

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

SMOKEY’S GREATER SHOWS, INC.

and

COMITE DE APOYO A LOS  
TRABAJADORES AGRICOLAS (CATA)

-

Case No. 01-CA-129998

**RESPONDENT’S OPPOSITION TO SUMMARY JUDGMENT  
AND RESPONSE TO NOTICE TO SHOW CAUSE**

Respondent Smokey’s Greater Shows, Inc., (“Smokey’s”) files this opposition to the General Counsel’s Motion for Summary Judgment (the “Motion”) in response to the Notice to Show Cause issued by the National Labor Relations Board (the “Board”) on July 28, 2020.

**INTRODUCTION**

The General Counsel’s Motion repeatedly alleges that Respondent has offered only “general denials” with regards to paragraphs 1 through 6 and 9 through 11 of the Compliance Specification. Respondent’ Amended Answer (“Answer”), however, specifically responds, including stating the bases for disagreement, to each allegation in the Specification, including paragraphs 1 through 6 and 9 through 11, as required by Section 102.56(b) of the Board’s Rules and Regulations. The Region’s Compliance Specification is replete with vague and contradictory information regarding the backwage calculations, and the methodology utilized by the Region to arrive at the total alleged backwage amount is utterly incomprehensible.

The General Counsel’s principal complaint in the Motion appears to be that Respondent has specifically denied numerous allegations in the Answer but has not, in some paragraphs of

the Answer, provided specific data or documents that the General Counsel “presumes” Respondent possesses. As explained in the Answer, Respondent lacks access to such data or documents because Respondent is plainly not required by law to maintain such data or documents.

The premises underlying the General Counsel’s Motion, as well as his (and the Region’s) allegations regarding backpay are erroneous and reflect a fundamental misunderstanding of the Fair Labor Standards Act (“FLSA”) and Department of Labor (“DOL”) regulations. The General Counsel’s unfamiliarity with the FLSA and DOL regulations is perhaps not surprising given that his Motion cites no authority for the Board to interpret the FLSA. Indeed, no such authority exists, as the Supreme Court has recognized that Congress authorized the Secretary of Labor to interpret the FLSA and its exemptions. *See Auer v. Robbins*, 519 U.S. 452, 456 (1997) (noting the FLSA grants the Secretary of Labor “broad authority” to interpret its exemptions).

The Supreme Court has previously admonished the Board for its misguided attempts to interpret and apply statutes over which it has no authority. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (“on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer”); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (noting that the Court has “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA”). Likewise, each of the cases cited by the General Counsel to purportedly support his Motion are inapplicable given the unique facts and the controlling legal standards and authority in this case.

In addition, the Board lacks jurisdiction over this matter, as Respondent and the Region previously agreed in writing to a settlement of this matter and there has been no breach of that agreement.

## **BACKGROUND**

Respondent is a seasonal amusement establishment that operates a traveling carnival during part of each calendar year. In 2014, after extensive recruiting efforts, Respondent was unable to meet its need for short-term and seasonal labor with U.S. workers and applied to the Department of Labor for certification to hire foreign temporary workers through the H-2B visa program. The Department of Labor certified that Respondent had been unable to locate sufficient numbers of U.S. workers, and approved its application to hire workers through the H-2B program. The Department of Homeland Security and the Department of State also each approved Respondent's H-2B application paperwork. Respondent's work is itinerant during the carnival season, meaning that it continually travels from town to town setting up the carnival, operating the carnival for several days, disassembling the carnival and then traveling to the next location to repeat the process. Unlike other employers, Congress granted seasonal amusement establishments, such as Respondent, special statutory recognition exempting them from the requirements of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(3). This special status has been repeatedly recognized and upheld by federal courts since it was enacted nearly 60 years ago.

Contrary to the Region's statement in the Compliance Specification that the parties were unable to reach an agreement about the amount of backpay required to settle this matter, the parties did, in fact, agree and Respondent signed the Region's "Agreement to Settle." Nonetheless, the Region has inexplicably proceeded to pursue efforts for a hearing on its Compliance Specification.

## **ARGUMENT**

Respondent's Answer complies with Section 102.56(b) of the Board's Rules and Regulations and as such, the Motion should be denied.

