and Bagley is no different from them. Those defenses are to no avail. The General Counsel has asserted that his backpay begins on December 7, 1987. I advised in my Interlocutory Determination of Eligibility that Bagley was indeed entitled to the offer but that the offer was cut off by subsequent events. There is no dispute with respect to the calculation as modified in the specification found in Appendix III of the liquidation document of November 21, 1994.

The facts are fairly simple. On May 1, 1987, Bagley received an offer from Respondent to return to an entry level job which he declined. That job involved raking the boilers which is hot, dirty and physically demanding. In June 1987 he obtained employment with the local newspaper, the Sitka Sentinel as a pressman and was retrained under a veterans retraining program. That job initially paid about $10 or $10.50 per hour for 5 or 6 months and then he became a journeymen pressman and began earning $15 per hour. He says between that time and June 30, 1989, he would have considered and probably accepted any offer to return to his position with Respondent as chief operator. However, he acknowledges that as of June 30, 1989, he would not have done so, as he preferred his job with the newspaper. In this regard, he has a family connection to the newspaper as both his brother-in-law and sister-in-law are owners of that business and his wife also works there. Accordingly, taking Bagley at his word, I conclude that he abandoned any interest he had in returning to work as of June 30, 1989.

1. Total Backpay		$32,884
2. Pension Credit	1.55 years	
3. 401(k) Matters		401
4. Severance Pay	None	

Albert Bigley

Bigley was a long time employee for Respondent having been hired in 1970 and coming into the power house in 1972. He had "frozen'' himself as a turbine operator and had engaged in part-time commercial fishing before the strike. However, during the strike he declined to attend any union meetings and took a job in November 1986 with White Pass Gas, a local supplier of natural gas and petroleum products. He has worked for that firm since then and was still working there at the time of the hearing. While he was employed at White Pass Gas he did take his lump sum retirement money, signing the resignation paper to do so. He admits that he knew he was resigning any interest in returning to Respondent and that he would not be recalled thereafter.

It appears to me that upon these facts Bigley has admitted that he had abandoned the strike to take permanent employment with White Pass Gas. As he had abandoned any interest in Respondent before the unfair labor practices even began, he is not entitled to a remedy.

LeRoy Dabaluz

At the time the strike ended Dabaluz was a fuel tender in the utilities department. That job is the third from the bottom. The General Counsel asserts that Dabaluz' backpay begins on June 25, 1987. Dabaluz says he signed up to return to work, but shortly thereafter he learned that the company was hiring only at the entry level. He did not want an entry level job and in any event was operating under the belief that he had been "fired'' since he had been permanently replaced during the strike. He had little expectation that he would be recalled to work. He does admit that he did not make any effort to keep Respondent apprised of his current addresses as he subsequently moved about in Southeast Alaska seeking work.

He says that in mid-April, he left Sitka to seek work in Petersburg, Alaska, and later moved to Ketchikan. During most of that time he was employed in the cold storage and fishery industry. In Ketchikan he was able to find only one job, as a rodbuster in the iron worker trade, but has continued to seek work, usually using the Alaska State unemployment system. He says that during the entire backpay period, the longest period of time that he has been unemployed was only about 5 weeks in the autumn of 1992. Even during that period he was looking at applying for work at various construction companies. He explained that he did not tell Respondent his current addresses because he thought he would never get his job back, despite the existence of the entry level recall system.

Respondent's principal concern is the period of unemployment which Dabaluz experienced in early 1993 after he was laid off by R-K Engineering, the company he had worked for at the end of 1992. Respondent asserts that this 8- to 10-week period should be docked from his gross backpay. However, there are two considerations. First, there is no showing that Dabaluz did not search for work during that period. I note that it is in the early part of the year, the dead of winter, when construction work is normally not available. Moreover, that sort of hiatus in employment is taken into account by the *Woolworth* formula. If the *Woolworth* formula, quarterly reporting periods, is followed as it was here, such gaps are to be expected and are an understood portion of the formula. Accordingly, I conclude that the backpay specification for Dabaluz with respect to the first quarter of 1993 should remain as it is. He is entitled to the full amount of net backpay for that quarter, $7904.

A second issue is whether his failure to keep Respondent apprised of his address in any way affects his entitlement to a backpay award. I conclude that his failure does not. The record shows that on August 14, 1987, Respondent sent Dabaluz a letter offering him what was undoubtedly an entry level job. He did not receive it and it was returned. Thereafter, Respondent declared him to have "refused reinstatement because he failed to return to work after notification.'' The problem with that is that he was offered only an entry level job. He is therefore a direct victim of the entry level job system and is entitled to full backpay as set forth in the modified specification. Had Respondent offered him his prestrike job, his failure to stay in touch might have been a concern. It did not and the defense is to no avail. A review of the backpay specification for Dabaluz, found in Appendix III of the November 21, 1994 liquidation document shows that his interim earnings have been substantial during that period of time.

1. Total Backpay		$78,030
2. Pension Credit	6.26 years	
3. 401(k) Matters		401
4. Severance Pay		3,998

Bart Edenso

At the time the strike began Edenso was a no. 1 and no. 2 recovery boiler operator, the job which was the fifth highest from the bottom in that department. There is really no dispute with respect to his circumstance. Respondent admits that he is entitled to some backpay and it would appear that he accepted an entry level job with Respondent. There is, therefore, no dispute with respect to his interim earnings. The backpay specification in the November 21, 1994 liquidation document reflects the proper figures; it even accounts for adjustment required due to the ineligibility of two others. This figure is in accordance with the August 1, 1995 errata.

1. Total Backpay		$21,774
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

David Hiebert

Hiebert is the original charging party in this case. His circumstances are a bit different from most of the others because he initially accepted a recall to an entry level job in the utility department. Specifically, he was first a relief and then a utility worker, principally assigned to raking the boiler, an arduous, hot, and dirty job. He had previously been a power boiler operator, the third highest job in that department. He described that work as "cushy'' as it mainly involved control room work. He had been employed by Respondent since 1976 and had been in the power house since that time. He discovered his acceptance of an entry level job was not to his liking. The work was difficult and Respondent insisted that he train less experienced employees who were ahead of him in the progression line. He was also paid the rate of a utility person when training others rather than a higher rate (except when he was actually assigned to work at a higher level for short periods) and his income dropped dramatically. In addition, he came to believe that working with inexperienced people was unsafe. Accordingly, in July 1988 he decided to quit and look for a better paying job.

Since Hiebert was a direct victim of the entry level job system found to be unlawful here, his acceptance of that job as well as a subsequent quit are of little significance, except to the extent that the pay which he received at the lower does constitute interim earnings.

When Hiebert quit, he also took advantage of the second "opening'' to obtain his lump sum retirement money, a sum of about $5000. He spent some of that money refurbishing the boat on which he lived, paying some debts and eventually motored from Sitka to Seattle. He rather quickly began searching for work in the Seattle area, initially finding some solicitation work for a local lobbying group. He also began taking night classes at a technical school to learn some computer skills.

It happened that his brother was employed at a Seattle-area computer cabling company, Redmond Cable, and he was eventually able to find part-time and subsequently full-time day work with that firm. At the same time he continued to go to night school, taking courses at the now defunct Griffin College. In the first quarter of 1991 he and his brother left Redmond Cable to form their own cabling company. As of the summer of 1993 he was continuing to work with that entrepreneurial enterprise. The General Counsel has chosen not to file a claim for

Hiebert for 1993 as he has not reported interim earnings for three quarters which he might otherwise be entitled to.

Respondent asserts that during several quarters in 1988 and 1989 Hiebert was actually attending school full time and that that circumstance deprives him of any claim for backpay during that period. However, the evidence shows that he only attended night school and was free to work a full day during that entire time. Indeed, his interim earnings demonstrate that he was able to work consistently for either Redmond Cable or his own firm. Although there may be some questions with respect to the specificity during the fourth quarter of 1988 and the first quarter of 1989, it does not appear to me that Respondent has carried its burden of proof to demonstrate that he had removed himself from the job market. Similarly, with respect to the second quarter of 1991, the evidence demonstrates that Hiebert was in the process of starting up his own company and attempting to make that business financially viable. Those efforts do not disqualify him from backpay. Accordingly, I conclude that Hiebert is entitled to backpay as set forth in the specification found in the November 21, 1994 liquidation document. The pension credit has been calculated from his actual departure on July 14, 1988, through the fourth quarter of 1992 on the assumption that he received pension credit for his work in 1987 and up through his departure in July 1988 as part of his lump sum payment.

1. Total Backpay		$103,480
2. Pension Credit	3.45 years	
3. 401(k) Matters		401
4. Severance Pay		9,642

Walter Jenny

At the time the strike began Jenny was a no. 3 recovery boiler operator in the utilities department and "frozen'' at that position. His backpay period begins on June 5, 1988. During the strike he left Sitka in order to live with his parents in Sedro Wooley, Washington, returning in March before the strike was over. Although he didn't immediately request reinstatement, he was privileged to rely upon the Union's request on his behalf.[15] Moreover, in May he learned of the lump sum opening and went to speak to Karla Parrish of the personnel department about that. He learned from Parrish that his recall prospects were not good; that Respondent was offering only entry level work. She also told him that if he wanted his lump sum from the retirement plan, he would have to resign. He took the lump sum at that stage. Like the others, I conclude that the lump sum defense has no validity as he was a direct victim of the unlawful recall system.

Insofar as backpay calculations are concerned, the parties have entered into a stipulation dealing with his interim earnings during the second, third, and fourth quarters of 1988. To that end, I have modified the backpay specification in accordance with the stipulation of April 25, 1995. With respect to 1989, it appears that Jenny obtained employment in the asbestos removal industry with a firm called "Asbestos General'' and later with another company called "Loss Control.'' There is no suggestion that aside from these two employments that he was not seeking work during 1989. Indeed, he was able to obtain employment during three of the four quarters. The only quarter in which he was unable to obtain employment was the second quarter of 1989, but Respondent has not been able to demonstrate that the unemployment period was due to a deliberate withdrawal from the employment market. Jenny testified that he sought interim employment during 1989, including asking for employment through Respondent, speaking both with Parrish and with Cline on different occasions.

Sometime in January 1993, he answered an ad for entry level employees at Respondent. He applied, was hired and worked for Respondent at the entry level job from sometime in January 1993 through part of the fourth quarter of 1993. For that reason the General Counsel has made a claim for backpay which includes the fourth quarter of 1993, unlike most of the other employees. That is reflected in the backpay specification.

Jenny's pension credit has been calculated from his actual departure on July 14, 1988, through the fourth quarter of 1992 on the assumption that he received pension credit for his work in 1987 and up through his departure in July 1988 as part of his lump sum payment. The General Counsel also notes, due to the fact that Jenny had taken his lump sum earlier and then had resumed employment in 1993, that the .8333 years of employment in 1993 should be deducted from his pension credit since he received another payment covering that period of time on November 10, 1993. Accordingly, an adjustment has been made taking that deduction into account, resulting in a calculation of an additional claim of 4.55 years as a pension credit.

1. Total Backpay		$104,718
2. Pension Credit	4.55 years	
3. 401(k) Matters		401
4. Severance Pay		6,491

Harry Johnson

At the beginning of the strike Johnson was a power boiler operator and had been so employed for about a year. Although he acknowledges that when the strike ended he did not apply for reinstatement, he also knew, from union officials such as Hiebert and others, that Respondent was hiring only at the entry level job. He regarded that as unfair and requiring him to resume performing arduous work. Under the backpay specification prior to the Interlocutory Determination of Eligibility, Johnson was not scheduled for recall until June 5, 1988. However, due to the ineligibility of other individuals, his new recall date became August 18, 1987.

