

**Nos. 18-1165 & 18-1171**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-  
APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MICHAEL CETTA, INC.,	)	
d/b/a SPARKS RESTAURANT,	)	
	)	Nos. 18-1165
Petitioner/Cross-Respondent	)	18-1171
	)	
v.	)	Board Case Nos.
	)	02-CA-142626
NATIONAL LABOR RELATIONS BOARD,	)	02-CA-144852
	)	
Respondent/Cross-Petitioner	)	
<hr/>	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

**A. Parties and Amici**

Michael Cetta, Inc., d/b/a Sparks Restaurant (“Sparks”) is the Petitioner in case No. 18-1165, and the Cross-Respondent in case No. 18-1171. The Board is the Respondent in case No. 18-1165, and the Cross-Petitioner in case No. 18-1171. United Food and Commercial Workers Local 342 was the charging party before the Board.

**B. Rulings under Review**

The case under review is a Decision and Order issued by the Board against Sparks in Board Case Nos. 02-CA-142626 and 02-CA-144852, entitled *Michael*

*Cetta, Inc., d/b/a Sparks Restaurant*, and reported at 366 NLRB No. 97, 2018 WL 2387584 (May 24, 2018).

**C. Related Cases**

The ruling under review was not previously before this or any other court, and Board counsel is not aware of any related cases currently pending or about to be presented in this or any other court.

s/ David Habenstreit  
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Dated at Washington, DC  
this 11th day of March 2019

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page</b>
Jurisdictional statement.....	1
Statement of issues.....	2
Relevant statutory provisions.....	3
Statement of the case.....	3
I. Statement of relevant findings of fact .....	4
A. Background .....	4
B. The December 5 strike; Sparks asks an employee if the Union could be voted out.....	4
C. The December 10 strike and its aftermath .....	5
D. Procedural history .....	9
II. The Board’s conclusions and Order.....	10
Summary of argument.....	11
Argument.....	14
I. Substantial evidence supports the Board’s finding that Sparks violated Section 8(a)(3) and (1) of the Act by failing to reinstate employees despite their unconditional offer to return to work .....	14
A. Standard of review for Board decisions .....	14

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page</b>
B. Striking employees who offer to return to work unconditionally are entitled to immediate reinstatement unless their employer asserts a legitimate business justification for its refusal .....	15
1. To permanently replace striking employees, the employer and the replacements must reach a mutual understanding about the permanent nature of their employment before the strikers unconditionally offer to return to work .....	17
2. Sparks failed to show that the replacement employees accepted its offers of permanent employment before the strikers unconditionally offered to return to work .....	18
3. Sparks’s procedural challenges are unavailing .....	24
a. Sparks’s estoppel and due-process claims lack merit.....	25
b. The Board reasonably drew an adverse inference from Sparks’s failure to introduce daily and weekly tip records for December 15 to 19, 2014 .....	32
c. The Board was within its discretion to deny Sparks’s motion to reopen the record, but even if the Court holds otherwise, the Board’s error was harmless.....	35
C. Sparks failed to show that its failure to rehire striking employees was due to an unprecedented drop in business .....	36
1. Factual background.....	37
2. Sparks’s business-decline argument fails because business was still at its peak when the strike ended.....	38

**TABLE OF CONTENTS**

<b>Headings</b>	<b>Page</b>
II. Sparks violated Section 8(a)(3) and (1) of the Act by discharging employees engaged in lawful economic strike .....	40
A. Substantial evidence supports the Board’s finding that Sparks’s conduct created an ambiguity that caused employees reasonably to believe they were discharged.....	41
B. Sparks’s many challenges to the Board’s unlawful-discharge finding are all equally meritless .....	43
III. The Board is entitled to summary enforcement of its finding that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the union.....	52
Conclusion .....	53

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
* <i>Avery Heights (Avery Heights I)</i> , 343 NLRB 1301 (2004) .....	47, 48
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011) .....	14
<i>Care One at Madison Ave., LLC v. NLRB</i> , 832 F.3d 351 (D.C. Cir. 2016) .....	17, 26
<i>CC1 Ltd. Partnership v. NLRB</i> , 898 F.3d 26 (D.C. Cir. 2018) .....	52
<i>Circus Casinos, Inc.</i> , 366 NLRB No. 110, 2018 WL 3020212 (June 15, 2018).....	36
* <i>Consolidated Delivery &amp; Logistics, Inc.</i> , 337 NLRB 524, 526 (2002), <i>enforced</i> , 63 F. App’x 520 (D.C. Cir. 2003).....	17-18, 20, 21, 26
<i>Corrections Corporation of America</i> , 347 NLRB 632 (2006) .....	52
<i>Desert Hospital v. NLRB</i> , 91 F.3d 187 (D.C. Cir. 1996) .....	26
* <i>Detroit Newspaper Agency</i> , 340 NLRB 1019 (2003) .....	16, 17, 26
<i>Diamond Walnut Growers, Inc. v. NLRB</i> , 113 F.3d 1259 (D.C. Cir. 1997).....	16
* <i>Elastic Stop Nut Division of Harvard Industries, Inc. v. NLRB</i> , 921 F.2d 1275 (D.C. Cir. 1990).....	30, 41, 45

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Gibson Greetings, Inc.</i> , 310 NLRB 1286 (1993) .....	22-23
<i>Gibson Greetings, Inc. v. NLRB</i> , 53 F.3d 385 (D.C. Cir. 1995) .....	23, 34
<i>Hialeah Hospital</i> , 343 NLRB 391 (2004) .....	52
<i>H&amp;F Binch Co.</i> , 188 NLRB 720 (1971) .....	23
<i>Hot Shoppes, Inc.</i> , 146 NLRB 802 (1964) .....	47
* <i>International Union, United Automobile, Aerospace &amp; Agricultural Implement Workers of America v. NLRB</i> , 459 F.2d 1329 (D.C. Cir. 1972) .....	31, 32
* <i>Jones Plastic &amp; Engineering Co.</i> , 351 NLRB 61 (2007) .....	17, 34
* <i>Kolkka Tables &amp; Finnish-American Saunas</i> , 335 NLRB 844 (2001) .....	29-30, 41, 42
* <i>Laidlaw Corp.</i> , 171 NLRB 1366 (1968) .....	16, 40
<i>Masters Pharmaceutical, Inc. v. Drug Enforcement Administration</i> , 861 F.3d 206 (D.C. Cir. 2017) .....	25
<i>National Conference of Firemen &amp; Oilers, SEIU v. NLRB</i> , 145 F.3d 380 (D.C. Cir. 1998) .....	50
* <i>New England Health Care Employees Union v. NLRB (Avery Heights II)</i> , 448 F.3d 189 (2d Cir. 2006) .....	47, 48

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>NLRB v. Champ Corp.</i> , 933 F.2d 688 (9th Cir. 1990) .....	41
<i>NLRB v. Erie Resistor Corp.</i> , 373 U.S. 221 (1963).....	16
* <i>NLRB v. Fleetwood Trailer Co.</i> , 389 U.S. 375 (1967).....	16, 41
<i>NLRB v. International Van Lines</i> , 409 U.S. 48 (1972).....	41
<i>NLRB v. Mackay Radio &amp; Telephone Co.</i> , 304 U.S. 333 (1938).....	15, 17
<i>Oberthur Technologies of American Corp. v. NLRB</i> , 865 F.3d 719 (D.C. Cir. 2017).....	15
<i>Pennypower Shopping News, Inc. v. NLRB</i> , 726 F.2d 626 (10th Cir. 1984) .....	41-42
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999).....	35
<i>Road Sprinkler Fitters Local Union No. 669 v. NLRB</i> , 681 F.2d 11 (D.C. Cir. 1982).....	17
<i>SFO Good-Nite Inn, LLC v. NLRB</i> , 700 F.3d 1 (D.C. Cir. 2012).....	21
<i>Spurlino Materials, LLC v. NLRB</i> , 805 F.3d 1131 (D.C. Cir. 2015).....	16
<i>Supervalu, Inc.</i> , 347 NLRB 404 (2006) .....	18, 23

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Solar Turbines Inc.</i> , 302 NLRB 14 (1991) .....	18
<i>Target Rock Corp.</i> , 324 NLRB 373 (1997), <i>enforced</i> , 172 F.3d 921 (D.C. Cir. 1998) .....	18
<i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001) .....	31-32
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951) .....	14
<i>Veritas Health Services, Inc. v. NLRB</i> , 895 F.3d 69 (D.C. Cir. 2018) .....	26, 44
<i>Wayneview Care Central v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011) .....	14

## TABLE OF AUTHORITIES

<b>Statutes:</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2(3) (29 U.S.C. § 152(3)).....	15, 40
Section 7 (29 U.S.C. § 157) .....	10, 16, 52
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 9, 10, 14, 16, 40, 41, 52
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	2, 3, 9, 10, 14, 16, 40, 41
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	1, 2, 14
Section 10(f) (29 U.S.C. § 160(f)).....	1, 2
Section 13 (29 U.S.C. § 163) .....	15
 <b>Rules and regulations</b>	
29 C.F.R. § 102.45(b) .....	39
29 C.F.R. § 102.46 .....	39
29 C.F.R. § 102.48(c).....	35
29 C.F.R. § 102.48(c)(1) .....	35, 36
 Federal Rule of Appellate Procedure 28(a)(8)(A) .....	 52
Federal Rule of Civil Procedure 8(d)(3) .....	29

## **GLOSSARY**

<b>A</b>	Joint Appendix filed by Michael Cetta, Inc., d/b/a Sparks Restaurant
<b>The Act</b>	National Labor Relations Act, 29 U.S.C. § 151 et seq.
<b>The Board</b>	National Labor Relations Board
<b>Br.</b>	Opening brief of Michael Cetta, Inc., d/b/a Sparks Restaurant
<b>The Complaint</b>	Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing issued May 29, 2015.
<b>The General Counsel</b>	Counsel for the Board's General Counsel
<b>SA</b>	Supplemental Appendix filed by the Board
<b>Sparks</b>	Michael Cetta, Inc., d/b/a Sparks Restaurant
<b>The Union</b>	United Food and Commercial Workers Local 342

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**ON PETITION FOR REVIEW AND CROSS-  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition for review of Michael Cetta, Inc., d/b/a Sparks Restaurant (“Sparks”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Decision and Order against Sparks, which is reported at 366 NLRB No. 97 (May 24, 2018). The Board’s Decision and Order is final under Section 10(e) and (f) of the National

Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151 et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). Sparks’s petition for review and the Board’s cross-application for enforcement are timely, as the Act places no time limitation on such filings. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, which allows the Board, in that circumstance, to cross-apply for enforcement. *Id.* § 160(f), (e).

### **STATEMENT OF ISSUES**

1. Whether substantial evidence supports the Board’s finding that Sparks violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate striking employees following their unconditional offer to return to work.
2. Whether substantial evidence supports the Board’s finding that Sparks violated Section 8(a)(3) and (1) of the Act by discharging employees who engaged in a lawful economic strike.
3. Whether the Court should summarily enforce the Board’s finding that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw their support from United Food and Commercial Workers Local 342.

## **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

## **STATEMENT OF THE CASE**

In July 2013, the Board certified United Food and Commercial Workers Local 342 ("the Union") as the exclusive collective-bargaining representative for Sparks's employees. But 18 months later, in December 2014, Sparks and the Union had yet to agree to a contract. Frustrated by what they perceived to be Sparks's foot dragging, most unit employees decided to go on strike. After about 10 days, the employees offered unconditionally to return to work, but Sparks refused to reinstate them and discharged them instead.

The Board found that Sparks violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by failing and refusing to reinstate employees engaged in an economic strike and by discharging them. The Board also found that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the Union. The Board seeks enforcement of its Order in full.

## **I. STATEMENT OF RELEVANT FINDINGS OF FACT**

### **A. Background**

Sparks operates a restaurant in New York, NY. (A4; SA46.)<sup>1</sup> Sparks's management consists of Michael and Steven Cetta, respectively president and vice president, office manager Shailesh Desai, and 5 managers referred to as Maître d's. (A4; SA1, 44-47.) Sparks also retains a human-resources consultant, Susan Edelstein. (A4; SA51.)

In July 2013, the Union was certified as the exclusive collective-bargaining representative of a unit consisting of Sparks's waiters and bartenders. (A4; A137-38.) Around that time, waiters Valjon Hajdini and Kristofer Fuller became shop stewards and members of the Union's bargaining committee. (A4; SA33.) The parties held several negotiating sessions over the next 18 months but were unable to reach a collective-bargaining agreement. (A4; A138.)

### **B. The December 5 Strike; Sparks Asks an Employee if the Union Could Be Voted Out**

On December 5, 2014, unit employees went on strike in frustration over the lack of progress with bargaining. (A4; SA14.) After about 2 hours, the employees returned to work unconditionally. (A4; SA14.) The next day, Maître d' Valter

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<sup>1</sup> Record abbreviations in this brief are explained in the Glossary. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Kapovic told Hajdini that he was interested in buying the restaurant but was worried that additional strikes would “drag the business down” and cause outside investors to “back off.” (A4; SA1, 6-7.) Hajdini replied that unit employees simply wanted a contract and that management could avert future strikes by making them an acceptable offer. Kapovic then asked, “If we buy the restaurant, . . . can we vote the Union out,” to which Hajdini replied, “I don’t see why the Union bothers you. All we want is a simple contract—that we get treated fairly.” (A4; SA7.)

### **C. The December 10 Strike and its Aftermath**

On December 10, 2014, upset at Sparks’s refusal to bargain further before the holidays, 36 unit employees went on strike. (A4 & n.2; A37 at ¶ 6, SA2-3, 25-26.) In the ensuing days, Sparks hired 34 employees to replace the strikers.<sup>2</sup> (A4-5.)

On the afternoon of December 19, the Union and the striking employees decided to make an unconditional offer to return to work. (A5; SA3, 27-28.) Bartender Elvi Hoxhaj went to the restaurant with two union representatives, but they were stopped in the vestibule by Sparks’s security guard. They informed the guard that they had come to speak with management about unconditionally

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<sup>2</sup> Additional facts regarding the hiring of replacement employees are set forth in the argument portion of this brief, under section I.B.2.

returning to work, and he told them to wait while he relayed their message. After speaking to Kapovic, who was standing nearby, the guard returned and said, “[T]hey don’t want you guys in here.” They repeated that they were “just trying to get an unconditional offer to return to work,” to which the guard responded, “I know, but they don’t want you in here.” (A5; SA28-30.) Later that afternoon, union representatives gathered employees and told them that Sparks had rejected their offer. (A5; SA3.)

That evening, the Union’s Secretary Treasurer, Lisa O’Leary, e-mailed Sparks’s attorney, Mark Zimmerman, stating that the offer remained valid despite Sparks’s rejection. O’Leary also conveyed the Union’s position that, unless and until Sparks accepted that offer, the employees were being locked out. (A5; A233.) On December 22, Zimmerman e-mailed Sparks’s response to O’Leary, which included the following paragraph:

Due to serious misconduct and unprotected activity by the union, its representatives and the striking employees during the two separate strikes at Sparks between December 5 and December 19, including without limitation, violence, threats and intimidation towards patrons and employees, destruction of property and trespass, be advised that Sparks must reject the union’s offer to return the striking employees to work at this time. After much consideration, Sparks has determined this option best protects the safety and security of its patrons, employees and delivery people from the conduct described above, and reserves all legal rights in connection with the union’s and Sparks’ employees’ conduct.

(A5; A231.) Later that day, O’Leary e-mailed a response expressing the Union’s disagreement with Zimmerman’s characterization of events and repeating its position that unit employees were being locked out. (A6; A231.)

In January 2015, two employees were notified that their health-insurance coverage had been terminated. (A15 n.23; SA10, 39.) One of them, Milazim Kukaj, received a letter from Discovery Benefits, Sparks’s insurance provider, stating that his coverage ended because he experienced a qualifying event of “Termination.” (A15 n.23; A219, SA39.) A month later, Discovery sent a second letter, which referred to the qualifying event as a “Reduction in Hours - Status Change.” Kukaj testified that he never received the second letter. (A15 n.23; A421, SA40-41.)

On January 8, 2015, Sparks and the Union reconvened for further negotiations. (A6; A138.) At that session, Louis LoIacono, the Union’s director of contracts, asked Zimmerman if he was going to respond to the unconditional offer and return employees to their jobs. Zimmerman replied that he could not do so because he was “protecting his client’s property,” and suggested that LoIacono “put it in writing.” (A6; SA4, 15, 33-34.) LoIacono asked if Zimmerman had any evidence of damage caused to the restaurant by striking employees, and Zimmerman told him to submit a written information request. (A6; SA4, 34.) Afterwards, together with stewards Fuller and Hajdini, LoIacono told employees

that Sparks blamed them for damaging its property and would not let them return to work. (A6; SA5-6, 15-16, 34-35.)

The next day, January 9, the Union e-mailed Zimmerman a request for information on various topics, including the following:

7. Copy of any evidence and/or videos that the employer has pertaining as evidence to support the employer's representative's response to the Union's unconditional return to work. We were told in writing by the employer representative that the employees could not return to work due to the fact that the representative was protecting his client's property due to incidents that took place at Sparks which had nothing to do with the employees or the strike or the lockout.

(A6, 13; A206.) In an e-mailed response on February 5, Zimmerman objected that “[the request] facially seeks irrelevant information ‘which had nothing to do with the employees or the strike or the lockout.’” (A6, 13; A203.) Sparks never provided any responsive information to that request. (A6, 13; SA42-43.) The parties met again on January 20 and February 25, but Sparks never mentioned having prepared a preferential rehire list or that it intended to return unit employees to work at any time. (A6; SA36-37.)

In May 2015, during a meeting to discuss the Union's charges, Sparks asserted for the first time that the striking employees had been permanently replaced. (A146.) On August 25, 2015, Sparks copied LoIacono on a letter offering full reinstatement to a former striker due to “the departure of a permanent replacement employee.” (A6; A209, SA37.) That same day, LoIacono requested a

copy of the preferential rehire list and a list of replacement employees, which were eventually provided on September 11. (A6; A210-15.)

#### **D. Procedural History**

On unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a consolidated complaint ("the Complaint") alleging that Sparks committed three violations of Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1). (A3-4; A27-32, 35-40.) Specifically, the Complaint alleged that Sparks: (1) failed and refused to reinstate the striking employees despite their unconditional offer to return to work; (2) denied employees their right to be placed on a preferential rehire list after they made their unconditional offer; and (3) discharged the employees for participating in a strike. The Complaint further alleged that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the Union. (A36-38.)

