

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

SWYEAR AMUSEMENTS, INC.

and

COMITE DE APOYO A LOS
TRABAJADORES AGRICOLAS (CATA)

-

Case No. 01-CA-130018

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

Respondent Swyear Amusements, Inc., (“Swyear”) 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 August 3, 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 that the General Counsel "presumes" Respondent possesses. As explained in the Answer, Respondent generally lacks access to such data because Respondent is plainly not required by law to maintain such data.

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 admits the precise cash wage amount that employees were paid each week. In addition, Respondent raised affirmative defenses that it also provided employees with benefits of value that count as additional compensation. Benefits that are clearly described in the collective bargaining agreement. 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 lodging¹ 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,² 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

¹ 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.

² 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.

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.

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 work allegedly began at each location during the 2014 season. Respondent's Answer admits that the alleged work locations and expected start dates are consistent with the tentative itinerary submitted to DOL in late 2013 or early 2014 as part of its H-2B application. The General Counsel objects to the Respondent's Answer on the basis that precise information regarding the dates on which the Respondent worked at each location in 2014 "is presumed to be within its knowledge."

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 this precise information, Respondent specifically noted in its Answer that it lacked the information.

In addition, the Answer noted that Respondent’s owner and custodian of business records had been unavailable as a result of acute medical care and thus to the extent any additional information might possibly exist regarding the Region’s allegations in this paragraph or any other paragraph (and despite Respondent’s specific admissions or specific denials throughout the Answer), such information was not reasonably available. 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 admitted 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. 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. 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 for nine groups of alleged employees enumerated in Groups A through I. Respondent specifically denied in its Answer that it owed any backpay to any listed individual, that it employed any of the named individuals, and asserted affirmative defenses to the general backwage theory asserted by the General Counsel. The General Counsel's claim that Respondent is required to create "an alternative list of employees" and alternative start dates is without merit because Respondent specifically denied that backpay was due to any employee whatsoever. Thus, Respondent has no obligation to construct and offer an alternative list of employees who would supposedly be due back pay in response to the Region claiming an entirely different list of individuals is allegedly due backpay. In essence, the General Counsel takes the remarkable position that Respondent is required to simultaneously both prosecute and defend the action. 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 concerns the alleged end date of the alleged "backpay" period for individuals named in Paragraph 4. Respondent specifically stated in its Answer that it lacked sufficient knowledge about the alleged end date and therefore denied the allegation. Respondent also again specifically denied that any of the named individuals were employees of Respondent. Respondent also again asserted affirmative defenses to the allegations. 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 claims the Respondent possesses. 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 allegations that employees worked an "average of 12 hours per day" each day that "there was a work location scheduled." Respondent specifically stated in its Answer that it lacked information about how the Region arrived at its determination or calculation of "averages" and specifically denied the allegation. Respondent admitted that work hours varied by work location. Respondent also again stated its affirmative defenses, including that it is exempt from the record-keeping, minimum wage and overtime requirements of the Fair Labor Standards Act. The General Counsel complains that Respondent did not furnish "alternative figures," but Respondent's affirmative defenses establish that Respondent is not required to maintain the information the General Counsel just presumes exists. 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 an alleged number of hours at "straight time" and that the workweek is calculated from Sunday through Saturday. Respondent specifically stated in its Answer that it lacked information about the Region's conclusions, determination of workweek, and methodology and calculation of hours, and specifically denied the allegation. The General Counsel's complaint that Respondent failed to identify the nature of the dispute is misplaced as Respondent admitted that its workweek was calculated from Tuesday to Monday, rather than Sunday to Saturday as alleged by the Region. 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 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, that the Region failed to define terms in the allegation and Respondent denied 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.

Paragraph 6(d) concerns an alleged “weekly gross backpay” calculation methodology for “regular hours worked multiplied by the prevailing wage rate.” Respondent’s Answer specifically denied the allegations³ 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.