He testified that he was unable to find employment in the Sitka area, although he had lived there all his life. Apparently the skills that he utilized at the plant were not readily transferable elsewhere in the community. It is true that there are other institutions in the Sitka community which operate boilers and/or large oil-fired furnaces of one type or another, but there is no showing that employment was available to Johnson during 1987. In any event, in August, he concluded that he did not have a sufficient breadth of skills to become employed in other fields. Accordingly, he decided to seek training as automotive/diesel mechanic and moved from Sitka to Denver, Colorado, for the express purpose of taking an associate of arts degree in that field at a college there. He testified that he went to school full time although he was able to obtain a part-time position with Sears, Roebuck & Co. He returned to Sitka after completing his automotive diesel mechanic training in May 1989. In the summer of 1989 he was engaged in commercial fishing but in October was hired by Southeast Marine as a diesel mechanic and testified that he has been employed there since. His backpay specification does show a period of 1 year beginning

[15] *United States Service Industries*, supra, and *Marlene Industries Corp v. NLRB*, supra.

with the first quarter of 1992 going through the fourth quarter of that year where he had no interim earnings, despite his testimony that he has been employed by Southeast Marine since 1989. Nonetheless, Respondent has not challenged the General Counsel's specification for those quarters.

In the first and second amendments to the fourth amended specification, some adjustments were made with respect to Johnson's interim earnings during the third quarter of 1993 and they have been accounted for in the November 21, 1994 liquidation document. In addition, the first and second amendments to the fourth amended specification also claim backpay for 22 days in October 1993, a portion of the fourth quarter of that year. Again, Respondent does not contest that claim.

Thus, the only issue[16] raised by Johnson's circumstances are whether his attending school in Denver between 1987 and 1989 serves as a bar to any recovery for that time period. I conclude that it does not. He was able to find part-time work with Sears while still attempting to better himself through acquiring skills in other fields, which eventually would have been used to find employment and to offset gross backpay. His circumstances are similar to those of Elaine Thomas and I shall treat them identically. See *J. L. Holtzendorff Detective Agency,* 206 NLRB 483, 484–485, and *American Compress Warehouse,* supra, 156 NLRB at 275. Accordingly, I accept the General Counsel's most recent backpay specification as set forth in the November 21, 1994 liquidation document.

With respect to his pension credits, the supplement to the liquidation document mistakenly shows that his recall date was June 5, 1988 (which it was originally), whereas it should have reflected the date of August 18, 1987, running through October 22, 1993. The pension figure below is calculated from August 18, 1987, through October 22, 1993.

1. Total Backpay		$179,688
2. Pension Credit	6.19 years	
3. 401(k) Matters		401
4. Severance Pay		8,091

John Lawson Jr.

John Lawson Jr. at the time of the strike began was a utility man in the utilities department. After the strike he accepted an entry level job and reached his old position in August 1989. There is no dispute with respect to the amount of backpay due him. Furthermore, he only worked a short time; his total employment time was too brief to allow him to become vested in the retirement plan.

1. Total Backpay		$1,718
2. Pension Credit	N/A	
3. 401(k) Matters	None	
4. Severance Pay	None	

Rodolfo Martin

At the time the strike began Martin was a no. 3 recovery boiler operator. When the strike ended he returned to work with Respondent at a lesser job. There is really no dispute with respect to his backpay, except that his recall date was advanced from October 12, 1991, to May 11, 1989, due to the ineligibility of some others.

1. Total Backpay		$18,965
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Libby Mears

At the time the strike began Libby Mears was a no. 3 boiler operator in the powerhouse. In the Interlocutory Determination of Eligibility I concluded that she was not eligible for recall. Her testimony should be taken in connection with that of her husband Roland, above. It will be recalled that both Mears voluntarily resigned on May 21, 1987, and did so without the connivance of Respondent. It should be noted here that Libby Mears, during the strike, began to work for the Sitka Sentinel local newspaper. Her husband eventually did so as well and I concluded based on those facts that these individuals knew that they had entered another career in the newspaper business and had no intention of returning to the mill after the strike ended. Indeed, they did not. Accordingly, Libby Mears, like her husband Roland, is not an individual eligible for recall as she abandoned that employment during the strike in favor of permanent employment elsewhere.

Theodore (Ted) Mukpik

When the strike began Mukpik was the chief operator in the utilities department, the highest paid job. Respondent acknowledges that Mukpik is entitled to backpay. He apparently accepted interim employment with Respondent but has never been able to work his way back to his original job.

1. Net Backpay		$46,819
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay		2,570

James Patterson (Estate of)

At the time the strike began Patterson was a utility man, the next to the bottom job in the utilities department. Respondent's answer asserts that Patterson is not eligible for recall because he had obtained permanent employment elsewhere. The parties have stipulated that Patterson died in a water skiing accident in 1989. The General Counsel asserts that his backpay period begins on June 6, 1988. He apparently returned to work sometime in the fall of 1988 and eventually reached his old position in the fourth quarter of that year. There is no dispute with respect to his interim earnings both at an earlier employer and at Respondent.

Although Respondent has defended on the grounds that Patterson had accepted permanent employment elsewhere, there is no evidence to that effect. Indeed, the evidence demonstrates that he did not, since he had returned to work with Respondent. Other defenses have not been raised. Accordingly, I conclude that the backpay specification as written is appropriate.

1. Total Backpay		$8,860
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Patrick Paul Jr.

When the strike began Paul, like Mukpik, was a chief operator. Respondent has admitted that Paul is entitled to reinstatement with backpay and his backpay figures are not in dispute. His backpay period begins in June 5, 1988, and ends in the fourth quarter of 1993. He, like several others, was included in amendment 2 to the fourth amended consolidated compliance specification as being entitled to work during the fourth quarter shutdown. Like Mukpik, he accepted another job with Respon-

[16] He, too, can rely on the Union's request for reinstatement. Id.

dent and worked during the backpay period. As there is no dispute with the calculation, his figures follow:

1. Net Backpay		$71,685
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay		2,713

John Potter

At the time the strike began Potter had "frozen'' as an evaporator operator. The General Counsel asserts that his backpay begins on November 11, 1987. Respondent defends on the ground that he took his lump sum and that upon returning to work bid to another department before his prestrike job opened and that he subsequently resigned. It is quite true that he accepted an entry level job in the utility department_raking boilers. He found the job not to his liking, was concerned about the inexperience of the operator, observed what he believed to be some unsafe conditions and was quite uncomfortable with the circumstances. Accordingly, he bid to the bleach plant, taking an entry level job there and working until July 1988, when he resigned. He also took advantage of the lump sum offer at that time. He then spent 3 months with an ill father, ultimately moving to Bellingham, Washington, where he worked at a nursing home for a while. He quit that job due to low pay and eventually entered the construction business as a drywall installer.

He testified that once he had moved to Bellingham he had no intention of ever returning to Sitka.

I conclude that his resignation with a present intention to move to Washington State and not to return in July 1988 terminated his backpay. See *Belt Supermarket*, 260 NLRB 118 (1982). There is no dispute with respect to the remaining figures and the backpay specification found in Appendix III of the November 21, 1994 liquidation document appears to be correct. Thus, his backpay covers only the fourth quarter of 1987 and the first quarter of 1988, for in the following two quarters his interim earnings exceeded his gross backpay.

1. Total Backpay		$4,200
2. Pension Credit	No new entitlement	
3. 401(k) Matters	None	
4. Severance Pay	None	

Roger Sele

When the strike ended Sele held the job of relief utility man in the utilities department, the entry level job. During the strike he applied for admission at Sheldon Jackson College in Sitka. While awaiting admission to that college, he obtained employment in the construction industry with McGraw Construction which had a contract to perform certain construction work at the Sitka Airport. When the strike ended in April, Respondent offered him his old job back, but he declined, preferring to remain with the construction firm.

Based upon Respondent's having offered him his old job and his declining it because he had obtained permanent employment elsewhere, I conclude that Sele is not eligible for reinstatement or backpay.

X. SMALL DEPARTMENTS

Unlike most of the other sections, the so-called "small departments'' group is an amalgamation of much smaller departments often consisting of only one or two people holding specific jobs. There may or may not be a "progression'' promotion system in effect for these jobs. Certainly "small departments'' is not intended to suggest that there is a department known by that name. The General Counsel has utilized this appellation to incorporate, for purposes of convenience, individuals who do not readily fall into any other category. Accordingly, each of these individuals presents a discrete set of factual circumstances. I proceed to the individuals:

Leo Michaud

At the beginning of the strike Michaud was the safety expediter in the safety department. He had been with Respondent for 12 years, but the record is not clear regarding how long he had been the safety expediter. As a safety expediter, his responsibilities required him to maintain all the safety equipment, the fire extinguishers, the fire truck and the ambulance, and to drive both pieces of equipment.

The General Counsel asserts that Michaud should have been recalled on January 1, 1990. Respondent defends on the ground that in October 1987 Michaud resigned from Respondent in order to take his lump sum retirement. There is no dispute that Michaud had signed up to return to work after the strike was over. Later, Respondent sent him a notice of the lump sum open period and the appropriate form. He said that he received that sometime in June or July and later went to speak to Karla Parrish of the Personnel Department about it. He acknowledges that she told him that if he took the lump sum retirement, he would have to quit. He told her he would wait, apparently to hope for the opening of his old job. He waited until October and by then had learned that his home mortgage was in arrears. Accordingly, he filed his request for a lump sum payment and received his money about November 6, 1987. (Respondent's records do not agree; its R. Exh. 8 shows Michaud to have applied for his lump sum on June 22, 1987. One explanation is that he signed the document in June but did not turn it in until October. The parties have stipulated that his termination date was effective October 15, 1987.) He says that he used the lump sum to pay the mortgage and make child support payments.

Except for signing that resignation form, there is no suggestion that he had revoked his request that he be recalled to work. Indeed, he testified that on May 15, 1988, he wrote Respondent a letter seeking the safety person job and submitted a resume. As late as April 1990, apparently in response to the opening which the General Counsel asserts that he was entitled to, he contacted Cline to ask him for the job. He says Cline told him only that he would "be taken under consideration.'' The job was filled by another person. He says that he spoke to Cline asking why he didn't get the job, but Cline told him that he didn't have to give him his job back because he had taken his retirement.

Throughout this decision I have discussed the issue of lump sum retirement resignations. As noted, there are two types of employee affected by these resignations. Previously we have discussed only those individuals whose recall was to entry level jobs. Those individuals were direct victims of the entry level job discrimination procedure and there is no question but that the lump sum issue is overridden by the need to remedy their circumstances. Michaud is the first individual who is not a direct victim of the recall system. He is instead, the victim of a discriminatory atmosphere designed, like the recall system, to eliminate union members from Respondent's work force. That issue is of course discussed above.

Therefore, Michaud as well as others in his circumstance, are clearly entitled to a reinstatement and a backpay award. Insofar

as backpay calculations are concerned, however, there is nothing significant in dispute.

1. Total Backpay		$9,655
2. Pension Credit	3.75 years	
3. 401(k) Matters	None	
4. Severance Pay		9,958

Denise Olson

At the time the strike began Olson was the stores inventory clerk in the stores department. It was a one of a kind job and not affected by the progression system. The General Counsel initially had alleged her proper recall date to be July 31, 1988. I declared her to be ineligible for recall in my Interlocutory Determination of Eligibility for Backpay because in February 1987, during the strike she embarked on a new career becoming permanently employed by the Southeast Alaska Regional Health Center (SEARHC).

In February 1987 she accepted a part-time job in the personnel department of that medical center. Eventually, she became the "senior human resource specialist,'' which is second in command of the personnel department. She says that she started out as a mental health clerical assistant earning $9.50 an hour, became an accounting technician in August 1987 and at that point became a "benefited full-time employee.'' She kept that job until she became a personnel assistant in August 1988, continued her way up through the hospital personnel office and on June 30, 1990 became a personnel specialist which was the highest she could go until she received her promotion to "senior human resource specialist.''

Olson had been the union treasurer during the strike. She had become very committed to the strike's cause and was embittered and angry over its outcome. At various points she advised the Board's Regional Office that she was "not willing to work with SCABS.'' Moreover, she admitted that she would not have returned to the plant at any time after she reached the salary "Range 9'' at SEARHC in June 1990.

Based on a number of considerations, particularly her desire to pursue a career at SEARHC, I find that even as early as February 1987 she had embarked on what she thought was a new career with SEARHC. She made a deliberate bet that SEARHC would be her new career and her bet turned out to be correct. She became a permanent employee receiving fringe benefits within 6 months of her hire, well before the alleged recall date of July 31, 1988.

I conclude, based upon all these facts, that Olson, despite some remonstrations to the contrary, had abandoned any interest in returning to Respondent as soon as she realized she was on a career track at SEARHC. She realized that shortly after she was hired in February 1987 while the strike under way. Indeed, this is one instance which an employee who took her lump sum retirement, as Olson did on July 22, 1987, may be considered evidence that she was indeed abandoning any interest in her old job. Accordingly, she is ineligible for recall.

Barbette Sisson aka Kayli Larson

When the strike began Sisson was a secondary treatment operator in the environmental department. She had been in that department for approximately 8 months. Prior to that she had been in the finishing room as a roll storage crane operator and had been employed by Respondent since May 1973. She testified that there were two other secondary treatment operators in that department as well as a relief secondary treatment operator. At the time she became an operator, there were three openings for the position and all three were filled by interdepartmental bids. As all three came into that job at the same time, plantwide seniority was used, rather than department seniority, to establish who had the greatest seniority. In addition, that department also had a relief secondary treatment operator. As noted earlier, the relief job was, like the other departments, an entry level position. Respondent's defense that she turned down a job offer is discussed separately, infra. That defense was rejected.

There is no significant dispute with respect to her backpay calculation and Respondent does not attack the formula with respect to her. Her backpay period begins on May 25, 1988. She had significant interim employment with the United States Postal Service during the entire backpay period, including at least three quarters in which her interim earnings exceeded her gross backpay. In addition, Sisson is alleged to have been one of those individuals who would have been held over during a portion of the fourth quarter of 1993, through November 5. Thus, her backpay figures are:

1. Total Backpay		$78,026
2. Pension Credit	5.47 years	
3. 401(k) Matters		401
4. Severance Pay		12,852

Charles (Chuck) Williams

When the strike began Williams was the most senior of the secondary treatment operators. The General Counsel asserts that his backpay begins on March 1, 1988. Respondent defends on the ground that he took his lump sum in July 1987, signing Respondent's form to do so and thereby resigning his employment. Like the others in that situation that defense is rejected. Respondent offers no other defense, except for its contention that he was not a victim of the recall system. That is patently not so, but really has little impact on how he should have been treated. Respondent, in fact, is relying mostly upon the ineffective resignation connected to the lump sum withdrawal.

I conclude that Williams is entitled to backpay as alleged in the backpay specification, found in the liquidation document of November 21, 1994. That document also provides backpay for a portion of the fourth quarter of 1993, as he would have been assigned to perform some work during the shutdown phase. In addition, the total backpay figure includes a $225 medical expense allowance.

1. Total Backpay		$161,107
2. Pension Credit	5.43 years	
3. 401(k) Matters		401
4. Severance Pay		9,282

XI. MAINTENANCE DEPARTMENT

With respect to the maintenance department, in large part these individuals were not direct victims of the unlawful entry level recall system, for the progression system did not apply. Nonetheless, they are strikers who were not recalled to their former jobs when those jobs became open and are therefore discriminatees under the meaning of the *Laidlaw* rule. Respondent defends on the ground that during the course of the strike it had reorganized the maintenance department to eliminate craft-oriented subdivisions of that department, converting all maintenance persons to the job of "general mechanic.'' In practice, however, individuals who had particular skills in a specific craft area, such as pipefitting or carpentry or electrical, were assigned to perform jobs where those skills could be properly

utilized. Indeed, Respondent determined at some point that a person whose skills lay in areas other than the particular tasks they were assigned would not be harshly judged based upon their performance in tasks for which they had not been trained. In large part, it appears that this so-called department reorganization was a bit of a failure, if not an outright sham. Flexibility with respect to certain assignments may well have been desirable, but was obviously not totally practicable. One does not automatically assign an electrician to carpentry work or vise versa. A given individual might well be able to perform adequately in both trades, but no one was fully cross-trained and it does not appear that Respondent made any great effort to do so. In some respects, Respondent's approach to the recall of maintenance employees, based on its perspective of what types of skills a particular employee had is a bit suspicious. This becomes particularly so where it has chosen to avoid recalling maintenance employees who also held positions with the Union. Respondent's claim, usually through Cline, that a particular maintenance person did not meet its requirements at any given time is subject to a great deal of subjective judgment, something which can not be trusted where Respondent has embarked, as it has, upon a campaign to avoid the recall of strikers and other union activists. In this regard, see the earlier discussion dealing with John Lawson Sr. With this background, I proceed to the individuals in the maintenance department.

Kit Andreason

The General Counsel has alleged Andreason's proper recall date to be August 4, 1988. When the strike began Andreason was a journeyman maintenance electrician and had been so employed since his hire in 1977. During the strike he utilized his skills to become employed with Brown & Root Construction in the Alaska North Slope oilfields. He continued to work at that job until late August 1987. He was able to vote in the NLRB election by mail ballot. He had maintained his home in Sitka while working on the North Slope and did sign up for recall in June. He learned that he was thirteenth on the recall list and therefore, continued to seek employment elsewhere. He filed resumes with Scott Paper Co. in Everett, Washington, and with Morton Forest Products in Morton, Washington. In September 1987, apparently shortly after his North Slope construction work ended, Scott Paper sent a personnel official to interview Andreason, as well as others in Sitka who had applied for work with that firm. Andreason participated in the interview and in October was called to Juneau to take a physical examination. Sometime in late October or the first part of November, Scott Paper offered him a job in Everett and he agreed to take it. He relocated his family to that city.

In addition, on December 8, 1987, he accepted Respondent's offer to permit him to take his lump sum retirement money from the retirement plan, signing the standard resignation form to do so. He says he was well aware that he was resigning from Respondent when he did.

On direct-examination he says that he would have considered an offer "in the electrical department'' had one been offered. Of course, none was because he had signed the resignation form, but it is also clear that he would not have been offered a job in the electrical department (although he might well have been assigned there) as Respondent was insisting on calling all the maintenance personnel "general mechanics.''

He says, somewhat uncertainly, that he "thinks'' that he would have accepted a job as a general mechanic with Respondent in Sitka during 1988 even after he had moved to Everett. He points out that he still owned property in Sitka and did not sell it until 1990. He also contends that he had both family and institutional ties to the Sitka area. He concedes however, on cross-examination, that his move to Everett became permanent at some point. He suggests that would be sometime in 1991 when he purchased a home there.

Based upon my assessment of the witness, his financial circumstances, his becoming employed with Brown & Root during the course of the strike, his desire for permanent employment and his overall knowledgeability about what he was doing, that he had become permanently employed at Scott Paper in Everett in a substantially equivalent, if not identical, job before his journeyman electrician job would have opened up in August of 1988. I conclude therefore that he had found permanent and substantial employment elsewhere and had relocated to another State to obtain it. Based upon those facts, I conclude that he had no intention of returning to Sitka to accept his old job even if it had been offered. Accordingly, I conclude that Andreason is not entitled to backpay.

John Bartels

The parties have agreed, pursuant to a substantive stipulation set forth in General Counsel's Exhibit 3, paragraph 6, upon the formula to be applied to Bartels with respect to quarters one, two, and three of 1989. His backpay ended when he was promoted to journeyman in September 1989. In addition, the parties agree that he is entitled to backpay for four quarters of 1988 and that the proper backpay figures are set forth in the Liquidation Document of November 21, 1994. Therefore, there is no dispute with respect to the manner or amount due Bartels.

1. Total Backpay		$29,551
2. Pension Credit	1.64 years[17]	
3. 401(k) Matters		401
4. Severance Pay	None	

James Button

Button was a certified welder who had worked for Respondent for 11-1/2 years before the strike. The General Counsel asserts that his backpay period begins on July 2, 1987. Respondent argues that Button resigned to take his lump sum retirement money in late December 1987. Button had signed up in June to return to work. From the end of the strike and thereafter he worked as a welder for a shipyard, Allen Marineways, as well as a construction company, S & S Construction Co. He says that he eventually decided to take the lump sum money because employment was uncertain in the construction industry, particularly during the winter months. He felt he had no alternative. Since that time he has continued to work in construction as a welder although he has also performed quite a bit of commercial fishing. He owns his own fishing boat and it is true that the depreciation which he has taken on the boat has reduced his interim earnings, for his tax return is a basic document from which the General Counsel has worked to determine his net backpay. Respondent has made an argument with respect to the fact that different commercial fishermen have been subject to different IRS rules and that the differing treatment has had an inequitable impact on the backpay calculations. One

[17] The pension credit figure shown here is based upon the backpay period. To the extent that it may have already been included in the figure shown in the supplement to liquidation report of November 23, 1994, compliance officials are authorized to make any mathematical adjustment required to grant him the amount of credit shown.

of the principal persons with which Respondent is concerned is no longer in the case, having been declared ineligible for backpay in the first place. Nonetheless, the Board has long since permitted discriminatees the benefits of any self-employment depreciation to which they were entitled and I see no reason to deviate from that practice now. *Cliffstar Transportation Co*., 311 NLRB 152, 170 (1993).

With respect to Respondent's defense that Button had resigned to get his lump sum, I note that he was entitled to be reinstated 6 months before he made that decision and that in large part Respondent's failure to offer him his old job in a timely fashion contributed to his decision to take the lump sum. Moreover, I have already determined elsewhere that these lump sum resignations do not qualify as a defense.

Respondent does not challenge the calculations, which include almost $12,000 in medical expenses, as well as work during the fourth quarter of 1993 for the shutdown phase.

1. Total Backpay		$102,602
2. Pension Credit	6.28 years	
3. 401(k) Matters		401
4. Severance Pay		12,138

Calvin Carlson

Carlson was a woodroom maintenance leadman. Unlike the journeyman maintenance personnel, leadmen are entitled to await an offer to their old job and are not obligated to accept a lesser position. The General Counsel asserts that Carlson should have been recalled to his maintenance leadman job in the woodroom on January 1, 1990. Respondent points out that Carlson took his lump sum and resigned in late July 1987. It did not offer him any job whatsoever. Carlson is a trained millwright and capable of working in construction in that field. Indeed, he did find some employment in that trade after the strike was over. In addition, he has spent a large portion of his time as a commercial fisherman.

Carlson clearly falls within the standard category of individuals whom I have determined lump sum resignations have no application. Accordingly, that defense is rejected. In addition, as noted earlier in the discussion, he had been a leadman and the only types of job which would have been offered to him would have been the multipurpose "general mechanic'' job, essentially an entry level job for a person of his experience. Accordingly, he is a victim of the entry level job discrimination system.