**Paragraph 1** concerns the amount of pay that workers allegedly received each week. Contrary to the allegations in the Motion, Respondent's Answer specifically responds to the allegations in the Compliance Specification and describes precise cash wage amount that employees were paid each week that exceeds the amount alleged by the Region. In addition, Respondent raised affirmative defenses that it also provided employees with additional compensation. The Motion alleges that Respondent's Answer "fails to identify any specific authority in support of its assertion" that other benefits warrant an offset to the Region's backpay calculations. Paragraph 1 of the Specification, however, contains no mention whatsoever of backpay in general, nor any mention of backpay for any specific worker, and Respondent's Answer to Paragraph 1 contains no reference to an offset for backpay. Thus, the basis for the General Counsel's complaint is not clear.

Further, contrary to the allegations in the Motion, Respondent's Answer to this paragraph does refer to specific provisions of the FLSA that provide relevant legal authority recognizing that the value of benefits such as lodging<sup>1</sup> are counted as wages in addition to a cash wage. Respondent also raised an affirmative defense that to the extent the Region alleges the FLSA applies to Respondent,<sup>2</sup> Respondent is exempt from the FLSA's record-keeping, minimum wage and overtime requirements. In the Motion, the General Counsel also complains that Respondent's Answer to this paragraph is insufficient because it does not identify which of the two exemptions in 29 U.S.C. § 213(a)(3) apply to Respondent. Both exemptions are included within section 213(a)(3) and both apply to Respondent and therefore Respondent's citation to section 213(a)(3) sufficiently put the Region on notice of the applicable affirmative defense.

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<sup>1</sup> As specified in the collective bargaining agreement that the Region acknowledges it obtained during its investigation, lodging was provided by the employer to all employees and the value of that housing was described.

<sup>2</sup> Notably, nowhere in the Compliance Specification does the Region ever actually allege – let alone demonstrate – that the Fair Labor Standards Act ("FLSA") even applies to Respondent and instead, without any foundation, just seems to assume that it does. Respondent has no obligation to assert a defense to an allegation that is not even articulated, but nonetheless raised the affirmative defense out of an abundance of caution.

In the Motion, the General Counsel also complains that Respondent's Answer to this paragraph is insufficient because with regard to the FLSA exemptions, Respondent "does not indicate that it made any effort to locate the information necessary to respond adequately to any of the allegations." But the Respondent is exempt from maintaining information the General Counsel apparently wishes existed, and because Respondent specifically stated it was exempt, the General Counsel's complaint makes no sense considering he fails to explain how one would possibly even make an effort to locate information that does not exist and that is not required to be created or maintained, as a matter of law. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 2** concerns the dates allegedly worked at each location during the 2014 season. The General Counsel objects to the Respondent's Answer on the basis that precise information regarding the dates on which the Respondent moved from one location to another in 2014 "is presumed to be within its knowledge." Respondent's Answer explains that the alleged work locations are consistent with the tentative itinerary submitted to DOL in late 2011 or early 2014. But Respondent specifically denied that four of the identified locations listed were, in fact, locations where Respondent ultimately worked in 2014.

The General Counsel's complaint here, again demonstrates his and the Region's complete unfamiliarity with (and lack of jurisdiction over) the H-2B program. The nature of the H-2B application process requires an Employer to estimate several months (and in some cases nearly a year) in advance where it will be working in the coming year. Thus, an employer submits to DOL, in advance, a "tentative" itinerary of potential work locations as part of the H-2B application process. The General Counsel has cited no legal obligation requiring an employer to create or maintain any additional or revised itinerary listing the precise dates and locations where

it actually works and precisely when it moves during the year. Indeed, there is no such requirement. Thus, although the General Counsel may “presume” that an employer has a precise record of each work location and precise dates on which it moved from one location to another, Respondent specifically noted in its Answer that it lacked information regarding the dates on which the carnival moved.

In addition, Respondent’s Answer to Paragraph 5 contains additional information on the dates worked at each location that is responsive and can be utilized by the Region to refine its alleged (though incorrect) backwage calculations. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 3** concerns the dates on which work allegedly ended at each location during the 2014 season. Respondent specifically acknowledged in the Answer that the alleged end dates of work are consistent with information contained on the tentative itinerary, but Respondent lacks knowledge regarding whether the specific end dates are correct and denies that it performed any work at four identified locations. As explained above regarding Paragraph 2, Respondent submitted a tentative itinerary to DOL as part of the H-2B program. The General Counsel has cited no legal obligation for an employer to create or maintain any additional or revised itinerary listing the precise dates when an employer ceases work at a location, and indeed, there is no such requirement. Thus, although the General Counsel may “presume” that an employer has a record of when it ends work at each location, Respondent specifically noted that it lacked information regarding the dates on which work ended at specific locations and in addition, Respondent specifically denied that it performed any work at four identified locations. Furthermore, Respondent’s Answer to Paragraph 5 contains additional information on the dates worked at each location that is responsive and can be utilized by the Region to refine its alleged

(though incorrect) backwage calculations. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 4** concerns the alleged start date for the alleged "backpay" period. Respondent specifically denied in its Answer that it owed any backpay to any employee and asserted affirmative defenses to the backwage theory asserted by the General Counsel. Respondent also provided additional information identifying the specific days on which work began, which differed from the dates alleged by the Region. The General Counsel's complaint that Respondent did not offer an alternative backwage calculation method or provide more data that the Region would like to have to refine its backwage computations is without merit because Respondent specifically denied that backpay was due to any employee. Thus, Respondent no obligation to construct and offer an alternative method for calculating back pay.

In addition, Respondent's Answer to Paragraph 5 contains additional information on the dates worked at each location that is responsive and can be utilized by the Region to refine its alleged (though incorrect) backwage calculations. Therefore, Respondent's Answer to Paragraph 4 meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 5(a)** concerns the alleged end date of the alleged "backpay" period for four (4) employees and **Paragraph 5(b)** concerns the alleged end date of the alleged "backpay" period for twenty-six (26) employees based on information the Region allegedly received from the union.

Respondent specifically stated in its Answer that it lacked knowledge of the information contained in the union records allegedly provided to the Region, and Respondent again denied that any backpay was due any employee. Once again, the General Counsel in his Motion

complains about Respondent's Answer and "presumes" that Respondent has precise information about the end date of the "backpay period" that the General Counsel alleges – a term that he never defines or explains. The General Counsel fails to establish that there is any legal obligation for an employer to maintain the information that he presumes the Respondent possesses. As explained in the Answers to Paragraphs 2, 3 and 4, as discussed above, Respondent assembled and submitted to DOL in late 2013 or early 2014 a tentative itinerary of its expected work locations, including projected start and end dates, for the upcoming 2014 season. But there is no legal obligation to create or maintain an updated or revised itinerary precisely listing each location where work takes place, the dates at that location and the dates the carnival moves. Respondent did, however, in its Answer offer information that it possessed regarding the specific locations where it worked and the dates worked at those locations, including the last work location of the season, which ended on October 12, 2014.<sup>3</sup> Thus, Respondent provided a specific denial of the allegations, offered affirmative defenses, and offered alternative facts rebutting the allegations. Therefore, Respondent's Answer plainly meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 6(a)** concerns the hours allegedly worked when no carnival was scheduled. Respondent specifically stated in its Answer that it lacked information about the Region's investigation and calculations and specifically denied the allegation. Respondent also again stated its affirmative defenses. In addition, Respondent also provided information it possessed that employees would have worked minimal or even zero hours – as opposed to the 10 hours alleged – on days when a carnival was not operating. The General Counsel complains the

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<sup>3</sup> Arguably, such information is also responsive to Paragraphs 2, 3 and 4, and although provided to the Region in the Answer to Paragraph 5, the information has nonetheless been provided to the Region and obviously can be utilized by the Region to the extent it seeks to revise its alleged backwage calculations.

additional information offered by the Respondent is “vague”, yet ironically fails to acknowledge the inherent vagueness in the Region’s calculation of alleged backwages due based upon on “an average” number of hours worked on an unspecified number of days at an unspecified number of work locations over an unspecified period of time. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(b)** concerns the number of hours allegedly worked when a carnival was scheduled. Respondent specifically stated in its Answer that it lacked information about the Region’s investigation and calculations and specifically denied the allegation. Respondent also again stated its affirmative defenses. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(c)** concerns the number of hours allegedly worked on the last day that a carnival was scheduled. Respondent specifically stated in its Answer that it lacked information about the Region’s investigation and calculations and specifically denied the allegation. Respondent also again stated its affirmative defenses. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(d)** concerns the number of hours allegedly worked on the days when a carnival moved. Respondent specifically stated in its Answer that it lacked information about the Region’s investigation and calculations and specifically denied the allegation. Respondent also again stated its affirmative defenses. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(e)** concerns an alleged calculation methodology for the “total number of hours” paid at a “straight time hourly rate” and includes the “average” number of hours allegedly worked each week at each work location during an alleged Sunday through Saturday workweek.

