

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**L.F.N. RESTAURANT, INC. d/b/a
NANNI RESTAURANT**

and

Case No. 02-CA-152777

LOCAL 100, UNITE HERE

and

Case No. 02-CA-156322

MARK FARERI, an Individual

**MEMORANDUM IN SUPPORT OF MOTION
FOR TRANSFER OF CASE TO THE BOARD AND MOTION
FOR DEFAULT JUDGMENT**

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board (the “Rules and Regulations”), Counsel for the General Counsel (“General Counsel”) submits this memorandum in support of the Motion for Default Judgment (the Motion). As set forth below, General Counsel respectfully submits that the pleadings herein and exhibits attached to the Motion establish that there exist no genuine issues of fact as to any allegation set forth in the Complaint, and that therefore, as a matter of law, an Order granting Default Judgment and remedying the violation as alleged in the Complaint should issue.

I. STATEMENT OF THE CASE

On May 21, 2015, a charge was filed by Local 100 UNITE HERE (the “Union” or “Charging Party Local 100”) against L.F.N Restaurant, Inc. d/b/a Nanni Restaurant (the “Respondent”). (Exhibit A) The charge alleged that the Respondent implemented a unilateral change to the terms and conditions of employment during contract hiatus by discharging Jose Felix Vasquez (Vasquez) and Raffaele Federico (Federico) and by laying off Marc Fareri

(Fareri) without bargaining with the Union, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On July 20, 2015, Fareri filed a charge alleging that Respondent terminated him in retaliation for his protected concerted activity in violation of Section 8(a)(1) of the Act. (Exhibit B) Based on these charges, an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (the Complaint) issued on November 30, 2015. (Exhibit C) The Complaint was served on Respondent via regular and certified mail. (Id.)

Respondent did not file an Answer within fourteen days of service of the Complaint, as required by Section 102.20 and 102.21 of the Rules and Regulations. On December 22, the General Counsel, by first class mail, notified Respondent that it had not filed an answer to the Complaint. (Exhibit D) The letter informed Respondent that it had an additional opportunity to file an answer by no later than December 30, 2015. Respondent was also advised that, if it failed to file an answer by that date, the General Counsel would take appropriate action, including filing a petition for default judgment. Respondent did not file an answer to the Complaint by December 30, 2015.

On January 12, 2016, the Regional Director issued an Amendment to Consolidated Complaint and Order Rescheduling Hearing (Amendment to Complaint) to Respondent. The Amendment to Complaint, in pertinent part, added a remedial paragraph and informed Respondent that if it did not file an answer by January 26, 2015, or if an answer was filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true. The Amendment to Complaint further rescheduled the hearing for this matter from February 9, 2016 to March 1, 2016. (Exhibit F)

On January 26, 2016, Victor Miriel sent an email General Counsel stating that his father had been ill and requesting a two week “extension to respond to the consolidated complaints

(case #:02-CA-152777 and 02-CA-156322)” (Exhibit G) General Counsel informed Victor Miriel by return email that same day that the Region agreed to a one week extension and that Respondent’s Answer was due on February 2, 2016. (Id.)

On January 27, 2016, the Regional Director issued an Order Extending Time to File Answer to Respondent. (Exhibit H) The Order extended the time within which Respondent might file an answer to the Amendment to Complaint to February 2, 2016.

Respondent did not file an answer on or before February 2, 2016, and has not to date filed an answer to the Complaint or Amendment to Complaint.

II. ARGUMENT

Point 1. There Are No Genuine Issues of Fact Which Warrant a Hearing.

The General Counsel submits that there is no genuine issue as to any material facts alleged in the Complaint or Amendment to Complaint as Respondent has failed to admit, deny, affirm or in any way answer the charges alleged therein.

The Complaint in this matter was properly served on Respondent pursuant to Sections 10(b) and 11(4) of the Act and Section 102.15 of the Board’s Rules and Regulations. Respondent has not disputed service and correspondence submitted with this Motion shows that Respondent requested and was granted an extension of time to file an Answer to the Complaint on January 26, 2016. (Exhibit G)

Section 102.20 of the Board’s Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the Complaint affirmatively states that an answer must be received on or before September 11, 2015, and that if no answer is filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the Complaint

are true. (Exhibit C) Similarly, the Amendment to Complaint states that that an answer must be received on or before January 26, 2016, and that if no answer is filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the Complaint are true. (Exhibit F) Respondent failed to file a timely answer within 14 days from the service of the Complaint and Amendment to Complaint. Respondent also disregarded an additional two separate opportunities extending the time for the filing of an answer, including the one week extension granted on January 26, 2016 at its request. (Exhibits D and H) Respondent was warned that such failure would result in the instant Motion.

As all material issues are deemed admitted, it is respectfully submitted that there exists no factual issue litigable before the Board and thus, no matter requiring a hearing. Consequently, Respondent is in default in this matter and entry of Default Judgment against Respondent is warranted. *In Re Rick's Painting and Drywall*, 338 NLRB 1091 (2003).

Point 2: Respondent's Alleged Conduct in Relation to the Discharges of Fareri, Federico, and Vasquez Violates Section 8(a)(5) and (1) of the Act.