In addition, Respondent has raised a side issue. Carlson testified that on three occasions after 1987 that he applied for work. Respondent treated him as a new employee in those instances and, among other things, required him to go through the standard screening process including a physical examination which he did not pass. It appears that I am to infer from that circumstance that Carlson was unable to perform the work which he would be required to do. I am unimpressed for several reasons. First, as a striker, Respondent was obligated to call him back without attaching any conditions. If he was unable to perform his job, that would have rather quickly become obvious once he had returned to it. *Brooks Research*, supra. Second, it is quite possible that his back injury had preexisted the strike. There is no evidence regarding that whatsoever. If that is the case, then Respondent had no difficulty employing him with that injury in the past and therefore need not have concerned itself with his ability to perform his job in the future based simply upon that. Third, by treating him as a new employee, rather than as a returning striker, Respondent was continuing the past discrimination against strikers which Judge Wacknov had found to be unlawful. Finally, I observe that it seems unlikely that this back injury had any impact on him whatsoever. I observe that he has worked both as a construction millwright and as a commercial fisherman since the end of the strike and has apparently not experienced any difficulty in performing those tasks. The findings of the company physician are therefore somewhat suspect. This defense is rejected. Carlson is entitled to backpay as set forth in the backpay specification found in the November 21, 1994 liquidation document. That includes 29 days in the fourth quarter of 1993 which Carlson would have spent during plant shutdown.

1. Total Backpay		$95,376
2. Pension Credit	3.82 years	
3. 401(k) Matters	None	
4. Severance Pay		9,812

Harold Frank

Frank had been employed as an electrician in Respondent's electrical shop since 1974, starting as an apprentice and later becoming an journeyman. During the strike, apparently as early as February 1987, Frank learned of an opening as the maintenance manager of the Chatham Straits School District in Angoon. As noted earlier, Angoon is a native village approximately 90 air miles north of Sitka. The school district operates seven schools and its maintenance manager was retiring. Sometime in March or April, Frank applied for that job with the school district. At that time he had been out of work for about a year due to the strike. In May, after the strike was over, the school district asked him to go to Angoon to take a test and he did so. In the meantime he had signed the recall list for Respondent. On June 30, Respondent advised him that he was eighth on the recall list.

Respondent did not explain that being eighth on the recall list for the maintenance department did not in fact mean that he was the eighth electrician; it did not explain that it was differentiating between and among skills of returning strikers in the maintenance department. Indeed, that very lack of explanation carries with it the suggestion that Respondent did not wish to give out any information to strikers about their likelihood of returning. That lack of candor had a negative impact not only on Frank but on others as well.

In any event, in July the Chatham Straits School District offered Frank the job and he accepted. He moved to Angoon in August, initially living in a trailer house. Eventually his family joined him and he ultimately built a house and moved into it on May 31, 1989. He described his work with the school district as being quite similar to what Respondent would have offered him as a general mechanic. In fact, he said, "It was more of a General Mechanic that the mill would have. You would be doing just about everything. Millwright work, electrician work. You would do pipefitting work. And overall general mechanic.'' In addition, he supervised two maintenance workers and two custodians.

The General Counsel asserts that Frank should have been recalled on January 26, 1988. At that time he was in Angoon living in a trailer and had not yet sold his home in Sitka. Respondent, however, did not call him back at that time because he had signed the resignation form in order to take his lump sum retirement money on July 21, 1987, about the same time he was moving to Angoon. He testified that he would have ac-

cepted an offer then to return to the mill had one been offered. Indeed, it appears that the school district job's salary was approximately two-thirds of that offered by the Mill. It seems quite likely therefore that even though he had recently moved to Angoon, he would have returned to Respondent had a proper offer been made in January 1988.

Nonetheless, as time went by in Angoon, and as he became more closely tied to that community, the salary differential became less and less of a concern. I think it is clear that he had evidenced his intention to permanently abandon his job with Respondent on May 31, 1989, when he moved into the full-size home which he had just built in Angoon.

Respondent asserts, of course, that he had resigned in July 1987 when he filled out the lump sum retirement form. However, I do not concur for the same reasons I rejected that defense elsewhere. Even so, I do agree that he had accepted a substantially equivalent job with the school district and although it may have been his initial intention to only utilize that job as interim employment. Yet, on May 31, 1989, he clearly abandoned any interest in returning to Respondent when he moved into his permanent home in Angoon. It is at that point that his backpay period ends.

This holding is consistent with my determination in the Interlocutory Determination of Eligibility and as a result the General Counsel has filed, on November 21, 1994, a modified backpay specification. There is no real dispute regarding the calculations contained therein and the figures are:

1. Net Backpay		$26,952
2. Pension Credit	1.33 years	
3. 401(k) Matters		401
4. Severance Pay	None	

James Gardner

Gardner was a longtime employee of Respondent, having first been hired in 1963. At the time of the strike he was a journeyman millwright and had been in the maintenance department for 23 years. The General Counsel asserts that he should have been recalled on July 6, 1987. Respondent defends its decision not to call him on several bases: that he had taken his lump sum and resigned, that he had relocated for personal reasons and that he had not mitigated his damages. He signed up to return to work after the strike was over but since he was not immediately recalled spent that summer for the first time attempting to engage in commercial fishing, working for a fishing boat owner. He did receive the lump sum offer in July but did not exercise that right until the December 1987.

In the meantime he sought work as fisherman in Petersburg, Alaska, a small town located on another island a little less than 100 miles to the southeast. He continued to seek work both as a fisherman and as a fish processor in a factory there. He was also receiving unemployment compensation, apparently complying with the State's rules regarding search for work.

Eventually, in August 1988 he obtained a job as a millwright at Ketchikan Pulp Company in Ketchikan. That job is essentially the same one which he had been performing for Respondent. He further testified that on October 31, 1988, he concluded that the Ketchikan Pulp job was his new permanent employment and that he would not have returned to Respondent after that date. Accordingly, I conclude that as of that date he had abandoned any interest he had in further employment with Respondent. His backpay period ends at that time. His situation was anticipated as a result of the Interlocutory Determination of Eligibility for Backpay and a new backpay specification was prepared and submitted on November 21, 1994, with the liquidation document.

Respondent argues that Gardner failed to perform an adequate search for work during the fourth quarter of 1987 and the first quarter of 1988. However, Respondent did not meet its burden of demonstrating that Gardner had withdrawn himself from the job market during those quarters. Accordingly, I find the modified backpay specification to be supported by the evidence.

1. Net Backpay		$42,147
2. Pension Credit	1.31 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Jesse Jones

Jones, together with other members of the Union's negotiating committee, believed, not without reason, that he had become a special target. During the strike he had served as the Union's president and, like John Lawson Sr. (see infra) received some unusual treatment during the reinstatement process. Without discussing it in great detail, I think it is fair to say that Jones, together with the bargaining unit negotiating committee members, and Respondent's Cline mutually disliked and mistrusted one another. That is apparent throughout *AP I*, *AP II* and even to some extent in *AP III*.

Nonetheless, with respect to Jones himself, the facts are relatively straightforward. Under theory A, the General Counsel asserts that Jones was entitled to be reinstated to his job as a journeyman pipefitter on February 8, 1988. Respondent argues that Jones was not recalled at that time because he had failed to provide a medical release before his reinstatement. It also asserts that he was permanently employed elsewhere.

Jones was a journeyman pipefitter. He had been employed by Respondent since 1962 and had been a journeyman pipefitter for approximately 8 years prior to the strike. Under the General Counsel's prestrike departmental seniority system, Jones should have been recalled on February 8, 1988. Under Respondent's poststrike ranking system, Jones was ranked 46th in recall, although in its June 30, 1987 letter it advised him that he was 30th on the recall list. It would appear that the variance related to the manner in which individuals had actually returned. In *AP II* the Board, adopting Judge Pannier's decision, found that Respondent had unlawfully failed to offer Jones reinstatement in early August 1988. Thus, not only did it fail to recall him in February of that year as he would have been entitled under theory A, it specifically discriminated against him beginning in August. Having heard the evidence adduced in the May 1989 hearing in front of Judge Pannier (and that evidence was closely connected to the treatment of John Lawson Sr.), Cline telephoned Jones in late October 1989, apparently to replace Lawson Sr., whose return had been short-lived.

At the time of Cline's inquiry Jones was employed at the local Sears, Roebuck store as a warehouseman and had been so employed since 1987. Shortly after the strike began in 1986, Jones had been struck by an automobile while walking a picket line during the strike. His leg had been broken and he had suffered some damage to his knee. He subsequently sued both the driver and Respondent for that injury. By 1987 he had recuperated sufficiently to be hired by Sears as a warehouseman. In that job he was required to perform heavy lifting and he was apparently able to do so without significant concern.

Nonetheless, when Cline called Jones in October 1989, he told him that he would be obligated to provide a medical release or pass a physical examination. Cline explained that this requirement was being imposed upon him because he had been "off work for more than three days after an injury.'' Jones responded in effect that the rule did not apply since the injury was not job-related and he believed that Cline was picking on him because of his involvement with the Union and with the strike. He asserted to Cline that other returning strikers were not being subjected to this requirement. Cline was not persuaded to rescind the requirement and Jones never took the physical or provided a medical release. As a result Cline decided Respondent had done what it could do to offer Jones reinstatement and refused to pursue the matter further. He declared Jones to be ineligible for reinstatement.

In terms of timing, it should be observed that Respondent's communication with Jones (as well as Lawson) occurred about a month after Judge Pannier's decision had issued in *AP II*. It is reasonable to assume that Respondent's offer was an attempt to demonstrate that it had complied with Judge Pannier's recommended order. It should also be observed here that Jones had testified in *AP II* in Cline's presence and Cline had been able to observe Jones walking freely and without the limp that he had exhibited during the recuperation period. Jones had also testified about his duties at Sears. Cline had no real reason to think that the leg injury, which had occurred some 3 years earlier, had any bearing on Jones's current ability.

Accordingly, I conclude that the condition which Cline imposed upon Jones, that he pass a physical exam or present a doctor's release respecting his leg, was an impermissible barrier to his reinstatement. I should observe here that not only was Jones a returning striker, who should have been recalled more than a year before, he was also the victim of a specific act of discrimination as found by Judge Pannier. Thus, to the extent that the rules regarding imposition of conditions upon returning strikers are may differ from the imposition of conditions on a straight discriminatee under Section 8(a)(3), Cline's condition breached both obligations. Cline's imposition of conditions on Jone's return was clearly improper. He was either treating him as a new employee or was not following the rule of *Brooks Research,* supra.

Insofar as Respondent's defense looks to Jones's employment at Sears, it is quite apparent that the Sears employment was only of an interim nature. It was not a full-time job and was certainly not substantially equivalent to that of journeyman pipefitter. He worked in the warehouse at the local Sears store performing the duties normally associated with that job_loading and unloading, moving inventory in and around the store, and packing and unpacking boxes. I can conceive of no circumstance where his acceptance of this job would be deemed an abandonment of interest with Respondent.

As for the backpay itself, there is really no significant dispute. Except for one quarter in 1992 he had substantial interim earnings. In addition, because he was unable to find equivalent health insurance, he did incur substantial medical expenses. I do note that these medical expenses may have been connected to the leg injury which he suffered, but that is not clear. To the extent that he may already have received reimbursement from Respondent for those injuries and to the extent those injuries have been included in the instant claim, Respondent is entitled to an offset. That can be determined administratively by the Board's compliance officials. For our purposes, however, I have included those medical expenses as part of the backpay claim. The medical expense portion amounts to $14,596. That figure, together with his net backpay totals $221,174. That is the figure shown below in the total backpay column. Jones's total backpay includes an 11-day claim during the fourth quarter of 1993 during the shutdown.