On November 18, 2016, following a 6-day hearing, Administrative Law Judge Lauren Esposito issued a decision and recommended order finding that Sparks violated the Act as alleged. (A3-20.) The case was transferred to the Board, whereupon the General Counsel and Sparks filed exceptions to the judge's decision. Sparks also filed a motion to reopen the record, arguing that the judge

erred in finding that it failed to produce certain subpoenaed documents and drawing an adverse inference on that basis.<sup>3</sup>

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On May 24, 2018, the Board (Members Pearce, McFerran, and Emanuel) issued a Decision and Order affirming the judge's findings that Sparks violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate the striking employees and also by discharging them. The Board declined to pass on whether Sparks denied employees their right to be placed on a preferential rehire list, as such a finding would not materially affect the remedy.<sup>4</sup> The Board also affirmed the judge's finding that Sparks violated Section 8(a)(1) of the Act by soliciting employees to withdraw support from the Union. (A1 & n.3.) Finally, the Board denied Sparks's motion to reopen the record because the evidence Sparks sought to introduce was neither newly discovered nor previously unavailable. (A1 n.3.)

The Board's Order requires Sparks to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A1-2.) Affirmatively, the Board's Order requires

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<sup>3</sup> Additional facts regarding Sparks's motion to reopen the record are set forth in the argument portion of this brief, under section I.B.3.c.

<sup>4</sup> Accordingly, Sparks's argument on that issue is moot. (Br. 52-53.)

Sparks to offer the discharged employees full reinstatement, make them whole for any loss of earnings or benefits suffered as a result of their discharge, remove from its files any reference to the discharges and notify employees when this is done. The Order also requires Sparks to post paper copies of a remedial notice and to distribute that notice electronically to its employees, if Sparks customarily communicates with them by such means. (A2-3.)

### **SUMMARY OF ARGUMENT**

1. Substantial evidence supports the Board's finding that Sparks violated the Act by failing to reinstate the striking employees after they offered to return unconditionally. Under Board law, an employer must reinstate striking employees immediately once they unconditionally offer to return to work, unless the employer provides a legitimate and substantial business justification not to do so. It is undisputed that the employees were not reinstated, so the issue turns on Sparks's two asserted justifications.

First, Sparks claims it hired permanent replacements before the strikers offered to return. The Board reasonably rejected that defense because Sparks failed to show that the replacements accepted its offers of employment before the strikers made their unconditional offer. The Court should deny Sparks's due-process and estoppel claims because the record shows the General Counsel never conceded that the replacements were permanently hired. Sparks's challenge to the

Board's adverse inference fails as well because Sparks cannot dispute that it failed to introduce documents that tended to substantiate when the replacements started work. Lastly, the Board was within its discretion to deny Sparks's motion to reopen the record because the materials in question were neither newly discovered nor previously unavailable.

Sparks's second asserted justification is that it suffered a drop in business that made it unnecessary to hire as much waitstaff as it had before the strike. However, Sparks does not dispute that the restaurant was still at the height of its busy holiday season when the strike ended and the employees offered to return. Moreover, even afterwards, Sparks's own business records show that the decline in business that occurred in January 2015 was the second smallest post-holiday drop of the previous 5 years, and that Sparks never previously laid off waitstaff after the holidays, or even during the summer, when business is the slowest. Thus, Sparks failed to show that its failure to reinstate the striking employees was due to a loss of business.

2. Even if Sparks could show that it permanently replaced the striking employees, substantial evidence supports the Board's independent finding that Sparks unlawfully discharged the employees for taking part in a strike. To determine whether Sparks discharged the striking employees, the Board analyzes the entire course of events from the employees' point of view, in particular

whether Sparks's statements or conduct would lead them reasonably to believe their employment had been terminated. The record reflects that Sparks denied employees access to its premises when they unconditionally offered to return to work. Two days later, Sparks's counsel, Zimmerman, rejected their offer again, accused them of various misconduct including violence, destruction of property, and trespass, and hinted at possible legal action against them. Nearly three weeks later, Zimmerman again rejected the employees' offer, still citing the need to protect Sparks's property. During this entire period, Sparks never expressed an intent to return the employees to work. Finally, Sparks waited until May 2015 to reveal that it had hired replacements on a permanent basis. On these facts, the Board reasonably concluded that Sparks's actions created an ambiguity that would lead reasonable employees to believe they were discharged.

Sparks's counter arguments do not pass muster. The Union's subjective belief that employees were locked out is irrelevant because the analysis is from the perspective of reasonable employees. Moreover, although Sparks had no obligation to disclose that it intended to hire permanent replacements, the Board reasonably found that concealing that fact over several months contributed to employees' uncertainty about their employment and belief that they had been discharged. Finally, Sparks failed to substantiate its claim that it concealed the fact that it had hired replacements out of fear of picket-line violence, and even if it

could, that still would not explain why Sparks continued to do so until May 2015, when the strike had ended in December.

3. Sparks's opening brief does not challenge the Board's finding that it violated the Act when Maître d' Kapovic asked waiter Hajdini if the employees could vote the Union out. Therefore, the Board is entitled to summary enforcement of that portion of its Order.

## **ARGUMENT**

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SPARKS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING TO REINSTATE EMPLOYEES DESPITE THEIR UNCONDITIONAL OFFER TO RETURN TO WORK**

#### **A. Standard of Review for Board Decisions**

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court must treat the Board's factual findings as conclusive if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Wayneview*, 664 F.3d at 348. Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Under that standard, "the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also Universal Camera*, 340 U.S. at 488 (reviewing court may not "displace

the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”). Finally, the Court must uphold the Board’s application of the governing law to the facts of the case unless it is arbitrary or otherwise erroneous. *Oberthur Techs. of Am. Corp. v. NLRB*, 865 F.3d 719, 723-24 (D.C. Cir. 2017).

**B. Striking Employees Who Offer to Return to Work Unconditionally Are Entitled to Immediate Reinstatement Unless their Employer Asserts a Legitimate Business Justification for its Refusal**

The National Labor Relations Act guarantees employees the right to engage in a strike.<sup>5</sup> Among its safeguards, the Act provides that strikers do not forfeit their status as employees, or the protections that go with it.<sup>6</sup> *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). Moreover, longstanding Board law dictates that economic strikers who offer to return to work without condition are entitled to immediate reinstatement, as failure to do so would discourage them

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<sup>5</sup> *See, e.g.*, 29 U.S.C. § 163 (“Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.”).

<sup>6</sup> The Act defines the term “employee” to include “any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.” 29 U.S.C. § 152(3).

from exercising their statutory rights.<sup>7</sup> *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1263-64 (D.C. Cir. 1997).

An employer who fails or refuses to reinstate striking employees violates Section 8(a)(3) and (1) of the Act, unless it demonstrates a legitimate and substantial business justification for its refusal.<sup>8</sup> *Fleetwood*, 389 U.S. at 378. Absent such a justification, the strikers are entitled to immediate reinstatement; however, if the employer can prove that such a justification existed, they are entitled only to be reinstated into vacancies created by the replacements' departure. *Detroit Newspaper Agency*, 340 NLRB 1019, 1019 (2003); *Laidlaw Corp.*, 171 NLRB 1366, 1368-70 (1968).

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<sup>7</sup> Sparks does not dispute the economic nature of this strike. See *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131, 1136-37 (D.C. Cir. 2015) (discussing difference between economic and unfair-labor-practice strikes).

<sup>8</sup> Section 7 of the Act protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, which includes the right to strike. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963); see also note 5, *supra*. Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in" Section 7. 29 U.S.C. § 158(a)(1). Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization," 29 U.S.C. § 158(a)(3), which includes participating in concerted action like a strike, *Erie Resistor*, 373 U.S. at 233.

Sparks contends it had two legitimate and substantial business justifications for not reinstating the striking employees. First, Sparks claims it hired permanent replacements before the strikers unconditionally offered to return to work. Second, Sparks asserts that a decline in business prevented their reinstatement. As shown below, the Board reasonably rejected both purported justifications.

- 1. To permanently replace striking employees, the employer and the replacements must reach a mutual understanding about the permanent nature of their employment before the strikers unconditionally offer to return to work**

An employer who fails to reinstate striking employees may assert, as a legitimate business justification, that it hired other employees to permanently replace the strikers as a means of continuing business operations. *Jones Plastic & Eng'g Co.*, 351 NLRB 61, 64 (2007) (citing *Mackay Radio*, 304 U.S. at 345-46). This being an affirmative defense, it is the employer's burden to show that the strikers were permanently replaced. *Jones Plastic*, 351 NLRB at 64; *accord Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 21 (D.C. Cir. 1982).

A critical aspect of the employer's burden is to show that the replacements were hired on a permanent basis before the strikers unconditionally offered to return to work. *Detroit Newspaper Agency*, 340 NLRB at 1019; *accord Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 361 (D.C. Cir. 2016). Mere evidence of the employer's *intent* to permanently employ the replacements is not enough. *Consol. Delivery & Logistics, Inc.*, 337 NLRB 524, 526 (2002), *enforced*,

63 F. App'x 520 (D.C. Cir. 2003) (per curiam). Rather, the employer must prove that it had “a mutual understanding [with] the replacements that the nature of their employment was permanent.” *Target Rock Corp.*, 324 NLRB 373, 373 (1997) (citation omitted), *enforced*, 172 F.3d 921 (D.C. Cir. 1998) (unpublished table decision). For such a mutual understanding to occur, the replacements must accept the employer’s offers of permanent employment before the strikers unconditionally offer to return to work. *Supervalu, Inc.*, 347 NLRB 404, 405 (2006); *Solar Turbines Inc.*, 302 NLRB 14, 14 (1991) (“[D]etermination of the replacement date turns on when a commitment to hire an employee for a permanent job was made and accepted.” (footnote omitted)).

