

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**OS TRANSPORT LLC AND
HCA MANAGEMENT, INC.
A SINGLE EMPLOYER**

and

**Cases 32-CA-025100
32-CA-025399
32-CA-025490**

**TEAMSTERS LOCAL NO. 350,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

MOTION FOR A BILL OF PARTICULARS

Respondent's Answer to the General Counsel's Compliance Specification fails to comply with the Boards' Rules and Regulations Section 102.56. The answer ignores the fundamental requirement that a respondent set forth in detail the factual basis for its denials and affirmative defenses. Although the answer asserts that, because of their immigration status, Respondent does not owe the discriminatees any backpay, Respondent neglects to plead any facts to support this affirmative defense. The Board does not permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted, nor baseless defenses to compliance with a Board Order for backpay by raising an employee's immigration status as it would contravene the policies underlying both IRCA and the NLRA. *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011).

The speciousness of Respondent's raising such issues in this case is evidenced by the fact that Respondent employed six of the discriminatees throughout the backpay period at issue in this case and reinstated the two remaining discriminates pursuant to a District Court

Injunction without ever raising any concerns as to their immigration status. Indeed, Respondent continued to employ many of the discriminatees long after the Injunction terminated upon issuance of the Board's Order in this case on August 31, 2012.

Therefore, the General Counsel requests that an order issue requiring Respondent to serve on the Counsel for the General Counsel a bill of particulars containing a full accounting of evidence that it intends to rely upon in order to assert that each of the discriminatees is ineligible for backpay during the *only* relevant backpay period covered by this order - May 6, 2010 through June 30, 2011.¹

I. Procedural History

On May 17, 2011, the United States District Court, Northern District of California granted the National Labor Relations Board's Petition for Temporary Injunctive Relief, filed pursuant to Section 10(j) of the Act. Pursuant to that injunction, Respondent reinstated two discriminatees named in the Compliance Specification, and rescinded unlawful changes to the terms and conditions of employment of six other employees named in the Compliance Specification. *Baudler v. OS Transport LLC, et al.*, Civil No. 5:11-CV-01943.

On January 21, 2016, the United States Court of Appeals for the Ninth Circuit granted the Board's Application for Summary Entry of a Judgment Enforcing an Order dated March 19, 2015, of the National Labor Relations Board (the Board). On February 12, 2016, the form of judgment submitted by the Board became the judgment of the court enforcing in full the provisions of the Board's Decision and Order directing Respondent to two discriminatees whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful actions

¹ The General Counsel presumes that in preparing its response to this inquiry, if granted, that Respondent will be mindful of the laws prohibiting discrimination during the investigation of employees' immigration status as set forth in IRCA, *supra*.

in violation of Section 8(a)(3) and (1) of the Act, and to make six other employees whole for any loss of earnings and other benefits suffered as a result of Respondent reducing in their work assignments and/or work hours in violation of Section 8(a)(1) and (3) of the Act.

On November 30, 2017, the Regional Director for Region 32 issued a Compliance Specification and Notice of Hearing, to which Respondent filed an answer on December 27, 2017. The Compliance Specification and Respondent's Answer are **attached hereto as Exhibits A and B**, respectively.

In its Answer, Respondent asserted the following affirmative defense:

... none of the individuals named in the back pay specification are entitled to a back pay remedy because none of them were eligible to work in the United States during the period when the alleged unfair labor practices occurred, and are therefore ineligible to receive back pay pursuant to *Hoffman Plastic Compounds Inc. v. NLRB* (2002) 535 U.S. 137.

Respondent's answer, however, does not provide any articulable facts in support of this asserted defense.

II. Respondent Has Failed to Plead Articulable Facts To Support Its Affirmative Defense Based on Immigration Status

The Board has recognized that where an employer raises immigration status during litigation, it can be highly destructive of employees' statutory rights as well as threaten the integrity of the Board's processes. For example, the Board has held that a respondent's act of serving subpoenas on discriminatees seeking immigration documents has a "devastating" effect on their ability to testify and therefore violates Section 8(a)(1) of the Act. *John Dory Boat Works*, 229 NLRB 844, 852 (1977). See also *AM Property Holding Corp.*, 350 NLRB 998, 998 n.4, 1042-43 (2007), enforced in part on other grounds, 647 F.3d 435 (2d Cir. 2011) (employer's statement during trial that it would "have to get an investigator and [find] out whether [the

witness was] here in this country illegally,” was an unlawful threat in violation of Section 8(a)(1) and (4)).

The Board is not alone in recognizing the ruinous effect of attempts to introduce evidence of immigration status into the litigation of workplace rights. Courts have repeatedly noted the chilling effects this type of inquiry has upon witnesses. As one court observed, “any inquiry into plaintiffs’ current immigration [] status ... will most assuredly strike paralyzing fear in the plaintiffs sufficient to chill any inclination they may have had to prosecute their pending claims.” *David v. Signal Int’l, LLC*, 735 F.Supp.2d 440, 444 (E.D. La. 2010) (internal citations omitted). See also *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), cert. denied, 544 U.S. 905 (2005) (explaining that individuals may choose to forego civil rights litigation if discovery around immigration status is permitted and that even documented workers may be chilled by such inquiries fearing that their immigration status would be changed or that immigration problems of family or friends may be revealed, or feeling intimidated by the prospect of having their immigration history examined in a public proceeding). It is for these very reasons that the Board has limited when and how immigration issues can be raised.

Further, the Board has held that because questions about immigration status are such an “intrusive inquiry,” and because of the extreme chilling effect that such an inquiry may have, that employers may not plead an affirmative defense in compliance without a factual basis for doing so. *Flaum Appetizing Corp.*, 357 NLRB 2006, 2012 (2011) (“mere service of a subpoena ... combined with knowledge that such an inquiry may be made in every case and will have to be contested, would have a chilling effect on the exercise of the fundamental right to file a charge with the Board.”). In *Flaum Appetizing*, the Board instructed that a respondent will not be allowed to use Board processes to launch a fishing expedition aimed at discovering unanticipated

evidence that might mitigate its backpay liability under *Hoffman Plastics*, and that an affirmative defense in a compliance hearing based on immigration status will not be permitted to proceed where a respondent fails to plead articulable facts in support of the defense. *Id.* at 2008, n. 8. Indeed, to allow Respondent's attempts to use the Board's compliance hearing to re-verify employees' work status to avoid backpay in this case, where it continued to employ the discriminatees both during and after the backpay period ended, could itself constitute a violation of the anti-discrimination provisions of the Immigration and Reform Control Act of 1986 (IRCA). See 8 U.S.C. sec. 1324b and 8 CFR sec. 274a.2(b), (1), (viii), (A), (5)).

The Board in *Flaum Appetizing* warned that if respondents were allowed to plead immigration status as an affirmative defense without any articulable basis, employers would do so as a matter of course. The result would be that,

in every case in which the Board has found that employees' rights have been violated, in order to obtain any remedy for the injuries suffered, the employees would potentially be subject to what is often an embarrassing and frightening inquiry into their immigration status.

In our view, subjecting every employee whose rights have been violated to such an intrusive inquiry, even when the party that has already been adjudged to have violated the law can articulate no justification for the inquiry, contravenes the purposes of the NLRA. *Id.* at 2011-2012.