1. Total Backpay		$221,174
2. Pension Credit	5.67 years	
3. 401(k) Matters		401
4. Severance Pay		17,850

Larry Judy

At the time the strike began Judy had been a carpentry lead in the maintenance department for about 4 years. He had acquired that job through department seniority. When the strike ended, he accepted an entry level job in the powerhouse where he worked for about 6 months. At that point he was again placed in the maintenance department, this time as a journeyman carpenter. He continued to work as a journeyman carpenter through the departure of two carpentry leadmen (general mechanic leads assigned to the carpentry aspect of the department). In fact, during a period in 1991, Judy was asked to serve as acting leadman for that part of the department when the lead was suspended for violating a safety rule.

Respondent's only defense to the General Counsel's claim of backpay is that Judy had been reinstated as a carpenter in April 1988. As noted, however, there is a significant difference between being a journeyman carpenter and being a lead in that department. Judy had previously been a lead and was entitled to reinstatement as a lead. The General Counsel asserts that should have occurred on January 23, 1989. Respondent did not actually offer the leadman's job to Judy until October 1, 1992, when the leadman departed. Since he should have been offered the lead job in January 1989, he is entitled to the differential in wages during that period. There is really no dispute with respect to the interim earnings since he was at all times employed by Respondent during the backpay period. I should observe here, that Judy, like other leads who went on strike was in fact a victim of the unlawful entry level recall system since that system did impact their recall to the maintenance department even though the entry level recall system did not specifically apply to the journeymen in that department.

1. Total Backpay		$23,328
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

Keith Haas

At the time the strike began, Haas was an electrical leadman in the maintenance department. He had been employed continuously at the mill for about 18 years and had been the electrical lead for about 1 year. When the strike ended he advised that he would return to work and in June 1987 Cline called him to discuss an opening. Cline told him that he had an opening in the maintenance department as a general mechanic. Haas determined to check into the nature of that job and spoke with Foreman Floyd Johnson about what would be required. He learned from Johnson that the lead electrical job was not being offered. As a result, on June 18, 1987, he wrote a letter to Cline stating that he wanted to remain on the preferential list for the lead electrician job only. That triggered Cline's decision to remove Haas' name from the preferential reinstatement list.

In essence Haas was removed from that list because he refused to take a job other than his own. That is identical to the violations found in the entry level system in other departments and falls directly within the ambit of *AP I*. Haas was entitled to await his electrical lead job, but Respondent removed him from consideration when it struck him from the list.

Eventually, Haas found employment with the Scott Paper Co. in Everett, Washington, and moved there. He has had substantial interim earnings at that employment and was still employed there at the time of this hearing.

Respondent asserts that Haas resigned in October 1987 when he decided to accept Respondent's lump sum offer of his retirement money. I have already determined elsewhere in this decision that those resignations are ineffective for purposes of tolling backpay. Haas' backpay period, under theory A, begins on April 1, 1989, and ends with the closure of the plant on September 30, 1993. The General Counsel has corrected a mistake contending that Haas is entitled to $401. Since Haas' backpay period does not begin until April 1, 1989, he does not qualify.

1. Total Backpay		$17,263
2. Pension Credit	4.50 years	
3. 401(k) Matters	None	
4. Severance Pay		16,606

Joseph Kilburn

Kilburn was a longtime journeyman pipefitter. He was a full term striker and had not been recalled as of December 1987. The General Counsel asserts that he should have been recalled on August 4, 1988. However, on December 28, 1987, he sent two notarized documents to Respondent. While it is apparent that one of his purposes was to take advantage of the lump sum offer, it is also quite clear that he intended to resign his interest in returning to work for Respondent.

As noted both documents are in his own handwriting and are not on the forms provided by Respondent. Furthermore, he testified that when he turned those documents in to the personnel department, he knew he was resigning his interest in returning to work.

He had, during September 1987, while working for a construction company at the mill, become involved in an incident which soured his desire to return to work. Accordingly, based upon his holographic resignation, as well as his admission that he knew what he was doing when he resigned, I conclude that this resignation should be honored. Accordingly, I find that Kilburn abandoned any interest in returning to Respondent and he is therefore not entitled to backpay. *Top Mfg. Co*., 254 NLRB 976 (1981).

James Lichner

At the time of the strike Lichner had been a maintenance millwright and had worked for Respondent since October 1974. The General Counsel asserts that he should have been recalled in December 1987. Respondent contends that Lichner resigned when he took his lump sum on December 23, 1987. As I have earlier determined that those resignations, when using Respondent's forms, are to be regarded as ineffective, that defense is rejected.

Lichner, however, presents some other problems. It appears that sometime during his past employment with Respondent he had suffered an industrial injury to his knee which became progressively worse and limiting. This condition eventually caused him to be sufficiently disabled where he realized he had to abandon his career as a millwright or truckdriver (a job which he had believed himself capable of performing and which he actually had performed for a construction firm in early 1988).

He testified that as early as January 1989 he knew that he had to change careers and he began to think about becoming a barber. At that time his daughter had opened her own beauty shop/barber shop in Anchorage and the idea of working with her appealed to him. Accordingly, he applied to the State of Alaska for disability retraining funding and was awarded a grant for that purpose. Beginning in June 1990 he moved to Anchorage where he spent 9-1/2 months, 10 hours per day, 6 days a week at barber school. He concluded his training in that field in April 1990 and began working as a barber in July 1990 with his daughter as planned. He was still employed as a barber at the time of the hearing.

The General Counsel asserts that Lichner's backpay period begins on December 16, 1989, and ends on July 31, 1990, when he became a barber and changed his career.

I agree that his decision to change careers is a terminating event for backpay purposes. However, I do not agree that the backpay period ends on July 31, 1990. I conclude that it ended in June 1989 when he accepted disability retraining from the State of Alaska and entered barber school. By accepting his disability retraining, he acknowledged that he was no longer capable of performing work as a millwright. That acknowledgment effectively terminated his backpay period for he could not have accepted millwright work thereafter. He knew he was unable to perform it. Accordingly, his backpay specification will be modified to demonstrate that the backpay period ended on June 30, 1989. In addition, Lichner has made certain medical claims which are not in dispute. These have been incorporated in the final figures.

1. Total Backpay		$71,680
2. Pension Credit	1.54 years	
3. 401(k) Matters		401
4. Severance Pay	None	

Richard McKinney

There is no dispute with respect to McKinney. The General Counsel asserts that he should have been recalled on September 14, 1987. He was actually recalled on February 8, 1988 (all backpay specifications with respect to McKinney contain a repetitive typographical error showing his recall as being February 8, 1987, rather than 1988). Since he was recalled to his proper job on February 8, 1988, his backpay is minimal and is set forth as follows.

1. Total Backpay		$8,047
2. Pension Credit	.39 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

David Meabon

At the time of the strike Meabon had been with the company for 17 or 18 years and had worked in the maintenance department as a journeyman millwright. Although he went out on strike with the others, as the strike began to wear on, he determined that it was appropriate for him to expand his skills in the job market. Sometime in early 1987, well before the strike ended, he applied for admission to a vocational school in Tacoma, Washington, to become a diesel mechanic. In order to finance that schooling, he obtained both Federal and state grant money. Shortly after the strike was over, he and his family

moved to Tacoma as planned. He continued to attend the diesel mechanic school until June 1989 when he completed the program. While he was at school, he obtained employment through the school as an extern at Crawford Aviation at the Seattle-Tacoma International Airport doing refueling and supplying aircraft.

After he had been in Washington State for a year, the State of Alaska determined that it would not continue to pay his school fees for it no longer regarded him as an Alaska resident. Accordingly, he applied for a similar loan from the State of Washington after having certified to that State that he was its resident. In addition to his employment at Crawford Aviation, he testified that he was also employed elsewhere in Tacoma. He eventually moved back to Sitka in 1990.

I conclude, based upon his behavior, that Meabon had determined, during the course of the strike, to abandon it and pursue another career as a diesel mechanic. To that end he arranged for and obtained both a Federal grant and a loan from the State of Alaska to support that career change. His decision was made and finalized well before any discrimination was levied upon persons who held his job. Thus, although he did not actually depart for Tacoma while the strike was still on (he left within a week or two of its end), his mind was made up. He had a present intention of changing careers. Furthermore, he later demonstrated that he had no intention of returning to Respondent in Alaska when he declared to the State of Washington that he was one of its residents entitling him to a state loan. Accordingly, I conclude that he had no intention of returning to Sitka at the time he left. Cf. *Belt Supermarket*, 260 NLRB 118 (1982). He did take advantage of the State of Alaska loan program in the first year. Knowing that it was a 2-year program in Washington State, he had no difficulty in staying there to complete the course and claiming himself to be a resident of that State to do so.

Therefore, I conclude that Meabon abandoned the strike and has clearly demonstrated that he had no interest in returning to Respondent after the strike ended. He is not entitled to any backpay.

August Nelson

At the time of the strike Nelson was a millwright in the maintenance department. The General Counsel asserts that Nelson should have been recalled on November 11, 1987, based upon a *Laidlaw* theory of recall. Respondent asserts that Nelson had resigned from the company in August when he took his lump sum retirement money. Nelson was one of the individuals to sign the company form and I have previously determined that signing that form in order to take one's retirement money is not a sufficient defense to its obligations to returning strikers.

Respondent also argues that Nelson failed to mitigate his damages during this entire backpay period, noting particularly his apparent periods of unemployment during which he appears to have sought no other job. In this connection, it also observes that Nelson has failed to file a tax return each year since 1987.

Nelson testified that he believed he was in such significant financial straits in August 1987 that he absolutely needed to take his lump sum money in order to survive. After doing so he went to Craig, Alaska, a village located on another island, to live with his parents and to seek other work. Eventually, in February 1988, he obtained work as a commercial fisherman. The evidence shows that since that time he has worked on various fishing vessels during the halibut, black cod, and salmon "openings'' permitted by the Federal and state fishing authorities. He testified that even though the openings are relatively short, permitting a total of only 17 to 18 days per year, the preparations involve over 6 months of work. In his most recent years he has been living aboard the Seiner *St. John* which is based in Seattle. That vessel normally winters in a Seattle fishing harbor and he lives aboard the vessel. Additional time, of course, is spent between traveling between Seattle and the Alaska commercial fishing grounds and, at the end of the season, returning to port. He is a very difficult witness to get hold of as a great deal of his time is spent aboard the vessel on the open sea. Thus, because the openings occur on specific dates, the vessel is at sea when they occur.

The records which were presented, and his testimony, demonstrate that he averages about $18,000 per year in net earnings. I observe here that he is not a vessel owner, but basically a deck hand. It is also true, I think, that crewmen often "share the catch'' and it does seem that the $17–$18,000 average per year is somewhat low. Even so, given the vicissitudes and vagaries of the fishing industry, it cannot be said with any certainty that he has concealed any earnings. He appears to live frugally, consistent with someone whose earnings are quite low.

He did testify that while employed as a millwright at the mill, that he did not engage in commercial fishing (although many others did) and that his principal field of employment was as a millwright. He had earned, he said, on average, about $50,000 per year as a millwright but was unable for some reason to find employment elsewhere in that field. It was therefore, not particularly unreasonable for him to have to sought employment in another trade altogether, and the commercial fishing trade is certainly a reasonable choice. I cannot conclude that he has deliberately underemployed himself since he left Respondent. In this sense, I note that at the time he left, he had no reasonable expectation to believe that Respondent had discriminated against him and he therefore had no motive to underemploy himself in order to enhance a backpay award. He simply left the Sitka area without much hope for the future.