Respondent specifically stated in its Answer that it lacked information about the Region’s investigation and calculations, that the Region failed to define terms in the allegation, and Respondent specifically denied that it worked at four identified locations. Respondent also again stated its affirmative defenses. Respondent admitted that its workweek was calculated from Thursday to Wednesday, rather than Sunday to through Saturday, as the Region alleged. Based on the extremely limited information Respondent is able to glean from the allegations about the Region’s backwage calculation methodology, it is clear that the Region’s failure to correctly identify the days that constitute a workweek fatally undermine all of its subsequent calculations about alleged backpay.<sup>4</sup> Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(f)** concerns an alleged prevailing wage rate for “regular hours” at each alleged work location. Respondent specifically stated in its Answer that it lacked information about the source of the Region’s allegations regarding specific prevailing wage rates at specific locations and that the Region failed to define terms in the allegation. Respondent admitted that the U.S. Department of Labor prevailing wage data website utilized for the H-2B program would be the best source for determining the specific prevailing wage rate applicable to a specific county and state in 2014. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

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<sup>4</sup> Moreover, the Region’s unexplained methodology using “averages” leads to other improbable conclusions, including, for example, in Paragraph 6(e) where the Region appears to allege that employees worked 136 hours of “regular” time in a week in Strong, ME at the beginning of the season and then 134 hours of “regular” time in a week in Concord, NH. Respondent specifically denied in response to Paragraph 2 that it even worked Concord, ME.

**Paragraph 6(g)** concerns an alleged “weekly gross backpay” calculation methodology for “regular hours worked multiplied by the prevailing wage rate.” Respondent’s Answer specifically denied the allegations and denied that any backpay is due to any worker. Respondent also again stated its affirmative defenses. Regarding this paragraph, the General Counsel states in the Motion that Respondent “claim[s] that it is entitled to an offset to the Region’s backpay calculations”, but Respondent makes no such claim in the Answer to this paragraph. The General Counsel also complains that Respondent does not offer an alternative formula to calculate “weekly gross backpay”, but Respondent specifically denied that any backpay was due and thus is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(h)** concerns a legal conclusion by the Region regarding the calculation and applicability of overtime pay. Respondent specifically stated in its Answer that it lacked information about the Region’s legal conclusions regarding the applicability of the FLSA. Respondent specifically denied the allegations and legal conclusion and denied that any overtime is due to any worker. Respondent also again stated its affirmative defenses, including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. Moreover, the Region, nor the General Counsel have even alleged, let alone demonstrated, that Respondent is covered by the FLSA. Nonetheless, out of an abundance of caution, Respondent repeatedly asserted affirmative defenses that it is exempt from the FLSA. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(i)** concerns an alleged backpay calculation methodology for total hours to be paid at an “overtime rate” based hours worked in excess of 40 between Sunday and Saturday of a single calendar week and includes alleged overtime hours per week at each alleged work location.

Respondent specifically stated in its Answer that it lacked information about how the Region arrived at its alleged determination<sup>5</sup> and specifically denied the allegation that any overtime is owed to any employee. Respondent also again stated its affirmative defenses, including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. The General Counsel also complains, with regard to this paragraph, that Respondent does not offer an alternative formula to calculate the number of hours due at the alleged overtime rate. But Respondent specifically denied that any overtime was due and thus is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 6(j)** concerns an alleged overtime prevailing wage rate for each alleged work location. Respondent specifically stated in its Answer that it lacked information about how the Region arrived at its alleged determination and specifically denied the allegation that any overtime is owed to any employee. Respondent also again stated its affirmative defenses,