Here, Respondent's affirmative defense that the discriminatees are not entitled to a backpay remedy because they were not eligible to work in the United States fails to meet the basic pleading requirements of Section 102.56 and *Flaum Appetizing*. Indeed, Respondent employed six of the discriminatees during the entire backpay period and the two remaining discriminatees from the time Respondent was ordered to reinstate them by the District Court. Respondent provides no factual basis for its assertions and fails to point to any specific

documents or evidence upon which it relied to determine the immigration status of the discriminatees. Respondent's attempts to pursue an intrusive and chilling inquiry into the discriminatees immigration status without any factual basis to do so would run afoul of the anti-discrimination provisions of IRCA and the Board's directives in *Flaum Appetizing* and should not be permitted in this case.

III. Conclusion

Accordingly, the General Counsel requests an order requiring Respondent to serve on the General Counsel, within 14 days of the date of the order, a bill of particulars which will include: (1) the identity of each discriminatee asserted to be unauthorized to work in the United States; and, (2) for each such discriminatee, a particularized and specific description of all of the evidence, both documentary and testimonial, that Respondent will rely upon to establish the ineligibility.

Respectfully submitted this 5th day of February, 2018.

/s/ Amy Berbower

Amy Berbower
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National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

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**TEAMSTERS LOCAL NO. 350,
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COMPLIANCE SPECIFICATION AND NOTICE OF HEARING

On January 21, 2016, the United States Court of Appeals for the Ninth Circuit granted the Board's Application for Summary Entry of a Judgment Enforcing an Order dated March 19, 2015, of the National Labor Relations Board (the Board). On February 12, 2016, the form of judgment submitted by the Board became the judgment of the court enforcing in full the provisions of the Board's Decision and Order directing OS Transport LLC and HCA Management, Inc., a single employer (Respondent), its officers, agents, successors, and assigns, to make Jesus Garcia Marquez (Marquez) and Alberto Pizano (Pizano) whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful actions in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, and to make Marquez, Pizano, Miguel Reynoso (Reynoso), Marcial Barron Salazar (Salazar), Efrain Gutierrez Najera (Gutierrez), Primitivo Guzman (Guzman), Jose Urias (Urias), and Ceferino Urias Velasquez (Velasquez) whole for any loss of earnings and other benefits suffered as a result of Respondent reducing in their work assignments and/or work hours in violation of Section 8(a)(1) and (3) of

the Act. As controversy currently exists over the amounts of backpay due under the terms of the Board's Order, the undersigned Regional Director of the National Labor Relations Board for Region 32, pursuant to the authority duly conferred upon her by the Board, hereby issues this Compliance Specification and Notice of Hearing and alleges that the backpay due under the Board's Order, as enforced by the Ninth Circuit, is as follows:

BACKPAY PERIOD

1.

(A) The backpay period for the termination of Marquez begins on May 6, 2010, and ends on June 13, 2011.

(B) The backpay period for the termination of Pizano begins on May 6, 2010, and ends on June 1, 2011.

(C) The backpay period for eight employees whose shifts and/or hours were changed and identified below in paragraph 5, begins on May 6, 2010, and ends on June 30, 2011.

COMPUTATION OF GROSS BACKPAY OF WAGES

2.

(A) Pursuant to the Board Order, an appropriate measure of gross backpay for Reynoso, Salazar, Gutierrez, Guzman, Urias, and Velasquez is to restore the wages that they averaged for the 12 months prior to May 6, 2010, throughout the backpay period as computed in *Ogle Protection Service*, plus interest as computed and described in *New Horizons* and *Kentucky River*.

(B) An appropriate measure of gross backpay for Marquez and Pizano from May 6, 2010 through the date of their respective terminations is the formula described in paragraph 2(A). In addition, an appropriate measure of gross backpay for Marquez and Pizano starting on the date of their respective terminations, is to project the monthly earnings averaged for the 12 months prior to May 6, 2010, through the end of the backpay period, as prescribed in *F. W. Woolworth Co.*, plus interest as computed and described in *New Horizons* and *Kentucky River*.

(C) Consistent with the formulas described in paragraphs 2(A) and 2(B), **Appendix A** sets forth the average monthly earnings for each affected employee during the 12-month period prior to the start of the unfair labor practices on May 6, 2010.

(D) **Appendix B** sets forth the employees' monthly earnings during the backpay period.

(E) Earnings reflected in **Appendix A** and **B** were obtained through Respondent's payroll records and employee pay stubs. Where no records were provided, a reasonable estimate was calculated.

(F) Consistent with the formulas described in 2(A) and 2(B), **Appendix C** sets forth the difference between the employees' average monthly earnings and their earnings during the backpay period.

(G) The negative monetary figures reflected in **Appendix C** indicate months within the backpay period in which the employees earned more than their average monthly earnings.

- i. In keeping with the running totals principle pursuant to *Ogle Protection Service*, these negative figures are reflected but do not affect the total amount owed by the Respondent for months during which the affected employees' earnings fell short of the average.

- ii. For months with negative figures, the gross backpay owed by Respondent equals zero.
- iii. Negative monthly totals are disregarded for purposes of calculating interest.
- (H) Total gross backpay for each employee is the sum of all monthly gross backpay owed during the backpay period.

COMPUTATION OF NET BACKPAY OF WAGES AND WORK-RELATED EXPENSES

3.

(A) Net backpay for Reynoso, Salazar, Gutierrez, Guzman, Urias, and Velasquez equals gross backpay. As described in paragraph 5, net backpay for each employee is calculated on a quarterly basis for purposes of calculating interest. Calendar quarter gross backpay is calculated by taking the sum owed to each employee, as identified **Appendix C**, for each month in a calendar quarter.

(B) Net backpay of wages for Marquez and Pizano equals gross backpay only during months in the backpay period when they were employed by Respondent. For the period of time starting at their respective termination through reinstatement, gross backpay is the difference between each of their calendar quarter gross backpay less calendar quarter interim earnings. Calendar quarter gross backpay for the portion of the backpay period during which Marquez and Pizano were not employed by Respondent is calculated by taking the sum of each of their respective gross monthly average earnings as identified **Appendix A** for each month in a calendar quarter.

(C) Interim search-for-work and work-related expenses are necessary expenses incurred by Marquez and Pizano in seeking and holding interim employment, such as mileage

driven for job applications and/or interviews and additional commuting costs, which would not have been incurred but for the unlawful terminations.

(D) Mileage reimbursements as part of interim expenses are calculated by multiplying the quarterly mileage incurred by each employee times the standard mileage rate set by the U.S. General Services Administration during the relevant backpay quarter.

(E) Total backpay due for wages for each employee is the sum of net backpay and interim expenses, if applicable, plus daily compound interest and excess tax liability.

EXCESS TAX LIABILITY

4.

(A) In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the named employees are entitled to be compensated for the adverse tax consequences of receiving the lump-sum backpay award in a calendar year other than the year in which the income would have been paid had the Act not been violated. If not for the unfair labor practice committed by Respondent, the named employees would have been paid in the years 2010 and 2011, rather than exclusively in the year Respondent makes final payment in these cases.¹

(B) In order to determinate what the appropriate excess tax award should be, the amount of Federal and State taxes need to be determined for the backpay as if the monies were paid when they were earned throughout the backpay period, as described below in subparagraph 4(c). The amount of Federal and State taxes need to be calculated for the lump sum payment if the payment was made this year, as described below in subparagraph 4(d). The excess tax liability was calculated as the difference between these two amounts.

¹ The amount in excess tax liability in this Compliance Specification will need to be updated to reflect the actual year of payment.

(C) The amount of Taxable Income for each year is based on the calculations for backpay in this Compliance Specification for 2010 and 2011, and is summarized in Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2. Using this taxable income for the various years, Federal and State taxes were calculated using the Federal and State tax rate for the appropriate years.² The Federal rates are based on each named employee's filing status selection.³ The amount of taxes owed for 2010 and 2011 would have been the amounts set forth in Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2.

(D) The total amount of the lump sum award that is subject to this excess tax award is set forth in Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2.⁴ The lump sum is based on the backpay calculations described in this specification.⁵ The amount of taxes owed in 2017 is based on the current Federal and State tax rates and on the filing status of each named employee.⁶ The amount of taxes owed on the lump sum is calculated and set forth in Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2.

(E) The adverse tax consequence is the difference between the amount of taxes on the lump sum amount being paid in 2017 for Federal taxes and State taxes and the amount of taxes that would have been charged if these amounts were paid when the backpay was earned in 2010 and 2011 for Federal taxes and State taxes. The amounts calculated for excess tax liability in

² The actual Federal tax rates were used, while the State's average tax rate was used for these previous years.

³ This Compliance Specification assumes a filing status of Single Filer for each employee, subject to amendment if necessary.

⁴ The lump sum amount does not include interest on the amount of backpay owed. Interest should be included in the lump sum amount; however interest continues to accrue until the payment is made. The lump sum amount will need to be adjusted when backpay is paid to the discriminatee to include interest.

⁵ Although the backpay period continues to accrue to the present date, there is no excess tax liability for backpay that would have been earned in the year a lump sum award is made.

⁶ The actual Federal tax rates were used for the current year, while an average State tax rate for the current year was used.

Federal taxes and State taxes are set forth in Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2.

(F) The excess tax liability payment that is to be made to the employees is also taxable income and causes additional tax liabilities. Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2 also include a calculation for these supplemental taxes. This amount is called the incremental tax liability. The incremental tax includes all of the taxes that each employee will owe on the excess tax payment. This incremental tax is calculated using the Federal tax rate used for calculating taxes for the backpay award and that average State tax rate for 2017. These amounts are shown in Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2.

(G) The Total Excess Taxes is the total tax consequence for each employee receiving a lump-sum award covering a backpay period longer than 1-year. The total Excess Taxes owed to each employee, determined by adding the Excess Taxes and Incremental Taxes, is shown in Appendices D.2, E.2, F.2, G.2, H.2, I.2, J.2, and K.2.

DISCRIMINATEES AND BACKPAY COMPUTATIONS

5.

(A) **Marcial Barron Salazar**

- i. The net backpay due to Salazar is set forth and summarized by calendar quarter in **Appendix D.1**.
- ii. The excess tax liability due to Salazar is set forth in **Appendix D.2**.

(B) **Jesus Garcia Marquez**

- i. The net backpay, including quarterly interim earnings and expenses, due to Marquez is set forth and summarized by calendar quarter in **Appendix E.1**.

- ii. The excess tax liability due to Marquez is set forth in **Appendix E.2.**
- (C) **Efrain Gutiérrez Najera**
 - i. The net backpay due to Gutierrez is set forth and summarized by calendar quarter in **Appendix F.1.**
 - ii. The excess tax liability due to Gutierrez is set forth in **Appendix F.2.**
- (D) **Primitivo Guzman**
 - i. The net backpay due to Guzman is set forth and summarized by calendar quarter in **Appendix G.1.**
 - ii. The excess tax liability due to Guzman is set forth in **Appendix G.2.**
- (E) **Alberto Pizano**
 - i. The net backpay, including quarterly interim earnings and expenses, due to Pizano is set forth and summarized by calendar quarter in **Appendix H.1.**
 - ii. The excess tax liability due to Pizano is set forth in **Appendix H.2.**
- (F) **Miguel Reynoso**
 - i. The net backpay due to Reynoso is set forth and summarized by calendar quarter in **Appendix I.1.**
 - ii. The excess tax liability due to Reynoso is set forth in **Appendix I.2.**
- (G) **Jose Urias**
 - i. The net backpay due to Urias is set forth and summarized by calendar quarter in **Appendix J.1.**
 - ii. The excess tax liability due to Urias is set forth in **Appendix J.2.**
- (H) **Ceferino Urias Velasquez**

- i. The net backpay due to Velasquez is set forth and summarized by calendar quarter in **Appendix K.1**.
- ii. The excess tax liability due to Velasquez is set forth in **Appendix K.2**.

SUMMARY

6.

(A) Summarizing the facts and calculations specified in the above paragraphs and in Appendices A through K, inclusive, the obligation of Respondent to make whole the identified discriminatees in accordance with the Board's Order and the 9th Circuit Court's enforcement will be discharged as of the date of this Specification by total payment of **\$134,124**, including payment to them in the amounts opposite the employees' names as set forth in **Appendix L**, plus interest compounded on a daily basis until the date of payment, minus tax withholdings required by Federal and State law on the net backpay amounts.

(B) The Regional Director, or his designee, reserves the right to amend any or all of the provisions of this Specification including to reflect information not now known to the Regional Director.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Section 102.56 of the Board's Rules and Regulations, it must file an answer to the Compliance Specification. The answer must be **received by this office on or before December 21, 2017, or postmarked on or before December 20, 2017**. Unless filed electronically in a PDF format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that such answer be signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed. See Section 102.56(a). If the answer being filed electronically is a PDF document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a Compliance Specification is not a PDF file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission.

As to all matters set forth in the Compliance Specification that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of

gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and Regulations, a copy of which is attached. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge, and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures.

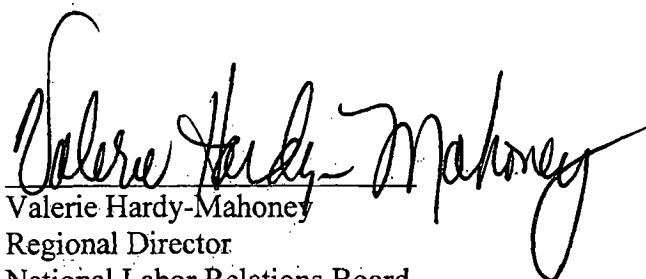
If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Compliance Specification are true. If the answer fails to deny allegations of the Compliance Specification in the manner required under Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations in the Compliance Specification are true and preclude Respondent from introducing any evidence controverting those allegations.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on February 20, 2018, at 9:00 a.m., at the Oakland Regional Office of the National Labor Relations Board, 1301 Clay Street, Suite 300N, Oakland, CA, 94612-5224, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Compliance Specification. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to

request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Oakland, California this 30th day of November 2017.

A handwritten signature in black ink, reading "Valerie Hardy-Mahoney", is written over a horizontal line.