**2. Sparks failed to show that the replacement employees accepted its offers of permanent employment before the strikers unconditionally offered to return to work**

To prove its affirmative defense, Sparks had to show that the replacements were permanently hired before the strikers unconditionally offered to return to work on December 19, 2014. As explained below, the Board reasonably found that Sparks’s failed to carry its burden because it did not show that the replacements accepted permanent offers of employment before the strikers made their unconditional offer. (A9-10.)

Prior to the strike, Sparks’s waitstaff consisted of 46 individuals. (A8 & n.9; A238-65.) A total of 36 unit employees participated in the December 10-19 strike.

(A4 & n.2; A37 at ¶ 6, SA2, 25-26.) In the ensuing days, Sparks hired 34 replacements: 5 employees who had been hired for “seasonal” employment before the strike;<sup>9</sup> 6 kitchen employees who were hired as waiters;<sup>10</sup> and 23 entirely new employees.<sup>11</sup> (A8-9 & n.10; A437-70.)

To show that it hired permanent replacements before the strikers’ December 19 unconditional offer to return, Sparks produced 34 letters, with typewritten dates ranging from December 11 to 19, 2014, offering permanent employment to the recipients. (A437-70.) Each letter is signed by Office Manager Desai and, with one exception (A438), by the employee to whom it is addressed. However, the employees’ signatures are undated, making it impossible to know if they signed the letters before the strikers made their unconditional offer.<sup>12</sup> Adding to the confused state of Sparks’s evidence of timing, the dates on several letters do not match the hiring dates of those replacements on the list Sparks provided to the Union.<sup>13</sup> (A10.) Finally, Sparks did not produce any replacement employee to testify about

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<sup>9</sup> (A433-36, 450-51, 454-55, 459.)

<sup>10</sup> (A449, 452-53, 456-58, SA48-50.)

<sup>11</sup> (A437-48, 460-70.)

<sup>12</sup> Sparks also provided 4 examples of offer letters signed by seasonal employees who were later offered permanent employment. (A433-36.) Three of those seasonal offer letters have handwritten dates next to the employee’s signature; by contrast, the signatures on those same employees’ permanent offer letters are undated. (*Compare* A433-34, 436, *with* A450, 454, 459.)

<sup>13</sup> (*Compare* A438-39, 441-43, 447-48, 460, 463, 465-69, *with* A217-18.)

the timing of their signatures or the hiring process in general. *See Consol. Delivery*, 337 NLRB at 526 (employer failed to prove mutual understanding where no replacement employee testified about hiring). Thus, the Board reasonably concluded that Sparks's offer letters did not establish whether or when it reached a mutual understanding with the replacements that they were being offered, and had accepted, permanent employment at the restaurant.

Sparks also provided testimonial evidence about the hiring process, which was either vague or inconclusive. Edelstein, the human-resources consultant, testified that she was responsible for finding, interviewing, and hiring suitable replacements, but she could not recall when any of them were hired. (A9; A180-81.) Edelstein testified that she prepared the offer letters with Desai and that she personally handed them to each applicant. (A9; A182-85, SA70-71.) However, she did not see a single replacement sign his or her letter, and she did not know the date any of the letters were signed or when they were returned to Sparks. (A9-10; A184-85, SA70-71.) Considering the vagueness of Edelstein's testimony, the Board reasonably declined to accept her surprisingly specific—but less-than-confident—blanket assertion that all letters were returned within 2 days of being

handed out, and on December 19 at the latest.<sup>14</sup> (A10; A186.) Vice-President Cetta’s testimony that the 6 kitchen employees were hired as waiters “at some point after December 10, 2014” was equally unilluminating (A10 n.14; SA49-50), and Desai was not asked about offer letters, interviews, or the hiring process in general (A9 n.13). *See Consol. Delivery*, 337 NLRB at 526 (employer offered no testimony about hiring discussions with replacement employees).

Turning to Sparks’s payroll records, the Board noted that they did not show with any specificity when the replacements started work, and thus did not clarify if they were permanently hired before the strikers unconditionally offered to return. (A10; SA52-53.) Finally, the Board drew an adverse inference from Sparks’s failure to produce records showing who worked between December 15 and 19, because those documents could have at least helped determine when the replacements started work (albeit not when they were permanently hired). (A10-11.)

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<sup>14</sup> *Cf. SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 10 (D.C. Cir. 2012) (Court will uphold judge’s credibility determinations adopted by the Board unless they are “hopelessly incredible, self-contradictory, or patently unsupportable”).

Contrary to Sparks’s claim (Br. 49-50), the Board did not find that all but 6 offer letters were returned prior to December 19, or even that they were likely returned before that date. Rather, the Board simply noted the contradictory and self-serving nature of Edelstein’s testimony that all letters were returned within a day or two of being distributed, and then, barely a few sentences later, that letters distributed on the 19th were returned that same day. (A10.)

Having surveyed the record as a whole, the Board reasonably concluded that Sparks failed to show the replacements were hired on a permanent basis before the strikers unconditionally offered to return to work. (A10.) While Sparks disputes that conclusion, it does not challenge any of the Board's findings about the shortcomings of its evidence. For instance, Sparks insists that Edelstein's testimony was uncontroverted (Br. 49), but does not otherwise contest that she provided no concrete information about when the offer letters were signed or returned to Sparks, or even about her conversations with the replacements, even though she claimed to have interviewed every single one of them. Nor does Sparks dispute the Board's finding that its offer letters do not establish with certainty when any single replacement accepted its offer of employment. Not only are those challenges waived, but Sparks achieves nothing by doubling down on that same, deficient evidence to prove its point. (Br. 48-50.)

Sparks also accuses the Board of basing its mutual-understanding determination "solely" on when the signed offer letters were returned and argues that there are other means to establish mutual understanding of permanent employment. (Br. 50.) While Sparks is correct as to the latter point, in all the cases on which it relies, there was specific evidence that showed a mutual understanding between the employer and its replacements. For example, in *Gibson Greetings, Inc.*, an employer hired replacement employees during a strike without

promising them that their employment would be permanent. 310 NLRB 1286, 1291 n.23 (1993). Nearly two months later, but before the strikers unconditionally offered to return, the employer circulated a memorandum stating: “Every additional replacement hired means one less job for the strikers at the conclusion of the strike.” *Id.* at 1290 n.19. On review, this Court held that although the memorandum was circulated months after the replacements started work, it showed the existence of a mutual understanding that the replacements were permanently hired before the strikers made their offer to return. *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 390 (D.C. Cir. 1995). In this case, however, Sparks never established conclusively that it reached a mutual understanding with the replacements before the strikers made their unconditional offer. This is because the evidence Sparks produced—Edelstein’s testimony and the offer letters—did not show when the replacements accepted its offers of permanent employment.<sup>15</sup> Despite those flaws, however, Sparks still chose to rely on that evidence, and

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<sup>15</sup> The other cases cited by Sparks are equally inapposite. *See Supervalu*, 347 NLRB at 416 (employer produced evidence that replacements signed offers of permanent employment before strikers’ return-to-work offer); *H&F Binch Co.*, 188 NLRB 720, 723 (1971) (employer produced evidence that replacements orally accepted offers of permanent employment).

therefore it cannot blame the Board after the fact for its failure to build a record that carried its evidentiary burden.<sup>16</sup>

In sum, the record is devoid of evidence or testimony showing that before the strikers unconditionally offered to return to work, a mutual understanding existed that the replacements had been offered, and had accepted, permanent employment with Sparks.<sup>17</sup> Accordingly, the Board reasonably concluded, and substantial evidence supports, that Sparks failed to establish the hiring of permanent replacements as a legitimate a substantial business justification for its failure to reinstate the striking employees.

### **3. Sparks's procedural challenges are unavailing**

Sparks contends the General Counsel was estopped from arguing that its replacements were not permanently hired before the employees' unconditional offer and that the Board violated its due-process rights by deciding the issue.

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<sup>16</sup> Sparks's baseless claim that it was somehow duped by the General Counsel into failing to introduce evidence of when the replacements started work is addressed in section I.B.3.a, below.

<sup>17</sup> Sparks wrongly claims that the unconditional offer was invalid because it was communicated to a security guard. (Br. 46 n.10.) The undisputed evidence shows that bartender Hoxhaj and two union representatives told the guard—whose agency was hired by Sparks—that they wanted to talk to management and the owners about an unconditional offer to return to work. They saw the guard talk to Maître d' Kapovic, an admitted supervisor and agent (SA1), who was standing a few feet away. The guard reported back “they don't want you in here.” (A5; A164, SA28-30). Accordingly, the offer was properly conveyed to Sparks via its agents.

(Br. 34-44.) Sparks also claims the Board violated its due-process rights by drawing an adverse inference from its failure to enter into evidence the daily and weekly tip records for December 15 to 19, 2014, and that the Board erred in denying its motion to reopen the record. (Br. 44-48.) Each of these arguments fails.

**a. Sparks’s estoppel and due-process claims lack merit**

According to Sparks, the General Counsel conceded several times before and during the hearing that replacement employees had been permanently hired, and only raised the issue for the first time in its post-hearing brief. Sparks contends that the General Counsel was estopped from arguing that Sparks failed to show it had reached a mutual understanding with the replacements regarding the permanence of their employment before the strikers made their unconditional offer. Sparks also claims that the judge erred in ruling on that point, and that the Board denied Sparks’s due-process rights by affirming the judge’s decision. (Br. 33-44.)

Sparks’s estoppel claim requires proving that the General Counsel made a “definite representation” that the permanent status of Sparks’s replacements was not in dispute, that Sparks reasonably “relied [on that representation] in such a manner as to change its position for the worse,” and that the General Counsel “engaged in affirmative misconduct” by pursuing a legal theory it had previously abandoned. *Masters Pharm., Inc. v. DEA*, 861 F.3d 206, 225 (D.C. Cir. 2017). As

to its procedural due-process claim, Sparks must show prejudice resulting from the assertedly erroneous ruling of the Board. *See Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 87 (D.C. Cir. 2018); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996). As shown below, both claims fail because the General Counsel never conceded that Sparks had hired permanent replacements before the employees made their unconditional offer, and in any event, Sparks was well aware of its burden of proof and fully litigated the issue.

Again, to prevail in its permanent-replacement defense, Sparks had to prove that it had reached a mutual understanding with the replacements about the permanence of their employment before the strikers offered to return. *Care One*, 832 F.3d at 361; *Detroit Newspaper Agency*, 340 NLRB at 1019. In other words, it was not enough to prove that the replacements were *hired*, a fact the General Counsel did not dispute. Rather, Sparks also had to show that, before the strikers made their offer, a shared understanding existed that the replacements had been offered, and had accepted, permanent employment with Sparks. *Consol. Delivery*, 337 NLRB at 526. It was that latter issue, which was in dispute. Indeed, the record reflects that Sparks was keenly aware a key element of its burden was to establish the permanence of its replacements. However, it is undisputed that Sparks never sought or secured a stipulation that the General Counsel conceded that issue. As a result, Sparks is left to argue that the Court should infer such a

concession from cherry-picked bits of testimony and some dubious parsing of the Complaint and the General Counsel's opposition to Sparks's petition to revoke a subpoena.

In and of itself, the length to which Sparks goes to prove its point should alert the Court to the weakness of its argument. For further evidence, the Court need only turn to the colloquy referred to at pages 37-38 of Sparks's brief. (A160-63.) As the transcript makes clear, the issue under discussion is not the replacements' permanent status or when a mutual understanding of that status was reached, but whether the General Counsel alleged that Sparks had an unlawful motive for hiring them. In addition, Sparks omits the most damning part of the discussion:

[GC]: But that doesn't have to do with the hiring of Permanent Replacements. We're not disputing the hiring.

[Sparks]: Okay, you're right.

[GC]: Again, it's not my burden to put on permanency of replacements, which you said it was. It's not. So, I --

[Sparks]: No, I understand.

(A163.) Sparks's response establishes that it was fully aware of its burden to prove the permanent status of its replacements.

Sparks also omits that the General Counsel elsewhere referred to the "alleged" permanent replacements and argued that Sparks unlawfully discharged the strikers "even assuming" they were permanently replaced. (A121-22.) Those

statements are further indication that the issue of the mutual understanding of the replacements' permanent status was in dispute. It also bears emphasizing that it was Sparks, not the General Counsel, who introduced the replacements' offer letters into evidence. Sparks was also the first to question Edelstein about the process of hiring replacements, including how they were recruited, when they were given offer letters and by whom, whether she witnessed the letters being signed, and when the letters were returned.<sup>18</sup> (A180-84.) That is not the conduct of a party who believes it has been released from its burden to show that it reached a mutual understanding with the replacements about the permanent nature of their employment before the strikers made their unconditional offer.

Sparks's reliance on the language of the Complaint (Br. 34) does not further its argument. The relevant Complaint allegation is that Sparks violated the Act by failing and refusing to reinstate the striking employees. (A38 at ¶ 7(b).) Where, here, it is undisputed that the strikers were not reinstated after they unconditionally offered to return, that allegation turned on whether Sparks had a legitimate and substantial business justification for refusing to reinstate them. And to prove that it did, Sparks had to show that it timely hired new employees to permanently replace

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<sup>18</sup> The General Counsel was the first to call Edelstein as a witness, but only questioned her about Sparks's payroll records.

the strikers. Therefore, there was no basis for Sparks to believe that the replacements' permanence was not at issue, quite to the contrary.

Unsurprisingly, Sparks ignores that aspect of the Complaint. Instead, Sparks argues that an entirely separate and independent allegation that it denied striking employees their right to be placed on a preferential rehire list (A38 at ¶ 7(c)), is an “implicit” concession that the replacements were permanently hired. (Br. 34.) The assumption underlying that argument flies in the face of the well-established rule of litigation that “a party may state as many claims or defenses as it has, regardless of consistency.” Fed. R. Civ. P. 8(d)(3). Whatever the General Counsel’s rationale for including both allegations in the Complaint, the fact that one assumes the strikers were permanently replaced cannot be construed to relieve Sparks of its defensive burden under the other.

Sparks also misrepresents (Br. 34-35) the contents of the Amendment to the Complaint, which sought additional remedies of reinstatement and make-whole relief for the “discharged strikers . . . despite the fact that [Sparks] had hired permanent replacement workers before the date of discharge.” (A47.) First, the Amendment plainly applies to the Remedy section of the Complaint, and thus it cannot alter the Complaint’s substantive allegations. Second, the Amendment relates to the unlawful-discharge allegation (A38 at ¶ 7(d)), for which the status of replacement employees is not a factor. *See Kolkka Tables & Fin.-Am. Saunas*, 335

NLRB 844, 846 (2001) (unlawful discharge turns only on showing if employer's conduct would lead reasonably prudent employee to believe s/he was discharged); *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990) (same). The Amendment merely states the obvious, which is that unlawfully discharged employees are entitled to full relief even if their employer has hired permanent replacements.

Finally, Sparks's argument about the General Counsel's opposition to its petition to revoke a subpoena (Br. 35-36) is simply absurd. Sparks claims that because the General Counsel refers to its failure to "reinstate strikers to open positions" (A67), and to the fact that under Board law, striking employees who have been permanently replaced are "entitled to full replacement upon departure of the replacements" (A68), the General Counsel effectively conceded that Sparks's replacements were permanently hired. But when the subpoena issued it was still unknown whether Sparks would succeed in proving that the replacements were permanently hired. Therefore, a mere reference to that outcome does not somehow relieve Sparks of its evidentiary burden. Moreover, the Complaint also alleged that, regardless of the replacements' status, Sparks violated the Act by failing to keep a preferential rehire list and reinstate strikers as openings arose. (A38 at ¶ 7(c).) The Board did not pass on that allegation as it would not materially affect the remedy (A1 n.3, 13-14); nevertheless, it was still in play when the subpoena

issued. Therefore, Sparks's premise regarding the import of "open positions" is wrong. The reference to open positions does not concede the replacements' *permanence* as a defense to Sparks's failure to reinstate the strikers when they offered to return (as opposed to when later vacancies arose per the rehire-list allegation). In these circumstances, it defies common sense to argue, as Sparks does, that one would reasonably construe the General Counsel's opposition as conceding that the replacements were permanently hired and that the strikers were not entitled to immediate reinstatement after they offered to return.

In conclusion, the record reflects that the General Counsel never conceded the issue whether Sparks's replacements were hired with a mutual understanding about the permanence of their employment before the striking employees made their unconditional offer. Therefore, Sparks's estoppel claim must fail because it cannot show that the General Counsel made a definite representation on which it reasonably relied. (Br. 40-42.) Sparks likewise fails to show that the Board violated its due-process rights by finding that its replacements were not permanently hired. Indeed, the record shows that Sparks was not only aware of its burden to establish that it timely hired permanent replacements, but that it litigated that issue by providing testimony from its managers, payroll records, and offer letters for every single replacement. Therefore, Sparks fails to show any prejudice resulting from the Board's ruling on that issue. *See Tasty Baking Co. v. NLRB*, 254

F.3d 114, 122 (D.C. Cir. 2001) (“due process is satisfied when a complaint gives a respondent fair notice . . . and when the conduct implicated in the alleged violation has been fully and fairly litigated” (internal quotation marks and citation omitted)). Accordingly, the Court should reject Sparks’s estoppel and due-process claims in full.

**b. The Board reasonably drew an adverse inference from Sparks’s failure to introduce daily and weekly tip records for December 15 to 19, 2014**

The Court reviews the Board’s drawing of an adverse inference for abuse of discretion. *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972). Sparks challenges the Board’s decision to draw an adverse inference from its failure to introduce daily and weekly tip records for the period from December 15 to 19, 2014.<sup>19</sup> (A10.) As shown below, the Board did not abuse its discretion and, even if it did, the error was harmless.

The adverse-inference rule provides that “when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” *Int’l Union*, 459 F.2d at 1336.

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<sup>19</sup> The daily tip sheet is used to record which employees worked on any given day and their share of the tip pool. (A7; A471.) At the end of each week, the information from the daily tip sheets is compiled into a spreadsheet called the weekly tip record. (A7; A238.)

Here, the Board based its ruling on the fact that, although Sparks had the burden to prove that replacement employees were permanently hired before the strikers made their unconditional offer, it failed to introduce daily and weekly tip records that would “tend to substantiate” when they started work. (A11.) Sparks does not dispute that finding, or that it failed to enter those documents into the record.

Therefore, the Board was well within its discretion to draw that adverse inference.

Sparks marshals several arguments against the Board’s decision, none of which has merit. First, Sparks submits that adverse inferences are only appropriate when the party who controls the evidence believes it would harm its case. (Br. 45 n.9.) However, the rule does not consider a party’s belief of whether the evidence is incriminating or exculpatory; rather, it is that party’s failure to produce *relevant* evidence, which gives rise to an inference that the evidence is unfavorable to it.

*Int’l Union*, 459 F.2d at 1336. Second, Sparks claims the Board erroneously concluded that it failed to produce the records in defiance of a subpoena. (Br. 16.)

However, the Board clearly stated that the fact that a subpoena was served on Sparks was not necessary to establish the adverse inference, but merely strengthened it. (A10-11.) Finally, Sparks argues the adverse inference was unwarranted because the General Counsel had the documents at the hearing.

(Br. 45.) Even if that is true, it still remained Sparks’s burden to establish its

affirmative defense by placing them into the record. *Jones Plastic*, 351 NLRB at 64.

Finally, Sparks fails to show prejudice resulting from the Board's adverse inference. As an initial matter, and contrary to Sparks's claim (Br. 45 n.9), the Board drew only one adverse inference from its failure to produce the daily and weekly tip records.<sup>20</sup> And although the Board stated that those documents would "tend to substantiate" Sparks's argument (A11), it stopped far short of Sparks's assertion that they were "likely determinative" of whether the replacements were permanently hired before the offer to return. (Br. 46.) Indeed, even if the replacements started work on or before December 19, that would not per se establish that, prior to the strikers' unconditional offer to return to work, Sparks and the replacements had reached a mutual understanding about the permanent nature of their employment. *See Gibson Greetings*, 53 F.3d at 385 (finding that permanence of employment was not established until months after replacements started work).

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<sup>20</sup> The Board drew three adverse inferences: one based on Sparks's failure to introduce daily or weekly tip records, and two because it failed to call Manager Ricardo Cordero to testify about its practice of hiring of seasonal employees, and about the hiring of waiter Jonathan Sturms nearly 2 months after the strikers made their unconditional return-to-work offer. (A11-12.) To the extent Sparks would attempt to challenge the two latter adverse inferences in its reply brief, those arguments are now waived.

**c. The Board was within its discretion to deny Sparks's motion to reopen the record, but even if the Court holds otherwise, the Board's error was harmless**

Section 102.48(c) of the Board's rules and regulations allows a motion to reopen the record only in "extraordinary circumstances." 29 C.F.R. § 102.48(c). In relevant part, the rule provides that "[o]nly newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing." *Id.* § 102.48(c)(1). The Board's denial of a motion to reopen the record is reviewed for abuse of discretion. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999). The Court will not overturn the Board's ruling "unless it clearly appears that the new evidence would compel or persuade to a contrary result." *Id.* (internal quotation marks, brackets, and citation omitted).

After the judge issued her decision, Sparks moved for the Board to reopen the record to admit daily and weekly tip records for the period from December 15 to 21, 2014. The Board denied that motion on grounds that those materials were neither newly discovered nor previously unavailable. (A1 n.3.) Sparks does not contest either finding, nor could it, given that it insists it provided the documents to the General Counsel ahead of the hearing. (Br. 45-46.)

Instead, Sparks argues its motion should have been granted because it sought to admit evidence that "may have been taken at the hearing." (Br. 47 (quoting

29 C.F.R. § 102.48(c)(1)).) But Sparks ignores that the rule also requires a showing of extraordinary circumstances, which do not exist when the movant had the evidence on hand and failed to introduce it at the hearing. *See Circus Casinos, Inc.*, 366 NLRB No. 110, 2018 WL 3020212, at \*1 (June 15, 2018) (denying motion where evidence was not newly discovered or previously unavailable, and employer failed to explain why it was not presented at the hearing), *review pet. filed*, Nos. 18-1201 & 18-1211 (D.C. Cir. July 31, 2018). Sparks's entire extraordinary-circumstances defense relies on its estoppel and due-process claims alleging that it was misled into thinking the permanence of its replacements was not in dispute. As shown at pp. 25-34 above, those claims are completely without merit.

**C. Sparks Failed to Show that its Refusal to Rehire Striking Employees Was Due to an Unprecedented Drop in Business**

As previously stated, once the striking employees unconditionally offered to return to work, Sparks was required to reinstate them to their former positions, unless it had a legitimate and substantial business justification not to do so.<sup>21</sup> Aside from arguing that the strikers were permanently replaced, Sparks claims it reduced its waitstaff after the strike due to a drop in business that was more significant than in previous years. (Br. 53-54.) Substantial evidence supports the

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<sup>21</sup> *See cases cited supra* p. 16.

Board’s finding that Sparks failed to show this was a legitimate and substantial business justification not to reinstate the strikers to their prior positions.

### **1. Factual background**

Sparks’s business follows a cyclical pattern. Busy season starts in late October and peaks in December. Business drops off in January, but recovers between February and March. Thereafter, things remain steady until June, before bottoming out in July and August. Despite the post-holiday slowdown, the beginning of the year is typically busier than the summer months. (A12; A510, SA8, 12-13, 17, 21-22, 31.)

As business fluctuates during the year, so do Sparks’s staffing needs. Sparks typically hires additional waitstaff between October and December to handle increased holiday traffic. (A8; SA8, 17-18, 21, 31.) There is no evidence that “seasonal” employees—or any employees, for that matter—are discharged after the busy season.<sup>22</sup> (A6 n.11; A213, SA8-9, 18-19, 32, 64-68.) Instead, during slower periods Sparks allows employees to work fewer days or take longer vacations, and on days where the ratio of waitstaff to customers is higher,

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<sup>22</sup> Sparks provided letters offering “seasonal employment” to 4 new employees between October and December 2014, but those letters did not define that term or limit the duration of their employment. (A9 n.11; A433-36.) Moreover, the record reflects that 13 employees were hired during the “seasonal” period between 2001 and 2013 and remained on staff consistently until the time of the strike. (A213, SA64-68.)

employees earn less money. (A8, 9 n.11; SA8-9, 18-19, 31-32.) When the holiday season returns, Sparks hires new staff to fill any openings that occurred during the year. (A8; SA9, 19-24, 32.)

**2. Sparks’s business-decline argument fails because business was still at its peak when the strike ended**

Sparks argues it had a legitimate business justification for not reinstating the striking employees because it experienced “a significant drop in business in 2015 as compared to prior years.” (Br. 53.) However, Sparks does not dispute the Board’s finding that the strikers unconditionally offered to return to work on December 19, while the restaurant was still at the height of its busy season. (A12.) Indeed, Sparks’s managers were very concerned about being short-staffed during the holidays.<sup>23</sup> (A12; SA69.) Therefore, the record does not support Sparks’s claim that it did not have enough business to reinstate all the striking employees when they offered to return.

Sparks’s claim that post-holiday business did not support maintaining pre-strike staffing levels is equally unsubstantiated. As an initial matter, even if that were true, it still would not excuse Sparks’s failure to reinstate the former strikers when they offered to return in December, when business was at its highest.

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<sup>23</sup> Edelstein testified that Sparks’s managers experienced “anxiety and stress about what was going on” when the strike began, and that they came to her saying, “[W]e need people, what do we do? What do we do?” (A12; SA69.)

Moreover, and in any event, Sparks's own business records belie its claim. First, the post-holiday decline in sales between December 2014 and January 2015 was actually the second smallest for that period since 2010. (A12; A510.) Second, the summer season is almost always slower than the period immediately after the holidays. (A12; A510.) Third, three witnesses testified that Sparks never laid off waitstaff after the holidays, or even during the slower summer season; instead, employees worked fewer days, took longer vacations, or worked for less money. (A12; A213, SA8-9, 18-19, 24, 31-32.) Fourth, those testimonies are borne out by business records, which show that Sparks's waitstaff always remained the same from one December to the following January, except between December 2014 and January 2015, after Sparks failed to reinstate the striking employees. (SA125-27.)<sup>24</sup> Equally significant, until December 2014, Sparks's waitstaff usually numbered between 43 and 46 and was never less than 41, even in the slowest summer months. (SA125-27.) And fifth, Sparks took no other step to address the

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<sup>24</sup> This document, which is cited as "GC Appendix A" in the Board's decision (A12), is a chart summarizing Sparks's monthly sales and corresponding staffing numbers for each month between January 2010 and September 2015. The General Counsel prepared this summary based on Sparks's monthly sales numbers (A510) and one weekly tip record chosen at random for each of the corresponding months. (SA107 n.37.) The underlying documents were admitted into evidence at the hearing, but the summary itself was not. (SA54-56, 72.) However, the summary was attached to the General Counsel's answering brief to Sparks's exceptions, (SA73-127), which is part of the agency record. *See* 29 C.F.R. § 102.45(b) (agency record includes exceptions to the judge's decision "and any cross-exceptions or answering briefs as provided in [29 C.F.R.] § 102.46.").

alleged overstaffing caused by the decline in business, for instance by reducing its kitchen staff. (A12 n.17).

Tellingly, Sparks does not dispute *any* of these Board findings. Instead, Sparks claims that the ratio of tips per waiter better reflects the necessity to reduce waitstaff and argues that “those tips would have plummeted” if Sparks had kept the same complement of waiters after December 2014. (Br. 53-54.) Not only is there no evidence Sparks ever made hiring decisions based on waitstaff income, but the undisputed above-cited evidence conclusively shows otherwise.

## **II. SPARKS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEES ENGAGED IN A LAWFUL ECONOMIC STRIKE**

Even if Sparks could show that it permanently replaced the striking employees, the Board would still prevail on its finding that Sparks violated the Act by unlawfully discharging them. The Act provides that strike participants remain statutory employees, *see* 29 U.S.C. § 152(3), and makes it unlawful for an employer to discriminate “in regard to hire or tenure of employment” against employees for exercising their protected rights, including the right to strike, *id.* § 158(a)(3). One reason this is important is that employees who have been permanently replaced—but not discharged—are entitled to full reinstatement to fill openings created by the departure of permanent replacements. *See Laidlaw*, 171 NLRB at 1369-70. Accordingly, courts have long recognized that employers who

discharge striking employees violate Section 8(a)(3) and (1) of the Act by effectively discouraging the exercise of their statutory rights. *NLRB v. Int'l Van Lines*, 409 U.S. 48, 52 (1972); *Fleetwood*, 389 U.S. at 378; *accord NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990) (citing cases).

**A. Substantial Evidence Supports the Board's Finding that Sparks's Conduct Created an Ambiguity that Caused Employees Reasonably to Believe They Were Discharged**

Sparks disputes the Board's finding that it discharged the striking employees. To determine whether a striking employee has been discharged, the Board considers whether the employer's statements or conduct "would logically lead a prudent person to believe his [her] tenure has been terminated." *Kolkka Tables*, 335 NLRB at 846 (internal quotation marks and citation omitted); *Elastic Stop*, 921 F.2d at 1282. The analysis is based on the perspective of reasonable employees and does not require "formal words of firing." *Kolkka Tables*, 335 NLRB at 846; *Elastic Stop*, 921 F.2d at 1282. Additionally, if the employer's acts or statements create "a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer." *Kolkka Tables*, 335 NLRB at 846 (internal quotation marks and citation omitted); *accord, e.g., Champ*, 933 F.2d at 692; *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626,

629 (10th Cir. 1984). In other words, any uncertainty created by the employer's statements or actions will be construed against it. *Kolkka Tables*, 335 NLRB at 846.

The Board found that Sparks's conduct created an ambiguity that would lead reasonable employees to believe that they had been discharged for participating in the December 10 strike. Sparks's first act was to refuse to allow employees back into the restaurant on December 19, after they had unconditionally offered to return to work. (A5, 15.) This was followed, on December 22, by Zimmerman's e-mail informing the Union that Sparks was rejecting the return-to-work offer "[d]ue to serious misconduct and unprotected activity by . . . the striking employees . . . , including without limitation, violence, threats and intimidation towards patrons and employees, destruction of property and trespass." As conveyed by Zimmerman, Sparks not only believed the safety of its patrons and staff required barring the employees from its premises, but was also considering legal action against them. (A14-15; A231.) Then, at a meeting with the Union on January 8, 2015, Zimmerman again rebuffed the unit's return-to-work offer, assertedly to protect Sparks's property. (A16; SA4, 15, 33-34.) This continued in later meetings on January 20 and February 25, where Sparks showed no intent to return the employees to work at all. At the same time, however, Sparks never disclosed in those discussions that it hired permanent replacements, nor did it provide a

preferential rehire list to the Union, even though it would have clarified the employees' status. (A16; SA36-37.) Together, these undisputed facts constitute substantial evidence to support the Board's finding that reasonable employees confronted with Sparks's conduct would believe that their employment had been terminated.

Although Sparks challenges several aspects of the Board's analysis, it is worth noting what Sparks does *not* dispute. Specifically, Sparks does not contest that refusing to take employees back after they unconditionally offered to return to work—during the busiest time of the year, no less—and hiring security guards to prevent them entering the restaurant would cause employees reasonably to believe they were discharged. Nor does Sparks dispute that reasonable employees would draw the same conclusion after it rejected their offer anew on January 8, 2015, or when it showed no intent to reinstate them in subsequent negotiations with the Union.

**B. Sparks's Many Challenges to the Board's Unlawful-Discharge Finding Are All Equally Meritless**

Sparks claims the Board erred in finding that reasonable employees would construe Zimmerman's e-mail as discharging them because it included the qualifier "at this time," which left open "the possibility that, in the future, [Sparks] might change its position." (Br. 25.) Sparks would have this Court believe that reasonable employees who—during a strike, and after making an unconditional

offer to return to work—were told that their employer does not want them on its premises, blames them for a litany of crimes, and is weighing legal action against them, would reasonably believe they still have a job. Sparks goes even further, arguing that because Zimmerman included those three words, no reasonably prudent employee would even consider his e-mail to be ambiguous. (Br. 25.) To say that argument strains credulity is an understatement; by contrast, the Board’s finding is eminently reasonable, and thus merits the Court’s deference. *See Veritas*, 895 F.3d at 78 (Court defers to reasonable, fact-based inferences drawn by the Board). Moreover, even if employees would not construe Zimmerman’s e-mail as a discharge, Sparks’s hiring of security guards to bar employees from the premises, its continued rejection of their return-to-work offer, and its failure to hire a single employee back until August 2015 would lead a reasonable employee to believe they were discharged.

Sparks’s argument that there is no evidence the Union shared Zimmerman’s e-mail with the employees also fails. (Br. 26.) As the Board found (A16), the Union had been the employees’ certified bargaining representative since July 2013. Moreover, waiters Fuller and Hajdini, who served as union stewards, participated in the January 8 meeting where Zimmerman said the employees could not return to work because Sparks believed they had damaged its property, and together with LoIacono, they conveyed Sparks’s position to the other employees. (A6, 16; SA5-

6, 15-16, 34-35.) As the Board found, therefore, it defies the parties' legal status and common sense to think that employees were not fully apprised of Sparks's accusations. (A16.)

Sparks also claims that the Union's reference to the employees as "locked out"—in O'Leary's response to Zimmerman's e-mail, in Board charges, and in LoIacono's testimony—is conclusive proof that they were not discharged. (Br. 21-23.) Simply put, the Union's subjective view of the situation is irrelevant.<sup>25</sup> The discharge analysis is an *objective* one, which focuses on how a reasonably prudent employee would construe Sparks's statements and actions.<sup>26</sup> See *Elastic Stop*, 921 F.2d at 1283. The Board found in this case that, taken together, Zimmerman's e-mail, Sparks's continuing refusal to allow employees onto its premises after their unconditional offer, and its concealment of the fact that it was hiring replacements would reasonably lead employees to believe that Sparks had terminated their employment. (A15-16.) Sparks's argument that there is no evidence the employees themselves thought they were discharged fails for the same reason (Br. 24), just as its claim that the judge misapplied the reasonable-employee

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<sup>25</sup> That being said, the Union's confusion about the strikers' employment status is understandable given the vagueness of Sparks's explanations for refusing to return them to work after their unconditional offer.

<sup>26</sup> For this reason, the fact that the Union did not file a charge alleging that the employees had been discharged does nothing to help to Sparks's cause. (Br 28.)

standard (Br. 26-27). As the judge explained, the Board’s analysis focuses on “the written and oral statements of employer representatives and not on the subjective responses of the employees in question.” (A131.)

Sparks fares no better arguing that employees could not reasonably have believed they were discharged because it did not require them to clear out their lockers, but instead offered to “arrange” for them to retrieve their belongings. (Br. 27.) The Board reasonably declined to consider that fact, given that Sparks had explicitly barred employees from the premises, purportedly to protect its staff, property and clientele. (Br. 15.) Indeed, Hajdini testified that he did not know at the time if his belongings were still in his locker because he was not allowed into the restaurant. (A15 n.24; SA11.) Moreover, Sparks’s offer to let the strikers retrieve their belongings from their lockers would only seem to reinforce a reasonable belief that they had been discharged.

Equally unavailing is Sparks’s claim that employees knew from third parties that they had not been discharged. (Br. 28.) The Board reasonably found that employees should not be required to divine their employment status from the communications of health-insurance providers or retirement-savings-plan administrators. (A15 n.23.) Furthermore, this argument cuts against Sparks’s overarching claim that its conduct was neither ambiguous nor confusing; indeed, if

that were true, Sparks's own employees would not have to turn to third parties to know if they still had a job.

Finally, there is no merit to Sparks's *Avery Heights* defense. *Avery Heights* (*Avery Heights I*), 343 NLRB 1301 (2004), *vacated and remanded sub nom. New England Health Care Emps. Union v. NLRB* (*Avery Heights II*), 448 F.3d 189 (2d Cir. 2006). The thrust of Sparks's argument is that Board law imposes no duty on employers to disclose the hiring of permanent replacements, and therefore the Board was precluded from finding that, by keeping its replacement campaign a secret and failing to provide a preferential rehire list, Sparks contributed to the ambiguity surrounding the employees' status. (Br. 30.)

In *Avery Heights I*, a judge found that the deliberate concealment of a replacement campaign for over 2 weeks was evidence that the employer had an unlawful motive for replacing its striking employees.<sup>27</sup> 343 NLRB at 1305-06. In reversing the judge's decision, the Board explained that hiring permanent replacements serves a lawful purpose of enhancing the employer's economic leverage, by allowing it to continue operating while pressuring strikers to return when they realize they are being replaced. The Board also noted that, while the

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<sup>27</sup> Although Board law permits hiring permanent replacements for legitimate business reasons, an employer violates the Act if it is motivated by an independent unlawful purpose, such as retaliating against striking employees or trying to break a union. *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). There is no claim in this case that Sparks acted with unlawful intent in hiring the replacements.

right to hire permanent replacements is well established, an employer has no corresponding obligation to inform a union of its “intention” or “plan” to do so. *Id.* at 1306. Based on those observations, the Board concluded that the employer did not have an unlawful motive for concealing its replacement campaign. *Id.* at 1306-07.

On review, the Second Circuit accepted the premise that employers have no obligation to “inform striking workers *before* hiring permanent replacements.” *Avery Heights II*, 448 F.3d at 195 (emphasis added). The court also assumed that there may be legitimate reasons for maintaining secrecy *during* a replacement campaign, like the fear of picket-line violence. *Id.* Absent such concerns, however, the court saw no logic in hiding the recruitment of permanent replacements, as that would only diminish the employer’s leverage with the strikers and their union. *Id.* Therefore, the court concluded that an employer’s unexplained failure to give notice of a replacement campaign could be evidence of unlawful motive. *Id.* at 195-96.

The Board’s decision in this case is consistent with *Avery Heights I* and *II*. The Board recognized that Sparks was within its rights “not [to] disclose its *intent* to hire permanent replacement employees *prior* to doing so” (A16 (emphases added)), but also found that “this does not somehow remove from consideration the effect of [Sparks’s] continued failure to provide this information to the striking

employees and the [U]nion.” In other words, the Board found that Sparks’s continued secrecy about the replacement campaign was probative of whether its behavior created an ambiguity that would lead reasonable employees to believe they had been discharged. Contrary to Sparks’s assertion (Br. 30), the Board did not create an affirmative duty to disclose replacement campaigns or preferential rehire lists; it simply found that employers logically should bear the consequences of any ambiguity resulting from their (lawful) refusal to do so. This accords with the Second Circuit’s holding that, simply because employers have the right to conceal replacement campaigns, the Board is not precluded from considering whether such concealment may support a different unfair-labor-practice finding.

Sparks also claims the Board should not have considered the fact that it kept its replacement campaign a secret because it had a legitimate reason for doing so, namely fear of picket-line violence. (Br. 31-32.) The problem for Sparks is that it did not produce any evidence to support such concerns. At the January 8 meeting, Sparks’s counsel Zimmerman claimed the strikers had broken windows and that he could not allow them back on the premises of concern for Sparks’s property. (A6; SA4, 34.) LoIacono asked to see evidence of damage caused by striking employees but Zimmerman demurred, telling him to submit a written information request. (A6; SA34.) When the Union complied, Zimmerman objected to the request as irrelevant. (A6, 13; A203, SA42-43.) Sparks never provided any

responsive information to the Union's request and did not otherwise produce any documentary evidence of striker misconduct.

Sparks's testimonial evidence was no more enlightening. Sparks called two security guards who testified generally that they observed picketers holding signs, blowing horns and whistles, and cursing at guards and staff.<sup>28</sup> (A174-75, SA57-58.) One guard gave hearsay testimony about a Sparks employee who claimed he was nearly injured by an unidentified individual on December 12, and the other testified about a scuffle that occurred in early December between an unidentified picketer and some customers leaving the restaurant. (A166, 172, SA59-63.) Thus, even assuming arguendo that Sparks established some picket-line misconduct occurred, Sparks produced no evidence to show that it was committed by a striking employee, as opposed to a picketer who was not employed by Sparks. In short, Sparks did not offer sufficient evidence to support a legitimate fear of picket-line violence.<sup>29</sup>

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<sup>28</sup> From the early days of the strike, and until mid-January 2015, Sparks hired a security agency to post guards outside the restaurant. (A164, 172-73.)

<sup>29</sup> Employees who engage in serious misconduct during a strike can lose the Act's protections and be lawfully discharged. *Nat'l Conference of Firemen & Oilers, SEIU v. NLRB*, 145 F.3d 380, 384 (D.C. Cir. 1998). Sparks, however, insists that "the hiring of permanent replacements *always* was the primary reason" for refusing the strikers' unconditional offer. (Br. 32.)

Finally, even if Sparks's evidence could justify concerns over picket-line violence, there is no evidence to suggest that those concerns remained valid by the time the strikers offered to return, much less into January 2015.<sup>30</sup> And yet, Sparks did not reveal that it had hired (assertedly permanent) replacement employees until at least May 2015. Sparks offers no basis for keeping the status of its replacements secret for so long. Therefore, it was entirely reasonable for the Board to find that, by concealing the fact that it had hired permanent replacements, Sparks contributed to the ambiguity over its employees' employment status, thereby supporting the belief that they were discharged.

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<sup>30</sup> According to Sparks's own witnesses, the two alleged incidents occurred very soon after the strike began on Wednesday, December 10. The first one took place on or before the 12th (A172), and the second occurred on a "Saturday [in] early December" (SA59), likely December 13, which was the second Saturday of that month. Sparks's witnesses did not testify about any incident after the strike ended on December 19.

### **III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT SPARKS VIOLATED SECTION 8(a)(1) OF THE ACT BY SOLICITING EMPLOYEES TO WITHDRAW SUPPORT FROM THE UNION**

Soliciting employees to decertify or otherwise withdraw support from a union restricts their Section 7 rights and thus violates Section 8(a)(1). *See, e.g., Corr. Corp. of Am.*, 347 NLRB 632, 633 (2006) (employer may not solicit employees to decertify union); *Hialeah Hosp.*, 343 NLRB 391, 392 (2004) (employer may not solicit employees to dissuade coworkers from supporting union).

The Board found that Sparks violated Section 8(a)(1) of the Act when Maître d' Kapovic asked waiter Hajdini whether the Union could be voted out if Kapovic purchased the restaurant. (A16-17.) Sparks does not challenge that finding in its opening brief; therefore, the Court should deem the issue waived and summarily enforce the Board's Order on this point. *See Fed. R. App. P. 28(a)(8)(A)* (argument section of a brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *CCI Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (Board is entitled to summary enforcement on issues not raised in opening brief).

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Sparks's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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March 2019

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MICHAEL CETTA, INC.,	)	
d/b/a SPARKS RESTAURANT,	)	
	)	Nos. 18-1165
Petitioner/Cross-Respondent	)	18-1171
	)	
v.	)	Board Case Nos.
	)	02-CA-142626
NATIONAL LABOR RELATIONS BOARD,	)	02-CA-144852
	)	
Respondent/Cross-Petitioner	)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its final brief contains 12,064 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2016. The Board further certifies that the electronic version of the Board’s brief filed with the Court in PDF form is identical to the hard copy that has been filed with the Court, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC  
this 11th day of March 2019

**STATUTORY AND REGULATORY ADDENDUM**  
**TABLE OF CONTENTS**

**National Labor Relations Act (“the Act”), 29 U.S.C. § 151, et seq.**

Section 2 (29 U.S.C. § 152) ..... i  
Section 7 (29 U.S.C. § 157) ..... i  
Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... ii  
Section 8(a)(3) (29 U.S.C. § 158(a)(3))..... ii  
Section 10(a) (29 U.S.C. § 160(a)) ..... iii  
Section 10(e) (29 U.S.C. § 160(e)) ..... iii  
Section 10(f) (29 U.S.C. § 160(f)) ..... iv  
Section 13 (29 U.S.C. § 163) ..... iv

**The Board’s Rules and Regulations**

29 C.F.R. § 102.45(b) .....v  
29 C.F.R. § 102.46(b) .....v  
29 C.F.R. § 102.48 ..... vi

**Federal Rules of Civil Procedure**

Rule 8(d)..... vi

## THE NATIONAL LABOR RELATIONS ACT

### **Section 2 of the Act (29 U.S.C. § 152) provides in relevant part:**

When used in this Act--

\* \* \*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

\* \* \*

### **Section 7 of the Act (29 U.S.C. § 157):**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

**Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:**

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

\* \* \*

**Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:**

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

\* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

\* \* \*

**Section 13 of the Act (29 U.S.C. § 163):**

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

## THE BOARD'S RULES AND REGULATIONS

### **29 C.F.R. § 102.45 Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case**

\* \* \*

(b) *Contents of record.* The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.

### **29 C.F.R. § 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.**

\* \* \*

(b) *Answering briefs to exceptions.*

(1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

**29 C.F.R. § 102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.**

\* \* \*

(c) *Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

\* \* \*

**FEDERAL RULES OF CIVIL PROCEDURE**

**Rule 8. General Rules of Pleading**

\* \* \*

**(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.**

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

\* \* \*

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____	)	
MICHAEL CETTA, INC.,	)	
d/b/a SPARKS RESTAURANT,	)	
	)	Nos. 18-1165
Petitioner/Cross-Respondent	)	18-1171
	)	
v.	)	Board Case Nos.
	)	02-CA-142626
NATIONAL LABOR RELATIONS BOARD,	)	02-CA-144852
	)	
Respondent/Cross-Petitioner	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-2960

Dated at Washington, DC  
this 11th day of March 2019