Accordingly, I conclude that the General Counsel's backpay specification is a reasonable one. In this regard, I should note that Nelson is the subject of a posthearing stipulation dated April 26, 1995, covering his 1993 employment. In that stipulation the parties agreed that his employment pattern remained the same in 1993 as it had in previous years. Since I am unable to agree with Respondent that he was under a duty to seek employment outside the fishing industry when the vessel was inactive (for that is the manner in which commercial fishermen usually work), I adopt the General Counsel's backpay specification set forth in the liquidation document of November 21, 1994. That includes Nelson's 11-day period in the fourth quarter of 1993 which is not shown in amendment no. 1 to the fourth amended consolidated compliance specification, but which is included in the liquidation document.

1. Total Backpay		$221,513
2. Pension Credit	6.83 years	
3. 401(k) Matters		401
4. Severance Pay		16,422

George Nichols

Respondent acknowledges Nichols' entitlement to backpay and there is no dispute with respect to the amount. His backpay period begins on August 31, 1987, and ends on December 16,

1987, when he was actually recalled. In that circumstance, his net backpay is as follows:

1. Total Backpay		$10,728
2. Pension Credit	.29 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Ron Owens

Respondent admits liability to Owens and there is no dispute with respect to the backpay calculation. His backpay period begins on March 21, 1988, and ends on April 18, 1988, when he was actually recalled. He had some interim earnings which have been taken into account. Furthermore, under the circumstances he is not entitled to any additional pension credit.

1. Total Backpay		$1,282
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

Earl Richards

At the time the strike began, Richards had been the lead maintenance person with responsibility for the power house, although assigned to the maintenance department. As with other leads, Richards was entitled to await his reinstatement to his lead position. In this respect, he was offered and accepted a job in the maintenance department on March 21, 1988, although his lead job did not open until April 1, 1989. It is the latter date which is the beginning of the backpay period. Therefore, the General Counsel only seeks the differential between the general mechanic's job which he held as of April 1, 1989, until he retired on September 1, 1992. Respondent never did offer him a lead position during his tenure after he returned. Respondent's only defense here is that he is not entitled to a lead position. I disagree for the reasons stated above with respect to all of the leads. Therefore, since his lead position came open as of April 1, 1989, he was entitled to that job and should have been paid at that rate until he retired. There being no other backpay issue with respects to Richards, I accept the backpay specification as set forth in the liquidation document.

1. Total Backpay		$61,538
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

James Ryman

James Ryman's circumstances are quite similar to those of Richards. At the time the strike began, Ryman was in the maintenance department as the pump shop/bleach plant digester leadman. The General Counsel asserts that job opened on January 18, 1988, and that his backpay begins at that time. Respondent contends that Ryman was not entitled to leadman's job, but even so it is apparent that he was recalled to work as a general mechanic on November 11, 1987. Thus, the General Counsel only seeks the differential between the general mechanic's rate which was paid to Ryman and the leadman rate up through his actual promotion to leadman on January 1, 1990.

James Ryman is entitled to the benefit of the same reasoning applied to other strikers who had formerly been leads and was privileged to await a leadman opening and have it offered at that time. That did not occur until January 1, 1990, the date which is used as the cutoff here. Since there is no other issue with respect to Ryman's entitlement, I accept the backpay specification as set forth in the liquidation document. There is no dispute with respect to those calculations.

1. Total Backpay		$25,983
2. Pension Credit	None	
3. 401(k) Matters	None	
4. Severance Pay	None	

Michael Ryman

When the strike began Mike Ryman was employed in the maintenance department as an operator. According to the fourth amended consolidated compliance specification he should have been recalled on June 15, 1987, but was not. Instead, at the end of the strike, by letter dated April 29, 1987, Respondent's Cline notified him that he had been ranked for poststrike recall but was "not in the upper 25 percent'' for reinstatement. Shortly thereafter, in late June or early July, Ryman took his lump sum entitlement. He testified that he did so because he had become financially strapped during the strike and he had not been able to get back to work after the strike was over. Indeed, he had sent his family to live in eastern Oregon during the strike. When he decided to take the lump sum retirement proposal, he asked Personnel Director Cline if there was going to be any employment and was told there would not be. He used the lump sum money to pay off a delinquent mortgage on his home in Sitka and then left to go to Oregon for work. He found employment at various locations including a construction company, a lumber company and a pulp mill in Eureka, California. In addition, he sought retraining in asbestos abatement, although he never worked in the field. Eventually, he learned of a job at a sawmill which was opening in Ketchikan, Alaska, and on July 7, 1989, became hired at that mill. He remained employed there until at least through the hearing in this matter.

Although Mike Ryman's backpay period begins on June 15, 1987, the backpay specification erroneously omitted claims for the second, third, and fourth quarter of 1987. The error was not noticed until late June 1995 when the General Counsel wrote Respondent a letter advising it of the error. The error could have been noticed earlier as the correct starting date of June 15, 1987, is shown in appendix B(XI)(II.A) of the fourth amended consolidated backpay specification. Respondent would not agree to the correction, which potentially adds an additional $27,666 to his claim. It seeks to inquire into Mike Ryman's interim earnings for that period. Clearly it is allowed to do so. Accordingly, those three quarters may be the subject of another supplemental proceeding for it should not be allowed to delay the remainder of this proceeding. The General Counsel may file a motion to hear this portion separately.

Despite that problem, Respondent argues that whatever system of recall should have been used, Ryman had resigned in order to take his lump sum and, indeed, he had taken that lump sum on July 6, 1987, about 2 weeks after he should have been recalled. He took that lump sum utilizing the company form and I have previously determined elsewhere that such resignations are not sufficient to qualify as a defense here. Moreover, the record shows Mike Ryman engaged in substantial efforts at obtaining interim employment. Respondent has not met its burden of showing Mike Ryman removed himself from the job market at any time.

Also, as previously noted in the Interlocutory Determination of Eligibility for Backpay, I have determined that Ryman's backpay entitlement ended with his acceptance of permanent employment at Ketchikan Pulp on July 7, 1989. In large part

that was a substantially equivalent job and as Ryman was an unreinstated striker, his acceptance of permanent employment there cut off backpay under the *Fleetwood* rule. Taking into account his medical claims, his partial total backpay is $89,552, not including the three quarters of 1987 which were inadvertently omitted.

1. Net Backpay (partial)		$89,552
2. Pension Credit	2.10 years	
3. 401(k) Matters		401
4. Severance Pay	None	

Tom Scheidt

At the time the strike began Scheidt was a welder in the weld shop. He is a highly skilled welder who, even while employed with Respondent, often taught welding classes at the University of Alaska Southeast Branch. The General Counsel asserts that he should have been recalled on April 8, 1988, as a general mechanic with welding skills. Respondent defends on the grounds that Scheidt had taken his lump sum retirement in December 1987 and had therefore resigned. As with the others, I do not regard taking the lump sum as a valid defense to a refusal to recall a striker. He, of course, benefits from the Union's general request for reinstatement made on his behalf and all the other employees.[18] Thus, this is a simple *Laidlaw* concern since Respondent bypassed him when that job became open.

Scheidt was able to utilize his welding skills at various places, including Allen Marineways, where over a number of years he helped build approximately seven vessels; S & S Construction; and serving as a welding inspector. In addition, he increased the amount of time he spent commercially fishing. He had substantial interim earnings during the entire backpay period. The General Counsel asserts as well that he would have been employed for 11 days during the fourth quarter of 1993. Thus, his backpay period begins on April 4, 1988, and ends on October 11, 1993. There is really no dispute with respect to the calculation or the theory. He also had some medical expenses and they have been taken into account.

1. Total Backpay		$127,470
2. Pension Credit	5.60 years	
3. 401(k) Matters		401
4. Severance Pay		17,136

Florian Sever

There is little if any dispute with respect to Sever's entitlement to backpay. The General Counsel asserts that his backpay period begins on February 29, 1988, and ends when he was recalled on approximately October 10, 1991. His total backpay includes some medical expenses and they have been taken into account.

1. Total Backpay		$162,312
2. Pension Credit	4.37 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Jon Shennett

Under the *Laidlaw* theory, Shennett should have been recalled on June 27, 1987. He was not actually recalled until February 29, 1988. Under that theory there is no dispute with respect to the amount of entitlement to backpay. Having determined that he should have been recalled under the *Laidlaw* rule, I conclude that the backpay specification as set forth in the liquidation document is appropriate.

1. Total Backpay		$25,526
2. Pension Credit	.91 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

David Slate

At the time the strike began, Slate had been in Respondent's maintenance department for approximately 9 years. He joined the strike with the others but by June 1987 had accepted temporary and casual work with the Alaska State Ferry System. He worked aboard ships as an oiler and junior engineer. This employment was somewhat sporadic as new hires are slotted to fill in for regular employees. The General Counsel asserts that Slate's backpay period begins on April 18, 1988. Respondent did not call Slate back to work at that time but ignored him and its treatment of him became a violation of the *Laidlaw* rules. However, on August 18, 1988, Respondent sent Slate a certified letter which was properly addressed. Slate did not respond. He explains that his mail was being accepted by a friend and that somehow the friend failed to transmit his mail to him. Even so, when he eventually learned of his friend's mistake and that Respondent had sent him a letter, he took no steps to explain what had happened. As of the time of the hearing he was still employed by the Alaska State Ferry System. I conclude that Respondent sent him a proper offer of reinstatement to what was essentially his prestrike job and that the responsibility for the failure to receive that offer was his own neglect. Accordingly, I conclude that Respondent properly struck him from the preferential recall list as of September 16, 1988, pursuant to its letter to him of that date. Insofar as the backpay calculations are concerned, there is no dispute with respect to them. His backpay period begins on April 18, 1988, and ends on August 25, 1988, 10 days after he should have received the offer.

1. Total Backpay		$6,314
2. Pension Credit	.35 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Douglas Stevens

Stevens was a maintenance pipefitter and had been employed by Respondent for about 11 years. The General Counsel asserts that his backpay begins on January 23, 1988. He, like many others, benefits from the Union's request for reinstatement at the end of the strike. At that time, he was working for a construction company on the Alaska North Slope. He returned to Sitka in June. In September 1987, having been unsuccessful in searching for employment, he moved his family to Vancouver, Washington. He followed them to Vancouver in December of that year. There he found work as a part-time appliance repairman, eventually becoming a full-time repairman. As of the date of the hearing he was still employed in that capacity. In December 1987 he accepted Respondent's lump sum offer, filling out Respondent's standard form to accept the retirement money. Respondent, as with the others, treated him as if he had resigned at that point. Respondent, of course, argues that the resignation was effective, but consistent with my rulings elsewhere in this decision I have determined that Respondent's use of that form was inappropriate and resignations induced by it should not be honored.

[18] *United States Service Industries*, supra; *Marlene Industries Corp. v. NLRB*, supra.

Thus, on January 23, 1988, when Respondent bypassed Stevens he became a discriminatee under *Laidlaw*. When that occurred he had already moved to Vancouver, Washington, and was living in precarious circumstances.

Eventually, however, he sold the house he had in Sitka, purchasing another in Vancouver in June 1989. It is fair to say, that although the hourly salary is slightly less in Vancouver than it would had he been employed by Respondent, given the cost-of-living differential by mid-1989, his real earning power was about the same in Vancouver as it had been with Respondent. His decision to buy the house in Vancouver amounts to an admission that he had no intention of returning to Respondent even if a proper job offer had been made. Accordingly, I conclude that his purchase of the house in June 1989 was an abandonment of any interest he had in returning to Respondent and his backpay period should end at that time.

There is really no dispute with respect to the amount of backpay due during that period of time and I shall adopt it.

1. Total Backpay		$43,933
2. Pension Credit	1.43 years	
3. 401(k) Matters		401
4. Severance Pay	None	

Leslie Sturm

Sturm's entitlement to backpay is based upon the use of pre strike seniority as a basis for recall. Since I have adopted that and rejected Respondent's use of the post-strike ranking theory, Sturm is essentially a *Laidlaw* victim. There is no dispute with respect to backpay under that theory. He should have been recalled on November 25, 1987 but was actually recalled on May 31, 1988. He is therefore entitled to backpay for that period of time. He had substantial interim earnings and those have been credited.

1. Total Backpay		$8,915
2. Pension Credit	.51 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

Bruce Whitcomb

Whitcomb was an operator who under prestrike seniority should have been recalled on April 29, 1987. He was actually recalled on December 28, 1987. Under the seniority recall system he had become a *Laidlaw* victim at the time Respondent bypassed him in April. There is no dispute with respect to the amount of backpay he is entitled to.

1. Total Backpay		$23,333
2. Pension Credit	.66 years	
3. 401(k) Matters	None	
4. Severance Pay	None	

XII. SPECIAL SITUATIONS

John Lawson Sr.

The principal issue with respect to Lawson Sr. is, as discussed previously, whether or not the job offer made to him in late September 1989 was a legitimate offer or was a sham designed to avoid the probable effects of Judge Pannier's order requiring Respondent to hire him and pay him backpay. I have concluded elsewhere that the offer was made in circumstances which reasonably lead one to conclude that it was indeed a sham. See pages 23–25, supra. The discussion here deals simply with the calculations to be applied.

First, it should be noted again that Lawson has two potential backpay periods. The one under scrutiny here results from Respondent's failure to recall him in August 1988 and runs until the plant was shut down in 1993. The second possible backpay theory dealt with his having been the machine shop leadman at the time the strike began. Unfortunately for him, at no time after the strike did the machine shop lead job ever reopen. Therefore, the second potential backpay period for him has never begun, at least prior to the September 1993 shutdown. Thus, the backpay period we are looking at begins on August 4, 1988 and continues through 11 days of the fourth quarter of 1993. Lawson had substantial interim earnings during that period as he was employed in various capacities including being a bus driver for Prewitt Transportation Enterprises, and for the Alaska State Ferry System as a part-time ticket agent. His employment history has been fully explored and the calculations do not present any dispute.

1. Total Backpay		$169,085
2. Pension Credit	5.18 years	
3. 401(k) Matters		401
4. Severance Pay		13,566

Edward Reiner

Reiner is a special circumstance only because he fell into a special category in *AP II*. He had been employed by S & S General Contractors which commonly worked as a maintenance contractor for Respondent. One of Respondent's strike replacements, an individual named David Ray was found by Judge Wacknov in *AP I* to have provoked a fight with Reiner at a local bar. Ray's brother, Bud Ray, while serving as an acting foreman told S & S that Respondent did not want Reiner on the plant premises because he was a "trouble maker.'' As a result, Respondent was found to have caused Reiner's discharge from employment at S & S. The circumstances in fact did not result in a great deal of backpay because Reiner declined an offer of recall about August 15, 1988. His backpay period thus runs from May 31, 1988, through August 15, 1988. There is also no dispute regarding the total amount. Of course, since Reiner was employed S & S, and not Respondent, he is not entitled to the fringe benefits that Respondent's employees would enjoy. Therefore, those items are omitted from his calculation.

Total Backpay	$10,243

Conclusion

There are some loose ends left here. They must be left to further proceedings as necessary. There are also some matters which I must leave to the initial discretion of the Regional Director in his supervision of compliance.

The loose ends include a clarification of the vacation pay claim. I found no specific reference to it in the backpay specifications or any of the posthearing liquidation documents. It may be that I have overlooked something, or it was inadvertently omitted from the specifications or perhaps the claims were necessarily incorporated in the gross backpay figures already considered.

Another loose end is the interim earnings question relating to Mike Ryman, specifically for 1987, quarters 2, 3, and 4. The gross claim for that is $27,666, but Respondent has never had an opportunity to explore his interim earnings for that time period. It is clearly entitled to do so. Due to the late discovery of the error of omission, I leave that matter to the Regional

Director for further action, including formal proceedings if necessary.

Similarly, I leave to the Director the authority to look at other items susceptible to administrative adjustment. These are: whether Ozawa is entitled to retirement plan credit for the time she was off work due to a pregnancy; whether Bartel is entitled to a retirement credit, and whether Respondent is entitled to an offset of medical claims for Jones. With regard to Jones, the amount I have allowed for medical claims may already have been paid by virtue of Jones's personal injury lawsuit. He is not entitled to recover his special damages twice.

Finally, it should be understood that the total backpay figure shown below does not include interest. The compliance office will calculate interest for each claimant separately using the formula set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Florida Steel Corp*., 231 NLRB 651 (1977). I recognize that the individual specifications provided by the region do show interest calculations up to certain dates. They are no longer accurate; for that reason I decline to republish them (except for the seven which are attached as appendices). Those are reproduced here for reasons relating to the calculation of net backpay only. Reference to the interest calculations should be ignored as they need to be redone.

Aside from the exceptions and possible modifications set forth above, the total backpay liquidated by this supplemental decision is:

$5,996,625

That amount includes the $401 claim for eligible employees and their severance pay, if any. It does not include the value of the additional retirement credits which are set forth in the section relating to each claimant. Those amounts are to be computed according to the rules of the plan but using the additional years credit which I find apply here.[19]

[19] If no exceptions are filed as provided by Sec. 102.46 of the Boards, Rules and Regulations, the findings, conclusion, and recommended Order shall, as provided in Sec. 102.48 of the rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX I

ALASKA PULP CORPORATION

APPENDIX TO SUPPLEMENTAL DECISION AND ORDER

Discriminatee: **Brown, Morris** SSN: [Omitted from publication.]

1. DEPARTMENT: Machine Room
2. JOB: Backtender
3. BACKPAY BEGINS: 8/7/87
4. DATE OF ANY SUBSEQUENT PROMOTION OR TITLE CHANGE, AND THE NEW POSITION: N/A
5. DATE AND NATURE OF ANY EVENT TERMINATING BACKPAY LIABILITY:
   No claim for 1993–failed to provide interim earnings data
6. SUMMARY OF BACKPAY LIABILITY TO DATE:

QTR	GROSS	INT EGS	NET BP	MEDICAL	TOT	INT %	INT	TOTAL BP + INT
87-3	$6,821	$75	$6,746	0	$6,746	0.6850	$4,621	$11,367
87-4	9,980	75	9,905	0	9,905	0.6600	6,537	16,442
88-1	9,523	614	8,909	0	8,909	0.6325	5,634	14,543
88-2	10,245	614	9,631	0	9,631	0.6075	5,850	15,481
88-3	10,037	614	9,423	0	9,423	0.5825	5,488	14,911
88-4	9,157	614	8,543	0	8,543	0.5550	4,741	13,284
89-1	12,770	171	12,599	0	12,599	0.5275	6,645	19,244
89-2	9,327	171	9,156	0	9,156	0.4975	4,555	13,711
89-3	12,928	171	12,757	0	12,757	0.4675	5,963	18,720
89-4	13,168	171	12,997	0	12,997	0.4400	5,718	18,715
90-1	12,437	1,780	10,657	0	10,657	0.4125	4,396	15,053
90-2	10,288	1,780	8,508	0	8,508	0.3850	3,275	11,783
90-3	11,878	1,780	10,098	0	10,098	0.3575	3,610	13,708
90-4	7,741	1,780	5,961	0	5,961	0.3300	1,967	7,928
91-1	9,921	864	9,057	0	9,057	0.3025	2,739	11,796
91-2	11,563	75	11,488	0	11,488	0.2775	3,187	14,675
91-3	10,884	75	10,809	0	10,809	0.2525	2,729	13,538
91-4	8,710	75	8,635	0	8,635	0.2275	1,964	10,599
92-1	12,555	361	12,194	0	12,194	0.2050	2,499	14,693
92-2	12,322	75	12,247	0	12,247	0.1850	2,265	14,512
92-3	11,473	75	11,398	0	11,398	0.1650	1,880	13,278
92-4	11,466	75	11,391	0	11,391	0.1475	1,680	13,071
TOTS:	$235,194	$12,085	$223,109	0	$223,109		$87,943	$311,052

APPENDIX II

ALASKA PULP CORPORATION

APPENDIX TO SUPPLEMENTAL DECISION AND ORDER

Discriminatee**: Castillo (P.), Placido** SSN: [Omitted from publication.]

1. DEPARTMENT: Woodroom
2. JOB: Head Sawyer
3. BACKPAY BEGINS: 4/20/87
4. DATE OF ANY SUBSEQUENT PROMOTION OR TITLE CHANGE, AND THE NEW POSITION: N/A
5. DATE AND NATURE OF ANY EVENT TERMINATING BACKPAY LIABILITY: N/A
6. SUMMARY OF BACKPAY LIABILITY TO DATE:

QTR.	GROSS	INT EGS	NET BP	MEDICAL	TOT	INT %	INT	TOTAL BP+INT
87-2	$9,267	$7,485	$1,782	0	$1,782	0.7075	$1,260	$3,042
87-3	9,964	10,172	0	0	0	0.6850	0	0
87-4	8,259	8,433	0	0	0	0.6600	0	0
88-1	10,348	9,229	1,119	0	1,119	0.6325	707	1,826
88-2	8,953	6,422	2,531	0	2,531	0.6075	1,537	4,068
88-3	12,516	8,872	3,644	0	3,644	0.5825	2,122	5,766
88-4	9,688	4,790	4,898	0	4,898	0.5550	2,718	7,616
89-1	14,269	1,606	12,663	0	12,663	0.5275	6,679	19,342
89-2	9,440	1,606	7,834	0	7,834	0.4975	3,897	11,731
89-3	11,642	1,606	10,036	0	10,036	0.4675	4,691	14,727
89-4	10,304	1,606	8,698	0	8,698	0.4400	3,827	12,525
90-1	11,565	1,606	9,959	0	9,959	0.4125	4,108	14,067
90-2	9,782	1,606	8,176	0	8,176	0.3850	3,147	11,323
90-3	9,843	1,606	8,237	0	8,237	0.3575	2,944	11,181
90-4	5,079	1,606	3,473	0	3,473	0.3300	1,146	4,619
91-1	8,691	1,606	7,085	0	7,085	0.3025	2,143	9,228
91-2	10,228	1,606	8,622	0	8,622	0.2775	2,392	11,014
91-3	13,285	1,606	11,679	0	11,679	0.2525	2,948	14,627
91-4	7,747	1,606	6,141	0	6,141	0.2275	1,397	7,538
92-1	12,301	1,606	10,695	0	10,695	0.2050	2,192	12,887
92-2	9,896	1,606	8,290	0	8,290	0.1850	1,533	9,823
92-3	12,372	1,606	10,766	0	10,766	0.1650	1,776	12,542
92-4	10,855	1,606	9,249	0	9,249	0.1475	1,364	10,613
93-1	10,655	1,606	9,049	0	9,049	0.1300	1,176	10,225
93-2	9,037	1,606	7,431	0	7,431	0.1125	835	8,266
93-3	13,647	1,606	12,041	0	12,041	0.0950	1,143	13,184
TOTS:	$269,533	$85,917	$184,098	0	$184,098		$57,682	$241,780

APPENDIX III

ALASKA PULP CORPORATION

APPENDIX TO SUPPLEMENTAL DECISION AND ORDER

Discriminatee: **Harriman, Deborah** SSN: [Omitted from publication.]