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

Appendix A- Pre-ULP Earnings

Pre-ULP Monthly Earnings (May 2009-April 2010)														
	Employee Name	May-09	Jun-09	Jul-09	Aug-09	Sep-09	Oct-09	Nov-09	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	Average monthly earnings
1	Marcial Barron Salazar	3,800	3,335	4,180	3,965	3,875	4,670	4,760	4,470	3,053	3,260	4,970	4,535	\$4,073
2	Jesus Garcia Marquez	3,945	3,900	4,315	4,081	3,975	4,610	3,915	5,075	3,735	3,275	4,350	3,865	\$4,087
3	Efrain Gutierrez Najera	4,125	4,390	3,700	4,215	4,315	3,520	4,540	4,255	2,590	4,080	4,530	4,755	\$4,085
4	Primitivo Guzman	4,235	4,435	4,740	4,490	4,260	4,710	4,555	5,045	4,020	4,445	5,430	4,350	\$4,560
5	Alberto Pizano	3,755	4,655	4,400	4,045	4,505	5,305	4,500	5,215	3,585	5,100	2,790	4,830	\$4,390
6	Miguel Reynoso	4,995	3,605	4,730	4,635	4,820	5,730	5,015	5,450	4,130	4,440	5,710	4,335	\$4,800
7	Jose Urias	3,445	4,025	3,710	4,125	4,125	4,755	4,070	4,815	3,178	2,775	4,615	4,555	\$4,016
8	Ceferino Urias Velazquez	4,075	3,725	3,725	3,595	4,015	5,075	4,215	3,830	3,220	4,205	4,555	4,090	\$4,027

Appendix B - Backpay Period Earnings

Actual Earnings During Backpay Period (May 2010-June 2011)															
Employee Name	May-10	Jun-10	Jul-10	Aug-10	Sep-10	Oct-10	Nov-10	Dec-10	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	
1 Marcial Barron Salazar	3,625	1,850	3,545	3,580	4,050	4,420	5,150	5,290	4,475	3,585	4,985	5,215	5,045	4,250	
2 Jesus Garcia Marquez	3,160	3,295	3,810	3,675	690	0	0	0	0	0	0	0	0	2,240	
3 Efraín Gutierrez Najera	3,319	3,319	3,319	2,075	3,515	3,235	3,700	4,070	3,820	3,125	4,205	3,670	4,320	3,850	
4 Primitivo Guzman	3,505	2,275	3,415	3,060	3,815	2,730	3,705	3,885	3,460	2,540	4,455	4,350	4,105	3,715	
5 Alberto Pizano	3,815	3,500	1,940	2,270	3,705	3,618	2,255	0	0	0	0	0	0	3,720	
6 Miguel Reynoso	2,030	3,315	3,565	3,460	3,090	3,835	4,270	4,620	3,515	3,160	4,305	4,040	4,470	3,620	
7 Jose Urias	3,585	3,640	4,025	3,310	3,885	3,925	4,585	5,045	4,140	3,395	4,870	4,800	4,945	4,120	
8 Ceferino Urias Velazquez	3,055	3,370	4,330	2,910	3,965	4,300	4,650	5,110	3,705	3,170	3,768	3,768	3,768	3,768	

Appendix C - Gross Backpay

Gross Backpay Owed During Backpay Period (Average Monthly Earnings Minus Actual Earnings*)																
	Employee Name	May-10	Jun-10	Jul-10	Aug-10	Sep-10	Oct-10	Nov-10	Dec-10	Jan-11	Feb-11	Mar-11	Apr-11	May-11	Jun-11	Total Gross Backpay
1	Marcial Barron Salazar	448	2,223	528	493	23	-347	-1,077	-1,217	-402	488	-912	-1,142	-972	-177	\$4,201
2	Jesus Garcia Marquez	927	792	277	412	3,397	4,087	4,087	4,087	4,087	4,087	4,087	4,087	4,087	1,847	\$40,345
3	Efrain Gutierrez Najera	766	766	766	2,010	570	850	385	15	265	960	-120	415	-235	235	\$7,998
4	Primitivo Guzman	1,055	2,285	1,145	1,500	745	1,830	855	675	1,100	2,020	105	210	455	845	\$14,819
5	Alberto Pizano	575	890	2,450	2,120	685	773	2,135	4,390	4,390	4,390	4,390	4,390	4,390	670	\$36,643
6	Miguel Reynoso	2,770	1,485	1,235	1,340	1,710	965	530	-650	1,285	1,640	495	760	330	1,180	\$15,720
7	Jose Urias	431	376	-9	708	131	91	-569	-1,029	-124	621	-854	-784	-829	-104	\$2,356
8	Ceferino Urias Velazquez	972	657	-303	1,117	62	-273	-623	-1,083	322	857	259	259	259	259	\$5,023

*When monthly figure is less than zero, the amount owed by Respondent for that month is zero.

Appendix D.1-Salazar Net Backpay

Case Name: OS Transport
Case Number: 32-CA-025100

Claimant: Marcial Barron Salazar

Backpay period:

5/6/2010-6/30/2011

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	2,670		2,670	-	-	2,670
2010	3	Total	1,043		1,043	-	-	1,043
2010	4	Total	-		-	-	-	-
2011	1	Total	488		488	-	-	488
2011	2	Total	-		-	-	-	-
Totals					4,201	-	-	4,201

Appendix D.2-Salazar Excess Tax

Case Name:	OS Transport	Backpay period: 5/6/2010-6/30/2011	Interest calculated to:
Case Number:	32-CA-025100		
Claimant:	Marcial Barron Salazar		

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Marcial Barron Salazar**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	3,714	Single Filer	CA	371	201
2011	488	Single Filer	CA	49	25
Taxes Paid:				420	226
Sum '00 to '14	4,201	Single Filer	CA	420	300

2017 0

Excess Tax on Backpay:	0	74
Incremental Tax on Backpay:		15
Total Excess Tax on Backpay:	89	

**Interest on
Backpay:**

1,175

Tax on Interest:	117	84
Incremental Tax on Interest:	42	
Total Excess Tax on Interest:	243	

Additional Tax Liability: 0

Total Excess Tax Liability: 332

Appendix E.1-Marquez Net Backpay

Case Name: OS Transport
Case Number: 32-CA-025100

Backpay period:

5/6/2010-6/30/2011

Claimant: Jesus Garcia Marquez

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	1,719		1,719	-	-	1,719
2010	3	Total	4,085		4,085	-	-	4,085
2010	4	Total	12,260	2,100	10,160	663	-	10,823
2011	1	Total	12,260	4,550	7,710	1,221	-	8,932
2011	2	Total	10,020	3,850	6,170	913	-	7,083
Totals					29,845	2,797	-	32,642

Appendix E.2-Marquez Excess Tax

Case Name:	OS Transport	Backpay period: 5/6/2010-6/30/2011	Interest calculated to:
Case Number:	32-CA-025100		
Claimant:	Jesus Garcia Marquez		

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Jesus Garcia Marquez**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	16,627	Single Filer	CA	2,075	898
2011	16,015	Single Filer	CA	1,977	825
Taxes Paid:				4,053	1,723
Sum '00 to '14	32,642	Single Filer	CA	4,430	2,328

2017 0

Excess Tax on Backpay: 378 606
Incremental Tax on Backpay: 280
Total Excess Tax on Backpay: 1,263

**Interest on
Backpay:**

8,430

Tax on Interest: 1,265 601
Incremental Tax on Interest: 530
Total Excess Tax on Interest: 2,396

Additional Tax Liability: 618

Total Excess Tax Liability: 4,277

Appendix F.1-Gutierrez Net Backpay

Case Name: OS Transport

Case Number: 32-CA-025100

Claimant: Efrain Gutierrez Najera

Backpay period:

5/6/2010-6/30/2011

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	1,531		1,531	-	-	1,531
2010	3	Total	3,345		3,345	-	-	3,345
2010	4	Total	1,249		1,249	-	-	1,249
2011	1	Total	1,224		1,224	-	-	1,224
2011	2	Total	649		649	-	-	649
Totals					7,998	-	-	7,998

Appendix F.2-Gutierrez Excess Tax

Case Name:	OS Transport	Backpay period: 5/6/2010-6/30/2011	Interest calculated to:
Case Number:	32-CA-025100		
Claimant:	Efrain Gutierrez Najera		

