

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

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

and

**Case 02-CA-142626
02-CA-144852**

**UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342**

MOTION FOR PARTIAL SUMMARY JUDGMENT

Counsel for the General Counsel (General Counsel) respectfully requests that the Board grant partial summary judgment against Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant (Respondent) for, in many instances, filing a response to the Compliance Specification that is insufficient to constitute an Answer under the requirements of Section 102.56 of the National Labor Relations Board's (Board) Rules and Regulations. In addition, the General Counsel also respectfully requests, that the Board deem admitted certain allegations in the Compliance Specification, grant partial summary judgment with respect to those allegations, and preclude Respondents from introducing evidence during the compliance hearing challenging the allegations deemed admitted, for the reasons set forth below.

Procedural Background

1. On May 24, 2018, the Board issued a Decision and Order¹ finding that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by failing and refusing to reinstate and by discharging the striking employees. *See* Exhibit 1. To remedy the violations, the Board ordered Respondent to make whole bargaining unit employees for any loss of earnings and other benefits suffered as a result of their terminations.

2. On August 23, 2019, the United States Court of Appeals for the District of Columbia Circuit issued its mandate in accordance with its May 20, 2019 judgment enforcing the Decision and Order of the Board. *See* Exhibit 2.

3. Controversy still exists over the validity of Respondent's reinstatement offers and the amount of backpay owed. As a result, on April 8, 2020, the Regional Director, on behalf of the Board, issued a Compliance Specification and Notice of Hearing alleging the amount owed. *See* Exhibit 3.

Answers and Extensions

4. On April 20, 2020, the Regional Director issued an Order Granting Extension of Time to file an Answer. *See* Exhibit 4.

5. On May 13, 2020, Respondent filed a response to the Compliance Specification. *See* Exhibit 5.

6. On May 14, 2020, the General Counsel sent a letter, by regular mail and email, to Respondent's counsels informing them that the response did not meet the requirements of Section 102.56 of the Board's Rules and Regulations as it merely contained general denials of the allegations contained in the Compliance Specification and that, if Respondent did not correct the

¹ 366 NLRB No. 97.

deficiencies by filing an Amended Answer by the close of business on May 21, 2020, the General Counsel would file a motion to strike and for summary judgment, in whole or in part. *See* Exhibit 6.

7. On May 19, 2020, the General Counsel spoke with Respondent's counsel, who requested additional time to file an Amended Answer due to the difficulties presented by the pandemic. That request was granted orally, and the deadline was extended until June 4, 2020. On May 27, 2020, the General Counsel sent a letter, by regular mail and email to confirm the deadline extension. Again, Respondent's counsel was reminded that a failure to meet the requirements of 102.56(b) would result in a motion to strike and for summary judgment, in whole or in part. *See* Exhibit 7.

8. On June 2, 2020, the General Counsel received an email from Respondent's counsel, who requested additional time to file an Amended Answer due to the pandemic and civil unrest. In response, on June 2, 2020 the General Counsel sent a letter, by regular mail and email, granting an extension until June 18, 2020. Again, Respondent's counsel was reminded that a failure to meet the requirements of 102.56(b) would result in a motion to strike and for summary judgment, in whole or in part. *See* Exhibit 8.

9. On June 18, 2020 Respondent filed an Amended Answer to Compliance Specification. *See* Exhibit 9.

Motion for Partial Summary Judgment

10. In certain instances, Respondent's Amended Answer does not comply with the Board's specificity requirements for an answer to a compliance specification as set forth in Section 102.56 of the Board's Rules and Regulations. Section 102.56(b) of the Rules states:

As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation

of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the Answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

Where a respondent neglects to meet these requirements, summary judgment is appropriate. *See, e.g., Yonkers Associates*, 340 NLRB 1237, 1238 (2003); *Active Fire Sprinkler Corp.*, 331 NLRB No. 13, slip op. at *3 (2000).

11. Section 102.56(c) of the Rules provides that if a respondent files an answer to a compliance specification that fails to deny an allegation in the manner required by Section 102.56(b) of the Rules, and the failure is not explained, "such an allegation will be deemed admitted as true, and may so be found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation."

12. Specification paragraph 1(a) alleges that the backpay period begins December 19, 2014. Respondent's Amended Answer argues that the date should be based on the number of "Laidlaw" vacancies. However, this issue has already been addressed by the Board in its underlying decision in this case and the issue cannot be relitigated at this stage of the proceedings. Moreover, Respondent failed to provide alternative dates for the backpay period to begin, in contravention to Section 102.56(b). Based on Respondent's inappropriate attempt to relitigate issues and its failure to provide alternative backpay period starting dates, the General Counsel seeks summary judgment on Specification paragraph 1(a).

13. Specification paragraph 1(b)(1) alleges the backpay period ending dates for some discriminatees, including Marko Beljan and Adnan Nuredini. Respondent only admits this allegation with respect to Marko Beljan and Adnan Nuredini in corresponding paragraph 1(b)(1).

Based on Respondent's unqualified admission, the General Counsel seeks summary judgment on Specification paragraph 1(b)(1) as related to discriminatees Marko Beljan and Adnan Nuredini.

14. Specification paragraph 1(b)(2)(A) alleges that discriminatee Elvi Hoxhaj worked six dinners per week and five lunches per month as a bartender prior to Respondent's unfair labor practice. Respondent generally denies this allegation, arguing that Hoxhaj did not work what was alleged, without providing any alternative method for calculating Hoxhaj's backpay. Based on Respondent's general denial in contravention to 102.56(b), the General Counsel seeks summary judgment on Specification paragraph 1(b)(2)(A).

15. Specification paragraphs 1(b)(2)(B) and (C) address the validity of the reinstatement offers to Elvi Hoxhaj and the impact the dates of those offers would have on the backpay period. Respondent contends that earlier offers were valid but fails to provide what the calculations should be based on their alternative ending dates. The General Counsel contends that failing to provide those supporting figures and calculations, as is required by Section 102.56(b), should result in summary judgment for Specification paragraphs 1(b)(2)(B) and (C).

16. Specification paragraph 1(b)(3)(A) outlines the method for determining the backpay period ending date for the 23 discriminatees named in paragraph 1(b)(3)(D). Respondent argues that business needs should dictate the number of staff and hours required, but again, Respondent failed to provide alternative dates for the ending date of the backpay period. Moreover, Respondent fails to explain its "business needs" or that the method used in the Specification was wrong. Based on the above, Respondent has not met the requirements of Section 102.56(b) and the General Counsel seeks summary judgment on paragraph 1(b)(3)(A).

17. Specification paragraphs 1(b)(3)(B) and (C) allege the number of waiters pre- and post-strike. Respondent admits these allegations. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment on Specification paragraphs 1(b)(3)(B) and (C).

18. Specification paragraph 1(b)(3)(D) alleges the backpay period for 23 discriminatees that accepted Respondent's facially valid offer of reinstatement but were not reinstated to substantially equivalent positions. Respondent argues that the backpay period should end upon the discriminatees' return to work but fails to support that assertion with dates the individuals returned to work. The General Counsel contends that without those dates Respondent has not met the requirements of Section 102.56(b) and summary judgment on paragraph 1(b)(3)(D) should be granted.

19. Specification paragraph 1(b)(4) alleges the backpay ending date for six discriminatees that accepted Respondent's facially valid offer for reinstatement and thereafter quit for reasons unrelated to insufficient hours of work. Respondent argues that the backpay period should end on dates different from what is alleged in the Specification, but no dates were provided. The General Counsel contends that without those dates Respondent has not met the requirements of Section 102.56(b) and summary judgment on paragraph 1(b)(4) should be granted.

20. Specification paragraph 1(b)(5) alleges the backpay period for discriminatee Valon Lokaj. Respondent admits that the backpay period is appropriate. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment on Specification paragraph 1(b)(5).

21. Specification paragraph 2(a) alleges that an appropriate measure of gross backpay is based on each discriminatee's average gross weekly earnings per quarter, inclusive of regular hours, overtime hours, meal hours, spread of hours, paid time off hours, and total tips during the

representative period. Respondent admits that the representative period is appropriate. However, Respondent argues that wage increases in subsequent years pursuant to New York State mandates as well as increases granted to other waiters should not be included. Respondent fails to provide alternative figures to support its assertions. The General Counsel contends that summary judgment should be granted for Respondent's admission regarding the representative period. Similarly, the General Counsel seeks summary judgment for the wage increase portion of Specification paragraph 2(a) as Respondent failed to meet the requirements of 102.56(b).

22. Specification paragraphs 2(b) and (c) outline each discriminatee's regular hours, overtime hours, meal hours, spread of hours, paid time off hours, tips earned, and gross pay. Respondent admits these allegations. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment on Specification paragraphs 2(b) and (c).

23. The introduction to Specification paragraph 2(d) outlines the method by which averages were calculated. Respondent admits these allegations. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment on the introduction to Specification paragraph 2(d).

24. Specification paragraph 2(d)(1) addresses gross weekly average calculations for discriminatees. Respondent denies that unpaid leave should be eliminated from the calculations. However, Respondent does not provide the necessary figures for alternative calculations nor does Respondent provide the alternative calculations. The General Counsel seeks summary judgment for Specification paragraph 2(d)(1) as Respondent failed to meet the requirements of 102.56(b).

25. Specification paragraph 2(e) alleges the average gross weekly hours and earnings per category in each quarter during the representative period. Respondent admits that the gross weekly hours and earnings are set forth therein, but denies the calculations are correct. The General

Counsel contends that Respondent's general denial, without providing alternative figures, does not meet the requirements of 102.56(b) and summary judgment should be granted for Specification paragraph 2(e).

26. Specification paragraphs 2(f) through (i) allege average gross weekly earnings in various forms. Respondent admits these allegations. Based on Respondent's unqualified admissions, the General Counsel seeks summary judgment for Specification paragraphs 2(f) through (i).

27. Specification paragraph 2(j) alleges the methods and figures for the average weekly gross earnings for each quarter of the backpay period. Respondent admits that the figures are correct but disputes the methods used to reach those figures. Based on Respondent's failure to provide alternative figures as is required by Section 102.56(b), the General Counsel seeks summary judgment for Specification paragraph 2(j).

28. Specification paragraph 2(k) alleges that backpay is partially tolled for various discriminatees during parts of the backpay period. Respondent admits this allegation. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for Specification paragraph 2(k).

29. Specification paragraph 2(l) alleges that an appendix sets forth each discriminatee's gross backpay. Respondent again admits that the gross backpay has been accurately tabulated but argues that the formula used to reach that conclusion is incorrect without providing its own method or calculations. Based on Respondent's failure to provide alternative figures as is required by Section 102.56(b), the General Counsel seeks summary judgment for Specification paragraph 2(l).

30. Specification paragraph 3(a) alleges calendar quarter interim earnings are appropriately measured by being prorated among the number of weeks worked for interim

employees. Respondent does not dispute that the appropriate measure of quarter interim earnings should be prorated by the number of weeks. However, Respondent denies sufficient knowledge to determine whether the employees' interim earnings totals are correct. Without providing alternative methods, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 3(a) relating to the method for calculating interim earnings.²

31. The introduction to Specification paragraph 3(d) states that net earnings from self-employment should be offset against gross backpay. Respondent admits this premise. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for the introduction portion of Specification paragraph 3(d).³

32. Specification paragraph 3(e) discusses the method for determining the appropriate measure of interim earnings from 2015-2017 for employees who were reinstated but not to substantially equivalent positions. Respondent disputes the method without providing an alternative, such as cut off dates, dollar amounts, or what positions were available during the relevant period. Without providing alternative figures or calculations, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 3(e).

² The General Counsel does not seek summary judgment on Specification paragraphs 3(b)(1) or 3(c) because the General Counsel recognizes that the information contained therein may not be within Respondent's knowledge and, thus, Respondent's general denials in the corresponding paragraphs of its Answer may be sufficient to satisfy Section 102.56(b) of the Rules.

³ The General Counsel does not seek summary judgment on Specification paragraphs 3(d)(1), 3(d)(2), or 3(d)(3) because the General Counsel recognizes that the information contained therein may not be within Respondent's knowledge and, thus, Respondent's general denials in the corresponding paragraphs of its Answer may be sufficient to satisfy Section 102.56(b) of the Rules.

33. Specification paragraph 3(f) alleges that it is appropriate to offset against backpay, as interim earnings, payments for temporary loss of wages awarded in a worker's compensation case to discriminatee Fatlum Spahija. Respondent admits that this is appropriate. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for Specification paragraph 3(f).⁴

34. Specification paragraph 4(a) alleges that the calendar quarter net backpay is determined by finding the difference between calendar quarter backpay and calendar quarter interim earnings. Respondent contends that this method is just one of many appropriate methods. However, Respondent provides no figures or alternative methods. Without providing alternative figures or calculations, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 4(a).⁵

35. Specification paragraph 5(a) alleges that discriminatees are entitled to be made whole for expenses incurred because of Respondent's unlawful actions. Respondent admits that this is true. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for Specification paragraph 5(a).⁶

⁴ The General Counsel does not seek summary judgment on Specification paragraphs 3(g) or 3(h) because the General Counsel recognizes that the information contained therein may not be within Respondent's knowledge and, thus, Respondent's general denials in the corresponding paragraphs of its Answer may be sufficient to satisfy Section 102.56(b) of the Rules.

⁵ The General Counsel does not seek summary judgment on Specification paragraph 4(b) because the General Counsel recognizes that the information contained therein may not be within Respondent's knowledge and, thus, Respondent's general denials in the corresponding paragraphs of its Answer may be sufficient to satisfy Section 102.56(b) of the Rules.

⁶ The General Counsel does not seek summary judgment on Specification paragraph 5(b) because the General Counsel recognizes that the information contained therein may not be within Respondent's knowledge and, thus, Respondent's general denials in the corresponding paragraphs of its Answer may be sufficient to satisfy Section 102.56(b) of the Rules.

36. Specification paragraph 5(c) alleges that discriminatees are entitled to be reimbursed for employment agency fees they paid to assist them in mitigating their losses. This paragraph also contains a chart listing each discriminatee and the amount incurred. Respondent admits that this concept is appropriate. Accordingly, the General Counsel seeks summary judgment for the method described in Specification paragraph 5(c), as it is an unqualified admission by Respondent. Similarly, the General Counsel does not seek summary judgment on the figures provided as it is outside the scope of Respondent's knowledge.

37. Specification paragraph 5(d) alleges that discriminatees are entitled to be reimbursed for expenses incurred in seeking interim employment in new occupations during the backpay period. This paragraph also contains a chart listing the discriminatee's name, amount incurred, and course type. Respondent admits that this concept is appropriate. Accordingly, the General Counsel seeks summary judgment for the method described in Specification paragraph 5(d), as it is an unqualified admission by Respondent. Similarly, the General Counsel does not seek summary judgment on the figures provided as it is outside the scope of Respondent's knowledge.

38. The introduction to Specification paragraph 5(e) alleges that discriminatees are entitled to be reimbursed for additional mileage incurred for commuting to interim employment. Respondent admits that this concept is appropriate. Therefore, the General Counsel seeks summary judgment for the method described in introduction to Specification paragraph 5(e), as it is an unqualified admission by Respondent.

39. Specification paragraph 5(e)(1) alleges that an appropriate measure for determining the amount due for additional mileage is the expense incurred commuting to the discriminatees' interim employers, less the expense incurred commuting to Respondent. Respondent agrees this is

appropriate. Therefore, the General Counsel seeks summary judgment for the method described in Specification paragraph 5(e)(1), as it is an unqualified admission by Respondent.⁷

40. Specification paragraph 6(a) describes Respondent's 401(k) retirement plan. Respondent admits that the provided description is correct. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for the method described in Specification paragraph 6(a).

41. Specification paragraph 6(b) alleges that discriminatees are entitled to be made whole for the loss of 401(k) plan contributions that should have been deposited into their 401k accounts. Respondent admits that discriminatees are entitled to be made whole for the loss of their 401k contributions, but argues that the method for determining what should be deposited is incorrect. Respondent fails to provide any alternative calculations or methods. This is within Respondent's knowledge because Respondent knows what 401(k) elections the discriminatees made. Without providing alternative figures or calculations, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 6(b).

42. Specification paragraph 6(c) alleges that Respondent should direct employee contributions to discriminatee 401(k) accounts if discriminatees maintain their 401(k) accounts. Respondent agrees with this allegation. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for the method described in Specification paragraph 6(c).⁸

⁷ The General Counsel does not seek summary judgment on Specification paragraphs 5(e)(2) and (3) because the General Counsel recognizes that the information contained therein may not be within Respondent's knowledge and, thus, Respondent's general denials in the corresponding paragraphs of its Answer may be sufficient to satisfy Section 102.56(b) of the Rules.

⁸ The General Counsel does not seek summary judgment on the footnote contained in Specification paragraph 6(c).

43. Specification paragraph 6(d) alleges that the appropriate estimate of the discriminatees' 401(k) plan contributions rate is obtained by dividing the quarterly gross pay amounts earned by each discriminatee's total 401(k) contribution amounts during the respective quarter. Respondent denies that this is correct but fails to provide alternative figures. Without providing alternative figures, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 6(d).

44. The introduction to specification paragraph 6(e) as well as Specification paragraphs 6(e)(1) through (3) set forth the name of each discriminatee with an active 401(k) account, their contributions, and gross pay per quarter. Respondent admits these allegations. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for the introduction to Specification paragraph 6(e) as well as Specification paragraphs 6(e)(1) through (3).

45. Specification paragraph 6(e)(4) alleges the contribution percentage rate for each discriminatee with a 401(k) account. Respondent disputes the contribution percentage rates but fails to provide any alternatives. Without providing alternative figures, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 6(e)(4).

46. Specification paragraphs 6(f) through (h) allege the appropriate amounts to be diverted into the 401(k) accounts based on various factors. Respondent denies that these figures are appropriate but fails to provide any alternatives. Without providing alternative figures, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraphs 6(f) through (h).

47. Specification paragraph 6(i) provides for estimated 401(k) contributions. Respondent denies this allegation because it claims it does not have sufficient knowledge, but this information is within their scope of knowledge. Moreover, Respondent provides no alternative calculations. Thus, the General Counsel seeks summary judgment for Specification paragraph 6(i).

48. Specification paragraph 6(j) alleges that an appropriate measure of the estimated earnings on contributions that would have been made to 401(k) accounts is the interest rate used by the Board for lost wages. It further argues that interest earned continues to accrue until the date of actual payment. Respondent agrees. Based on Respondent's unqualified admission, the General Counsel seeks summary judgment for Specification paragraph 6(j).

49. Specification paragraph 6(k) alleges that gross and net backpay should be adjusted for discriminatees with active 401(k) accounts by deducting 401(k) contributions they would have made. Respondent admits that our calculations are correct, but that the method is wrong. Respondent fails to provide alternative calculations based on their proposed method. Without providing alternative calculations, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 6(k).

50. Specification paragraph 7(a) alleges that the Board's decision in *Don Chavas* entitles discriminatees to be compensated for any adverse tax consequences incurred by receiving a lump sum. Respondent's objections to this allegation would involve relitigating *Don Chavas*. As the Board has already considered this argument, and this is well-settled law, the General Counsel seeks summary judgment for Specification paragraph 7(a).

51. Specification paragraph 7(b) alleges the basis for the excess tax award. Other than to argue that discriminatees are not entitled to this award, Respondent provides no alternative basis

for calculating the award. Without providing alternative calculations, Respondent has not adequately complied with Section 102.56(b) and thus, the General Counsel seeks summary judgment for Specification paragraph 7(b).⁹

52. Based on the foregoing, the General Counsel moves for partial summary judgment against Respondent for its unqualified admissions as well as failing to file an answer in conformity with Section 102.56. The General Counsel requests that Respondent be precluded from introducing at the compliance hearing any evidence challenging the above allegations of the Compliance Specification.

Respectfully submitted,

/s/ Jessica L. Cacaccio

Jessica L. Cacaccio
Counsel for the General Counsel
National Labor Relations Board, Region 3
130 S. Elmwood Avenue, Suite 630
Buffalo, New York 14202
716-398-7022
Jessica.cacaccio@nrlb.gov

Dated at Buffalo, New York,
this 9th day of July, 2020

⁹ The General Counsel does not seek summary judgment on Specification paragraphs 7(c) through (j) because these paragraphs provide the individual backpay amounts which are subject to change if Respondent prevails on its position that interim earning amounts are greater than those set forth in the Specification. The General Counsel does not seek summary judgment on Specification paragraph 8 for the same reasons.

STATEMENT OF SERVICE

I hereby certify that on July 9, 2020, I electronically filed the General Counsel's MOTION FOR PARTIAL SUMMARY JUDGMENT in Case 02-CA-142626 and Case 02-CA-144852 with the National Labor Relations Board using the NLRB E-Filing System, and I hereby certify that I provided copies of the same documents, via electronic mail (e-mail), on the following:

Michael P. MacHarg Sr.
Kathryn T. Lundy
Marc B. Zimmerman
Freeborn & Peters
311 South Wacker Suite 3000
Chicago, IL 60606
Attorneys for Respondent
Email addresses:
mmacharg@freeborn.com;
klundy@freeborn.com;
mzimmerman@freeborn.com

Martin L. Milner Esq.
Simon & Milner
99 West Hawthorne Avenue, Suite 308
Valley Stream, NY 11580
Attorney for the Charging Party
Email: mmilner@simonandmilner.com

Dated July 9, 2020
At Buffalo, New York

Respectfully Submitted,

/s/ Jessica L. Cacaccio

Jessica L. Cacaccio
Counsel for the General Counsel
National Labor Relations Board, Region 3
130 S. Elmwood Avenue, Suite 630
Buffalo, New York 14202
716-398-7022
Jessica.cacaccio@nlrb.gov

EXHIBIT 1

366 NLRB No. 97 (N.L.R.B.), 211 L.R.R.M. (BNA) 1490, 2018 WL 2387584

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT
AND
UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342

Cases 02-CA-142626 and 02-CA-144852

May 24, 2018

SUMMARY

*1 New York, NY, June 20, 2018. Errata to May 24, 2018 Decision and Order.

SUMMARY

The Board adopted the Administrative Law Judge's conclusions that the Respondent violated Section 8(a)(3) and (1) by failing and refusing to reinstate striking employees after their unconditional offer to return to work and violated Section 8(a)(1) by soliciting employees to withdraw their support for the Union. A Board majority (Members Pearce and McFerran) adopted the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging the striking employees. Member Emanuel found it unnecessary to pass on the discharge allegation because it would not materially affect the remedy. The Board found it unnecessary to pass on whether the Respondent also violated 8(a)(3) and (1) by denying the striking employees their right to be placed on a preferential hiring list. Charges filed by United Food and Commercial Workers Local 342. Administrative Law Judge Lauren Esposito issued her decision on November 18, 2016. Members Pearce, McFerran, and Emanuel participated.

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On November 18, 2016, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a brief in support. The General Counsel filed an answering brief, and the Respondent filed a reply. The General Counsel filed a cross-exception and a brief in support, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs² and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order as modified and set forth in full below.⁴

ORDER

The National Labor Relations Board orders that the Respondent, Michael Cetta, Inc. d/b/a Sparks Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in an economic strike.

(b) Failing and refusing to reinstate striking employees to their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

(c) Soliciting employees to withdraw their support for the United Food and Commercial Workers Local 342 (Union).

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adam Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

*2 (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 24, 2018

Mark Gaston Pearce
Member
Lauren McFerran
Member
William J. Emanuel
Member

Rebecca A. Leaf, Esq., for the General Counsel.
Thomas J. Bianco, Esq., Marc B. Zimmerman, Esq., and Regina E. Faul, Esq., for the Respondent.
Martin Milner, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

***3** LAUREN ESPOSITO, Administrative Law Judge.

Based upon a charge in Case 02-CA-142626, filed on December 10, 2014, and amended on January 9, 2015, and upon a charge in Case 2-CA-144852, filed on January 22, 2015, by United Food and Commercial Workers Local 342 (“Local 342” or “the Union”), an Order consolidating cases, consolidated complaint, and notice of hearing issued on May 29, 2015 (the “complaint”). The complaint alleges that Michael Cetta, Inc. d/b/a Sparks Restaurant (“Sparks” or “Respondent”) violated Sections 8(a) (1) and (3) of the Act by failing and refusing to reinstate striking employees despite an unconditional offer to return to work, denying the striking employees their right to be placed on a preferential hiring list, and discharging the striking employees. The complaint further alleges that Sparks violated Section 8(a)(1) by soliciting employees to withdraw their support for the Union. On September 18, 2015, the Regional Director, Region 2 issued an Order amending complaint and amendment to complaint stating that as part of the Remedy General Counsel seeks an order requiring that Respondent offer reinstatement to all of the striking employees and make them whole from the date of their discharge, despite the fact that Respondent had previously hired permanent replacement employees. This case was tried before me on October 7, 9, and 13 through 16, 2015, in New York, New York.

After the conclusion of the trial, the parties filed briefs, which I have read and considered. Base on those briefs, and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

i. jurisdiction

Sparks is a restaurant located at 210 East 46th Street, New York, New York, engaged in the sale of food and beverages. Sparks admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Sparks stipulated at the hearing and I find that Local 342 is a labor organization within the meaning of Section 2(5) of the Act (Tr. 7).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Respondent operates a steakhouse restaurant at its 210 East 46th Street location, preparing and serving food and drinks to individual customers and for private parties arranged on its premises (Tr. 245-246, 250). The restaurant is on two floors with some rooms for individual or “a la carte” dining and other small rooms for private events (Tr. 249-250). Sparks is open Monday through Friday for both lunch and dinner, and on Saturday for dinner only (Tr. 246). Lunch begins around 11:30 a.m. or noon, and runs until approximately 3 p.m. (Tr. 246). Dinner begins at around 5 p.m., and continues until the customers with the last reservation finish their meals (Tr. 246). Sparks employs waiters and bartenders, as well as kitchen workers such as cooks/chefs, dishwashers, and prep workers (Tr. 246-247). Respondent also employs an office manager, Shailesh Desai, and an assistant to Desai (Tr. 248). Desai testified at the hearing on behalf of Sparks.

Michael and Steven Cetta are owners of Sparks, and its president and vice president, respectively. Sparks stipulated at the hearing that Michael and Steven Cetta, as well as Maitre'd Valter Kapovic, were at all material times supervisors within the meaning of Section 2(11) of the Act, and agents of Sparks acting on its behalf within the meaning of Section 2(13) (Tr. 7). Steven Cetta testified at the hearing that as vice president he is responsible for overseeing “everything” and “everybody.” (Tr. 244.) In addition to Kapovic, Sparks employs managers named Abdul, Ricardo (Cordero), Octavio, and Nick, all of whom report to Steven Cetta (Tr. 244-245). In addition, since 2009, Sparks has engaged Susan Edelstein as a human resources consultant (Tr. 287-288). Edelstein testified in that capacity and as Custodian of Sparks' personnel records (Tr. 288).

2. Events prior to the December 10, 2014 strike

Local 342 was certified as the exclusive collective-bargaining representative of a unit of waiters and bartenders at Sparks on July 11, 2013, and since then the parties have had approximately 8 negotiating sessions but have not entered into a collective-bargaining agreement (Tr. 32-34, 174-175). Negotiations have been generally attended by Director of Contracts, Louis LoIacono, his executive assistant Mary Ann Kelly, representative Carolina Martinez, and Shop Stewards Kristofer Fuller and Valjon Hajdini for Local 342 (Tr. 99-100, 154, 175-176). Attorneys Marc Zimmerman and Regina Faul, Steven Cetta, and Susan Edelstein have attended negotiations for Sparks. (Tr. 100, 176, 251.)

After a bargaining session on December 5, 2014, frustrated with what they perceived of a lack of movement on the part of Sparks in negotiations, the waiters and bartenders decided to go on strike that evening (Tr. 34). The waiters and bartenders went on strike for approximately 2 hours on the evening of December 5, 2014, from roughly 7 to 9 p.m., returning to work after making an unconditional offer (Tr. 34-35, 47, 55-56, 101-102).

Waiter Valjon Hajdini testified that the next day, December 6, 2014, Manager Valter Kapovic asked to speak with him when he arrived at work. The two spoke in the Madison Room downstairs, one of the rooms used for private parties. Hajdini testified that Kapovic said he was concerned about the waiters and bartenders' going on strike. According to Hajdini, Kapovic stated that he was interested in buying the restaurant, and had investors, but that the strike would “drag the business down” and the investors would “back off.” Hajdini stated that the waiters and bartenders “were not looking to go on strike again,” but were only looking for “a simple contract.” Hajdini stated that, “if you don't want us to go on strike . . . make an offer that is easy for us to accept.” Kapovic said that he was going to talk to Steve Cetta, “and see if we can do something about that.” Kapovic then asked “can we vote the Union out” if he and his investors bought the restaurant. Hajdini responded, “I don't see why the Union bothers you. All we want is a simple contract--that we get treated fairly.”¹ [Tr. 39-40.]

3. The December 10, 2014 strike and subsequent events

Frustrated with the lack of progress in negotiations, the waiters and bartenders began another strike at approximately 7 p.m. on December 10, 2014 (Tr. 35-36, 102-105, 154-155, 252). A total of 36 employees engaged in the strike, 34 waiters and 2 bartenders.² The nonstriking employees consisted of bargaining unit employees who decided not to participate in the strike and 5 employees referred to by Respondent as “seasonal” (Respondent's posthearing br. at 34). Respondent stipulated at the hearing and I find that the strike which began on December 10, 2014, was concerted in nature (Tr. 7-8).

On December 19, 2014, the striking employees together with union representatives Steve Boris and John decided to make an unconditional offer to return to work. Bartender Elvi Hoxhaj testified that between 3:30 and 4:30 p.m. that day, he and the two union representatives decided that they would go into the restaurant and make an unconditional offer to return to work. As they entered the restaurant, they were stopped in the vestibule by a security guard. Boris explained to security that Hoxhaj was a worker and they were union representatives, and that “they wanted to talk to management and ownership about an unconditional offer to return to work.” According to Hoxhaj, security told the group to stay where they were, and the security guard would go inside and convey the message. Hoxhaj then saw the security guard speak to Kapovic, who was on the phone. After they spoke, one of the security guards returned to speak with Hoxhaj and the union representatives, who stated, “we're just trying to get an unconditional offer to return to work.” The security guard responded, “I know, but they don't want you in here.” [Tr. 156-159.] Other employees were subsequently informed by Boris that Local 342 had made an unconditional offer for the striking employees to return to work, which Sparks had rejected (Tr. 59-60, 82-85).

On December 19, 2014, at 8:55 p.m., Local 342 Secretary-Treasurer sent the following email to Marc Zimmerman:
Good evening. I am Lisa O'Leary, Secretary Treasurer of UFCW Local 342 and I am authorized to send you this email on behalf of Local 342. Local 342 today has made an unconditional offer to return to work, and that offer remains. President Abondolo shared with me his email exchange with you earlier today. I write again to confirm that the offer to return to work is unconditional, and tied to no additional action being performed by your client. UFCW Local 342 continues its offer to bargain prior to your January 8th date, but this continuing offer to bargain, which has at all times been rejected by your client, is separate from Local 342's unconditional offer to return to work. I suspect you are aware of this, but if not I am telling you so here.

* * *

The community groups, NYPD, and the local Councilman have all spoken with Local 342 at various times in the last week to inquire if the Union and your client are talking, and at least make an attempt to resolve the dispute. We have sadly had to report that you rejected the free services of Federal Mediation, and are in fact not interested in communication prior to January 8th. Because various people in the community have expressed concern about the situation, UFCW made the unconditional offer to return to work today as a demonstration of good faith. Your client has so far rejected the offer. It is the Union's position that the employees are locked out, unless or until the employer should accept the unconditional offer to return to work.

I close by telling you that since your client has rejected the free services of a professional labor mediator, Local 342 believes we should at this time restrict communications with you to one person at Local 342. We do this with the intent of reducing opportunity for unintentional misunderstandings. President Abondolo requested I provide you with my cell number [...] in the event your client wishes to communicate with the Union prior to January 8th. You have my email address. Should your client wish to accept the unconditional offer to return, I would be your contact person. Should any other matter arise, I am your contact person. At this time Local 342 will of course meet on January 8th if your client is willing to do so. We will need to find a neutral, acceptable place to meet, so at some point prior to the 8th of January you can let me know when that can be discussed. We can use the Federal Mediation offices in Woodbridge New Jersey for free, even if your client will not permit the assistance of a Federal Mediator. If that is not acceptable then we will have to agree to a hotel. Thank you for your time.

The next morning at 10:31 a.m., Zimmerman wrote to O'Leary acknowledging receipt of her email, and on Monday, December 22, 2014, at 10:53 a.m. sent O'Leary the following response:

I write in response to your e-mail Friday evening and apologize for not getting back to you sooner.

The e-mails I received on Friday from Janel D'Amassa (on Rich's behalf) did not propose an unconditional offer to return to work of the striking employees. Rather, Rich's offer was conditioned on Sparks' agreement to "meet for a bargaining session some time between Christmas and New Year's Eve." Nonetheless, I understand from your e-mail that the union has since revised that position and now proposes an unconditional return of the striking employees.

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.

Sparks' decision has no bearing on its desire to continue to bargain in good faith with the union for an initial contract, and we look forward to meeting in person on January 8. Alternatively, Sparks would be able to reschedule our next bargaining session to January 7, if the union would be willing to push our normal start time back a bit to 11:30 a.m. Please let me know if that date/time works for the union. Woodbridge, New Jersey is not a convenient location for us to meet. If the union is unwilling to use our offices (as has been our custom to alternate between our place and yours), we can arrange for a "neutral" site that is more accessible to both parties. In the interim, I fully expect to provide you with Sparks' written counterproposals to the union's December 10 bargaining proposals early this week and welcome any written response the union sees fit to make in advance of our in-person bargaining session.

O'Leary responded at 11:14 a.m.:

UFCW Local 342 disagrees with your characterization of events in the second and third paragraphs below. I restate: UFCW Local 342 continues to make an unconditional offer to return to work, and that our position is that Sparks employees are locked out. I restate: UFCW Local 342 urges your client to reconsider its position regarding mediation services. I will need to make sure January 7th is good before I confirm, but will get back to you without unreasonable delay. Thank you for your response, and I will pass it on.

[GC Exh. 9.]

The parties also discussed the return of the striking employees at the next negotiating session, on January 8, 2015. Louis LoIacono, the union's spokesperson at this session, testified that much of the session consisted of the Union's requesting information necessary for it to formulate bargaining proposals (Tr. 176-178). LoIacono testified that after bargaining concluded he had asked Marc Zimmerman to speak with him. Zimmerman approached with Sparks attorney, Regina Faul, and LoIacono asked Zimmerman if he was going to respond to the Union's unconditional offer to return to work, and return the striking employees to their jobs. Zimmerman responded that he was protecting Sparks' property at the time and could not do so, and suggested that LoIacono "put it in writing." LoIacono asked Zimmerman whether he had any "proof or evidence of anything," and Zimmerman again told him to put an information request in writing. [Tr. 176-177; see also Tr. 36-37, 106-107, 126-127.] LoIacono and the shop stewards informed the striking employees of the events of this negotiating session (Tr. 38-39, 107-108, 177-178).

Subsequently on January 9, 2015, Jhana Branker, Abondolo's executive assistant, sent an email on Abondolo's behalf to Zimmerman, requesting information on a number of different topics (Tr. 179; GC Exh. 3). The email contained the following request for information:

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.

GC Exh. 3, p. 22. On February 5, 2015, Zimmerman responded to this request for information as follows:

Response and Objections: Sparks objects to Request 7 as it facially seeks irrelevant information “which had nothing to do with the employees or the strike or the lockout.” Subject to the foregoing objection and the General Objections above, Sparks responds that all terms and conditions of employment for bargaining unit employees are subjects of bargaining presently being negotiated with the union.

GC Exh. 3, p. 19. LoIacono testified that the Union never received any information from Sparks in response to this request (Tr. 229-230).

LoIacono testified that during the negotiating sessions he attended after the strike began--on January 8 and 20, and February 25, 2015--Sparks never stated that it had prepared a list or an order for the recall of the striking employees, or that it would return the striking employees to work at all (Tr. 181-182). On August 25, 2015, LoIacono received a copy of a letter from Steven Cetta to striking employee Adnan Nuredini (Tr. 182-183; GC Exh. 4). This letter stated that “As a result of the departure of a permanent replacement employee,”³ Sparks was offering Nuredini “full reinstatement to a position as a waiter, effective immediately, consistent with your preferential rehire rights as an economic striker under the National Labor Relations Act” (GC Exh. 4). LoIacono wrote to Cetta that same day, requesting a copy of Sparks' preferential rehire list and information regarding its preparation, and a list of the permanent replacement employees (Tr. 183; GC Exh. 5). LoIacono also stated, “Notwithstanding the above demand, Local 342 considers all the employees who are subjects of the pending NLRB case⁴ to have been illegally discharged and to be entitled to reinstatement with full back pay” (GC Exh. 5). On September 11, 2015, Faul responded to LoIacono's information request, and attached a “Preferential Rehire List” and a list of permanent replacements (GC Exh. 6). Faul sent LoIacono an amended list of permanent replacements on October 5, 2015 (GC Exh. 7). LoIacono testified that prior to September 11, 2015, he had never seen or been told of the preferential rehire list by Sparks (Tr. 186).

B. Discussion and Analysis

1. Failure to reinstate the striking employees after their unconditional offer to return to work

The complaint alleges that since on or about December 19, 2014, Sparks has failed and refused to reinstate any of the striking employees, despite their having made an unconditional offer to return to their former or substantially equivalent positions of employment on that date, in violation of Sections 8(a)(1) and (3) of the Act. Complaint ¶ 7(a-b). It is well-settled that economic strikers are entitled to immediate reinstatement to their former positions after making an unconditional offer to return to work, absent a “legitimate and substantial” business justification. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969); *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007); *Supervalu, Inc.*, 347 NLRB 404, 405 (2006). The hiring of permanent replacement employees in order for the employer to continue its business operations prior to an unconditional offer to return to work constitutes a legitimate and substantial business justification. *Jones Plastic & Engineering Co.*, 351 NLRB at 64; *Supervalu, Inc.*, 347 NLRB at 405. The burden of proving the existence of a legitimate and substantial business justification for failing to reinstate economic strikers lies with the employer. *Supervalu, Inc.*, 347 NLRB at 405, citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967); *Peerless Pump Co.*, 345 NLRB 371, 375 (2005). In order to satisfy this burden, the employer must provide “specific” proof that it reached a “mutual understanding” with the replacements that they were permanent employees prior to the unconditional offer to return to work. *Jones Plastic & Engineering Co.*, 351 NLRB at 64; *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), *enfd.* 63 Fed Appx. 520 (D.C. Cir. 2003); *Towne Ford*, 327 NLRB 193, 204 (1998).

In addition, it is well settled that in the event that no vacancy in the striking employees' classifications exists, the employer is required to place them "on a nondiscriminatory recall list until a vacancy occur[s]." *Peerless Pump Co.*, 345 NLRB at 375. Subsequently, reinstatement is contingent upon the occurrence of a "genuine job vacancy" or a "Laidlaw vacancy," which is engendered when the employer expands its workforce, discharges an employee, or when an employee quits or leaves the employer.⁵ *Pirelli Cable Corp.*, 331 NLRB 1538, 1540 (2000), quoting *NLRB v. Delta-Macon Brick & Tile Co.*, 943 F.2d 567, 572 (5th Cir. 1991). General Counsel bears the burden of establishing that a Laidlaw vacancy exists.⁶ *Pirelli Cable Corp.*, 331 NLRB at 1540. When such a vacancy occurs, the striking employees are entitled to full reinstatement, unless they have "acquired regular and substantially equivalent employment" or the employer proves that there were legitimate and substantial business reasons for failing to offer the striking employees reinstatement at the time. *Peerless Pump Co.*, 345 NLRB at 375, quoting *Laidlaw Corp.*, 171 NLRB at 1369-1370. Here, the Complaint alleges that since December 19, 2014, Sparks has denied the striking employees their right to be placed on a preferential hiring list, and General Counsel asserts that Sparks has failed to reinstate the striking employees to vacant positions as they have occurred. Complaint ¶ 7(c).

Sparks argues that it had permanently replaced the striking employees prior to their December 19, 2014 unconditional offer to return to work. Sparks further contends that a downturn in its business overall obviated the need for the level of waitstaff that had been employed prior to the December 10, 2014 strike. Additionally, Sparks claims that it had been "overstaffed" in the past due to the striking employees' lack of reliability, which required a larger group of employees to cover during unanticipated absences. Sparks asserts that it therefore had fewer available waitstaff and bartender positions after the strike, and thus a legitimate business justification for refusing to reinstate the striking employees.

Sparks and General Counsel base their contentions regarding the pre-strike employee complement and existing Laidlaw vacancies after the December 19, 2014 unconditional offer on different types of records created by Sparks in the ordinary course of its operations, and dispute the documents' probative value accordingly. General Counsel argues that Weekly Tip records--spreadsheets recording the weekly tips of all employees--most accurately reflect Sparks' complement of waitstaff and bartenders at any given point in time (GC Posthearing Br. p. 23). Sparks asserts that Daily Tip records--handwritten notes of tip calculations made on a daily basis--more accurately depict the staffing needs of the restaurant, in that they record how many employees worked each day (RS Posthearing Br. at p. 37). I find that the Weekly Tip records more accurately reflect the overall number of Sparks' waitstaff and bartender employees for any particular period. The Daily Tip records only indicate the employees working any particular day and shift, and thus do not establish the full complement of Sparks employees.⁷ Because every Sparks employee does not work every single shift, the Daily Tip records do not encompass the entire workforce. The Weekly Tip records, by contrast, list every waiter and bartender employed by Sparks, regardless of the individual days they worked during the week in question.

In addition, the Daily Tip sheets produced by Respondent and submitted into evidence were not complete, and were not provided for critical time periods. For example, the one week of Daily Tip sheets in September, November, and December 2014 Sparks submitted for the purposes of comparison with Weekly Tip records submitted by General Counsel were actually Daily Tip sheets for September, November, and December 2013. (RS Exh. 25.) The December 1, 2014, through December 6, 2014 Daily Tip sheets were included elsewhere in the record (RS Exh. 8), but not the Daily Tip sheets for the comparator weeks in September and November. Therefore, it is not apparent that Sparks' records submitted for these weeks provide a comprehensive and reliable reflection of the waitstaff and bartenders employed during the stated periods. As a result, the Weekly Tip records provide a more comprehensive account of Sparks' waitstaff and bartender employees overall.

Furthermore, the evidence does not support Sparks' contention that it kept an inflated roster of employees prior to the strike, which was no longer necessary because the replacement employees were more reliable. Sparks argues in its Post-Hearing Brief that the employees who participated in the strike called out of work and took time off "at their discretion," forcing Respondent to rely on "'backup" workers which were no longer necessary after the replacement employees began (RS Posthearing Br. at p. 38-39). Sparks therefore contends that the total number of waiters and bartenders employed prior to the strike was artificially inflated, and is not probative with respect to the ultimate number of Laidlaw vacancies which existed subsequently. However, the

record establishes that, as Sparks states in its Posthearing brief, “Sparks daily staffing needs fluctuate throughout the year” (RS Posthearing Br. at 40). The record evidence in the form of credible employee testimony further establishes that Sparks' practice in the past was to allow employees to take extended vacations or other forms of time off during periods which were not as busy, as opposed to laying them off (Tr. 41-42, 117-118, 160-161). For example, waiter Valjon Hajdini credibly testified that he began his employment with Sparks in September 2008, and worked about 42 hours per week--six dinners and one lunch-- until the December 10, 2014 strike (Tr. 26). During this time he observed that while more employees were hired immediately before the busy season, during the slower season not a single employee was terminated (Tr. 41-42). Instead, the roster of employees simply rotated days of work, and employees took longer vacations or time off (Tr. 41-42). Hajdini testified that more employees were hired every fall only because some employees left Sparks for better jobs, became ill, or were fired, creating a shortage of staff prior to the busier months (Tr. 42). Waiter Kristopher Fuller similarly testified that since the inception of his employment with Sparks in 2007 employees were kept on from the busy period into the slower period, and the only turnover that occurred happened naturally as employees left for better jobs or were fired (Tr. 120-122). Bartender Elvi Hoxhaj also testified that during the 12 years he was employed by Sparks, employees were never laid off during the slower months (Tr. 152). Based on his observations, Hoxhaj testified that the available work was distributed evenly, so that each waitstaff employee worked 4 or 5 days per week rather than 6, or the employees each took longer vacations. Hoxhaj stated that he only witnessed employees leave their employment with Sparks when they were discharged or “because of personal reasons” (Tr. 160-161). Sparks offered no explanation for its departure from this practice after the inception of the strike. Thus, I am not persuaded by its contention that its prestrike employee complement was artificially enlarged, and therefore not useful to determine the existence of Laidlaw vacancies.

Sparks' Weekly Tip records establish that the restaurant employed a total of 46 waiters and bartenders immediately prior to December 10, 2014 (GC Exh. 13(b)).⁸ The payroll for the period immediately after the strike began (December 15 through 21, 2014) lists a total of 37 waiters and bartenders (GC Exh. 16).⁹ Therefore, the record establishes that from the inception of the strike on December 10, 2014, and through the time of the striking employees' unconditional offer to return to work on December 19, 2014, there were at least 9 vacant waiter/bartender positions.

Respondent contends that it did not return the striking employees to work after their unconditional offer to return for substantial and legitimate business reasons. First, Sparks asserts that it hired permanent replacements for the striking employees prior to their unconditional offer to return to work on December 19. Sparks further argues that a downturn in its overall business obviated the need for the amount of waiters and bartenders it had previously employed, thereby justifying its refusal to reinstate the striking employees. As discussed above, the employer bears the burden of proving the existence of a legitimate and substantial business justification for failing to reinstate economic strikers following an unconditional offer to return to work. *Supervalu, Inc.*, 347 NLRB at 405; *Peerless Pump Co.*, 345 NLRB at 375. For the following reasons, I find that Sparks has failed to satisfy this standard.

In order to establish that economic strikers were not returned to work after an unconditional offer because their positions had already been filled by permanent replacements, the employer must present “specific” proof of having reached a “mutual understanding” with the replacements to that effect. *Jones Plastic & Engineering Co.*, 351 NLRB at 64; *Consolidated Delivery & Logistics*, 337 NLRB at 526. Thus, the employer must present evidence that the circumstances of the replacement employees' hiring show that the replacements “were regarded by themselves and [the employer] as having received their jobs on a permanent basis.” *Consolidated Delivery & Logistics*, 337 NLRB at 526, quoting *Target Rock Corp.*, 324 NLRB 373 (1997), *enfd.* 173 F.3d 921 (D.C. Cir. 1998). Evidence of the employer's intent to hire the replacements on a permanent basis is insufficient. *Consolidated Delivery & Logistics*, 337 NLRB at 526. Furthermore, evidence of an offer of work on a permanent basis is inadequate absent a showing that the replacement employee accepted the offer prior to the striking employees' unconditional offer to return to work. *Choctaw Maid Farms, Inc.*, 308 NLRB 521, 527-528 (1992), citing *Solar Turbines*, 302 NLRB 14 (1991), *affd. sub nom. Machinists v. NLRB*, 8 F.3d 27 (9th Cir. 1993) (employer's statement to replacements that they “had a job” insufficient to establish hiring on a permanent basis without evidence that replacements accepted offer).

The evidence establishes that Sparks obtained replacement employees via three different methods. Six kitchen employees were reassigned to waitstaff positions,¹⁰ five purportedly “seasonal” employees hired before the strike began became replacements, and 23 replacement employees were hired directly after the strike began. The available evidence establishes that Sparks used similar documents when it hired or reassigned these employees to permanent replacement positions, and Sparks contends that these employees thereby constituted permanent replacements for the economic strikers prior to the unconditional offer to return to work on December 19, 2014. In particular, the replacement employees were provided with a letter stating as follows:

It is a pleasure to extend to you an offer of employment in a permanent position as Waiter [Bartender], for Michael Cetta, Inc. dba Sparks Steak House.

Your start date will be December 15, 2014. Your compensation will be paid based on a weekly basis (52 pay period per year) of \$8.00/hour (less tip credit) and applicable tips.

Eligibility for medical insurance benefits will begin following ninety (90) days of continued employment. The Company's employee benefits programs are described under separate cover, and the terms of the official plan documents govern all issues of eligibility and benefits, in the event of a conflict between the contents of this letter and the terms of the plan documents.

Based on the Company's time-off policies, employees become eligible for paid time off as explained fully in our employee handbook. If the Company develops other benefit programs for which you may be eligible, the Company will advise you accordingly. The Company reserves the right to modify, supplement, and discontinue all employee benefits programs in its sole discretion.

In accordance with the Immigration Reform and Control Act, we are required to verify that you are legally entitled to work in the United States. You will be required to complete an I-9 form on your first day of employment, and present original documents establishing identity and employment eligibility.

This offer is not a contract for employment; your employment is “at-will” and may be terminated at any time for any reason by you or Michael Cetta, Inc.

Congratulations on your new position! We are very excited to have you join our organization, and we are sure that you will be a valuable addition to Sparks Steak House. Please do not hesitate to call me at 212.687.4806 should you have any questions.

Sincerely,

Shailesh Desai

RS Exh. 7(a-hh). These letters were signed by both Desai and all but one were signed by the individual employees. All of the letters contained typewritten dates across the top preceding the text. Two of the letters were dated December 11, 2014, 26 were dated December 15, and six were dated December 19.¹¹ The letters were signed by the replacement employees, but the signatures were not dated.

Again, it is Sparks' burden to establish that it reached a mutual understanding with these employees regarding their status as permanent replacements for the economic strikers prior to 4 p.m. on December 19, 2014, when the unconditional offer to return to work was made. I find that the evidence adduced by Sparks to attempt to elucidate the understanding it reached with the replacement employees, and the time at which the agreement regarding their employment status was arrived at, is insufficient to do so. Sparks did not call any of the replacement employees to testify regarding the process by which they were hired or reassigned, and their understanding regarding the nature of their employment thereafter. Edelman testified that she was responsible for finding, interviewing, and “going through the process of hiring waiters” on December 11, 2014 (Tr. 419).¹² She testified that she “contacted staffing agencies” and sought referrals from Sparks' current staff, and that she “did a series

of many, many, many interviews in the course of the day,” ultimately offering positions to prospective employees (Tr. 419). She was not asked for and did not provide any additional information about her interactions with candidates during the interviews. According to Edelstein, this process began on December 11, 2014, and continued “over the course of a few days,” but she could not recall with any more specificity how long the process took, or how many replacement employees were hired (Tr. 419-420).

Edelstein was no more detailed with respect to the letters offering permanent replacement positions, and their distribution, signature, and return. Edelstein testified that she and Desai prepared the letters offering permanent employment¹³ (Tr. 421; RS Exh. 7(a-hh)). She further testified that she handed the letters to replacement employee candidates (Tr. 423-424). However, she did not witness their signatures on the letters, and did not know whether the replacement employees signed the letters on the date that, presumably, either she or Desai placed at the top of the text (Tr. 424, 534-535; R.S. Exh. 7(a-hh)). Nor could she testify with any specificity regarding when the individual letters were returned with the replacement employees' signatures. Her testimony regarding the receipt of the signed offer letters comprising Respondent's Exhibit 7 was nebulous and significantly equivocal:
Q: And do you recall the last day that you received any of these documents returned to you?

A: I know that the last person - I don't it. It was - you know, whenever it was issued, it was within a day or so that we got them back. So whenever the last one was issued is when I got it back. I don't know the exact last day. I think it was - let me just take - can I just look at something?

Q: Sure.

A: Thanks.

(The witness examined the document.)

THE WITNESS: It was - I believe it was the 19th of December. The last day that we got this one - these back.

Tr. 426.

I simply do not find Edelstein's testimony regarding the hiring process and the offer letters probative. She provided virtually no information regarding her interactions with the replacement employee candidates, which would elucidate whether and when a mutual understanding regarding their employment status arose. Although Edelstein's testimony ostensibly encompassed all of the offer letters--including those provided to the reassigned kitchen workers and the “seasonal” employees--her narrative testimony appeared to pertain solely to the newly hired replacement employees, and not to either of the former groups.¹⁴ Her testimony regarding when Sparks received the offer letters signed by the replacement employees was vague and equivocal. In particular, I note that the list of permanent replacement employees provided to LoIacono on September 11, 2015, contains hiring dates for the replacement employees at odds with the dates of the offer letters (GC Exh. 6; R.S. Exhs. 7(a-hh)). And because several of the offer letters are dated December 19, 2014, if Sparks received them signed by the employee “within a day or so,” it is doubtful that all of the offer letters were received with employee signatures as of that date, as Edelstein claims (RS Exhs. 7(l, m, x, aa, bb, hh)).

Furthermore, the available payroll records do not illuminate the situation. For example, four of the six ostensibly reassigned kitchen employees and all 23 of the newly hired replacement employees appear on the payroll as waitstaff for the period December 15 through 21, 2014. However, the payroll evidence does not establish the date that the newly hired employees began working, or that the kitchen employees began working as waitstaff, with any further specificity (GC Exh. 16; Tr. 300-301). Furthermore, one of the former kitchen employees first appears as waitstaff on the payroll for the period December 22 through 28, 2014, and another does not appear as waitstaff on the payroll until the period January 5 through 11, 2015, well after the unconditional offer to return to work (GC Exh. 18 and 20). In addition, Daily Tip sheets and Weekly Tip records which would have established the precise dates that the newly hired employees began working and that former kitchen employees worked

as waitstaff by virtue of their receipt of tips were not produced by Respondent. As a result, the available documentary evidence does not establish that the former kitchen workers and the 23 newly hired employees constituted permanent replacements for the striking waitstaff and bar tenders prior to the unconditional offer to return to work on December 19, 2014.

General Counsel asserts that an adverse inference should be drawn based upon Sparks' failure to produce documents--in particular Weekly and Daily Tip records--which would have shown the exact date that the kitchen workers and newly hired replacements began working as waitstaff and bartenders during the period from December 15 through 19, 2014. General Counsel also asks that I draw an adverse inference based on Sparks' failure to call as a witness manager Ricardo Cordero, who signed the letters offering "seasonal" employment and hired Jonathan Sturms in February 2015. For the following reasons, I find that such adverse inferences are appropriate.

Succinctly stated, the adverse inference rule consists of the principle 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." *Auto Workers v. NLRB*, 459 F.2d 1329, 1335-1336 (D.C. Cir. 1972) (describing the adverse inference rule as "more a product of common sense than of the common law"); see also *Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at p. 2-3 and at fn. 13 (2014); *SKC Electric*, 350 NLRB 857, 872 (2007). An adverse inference may be drawn based upon a party's failure to call a witness within its control having particular knowledge of the facts pertinent to an aspect of the case. See *Chipotle Services, LLC*, 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015) (adverse inference is particularly warranted where uncalled witness is an agent of the party in question); *SKC Electric, Inc.*, 350 NLRB at 872-873. An adverse inference may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at p. 2-3 (failure to produce subpoenaed accident reports pertinent to the "treatment of similarly situated employees" warrants adverse inference that records would have established that such employees were treated more leniently than discriminatee); *Massey Energy Co.*, 358 NLRB 1643, 1692, fn. 63 (2012); see also *Zapex Corp.*, 235 NLRB 1237, 1239 (1978).

The adverse inference rule does not require that the party seeking the adverse inference have sought the witness testimony or documents via subpoena. *Auto Workers v. NLRB*, 459 F.2d at 1338 (applicability of the adverse inference rule "in no way depends on the existence of a subpoena compelling production of the evidence in question"). However, where a subpoena applicable to the particular witness or documentary evidence in question has been served, the rationale for drawing an adverse inference is strengthened. *Auto Workers v. NLRB*, 459 F.2d at 1338 ("the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference"); *People's Transportation Service, Inc.*, 276 NLRB 169, 223 (1985). An adverse inference has been deployed as a discovery sanction in such cases. See, e.g., *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), *enfd.* 156 FedAppx. 386 (2d Cir. 2005).

In the instant case, Sparks failed to produce or enter into evidence either Weekly or Daily Tip records for one of the most significant weeks in question, December 15 through 21, 2014. Such records, by establishing any shifts worked by alleged replacement employees, would tend to substantiate Respondent's claim that the striking employees were permanently replaced prior to their unconditional offer to return on December 19 at 4 p.m. Not only were such records subpoenaed by General Counsel, but I denied Sparks' petition to revoke and ordered the production of these documents on October 1, 2015. Although Sparks subsequently produced copious documents involving employee payroll and tips for 5 years dating back to January 2010, it failed to introduce evidence with regard to this critical week. Furthermore, there was no indication from Sparks' witnesses that such documents had not been created or maintained in the ordinary course of its business. Edelstein testified that Weekly Lunch and Dinner Tip records (GC Exh. 13(b)) are kept for every week the restaurant is open (Tr. 294, 321). She also testified that it would be impossible to determine, from the payroll records alone, what day of any given week an employee worked (Tr. 300-303). Cetta stated in his testimony that schedules such as the dinner schedule in evidence as General Counsel Exhibit 13(a) are kept in the ordinary course of business for every week the restaurant is open (Tr. 266). Sparks entered into a similar stipulation with respect to Weekly Tip records (GC Exh. 13(b)), and employee hours summaries (GC Exh. 13(c)) (Tr. 284). Because there was no documentary or testimonial evidence to elucidate the specific date that replacement employees signed and returned their offer letters, or the date on which a mutual understanding that employees were permanent replacements was reached, evidence

establishing the specific dates of employment during the period December 15 through 21 was critical. Yet Sparks failed to produce records having a direct probative bearing on this issue, records which were admittedly made and kept in the ordinary course of its business, despite my order denying the Petition to Revoke and requiring that they do so. Such a course of events militates in favor of drawing an adverse inference to the effect that if the records in question had been produced, they would not have established that reassigned kitchen employees and newly hired replacements employees were performing waitstaff and bartending work prior to the unconditional offer to return to work on December 19. See *Zapex Corp.*, 235 NLRB at 1239 (failure to produce personnel files of alleged permanent replacement employees warrants inference that records would have tended to show that replacements were not in fact permanent).

I further find it appropriate to draw an adverse inference based on Sparks' failure to call its Manager Ricardo Cordero as a witness.¹⁵ As discussed above, Cordero was both the signatory to the seasonal offer letters and the manager who hired Jonathan Sturms in February 2015. Edelstein testified that she created the "seasonal employment offer" template used by Cordero and signed by him¹⁶ (Tr. 411-413; RS Exh. 6(a)-(d)). As a result, Cordero would most likely have had information regarding the understanding between the "seasonal" hires and Sparks prior to their allegedly obtaining a permanent replacement position. Edelstein testified that she only interviewed one of the five alleged "seasonal employees," Luis Calle, whose offer letter was never signed and returned (Tr. 416-418). Edelstein further testified that she did not recall giving the seasonal employment letters to employees Andrew Globus, Mostafa Belabez, Luis Vasconez, or Anass Kesley (Tr. 463; RS Exh. 6(a)-(d)). As Cordero's signature was on the offer letters for these four "seasonal" employees, his testimony would have illuminated the status of their employment. Testimony could have also been elicited regarding his general experience in hiring for Sparks as related to positions of "seasonal employment." For example, some of the "seasonal" offer letters contain dated signatures, indicating that this process differed from the hiring and reassignment process for the alleged permanent replacement employees in December (RS Exh. 6(a, b, d)). Thus I find it appropriate to infer that had Cordero testified, his testimony would not have supported a finding that the "seasonal" employees' understanding regarding their status was consistent with that of a legitimate permanent replacement.

I also find it appropriate to draw an adverse inference based upon Sparks' failure to call Cordero given Cordero's hiring of employee Jonathan Sturms in February 2015. Although Edelstein testified that Cordero hired Sturms without the proper authorization, her testimony was inconsistent on this point (Tr. 427). Edelstein initially contended that Sparks changed the process for hiring after the strike, and that she explained the new procedures, which required Steve Cetta's specific approval for hiring staff, at a management meeting (Tr. 473-474, 476). According to Edelstein, the managers responded, "we need people, what do we do? What do we do?" She testified that she responded by attempting to "alleviate their anxiety and stress about what was going on," and to "help them understand that we understand that we are short waiters or we need people or whatever it is, we understand" (Tr. 478). However, Edelstein and Cetta then purportedly discharged Sturms after discovering that Cordero had hired him without consulting Cetta, in violation of this policy, because, "No one should have been hired" and "We didn't need anybody" (Tr. 502-505). When questioned further regarding why Sturms was hired if Sparks did not need additional help, Edelstein claimed that Cordero apologized, saying he had made a mistake (Tr. 555-556). Thus, Cordero's testimony regarding how the hiring of Sturms came about--whether Sparks was actually "short waiters" or whether Sturms' hiring was a "mistake" because Respondent "didn't need anybody"--would have been illuminating. I thus find that Sparks' failure to call Cordero to testify regarding the hiring of Sturms warrants an adverse inference that Cordero's testimony would not have supported Sparks' contentions regarding these issues.

The record evidence establishes additional Laidlaw vacancies, as identified by General Counsel. For example, General Counsel contends that the replacement employees Andreas Zenteno, Freddy Guzhnay, Carlos "Alex" Ruiz, and Maximillian Vainshtub left Sparks sometime between December 22, 2014, and January 18, 2015, creating Laidlaw vacancies that Sparks did not recall striking employees to fill (GC Br. 34-35). Edelstein confirmed this in her testimony (Tr. 328-335). General Counsel further contends that a striking employee should have been recalled to work when waiter Helene DeLillo left Sparks' employment on or before January 4, 2015. Edelstein confirmed in her testimony that DeLillo did not appear on or after the January 5-11, 2015 payroll (GC Exh. 20; Tr. 325, 327, 331). Sparks adduced no evidence as to why DeLillo's position or the four others identified above were not offered to striking employees, other than general arguments regarding overstaffing and seasonality which I am

rejecting herein. I therefore find that departure of Zenteno, Guzhnay, Ruiz, Vainshtub, and DeLillo created Laidlaw vacancies, to which Sparks was obligated to respond by offering these positions to striking employees. I further find that because there is no evidence that DeLillo was hired as a permanent replacement prior to the unconditional offer to return to work, her position should have been made available to a striking employee upon the unconditional offer to return to work on December 19, 2014.

Sparks further claims that a downturn in its business necessitated a smaller staff, so that its failure to recall the striking employees after their unconditional offer to return to work can be justified on this basis. The evidence adduced at the hearing, however, does not satisfy Sparks' burden to prove that strained financial circumstances obviated the need for what had previously been a full complement of employees, either at the time of the unconditional return to work or thereafter.

First of all, it is undisputed that December is the busiest month of the year at Sparks due to holiday parties and celebrations. Financial records introduced into evidence establish that, as is typical, December 2014 was the month of that year with Sparks' highest sales (Tr. 646-648, G.C. Appendix A, and RS Exh. 16). Thus, the December 10, 2014 strike and December 19, 2014 unconditional offer to return to work took place during the time that Sparks did its highest volume of business for the year. It is also undisputed that Sparks transferred kitchen workers and hired employees to work in lieu of the striking employees, both during this time and thereafter. There is no question that Sparks did so out of necessity. As Edelstein testified, when she met with management personnel after the strike began and told them that all new hires in the future must be approved by Cetta, the managers responded, "we need people, what do we do? What do we do?" (Tr. 478). Edelstein testified that her response attempted "to not only alleviate their anxiety and stress about what was going on, but to help them understand that we understand that we are short waiters or we need people" (Tr. 478). Furthermore, although December is the busiest month of the year for Sparks, the "slow" season takes place over the summer, and not in January and February (Tr. 41, 115, 645-646; GC Appendix A). Thus, while Sparks' financial records establish that its total gross profit declined from December 2013/January 2014 to December 2014/January 2015, the restaurant was still at the height of its busy season when the strike and unconditional offer to return to work took place, and had not yet entered its slowest season when striking employees were not recalled to replace employees whose employment terminated in early 2015.

Furthermore, the evidence establishes, as General Counsel argues, that the decline in sales which Sparks experienced from December 2014 to January 2015 was not as drastic as Sparks contends. The documentary evidence establishes that over the past five years the December 2014 to January 2015 decline is actually the second smallest decline for that period (GC Appendix A; RS Exh. 16). And, as discussed above, the evidence establishes that Sparks has never before laid off waitstaff and bartenders, even during its slow season over the summer. Instead, these employees remained employed, taking long vacations or leaves of absence and dividing the available work. The evidence does not support any reason for Sparks' departure from this practice, even during periods of larger or more dramatic declines in business from December of one year to January of the next. See *Kurz-Kasch, Inc.*, 301 NLRB 946, n. 3, 951 fn. 6 (evidence did not establish previously-existing practice of temporarily shifting employees, which Respondent contended obviated the necessity of recalling striking employees); *Austin Powder Co.*, 141 NLRB 183, 186 (1963), enf. 350 F.2d 973 (6th Cir. 1965) (Respondent's claim that economic decline necessitated layoffs was suspect, where it did not discharge employees at a different plant which suffered a similar decline in business). I further note that there is no evidence that Sparks took other steps to address purported issues of overstaffing caused by the decline in business, such as transferring the former kitchen workers back to their previous positions.¹⁷ Therefore Sparks' attempt to justify its refusal to recall the striking employees to work on this basis is not persuasive.

The cases cited by Sparks in support of its defense that a decline in its business constituted a substantial business justification for failing to return the striking employees to work as vacancies arose are inapposite. For example, in *Providence Medical Center*, 243 NLRB 714, 738-739 (1979), the workload in the laboratory where the striking technologists were employed was reduced due to the simultaneous strike of a separate bargaining unit of nurses at the Respondent hospital, and Respondent hired only one short-term laboratory employee during the 2½ months after both strikes concluded. Similarly, in *Bushnell's Kitchens, Inc.*, 222 NLRB 110, 117 (1979), the employer hired no replacement employees during the strike in question, employees responsible for sales instead performed production work during the strike resulting in a decline in orders, and an OSHA inspector ordered the employer to cease using certain production equipment. In *William O. McKay Co.*, 204 NLRB 388, 389, 393 (1973), Respondent

reduced its overall workforce by almost forty percent (from 100 to 65 employees) during the year before the strike began. Finally, in *Colour IV Corp.*, 202 NLRB 44, 44-45 (1973), the Board found that the striking employee not returned to work lacked the qualifications Respondent required for the poststrike work available. As a result, I find that these cases are not analogous to the circumstances at issue here.

For all of the foregoing reasons, I find that Sparks has failed to establish that an economic decline constituted a legitimate and substantial business justification for failing to reinstate the striking employees.

Finally, I find that Sparks has offered shifting rationales for its refusal to reinstate the striking employees after their December 19, 2014 unconditional offer to return to work that render its various explanations suspect. In December 2014, Sparks was contending that picket line misconduct constituted its sole reason for failing to reinstate the striking employees. Zimmerman's December 22, 2014 email declining to reinstate the striking employees provides only this justification, asserting that they engaged in "violence, threats," "intimidation," "destruction of property and trespass." Nowhere does Zimmerman mention that permanent replacement employees had been hired prior to the striking employees' unconditional offer, or that an economic downturn of some sort had eliminated the need for the previous complement of waitstaff and bartender employees. At the January 8, 2015 negotiating session Zimmerman continued to insist that he could not return the striking employees to work because he was "protecting Sparks property." I further note that Sparks did not provide any information in response to Local 342's request for information pertaining to the incidents of, according to Zimmerman, "violence, threats and intimidation . . . destruction of property and trespass" that purportedly engendered Sparks' decision to refuse to reinstate the striking employees. The evidence establishes that on January 9, 2015, Local 342 requested "any evidence and/or videos . . . to support the employer's representative's response to the Union's unconditional return to work," namely the assertion that Zimmerman "was protecting his client's property due to incidents that took place at Sparks" which the Union contended were not caused by the strike or the striking employees (GC Exh. 3, p. 22). It is well settled that the Board considers such information to be necessary for a Union's performance of its duties as bargaining representative. See, e.g., *NTN Bower Corp.*, 356 NLRB 1072, 1139 (2011); *Page Litho, Inc.*, 311 NLRB 881, 891 (1993). Zimmerman's response that the requested information was "irrelevant" based upon the Union's contention that its activities and those of the striking employees were not responsible for any alleged incidents is legalistic circumlocution, as is his assertion that "all terms and conditions for bargaining unit employees are . . . presently being negotiated" (GC Exh. 3, p. 19). Thus, the evidence establishes that Sparks never provided anything to the Union in order to substantiate its contention that "violence, threats and intimidation . . . destruction of property and trespass" justified its refusal to reinstate the striking employees. Now in its Posthearing Brief, Sparks has abandoned its picket line misconduct argument, and contends that the permanent replacement of the striking employees and an economic downturn constitute its legitimate business justifications for declining to offer reinstatement. I find that the shifting explanations asserted by Sparks at the time of the unconditional offer and January 2015 negotiating sessions, the hearing in this matter, and its Posthearing Brief militate against crediting any one as a legitimate and substantial business justification for failing to reinstate the striking employees.

For all of the foregoing reasons, I find that since December 19, 2014, Sparks has failed and refused to reinstate the striking employees, despite their having made an unconditional offer to return to work on that date, in violation of Sections 8(a)(1) and (3) of the Act. I further find that Sparks violated Sections 8(a)(1) and (3) by failing to reinstate the striking employees to vacant waitstaff and bartender positions as they have occurred.¹⁸

2. The preferential hiring list

The complaint alleges at Paragraph 7(c) that Sparks violated Sections 8(a)(1) and (3) of the Act by failing and refusing to place the striking employees on a preferential hiring list. It is well settled that economic strikers making an unconditional offer to return to work at a time when their positions are filled by permanent replacements remain employees, and "are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantial equivalent employment." *Laidlaw Corp.*, 171 NLRB at 1369-1370. To this end, the employer must maintain a "nondiscriminatory recall list" such that when openings become available, "the unreinstated striker could be recalled to his or her former or substantially equivalent position." *Peerless Pump Co.*, 345 NLRB at 375. The burden of offering reinstatement in this context rests with

the employer; strikers and the union are not required to approach the employer regarding available positions. *Laidlaw Corp.*, 171 NLRB at 1369; see also *Alaska Pulp Corp.*, 326 NLRB 522, 528 (1998) (employer required to “seek out strikers as their prestrike or substantially equivalent positions become available to offer reinstatement”).

The evidence here fails to establish that Sparks created or maintained a preferential hiring list prior to September 11, 2015, when it provided a seniority list it was purportedly using as a preferential hiring list to the Union in response to the Union's information request (GC Exhs. 5-7; Tr. 186). Sparks argues in its Posthearing Brief that it had no obligation to inform the economic strikers or the Union that permanent replacement employees had been hired, citing *Avery Heights*, 343 NLRB 1301, 1305-1306 (2004), vacated and remanded on other grounds, 448 F.3d 189, 195 (2nd Cir. 2006).¹⁹ That case, however, addressed an employer's refusal to disclose its intention or plan to hire permanent replacement employees; the employer there informed the union that it was hiring permanent replacement employees two weeks after the hiring began. *Avery Heights*, 343 NLRB at 1306-1307. Here, by contrast, Sparks declined for months to inform the Union regarding its hiring of permanent replacement employees and the existence of any preferential hiring list. It pursued this course despite the Union's reiteration of its unconditional offer to return to work at the January 8, 2015 negotiating session, the Union's subsequent request for information regarding Sparks' rationale for refusing to reinstate the striking employees, and subsequent bargaining sessions (on February 25 and March 20, 2015,²⁰ for example). Furthermore, the evidence as discussed above establishes that Sparks not only hired replacement employees, but continued to do so through February 2015 (when it hired Sturms) without informing the Union or the striking employees. I also note that, if Sparks had truly eliminated waitstaff and bartender positions for legitimate business reasons such as a financial decline, the failure to notify the Union “tends to militate against Respondent's good faith in dealing with the strikers.” *Transport Service Co.*, 302 NLRB 22, 29 (1991). As a result, the evidence establishes that Sparks failed to satisfy its obligation to create and implement a preferential hiring list with respect to the striking employees.

Sparks further argues that it discharged its duty to create and maintain a preferential hiring list when it notified the Board Agent by letter of March 5, 2015, that the economic strikers had been permanently replaced.²¹ I disagree. First of all, it is baffling that Sparks would provide this information to the Board Agent during the course of the investigation without providing it to the Union, with whom it was interacting at least once per month for contract negotiations. Notice provided to a Board Agent during the investigation of an unfair labor practice charge does not constitute notice to the Union or the striking employees. Furthermore, in the March 5, 2015 letter itself, Sparks attempts to turn the evidentiary burdens in this area on their head by complaining that the Union had not actively sought bargaining regarding returning the striking employees to work. As the above-described caselaw makes clear, the onus for creating the preferential hiring list and making offers of reinstatement to economic strikers falls on the employer.

For all of the foregoing reasons, I find that Sparks failed to and refused to place the striking employees on a preferential hiring list in violation of Sections 8(a)(1) and (3) of the Act.

3. The alleged discharge of the strikers

The complaint further alleges at Paragraph 7(d) that Respondent violated Sections 8(a)(1) and (3) of the Act by discharging the striking employees on December 22, 2014. See *Tri-State Wholesale Bldg. Supplies, Inc.*, 362 NLRB No. 85 at p. 1, fn. 1, p. 5 (2015) (enfd. 2016 WL 4245468 (6th Cir. 2016)); *Pride Care Ambulance*, 356 NLRB No. 128 at p. 1-3 (2011). General Counsel contends that on December 22, 2014, Sparks violated Sections 8(a)(1) and (3) by discharging the striking employees via Zimmerman's email to O'Leary. In order to determine whether a striker has been discharged, the Board evaluates whether the employer's statements and actions “would logically lead a prudent person to believe his [or her] tenure has been terminated.” *Pride Care Ambulance*, 356 NLRB 1023, 1024, quoting *Leiser Construction LLC*, 349 NLRB 413, 416 (2007), petition for review denied, enfd. 281 Fed. Appx. 781 (10th Cir. 2008); see also *Tri-State Wholesale Bldg. Supplies, Inc.*, 362 NLRB No. 85, at p. 5. In order to determine whether a prudent person would reasonably believe that their employment had been terminated, “it is necessary to consider the entire course of relevant events from the employee's perspective.” *Pride Care Ambulance*, 356 NLRB supra at 1024, quoting *Leiser Construction LLC*, 349 NLRB at 416. In addition, the Board has held that any uncertainty created by the employer's statements or actions will be construed against it. *Kolkka Tables & Finnish-American Saunas*, 335

NLRB 844, 846 (2001). As the Board stated in *Brunswick Hospital Center*, if the employer's conduct engenders "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."²² 265 NLRB 803, 810 (1982); see also *Kolkka Tables & Finnish-American Saunas*, 335 NLRB at 846-847; *Grosvenor Resort*, 336 NLRB 613, 617-618 (2001).

I find under the above standard that Zimmerman's December 22 email on behalf of Sparks to O'Leary constituted a discharge of the striking employees. In this email, Zimmerman informs the Union, "be advised that Sparks must reject the union's offer to return the striking employees to work at this time," without using the words "discharge" or "terminate." However, Zimmerman attributes Sparks' refusal to return the striking employees to work to "serious misconduct and unprotected activity by . . . the striking employees during the two separate strikes at Sparks between December 5 and December 19, including . . . violence, threats and intimidation towards patrons and employees, destruction of property and trespass." Zimmerman goes on to describe the refusal to return the striking employees to work as the "option" that "best protects the safety and security of its patrons, employees and delivery people from the [striking employees'] conduct," and raises the possibility of legal action by stating that Sparks "reserves all legal rights in connection with . . . Sparks' employees' conduct." I find that the striking employees could reasonably interpret Zimmerman's statements accusing them of "violence, threats," "intimidation," "destruction of property and trespass," declining to return them to work to ensure "the safety and security of [Sparks] patrons, employees and delivery people," and intimating potential legal action as discharging them from employment. Thus, in the context of the caselaw Zimmerman's statements in his December 22 email, in conjunction with Respondent's refusal to admit the employees onto Sparks' premises on December 19 after their unconditional offer to return to work, would lead the employees to reasonably believe that Sparks had terminated their employment.²³

In reaching this conclusion, I reject Sparks' argument that Zimmerman's December 22 email should be the only piece of evidence considered in order to determine whether Respondent discharged the striking employees (RS Posthearing Br. at p. 18-20). Respondent contends that because the consolidated complaint alleges at ¶ 7(d) that Sparks, by Zimmerman's email, discharged the striking employees on December 22, no other evidence regarding the status of the striking employees, or their interactions with Sparks representatives, should be evaluated. However, Sparks, having heard the evidence presented by General Counsel, had a full and fair opportunity to adduce its own evidence relevant to the alleged discharge of the striking employees at the hearing. Sparks tacitly acknowledges as much; at the hearing and in its Posthearing Brief, Sparks stated, "neither [the December 22 email] nor any other action by Sparks could have led a reasonable person to believe Sparks had terminated any economic striker" (Tr. 352-354; Posthearing Br. at p. 18). In its Posthearing Brief Sparks goes on to address, in addition to Zimmerman's December 22 email, the parties' remarks at the January 20 bargaining session, and "confusion" which may have been caused by the striking employees' interactions with the benefits plan administrator (Posthearing Br. at 25). These arguments illustrate that, despite the wording of the complaint's allegation, Sparks had an opportunity to respond to additional evidence presented by the General Counsel which would tend to establish a reasonable belief on the part of the striking employees that they had been discharged.

Nor do I find persuasive the other evidence presented by Sparks in support of its contention that the striking employees could not have reasonably believed that they were discharged. Sparks argues that as of January 8, 2015, the striking employees' personal belongings remained in the employees' lockers at Sparks, indicating that they were still employed. However, this fact is irrelevant when the employees had been barred by Sparks from returning to the restaurant for any purpose in order to, according to Zimmerman, protect the current employees and Sparks' property.²⁴ Sparks' recall of one of the striking employees in August 2015 cannot possibly be relevant to the employees' reasonable belief as to their employment status during the seven intervening months. Furthermore, the fact that termination letters, which had been issued in the past, were not issued to the striking employees does not clarify the ambiguity in their employment status created by Sparks' conduct. There is no evidence that termination letters had been issued by Sparks as a long-standing practice,²⁵ and Edelstein admitted that sending such letters to discharged employees was a practice only recently implemented (Tr. 472). As discussed above, it is the perspective of the employees, and not the specific conduct of the employer, that is considered in determining whether they reasonably believed

that they were discharged. Given Sparks' refusal to permit the striking employees to enter the premises on December 19 and Zimmerman's December 22 email, Sparks' declining to issue termination letters is insufficient to clarify the ambiguity created by its other conduct in the minds of the striking employees.

I am also unpersuaded by Sparks' contention that the language of the December 22 email is less explicit than the statements at issue in *Tri-State Wholesale Building Supplies, Inc.* and *Grosvenor Resort* which were found to engender a reasonable belief that economic strikers had been terminated. *Tri-State Wholesale Building Supplies, Inc.* involved an unequivocal statement that the economic strikers had been discharged. 362 NLRB No. 85 at p. 4 (“Please be advised you should not report for work at Tri-State Wholesale for any future shifts as your position has been filled and your employment terminated”). However, as discussed above, the standard requires not a definitive statement of discharge, but only circumstances engendering a reasonable belief on the part of the economic strikers that they have been terminated, with ambiguities created by the employer's conduct construed against them. The ambiguity created by Sparks' conduct here--the refusal to allow the striking employees on the premises on December 19 and Zimmerman's December 22 email--was sufficient to create a reasonable belief that the striking employees had been discharged. The situation at issue in *Grosvenor Resort*, also cited by Sparks, is more analogous to the events established by the credible evidence here. In that case, the employer's communication to the striking workers stated “that they had been permanently replaced . . . that they should bring ‘all their uniforms, hotel ID/timecard, and any other [of the Respondent's] property’ to the Respondent's office,” to receive “their ‘final check’ for their ‘final wages,’ including any outstanding vacation pay” contractually available only upon termination. *Grosvenor Resort*, 336 NLRB at 617-618. The Board concluded that the employer's references to a “final check” for “final wages” and “outstanding vacation pay” remittable solely upon discharge was sufficient to create a reasonable belief that the striking employees had been terminated. Here the references in Zimmerman's December 22 email to violence, threats, destruction of property, and other unlawful conduct, together with the implication of legal action, served a similar purpose.

The issue of the striking employees' understanding is further complicated here by the fact that Sparks did not inform the union or the strikers that it was hiring permanent replacement employees. Of course, Sparks was not required to do so. *Avery Heights*, 343 NLRB at 1305-1306. However, after December 19, 2014, Sparks continued to rebuff the striking employees' unconditional offers to return to work at the parties' January 8, 2015 negotiating session. The evidence also establishes that at subsequent negotiating sessions on January 20 and February 25, Sparks did not inform the union that it had prepared a preferential hiring list or an order for the recall of the striking employees. Sparks was within its rights when it did not disclose its intent to hire permanent replacement employees prior to doing so. However, this does not somehow remove from consideration the effect of its continued failure to provide this information to the striking employees and the union, together with the failure to provide a preferential hiring list, on the perception of the striking employees regarding their employment status.

In this regard, I find that Sparks' shifting explanations for its refusal to recall the striking employees particularly pertinent. As discussed above, Zimmerman's December 22 email provided one rationale for refusing to allow the striking employees to return to work--picket line misconduct, including “‘violence, threats,’ ‘intimidation,’ ‘destruction of property and trespass.’” The hiring of permanent replacements--which had allegedly occurred prior to that time--and a downturn in business which resulted in the need for a smaller staff were not mentioned. At the January 8, 2015 negotiating session Zimmerman reiterated this rationale, telling LoIacono that he could not return the striking employees to work because he was “protecting Sparks property.” When the Union subsequently wrote to request information regarding Zimmerman's claim, Zimmerman responded with legal sophistry, and never provided information. Now, however, in its Posthearing Brief, Sparks does not even assert that some sort of picket line misconduct constituted its legitimate business justification for refusing to return the striking employees to work. Instead, Sparks contends that its legitimate business justifications consist of having hired permanent replacement employees prior to the striking employees' unconditional offer to return to work, and its economic downturn. These shifting contentions support the conclusion that Sparks' conduct with respect to the union and the striking employees created ambiguity regarding their status which should be construed against Respondent.

Finally, Sparks contends that the striking employees could not have interpreted the December 22 email as discharging them because the email was sent to Charging Party UFCW Local 342, and not to the employees. I find this argument unpersuasive as

well. The record indicates that UFCW Local 342 was certified as the exclusive collective-bargaining representative of Sparks' waitstaff and bartenders on July 11, 2013, and the parties have been negotiating a collective-bargaining agreement since that time. Shop stewards and striking employees Kristofer Fuller and Valjon Hajdini attended collective-bargaining negotiations with Local 342 representatives. In this context, an assertion that email communications with Local 342 regarding the ongoing strike and contract negotiations were somehow insufficient to constitute notice to the striking employees is contrary to the legal status of the parties and simply defies common sense.

For all of the foregoing reasons, I find that Sparks discharged the striking employees on December 22, 2014, in contravention of their rights under Laidlaw and its progeny, in violation of Sections 8(a)(1) and (3) of the Act.

4. Kapovic's alleged unlawful statement soliciting employees to withdraw their support for the union

The complaint further alleges at Paragraph 5 that Sparks violated Section 8(a)(1) when Kapovic solicited employees to withdraw their support for the union on December 6, 2014. I find that during the meeting that Kapovic initiated with shop steward and negotiating committee member Valjon Hajdini, Kapovic solicited Hajdini and the employees to abandon their support for Local 342. I credit Hajdini's uncontradicted testimony that Kapovic asked to speak with him, and expressed his opinion that another strike of the waiters and bartenders would “drag the business down” and that the investors with whom he was considering buying the restaurant would “back off” as a result. I further credit Hajdini's testimony that Kapovic asked him whether the employees would “vote the Union out” if Kapovic and the other investors bought the restaurant.

It is well settled that employer attempts to convince employees to abandon their support for a union, or to convince other employees to abandon their union support or activities, violate Section 8(a)(1). See *Ozburn-Hessey Logistics LLC*, 357 NLRB No. 1526, 1553 (2011) (solicitation of employee to persuade another employee to abandon her support for the union violated Section 8(a)(1)). In addition, employer predictions of adverse business consequences as a result of union representation violate Section 8(a)(1) if they are not supported by an “objective factual basis.” *Tradewest Incineration*, 336 NLRB 902, 907 (2001) (statement that union representation would make it “unlikely that our parent company will view [employer] as an appropriate location to invest in long-term capital” coercive); see also *General Electric Co.*, 321 NLRB 662, fn. 5, 666-667 (1996) (upholding ALJ finding of 8(a)(1) violation based on General Manager's remarks that “the company that supplies the investment dollars for our growth . . . [is] watching what happens here” and encouraging employees to vote against the union); *Limestone Apparel Group*, 255 NLRB 722, 730-731 (1981) (investor's statement that he would not commit any additional resources to the plant if the union came in violated Section 8(a)(1)).

I find that Kapovic's statements were unlawful given this legal context. Sparks admitted that Kapovic was at all material times a supervisor within the meaning of Section 2(11), and an agent within the meaning of Section 2(13) acting on Sparks' behalf. Kapovic approached Hajdini doubtless aware that Hajdini was a shop steward and a member of the union's negotiating committee, and by asking Hajdini whether the employees as a group would “vote the Union out” appears to have been addressing Hajdini in his representative capacity. Kapovic and Hajdini also discussed the strike in the context of the ongoing contract negotiations. When Hajdini stated to Kapovic that the employees “were not looking to go on strike again,” only for “a simple contract,” and that, “if you don't want us to go on strike . . . make an offer that is easy for us to accept,” he was addressing Kapovic as a representative of Sparks. Kapovic responded in that capacity, stating that he would going to talk to Steve Cetta, “and see if we can do something about that.” Accordingly, after Kapovic then asked Hajdini whether the employees could “vote the Union out” if Kapovic and his investors bought the restaurant, Hajdini again referred to the ongoing negotiations, stating, “All we want is a simple contract--that we get treated fairly.”

Sparks contends in its Posthearing Brief that the evidence does not establish a violation, because Hajdini could not have reasonably believed that Kapovic was “reflecting company policy and speaking and acting for” Sparks' management, given Kapovic's comments regarding purchasing the business himself. Posthearing Brief at 46-47. However, Sparks admitted on the record that Kapovic was a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) (Tr. 7). As General Counsel points out, it is well settled that “an employer is bound by the acts and statements” of

statutory supervisors, “whether specifically authorized or not.” *Coastal Sunbelt Produce*, 362 NLRB No. 126 at p. 33 (2015); see also *Grouse Mountain Lodge*, 333 NLRB 1322, 1328 fn. 7 (2001); *Manhattan Hospital*, 280 NLRB 113, 118 (1986). There is also authority for the proposition that an employer is bound by the acts of supervisors that are contrary to the employer's directions. See *Rosedev Hospitality, Secaucus, LP*, 349 NLRB 202 fn. 3, 210-211 (2007); *Dixie Broadcasting Co.*, 150 NLRB 1054, 1076-1079 (1965).

By contrast, the cases discussed by Sparks in its Brief involve situations where the individual in question was neither a statutory supervisor nor an agent of the employer, and the allegations that their statements violated Section 8(a)(1) were dismissed on that basis. See *Pan-Oston Co.*, 336 NLRB 305, 305-307 (2001) (employee who allegedly committed Section 8(a)(1) violations neither a statutory supervisor nor an agent of Respondent pursuant to Section 2(13)); *Waterbed World*, 286 NLRB 425, 426-427 (1987) (same). While, as discussed in *Pan-Oston Co.*, an employee may function as an agent of the employer pursuant to Section 2(13) for one purpose but not another, Sparks provides no support for the position that that principle also applies to statutory supervisors within the meaning of Section 2(11). 336 NLRB at 305-306. The Board did apply this particular agency principle to a statutory supervisor in *Sea Mar Community Health Center*, 345 NLRB 947 (2005). However, that case involved a renegade supervisor who established an expanded dental lab and created a dental lab technician position, in direct contravention of specific orders by employer's CEO and Deputy Director prohibiting him from doing so. *Sea Mar Community Health Center*, 345 NLRB at 949-950. Characterizing the case as involving “unique circumstances,” and an “unusual factual scenario,” the Board held that the employer did not violate Section 8(a)(1) and (5) by refusing to provide the union with notice and the opportunity to bargain regarding the closure of the “rogue” dental lab and its effects.²⁶ *Sea Mar Community Health Center*, 345 NLRB at 947, 949-951. As a result, I do not find that case to be applicable here.

Instead, I find that the circumstances surrounding Kapovic's comments to Hajdini fall more appropriately within the scope of cases ruling that an employer is bound by the comments of a supervisor, even when unauthorized. Kapovic and Hajdini were on Sparks' premises and in a work area when Kapovic initiated the conversation. Although Kapovic referred to his interest in buying the restaurant and potential investors, Hajdini responded in terms of the current contract negotiations, stating that an offer from Sparks that the employees could accept would obviate the possibility of another strike. Kapovic in turn did not respond as an individual seeking to establish his own business; instead he said that he would speak to Cetta and “see if we can do something about that.” Therefore, it was reasonable for Hajdini to believe that Kapovic was addressing him as a supervisor on behalf of Sparks, as well as a possible purchaser of the business. I therefore find that Sparks is bound by Kapovic's comments.

For all of the foregoing reasons, I find that Sparks violated Section 8(a)(1) when Kapovic unlawfully solicited of employees to abandon their support for the Union on December 6, 2014.

5. Remedial issues

Under current Board law, lawful economic strikers that have been unlawfully discharged are entitled to, “full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements, and mak[ing] them whole for any loss of earnings and other benefits.” *Tri-State Wholesale Building Supplies*, 362 NLRB No. 85 at p. 1 (2015). However, remedies available to economic strikers are contingent upon whether the economic striker was permanently replaced before or after their unlawful discharge. *Detroit Newspapers*, 343 NLRB 1041-1042 (2004). If the strikers were permanently replaced after the unlawful discharge, they are “entitled to immediate reinstatement and backpay running from the date of the discharge (regardless of when, or if, [they] unconditionally offer[] to return to work).” *Detroit Newspapers*, 343 NLRB at 1041-1042, citing *Hormigonera del Toa, Inc.*, 311 NLRB 956, 957-958, fn. 3 (1993). If the strikers were lawfully permanently replaced prior to the discharge, they are entitled to reinstatement upon the departure of the employee that permanently replaced them, with backpay running from the date that the replacement employee leaves. *Detroit Newspapers*, 343 NLRB at 1041-1042.

Here, the economic strike began on December 10, 2014. The striking employees made an unconditional offer to return to work on December 19, 2014, and were subsequently discharged on December 22, 2014, in violation of Sections 8(a)(1) and (3) of

the Act. However, in this case the remedial distinction articulated in *Detroit Newspapers* is irrelevant given my conclusion that Respondent has not satisfied its burden to prove that it had permanently replaced the economic strikers prior to the unconditional offer to return to work on December 19, 2014. As a result, the economic strikers were not permanently replaced prior to their discharge on December 22, 2014. The striking employees are therefore entitled to immediate reinstatement and backpay running from December 19, 2014, the date of their unconditional offer to return to work.

General Counsel asks me to review and overturn the “Board's current remedial rule” as applied to unlawfully discharged economic strikers, so that the available remedies are no longer contingent upon whether the economic strikers were permanently replaced prior to the date of their discharge. As discussed above, such a venture is unnecessary. In any event, as an Administrative Law Judge, I am bound to follow existing Board law which has not been overruled by the Supreme Court. *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); see also *Gas Spring Co.*, 296 NLRB 84, 97-98 (1989), *enfd.* 908 F.2d 966 (4th Cir. 1990).

General Counsel also urges that I award search-for-work and work-related expenses to the economic strikers who were unlawfully discharged, regardless of the discharged strikers' interim earnings and separately from taxable net backpay, with interest. Such a component of the remedy is appropriate based upon the Board's recent ruling to that effect in *King Soopers, Inc.*, 364 NLRB No. 93 at p. 8-9 (2016) (providing for such a remedy, to be ordered on a retroactive basis). Backpay shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), being awarded on a quarterly basis with interest accruing as set forth in *New Horizons*, 283 NLRB 1173 (1987), and compounded in accordance with *Kentucky River Medical Center*, 356 NLRB 6 (2010). Interest on search-for-work and work-related expenses shall be calculated in the same manner. Respondent will also be required to absorb the adverse tax consequences, if any, of receiving a lump-sum backpay award covering periods longer than one year as set forth in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and to file a report with the Social Security Administration allocating the payments to the appropriate calendar quarters.

CONCLUSIONS OF LAW

1. Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant (“Respondent”) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Food and Commercial Workers (“the Union”) is a Labor Organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to reinstate Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj since their unconditional offer to return to work on December 19, 2014, Respondent violated Sections 8(1) and (3) of the Act.
4. By denying the employees listed above their right to be placed on a preferential hiring list since December 19, 2014, Respondent violated Sections 8(a)(1) and (3) of the Act.
5. By discharging the employees listed above on or about December 22, 2014, Respondent violated Sections 8(a)(1) and (3) of the Act.
6. By soliciting employees to withdraw their support for the Union, Respondent violated Section 8(a)(1) of the Act.
7. The above violations are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in an unfair labor practice, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to reinstate Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj, upon their unconditional offer to return to work, and that Respondent unlawfully discharged these employees, I shall order Respondent to offer them full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements, and make them whole for any loss of earnings and other benefits. Backpay shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest accruing at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall also compensate the unlawfully discharged employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee. Pursuant to *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall further compensate the employees named above for search-for-work and interim employment expenses, separately from taxable net backpay and regardless of whether they exceed the employees' interim earnings, with interest at the rate prescribed in *New Horizons*, compounded daily as prescribed in *Kentucky River Medical Center*, above.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended²⁷

ORDER

Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant, New York, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

- (a) Discharging or otherwise discriminating against employees for engaging in an economic strike.
- (b) Denying employees engaged in an economic strike their right to be placed on a preferential hiring list.
- (c) Failing and refusing to reinstate employees engaged in an economic strike after their unconditional offer to return to work.
- (d) Soliciting employees to withdraw their support for the Union.
- (e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days from the date of the Board's Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions,

without prejudice to their seniority or any other rights or privileges previously enjoyed, and discharging if necessary any replacements.

(b) Make the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post, at its facility in New York, New York, copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent at any time since December 19, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 18, 2016

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in an economic strike or other protected concerted activities.

WE WILL NOT deny you the right to be placed on a preferential hiring list when engaged in an economic strike.

WE WILL NOT unlawfully refuse to reinstate you if you are engaged in an economic strike and make an unconditional offer to return to work.

WE WILL NOT solicit you to withdraw your support for the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in your exercise of the rights listed above.

WE WILL within 14 days of the Board's Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and discharging if necessary any replacements.

WE WILL make those employees whole for any loss of earnings and other benefits resulting from our failure to reinstate them after their unconditional offer to return to work and from their discharge, less any net earnings, plus interest.

WE WILL compensate those employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of those employees, and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT

The Administrative Law Judge's decision can be found at www.nlr.gov/case/02-CA-142626 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Footnotes

- 1 The judge recommended a broad cease-and-desist order. We adopt the judge's recommendation in the absence of a specific exception. See *Leiser Construction*, 349 NLRB 413, 418 fn. 28 (2007), enf. 281 Fed. Appx. 781 (10th Cir. 2008).
- 2 The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel moves to strike the Respondent's brief in support of its exceptions on the ground that it fails to comply with the Board's Rules and Regulations in that it does not contain references to the specific exceptions to which its arguments relate. Although the Respondent's brief does not comply in all particulars with Sec. 102.46(a)(2), we accept it because the Respondent's brief is otherwise substantially compliant. See *Metta Electric*, 338 NLRB 1059, 1059 (2003).

The General Counsel moves to strike the appendix to the Respondent's brief in support of its exceptions. We agree with the General Counsel that the documents comprising the appendix were not introduced as evidence at the hearing and, therefore, cannot be introduced into the record at this point. See Sec. 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's motion to strike them. *S. Freedman Electric, Inc.*, 256 NLRB 432, 432 fn. 1 (1981).

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

We deny the Respondent's motion to reopen the record to receive additional evidence. The evidence the Respondent seeks to adduce has not been shown to be newly discovered or previously unavailable, as required by Sec. 102.48(c)(1) of the Board's Rules and Regulations.

The Respondent excepts to the judge's finding that it violated Sec. 8(a)(1) by soliciting employees to withdraw their support for the Union. The Respondent, however, does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous finding should be overturned. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006). In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to reinstate and by discharging the striking employees, we find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(3) and (1) by denying employees their right to be placed on a preferential hiring list. Finding the additional 8(a)(3) violation would not materially affect the remedy. Member Pearce agrees that it is unnecessary to pass, but he further notes that it is undisputed the Respondent did not provide evidence of a preferential hiring list prior to September 11, 2015.

Member Emanuel agrees that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to reinstate the striking employees after their unconditional offer to return to work. He finds that the Respondent failed to carry its burden to prove, as an affirmative defense, that it hired permanent replacements before the unconditional offer to return. The Respondent was required to prove "a mutual understanding with the replacements that they are permanent," and it failed to do so. See *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007), *pet. for rev. denied.* 544 F.3d 841 (7th Cir. 2008); *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524 (2002), *enfd.* 63 Fed. Appx. 520 (D.C. Cir. 2003). Member Emanuel observes that the Respondent's letters to the replacements offering them employment would have been adequate to establish a mutual understanding if the Respondent had provided specific evidence of when the letters were signed by the replacements and returned. Member Emanuel also finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(3) and (1) by discharging the striking employees because the additional violation would not materially affect the remedy.

We shall modify the judge's remedy and recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to our findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

4 The General Counsel filed a limited cross-exception asking the Board to reconsider its remedy for unlawfully discharged economic strikers who were permanently replaced prior to their discharge. In view of our finding that the Respondent failed to establish it had permanently replaced the striking employees, we find it unnecessary to pass on this exception because it would not affect the remedy.

5 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

1 Kapovic did not testify at the hearing.

2 The bartenders and waiters who engaged in the strike beginning December 10, 2014, are Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepień, Alim Tagani, and Mergim Zeqiraj.

3 The evidence establishes that Sparks hired and reassigned employees to replace the economic strikers. Because so much of the evidence regarding the replacement employees is contested in various ways, it will be discussed *infra*.

4 The charges in the instant case had already been filed.

- 5 Temporary transfers of employees, by contrast, do not create a *Laidlaw* vacancy. *Pirelli Cable Corp.*, 331 NLRB at 1540.
- 6 General Counsel contends that under *Kurz-Kasch, Inc.*, 301 NLRB 946, 949 (1991), a decline in the employer's workforce below prestrike levels "creates the presumption that vacancies existed," which can be rebutted by proof on the employer's part of "substantial and legitimate business reasons" for the existing number of employees. However, that analysis was part of the decision of the Sixth Circuit remanding the case. *Kurz-Kasch, Inc.*, 301 NLRB at 946, 948-949; *Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757 (6th Cir. 1989). Thus, while the Sixth Circuit's burden-shifting analysis constituted the law of that particular case, it has not been subsequently applied with any degree of uniformity. I note that the Sixth Circuit's analysis in *Kurz-Kasch, Inc.* was cited at length by the ALJ in *Laidlaw Waste Systems*, but the Board did not discuss it in upholding her decision. See *Laidlaw Waste Systems*, 313 NLRB 680, 680-682 fns. 3, 7, and at 694 (1994).
- 7 The case of Sparks waiter Joanna is illustrative. Edelstein testified at the hearing that Joanna was out of work on an extended medical leave, and her name was therefore redacted from the Daily Tip record (Tr. 530-531; RS Exh. 8). However, during her testimony Edelstein also stated that Joanna was still an employee of Sparks, regardless of her having been removed from the Daily Tip record, and her name appears on the Weekly Tip record (Tr. 536-539; GC Exh. 13(b)). This evidence indicates that the Daily Tip record does not contain a complete record of Sparks' waiters and bartenders during the pertinent periods.
- 8 The payroll for this period contains only 45 waiters and bartenders, because Joanna did not work and therefore was not paid (GC Exh. 13(d)).
- 9 There were no Weekly Tip records produced for this or any other week until the week of January 19 through 24, 2015. Information was therefore culled from both the Weekly Tip records (which constitute the most accurate reflection of the roster of employees) and the payroll records (reflecting the wages actually paid for a given week) to establish that there were 46 employees immediately prior to the strike and 37 immediately thereafter.
- 10 These employees had been employed by Sparks in kitchen positions for some time prior to being reassigned to waitstaff work. See GC Exh. 6 and 7; Tr. 264-265. Because the evidence establishes that Sparks hired new employees to replace the kitchen workers who were transferred into waitstaff positions, the waitstaff positions into which they transferred constituted *Laidlaw* vacancies. GC Exh. 14 and 23(B). See *Pirelli Cable Corp.*, 331 NLRB at 1540; *K-D Lamp Co.*, 229 NLRB 648, 650 (1977).
- 11 The alleged "seasonal employees" were given two offer letters. The first, distributed in October and November 2014 depending upon the employee, begins, "It is a pleasure to extend you an offer of seasonal employment as a Waiter for Michael Cetta, Inc. dba Sparks Steak House. Your start date will be DATE. Your compensation will be paid on a weekly basis (52 pay periods a year) of \$8.00/hour (less tip credit) and applicable tips." [R.S. Exh. 6(a-d)] There is no end date or time period for employment specified in the letter. Furthermore, the evidence establishes that prior to the December 10, 2014 strike Sparks had never hired employees on a seasonal basis whose employment terminated after the busiest months. Instead, the evidence establishes that employees hired from October to December were always maintained on the roster and allowed to take vacation or unpaid time off as business slowed.
- 12 Edelstein testified that she was not at Sparks on December 10, 2014, when the strike began (Tr. 418-419).
- 13 Desai testified on behalf of Sparks, but was not questioned regarding the offer letters or his involvement in the interview and hiring process.
- 14 The only evidence regarding the reassignment of the kitchen employees is Steve Cetta's testimony that their reassignment to waitstaff positions took place after December 10, 2014 (Tr. 264-265).
- 15 Cetta testified that Ricardo Cordero was still employed by Sparks as a manager at the time of the hearing (Tr. 244).
- 16 Desai testified that he signed offer letters in fall 2014 in anticipation of the busy season at Sparks, but his signature does not appear on the "seasonal" offer letters (Tr. 649-650). This leads me to conclude that in his testimony he was referring to offer letters he gave to the former kitchen workers, the other newly hired replacements, or to the "seasonal" employees in mid-December 2014.
- 17 This is particularly the case given that, as General Counsel argues and calculations based on payroll records confirm, kitchen workers ultimately "cost" Sparks 4.5 times more in payroll than waitstaff and bartenders, because Sparks is ineligible for a tip credit with respect to the kitchen workers. See RS Exhs. 15, 17; GC Posthearing Br. at p. 46, fn. 33.
- 18 The precise number of *Laidlaw* vacancies to which economic strikers should have been reinstated is a matter for compliance. *Chicago Tribune Co.*, 304 NLRB 259, 277-278 (1991); *Concrete Pipe & Products Corp.*, 305 NLRB 152, 154 fn. 9 (1991).
- 19 The Second Circuit upheld the Board's determination that the employer in *Avery Heights* was not required to inform the employees or the union prior to hiring permanent replacements, but reversed the Board's conclusion that its having done so did not violate the Act.
- 20 Sparks attempted to elicit testimony from LoIacono to the effect that on or about March 20, 2015, Abondolo told him that Zimmerman had stated that Sparks had permanently replaced the striking employees (Tr. 208-213, 357). As Zimmerman chose not to address this issue in his testimony, I credit LoIacono's statement that Abondolo never did so. In any event, affirmative testimony on LoIacono's part would have been nonprobative hearsay.
- 21 Sparks attached a copy of this letter to its Post-Hearing Brief and raised this argument for the first time therein. General Counsel subsequently moved to strike based upon Sparks' failure to enter the evidence into the record during the hearing. Respondent countered

that the ALJ may take judicial notice of records within the agency's own files. I have considered the letter submitted by Sparks, but do not ultimately find it material to my conclusions on the issue for the reasons which follow in the text.

- 22 In its Posthearing Br., Sparks attempts to effectively reverse the well settled rule construing ambiguities in this respect against the employer by contending that the conduct of the Union and the 401(k) plan administrator ““inflamed” the employees and caused any confusion regarding their employment status. RS Posthearing Brief at 21-23 and 24-25. I decline to do so.
- 23 I further note that some striking employees were provided with contradictory information regarding their employment status via Sparks' health insurance plan administrator which, at the very least, would raise the possibility that they had been discharged. The evidence establishes that in January 2015, some employees who participated in Sparks' group health insurance plan received letters stating that their coverage was being terminated based upon a qualifying event in the form of a “termination,” and notifying them of their rights under COBRA (GC Exh. 8; Tr. 196). One month later, at least one employee was sent a second COBRA letter, describing the qualifying event in question as a “reduction in hours” (RS Exh. 2). The employee to whom the second COBRA letter was addressed testified that he never received it (Tr. 200-201). Nevertheless, I find it unreasonable to place on the employees the onus for discerning the meaning of different qualifying events under COBRA in order to dispel the confusion regarding their employment status which these letters doubtless engendered.
- 24 Hajdini testified that at the time he did not know whether his belongings remained in his locker, because he had not been allowed back on Sparks' premises (Tr. 64).
- 25 Sparks introduced two letters threatening employees who were apparently absent from work for two months with discharge if they did not return to work within a stated period of time, but both are dated September 24, 2014 (RS Exhs. 10, 11).
- 26 I note that recently in *Postal Service*, 364 NLRB No. 62 (2016), the Board affirmed an ALJ's order finding that a statutory supervisor was acting in her personal interest, and not as an agent within the scope of her employment, when she obtained a stalking order against a union steward. The ALJ found, based on the supervisor's testimony, that the supervisor obtained the stalking order as “an act of desperation...to alleviate her own personal fears.” *Postal Service*, 364 NLRB No. 62 at p. 18. As a result, the ALJ found that the only conduct of the supervisor imputable to the employer was the supervisor's enforcement of the terms of the protective order on the employer's premises, which interfered with the union steward's contract administration activities. *Postal Service*, 364 NLRB No. 62 at p. 1, 18-19. However, the Board noted that there were no exceptions filed with respect to this particular conclusion. *Postal Service*, 364 NLRB No. 62 at p. 1, fn. 2. As a result, I do not consider the case to have precedential import on the issue.
- 27 If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.
- 28 If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

366 NLRB No. 97 (N.L.R.B.), 211 L.R.R.M. (BNA) 1490, 2018 WL 2387584

EXHIBIT 2

805 Fed.Appx. 2

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. D.C.Cir. Rule 32.1 and Rule 36. United States Court of Appeals, District of Columbia Circuit.

MICHAEL CETTA, INC., d/b/
a Sparks Restaurant, Petitioner

v.

NATIONAL LABOR RELATIONS
BOARD, Respondent

No. 18-1165

|
September Term, 2018

|
Consolidated with 18-1171

|
Filed on: May 20, 2019

Synopsis

Background: Employer petitioned for review of decision of National Labor Relations Board (NLRB) finding it committed unfair labor practices, in violation of National Labor Relations Act (NLRA), based on discharging and failing to reinstate striking workers.

Holdings: The Court of Appeals held that:

[1] substantial evidence supported NLRB's finding that employees reasonably believed their employment status was questionable because of their strike activity, and

[2] substantial evidence supported NLRB's finding that employer lacked legitimate and substantial business justification for not rehiring employees after strike.

Petition denied and cross-application for enforcement granted.

West Headnotes (2)

[1] **Labor and Employment** 🔑 Striking employees

Substantial evidence supported National Labor Relations Board's (NLRB) finding that employer of striking restaurant workers created an uncertain situation for employees leading to a climate of ambiguity and confusion that would reasonably cause them to believe that their employment status was questionable because of their strike activity, in violation of NLRA; evidence indicated that employer repeatedly rejected striking employees' offer to return, that it offered shifting explanations for those rejections, and that it had banned all employees from returning to the restaurant for any purpose. National Labor Relations Act § 8, 29 U.S.C.A. § 158(a)(1), (3).

[2] **Labor and Employment** 🔑 Striking employees

Substantial evidence supported National Labor Relations Board's (NLRB) finding that employer lacked legitimate and substantial business justification for not rehiring restaurant workers following strike, in violation of NLRA; evidence indicated that replacement workers had been hired with no understanding that their arrangement would be permanent, and that employer's claimed downturn in business justifying failure to rehire was instead a cyclical occurrence after the holidays, and employer had never before reduced its staffing levels during off-peak periods. National Labor Relations Act § 8, 29 U.S.C.A. § 158(a)(1), (3).

*3 On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Attorneys and Law Firms

Jon Schuyler Brooks, Michelman & Robinson, LLP, New York, NY, for Petitioner

Usha Dheenan, David S. Habenstreit, Gregoire Frederic Sauter, National Labor Relations Board, (NLRB) Appellate and Supreme Court Litigation Branch, Washington, DC, for Respondent

Before: Rogers, Tatel, and Pillard, Circuit Judges.

JUDGMENT

Per Curiam

This case was considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board (“NLRB” or “Board”) and was briefed and argued by counsel. Michael Cetta, Inc. d/ b/a Sparks Restaurant (“Sparks”) petitions for review of the Board’s Decision and Order finding Sparks committed unfair labor practices in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons that follow, it is

ORDERED and **ADJUDGED** that the petition for review is denied, and the Board’s cross-application for enforcement is granted.

In December 2014, Sparks and the union representing its waiters and bartenders had been unsuccessfully attempting to negotiate a contract for a year and a half. Following a brief, two-hour strike on December 5, a Sparks manager tried to convince an employee to leave the union. That effort failed, and no contract agreement resulted.

On December 10, thirty-six of Sparks’s waiters and bartenders went on strike to protest the lack of progress in negotiations. After nine days, the strikers made a voluntary and unconditional offer to return to work. Sparks’s management refused the offer, accusing the strikers of having committed picket-line violence and intimidation. *4 At a January negotiation session, Sparks’s representatives again refused to allow the strikers to return to work, repeating their insinuation that the striking employees posed a threat. When union

officials asked Sparks to identify a particular violent incident, the restaurant refused.

It later became clear that Sparks had hired workers to replace the strikers. And although several of those replacement employees left in early 2015, Sparks waited until August before it invited a single striking worker to return.

As relevant to this petition, the Board found that Sparks committed three unfair labor practices in violation of the National Labor Relations Act: (1) discharging striking workers; (2) failing to reinstate striking workers following a voluntary and unconditional offer to return to work; and (3) soliciting workers to withdraw their support from the union. Sparks’s petition challenges the Board’s findings with respect to discharge and failure to reinstate the strikers.

We begin with discharge. Sparks does not challenge the governing legal framework. For purposes of the Act, an employee is considered discharged “if the words or conduct of the employer would reasonably lead an employee to believe that he had been fired.” *Elastic Stop Nut Division of Harvard Industries, Inc. v. NLRB*, 921 F.2d 1275, 1282 (D.C. Cir. 1990). The test is an objective one: it “depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer.” *NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990), *as amended* (May 20, 1991) (emphasis omitted) (internal quotation marks omitted). Board precedent—uncontested by Sparks—supplements this rule by providing that “the employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees” leading to “a climate of ambiguity and confusion” that would “reasonably cause[] strikers to believe ... that their employment status was questionable because of their strike activity.” *In re Kolkka*, 335 NLRB 844, 846 (2001) (internal quotation marks omitted).

Sparks challenges the Board’s factual finding that the striking workers would reasonably have concluded that their employment status was ambiguous. But “we may not disturb the Board’s findings of fact when those findings are supported by substantial evidence based upon the record taken as a whole.” *Elastic Stop Nut*, 921 F.2d at 1279. “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (internal quotation marks omitted).

[1] Here, ample evidence supported the Board’s discharge finding, including Sparks’s repeated rejections of the employees’ offer to return, its “shifting explanations” for those rejections, and its ban on the employees “returning to the restaurant for any purpose.” *In re Michael Cetta, Inc.*, 366 NLRB No. 97, slip op. at 14–16 (May 24, 2018). Contrary to Sparks’s argument, the Board’s general counsel was under no obligation to call any employees to testify to their subjective belief that they had been discharged; as Sparks concedes, the test is objective. *See Champ Corp.*, 933 F.2d at 692. Similarly, statements by union officials suggesting they believed the workers were “locked out” rather than discharged offer no basis to disturb the Board’s finding. The test “depends on the reasonable inferences that the *employee* could draw,” and characterizations by the union’s officers are not dispositive of what the employees might have concluded. *5 *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629 (10th Cir. 1984). Nor did the Board unfairly punish Sparks for exercising the right to decline to disclose the existence of replacement workers. Assuming such a right exists, the Board is still entitled to consider how an employer exercises that right as evidence of a different unfair labor practice. *See New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006) (concluding that an employer’s concealment of a replacement campaign might be evidence of “an independent unlawful purpose,” such as “an illicit motive to break a union”).

With respect to the failure-to-reinstate charge, Sparks again does not contest the controlling law. The National Labor Relations Act requires an employer to “reinstate strikers” following their voluntary and unconditional offer to return. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967). An employer, however, may refuse reinstatement if “it can demonstrate that it acted to advance a legitimate and substantial business justification.” *New England Health Care Employees Union*, 448 F.3d at 191 (internal quotation marks omitted). “The burden of proving justification is on the employer.” *Fleetwood Trailer*, 389 U.S. at 378, 88 S.Ct. 543. Sparks offered two independent justifications to the Board.

First, Sparks claimed that it lawfully hired permanent replacements. *See Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995) (“That [the striker] was replaced by a permanent employee during the strike is [a legitimate and substantial business] justification....”). Under unchallenged Board precedent, to succeed on that claim, Sparks had to prove “there was a mutual understanding between the

[employer] and the replacements that the nature of their employment was permanent.” *Target Rock Corp.*, 324 NLRB 373, 373 (1997), *enforced sub nom. Target Rock Corp. v. NLRB*, 172 F.3d 921 (D.C. Cir. 1998) (unpublished per curiam decision). Crucially, Sparks had to demonstrate that the understanding was reached “before [the strikers] made unconditional offers to return to work.” *Supervalu, Inc.*, 347 NLRB 404, 405 (2006).

Sparks argues that the general counsel conceded that Sparks timely hired replacements and therefore that the Board was not entitled to make a contrary finding. This argument misses the mark. Although the general counsel’s attorney agreed that Sparks had hired replacements *at some point*, she never conceded *when* that happened. *See* Hearing Tr. 17, Joint Appendix 122 (general counsel’s opening statement: “You will also learn that at the time the employees offered to return to work on December 19th, Sparks had not replaced all the strikers and that positions were available for the former striker[s] to return to work.”). Thus, Sparks still had to present evidence establishing that it reached the necessary mutual understanding with the replacements before the December 19 offer to return to work.

[2] The Board found that Sparks failed to meet that burden, and substantial evidence supports that finding. Although Sparks introduced offer letters for the replacements that it had issued on or before December 19, those letters did not indicate when the replacements signed them and the testimony of Sparks’s human resources officer fell short of filling the gap. Sparks cites *Gibson Greetings* for the proposition that an employer’s unilateral statements can establish the necessary mutual understanding. And so they may, depending on the context. 53 F.3d at 390–91. But this case is very different from *Gibson Greetings*, where the replacements had been working for several months and had received confirmation of their jobs’ permanency *6 more than a month before the strikers offered to return. *Id.* at 387–91. The rapidly evolving events and compressed timeline here make it more critical to establish exactly when the replacements reached a mutual understanding with Sparks.

Sparks now contends that certain tip records from the week of December 15–21 would have helped clarify this timing issue. But Sparks failed to introduce those records into evidence at the hearing. Based in part on that omission, the ALJ drew an adverse inference against Sparks, assuming that the records would not have supported its position. To be sure, the ALJ also thought (erroneously, as it turns out) that Sparks had

failed to even produce those records during discovery. Even if that mistaken impression contributed to the ALJ's decision to draw the adverse inference, however, any error was harmless because admitting the tip records would not have affected the outcome. See *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 582 (D.C. Cir. 2015) (“In administrative law, as in federal civil and criminal litigation, there is a harmless error rule: [section] 706 of the Administrative Procedure Act instructs reviewing courts to take due account of the rule of prejudicial error.” (alteration, citation, and internal quotation marks omitted)). At most, the missing records would have shown that some of the replacements started work before December 19. Such evidence would not have resolved the crucial evidentiary issue in this case: when the replacements understood their arrangement with Sparks to be permanent. See *In re Michael Cetta, Inc.*, 366 NLRB No. 97, slip op. at 10 (records “would have established the precise dates that the newly hired employees *began working*,” not when they understood their positions to be permanent (emphasis added)); see also Oral Arg. Rec. 13:18–14:54 (offering no explanation for how Sparks was prejudiced by the inference). Nor was the Board obligated to reopen the record for Sparks to introduce the tip sheets. Sparks's only excuse for failing to introduce them the first time around was the general counsel's supposed concession. Since that concession never happened, there was no reason to reopen the record.

Sparks argues that it had a second legitimate business reason for not reinstating its employees: a decline in business after December 2014. But the Board reasonably found based on five years' worth of sales records that Sparks's business suffered a downturn every year after the holiday rush. Despite this cyclical pattern, Sparks had never before reduced its staffing levels during off-peak periods. Thus, the Board found, the downturn in business failed to explain Sparks's failure to rehire the strikers. Sparks has given us no basis to upset that finding. See *Bally's Park Place*, 646 F.3d at 935 (Board accorded “a very high degree of deference” (internal quotation marks omitted)).

Finally, as Sparks chose not to challenge the unlawful solicitation finding in its petition for review, the Board is entitled to summary enforcement on that issue. See *CCI Limited Partnership v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (finding “summary enforcement is appropriate” when an issue is not raised in petitioner's “opening[] brief”).

All Citations

805 Fed.Appx. 2

EXHIBIT 3

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

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

and

**UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342**

Cases 02-CA-142626 and 02-CA-144852

COMPLIANCE SPECIFICATION AND NOTICE OF HEARING

On August 23, 2019, the United States Court of Appeals for the District of Columbia Circuit issued its mandate in accordance with its May 20, 2019 judgment enforcing the Decision and Order of the National Labor Relations Board reported at 366 NLRB No. 97 on May 24, 2018. The Board ordered Michael Cetta, Inc., d/b/a Sparks Restaurant (“Respondent”) to offer full reinstatement to Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adam Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivce¹, Amir Jakupi, Jeton Karahoda², Bardhyl Kelmendi, Milazim Kukaj, Rachid Lamnji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resultbegu, Khalid Seddiki, Youssef Semlali³ El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim

¹ The Board order incorrectly spelled Ante Ivce’s last name as Ivre.

² The Board order incorrectly spelled Jeton Karahoda’s last name as Kerahoda.

³ The Board order incorrectly spelled Youssef Semlali El Idrissi’s last name as Semlalo.

Tagani, and Mergim Zeqiraj to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; to make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them; to remove from its files any reference to the unlawful discharges, and notify the employees in writing that this has been done and that the discharges will not be used against them in any way; to compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards; to file with the Regional Director a report allocating the backpay awards to the appropriate calendar years for each employee; and to post a Notice to Employees and distribute it electronically, if applicable.

As a controversy exists over the validity of Respondent’s reinstatement offers and the amount of backpay due, the Regional Director of the National Labor Relations Board for the Third Region, pursuant to Sections 102.54 and 102.55 of the Board’s Rules and Regulations, hereby issues this Compliance Specification and alleges as follows:

1. BACKPAY PERIOD

- (a) The backpay period for all discriminatees begins December 19, 2014, the date of the unconditional offers to return to work.
- (b) The backpay period ends upon the following:
 - (1) For the following discriminatees who waived reinstatement, the backpay period ends on the date Respondent made a facially valid offer of reinstatement:

	Name		End Date
(A)	Beljan	Marko	12/02/2016
(B)	Jakupi	Amir	12/09/2016
(C)	Nuredini	Adnan	06/21/2016
(D)	Seddiki	Khalid	12/09/2016
(E)	Semlali El Idrissi	Youssef	12/09/2016

(2) (A) Elvi Hoxhaj worked six dinners per week and five lunches per month as a bartender prior to Respondent's unfair labor practice.

(B) Respondent made several invalid offers of reinstatement to nonequivalent employment to Elvi Hoxhaj. Therefore, his backpay period continues to run until Respondent makes a valid offer of reinstatement to him.

(C) Elvi Hoxhaj's backpay is calculated through April 25, 2020; however, backpay continues to accrue until Respondent makes a valid offer of reinstatement to him.

(3) (A) A reasonable measure of when the backpay period ends for discriminatees named below in paragraph 1(b)(3)(D) who were reinstated and remained working for Respondent is when the number of waiters per pay period, subsequent to the date when all discriminatees were offered reinstatement,⁴ fell below 38 (the average number of waiters per pay period during the one-year period before the strike). This was attained on the payroll period ending December 24, 2017.

(B) **Average Number of Waiters Pre-Strike**

<u>PAY PERIOD</u>	<u>NUMBER OF WAITERS⁵</u>
December 2013	40
January 2014	39
February 2014	39
March 2014	38
April 2014	39
May 2014	39
June 2014	39
07/06/14	39
07/13/14	39
07/27/14	39
08/03/14	39

⁴ The last batch of reinstatement offers from Respondent to discriminatees are dated from December 2 to December 9, 2016.

⁵ Number of waiters as reported in payroll records submitted by Respondent, excluding the week ending July 20, 2014, for which Respondent failed to provide payroll records. Respondent submitted monthly payroll records for some months and weekly records for other pay periods.

<u>PAY PERIOD</u>	<u>NUMBER OF WAITERS</u>
08/10/14	39
08/17/14	39
08/24/14	39
08/31/14	32
09/07/14	39
09/14/14	34
09/21/14	35
09/28/14	36
10/05/14	35
10/12/14	37
10/19/14	39
10/26/14	39
November 2014	45
AVERAGE # OF WAITERS DURING PRE-STRIKE PERIOD	
	38

(C) Number of Waiters⁶ Post-Strike

<u>2014</u>			<u>2015</u>			<u>2016</u>			<u>2017</u>			<u>2018</u>		
<u>Pay</u>														
<u>Period</u>	<u># of Waiters</u>		<u>Period</u>	<u># of Waiters</u>		<u>Period</u>	<u># of Waiters</u>		<u>Period</u>	<u># of Waiters</u>		<u>Period</u>	<u># of Waiters</u>	
12/07/14	42		01/04/15	34		01/03/16	37		01/01/17	46		01/07/18	35	
12/14/14	42		01/11/15	33		01/10/16	34		01/08/17	51		01/14/18	38	
12/21/14	34		01/18/15	32		01/17/16	35		01/15/17	51		01/21/18	36	
12/28/14	35		01/25/15	31		01/24/16	37		01/22/17	51		01/28/18	36	
<u>Dec 2014</u>	<u>38.25</u>	<u>Avg</u>	02/01/15	31		01/31/16	36		01/29/17	51				
			<u>Jan 2015</u>	<u>32.2</u>	<u>Avg</u>	<u>Jan 2016</u>	<u>35.8</u>	<u>Avg</u>	<u>Jan 2017</u>	<u>50</u>	<u>Avg</u>	<u>Jan 2018</u>	<u>36.25</u>	<u>Avg</u>
			02/08/15	31		02/07/16	37		02/05/17	49		02/04/18	35	
			02/15/15	32		02/14/16	36		02/12/17	51		02/11/18	37	
			02/22/15	30		02/21/16	33		02/19/17	49		02/18/18	35	
			03/01/15	29		02/28/16	32		02/26/17	51		02/25/18	35	
			<u>Feb 2015</u>	<u>30.5</u>	<u>Avg</u>	<u>Feb 2016</u>	<u>34.5</u>	<u>Avg</u>	<u>Feb 2017</u>	<u>50</u>	<u>Avg</u>	<u>Feb 2018</u>	<u>35.5</u>	<u>Avg</u>
			03/08/15	30		03/06/16	35		03/05/17	51		03/04/18	33	
			03/15/15	31		03/13/16	34		03/12/17	52		03/11/18	31	
			03/22/15	30		03/20/16	35		03/19/17	50		03/18/18	34	
			03/29/15	31		03/27/16	35		03/26/17	49		03/25/18	35	
			<u>Mar 2015</u>	<u>30.5</u>	<u>Avg</u>	<u>Mar 2016</u>	<u>34.75</u>	<u>Avg</u>	04/02/17	49		04/01/18	36	
			04/05/15	31		04/03/16	35							
			04/12/15	31		04/10/16	35		04/09/17	47		04/08/18	36	
			04/19/15	31		04/17/16	37		04/16/17	47		04/15/18	36	
			04/26/15	31		04/24/16	37		04/23/17	47		04/22/18	36	
			05/03/15	31		05/01/16	36		04/30/17	47		04/29/18	37	

⁶ Number of waiters as reported in Respondent's weekly payroll records.

2014 Pay Period	# of Waiters	2015 Pay Period	# of Waiters	2016 Pay Period	# of Waiters	2017 Pay Period	# of Waiters	2018 Pay Period	# of Waiters
		Apr 2015	31 Avg	Apr 2016	36 Avg	Apr 2017	47 Avg	Apr 2018	36.25 Avg
		05/10/15	30	05/08/16	34	05/07/17	47	05/06/18	37
		05/17/15	31	05/15/16	35	05/14/17	47	05/13/18	35
		05/24/15	31	05/22/16	34	05/21/17	47	05/20/18	36
		05/31/15	29	05/29/16	33	05/28/17	46	05/27/18	37
		May 2015	30.25 Avg	May 2016	34 Avg	May 2017	46.75 Avg	May 2018	36.25 Avg
		06/07/15	30	06/05/16	33	06/04/17	45	06/03/18	37
		06/14/15	31	06/12/16	35	06/11/17	46	06/10/18	34
		06/21/15	30	06/19/16	34	06/18/17	48	06/17/18	36
		06/28/15	29	06/26/16	34	06/25/17	48	06/24/18	34
				07/03/16	35	07/02/17	48	07/01/18	34
		Jun 2015	30 Avg	Jun 2016	34.2 Avg	Jun 2017	47 Avg	Jun 2018	35 Avg
		07/05/15	27	07/10/16	32	07/09/17	43	07/08/18	33
		07/12/15	28	07/17/16	32	07/16/17	44	07/15/18	33
		07/19/15	29	07/24/16	30	07/23/17	45	07/22/18	34
		07/26/15	28	07/31/16	30	07/30/17	43	07/29/18	34
		Jul 2015	28.2 Avg	Jul 2016	31 Avg	Jul 2017	43.75 Avg	Jul 2018	33.5 Avg
		08/09/15	30	08/07/16	32	08/06/17	43	08/05/18	33
		08/16/15	29	08/14/16	32	08/13/17	41	08/12/18	32
		08/23/15	29	08/21/16	34	08/20/17	42	08/19/18	31
		08/30/15	29	08/28/16	36	08/27/17	42	08/26/18	31
		Aug 2015	29.25 Avg	Aug 2016	33.5 Avg	Aug 2017	42 Avg	Aug 2018	31.75 Avg
		09/06/15	27	09/04/16	34	09/03/17	42	09/02/18	33
		09/13/15	28	09/11/16	34	09/10/17	41	09/09/18	32
		09/20/15	28	09/18/16	35	09/17/17	42	09/16/18	33
		09/27/15	27	09/25/16	36	09/24/17	43	09/23/18	33
								09/30/18	33
		Sep 2015	27.5 Avg	Sep 2016	34.75 Avg	Sep 2017	42 Avg	Sep 2018	32.8 Avg
		10/04/15	31	10/02/16	34	10/01/17	41		
		10/11/15	31	10/09/16	35	10/08/17	42	10/07/18	36
		10/18/15	31	10/16/16	37	10/15/17	41	10/14/18	38
		10/25/15	34	10/23/16	37	10/22/17	41	10/21/18	39
		11/01/15	37	10/30/16	37	10/29/17	38	10/28/18	40
		Oct 2015	32.8 Avg	Oct 2016	36 Avg	Oct 2017	40.6 Avg	Oct 2018	38.25 Avg
		11/08/15	37	11/06/16	37	11/05/17	41	11/04/18	41
		11/15/15	38	11/13/16	37	11/12/17	39	11/11/18	41
		11/22/15	38	11/20/16	37	11/19/17	40	11/18/18	40
		11/29/15	38	11/27/16	37	11/26/17	40	11/25/18	41
		Nov 2015	37.75 Avg	Nov 2016	37 Avg	Nov 2017	40 Avg	Nov 2018	40.75 Avg
		12/06/15	38	12/04/16	38	12/03/17	40	12/02/18	40
		12/13/15	38	12/11/16	39	12/10/17	41	12/09/18	41
		12/20/15	38	12/18/16	47	12/17/17	40	12/16/18	42
		12/27/15	36	12/25/16	49	12/24/17	41	12/23/18	41
						12/31/17	35	12/30/18	40
		Dec 2015	37.5 Avg	Dec 2016	43.25 Avg	Dec 2017	39.4 Avg	Dec 2018	40.8 Avg

(D) For the following discriminatees who accepted Respondent's facially valid offer of reinstatement, upon their return to work, they discovered they were scheduled to work and worked fewer hours as they had worked prior to their terminations. As a result, the discriminatees were not reinstated to substantially equivalent positions and their backpay periods end on December 24, 2017, which is the date payroll records first show that the number of waiters returned to the pre-strike average number of waiters per month.

Name		Name	
(i)	Alarcon Gerardo	(xiii)	Lustica Silvio
(ii)	Albarracin Fredy	(xiv)	Mushkolaj Iber
(iii)	Demaj Arlind	(xv)	Patino Juan
(iv)	Fuller Kristopher	(xvi)	Prelvukaj Sadik
(v)	Gjevukaj Adem	(xvii)	Puente Francisco
(vi)	Hajdini Valjon	(xviii)	Qelia Ermal
(vii)	Iriarte Juan	(xix)	Resulbegu Nagip
(viii)	Ivce Ante	(xx)	Spahija Fatlum
(ix)	Karahoda Jeton	(xxi)	Stepien Andrzej
(x)	Kelmendi Bardhyl	(xxii)	Tagani Alim
(xi)	Kukaj Milazim	(xxiii)	Zeqiraj Mergim
(xii)	Lamniji Rachid		

(4) For discriminatees who accepted Respondent's facially valid offer of reinstatement and thereafter quit their employment for reasons unrelated to insufficient hours of work, their backpay period ends on the date they ended their employment. Those discriminatees are:

	Name		End Date
(A)	Campanella	James	03/12/2017
(B)	Collins	Ian	04/02/2017
(C)	Cutra	Elvis	02/12/2017
(D)	Neziraj	Gani	09/03/2017
(E)	Neziraj	Kenan	03/26/2017
(F)	Neziraj	Xhavit	08/27/2017

(5) Discriminatee Valon Lokaj's backpay period ends on June 30, 2016, the date that he became unavailable for employment prior to Respondent's July 8, 2016 offer of reinstatement to him.

2. GROSS BACKPAY

(a) An appropriate measure of calendar quarter gross backpay is based on each discriminatee's average gross weekly earnings per quarter,⁷ inclusive of regular hours, overtime hours, meal hours,⁸ spread of hours, paid time off hours, and total tips, during each quarter of the twelve months immediately preceding the unlawful discharges, (the "representative period,")⁹ plus wage increases in subsequent years pursuant to New York State mandates and the Respondent's increases granted to other waiters.

(b) Appendices 1(a) through 1(jj) set forth in alphabetical order the following on a calendar quarter basis during the representative period:

1. Column C sets forth each discriminatee's regular hours.

⁷ Quarterly averages are appropriate to account for employees earning more during certain portions of the year during the pre-discrimination period.

⁸ The amount equal to the value of "meal hours" that Respondent would have reported to the Internal Revenue Service for meals the discriminatees would have partaken each workday but for their termination is included in their calculations for average gross weekly earnings inasmuch as discriminatees were required to provide their own meals during the backpay period.

⁹ The twelve-month representative period for calculations includes data from December 2013 to November 2014, excluding the week ending July 20, 2014 for which Respondent failed to provide payroll records. December 2013 data was used in lieu of December 2014 as this is the most recent and complete December data in the pre-discrimination period.

2. Column D sets forth each discriminatee's overtime hours.
3. Column E sets forth each discriminatee's meal hours.
4. Column F sets forth each discriminatee's spread of hours.
5. Column G sets forth each discriminatee's paid time off hours.
6. Column H sets forth each discriminatee's total tips earned.
7. Column I sets forth each discriminatee's total gross pay.

(c) Each discriminatee's total hours and earnings per category in each quarter during the representative period are set forth in Appendices 1(a)-(jj), Rows 6, 13, 29, and 39, along with the total Gross Pay per quarter.

(d) Averages were calculated by dividing the totals per quarter (as described above in 2(c)) in each category of hours and earnings by the number of weeks that discriminatees were paid in each respective quarter.¹⁰

1. Gross weekly average calculations for the discriminatees do not include unpaid leave. Listed below are the unpaid week ending dates excluded from the named discriminatee's weekly average calculation and the number of weeks used as the divisor in calculating the gross weekly average for the relative quarter:

Name		Appendix	Weeks ending	Quarter	Divided by
(A)	Alarcon Gerardo	1(a)	02/16/14; 02/23/14; 03/02/14	1	10
(B)	Beljan Marko	1(c)	02/23/14	1	12

¹⁰ Inasmuch as Respondent did not provide payroll records for week ending July 20, 2014, the divisor for the third quarter of 2014 is 12 weeks (rather than the 13 weeks used in every other quarter), less the additional weeks of unpaid leave the discriminatees used.

	Name		Appendix	Weeks ending	Quarter	Divided by
(C)	Campanella	James	1(d)	08/24/14; 08/31/14; 09/07/14	3	9
(D)	Fuller	Kristopher	1(h)	08/31/14	3	11
(E)	Iriarte	Juan	1(l)	03/02/14; 03/09/14; 03/16/14; 03/23/14; 03/30/14	1	8
(F)	Ivce	Ante	1(m)	08/03/14; 09/07/14; 09/14/14; 09/21/14; 09/28/14	3	7
(G)	Ivce	Ante	1(m)	10/05/14; 10/12/14; 10/19/14; 10/26/14	4	9
(H)	Jakupi	Amir	1(n)	07/13/14; 07/27/14; 08/03/14	3	9
(I)	Kukaj	Milazim	1(q)	07/06/14; 07/13/14	3	10
(J)	Lamniji	Rachid	1(r)	08/31/14; 09/07/14	3	10
(K)	Lamniji	Rachid	1(r)	10/05/14	4	12
(L)	Lokaj	Valon	1(s)	07/06/14; 07/13/14; 07/27/14; 08/03/14	3	8
(M)	Lustica	Silvio	1(t)	07/27/14; 08/03/14; 08/10/14; 08/17/14; 08/24/14	3	7
(N)	Neziraj	Gani	1(v)	07/27/14; 08/03/14; 08/10/14; 08/17/14; 08/24/14	3	7

	Name		Appendix	Weeks ending	Quarter	Divided by
(O)	Neziraj	Xhavit	1(x)	01/05/14; 01/12/14; 01/19/14; 01/26/14	1	9
(P)	Nuredini	Adnan	1(y)	08/03/14; 08/10/14; 08/17/14	3	9
(Q)	Puente	Francisco	1(bb)	03/09/14; 03/16/14; 03/23/14	1	10
(R)	Puente	Francisco	1(bb)	07/27/14; 08/03/14	3	10
(S)	Qelia	Ermal	1(cc)	12/08/13; 12/15/13; 12/22/13; 12/29/13 (for regular hours only due to a negative number in regular hours reported in payroll records for December 2013)	4	9 (only applies to regular hours)
(T)	Seddiki	Khalid	1(ee)	08/24/14; 08/31/14	3	10
(U)	Semlali El Idrissi	Youssef	1(ff)	09/14/2014	3	11
(V)	Spahija	Fatlum	1(gg)	01/05/14; 01/12/14	1	11
(W)	Spahija	Fatlum	1(gg)	07/06/14; 07/27/14	3	10
(X)	Spahija	Fatlum	1(gg)	12/08/13; 12/15/13; 12/22/13; 12/29/13	4	9
(Y)	Tagani	Alim	1(ii)	07/27/14; 08/03/14; 08/10/14; 09/07/14	3	8
(Z)	Zeqiraj	Mergim	1(jj)	08/03/14; 08/10/14; 08/17/14; 08/24/14; 09/07/14	3	7

(e) Each discriminatee’s average gross weekly hours and earnings per category in each quarter during the representative period are set forth in Appendices 1(a)-(jj), Rows 7, 14, 30, and 40.

(f) Average gross weekly earnings used in backpay calculations account for wage increases for regular and overtime hourly rates pursuant to New York State mandated minimum wage scales for tipped food service workers for 2015, 2016, and 2017.

<u>NYS MINIMUM WAGE FOR TIPPED FOOD SERVICE WORKERS</u>		
EFFECTIVE DATE	REG HRS RATE	OT HRS RATE
On and after December 31, 2013	\$ 5.00	\$ 9.00
On and after December 31, 2014	\$ 5.00	\$ 9.38
On and after December 31, 2015	\$ 7.50	\$ 12.00
On and after December 31, 2016	\$ 7.50	\$ 13.50

(g) Average gross weekly earnings used in backpay calculations account for wage increases for meal hours, spread of hours, and paid time off hours rates pursuant to New York State mandated basic minimum wage scales for 2015, 2016, and 2017.¹¹

<u>NYS BASIC MINIMUM WAGE</u>			
EFFECTIVE DATE	MEAL HRS RATE	SPREAD OF HRS RATE	PTO HRS RATE
On and after December 31, 2013	\$ 2.50	\$ 8.00	\$ 5.00
On and after December 31, 2014	\$ 2.50	\$ 8.75	\$ 8.75
On and after December 31, 2015	\$ 2.50	\$ 9.00	\$ 9.00
On and after December 31, 2016	\$ 2.85	\$ 11.00	\$ 11.00

¹¹ As reported in Respondent’s payroll records for 2015, 2016, and 2017.

(h) Discriminatee bartender Adnan Nuredini was paid at a higher hourly rate than other discriminatees during the pre-discrimination period and his higher hourly rate is maintained during the backpay period.

<i>NUREDINI, ADNAN</i>					
<u>EFFECTIVE DATE</u>	<u>REG HRS</u> <u>RATE</u>	<u>OT HRS</u> <u>RATE</u>	<u>MEAL</u> <u>HRS</u> <u>RATE</u>	<u>SPREAD</u> <u>OF HRS</u> <u>RATE</u>	<u>PTO HRS</u> <u>RATE</u>
On and after December 31, 2013	\$9.75	\$14.63	\$2.50	\$8.00	\$9.75
On and after December 31, 2014	\$9.75	\$14.63	\$2.50	\$8.75	\$9.75
On and after December 31, 2015	\$9.75	\$14.63	\$2.50	\$9.00	\$9.75
On and after December 31, 2016	\$9.75	\$14.63	\$2.85	\$11.00	\$11.00

(i) Discriminatee bartender Elvi Hoxhaj was paid at a higher hourly rate than other discriminatees during the pre-discrimination period and his hourly rate is maintained during the backpay period until 2016 when the New York State minimum rates were increased to higher than his pre-discrimination rates.

<i>HOXHAI, ELVI</i>					
<u>EFFECTIVE DATE</u>	<u>REG HRS</u> <u>RATE</u>	<u>OT HRS</u> <u>RATE</u>	<u>MEAL HRS</u> <u>RATE</u>	<u>SPREAD OF</u> <u>HRS RATE</u>	<u>PTO HRS</u> <u>RATE</u>
On and after December 31, 2013	\$7.50	\$11.25	\$2.50	\$8.00	\$7.50
On and after December 31, 2014	\$7.50	\$11.25	\$2.50	\$8.75	\$8.75
On and after December 31, 2015	\$7.50	\$12.00	\$2.50	\$9.00	\$9.00
On and after December 31, 2016	\$7.50	\$13.50	\$2.85	\$11.00	\$11.00
On and after December 31, 2017	\$8.65	\$15.15	\$3.25	\$13.00	\$13.00
On and after December 31, 2018	\$10.00	\$17.50	\$3.60	\$15.00	\$15.00
On and after December 31, 2019	\$10.00	\$17.50	\$3.60	\$15.00	\$15.00

- (j) Appendices 2(a) through (jj) set forth, in alphabetical order, and on a calendar quarter basis, each discriminatee’s average regular hours, overtime hours, meal hours, spread of hours, and paid time off hours from the representative period, referenced above in Paragraphs 2(d) through 2(e), multiplied by the applicable rates set forth above in Paragraphs 2(f) through 2(i), plus the weekly average tips earned per quarter during the representative period, resulting in the average weekly gross earnings used in calculations for each quarter of the backpay period.
- (k) Backpay is tolled for the parts of the backpay period for discriminatees and time periods set forth below because they failed to meet their obligation to mitigate or were unavailable for interim employment.

	<u>Name</u>		<u>Time Period</u>
(1)	Alarcon	Gerardo	10/30/16 - 11/27/16
(2)	Campanella	James	12/10/16 - 12/25/16; 02/12/17 - 02/19/17
(3)	Collins	Ian	06/19/15 - 10/03/16
(4)	Cutra	Elvis	12/25/16 - 01/01/17; 01/29/17 - 02/05/17
(5)	Demaj	Arlind	07/02/17 - 07/09/17
(6)	Fuller	Kristopher	12/10/16 - 01/02/17; 03/26/17 - 04/02/17; 04/09/17 - 04/16/17
(7)	Gjevukaj	Adem	01-29-17 - 02/05/17; 07/02/17 - 07/09/17
(8)	Hajdini	Valjon	12/10/16 - 01/01/17; 08/06/17 - 08/13/17
(9)	Ivce	Ante	09/06/15 - 09/27/15; 07/02/17 - 07/09/17;

			09/03/17 - 09/10/17
(10)	Karahoda	Jeton	10/14/15 - 10/21/15; 09/24/17 - 10/01/17
(11)	Kukaj	Milazim	07/24/17 - 12/03/17
(12)	Lamniji	Rachid	10/14/15 - 11/08/15; 10/23/16 - 10/30/16
(13)	Lustica	Silvio	10/14/15 - 10/21/15; 06/19/16 - 06/26/16; 09/11/16 - 10/09/16; 08/20/17 - 08/27/17
(14)	Mushkolaj	Iber	07/13/16 - 07/24/16; 01/22/17 - 01/29/17; 02/05/17 - 02/12/17
(15)	Neziraj	Gani	12/10/16 - 01/08/17
(16)	Neziraj	Kenan	12/10/16 - 01/01/17; 02/12/17 - 02/19/17; 02/26/17 - 03/05/17
(17)	Neziraj	Xhavit	08/07/16 - 08/14/16; 12/25/16 - 01/01/17; 02/12/17 - 02/19/17; 03/19/17 - 03/26/17; 06/04/17 - 06/11/17; 07/16/17 - 07/23/17
(18)	Nuredini	Adnan	10/04/15 - 10/24/15
(19)	Patino	Juan	04/09/17 - 04/16/17
(20)	Prelvukaj	Sadik	07/01/15 - 07/15/15; 10/14/15 - 10/31/15; 07/10/16 - 08/14/16; 05/28/17 - 06/04/17; 07/23/17 - 08/13/17
(21)	Puente	Francisco	02/01/15 - 02/07/15; 12/10/16 - 12/18/16; 03/13/17 - 03/26/17; 09/11/17 - 09/24/17
(22)	Qelia	Ermal	12/10/16 - 12/18/16; 07/09/17 - 08/13/17

(23)	Resulbegu	Nagip	10/07/16 - 10/23/16; 09/17/17 - 10/01/17
(24)	Semlali El Idrissi	Youssef	09/27/15 - 12/26/15
(25)	Spahija	Fatlum	10/14/15 - 01/17/16; 03-06/16 - 03/12/16; 07/03/16 - 07/09/16; 04/23/17 - 06/03/17
(26)	Stepien	Andrzej	12/10/16 - 02/05/17
(27)	Tagani	Alim	01/01/17 - 01/08/17
(28)	Zeqiraj	Mergim	06/28/15 - 07/25/15; 10/14/15 - 10/25/15; 01/03/16 - 01/10/16; 07/03/16 - 07/31/16; 08/27/17 - 09/30/17

- (l) Appendices 3(a)-(jj), set forth in alphabetical order, each discriminates' gross backpay amount on a calendar quarter basis in the column titled "Gross Backpay."

3. INTERIM EARNINGS

(a) An appropriate measure of calendar quarter interim earnings are quarterly interim earnings prorated among the number of weeks worked for interim employers. Weekly prorated interim earnings are set forth in Appendices 3(a)-(jj).

(b) Interim earnings for discriminatee Elvi Hoxhaj are estimated from March 9 through April 25, 2020.¹²

1. An accurate measure of estimated interim earnings for discriminatee Elvi Hoxhaj is the average of his actual earnings at his interim employment from December 30, 2019 through March 9, 2020.

¹² Elvi Hoxhaj's backpay is calculated through April 25, 2020; however, backpay continues to accrue until Respondent makes a valid offer of reinstatement to him.

- (c) Interim earnings based on hours worked in excess of those available at Respondent at the gross employer are not used to offset gross backpay.
- (d) It is appropriate that net earnings from self-employment are offset against gross backpay.
1. Discriminatee Adnan Nuredini incurred net loss amounts from his self-employment as reported to the Internal Revenue Service in his annual income tax filings for 2015. Based on this filing, no interim earnings are offset against his gross backpay for self-employment in 2015.
 2. Discriminatee Nuredini's net earnings amounts from his self-employment as reported to the Internal Revenue Service in his annual income tax filings for 2016 are offset against his gross backpay in 2016.
 3. Discriminatee Fatlum Spahija's self-employment produced no net earnings. Therefore, no interim earnings are offset against his gross backpay for self-employment from June 25, 2015 to January 17, 2016.
- (e) For those employees who were reinstated but not to substantially equivalent positions, named above in Paragraphs 1(b)(3)(D), and 1(b)(4), an appropriate measure of interim earnings post-reinstatement for years 2015, 2016, and 2017 is the average weekly gross earnings per quarter reported in the Respondent's payroll records.
- (f) It is appropriate to offset against gross backpay, as interim earnings, payments for temporary loss of wages awarded in a workers' compensation case to discriminatee Fatlum Spahija for the period beginning on September 9, 2017 and ending on December 24, 2017, date in which backpay period ends as described in Paragraph 1(b)(3)(D) on this Compliance Specification.
- (g) No interim earnings were offset against weeks for which no backpay was due.

(h) Discriminatees’ interim earnings per calendar quarter of the backpay periods are set forth in Appendices 3(a)-(jj) under the column titled “Quarter Interim Earnings.”

4. NET BACKPAY

- a) Calendar quarter net backpay is the difference between calendar quarter gross backpay and calendar quarter interim earnings.
- b) The total amount of discriminatees’ net backpay is set forth in Appendices 3(a)-(jj), under the column titled “Net Backpay.”

5. EXPENSES

- a) Discriminatees are entitled to be made whole for expenses they incurred as a result of the Respondent’s unlawful actions.
- b) Penalties for early withdrawals from 401(k) plans and loan defaults on borrowing from discriminatees’ 401(k) plans during the backpay period as reported by discriminatees are set forth below opposite to each discriminatee’s name:

	<u>Last Name</u>	<u>First Name</u>	<u>401(k) Related Expense</u>	<u>Quarter Incurred</u>
(1)	Alarcon	Gerardo	\$2,551	Q3 – 2015
(2)	Fuller	Kristopher	\$140	Q4 - 2016
(3)	Hajdini	Valjon	\$115	Q2 - 2015
(4)	Hoxhaj	Elvi	\$4,204	Q1 - 2015
(5)	Hoxhaj	Elvi	\$5,313	Q3 - 2017
(6)	Mushkolaj	Iber	\$592	Q1 - 2015
(7)	Neziraj	Gani	\$180	Q1 - 2015
(8)	Neziraj	Kenan	\$564	Q1 - 2017
(9)	Qelia	Ermal	\$390	Q1 - 2015
(10)	Resulbegu	Nagip	\$2,922	Q4 - 2015
(11)	Stepien	Andrzej	\$579	Q4 - 2015

- c) Discriminatees are entitled to be reimbursed for employment agency fees they paid to assist

them in mitigating their losses in the amounts opposite their names below:

	<u>Last Name</u>	<u>First Name</u>	<u>Employment Agency Expense</u>	<u>Quarter Incurred</u>
(1)	Beljan	Marko	\$150	Q2 - 2016
(2)	Beljan	Marko	\$150	Q3 - 2016
(3)	Ivce	Ante	\$150	Q2 - 2015
(4)	Neziraj	Gani	\$150	Q1 - 2015
(5)	Resulbegu	Nagip	\$150	Q4 - 2015

d) Discriminatees are entitled to be reimbursed for expenses they incurred in seeking interim employment in new occupations during the backpay period as set forth below:

	<u>Last Name</u>	<u>First Name</u>	<u>Search for work Expenses</u>	<u>Course Type</u>	<u>Quarter Incurred</u>
(1)	Cutra	Elvis	\$1,150	Hair Cutting Class	Q3 - 2015
(2)	Karahoda	Jeton	\$100	Real Estate Course	Q1 - 2015

e) Discriminatees are entitled to be reimbursed for the additional mileage incurred for the commute to their interim employers.

1. An appropriate measure of the amount due for additional mileage is the expense incurred commuting to the discriminatees' interim employers, less the expense incurred commuting to Respondent.
2. An appropriate measure of the mileage expense for commuting to interim employers is the total number of additional miles per week on their round-trip mileage from their home to their interim employer times the IRS mileage rate in effect at the time of the interim employment.
3. Discriminatee Amir Jakupi is entitled to be reimbursed for additional mileage expenses he incurred in his commute to interim employer Del Friscos Grille in Stamford, Connecticut for the period beginning on August 1, 2015 until October 29, 2015 (13

weeks). His interim employment expenses are set forth below :

	<u>Last Name</u>	<u>First Name</u>	<u>Weekly Miles at Respondent</u>	<u>Weekly Miles at Interim Employer</u>	<u>Additional Mileage per week</u>	<u>IRS Mileage Rate</u>	<u>Add'l Mileage Expenses per week</u>	<u>Mileage Expenses</u>	<u>Quarter Incurred</u>
(A)	Jakupi	Amir	30	60	30	\$ 0.575	\$ 17.25	\$ 138	Q3 - 2015
(B)	Jakupi	Amir	30	60	30	\$ 0.575	\$ 17.25	\$ 86	Q4 - 2015

6. BENEFITS – 401(k)

- a) Respondent offers a 401(k) retirement plan to its employees where employees select a percentage of contributions to be withheld from their wages and directed to the plan on their behalf for tax deferred purposes. Respondent gives employees the flexibility to change the percentage of contributions at any time. Respondent does not provide a matching contribution for 401(k) participants.
- b) Discriminatees are entitled to be made whole for the loss of 401(k) plan contributions that should have been deposited into their 401(k) accounts based on their gross backpay during the backpay period.
- c) It is appropriate that Respondent should direct employee contributions to discriminatees' 401(k) accounts if the discriminatees continue to maintain 401(k) accounts.¹³
- d) An appropriate estimate of the discriminatees' 401(k) plan contribution rates is obtained by dividing the total gross pay amounts earned by each discriminatee in each quarter of the pre-discrimination representative period mentioned above in paragraph 2(c) by each discriminatee's total 401(k) contribution amounts during the respective quarter.
- e) Appendices 4(a) - 4(q) set forth, in alphabetical order, the following on a quarterly basis:

¹³ Discriminatee Iber Mushkolaj has not confirmed to the Region whether his 401(k) account is still active; for purposes of backpay calculations, the Region assumes that his account is still active; his calculations will be revised if it is determined his account is no longer active.

1. Column A sets forth the name of each discriminatee with an active 401(k) account,
 2. Column C sets forth the amounts each discriminatee contributed to a 401(k) account during the representative period,
 3. Column D sets forth each discriminatee's gross pay per quarter during the representative period,
 4. Column E sets forth the contribution percentage rate for each discriminatee as described above in 6(d).
- f) An appropriate measure of the amount to be diverted to each discriminatee's 401(k) account for each pre-reinstatement quarter of the backpay period, is the quarterly 401(k) contribution rate from Column E of Appendix 4 multiplied by the amount of gross backpay for each affected discriminatee and is set forth in Appendix 5.
- g) In quarters when interim earnings were earned at Respondent (post-reinstatement), the 401(k) contribution is calculated by multiplying the quarterly 401(k) contribution rate from Column E of Appendix 4 by the net backpay (difference between gross backpay and interim earnings at Respondent) and is set forth in Appendix 5.
- h) In quarters that include combined interim earnings at the Respondent (post-reinstatement) and interim earnings earned at other employers, 401(k) contributions are calculated weekly, using net backpay for weeks with earnings at the Respondent and gross backpay for weeks with interim earnings at other employers.¹⁴
- i) Estimated 401(k) contributions, prorated by calendar quarter of the backpay period, are set forth in the Column titled "401K Contributions" of Appendix 5.

¹⁴ No discriminatee has reported having a 401(k) plan at other interim employers.

- j) An appropriate measure of the estimated earnings on the contributions that would have been made to discriminatees' 401(k) accounts¹⁵ is the interest rate used by the Board for lost wages.¹⁶
- k) Gross backpay and net backpay amounts are adjusted for discriminatees with active 401(k) accounts by deducting 401(k) contributions they would have made and are set forth in Appendix 6, where applicable.

7. ADVERSE TAX CONSEQUENCES

- a) In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*,¹⁷ discriminatees are entitled to be compensated for any adverse tax consequences of receiving backpay as a lump sum. If not for the unfair labor practice committed by Respondent, the backpay award for discriminatees would have been paid over more than one year rather than paid in the year Respondent makes final payment in this case. Backpay for this case should have been earned in 2014, 2015, 2016, and 2017 rather than exclusively in 2020 or other future year when the payment will be made.¹⁸
- b) In order to determine what the appropriate excess tax award should be, the amounts of federal and state taxes need to be determined for the backpay as if the money had been paid when it was earned throughout the backpay period. In addition, the amounts of federal and state taxes need to be calculated for the lump sum payment if the payment was made this

¹⁵ Although requested, Respondent has failed to provide to the Region information regarding discriminatees' selection of 401(k) funds and their performance and earnings during the backpay period.

¹⁶ Interest earned on 401(k) contributions continues to accrue until the date of actual payment; interest calculations will need to be adjusted when backpay is paid.

¹⁷ 361 NLRB No. 10 (2014).

¹⁸ All information, including the amounts owed will need to be updated to reflect the actual year of payment.

year. The excess tax liability was calculated as the difference between these two amounts for each discriminatee.

- c) The amounts of Taxable Income for each calendar year for each discriminatee are based on the calculations for backpay in this compliance specification for 2014, 2015, 2016, and 2017 and are summarized in Appendices 7(a) through 7(jj). Using this Taxable Income for the various years, federal and state taxes were calculated using the federal and state tax rates for the appropriate years.¹⁹ The federal rates are based on the reported tax filing status for each discriminatee, as shown in Appendices 7(a) through 7(jj).
- d) The amounts of taxes owed for 2014, 2015, 2016, and 2017 would have been the amounts set forth in Appendices 7(a) through 7(jj), opposite to the Title “Taxes Paid” for each discriminatee. The amounts of federal and state taxes are broken down by year and set forth in Appendices 7(a) through 7(jj), under each respective column for the specific year.
- e) The total amount of the lump sum award for each discriminatee that is subject to this excess tax award is set forth on Appendices 7(a) through 7(jj),²⁰ opposite to the title, “Sum ’00 to [].”
- f) The lump sum amounts are based on the backpay calculations described in this specification.
- g) The amounts of taxes owed in 2020 are based on the current federal and state tax rates²¹ and on the fact that discriminatees will be filing their income taxes based on the tax filing status as set forth in Appendices 7(a) through 7(jj). The amounts of taxes owed on the lump

¹⁹ The actual federal tax rates were used, while the state’s average tax rate was used for these previous years.

²⁰ The lump sum amount does not include interest on the amount of backpay owed. Interest should be included in the lump sum amount; however, interest continues to accrue until the payment is made. The lump sum amount will need to be adjusted when backpay is paid to the discriminatees to include interest.

²¹ The actual federal tax rates were used for the current year, while an average state tax rate for the current year was used.

sum amounts were calculated as the amounts shown in Appendices 7(a) through 7(jj) in the lines titled, “Sum ’00 to [],” under each column for federal and state taxes for each of the discriminatees.

- h) The adverse tax consequence is the difference between the amount of taxes on the lump sum amounts being paid in 2020²² and the amount of taxes that would have been charged if these amounts were paid when the backpay was earned in 2014, 2015, 2016, and 2017. These amounts are set forth in Appendices 7(a) through 7(jj)²³ opposite to the title, “Excess Tax on Backpay.”
- i) Any excess tax liability payment that is to be made to discriminatees is also taxable income and causes additional tax liabilities. Appendices 7(a) through 7(jj) includes calculations for these supplemental taxes. These amounts are called the incremental tax liability. The incremental tax includes all of the taxes that discriminatees will owe on the excess tax payment. This incremental tax is calculated using the federal tax rates used for calculating taxes for the backpay awards and the average state tax rate for 2020. The incremental tax amount for each discriminatee is set forth in Appendices 7(a) through 7(jj)²⁴ and titled, “Incremental Tax on Backpay.”
- j) The Total Excess Tax is the total tax consequence for discriminatees receiving a lump sum award in a year other than when it was earned. It is the sum of the excess tax on backpay and the incremental amount. The total excess tax amounts owed to the discriminatees are shown in Appendix 8 opposite to each name and in Appendices 7(a) through 7(jj) in each discriminatee’s calculation. The amount of excess tax liability will need to be updated to

²² Assuming backpay is paid in 2020.

²³ However, additional excess taxes may still be owed on the interest once that amount is liquidated.

²⁴ An incremental tax liability on the interest may still be owed once that amount is liquidated.

reflect the actual date of payment. Moreover, there may be a liability on the interest amount once that amount is liquidated.²⁵

8. SUMMARY

Summarizing the facts and calculations specified above, and in the Appendices, the obligation of Respondent under this Compliance Specification to make the discriminatees whole for losses suffered as a result of Respondent's unlawful conduct will be discharged by payment to the discriminatees for backpay, minus applicable withholdings pursuant to federal and state laws, expenses, excess tax, and 401(k) contributions directed to their 401(k) accounts, as set forth in Appendix 8, columns C through F totaling **\$4,427,987.00**, plus interest accrued to date of payment.²⁶

Full compliance with the Board Order and Court Judgment will be achieved upon effectuation of the make whole remedy, as described in Section 8 of this Specification.

The Regional Director, or his designee, reserves the right to amend any or all provisions of this Compliance Specification by inclusion of information not currently known to the Regional Director.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Section 102.56 of the Board's Rules and Regulations, it must file an answer to the Compliance Specification. The answer must be received by this office on or before **April 29, 2020**. Respondent must serve a copy of the answer on each of the other parties.

²⁵ Interest continues to accrue until the payment is made; the amount of excess tax liability will need to be adjusted when backpay is paid to the discriminatees to include interest up to the date of payment.

²⁶ Respondent will further file with the Regional Director a completed Report of Backpay Paid under the National Labor Relations Act, which the Regional Director will file with the Social Security Administration for the purpose of allocating the payment to the appropriate calendar years. Respondent is also required to submit to the Regional Director the W2s reflecting backpay amounts paid to the discriminatees.

The answer must be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the answer to a Compliance Specification is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Compliance Specification are true.

As to all matters set forth in the Compliance Specification that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and

Regulations. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures.

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

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **a date, time and place to be determined**, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Compliance Specification, at which time Respondent and any other party to this proceeding will have the right to appear in person, or otherwise, and give testimony. The procedures to be followed at the hearing are described in the attached form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached form NLRB-4338.

Dated: April 8, 2020

/s/ Paul J. Murphy
Paul J. Murphy, Regional Director
National Labor Relations Board
Region 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Attachments

Appendices 1 through 8

EXHIBIT 4

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

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

and

**UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342**

Cases 02-CA-142626 and 02-CA-144852

**ORDER GRANTING EXTENSION OF TIME
TO FILE AN ANSWER**

Upon proper cause shown by Michael Cetta, Inc. d/b/a Sparks Restaurant (Respondent) with respect to its request for an extension of time to file an answer to the Compliance Specification,

IT IS HEREBY ORDERED, pursuant to Section 102.56(d) of the Board's Rules and Regulations, as amended, that the time for the filing of Respondent's answer in the above-entitled matter is extended to **May 13, 2020**.

Dated: April 20, 2020

/s/ Paul J. Murphy

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

EXHIBIT 5

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

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

Respondent,

v.

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342,

Complainant.

Case Nos.: 02-CA-142626 and
02-CA-144852

ANSWER TO COMPLIANCE SPECIFICATION

Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant (hereinafter, “Sparks” or Respondent or Employer) answers the Compliance Specification issued on April 8, 2020 by Region 3 (through transfer from Region 2, where the underlying events occurred) and shows as follows:

With respect to the unnumbered introductory paragraph, Respondent admits that the National Labor Relations Board issued a Decision and Order on May 24, 2018 and that said Order was enforced by the District of Columbia Court of Appeals on May 20, 2019. In further response to the unnumbered paragraph of the Specification, Respondent admits that a controversy exists regarding the reinstatement offers which have been issued, the amount of backpay due and the failure to mitigate damages as required under the Act.

With respect to the allegations contained in paragraph I of the Specification, Respondent responds as follows:

1. BACKPAY PERIOD

(a) Respondent denies that the backpay period covered by the Specification should commence on December 19, 2014, because the offers were not made in good faith, were not made at a time when job openings existed and because, as demonstrated *infra*, the Specification ignores and/or disregards the actual number of “*Laidlaw*” vacancies.

(b) Respondent admits that certain discriminatees waived reinstatement. Further, it is admitted that the backpay period ends on the date Respondent made a facially valid offer of reinstatement. Respondent DENIES that facially valid offers of reinstatement were mailed on the dates listed in the Specification. Specifically offers were transmitted:

(1)	Beljan	12-2-16
	Jakupi	12-2-16
	Nuredini	6-21-16
	Seddiki	12-2-16
	Somali El Idrissi	12-2-16

(2)(A) Respondent denies that Hoxhaj worked six dinners per week and five lunches per month as a bartender. Mr. Hoxhaj received valid offers of reinstatement on April 16, 2016 and again in July 12, 2016 and then on November 17, 2016.

(2)(B) As noted above, Respondent’s offers to Hoxhaj were valid and declined by either the employee or union for personal or political reasons. Each declination constitutes a failure to properly mitigate.

(2)(C) Respondent denies that backpay continues to accrue to Hoxhaj for the reasons expressed in 1(b)2(A and B), *supra*. Respondent affirmatively defends that Hoxhaj inadequately mitigated his damages.

(3)(A) Respondent denies that the backpay period ends only upon all discriminatees being offered reinstatement and the average number of waiters fell below 38, on or about

December 24, 2017. Respondent avers that business needs dictated both appropriate staffing levels and hours.

(3)(B) Respondent admits that the Region's calculations are mathematically correct.

(3)(C) Respondent admits that the payroll records reflect the average number of waiters per pay period as stated in the Specification.

(3)(D) Respondent admits that the enumerated individuals accepted facially valid offers of reinstatement. Respondent denies that they were not returned to substantially equivalent positions. Respondent denies that the backpay period ends on December 24, 2017. Respondent affirmatively defends that it is under no legal obligation to guarantee a precise level of business hours following a labor dispute. Respondent avers that the named individuals ended their backpay periods upon returning to work.

(4) Respondent admits that discriminatees received facially valid offers of reinstatement and subsequently quit their employment. Respondent admits that their backpay terminates upon the BEGINNING of their employment, not the end of their employment as alleged in the Specification. In addition, Respondent defends that backpay is tolled when discriminatees unreasonably delayed commencing employment.

(5) Respondent admits that Valon Lokaj was unavailable for work on June 30, 2016 and is not entitled to backpay after that date.

2. GROSS BACKPAY

(a) Respondent admits that an appropriate measure of calendar quarter gross backpay is based on each discriminatees average gross weekly earnings per quarter, inclusive of regular hours, overtime hours, meal hours, spread of hours, paid time off hours, and total tips, during

each quarter of the twelve months immediately preceding the discharges¹, (the “representative period,”) plus wage increases in subsequent years pursuant to New York State mandates. Respondent denies that wage increases granted to other waiters over and above those required by law constitutes an appropriate measure of backpay. Respondent affirmatively defends including such increases would amount to a windfall prohibited by the National Labor Relations Act, as such merit increases do not “make whole” an individual whose performance is not comparable.

Respondent affirmatively defends that employee time off taken without pay should not be removed from the calculation. There are numerous reasons employees opted to work without pay, most frequently an effort avoid slow season and low earnings.

(b) Respondent admits that Appendices 1(a) through 1 (jj) purport to set forth:

1. Column C — discriminatees regular hours
2. Column D — overtime hours
3. Column E — meal hours
4. Column F — spread of hours
5. Column G — paid time off hours
6. Column H — tips earned
7. Column I — total gross pay

(c) Respondent admits that each discriminatee’s total hours and earnings per category in each quarter during the representative period are set for in the Appendices.

(d) Respondent admits that averages were calculated by dividing the totals per quarter divided by the number of weeks that discriminates were paid in each respective quarter.

¹ Respondent refuses to concede that the discharges were unlawful.

Respondent denies that the Specification correctly demonstrates an actual number of weeks that each employee received pay.

1. Respondent denies that eliminating unpaid leave accurately reflects an employee's average earnings. Respondent avers that the only appropriate calculation is gross earnings divided by weeks in a quarter.

(A) Respondent admits that Alarcon took the unpaid time listed in the Specification.

(B) Respondent denies that Beljan missed only the week of 2/23/14, additionally he was absent the week of 10/25/14.

(C) Respondent denies that Campanella took only the time off listed in the Specification, in addition he was absent the week of 10/25/14.

(D) Respondent admits that Fuller took the unpaid time listed in the Specification.

(E) Respondent admits that Iriate took the unpaid time listed in the Specification. In addition, he missed the week ending 10/25.

(F) Respondent admits that Ivce took the unpaid time listed in the Specification.

(G) Respondent admits that Ivce took the unpaid time listed in the Specification.

(H) Respondent presently lacks factual documentation to either admit or deny the allegation in the Specification.

(I) Respondent admits only that Kukaj missed the week ending 7/19/14.

(J) Respondent admits that Lamnji took the unpaid time listed in the Specification.

(K) Respondent admits that Lamnji took the unpaid time listed in the Specification.

(L) Respondent denies Lokaj missed any time as alleged.

(M) Respondent admits that Lustica took the unpaid time listed in the Specification, additionally he missed the week ending October 25, 2014.

(N) Respondent admits that Neziraj took the unpaid time listed in the Specification.

(O) Respondent admits that X. Neziraj took the unpaid time listed in the Specification.

(P) Respondent admits that Nuredini took the unpaid time listed in the Specification.

(Q) Respondent admits that Puente took the unpaid time listed in the Specification.

(R) Respondent admits that Puente took the unpaid time listed in the Specification.

(S) Respondent denies the allegations in d(1)(S).

(T) Respondent admits that Seddiki took the unpaid time listed in the Specification.

(U) Respondent admits that Semlali El Idriss took the unpaid time listed in the Specification.

(V) Respondent denies the allegations in d(1)(V). Respondent additionally avers that the employee missed the week ending 10/25/14.

(W) Respondent admits the allegations contained in d(1)(W). Respondent additionally avers that the employee missed the week ending 10/25/14.

(X) Respondent denies the allegation in d(1)(X).

(Y) Respondent presently lacks factual documentation to either admit or deny the allegation in the Specification.²

(Z) Respondent admits that Zeqiraj took the unpaid time listed in the Specification.

(e) Respondent admits that the gross weekly hours and earnings are set forth in the Appendices 1 (a)-(jj). Respondent denies that the calculations are correct.

(f) Respondent admits the allegation in 2(f).

(g) Respondent admits the allegation in 2(g).

(h) Respondent denies the allegations in 2(h).

(i) Respondent denies the allegations in 2(i).

(j) Respondent denies the calculations are correct in 2(j).

(k) Respondent admits that the individuals named in 2(k) were unavailable for work and failed to mitigate damages. Respondent denies that this list is exhaustive and fails to cover numerous other dates where employees were unavailable or unwilling to work and failed to mitigate their damages.

(l) Respondent admits the Appendices 3(a)-(jj) set forth “gross backpay.”

² Due to the highly unusual circumstances surrounding the present pandemic known as COVID-19 or the Novel Coronavirus, the undersigned does not have the capacity to acquire all existing records due to travel restrictions, business closures and the unavailability of many individuals.

3. INTERIM EARNINGS

(a) Respondent denies that the calculations and totals contained in Appendices 3(a)-(jj) of the Specification are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(b) Respondent denies the allegation in 3(b) of the Specification, because Hoxhaj has repeatedly refused to accept bona fide, lawful offers of reinstatement.

1. Respondent denies the allegations in 3(b)(1) of the specification. Respondent lacks knowledge to permit it to admit or deny that the interim earnings identified are a complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(c) Respondent denies the allegations in Section 3(c) of the Specification.

(d) Respondent admits that earnings from self-employment are offset against any backpay.

1. Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings (losses) identified are the complete total of any such earnings (losses), or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

2. Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee

may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

3. Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(e) Respondent denies that any employees were reinstated to less than substantially equivalent positions, particularly those noted in Paragraphs 1(b)(3)(D) and 1(b)(4). Respondent further denies that the average weekly gross earnings per quarter constitute a discriminatee's entire interim earnings and Respondent avers that employees frequently failed to avail themselves for available work.

(f) Respondent admits the allegation in Section 3(f) of the Specification.

(g) Respondent denies the allegation in Section 3(g) of the Specification, such an application would impermissibly grant discriminates an unlawful windfall above and beyond a "make whole" remedy.

(h) Respondent denies that the calculations and totals identified in Appendices 3(a)-(jj) of the Specification are accurate or correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

4. NET BACKPAY

(a) Respondent admits that one possible calculation of net backpay is the difference between calendar quarter gross backpay and calendar quarter interim earnings. Respondent denies that is the appropriate formula under this Specification. Moreover, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(b) Respondent denies that the calculations and totals identified in Appendices 3(a)-(jj) of the Specification are accurate or correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

5. EXPENSES

(a) Respondent admits the allegation in Section 5(a) of the Specification.

(b) Respondent denies the allegations in Section 5(b) of the Specification. Respondent lacks sufficient knowledge to permit it to admit or deny that 401(k) withdrawals were in any way related to post-strike activity and denies the entirety of the allegation of that basis.

(c) Respondent admits that legitimate employment agency fees are reimbursable, but Respondent lacks sufficient knowledge and information to know whether they alleged payments were legitimate, for work that the employee might actually be qualified to perform and whether repeated payments were necessary.

(d) Respondent admits that discriminatees are entitled to reimbursement for expenses incurred in an interim employment search, but Respondent DENIES that the listed expenses in Section 5(d) were incurred in good faith or were reasonably calculated to acquire employment.

(e) Respondent admits that discriminatees may be entitled to reimbursement for the additionally mileage incurred of the commute to interim employers.

1. Respondent admits the allegations in Specification 5(e)(1).

2. Respondent admits that one method of measuring mileage expense for commuting to interim employers is the total number of additional miles per week on their round trip mileage from their home to their interim employer times the IRS mileage rate in effect at the time of the interim employment. Respondent DENIES that calculation is appropriate within this Specification. Most, if not all, New York City residents utilize public transportation. Respondent is without sufficient knowledge to permit it to admit or deny whether any change in the physical distance traveled actually resulted in an expense to an alleged discriminatee. Accordingly, Respondent denies the allegation on this basis.

3. Respondent lacks sufficient information to permit it to admit or deny whether Jakupi actually commuted to the interim employer as alleged. Upon that basis, Respondent denies the allegation contained in Specification Paragraph 5(e)(3).

6. BENEFITS – 401(K)

(a) Respondent admits the allegations in Paragraph 6(a) of the Specification.

(b) Respondent lacks sufficient knowledge to permit it to admit or deny that 401(k) plan contributions would have been elected, and therefore deposited, during the backpay period. Therefore, Respondent denies this allegation on that basis.

(c) Respondent admits that any funds that are found to be designated as 401(k) contributions would be directed to a 401(k) account. Respondent DENIES that it is appropriate

to assume that Iber Mushkolaj maintains a 401(k) and maintains that such a presumption attempts to unlawfully enrich Mushkolaj and improperly places the burden for demonstrating a loss on Respondent.

(d) Respondent denies the allegations in Paragraph 6(d) of the Specification. It is wholly inappropriate to estimate 401(k) plan contribution rates. The only appropriate determination of plan contribution rates is the actual rates elected by the employees at the time of the commencement of the backpay period.

(e) Respondent admits that Appendix 4 (a)-(q) contains an alphabetized list of names:

1. Respondent denies the allegations set forth in Paragraph 6(e)(1) of the Specification.

2. Respondent denies that the calculations and totals identified in Paragraph 6 (e)(2) are correct.

3. Respondent admits that Appendix 4, Column D sets forth discriminatee gross pay by quarter.

4. Respondent denies this allegation and re-affirms its response stated above in 6(d) of the Answer.

(f) Respondent denies the allegations in Paragraph 6(f) of the Specification. The only appropriate calculation with respect to a discriminatee's plan contribution rates is the actual rates elected by the employees at the time of the commencement of the backpay period.

(g) Respondent denies the allegations in Paragraph 6(g) of the Specification. Once an employee has been reinstated, it would be punitive to continue awarding them a benefit greater than that they actually earned. Such punitive economic damages are prohibited under the National Labor Relations Act.

(h) Respondent denies the allegations in Paragraph 6(h) of the Specification.

(i) Respondent lacks sufficient knowledge to permit it to admit or deny that the referenced Appendix correctly identify employee 401(k) contributions. Accordingly, Respondent denies the allegation on that basis.

(j) Respondent admits the allegations in Paragraph 6(j) of the Specification.

(k) Respondent denies that the calculations contained in Paragraph 6(k) are correct.

7. ADVERSE TAX CONSEQUENCES

(a) Respondent denies that Don Chavas, LLC d/b/a Tortillas Don Chavas, is correctly decided and avers that it should be reconsidered.

(b) Respondent admits the allegations in Paragraph 7(b) correctly states a manner of calculation for tax liability; Respondent denies any such liability is appropriate.

(c) Respondent denies that the calculations and totals identified in Paragraph 7(c) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(d) Respondent denies that the calculations and totals identified in Paragraph 7(d) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(e) Respondent denies that the calculations and totals identified in Paragraph 7(e) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(f) Respondent denies that the backpay calculations throughout this Specification are correct.

(g) Respondent denies that the calculations and totals identified in Paragraph 7(g) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(h) Respondent admits the calculation of adverse tax consequences is accurate, but denies that it is lawful.

(i) Respondent denies the allegation in Paragraph 7(i) of the Specification. This calculation considers a penalty that is infinite when taken to its logical extreme.

(j) Respondent denies that the calculations in Appendix 8 are correct. Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified in Appendices 7(a)-(jj) are correct. On that basis, Respondent denies this allegation on that basis.

8. SUMMARY

With respect to the Summary, Respondent denies that is liable for the amount of backpay identified in the Specification, and therefore, denies that the payment of such amount of backpay is required for Respondent to discharge its obligations to any discriminatee.

AFFIRMATIVE DEFENSES

Upon information and belief, Respondent avers that some or all discriminatees did not exercise reasonable diligence to mitigate any backpay loss. Further, Respondent lacks sufficient knowledge to evaluate the bald interim earnings figures set forth for each discriminatee, and therefore, rejects and challenges said figures.

Dated: May 13, 2020

Respectfully submitted,

/s/ Michael P. MacHarg
Michael P. MacHarg
FREEBORN & PETERS LLP
311 South Wacker Drive | Suite 3000
Chicago, IL 60606
(312) 360-6000
mmacharg@freeborn.com

Marc B. Zimmerman
Kathryn T. Lundy
FREEBORN & PETERS LLP
The Helmsley Building
230 Park Avenue | Suite 630
New York, NY 10169
(212) 218-8760
mzimmerman@freeborn.com
klundy@freeborn.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on May 13, 2020, I caused a true and correct copy of the foregoing **Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant's Answer To Compliance Specification** to be electronically filed with the U.S. National Labor Relations Board (Region 3), Buffalo, New York utilizing the Board's custom electronic file system, which sent notification of such filing to counsel of record:

Brian Cugini
Organizer
United Food & Commercial Workers
Local 342
166 East Jericho Turnpike
Mineola, NY 11501-2033

Steven Cetta
Owner
Michael Cetta, Inc. d/b/a Sparks Restaurant
210 East 46th Street
New York, NY 10017

Paul J Murphy
Regional Director
National Labor Relations Board
Region 3
130 South Elmwood Avenue | Suite 630
Buffalo NY 14202-2465

Martin L. Milner, Esq.
Simon & Milner
99 West Hawthorne Avenue | Suite 308
Valley Stream, NY 11580
mmilner@simonandmilner.com

/s/ Michael M. MacHarg

Under penalties as provided by law pursuant to Section-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

5252907v2

EXHIBIT 6



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Agency Website: www.nlr.gov
Telephone: (716)551-4931
Fax: (716)551-4972

May 14, 2020

By regular mail and
email to mmacharg@freeborn.com,
mzimmerman@freeborn.com, and
klundy@freeborn.com

Michael P. MacHarg
Marc B. Zimmerman
Kathryn T. Lundy
FREEBORN & PETERS LLP
The Helmsley Building
230 Park Ave., Ste. 630
New York, NY 10169

Re: Michael Cetta, Inc. d/b/a Sparks Restaurant
Case 02-CA-144626 and 02-CA-144852

Dear Counselors:

Respondent's Answer to the Compliance Specification in the above matter does not meet the requirements of Section 102.56(b) of the Board's Rules and Regulations. Specifically, the Answer contains numerous general denials, which are insufficient under Section 102.56(b). The Answer also fails to set forth the basis for Respondent's disagreement with the General Counsel's gross backpay calculations, or to set forth Respondent's position as to the backpay amounts owing, as required by Section 102.56(b).

Please be advised that unless an amended Answer that meets the requirements of Section 102.56(b) is filed by the close of business on **May 21, 2020**, the General Counsel will file a motion to strike and for summary judgment, in whole or in part.

Please contact me at (716)398-7022, if you have any questions in this regard.

Very truly yours,

/s/ Jessica L. Cacaccio

JESSICA L. CACACCIO
Counsel for the General Counsel

EXHIBIT 7



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Agency Website: www.nlr.gov
Telephone: (716)551-4931
Fax: (716)551-4972

May 27, 2020

By regular mail and
email to mmacharg@freeborn.com,
mzimmerman@freeborn.com, and
klundy@freeborn.com

Michael P. MacHarg
Marc B. Zimmerman
Kathryn T. Lundy
FREEBORN & PETERS LLP
The Helmsley Building
230 Park Ave., Ste. 630
New York, NY 10169

Re: Michael Cetta, Inc. d/b/a Sparks Restaurant
Case 02-CA-144626 and 02-CA-144852

Dear Counselors:

As was discussed with Mr. MacHarg on May 19, 2020, the General Counsel has extended the deadline to file an amended Answer in this matter from May 21, 2020 to June 4, 2020. This deadline was extended due to the difficulties presented by the Covid-19 pandemic.

Please be advised that unless an amended Answer that meets the requirements of Section 102.56(b) is filed by the close of business on **June 4, 2020**, the General Counsel will file a motion to strike and for summary judgment, in whole or in part.

Please contact me at (716)398-7022, if you have any questions in this regard.

Very truly yours,

/s/ Jessica L. Cacaccio

JESSICA L. CACACCIO
Counsel for the General Counsel

EXHIBIT 8



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Agency Website: www.nlr.gov
Telephone: (716)551-4931
Fax: (716)551-4972

June 2, 2020

By regular mail and
email to mmacharg@freeborn.com,
mzimmerman@freeborn.com, and
klundy@freeborn.com

Michael P. MacHarg
Marc B. Zimmerman
Kathryn T. Lundy
FREEBORN & PETERS LLP
The Helmsley Building
230 Park Ave., Ste. 630
New York, NY 10169

Re: Michael Cetta, Inc. d/b/a Sparks Restaurant
Case 02-CA-144626 and 02-CA-144852

Dear Counselors:

As was discussed with Mr. MacHarg on June 2, 2020, the General Counsel has again extended the deadline to file an amended Answer in this matter. The deadline has now been moved from June 4, 2020 to June 18, 2020. This deadline was extended due to the difficulties presented by the Covid-19 pandemic as well as the uncertainties surrounding civil unrest near Respondent's location.

Please be advised that unless an amended Answer that meets the requirements of Section 102.56(b) is filed by the close of business on **June 18, 2020**, the General Counsel will file a motion to strike and for summary judgment, in whole or in part.

Please contact me at (716)398-7022, if you have any questions in this regard.

Very truly yours,

/s/ Jessica L. Cacaccio

JESSICA L. CACACCIO
Counsel for the General Counsel

EXHIBIT 9

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

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

Respondent,

v.

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342,

Complainant.

Case Nos.: 02-CA-142626 and
02-CA-144852

RESPONDENT’S AMENDED ANSWER TO COMPLIANCE SPECIFICATION

Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant (hereinafter, “Sparks” or Respondent or Employer) answers the Compliance Specification issued on April 8, 2020 by Region 3 (through transfer from Region 2, where the underlying events occurred) and shows as follows:

With respect to the unnumbered introductory paragraph, Respondent admits that the National Labor Relations Board issued a Decision and Order on May 24, 2018 and that said Order was enforced by the District of Columbia Court of Appeals on May 20, 2019. In further response to the unnumbered paragraph of the Specification, Respondent admits that a controversy exists regarding the reinstatement offers which have been issued, the amount of backpay due and the failure to mitigate damages as required under the Act.

With respect to the allegations contained in paragraph I of the Specification, Respondent responds as follows:

1. BACKPAY PERIOD

(a) Respondent denies that the backpay period covered by the Specification should commence on December 19, 2014, because the offers were not made in good faith, were not made at a time when job openings existed and because, as demonstrated *infra*, the Specification ignores and/or disregards the actual number of “*Laidlaw*” vacancies.

(b) Respondent admits that certain discriminatees waived reinstatement. Further, it is admitted that the backpay period ends on the date Respondent made a facially valid offer of reinstatement. Respondent DENIES that facially valid offers of reinstatement were mailed on the dates listed in the Specification. Specifically offers were transmitted:

(1)	Beljan	12-2-16
	Jakupi	12-2-16
	Nuredini	6-21-16
	Seddiki	12-2-16
	Somali El Idrissi	12-2-16

(2)(A) Respondent denies that Hoxhaj worked six dinners per week and five lunches per month as a bartender. Mr. Hoxhaj received valid offers of reinstatement on April 16, 2016 and again in July 12, 2016 and then on November 17, 2016. Any valid offer of reinstatement tolls the backpay due to Hoxhaj.

(2)(B) As noted above, Respondent’s offers to Hoxhaj were valid and declined by either the employee or union for personal or political reasons. Each declination constitutes a failure to properly mitigate.

(2)(C) Respondent denies that backpay continues to accrue to Hoxhaj for the reasons expressed in 1(b)2(A and B), *supra*. Respondent affirmatively defends that Hoxhaj inadequately mitigated his damages.

(3)(A) Respondent denies that the backpay period ending is contingent upon staffing levels being equivalent to pre-strike levels. There has not been an administrative finding that

Respondent unlawfully suppressed staffing levels. Extending the backpay period until December 24, 2017 unlawfully burdens Respondent with an additional year of backpay obligation without any correlative unfair labor practice finding. Respondent avers that business needs dictated both appropriate staffing levels and hours at all times.

(3)(B) Respondent admits that the Region's calculations are mathematically correct.

(3)(C) Respondent admits that the payroll records reflect the average number of waiters per pay period as stated in the Specification.

(3)(D) Respondent admits that the enumerated individuals accepted facially valid offers of reinstatement. Respondent denies that they were not returned to substantially equivalent positions. Respondent denies that the backpay period ends on December 24, 2017. Respondent affirmatively defends that it is under no legal obligation to guarantee a precise level of business hours following a labor dispute. Respondent avers that the named individuals ended their backpay periods upon returning to work.

(4) Respondent admits that discriminatees received facially valid offers of reinstatement and subsequently quit their employment. Respondent admits that their backpay terminates upon the BEGINNING of their employment, not the end of their employment as alleged in the Specification. In addition, Respondent defends that backpay is tolled when discriminatees unreasonably delayed commencing employment.

(5) Respondent admits that Valon Lokaj was unavailable for work on June 30, 2016 and is not entitled to backpay after that date.

2. GROSS BACKPAY

(a) Respondent admits that an appropriate measure of calendar quarter gross backpay is based on each discriminatees average gross weekly earnings per quarter, inclusive of regular hours, overtime hours, meal hours, spread of hours, paid time off hours, and total tips, during

each quarter of the twelve months immediately preceding the discharges¹, (the “representative period,”) plus wage increases in subsequent years pursuant to New York State mandates. Respondent denies that wage increases granted to other waiters over and above those required by law constitutes an appropriate measure of backpay. Respondent affirmatively defends including such increases would amount to a windfall prohibited by the National Labor Relations Act, as such merit increases do not “make whole” an individual whose performance is not comparable.

Respondent affirmatively defends that employee time off taken without pay should not be removed from the calculation. There are numerous reasons employees opted to work without pay, most frequently an effort avoid slow season and low earnings.

(b) Respondent admits that Appendices 1(a) through 1 (jj) purport to set forth:

1. Column C — discriminatees regular hours
2. Column D — overtime hours
3. Column E — meal hours
4. Column F — spread of hours
5. Column G — paid time off hours
6. Column H — tips earned
7. Column I — total gross pay

(c) Respondent admits that each discriminatee’s total hours and earnings per category in each quarter during the representative period are set for in the Appendices.

(d) Respondent admits that averages were calculated by dividing the totals per quarter divided by the number of weeks that discriminates were paid in each respective quarter.

¹ Respondent refuses to concede that the discharges were unlawful.

Respondent denies that the Specification correctly demonstrates an actual number of weeks that each employee received pay.

1. Respondent denies that eliminating unpaid leave accurately reflects an employee's average earnings. Respondent avers that the only appropriate calculation is gross earnings divided by weeks in a quarter.

(A) Respondent admits that Alarcon took the unpaid time listed in the Specification.

(B) Respondent denies that Beljan missed only the week of 2/23/14, additionally he was absent the week of 10/25/14.

(C) Respondent denies that Campanella took only the time off listed in the Specification, in addition he was absent the week of 10/25/14.

(D) Respondent admits that Fuller took the unpaid time listed in the Specification.

(E) Respondent admits that Iriate took the unpaid time listed in the Specification. In addition, he missed the week ending 10/25.

(F) Respondent admits that Ivce took the unpaid time listed in the Specification.

(G) Respondent admits that Ivce took the unpaid time listed in the Specification.

(H) Respondent presently lacks factual documentation to either admit or deny the allegation in the Specification.

(I) Respondent admits only that Kukaj missed the week ending 7/19/14.

(J) Respondent admits that Lamnji took the unpaid time listed in the Specification.

(K) Respondent admits that Lamnji took the unpaid time listed in the Specification.

(L) Respondent denies Lokaj missed any time as alleged.

(M) Respondent admits that Lustica took the unpaid time listed in the Specification, additionally he missed the week ending October 25, 2014.

(N) Respondent admits that Neziraj took the unpaid time listed in the Specification.

(O) Respondent admits that X. Neziraj took the unpaid time listed in the Specification.

(P) Respondent admits that Nuredini took the unpaid time listed in the Specification.

(Q) Respondent admits that Puente took the unpaid time listed in the Specification.

(R) Respondent admits that Puente took the unpaid time listed in the Specification.

(S) Respondent denies the allegations in d(1)(S).

(T) Respondent admits that Seddiki took the unpaid time listed in the Specification.

(U) Respondent admits that Semlali El Idriss took the unpaid time listed in the Specification.

(V) Respondent denies the allegations in d(1)(V). Respondent additionally avers that the employee missed the week ending 10/25/14.

(W) Respondent admits the allegations contained in d(1)(W). Respondent additionally avers that the employee missed the week ending 10/25/14.

(X) Respondent denies the allegation in (d)(1)(X) and states that the employee worked the entire quarter..

(Y) Respondent presently lacks factual documentation to either admit or deny the allegation in the Specification.²

(Z) Respondent admits that Zeqiraj took the unpaid time listed in the Specification.

(e) Respondent admits that the gross weekly hours and earnings are set forth in the Appendices 1 (a)-(jj). Respondent denies that the calculations are correct.

(f) Respondent admits the allegation in 2(f).

(g) Respondent admits the allegation in 2(g).

(h) Respondent admits the allegation in 2(h).

(i) Respondent admits the allegation in 2(i).

(j) Respondent admits that the mathematical calculations in 2(j) are correct.

(k) Respondent admits that the individuals named in 2(k) were available for work and failed to mitigate damages. Respondent denies that this list is exhaustive, but lacks the specific information as to the precise dates certain individuals were unavailable for work or failed to

² Due to the highly unusual circumstances surrounding the present pandemic known as COVID-19 or the Novel Coronavirus, the undersigned does not have the capacity to acquire all existing records due to travel restrictions, business closures and the unavailability of many individuals.

mitigate. Respondent's overarching defense is that, upon information and belief, all individuals failed to exercise reasonable diligence in mitigating backpay loss.

(l) Respondent admits the Appendices 3(a)-(jj) set forth "gross backpay."

3. INTERIM EARNINGS

(a) Respondent denies that the calculations and totals contained in Appendices 3(a)-(jj) of the Specification are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(b) Respondent denies the allegation in 3(b) of the Specification, because Hoxhaj denied lawful offers of reinstatement on April 16, 2016, July 12, 2016 and November 17, 2016.

1. Respondent denies the allegations in 3(b)(1) of the specification. Respondent lacks knowledge to permit it to admit or deny that the interim earnings identified are a complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(c) Respondent denies the allegation in Section 3(c) of the Specification, because allowing a discriminatee to work additional hours without an offset to backpay would allow an unjust enrichment and violate Respondent's Due Process.

(d) Respondent admits that earnings from self-employment are offset against any backpay.

1. Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings (losses) identified are the complete total of any such earnings (losses), or

that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

2. Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

3. Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(e) Respondent denies that any employees were reinstated to less than substantially equivalent positions, particularly those noted in Paragraphs 1(b)(3)(D) and 1(b)(4). Respondent further denies that the average weekly gross earnings per quarter constitute a discriminatee's entire interim earnings and Respondent avers that employees frequently failed to avail themselves for available work.

(f) Respondent admits the allegation in Section 3(f) of the Specification.

(g) Respondent denies the allegation in Section 3(g) of the Specification, such an application would impermissibly grant discriminates an unlawful windfall above and beyond a "make whole" remedy.

(h) Respondent denies that the calculations and totals identified in Appendices 3(a)-(jj) of the Specification are accurate or correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

4. NET BACKPAY

(a) Respondent admits that one possible calculation of net backpay is the difference between calendar quarter gross backpay and calendar quarter interim earnings. Respondent denies that is the appropriate formula under this Specification. Respondent affirmatively defends that the proper formula must take into account the overall reduction in available hours. One instance of a proper formula would consider total hours available per employee over a quarter divided by the number of employees. That would establish the maximum gross backpay for the quarter. Moreover, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

(b) Respondent denies that the calculations and totals identified in Appendices 3(a)-(jj) of the Specification are accurate or correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the interim earnings identified are the complete total of any such earnings, or that a discriminatee may be excused for not having earned greater interim earnings because she allegedly exercised reasonable diligence to generate more such earnings; therefore, Respondent denies the allegation on that basis.

5. EXPENSES

(a) Respondent admits the allegation in Section 5(a) of the Specification.

(b) Respondent denies the allegations in Section 5(b) of the Specification. Respondent lacks sufficient knowledge to permit it to admit or deny that 401(k) withdrawals were in any way related to post-strike activity and denies the entirety of the allegation of that basis.

(c) Respondent admits that legitimate employment agency fees are reimbursable, but Respondent lacks sufficient knowledge and information to know whether they alleged payments were legitimate, for work that the employee might actually be qualified to perform and whether repeated payments were necessary.

(d) Respondent admits that discriminatees are entitled to reimbursement for expenses incurred in an interim employment search, but Respondent DENIES that the listed expenses in Section 5(d) were incurred in good faith or were reasonably calculated to acquire employment.

(e) Respondent admits that discriminatees may be entitled to reimbursement for the additionally mileage incurred of the commute to interim employers.

1. Respondent admits the allegations in Specification 5(e)(1).

2. Respondent admits that one method of measuring mileage expense for commuting to interim employers is the total number of additional miles per week on their round trip mileage from their home to their interim employer times the IRS mileage rate in effect at the time of the interim employment. Respondent DENIES that calculation is appropriate within this Specification. Most, if not all, New York City residents utilize public transportation. Respondent is without sufficient knowledge to permit it to admit or deny whether any change in the physical distance traveled actually resulted in an expense to an alleged discriminatee. Accordingly, Respondent denies the allegation on this basis.

3. Respondent lacks sufficient information to permit it to admit or deny whether Jakupi actually commuted to the interim employer as alleged. Upon that basis, Respondent denies the allegation contained in Specification Paragraph 5(e)(3).

6. BENEFITS – 401(K)

(a) Respondent admits the allegations in Paragraph 6(a) of the Specification.

(b) Respondent lacks sufficient knowledge to permit it to admit or deny that 401(k) plan contributions would have been elected, and therefore deposited, during the backpay period. Therefore, Respondent denies this allegation on that basis.

(c) Respondent admits that any funds that are found to be designated as 401(k) contributions would be directed to a 401(k) account. Respondent DENIES that it is appropriate to assume that Iber Mushkolaj maintains a 401(k) and maintains that such a presumption attempts to unlawfully enrich Mushkolaj and improperly places the burden for demonstrating a loss on Respondent.

(d) Respondent denies the allegations in Paragraph 6(d) of the Specification. It is wholly inappropriate to estimate 401(k) plan contribution rates. The only appropriate determination of plan contribution rates is the actual rates elected by the employees at the time of the commencement of the backpay period.

(e) Respondent admits that Appendix 4 (a)-(q) contains an alphabetized list of names:

1. Respondent admits the allegations set forth in Paragraph 6(e)(1) of the Specification.

2. Respondent admits that the calculations and totals identified in Paragraph 6 (e)(2) are correct.

3. Respondent admits that Appendix 4, Column D sets forth discriminatee gross pay by quarter.

4. Respondent denies this allegation and re-affirms its response stated above in 6(d) of the Answer.

(f) Respondent denies the allegations in Paragraph 6(f) of the Specification. The only appropriate calculation with respect to a discriminatee's plan contribution rates is the actual rates elected by the employees at the time of the commencement of the backpay period.

(g) Respondent denies the allegations in Paragraph 6(g) of the Specification. Once an employee has been reinstated, it would be punitive to continue awarding them a benefit greater than that they actually earned. Such punitive economic damages are prohibited under the National Labor Relations Act.

(h) Respondent denies the allegations in Paragraph 6(h) of the Specification and avers that net backpay should be used for all weeks.

(i) Respondent lacks sufficient knowledge to permit it to admit or deny that the referenced Appendix correctly identify employee 401(k) contributions. Accordingly, Respondent denies the allegation on that basis.

(j) Respondent admits the allegations in Paragraph 6(j) of the Specification.

(k) Respondent admits that the calculations contained in Paragraph 6(k) are correct.

7. ADVERSE TAX CONSEQUENCES

(a) Respondent denies that Don Chavas, LLC d/b/a Tortillas Don Chavas, is correctly decided and avers that it should be reconsidered.

(b) Respondent admits the allegations in Paragraph 7(b) correctly states a manner of calculation for tax liability; Respondent denies any such liability is appropriate.

(c) Respondent denies that the calculations and totals identified in Paragraph 7(c) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it

to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(d) Respondent denies that the calculations and totals identified in Paragraph 7(d) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(e) Respondent denies that the calculations and totals identified in Paragraph 7(e) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(f) Respondent denies that the backpay calculations throughout this Specification are correct.

(g) Respondent denies that the calculations and totals identified in Paragraph 7(g) and Appendices 7(a)-(jj) are correct. In addition, Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified are accurate and complete, and therefore, Respondent denies the allegations on that basis.

(h) Respondent admits the calculation of adverse tax consequences is accurate, but denies that it is lawful.

(i) Respondent denies the allegation in Paragraph 7(i) of the Specification. This calculation considers a penalty that is infinite when taken to its logical extreme.

(j) Respondent denies that the calculations in Appendix 8 are correct. Respondent lacks sufficient knowledge to permit it to admit or deny that the earnings identified in Appendices 7(a)-(jj) are correct. On that basis, Respondent denies this allegation on that basis.

8. SUMMARY

With respect to the Summary, Respondent denies that is liable for the amount of backpay identified in the Specification, and therefore, denies that the payment of such amount of backpay is required for Respondent to discharge its obligations to any discriminatee.

AFFIRMATIVE DEFENSES

Upon information and belief, Respondent avers that some or all discriminatees did not exercise reasonable diligence to mitigate any backpay loss. Further, Respondent lacks sufficient knowledge to evaluate the bald interim earnings figures set forth for each discriminatee, and therefore, rejects and challenges said figures.

Dated: June 18, 2020

Respectfully submitted,

/s/ Michael P. MacHarg
Michael P. MacHarg
FREEBORN & PETERS LLP
311 South Wacker Drive | Suite 3000
Chicago, IL 60606
(312) 360-6000
mmacharg@freeborn.com

Marc B. Zimmerman
Kathryn T. Lundy
FREEBORN & PETERS LLP
The Helmsley Building
230 Park Avenue | Suite 630
New York, NY 10169
(212) 218-8760
mzimmerman@freeborn.com
klundy@freeborn.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on June 18, 2020, I caused a true and correct copy of the foregoing **Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant's Amended Answer To Compliance Specification** to be electronically filed with the U.S. National Labor Relations Board (Region 3), Buffalo, New York utilizing the Board's custom electronic file system, which sent notification of such filing to counsel of record:

Brian Cugini
Organizer
United Food & Commercial Workers
Local 342
166 East Jericho Turnpike
Mineola, NY 11501-2033

Steven Cetta
Owner
Michael Cetta, Inc. d/b/a Sparks Restaurant
210 East 46th Street
New York, NY 10017

Paul J Murphy
Regional Director
National Labor Relations Board
Region 3
130 South Elmwood Avenue | Suite 630
Buffalo NY 14202-2465

Martin L. Milner, Esq.
Simon & Milner
99 West Hawthorne Avenue | Suite 308
Valley Stream, NY 11580
mmilner@simonandmilner.com

/s/ Michael M. MacHarg

Under penalties as provided by law pursuant to Section-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

5290315v2/33438-0006