The Complaint alleges all of the elements necessary to establish that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide notice to the Union in accordance with the terms of the expired collective-bargaining agreement of the lay off and/or discharge of employees Jose Felix Vasquez, Raffaele Federico, and Marc Fareri.

It is well established that an employer's disciplinary system is a mandatory subject of bargaining and that an employer violates Section 8(a)(5) of the Act by unilaterally instituting changes to disciplinary procedures and rules. *Migali Industries*, 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining). The duty to bargain arises, however, only if the changes have a material, substantial, and significant impact on the

employees' terms and conditions of employment. *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

Here, the Complaint alleges that the Union has been the designated exclusive collective-bargaining representative of a bargaining unit of "all dining room and kitchen employees employed by the Employer" since about 1987 and that this recognition has been embodied in successive collective bargaining agreements, the most recent of which was effective from November 1, 2011 to October 31, 2014. (Exhibit G at ¶ 6)

The Complaint Further alleges the contractual provisions in the most recent but expired collective-bargaining agreement requiring notice to the Union prior to a lay-off and discharge. (Exhibit G at ¶ 7) Specifically, the Complaint alleges that Article 18 of the expired collective-bargaining agreement provides, in pertinent part, that:

- i. Seniority shall govern with respect to lay-off and recall.
- ii. If as a result of the diminution of business, the Employer wishes to reduce the number of employees by laying off one or more employees, such lay off shall be effectuated only upon two weeks prior written notice to the Union.

The Complaint further alleges that Article 19 of that agreement provides, in pertinent part, that:

- i. The Employer may summarily discharge, suspend or discipline an employee for physical fighting on the Employer's premises, being under the influence of liquor or drugs who on duty, dishonesty in connection with his employment or engaging in an unauthorized work stoppage.
- ii. If the Employer desires to discharge, suspend or discipline an employee for causes other than specified above, the Employer shall notify the Union in writing at least six business days in advance of the intended discharge, suspension or discipline during which time the Union may investigate the grounds therefore. The Employer and the Union shall have a conference within a reasonable time after the Union's receipt of said notice to discuss and attempt to resolve the matter. If the matter is not resolved, it shall be processed in accordance with the grievance procedure set forth in this Agreement. Pending resolution or final determination by arbitrator's award, the employee in

question shall not be removed from the job. Notwithstanding the immediately preceding sentence, if the Employer discharges or suspends the employee from his employment prior to resolution of the matter or the rendering of an arbitrator's award, the Employer shall continue to pay wages and all other benefits to the employee, including an amount equal to the tips that the employee had been reporting prior to removal from employment, beginning the day of the employees' discharge or suspension from employment and continuing until the date of resolution or the arbitrator's award.

The Complaint further alleges that Respondent failed to continue in effect the above cited terms and conditions of the expired collective-bargaining agreement when it failed to give contractually require notice to the Union of the January 19, 2015 lay off or discharge of Jose Felix Vasquez, the May 11, 2015 lay off or discharge of Raffaele Federico, and the March 25, 2015 discharge of Marc Fareri.

As the above material issues are deemed admitted, the uncontroverted facts show that the Respondent changed the collective bargaining agreement Article 18 and 19 notice requirements and, as a result, the Union's opportunity for pre-discharge bargaining and contractual grievances under Article 19. The resulting impact on employees' terms and conditions of employment was material, substantial, and significant because it changed the disciplinary procedures and rules and also because it denied the Union the opportunity to bargain over discipline or layoff terms for bargaining unit employees prior to the implementation of the discharges, when bargaining was likely to produce a different result.

For the foregoing reasons, Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the Act.

Point 3: Respondent discharged Fareri because he claimed the right to be paid wages owed to him by Respondent in accordance with the collective-bargaining agreement, in violation of Section 8(a)(1) of the Act.

The Complaint alleges all of the elements necessary to establish that Respondent violated Section 8(a) (1) of the Act when it discharged employee Marc Fareri because he claimed the right to be paid wages owed to him by Respondent in accordance with the collective-bargaining agreement.

It is well settled that action by an individual to enforce a provision of an existing collective-bargaining agreement is concerted activity and protected under Section 7 of the Act and that Employer retaliation against an employee engaging in such protected activity violates Section 8(a)(1) of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

Here, the Complaint alleges that Respondent employee Fareri claimed the right to be paid wages owed to him by Respondent in accordance with Article 6 of the collective-bargaining agreement in mid-March and that Respondent discharged Fareri on March 24, 2015 because he engaged in that protected activity.

As the above material issues are deemed admitted, the uncontroverted facts show that Respondent discharged its employee Marc Fareri on March 24, 2015 because he engaged that protected activity and in violation of Section 8(a)(1) of the Act.

III. REMEDY

It is hereby requested that the Board issue an appropriate remedial order which would require that Respondent cease and desist from engaging in the unlawful conduct alleged herein, including an order requiring that Respondent reimburse Jose Felix Vasquez, Raffaele Federico and Marc Fareri for all search-for-work and work-related expenses regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall