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Efrain Gutierrez Najera**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	6,125	Single Filer	CA	612	331
2011	1,873	Single Filer	CA	187	96
Taxes Paid:				800	427
Sum '00 to '14	7,998	Single Filer	CA	800	571

2017 0

Excess Tax on Backpay:	0	143
Incremental Tax on Backpay:		30
Total Excess Tax on Backpay:	173	

**Interest on
Backpay:**

2,161

Tax on Interest:	216	154
Incremental Tax on Interest:	77	
Total Excess Tax on Interest:	447	

Additional Tax Liability: 66

Total Excess Tax Liability: 685

Appendix G.1-Guzman Net Backpay

Case Name: OS Transport

Case Number: 32-CA-025100

Claimant: Primitivo Guzman

Backpay period:

5/6/2010-6/30/2011

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	3,339		3,339	-	-	3,339
2010	3	Total	3,389		3,389	-	-	3,389
2010	4	Total	3,359		3,359	-	-	3,359
2011	1	Total	3,224		3,224	-	-	3,224
2011	2	Total	1,509		1,509	-	-	1,509
Totals					14,819	-	-	14,819

Appendix G.2-Guzman Excess Tax

Case Name:	OS Transport	Backpay period: 5/6/2010-6/30/2011	Interest calculated to:
Case Number:	32-CA-025100		
Claimant:	Primitivo Guzman		

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Primitivo Guzman**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	10,087	Single Filer	CA	1,094	545
2011	4,733	Single Filer	CA	473	244
Taxes Paid:				1,568	788
Sum '00 to '14	14,819	Single Filer	CA	1,757	1,057

2017 0

Excess Tax on Backpay: 189 269
Incremental Tax on Backpay: 130

Total Excess Tax on Backpay: 588

**Interest on
Backpay:**

3,958

Tax on Interest: 594 282
Incremental Tax on Interest: 249

Total Excess Tax on Interest: 1,125

Additional Tax Liability: 0

Total Excess Tax Liability: 1,713

Appendix H.1 - Pizano Net Backpay

Case Name: OS Transport
Case Number: 32-CA-025100

Claimant: Alberto Pizano

Backpay period:

5/6/2010-6/30/2011

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	1,466		1,466	-	-	1,466
2010	3	Total	5,256		5,256	-	-	5,256
2010	4	Total	7,299		7,299	61	-	7,359
2011	1	Total	13,171		13,171	4	-	13,175
2011	2	Total	9,451		9,451	-	-	9,451
Totals					36,643	65	-	36,708

Appendix H.2 - Pizano Excess Tax

Case Name:	OS Transport	Backpay period: 5/6/2010-6/30/2011	Interest calculated to:
Case Number:	32-CA-025100		
Claimant:	Alberto Pizano		

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Alberto Pizano**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	14,081	Single Filer	CA	1,693	760
2011	22,627	Single Filer	CA	2,969	1,165
Taxes Paid:				4,662	1,926
Sum '00 to '14	36,708	Single Filer	CA	5,040	2,618

2017 0

Excess Tax on Backpay:	378	693
Incremental Tax on Backpay:		304
Total Excess Tax on Backpay:	1,375	

**Interest on
Backpay:**

9,420	Tax on Interest:	1,413	672
	Incremental Tax on Interest:	593	
	Total Excess Tax on Interest:	2,678	

Additional Tax Liability: 1,154

Total Excess Tax Liability: 5,206

Appendix I.1-Reynoso Net Backpay

Case Name: OS Transport

Case Number: 32-CA-025100

Claimant: Miguel Reynoso

Backpay period:

5/6/2010-6/30/2011

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	4,254		4,254	-	-	4,254
2010	3	Total	4,284		4,284	-	-	4,284
2010	4	Total	1,494		1,494	-	-	1,494
2011	1	Total	3,419		3,419	-	-	3,419
2011	2	Total	2,269		2,269	-	-	2,269
Totals					15,720	-	-	15,720

Appendix I.2-Reynoso Excess Tax

Case Name:	OS Transport	Backpay period: 5/6/2010-6/30/2011	Interest calculated to:
Case Number:	32-CA-025100		
Claimant:	Miguel Reynoso		

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Miguel Reynoso**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	10,032	Single Filer	CA	1,086	542
2011	5,688	Single Filer	CA	569	293
Taxes Paid:				1,655	835
Sum '00 to '14	15,720	Single Filer	CA	1,892	1,121

2017 0

Excess Tax on Backpay:	237	287
Incremental Tax on Backpay:		149
Total Excess Tax on Backpay:	672	

**Interest on
Backpay:**

4,210

Tax on Interest:	632	300
Incremental Tax on Interest:	265	
Total Excess Tax on Interest:	1,197	

Additional Tax Liability: 0

Total Excess Tax Liability: 1,869

Appendix J.1-Urias Net Backpay

Case Name: OS Transport
Case Number: 32-CA-025100

Claimant: Jose Urias

Backpay period:

5/6/2010-6/30/2011

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	807		807	-	-	807
2010	3	Total	837		837	-	-	837
2010	4	Total	91		91	-	-	91
2011	1	Total	621		621	-	-	621
2011	2	Total	-		-	-	-	-
Totals					2,356	-	-	2,356

Appendix J.2-Urias Excess Tax

Case Name:	OS Transport	Backpay period: 5/6/2010-6/30/2011	Interest calculated to:
Case Number:	32-CA-025100		
Claimant:	Jose Urias		

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Jose Urias**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	1,735	Single Filer	CA	174	94
2011	621	Single Filer	CA	62	32
Taxes Paid:				236	126
Sum '00 to '14	2,356	Single Filer	CA	236	168

2017 0

Excess Tax on Backpay:	0	42
Incremental Tax on Backpay:		9
Total Excess Tax on Backpay:	51	

**Interest on
Backpay:**

643	Tax on Interest:	64	46
	Incremental Tax on Interest:	23	
	Total Excess Tax on Interest:	133	

Additional Tax Liability: 0
Total Excess Tax Liability: 184

Appendix K.1-Velasquez Net Backpay

Case Name: OS Transport

Case Number: 32-CA-025100

Backpay period:

Claimant: Ceferino Urias Velasquez

5/6/2010-6/30/2011

Interest
calculated to: 11/30/2017

Year	Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses	Net Backpay & Expenses
2010	2	Total	1,629		1,629	-	-	1,629
2010	3	Total	1,179		1,179	-	-	1,179
2010	4	Total	-		-	-	-	-
2011	1	Total	1,438		1,438	-	-	1,438
2011	2	Total	777		777	-	-	777
Totals					5,023	-	-	5,023

Appendix K.2-Velasquez Excess Tax

Case Name:	OS Transport	
Case Number:	32-CA-025100	Backpay period:
Claimant:	Ceferino Urias Velasquez	5/6/2010-6/30/2011
		Interest calculated to:

Qtr	Week End	Gross Backpay	Quarter Interim Earnings	Net Backpay	Interim Expenses	Medical Expenses
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Adjusted Taxes for Lump Sum Backpay

Case Name: **OS Transport**
Case Number: **32-CA-025100**
Claimant: **Ceferino Urias Velasquez**

Year	Taxable Income (Backpay)	Filing Status	State	Federal Tax	State Tax
2010	2,808	Single Filer	CA	281	152
2011	2,215	Single Filer	CA	222	114
Taxes Paid:				502	266
Sum '00 to '14	5,023	Single Filer	CA	502	358

2017 0

Excess Tax on Backpay: 0 93
Incremental Tax on Backpay: 19
Total Excess Tax on Backpay: 112

Interest on Backpay:

1,343

Tax on Interest: 134 96
Incremental Tax on Interest: 48
Total Excess Tax on Interest: 278

Additional Tax Liability: 0

Total Excess Tax Liability: 390

Appendix L - Summary

Summary of Monetary Liability*					
	Employee Name	Net Backpay	Interim Expenses	Excess Tax	Total
1	Marcial Barron Salazar	4,201		332	4,534
2	Jesus Garcia Marquez	29,845	2,797	4,277	36,918
3	Efrain Gutierrez Najera	7,998		685	8,683
4	Primitivo Guzman	14,819		1,713	16,532
5	Alberto Pizano	36,643	65	5,206	41,914
6	Miguel Reynoso	15,720		1,869	17,589
7	Jose Urias	2,356		184	2,540
8	Ceferino Urias Velasquez	5,023		390	5,413
	Total:	\$ 116,605	\$ 2,862	\$ 14,656	\$ 134,124

*Amounts do not include daily compound interest.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Cases: 32-CA-025100
32-CA-025399
32-CA-025490

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds thereafter must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request;

and

- (5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.
- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

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Attorneys for OS TRANSPORT LLC and
HCA MANAGEMENT, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OS TRANSPORT LLC and HCA
MANAGEMENT, INC., A SINGLE
EMPLOYER

CASE NO.: 32-CA-025100
32-CA-025399
32-CA-025490

and

ANSWER TO THE COMPLIANCE
SPECIFICATION

TEAMSTERS LOCAL NO. 350,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

COMES NOW Respondent OS TRANSPORT, INC. and HCA MANAGEMENT, INC.
and answers the Compliance Specification issued on November 30, 2017 as follows:

Introductory Paragraph: Respondent submits that the Regional Director's calculations of backpay to make the listed individuals whole are incorrect, as set forth more fully herein. Respondent further submits that none of the individuals named in the back pay specification are entitled to a back pay remedy because none of them were eligible to work in the United States during the period when the alleged unfair labor practices occurred, and are therefore ineligible to receive back pay pursuant to *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137.

1. (A) Respondent denies that the back pay period for Marquez' termination begins on May 6, 2010, as he was not terminated until October 14, 2010. Respondent denies that the back

1 pay period for Marquez' termination ends on June 13, 2011, as he was offered reinstatement
2 with the Respondent on May 23, 2011. Respondent submits that Marquez is not entitled to a
3 back pay remedy because he was not eligible to work in the United States at the time of the
4 alleged unfair labor practices, and is therefore ineligible to receive back pay pursuant to
5 *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137.

6 1. (B) Respondent denies that the back pay period for Pisano's termination begins on
7 May 6, 2010, as he was not terminated until November 19, 2010. Respondent denies that the
8 back pay period for Pisano's termination ends on June 1, 2011, as he was offered reinstatement
9 with the Respondent on May 23, 2011. Respondent submits that Pisano is not entitled to a back
10 pay remedy because he was not eligible to work in the United States at the time of the alleged
11 unfair labor practices, and is therefore ineligible to receive back pay pursuant to *Hoffman*
12 *Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137.

13 1. (C) Respondent admits that the back pay period for the alleged changes in shifts and
14 hours begins on May 6, 2010. Respondent denies that the back pay period for the alleged
15 changes in shifts and hours ends on June 30, 2011, as the alleged changes in shifts and hours
16 were restored to the status quo ante on or before May 31, 2011. Respondent submits that none
17 of the named individuals are entitled to a back pay remedy because they were not eligible to
18 work in the United States at the time of the alleged unfair labor practices, and are therefore
19 ineligible to receive back pay pursuant to *Hoffman Plastic Compounds, Inc. v. NLRB* (2002)
20 535 U.S. 137.

21 2. (A) Respondent submits that the Regional Director's calculations of back pay are
22 based on a misreading or misapplication of *Ogle Protection Service*, as the calculations are
23 based on a comparison of actual monthly earnings to the individual's averaged prior year
24 monthly earnings, but only includes months when the individual earned less than the average,
25 disregarding months where the individual earned more than the average from the prior year.
26 Respondent submits that the proper calculation of back pay is based on the difference in pay
27 over the entire twelve month period of May 2010 to April 2011 as compared to the prior twelve
28 month period of May 2009 to April 2010, as set forth in Appendix 1 attached hereto, plus the

1 difference in pay between May 2011 and May 2009. Respondent submits that if an individual
2 earned more in the period of May 2010 to May 2011 based on the comparisons in Appendix 1
3 and 2 than in the prior comparable period, the individual should not be entitled to backpay.
4 This method of calculation is sufficient to make the affected individuals whole and avoids
5 granting an unearned windfall.

6 2. (B) Respondent submits that the back pay calculations for Marquez the period of
7 May 6, 2010 through the date of their termination is incorrect, as Marquez is not owed backpay
8 for the month of September, 2010, since he was on leave pursuant to his own request during
9 most of the month. Respondent submits that the appropriate measure of gross backpay for
10 Marquez and Pisano, if back pay is owed starting on the date of their respective terminations,
11 would be to project the monthly earnings averaged for the twelve month period prior to the date
12 of their respective terminations. In addition, the back pay calculation for Marquez and Pisano
13 for the period after their termination through the date of the offer of reinstatement is incorrect
14 as backpay is awarded beyond the date when each was offered reinstatement, and no backpay is
15 owed to Marquez for the period between the offer of reinstatement and June 13, as Marquez
16 chose not to return until then, missing two weeks of potential earnings. Further, the backpay
17 calculation for Pisano and Marquez does not take into account all of their interim earnings from
18 other employment, or alternatively, the amount of interim earnings they could have received if
19 they had engaged in reasonable efforts to secure other employment and mitigate their damages.

20 2. (C) Respondent submits that the “average monthly earnings” calculated on Appendix
21 A is not the proper measurement for calculating back pay where the finding was that hours or
22 work assignments were reduced, as the nature of Respondent’s business was seasonal and an
23 annualized comparison is more appropriate, as set forth in Appendix 1 and 2. Respondent
24 submits that the actual monthly earnings for the 12 months prior to May 6, 2010 as set forth in
25 Appendix A are correct.

26 2. (D) Respondent admits that the actual earnings during the back pay period set forth
27 on Appendix B are correct.

28 2. (E) Respondent submits that the “average monthly earnings” calculated on Appendix

1 A is not the proper measurement for calculating back pay where the finding was that hours or
2 work assignments were reduced, as the nature of Respondent's business was seasonal and and
3 an annualized comparison is more appropriate, as set forth in Appendix 1 and 2.

4 2 (F) Respondent submits that the gross back pay calculation in Appendix C is
5 incorrect, because it is not based on an annualized comparison of actual earnings, but instead is
6 calculated by subtracting actual earnings per month from the average monthly earnings amount.
7 This is not the proper measurement for calculating back pay where the finding was that hours
8 or work assignments were reduced. Further, the total gross back pay amount does not take into
9 account those months when the actual earnings exceeded either the average monthly earnings
10 or the actual earnings. Where the actual earnings in the back pay period were higher than the
11 previous year, such amounts should be offset against those months when actual earnings were
12 lower than the previous year, so that on an annualized basis the employees are made whole,
13 instead of receiving an amount that is higher than what they received in the prior year, which
14 would constitute an unearned windfall. Respondent further submits that Marquez is not owed
15 backpay for the month of September, 2010, as he was on leave pursuant to his own request
16 during most of the month. In addition, the back pay calculation for Marquez and Pisano for
17 the period after their termination through the date of the offer of reinstatement is incorrect as
18 backpay is awarded beyond the date when each was offered reinstatement, and no backpay is
19 owed to Marquez for the period between the offer of reinstatement and June 13, as Marquez
20 chose not to return until then, missing two weeks of potential earnings. Further, the backpay
21 calculation for Pisano and Marquez does not take into account all of their interim earnings from
22 other employment, or alternatively, the amount of interim earnings they could have received if
23 they had engaged in reasonable efforts to secure other employment and mitigate their damages.

24 2 (G) Respondent submits that the negative monetary figures in Appendix C, reflecting
25 months where the employee's actual earnings exceeded the average monthly earnings, should
26 have been included in the calculations as an offset against those months when actual earnings
27 were lower than the previous year, so that on an annualized basis the employees are made
28 whole, instead of receiving an amount that is higher than what they received in the prior year,

1 which would constitute an unearned windfall.

2 2 (G)(i) Respondent submits that the “running totals” principle under *Ogle Protection*
3 *Service* is inapplicable in the present case, and that the negative figures reflected in Appendix C
4 should have affected the total amount owed by Respondent by comparing total earnings on an
5 annualized basis as set forth in Appendix 1 and 2.

6 2 (G)(ii) Respondent submits that for months with negative figures, the amount should
7 be offset against those months where the affected employee’s earnings were below the
8 comparable month from the prior year, so that on an annualized basis the employees are made
9 whole, instead of receiving an amount that is higher than what they received in the prior year,
10 which would constitute an unearned windfall.

11 2 (G)(iii) Respondent submits that for months with negative figures, the amount should
12 be offset against those months where the affected employee’s earnings were below the
13 comparable month from the prior year, so that on an annualized basis the employees are made
14 whole, instead of receiving an amount that is higher than what they received in the prior year,
15 which would constitute an unearned windfall. This reduction in back pay owed should be
16 taken into account in calculating interest.

17 2 (H) Respondent submits that the gross back pay calculation in Appendix C is
18 incorrect, because it is not based on an annualized comparison of actual earnings, but instead is
19 calculated by subtracting actual earnings per month from the average monthly earnings amount.
20 This is not the proper measurement for calculating back pay where the finding was that hours
21 or work assignments were reduced. Further, the total gross back pay amount does not take into
22 account those months when the actual earnings exceeded either the average monthly earnings
23 or the actual earnings. Where the actual earnings in the back pay period were higher than the
24 previous year, such amounts should be offset against those months when actual earnings were
25 lower than the previous year, so that on an annualized basis the employees are made whole,
26 instead of receiving an amount that is higher than what they received in the prior year, which
27 would constitute an unearned windfall. Respondent further submits that Marquez is not owed
28 backpay for the month of September, 2010, as he was on leave pursuant to his own request

1 during most of the month. In addition, the back pay calculation for Marquez and Pisano for the
2 period after their termination through the date of the offer of reinstatement is incorrect as
3 backpay is awarded beyond the date when each was offered reinstatement, and no backpay is
4 owed to Marquez for the period between the offer of reinstatement and June 13, as Marquez
5 chose not to return until then, missing two weeks of potential earnings. Further, the backpay
6 calculation for Pisano and Marquez does not take into account all of their interim earnings from
7 other employment, or alternatively, the amount of interim earnings they could have received if
8 they had engaged in reasonable efforts to secure other employment and mitigate their damages.

9 3. (A) Respondent submits that the net backpay calculations for the named individuals
10 as set forth in Appendix C are incorrect, for the reasons stated herein.

11 3. (B) Respondent submits that the net backpay calculations for Marquez and Pisano
12 are incorrect, for the reasons stated herein. Respondent admits that for the period starting at
13 their respective dates of termination through offer of reinstatement, gross backpay would be the
14 difference between calendar quarter gross backpay less calendar quarter interim earnings, but
15 submits that the interim earnings reflected in the Compliance Specification are incorrect.

16 3. (C) Respondent submits that interim search-for-work and work-related expenses
17 should not be awarded to Marquez and Pisano, as such remedy was not requested in the
18 Complaint nor ordered by the NLRB in the decision on the underlying case. Respondent
19 further submits the interim search-for-work and work-related expenses formula adopted in *King*
20 *Soopers*, 364 NLRB No. 93 (2016) was wrongly adopted, and should not be applied
21 retroactively. Respondent further submits that the requested search-for-work and work-related
22 expenses are incorrectly calculated.

23 3. (D) Respondent submits that mileage reimbursements should not be awarded for the
24 reasons stated herein.

25 3. (E) Respondent submits that that total backpay due for each named individual is
26 incorrect, for the reasons stated herein, and that excess tax liability should not be awarded.

27 4. (A) Respondent submits that excess tax liability cannot be awarded as it was not
28 requested as a remedy in the Complaint nor awarded by the Administrative Law Judge.

1 Respondent further submits that the decision upon which the award of excess tax liability is
2 based, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), was wrongly
3 decided and should be reversed. Respondent further submits that none of the named
4 individuals will suffer from adverse tax liability from the payment of backpay, and the
5 Regional Director's calculations of excess tax liability are based on faulty calculations of
6 backpay owed and are incorrectly calculated, for reasons including any backpay award will not
7 be paid until tax year 2018 at the earliest.

8 4. (B) Respondent submits that excess tax liability cannot be awarded as it was not
9 requested as a remedy in the Complaint nor awarded by the Administrative Law Judge.
10 Respondent further submits that the decision upon which the award of excess tax liability is
11 based, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), was wrongly
12 decided and should be reversed. Respondent further submits that none of the named
13 individuals will suffer from adverse tax liability from the payment of backpay, and the
14 Regional Director's calculations of excess tax liability are based on faulty calculations of
15 backpay owed and are incorrectly calculated, for reasons including any backpay award will not
16 be paid until tax year 2018 at the earliest.

17 4. (C) Respondent submits that excess tax liability cannot be awarded as it was not
18 requested as a remedy in the Complaint nor awarded by the Administrative Law Judge.
19 Respondent further submits that the decision upon which the award of excess tax liability is
20 based, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), was wrongly
21 decided and should be reversed. Respondent further submits that none of the named
22 individuals will suffer from adverse tax liability from the payment of backpay, and the
23 Regional Director's calculations of excess tax liability are based on faulty calculations of
24 backpay owed and are incorrectly calculated, for reasons including any backpay award will not
25 be paid until tax year 2018 at the earliest.

26 4. (D) Respondent submits that excess tax liability cannot be awarded as it was not
27 requested as a remedy in the Complaint nor awarded by the Administrative Law Judge.
28 Respondent further submits that the decision upon which the award of excess tax liability is

1 based, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), was wrongly
2 decided and should be reversed. Respondent further submits that none of the named
3 individuals will suffer from adverse tax liability from the payment of backpay, and the
4 Regional Director's calculations of excess tax liability are based on faulty calculations of
5 backpay owed and are incorrectly calculated, for reasons including any backpay award will not
6 be paid until tax year 2018 at the earliest.

