

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMOKEHOUSE RESTAURANT]	
]	
Respondent,]	
]	
and]	
]	CASE NOS. 31-CA-26240
HOTEL EMPLOYEES AND RESTAURANT]	31-CA-26418
EMPLOYEES UNION, LOCAL 11, AFL-CIO,]	31-CA-26285
]	
Charging Party.]	
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**UNITE HERE, LOCAL 11'S BRIEF IN SUPPORT OF
MOTION TO STRIKE PORTIONS OF
RESPONDENT'S AMENDED ANSWER AND
FOR PARTIAL SUMMARY JUDGMENT**

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I. INTRODUCTION

Charging Party Hotel Employees and Restaurant Employees Union, Local 11, now UNITE HERE, Local 11 ("the Union") supports Counsel for the General Counsel's ("General Counsel") Motion to Strike Portions of Respondent's Amended Answer and for Partial Summary Judgment ("Motion for Partial Summary Judgment").

Respondent Smoke House Restaurant purchased the Smoke House Restaurant ("the Restaurant") in April of 2003. Upon taking over control of the Restaurant, Respondent refused to recognize or bargain with the Union or to comply with the terms and conditions of employment contained in the collective bargaining agreement between the Union and the previous owners of the Restaurant. The Board held that Respondent committed various unfair labor practices, including refusing to recognize the Union and unilaterally departing from the terms and conditions of the Union's contract with the previous owners. The Board ordered Respondent, among other things, to restore the terms and conditions of employment contained in the collective bargaining agreement between the Union and the previous owners and to make unit employees whole for any losses suffered as a result of Respondent's unfair practices.

Among the terms and conditions in the collective bargaining agreement was an obligation for Respondent to make contributions to and provide health coverage through the Los Angeles Hotel-Restaurant Employer-Union Welfare Fund ("the Fund"). The General Counsel's Amended Compliance specification requires Respondent to reimburse the Fund for payments Respondent has failed to make since taking over operation of the Restaurant. Respondent denies owing reimbursement to the Fund, claiming alternatively that the collective bargaining agreement creating that obligation expired or that it reached or would have reached impasse with the Union

at the time of the expiration. Both of these arguments contradict the Board's Order. The Board ordered Respondent to restore the terms and conditions of employment contained in the collective bargaining agreement until a new agreement was negotiated with the Union or Respondent and the Union bargained to impasse, regardless of the term of the collective bargaining agreement. Because the Board found that Respondent unlawfully refused to recognize or bargain with the Union, Respondent cannot claim to have reached impasse with the Union. Because Respondent's denials merely attempt to relitigate matters already decided by the Board, they are inappropriate and should be stricken. Under the Board's Rule and Regulations, allegations in the Amended Compliance Specification that are not properly denied shall be deemed to be admitted. On the basis of these admitted allegations, the General Counsel is entitled to partial summary judgment.

The Amended Compliance Specification provides a formula by which the General Counsel calculated the amount Respondent owes the Fund. Respondent denies the General Counsel's formulation, but does not provide any alternative formulation. Under the Board's Rules and Regulations, a respondent who disputes the General Counsel's backpay formulation is required to provide its own formula for calculating backpay and supporting figures. When the respondent fails to properly deny the backpay formulation, the General Counsel's formulation shall be deemed to be admitted. The General Counsel is entitled to partial summary judgment with respect to the amount owed by Respondent to the Fund.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent took over operation of the Restaurant on April 30, 2003. Respondent purchased the Restaurant from previous owner JLL Restaurant, Inc. ("JLL"), which was in bankruptcy at the time of the sale. *Smoke House*, 347 NLRB at 199. JLL and the Union were

parties to a collective bargaining agreement covering various categories of Restaurant employees. *Id.* at 198-99. The Union/JLL collective bargaining agreement was effective September 15, 1996, through September 14, 2001, with automatic yearly renewal thereafter unless terminated or re-opened. *Id.* The contract provided for health benefits for unit employees through the Fund. *Id.*

On April 3, 2003, the bankruptcy court authorized the sale of assets from JLL to Respondent. *Id.* at 199. That same day, Respondent informed the Union that Respondent planned to open a new restaurant with new employees and to operate without the Union. *Id.* Respondent required Restaurant employees to apply to keep their jobs, and during interviews Respondent informed applicants that Respondent would be operating the Restaurant without the Union and that benefits would be changed. *Id.* at 199-200.

The Union picketed the Restaurant in protest of the sale to Respondent. *Id.* at 200. Respondent threatened that it would not purchase the Restaurant because of the picket. *Id.* Respondent decided to continue with its plans to purchase the Restaurant after being shown a decertification petition signed by Restaurant employees. *Id.*

When Respondent took over operation of the Restaurant, it retained 63 of JLL's 70 nonsupervisory employees. *Id.* at 201. On May 1, 2003, Respondent began operating the Restaurant at the same location with the same furniture, equipment, fixtures, and food and liquor inventories as JLL. *Id.* at 202. Respondent refused to recognize and bargain with the Union. *Id.* Respondent did not adopt the health plan provided in the collective bargaining agreement between the Union and JLL. *Id.* Between May and December Respondent did not provide any health coverage for unit employees; in December it instituted its own health plan without notifying or bargaining with the Union. *Id.*

The Union filed various unfair practice charges against JLL and Respondent. On April 6, 2004, Administrative Law Judge Lana H. Parke issued a decision finding JLL and Respondent guilty of several unfair practices, including that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, failing to apply the terms and conditions of employment contained in the collective bargaining agreement between the Union and JLL, and unilaterally changing the terms and conditions of employment as set by the collective bargaining agreement. *Id.* at 207-08. The ALJ issued an order requiring Respondent, among other things, to recognize and bargain with the Union and "retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto." *Id.* at 208-09. On May 31, 2006, the Board issued a decision affirming the ALJ's rulings, findings, and conclusions, and adopting her order with certain technical modifications. *Id.* at 192. On May 12, 2009, the Ninth Circuit granted enforcement of the Board's Order. *NLRB v. JLL Restaurant, Inc.*, 325 Fed. Appx. 577 (9th Cir. 2009).

On March 31, 2010, the Acting Regional Director for Region 31 issued a Compliance Specification. Respondent filed an Answer on April 20, 2010. In May of 2010, the General Counsel informed Respondent that its Answer was deficient under Section 102.56 of the Rules and Regulations and that the Region would issue an Amended Compliance Specification to provide Respondent with another opportunity to answer. On May 25, 2010, Region 31 issued an Amended Compliance Specification, and on June 14, 2010, Respondent answered. On September 2, 2010, the General Counsel informed Respondent that its Answer to the Amended Compliance Specification was also deficient under Section 102.56 and that, if the defects were not cured by

September 9, 2010, the General Counsel would move for partial summary judgment. On September 13, 2010, Respondent filed an Amended Answer. Finding the Amended Answer still deficient under Section 102.56, the General Counsel now moves to strike those portions of the Amended Answer not in compliance with the Rules and Regulations and for partial summary judgment.

III. ARGUMENT

A. Partial Summary Judgment Should be Granted With Respect to Respondent's Obligation to Reimburse The Fund Because Respondent's Denials of these Allegations Solely Attempt to Relitigate Matters Already Decided by the Board.

The Board's earlier decision in this matter imposes on Respondent a duty to take retroactive action to restore the terms and conditions of employment set forth in the collective bargaining agreement between JLL and the Union. The notice which the Board ordered Respondent to post contains the following paragraph:

WE WILL on request of the Union, retroactively restore the terms and conditions of employment of our employees in the unit as established by the collectively-bargained agreement between JLL and the Union and make our employees whole for any losses caused by our unilateral change.

Smoke House Restaurant, 347 NLRB 192, 197 (2006). Among the terms and conditions in the collective bargaining agreement between the Union and JLL is a responsibility for Respondent to make contributions to and provide benefits to unit employees through the Fund. Respondent unlawfully refused to contribute to the Fund since taking over control of the Restaurant. The Board has recognized that the diversion of contributions from union funds may harm the funds

and undercut the ability of those funds to provide for future needs. *Kenmore Contracting Co., Inc.*, 303 NLRB 1, 2-3 (1991). When employees have a future interest in a union fund, backpayments to the fund are a proper remedy because they ensure the fund's financial viability necessary to satisfy employees' future needs. *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.*, 191 F. 3d 316, 324 (2d Cir. 1999), citing *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F. 2d 151, 157-60 (2d Cir. 1991).¹ To make employees absolutely whole, the employer must

¹ In its Opposition, Respondent cites *Lawrenceville Ready-Mix Co.*, 305 NLRB 1010, 1011 n. 4 (1991), for the proposition that because the Fund is a health benefit fund and not a pension fund, unit employees cannot have a future interest in its viability. However, in *Centra, Inc.*, 314 NLRB 814, 820 n. 11 (1994) (*enforcement denied on other grounds by Centra, Inc. v. NLRB*, No. 95-5481, 95-5482, 1997 WL 159376 (6th Cir. April 3, 1997)), the Board affirmed the ALJ's conclusion that:

Whatever else the Board held in *Lawrenceville Ready-Mix*, including the footnote, it has not held that Health and Welfare Funds do not present situations where employees have an economic stake in the future vitality of the Fund. The Board, as is obvious, held that health and welfare funds present the problem of whether employees have a stake in the fund whose viability is in issue because of a failure of contribution. While the law of the case in *Manhattan Eye, Ear, & Throat* is that there was no concrete interest of the [employees'] stake in the future of that fund (they had renounced their interest and decertified the union), the same cannot be said of the . . . employees herein.

(Internal quotations and citations omitted). While setting aside the Board's order in *Centra* and remanding on other grounds, the Sixth Circuit held:

Central argues in its petition for review that the Board's order is punitive because the health and welfare benefits do not vest and the order does not make the employees whole for any loss incurred. However, the union and the employees it represents have an interest in ensuring that the funds are made whole. Specifically, the employees have an economic stake in the future solvency of the fund. Central's failure to make contributions to the health and welfare funds during the relevant time period undercut the financial strength of the funds and jeopardized the future benefits to which the employees are entitled. We agree with the Board that the remedy is not punitive here.

Centra, Inc. v. NLRB, 1997 WL 159376 at *1 (internal citations omitted).

contribute to union plans to the extent necessary to ensure the plan's undiminished viability. *Sedgwick Realty LLC*, 337 NLRB 245, 248 (2001). By ordering Respondent to retroactively restore the terms and conditions of the contract between the Union and JLL, the Board ordered Respondent to restore unit employees' participation in the Fund. The General Counsel is therefore correct in requiring Respondent to reimburse the Fund in order to ensure the Fund's viability and make unit employees absolutely whole.

In its Amended Answer to the General Counsel's Amended Compliance Specification, Respondent denies its retroactive liability to the Fund, raising only arguments that contradict the Board's previous holding in this matter. Such arguments are "entirely inappropriate" and should be stricken. *See Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004). Respondent repeatedly asserts that it has no obligation to contribute to the Fund because the collective bargaining agreement creating such an obligation expired or, alternatively, because it claims it did or would have reached impasse with the Union prior to December, 2003. Amended Answer, pp. 2-3. This assertion contradicts the Board's holding in the underlying case. *Smoke House*, 347 NLRB 192. The ALJ, whose findings and conclusions the Board affirmed, held that Respondent "was required to follow the terms and conditions of employment established by JLL's contract with the Union *until such time as respondent negotiated a new contract with the Union or negotiated to impasse.*" *Id.* (emphasis added).

Respondent's obligation to comply with the terms and conditions of the Union's contract with JLL therefore did not end on the expiration date of that contract, but remains ongoing until a new agreement is negotiated between the Union and Respondent or until the parties bargain to impasse. As the Board noted, "It is undisputed that the Respondent refused to recognize the

Union." *Id.* at 192. Respondent's contention that it bargained or would have bargained to impasse with the Union – and therefore was free to unilaterally cease contributing to the Fund – contradicts the Board's holding that Respondent unlawfully refused to bargain with the Union. Because Respondent never negotiated a new agreement with the Union, its obligation to comply with the JLL/Union contract is ongoing and retroactive to when it first unlawfully refused to recognize the Union and unilaterally changed unit employees' health benefits.²

Respondent inappropriately bases its denials on arguments contradicted by the Board's earlier ruling and these denials should be stricken from Respondent's Amended Answer.

Convergence Communications, Inc., 342 NLRB at 919. Doing so leaves Respondent's Amended Answer silent on the issue of retroactive liability to the Fund, and the allegations contained in the Trust Fund Reimbursement portion of the Amended Compliance Specification Appendix A must be deemed admitted and Respondent must be precluded from introducing evidence controverting

² Relying on *Planned Building Services, Inc.*, 347 NLRB 670, 676 (2006), Respondent argues that it is allowed to present evidence establishing what would have occurred had it bargained with the Union. *Planned Building Services*, however, cannot be read as an invitation to relitigate the hearing on the merits, as Respondent attempts to do by claiming that it was excused from following the terms of the collective bargaining agreement between the Union and JLL either because of the expiration of that agreement or the existence of impasse sometime before December of 2003. If Respondent is arguing that its retroactive liability to the Fund is lessened because it can prove that it would have reached impasse with the Union at some point, Section 102.56(b) of the Rules and Regulations requires Respondent, in its answer, to set forth in detail the premises on which it disputes the General Counsel's backpay calculation and to furnish supporting figures. Respondent's Amended Answer contains only the bald assertion that Respondent and the Union would have reached impasse sometime before December of 2003 and provides no supporting figures. As a matter of law, Respondent cannot prove that it would have reached impasse with the Union because it never restored the terms and conditions of the collective bargaining agreement between the Union and JLL, which is the baseline for good faith bargaining. See *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002). Section 102.56(c) provides that allegations in the compliance specification not properly denied under Section 102.56(b) shall be deemed to be admitted and Respondent shall be precluded from offering any evidence controverting the allegation.

these allegations. Section 102.56(c). On this basis, the Board should grant partial summary judgment to the General Counsel on the issue of Respondent's retroactive liability to the Fund.

B. Because the General Counsel Has Set Forth a Reasonable Formula For Calculating Respondent's Liability to the Fund and Respondent Has Failed to Offer an Alternative Formula, Partial Summary Judgment Should be Granted With Respect to the Amount Owed by Respondent to the Fund.

The General Counsel's Amended Compliance Specification sets forth a formula for calculating the amount owed by Respondent to the Fund dating back to the Respondent's initial unfair labor practices. The contribution rate is based on the average rate increases experienced by similarly situated restaurants contributing to the Fund over that time period. Amended Compliance Specification, pp. 2-3. Respondent's Amended Answer provides no alternative formula for calculating the amount it owes to the fund, instead rearguing points that the Board has already decided and claiming to owe nothing to the Fund at all. Amended Answer, pp. 2-3. Where a respondent disputes the figures contained in a compliance specification or the premises on which they are based, it must state why it disagrees and what it considers to be the correct premises, and it must provide the relevant supporting figures. *Kidd Electric Co.*, 322 NLRB 33, 33-34 (1996). When a respondent, as in this case, fails to properly respond to the allegations of a compliance specification and instead "attempt[s] to relitigate an issue that was decided in the unfair labor practice case[,]" the Board shall deem the relevant portions of the compliance specification to be admitted to be true and may grant partial summary judgment to the General Counsel. *Id.* at 34; Section 102.56(b) and (c).

The Board has previously recognized the difficulty for purposes of calculating retroactive

liability of reconstructing what the world would have looked like had no unfair labor practices been committed. *Alaska Pulp Corporation*, 326 NLRB 522, 523 (1998). The Board therefore grants "wide discretion" to the General Counsel in selecting a formula for calculating retroactive liability. *Id.* Where the General Counsel offers a backpay formula reasonably designed to arrive at the approximate amount of backpay due, the Board will adopt the General Counsel's formula unless the respondent offers an alternate method which the Board finds to be more accurate. *Id.* Here, the General Counsel calculated Respondent's retroactive liability to the Fund on the basis that, had Respondent not unlawfully refused to bargain with the Union and had not unilaterally withdrawn from the Fund, Respondent would have experienced rate increases similar to those experienced by similarly situated restaurants that contribute to the Fund. Any uncertainty about the amount Respondent would have paid to the Fund over the past eight years is a result of Respondent's unlawful conduct; because Respondent cannot be allowed to benefit from its unlawful conduct, it bears the burden of providing a more accurate formulation. *Id.* However, Respondent offers no alternate formulation. The General Counsel is entitled to partial summary judgment on the amount owed by Respondent to the Fund.

In Respondent's initial Answer to the Amended Compliance Specification, Respondent argued that its retroactive liability to the Fund should be limited to a per employee/per hour rate of \$1.43, which it claims is the rate in the 1996-2001 collective bargaining agreement between JLL and the Union. Answer to the Amended Compliance Specification, pp. 5-9. Respondent's Amended Answer, which does not set forth an alternate method for calculating retroactive liability to the Fund and simply reargues matters already decided by the Board, supersedes its initial Answer, and any arguments by Respondent for a lower contribution rate should not be

considered. *See North Slope Mechanical*, 286 NLRB 633, 634 n. 3 (1987). Even if arguments for a lower contribution rate are considered, any uncertainty as to which rate should apply must be resolved against Respondent, the party whose unfair practices created the uncertainty. *Alaska Pulp*, 326 NLRB at 523.

Because the General Counsel has offered a reasonable basis for calculating the amount owed by Respondent to the Fund and the Respondent has failed to offer an alternative formulation, the Board should grant partial summary judgment on this issue and adopt the General Counsel's formula.

C. Partial Summary Judgment Should be Granted With Respect to Premium Expenses Owed by Respondent to Unit Employees Because Respondent's Denials of these Allegations Attempt to Relitigate Matters Already Decided by the Board.

The Amended Compliance Specification, in Appendix B, calculates the amount that Respondent must reimburse its unit employees for health expenses based on the sum of medical insurance premiums and medical expenses incurred by unit employees as a result of Respondent's unilateral changes to health benefits. Amended Compliance Specification, pp. 3-4. Respondent purports to deny these allegations by repeating arguments that the General Counsel's formulation is incorrect either due to the expiration of the collective bargaining agreement between the Union and JLL or a purported impasse between Respondent and the Union and, alternatively, denies the medical expenses portion of the calculation by claiming to be without knowledge to respond specifically. Amended Answer, pp. 3-5. For the reasons argued above, Respondent cannot appropriately base its denials on expiration of the collective bargaining agreement between the

Union and JLL or the claimed existence of some impasse between Respondent and the Union, and such denials should be stricken from the Amended Answer. The General Counsel is therefore correct in moving to strike all Respondent's denials related to Appendix B except for those where Respondent denies knowledge of employee medical expenses. Motion for Partial Summary Judgment, pp. 9-10. The General Counsel correctly argues that Respondent's denials based on premium expenses rely solely on attempts to relitigate matters already decided by the Board. *Id.* Because Respondent does not dispute the General Counsel's calculation of premium expenses on any other grounds, the allegations related to premium expenses must be deemed to be admitted. Section 102.56(c). On this basis, the Board should grant partial summary judgment to the General Counsel with respect to the premium expenses component of the health expenses owed by Respondent to unit employees.

D. All Other Portions of the Amended Answer Which Contradict the Board's Previous Ruling or Fail to Satisfy Respondent's Obligations to Offer Alternative Methods of Calculating its Retroactive Liability Should be Stricken.

The General Counsel correctly moves to strike the majority of Respondent's affirmative defenses. Motion for Partial Summary Judgment, pp. 10-12. Most of these affirmative defenses fail for reasons discussed above. Affirmative defenses 1, 2, 3, 5, 6, and 10 [Amended Answer, pp. 6-7] repeat arguments related to the expiration of the collective bargaining agreement between the Union and JLL or the argued existence of impasse between Respondent and the Union that are foreclosed by the Board's previous decision in this matter. Affirmative defenses 4 (second one), 7, 12, 13, and 14 [Amended Answer, pp. 6-7] dispute the basis of the General Counsel's

formulation of a make-whole remedy without setting forth alternative formulas or theories for calculating the remedy. See Section 102.56(b). These affirmative defenses should be stricken from the Amended Answer and Respondent should be barred from raising them.

Finally, the Relief Requested section of the Amended Answer [pp. 7-8] contains the same inappropriate arguments addressed above. Respondent claims its responsibility to reimburse the Fund and unit employees for losses caused by its unlawful unilateral change in health benefits is limited by either the expiration of the collective bargaining agreement between the Union and JLL or a purported impasse between Respondent and the Union. Again, these arguments contradict and are thus foreclosed by the Board's previous holding in this matter. Additionally, as the General Counsel notes, Respondent's argument that the Amended Compliance Specification requires it to pay a windfall to the Fund is contradicted by the Board's prior holdings that the reimbursement of trust funds protects employees' interest in the viability of such funds. *See Sedgwick Realty LLC*, 337 NLRB at 247-48. As the General Counsel shows, Respondent merely raises the speculative possibility of a windfall without alleging facts to establish a windfall, thus failing to satisfy its burden under the rules. *Banknote Corp. of Am.*, 327 NLRB 625, 625 (1999); Section 102.56(b) and (c). Accordingly, the "Relief Requested" section should be stricken from the Amended Answer.

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IV. CONCLUSION

For the foregoing reasons, Charging Party UNITE HERE Local 11 respectfully requests that the Board grant the General Counsel's Motion to Strike Portions of Respondent's Amended Answer and For Partial Summary Judgment.

DATED: January 10, 2011

ELLEN GREENSTONE
ANTHONY P. RESNICK
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By  _____
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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2011, a copy of the foregoing **UNITE HERE, LOCAL 11'S BRIEF IN SUPPORT OF MOTION TO STRIKE PORTIONS OF RESPONDENT'S AMENDED ANSWER AND FOR PARTIAL SUMMARY JUDGMENT** was sent by email and by regular U.S. Mail to the following persons and was filed electronically with the Office of the Executive Secretary:

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