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<sup>5</sup> As explained with regard to Paragraph 6(e) above, the Region’s unexplained methodology leads to improbable conclusions that underlie its allegations and backpay calculations. In Paragraph 6(i), those conclusions and allegations become absurd. For example, the Region appears to allege that employees worked 135 hours of “overtime” in a week at Strong, ME, and in Paragraph 6(e), the Region appears to allege that employees worked 136 hours of “regular” time in a week at Strong, ME. Similarly, the Region appears to allege 134 hours of “regular” time in a week and 151 hours of “overtime” in a week at Concord, NH. Thus, it appears the Region is alleging Respondent worked an impossible 271 hours in a 7-day workweek in Strong, ME and 285 hours in Concord, NH. Of course, there are only a maximum of 168 hours in any 7-day workweek period, whether that period is calculated from Sunday to Saturday as the Region incorrectly alleges, or whether the period is Thursday to Wednesday, as Respondent admits. If the amounts presented by the Region are intended cover more than a week, the vague and confusing presentation by the Region prevents Respondent from being able to reasonably discern the basis for allegation.

including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. The General Counsel complains, with regard to this paragraph, that Respondent does not offer an alternative formula to calculate the number of hours due at the overtime rate. But Respondent specifically denied that any overtime was due and thus is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 6(k)** concerns an alleged calculation methodology for a "weekly gross backpay total owed" for "overtime" based on "regular hours worked multiplied by the prevailing wage rate." Respondent specifically denied the Region's allegation regarding its calculation methodology and specifically denied that any backpay or overtime is owed to any employee. Respondent also again stated its affirmative defenses, including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. The General Counsel complains, with regard to this paragraph, that Respondent does not offer an alternative formula to calculate the "weekly gross backpay", but Respondent specifically denied that any backpay or overtime was due and thus is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 6(l)** concerns whether Attachment 2 to the Compliance Specification summarizes the start date, end date, work location, hours worked, prevailing wage rate and overtime prevailing wage rate "described above", as alleged.

As the Region acknowledges in paragraph 6(l), and as the General Counsel acknowledges in the Motion, this paragraph simply states that the allegations contained elsewhere in the

Compliance Specification are *summarized* in Attachment 2. Respondent admitted that the information contained in Attachment 2 appears to repeat information contained elsewhere in the Compliance Specification. Notably, the Region did not separately seek an admission or denial as to the truth or accuracy of the underlying information summarized and thus Respondent was under no obligation to admit or deny the truth or accuracy of the underlying information in the *summary* Attachment.

Moreover, Respondent specifically stated in its response that the underlying information and allegations in the Attachment was repetitive and a duplicative response to each of those underlying allegations would not be provided. Respondent also repeated information regarding the dates and locations of various events that it had already provided elsewhere in its Answer. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 6(m)** concerns an alleged calculation methodology for “weekly gross backpay total for the 2014 season” based on “weekly gross backpay total for regular hours and weekly gross backpay for overtime hours.”

Respondent specifically stated in its Answer that it lacked information about the Region's calculation methodology and specifically denied that any backpay is owed to any employee. Respondent also again stated its affirmative defenses, including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. The General Counsel complains, with regard to this paragraph, that Respondent failed to set forth in detail why the FLSA exemption applies and that Respondent does not offer an alternative formula to calculate the number of hours due at the overtime rate. But Respondent specifically cited the applicable FLSA exemption as an affirmative defense and denied that any overtime was due. The very terms of the statutory exemption contain the elements that must be present to satisfy the

exemption and no additional information is required to put the Region on notice of Respondent's affirmative defense. Further, Respondent is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 6(n)** concerns an alleged calculation methodology for "weekly gross backpay total for Groups A and B" based on information in Attachments 3A and 3B of the Compliance Specification. Attachments 3A and 3B apparently purport to describe two different time periods with the same alleged start date but with different alleged end dates of work and alleged backpay each week that apparently correspond to the two groups of workers alleged by the Region on Attachment 1.

Respondent specifically stated in its Answer that it lacked information about the Region's calculation methodology and specifically denied that any backpay or overtime is owed to any employee. Respondent also again stated its affirmative defenses, including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements.

Curiously, the General Counsel complains, with regard to this paragraph, that Respondent has provided too much detailed information in Answer. Respondent's Answer provides additional information that directly contradicts the Region's backwage calculations and underlying assumptions by specifically rebutting the Region's allegation that the backpay period for all employees began on the same date and ended on the same date for 26 employees, with the alleged backpay period ending on a different date for four employees.

Respondent's Answer places named employees in two different groups (Group 1 and Group 2) based on their start date and the number of weeks each named employee worked. This specific information directly disputes the Region's false construct and placement of named

employees in Group A and Group B, as well as the alleged start dates and weeks worked by each employee. Those fundamental errors by the Region completely undercut the validity of its subsequent calculations. This information would seem to be the kind of additional information that the General Counsel elsewhere in his Motion repeatedly complains was not provided. Yet, when Respondent provides the information, the General Counsel inexplicably complains that it does not correspond to the allegations.

The General Counsel also complains, with regard to this paragraph, that Respondent does not offer an alternative formula to calculate weekly gross backpay for the Region's alleged Groups A and B of employees. But Respondent specifically denied that backpay was due to the employees listed in Groups A and B. Moreover, Respondent provided specific facts demonstrating that the Region's assignment of employees to Group A or Group B, as well as the corresponding start dates and total weeks worked is fundamentally flawed, which further undermines the Region's calculations. Respondent is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 6(o)** concerns an alleged calculation methodology for "quarterly gross backpay total for Groups A and B" based on information in Attachments 3A and 3B of the Compliance Specification.

Respondent specifically stated in its Answer that it lacked information about the Region's calculation methodology and specifically denied that any backpay or overtime is owed to any employee. Respondent also again stated its affirmative defenses, including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. The General Counsel also complains, with regard to this paragraph, that Respondent does not offer an

alternative formula to calculate quarterly gross backpay for the Region's alleged Groups A and B of employees. But Respondent specifically denied that backpay was due to the employees listed in Groups A and B. Respondent is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 9** concerns an alleged apparent calculation methodology for "quarterly interim earnings" and a "quarterly salary paid" to employees in Groups A and B based on information in Attachments 3A and 3B of the Compliance Specification.

Respondent specifically stated in its Answer that it lacked information about the Region's calculation methodology and denied the allegation. Respondent further specifically denied that employees were paid a quarterly salary. The General Counsel complains that Respondent does not offer an alternative formula to calculate "quarterly interim earnings" for the Region's alleged Groups A and B of employees. But Respondent specifically denied the premise of the Region's allegation – that employees were paid a quarterly salary. Respondent is under no obligation to construct and offer an alternative methodology for calculating pay on a different basis than it was provided to the employees. Therefore, Respondent's Answer meets the requirements of Section 102.56(b) of the Board's Rules and Regulations and should not be stricken.

**Paragraph 10** concerns an alleged calculation methodology for "calendar quarter net backpay due each employee in Groups A through I" based on information in Attachments 3A through 3I of the Compliance Specification.

Respondent specifically stated in its Answer that it lacked information about the Region's calculation methodology and denied the allegation. Respondent also specifically denied that any backpay is owed to any employee. Respondent also again stated its affirmative defenses,

including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. The General Counsel complains that Respondent does not offer an alternative formula to calculate “calendar quarter backpay” due based on the Region’s alleged grouping of employees. But Respondent specifically denied that backpay was due. Respondent is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

**Paragraph 11** concerns an alleged calculation methodology for “total net backpay due each employee in Groups A and B” based on information in Attachment 1. Respondent specifically stated in its Answer that it lacked information about the Region’s calculation methodology and denied the allegation. Respondent also specifically denied that any backpay is owed to any employee. Respondent also again stated its affirmative defenses, including citing the specific provisions of FLSA that exempt Respondent from, *inter alia*, overtime requirements. The General Counsel complains that Respondent does not offer an alternative formula to calculate “total net backpay” due based on the Region’s alleged grouping of employees. But Respondent specifically denied that backpay was due. Respondent is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Therefore, Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken.

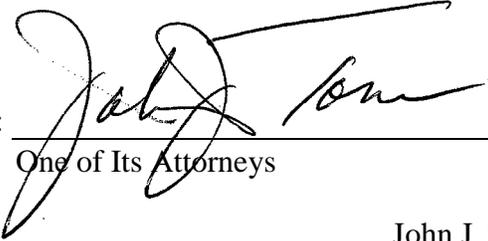
### **CONCLUSION**

Respondent’s Answer meets the requirements of Section 102.56(b) of the Board’s Rules and Regulations and should not be stricken. Furthermore, the Board lacks jurisdiction over this matter as Respondent and the Region previously agreed in writing to a settlement of this matter

and there has been no breach of that agreement. Based on the foregoing, Smokey's Greater Shows submits that the Motion should be denied.

Respectfully submitted,

DATED: August 31, 2020

By:   
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One of Its Attorneys

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