1. DEPARTMENT : Bleach Plant
2. JOB : Screen Tender
3. BACKPAY BEGINS : 07/13/87
4. DATE OF ANY SUBSEQUENT PROMOTION OR TITLE CHANGE, AND THE NEW POSITION: N/A
5. DATE AND NATURE OF ANY EVENT TERMINATING BACKPAY LIABILITY: N/A
6. SUMMARY OF BACKPAY LIABILITY TO DATE:

QTR	GROSS	INT EGS	NET BP	MEDICAL	TOT	INT %	INT	TOTAL BP + INT
87-3	$7,655	$2,902	$4,753	0	$4,753	0.6850	$3,255	$8,008
87-4	6,912	2,802	4,110	0	4,110	0.6600	2,712	6,822
88-1	9,353	3,731	5,622	0	5,622	0.6325	3,555	9,177
88-2	7,105	3,731	3,374	0	3,374	0.6075	2,049	5,423
88-3	10,002	3,731	6,271	0	6,271	0.5825	3,652	9,923
88-4	7,343	3,731	3,612	0	3,612	0.5550	2,004	5,616
89-1	11,218	4,647	6,571	0	6,571	0.5275	3,466	10,037
89-2	7,802	4,647	3,155	0	3,155	0.4975	1,569	4,724
89-3	11,854	4,647	7,207	0	7,207	0.4675	3,369	10,576
89-4	9,685	4,647	5,038	0	5,038	0.4400	2,216	7,254
90-1	11,162	2,625	8,537	0	8,537	0.4125	3,521	12,058
90-2	9,008	2,625	6,383	0	6,383	0.3850	2,457	8,840
90-3	9,494	2,625	6,869	0	6,869	0.3575	2,455	9,324
90-4	6,295	2,625	3,670	0	3,670	0.3300	1,211	4,881
91-1	8,528	4,038	4,490	0	4,490	0.3025	1,358	5,848
91-2	9,756	4,038	5,718	0	5,718	0.2775	1,586	7,304
91-3	9,792	4,038	5,754	0	5,754	0.2525	1,452	7,206
91-4	7,963	4,038	3,925	0	3,925	0.2275	892	4,817
92-1	10,728	4,519	6,209	0	6,209	0.2050	1,272	7,481
92-2	10,695	4,519	6,176	0	6,176	0.1850	1,142	7,318
92-3	9,974	4,519	5,455	0	5,455	0.1650	900	6,355
92-4	9,513	4,519	4,994	0	4,994	0.1475	736	5,730
93-1	9,061	5,507	3,554	0	3,554	0.1300	462	4,016
93-2	7,426	0	7,426	0	7,426	0.1125	835	8,261
93-3	11,212	0	11,212	0	11,212	0.0950	1,065	12,277
TOTS:	$229,536	$89,451	$140,085	0	$140,085		$49,191	$189,276

APPENDIX IV

ALASKA PULP CORPORATION

APPENDIX TO SUPPLEMENTAL DECISION AND ORDER

Discriminatee: **Jenny, Walter** SSN: [Omitted from publication.]

1. DEPARTMENT : Utilities
2. JOB : #3 Recovery Boiler Operator
3. BACKPAY BEGINS : 6/5/88
4. DATE OF ANY SUBSEQUENT PROMOTION OR TITLE CHANGE, AND THE NEW POSITION: Power Boiler Operator 7/14/92
5. DATE AND NATURE OF ANY EVENT TERMINATING BACKPAY LIABILITY:
6. SUMMARY OF BACKPAY LIABILITY TO DATE:

QTR	GROSS	INT EGS	NET BP	MEDICAL	TOT	INT %	INT	TOTAL BP + INT
88-2	$8,477	$1,177	$7,300	0	$7,300	0.6075	$4,434	$11,734
88-3	10,912	4,489	6,423	0	6,423	0.5825	3,741	10,164
88-4	9,382	4,489	4,893	0	4,893	0.5550	2,715	7,608
89-1	12,620	9,833	2,787	0	2,787	0.5275	1,470	4,257
89-2	8,788	9,833	0	0	0	0.4975	0	0
89-3	13,114	9,833	3,281	0	3,281	0.4675	1,533	4,814
89-4	10,829	9,833	996	0	996	0.4400	438	1,434
90-1	12,157	5,864	6,293	0	6,293	0.4125	2,595	8,888
90-2	10,490	4,245	6,245	0	6,245	0.3850	2,404	8,649
90-3	9,769	5,864	3,905	0	3,905	0.3575	1,396	5,301
90-4	7,697	5,864	1,833	0	1,833	0.3300	604	2,437
91-1	9,037	8,517	520	0	520	0.3025	157	677
91-2	11,341	8,472	2,869	0	2,869	0.2775	796	3,665
91-3	11,484	0	11,484	0	11,484	0.2525	2,899	14,383
91-4	8,310	1,890	6,420	0	6,420	0.2275	1,460	7,880
92-1	11,398	0	11,398	0	11,398	0.2050	2,336	13,734
92-2	10,825	5,794	5,031	0	5,031	0.1850	930	5,961
92-3	11,194	6,615	4,579	0	4,579	0.1650	755	5,334
92-4	11,194	4,471	6,723	0	6,723	0.1475	991	7,714
93-1	11,194	5,570	5,624	0	5,624	0.1300	731	6,355
93-2	11,194	10,235	959	0	959	0.1125	107	1,066
94-3	11,194	7,049	4,145	0	4,145	0.0950	393	4,538
94-4	5,318	4,308	1,010	0	1,010	0.0775	78	1,088
TOTS:	$237,918	$134,245	$104,718	0	$104,718		$32,963	$137,681

APPENDIX V

ALASKA PULP CORPORATION

APPENDIX TO SUPPLEMENTAL DECISION AND ORDER

Discriminatee: **Lichner, Jim** SSN: [Omitted from publication.]

1. DEPARTMENT: Maintenance
2. JOB: General Mechanic
3. BACKPAY BEGINS: 12/16/87
4. DATE OF ANY SUBSEQUENT PROMOTION OR TITLE CHANGE, AND THE NEW POSITION: N/A
5. DATE AND NATURE OF ANY EVENT TERMINATING BACKPAY LIABILITY: 7/31/90 Changed careers
6. SUMMARY OF BACKPAY LIABILITY TO DATE:

QTR	GROSS	INT EGS	NET BP	MEDICAL	TOT	INT %	INT	TOTAL BP + INT
87-4	$1,555	$1,677	0	0	0	0.6600	0	0
88-1	11,231	1,625	$9,606	$272	$9,878	0.6325	$6,247	$16,125
88-2	11,091	0	11,091	573	11,664	0.6075	7,085	18,749
88-3	13,089	0	13,089	572	13,661	0.5825	7,957	21,618
88-4	10,369	1,305	9,064	583	9,647	0.5550	5,354	15,001
89-1	14,284	0	14,284	734	15,018	0.5275	7,921	22,939
89-2	10,578	0	10,578	1,234	11,812	0.4975	5,876	17,688
89-3	13,765	0	13,765	1,819	15,584	0.4675	7,285	22,869
89-4	12,334	0	12,334	2,001	14,335	0.4400	6,307	20,642
90-1	14,368	0	14,368	0	14,368	0.4125	5,926	20,294
90-2	11,404	0	11,404	126	11,530	0.3850	4,439	15,969
90-3	4,037	1,949	2,088	92	2,180	0.3575	779	2,959
TOTS:	$128,105	$6,556	$121,671	$8,006	$129,677		$65,176	$194,853

APPENDIX VI

ALASKA PULP CORPORATION

APPENDIX TO SUPPLEMENTAL DECISION AND ORDER

Discriminatee: **Mann, Karen** SSN: [Omitted from publication.]

1. DEPARTMENT: Technical
2. JOB: Viscosity Tester
3. BACKPAY BEGINS: 11/24/89
4. DATE OF ANY SUBSEQUENT PROMOTION OR TITLE CHANGE, AND THE NEW POSITION: NONE
5. DATE AND NATURE OF ANY EVENT TERMINATING BACKPAY LIABILITY:
6. SUMMARY OF BACKPAY LIABILITY TO DATE:

QTR	GROSS	INT EGS	NET BP	MEDICAL	TOT	INT %	INT	TOTAL BP + INT
89-4	$4,831	0	$4,831	0	$4,831	0.4400	$2,125	$6,956
90-1	10,790	0	10,790	0	10,790	0.4125	4,450	15,240
90-2	11,195	0	11,195	0	11,195	0.3850	4,310	15,505
90-3	11,377	0	11,377	0	11,377	0.3575	4,067	15,444
90-4	6,244	0	6,244	0	6,244	0.3300	2,060	8,304
91-1	9,262	0	9,262	0	9,262	0.3025	2,801	12,063
91-2	10,212	0	10,212	0	10,212	0.2775	2,833	13,045
91-3	9,169	$8,353	816	0	816	0.2525	206	1,022
91-4	7,856	8,353	0	0	0	0.2275	0	0
92-1	12,828	8,262	4,566	0	4,566	0.2050	936	5,502
92-2	8,003	8,262	0	0	0	0.1850	0	0
92-3	10,114	8,262	1,852	0	1,852	0.1650	305	2,157
92-4	9,428	8,262	1,166	0	1,166	0.1475	171	1,337
93-1	8,522	9,374	0	0	0	0.1300	0	0
93-2	6,691	9,374	0	0	0	0.1125	0	0
93-3	11,414	9,374	2,040	0	2,040	0.0950	193	2,233
TOTS:	$147,936	$77,876	$74,351	0	$74,351		$24,457	$98,808

APPENDIX VII

ALASKA PULP CORPORATION

APPENDIX TO SUPPLEMENTAL DECISION AND ORDER

Discriminatee: **Ryman, Mike** SSN: [Omitted from publication.]

1. DEPARTMENT: Maintenance
2. JOB: Operator
3. BACKPAY BEGINS: 6/15/87
4. DATE OF ANY SUBSEQUENT PROMOTION OR TITLE CHANGE, AND THE NEW POSITION: N/A
5. DATE AND NATURE OF ANY EVENT TERMINATING BACKPAY LIABILITY: 7/7/89 Accepted employment at Ketchikan Pulp Co.
6. SUMMARY OF BACKPAY LIABILITY TO DATE:

QTR	GROSS	INT EGS	NET BP	MEDICAL	TOT	INT %	INT	TOTAL BP + INT
87-2	$2,032	0	$2,032	0	$2,032	0.7075	$1,437	$3,469
87-3	14,213	0	14,213	0	14,213	0.6850	9,735	23,948
87-4	11,421	0	11,421	0	11,421	0.6600	7,537	18,958
88-1	12,158	0	12,158	0	12,158	0.6325	7,689	19,847
88-2	11,869	0	11,869	0	11,869	0.6075	7,210	19,079
88-3	13,441	$5,955	7,486	0	7,486	0.5825	4,360	11,846
88-4	12,324	6,045	6,279	0	6,279	0.5550	3,484	9,763
89-1	15,616	3,002	12,614	$50	12,664	0.5275	6,680	19,344
89-2	12,018	2,629	9,389	0	9,389	0.4975	4,671	14,060
89-3	2,001	0	2,001	40	2,041	0.4675	954	2,995
TOTS:	$107,093	$17,631	$89,462	$90	*$89,552		$53,757	$143,309

* Less interim earnings, if any, for quarters 1987-2, -3, and -4.