7 4. (E) Respondent submits that excess tax liability cannot be awarded as it was not
8 requested as a remedy in the Complaint nor awarded by the Administrative Law Judge.
9 Respondent further submits that the decision upon which the award of excess tax liability is
10 based, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), was wrongly
11 decided and should be reversed. Respondent further submits that none of the named
12 individuals will suffer from adverse tax liability from the payment of backpay, and the
13 Regional Director's calculations of excess tax liability are based on faulty calculations of
14 backpay owed and are incorrectly calculated, for reasons including any backpay award will not
15 be paid until tax year 2018 at the earliest.

16 4. (F) Respondent submits that excess tax liability cannot be awarded as it was not
17 requested as a remedy in the Complaint nor awarded by the Administrative Law Judge.
18 Respondent further submits that supplemental or incremental tax liability cannot be awarded as
19 it was not requested as a remedy in the Complaint nor awarded by the NLRB in its decision.
20 Respondent further submits that the decision upon which the award of excess tax liability is
21 based, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), was wrongly
22 decided and should be reversed. Respondent further submits that none of the named
23 individuals will suffer from adverse tax liability from the payment of backpay, and the
24 Regional Director's calculations of incremental tax liability are based on faulty calculations of
25 backpay owed and are incorrectly calculated, for reasons including any backpay award will not
26 be paid until tax year 2018 at the earliest.

27 4. (G) Respondent submits that excess tax liability cannot be awarded as it was not
28 requested as a remedy in the Complaint nor awarded by the Administrative Law Judge.

Respondent further submits that supplemental or incremental tax liability cannot be awarded as it was not requested as a remedy in the Complaint nor awarded by the NLRB in its decision. Respondent further submits that the decision upon which the award of excess tax liability is based, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), was wrongly decided and should be reversed. Respondent further submits that none of the named individuals will suffer from adverse tax liability from the payment of backpay, and the Regional Director's calculations of Total Excess Tax liability are based on faulty calculations of backpay owed and are incorrectly calculated, for reasons including any backpay award will not be paid until tax year 2018 at the earliest.

5. (A) (i) Respondent submits that the net backpay allegedly due to Salazar set forth in Appendix D.1. is not owed by Respondent, either in whole or in part, for the reasons stated herein.

5. (A) (ii) Respondent submits that it does not owe Salazar for excess tax liability, for the reasons stated herein.

5. (B) (i) Respondent submits that the net backpay allegedly due to Marquez set forth in Appendix E.1. is not owed by Respondent, either in whole or in part, for the reasons stated herein.

5. (B) (ii) Respondent submits that it does not owe Marquez for excess tax liability, for the reasons stated herein.

5. (C) (i) Respondent submits that the net backpay allegedly due to Gutierrez set forth in Appendix F.1. is not owed by Respondent, either in whole or in part, for the reasons stated herein.

5. (C) (ii) Respondent submits that it does not owe Gutierrez for excess tax liability, for the reasons stated herein.

5. (D) (i) Respondent submits that the net backpay allegedly due to Guzman set forth in Appendix G.1. is not owed by Respondent, either in whole or in part, for the reasons stated herein.

5. (D) (ii) Respondent submits that it does not owe Guzman for excess tax liability, for

1 the reasons stated herein.

2 5. (E) (i) Respondent submits that the net backpay allegedly due to Pisano set forth in
3 Appendix H.1. is not owed by Respondent, either in whole or in part, for the reasons stated
4 herein.

5 5. (E) (ii) Respondent submits that it does not owe Pisano for excess tax liability, for
6 the reasons stated herein.

7 5. (F) (i) Respondent submits that the net backpay allegedly due to Reynoso set forth
8 in Appendix I.1. is not owed by Respondent, either in whole or in part, for the reasons stated
9 herein.

10 5. (F) (ii) Respondent submits that it does not owe Reynoso for excess tax liability, for
11 the reasons stated herein.

12 5. (G) (i) Respondent submits that the net backpay allegedly due to Urias set forth in
13 Appendix J.1. is not owed by Respondent, either in whole or in part, for the reasons stated
14 herein.

15 5. (G) (ii) Respondent submits that it does not owe Urias for excess tax liability, for the
16 reasons stated herein.

17 5. (H) (i) Respondent submits that the net backpay allegedly due to Velasquez set forth
18 in Appendix K.1. is not owed by Respondent, either in whole or in part, for the reasons stated
19 herein.

20 5. (H) (ii) Respondent submits that it does not owe Velasquez for excess tax liability,
21 for the reasons stated herein.

22 6. (A) Respondent submits that it does not owe the backpay and excess tax liability set
23 forth in the Compliance Specification, either in whole or in part, for the reasons stated herein.

24 6. (B) The Regional Director should not be permitted to amend the Compliance
25 Specification if she did not properly plead the necessary facts to support the claimed amount of
26 back pay or excess tax liability.

27 For the foregoing reasons, Respondent hereby prays that the Compliance Specification
28 be denied in its entirety.

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Dated: December 27, 2017

CUMMINS & WHITE, LLP

By: 

Erick J. Becker, P.C.
Attorneys for OS TRANSPORT LLC

STATE OF CALIFORNIA)
COUNTY OF ORANGE) SS.

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 2424 S.E. Bristol Street, Suite 300, Newport Beach, CA 92660-0764.

Larry Daugherty
Business Representative
Teamsters Union Local 350
295 89th Street, Suite 304
Daly City, CA 94015

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Executed on December 27, 2017, at Newport Beach, California.

Ellen Cline

Appendix 1 Gross Backpay for Change to Shifts and Hours

Based on Comparison of Earnings Between May 2009 – April 2010 to May 2010 – April 2011

Employee Name	2009 period earnings	2010 period earnings	Total Gross Backpay
Marcial Barron Salazar	\$48,873	\$49,770	\$0
Efrain Najera	\$49,015	\$41,372	\$7,643
Primitivo Guzman	\$54,715	\$41,195	\$13,250
Miguel Reynoso	\$57,595	\$43,205	\$14,390
Jose Urias	\$48,193	\$49,205	\$0
Ceferino Urias Velasquez	\$48,324	\$46,101	\$2,223

Appendix 2 Gross Backpay for Change to Shifts and Hours

Based on Comparison of Earnings Between May 2009 and May 2011

Employee Name	2009 period earnings	2011 period earnings	Total Gross Backpay
Marcial Barron Salazar	\$3800	\$5045	\$0
Efrain Najera	\$4125	\$4370	\$0
Primitivo Guzman	\$4235	\$4105	\$130
Miguel Reynoso	\$4995	\$4470	\$525
Jose Urias	\$3445	\$4945	\$0
Ceferino Urias Velasquez	\$4075	\$3768	\$307

Appendix 3 Total Gross Backpay for Change to Shifts and Hours

For period of April 2010 through May 2011

Employee Name	Total Gross Backpay
Marcial Barron Salazar	\$0
Efrain Najera	\$7,643
Primitivo Guzman	\$13,380
Miguel Reynoso	\$14,915
Jose Urias	\$0
Ceferino Urias Velasquez	\$2,530

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**OS TRANSPORT LLC AND
HCA MANAGEMENT, INC.
A SINGLE EMPLOYER**

and

**TEAMSTERS LOCAL NO. 350,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

**Cases: 32-CA-025100
32-CA-025399
32-CA-025490**

Dated: February 5, 2018

AFFIDAVIT OF SERVICE OF MOTION FOR A BILL OF PARTICULARS

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Erick J. Becker, Esq.
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National Labor Relations Board
Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103
E-FILE

February 5, 2018

Date

Ida Lam, Designated Agent of NLRB

Name



Signature