³ The Region’s methodology is obviously and fatally flawed on its face, as it calculates “weekly gross backpay total owed for *regular* hours worked” as the product of “*regular* hours multiplied by the prevailing wage rate” and it also calculates “weekly gross backpay total owed for *overtime* hours worked” as the product of “*regular* hours worked multiplied by the prevailing wage rate.” Compare paragraph 6(d) with paragraph 6(h) of the Compliance Specification (emphasis added).

Paragraph 6(e) 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, and specifically 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(f) 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 and denied the allegation.⁴ Respondent also 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 “for determining the discriminatees’ eligibility for overtime.” But Respondent specifically denied that any overtime was due and thus is under no obligation to construct and offer an alternative methodology for

⁴ Respondent’s denial again covers the Region’s allegation here that Respondent’s workweek ran from Sunday to Saturday, which was previously addressed in paragraph 6(b).

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(g) 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, 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 set forth in detail why the FLSA exemption applies and does not furnish alternative prevailing wage rates. 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, including that it is exempt from the FLSA overtime obligations. In addition, Respondent specifically denied that any overtime was due and thus is under no obligation to construct and offer an alternative methodology and wage rates 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 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 methodology⁵ and specifically denied that any backpay or overtime is owed to any employee.

⁵ The Region's methodology is obviously and fatally flawed on its face, as it calculates "weekly gross backpay total owed for *overtime* hours worked" as the product of "*regular* hours worked multiplied by the prevailing wage rate" and it also calculates "weekly gross backpay total owed for *regular* hours worked" as the product of "*regular* hours multiplied by the prevailing wage rate." Compare paragraph 6(d) with paragraph 6(h) of the Compliance Specification (emphasis added).

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. Regarding this paragraph, the General Counsel also states in the Motion that Respondent argues “that it is entitled to an offset to the Region’s gross backpay calculations”, but Respondent makes no such claim in the Answer to this paragraph. 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 whether Attachment 1 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(i), 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 1. Respondent admitted that the information contained in Attachment 1 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. 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 calculation methodology for "weekly gross backpay total for the 2014 season" based on "weekly gross backpay total for regular hours and the 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. As previously noted, the Region's methodology is obviously and fatally flawed on its face. *See, supra*, footnotes 3 and 5. 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(k) concerns an alleged calculation methodology for "weekly gross backpay total for alleged employee Groups A through I" based on 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 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 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. Regarding this paragraph, the General Counsel also states in the Motion that Respondent claims "that it is entitled to an offset to the Region's gross backpay calculations", but Respondent makes no such claim in the Answer to this paragraph. 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(1) concerns an alleged calculation methodology for "quarterly gross backpay total for 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 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 through I employees. But Respondent specifically denied that backpay was due to the employees listed in Groups A through I. Respondent is under no obligation to construct and offer an alternative methodology for calculating pay that is not due. Regarding this paragraph, the General Counsel also states in the Motion that Respondent claims "that it is entitled to an offset to the Region's gross backpay calculations", but Respondent makes no such claim in the Answer to this paragraph. 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 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 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. Regarding this paragraph, the General Counsel also states in the Motion that Respondent claims "that it is entitled to an offset to the Region's gross backpay calculations", but Respondent makes no such claim in the Answer to this paragraph. 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 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 "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

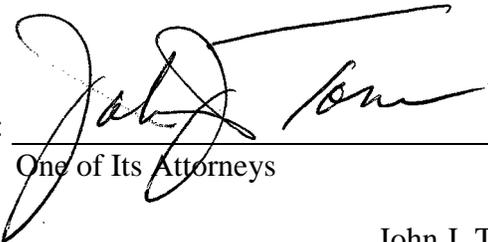
not due. Regarding this paragraph, the General Counsel also states in the Motion that Respondent claims “that it is entitled to an offset to the Region’s gross backpay calculations”, but Respondent makes no such claim in the Answer to this paragraph. Therefore, Respondent’s Answer meets the requirements 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, Swyear Amusements, Inc. submits that the Motion should be denied.

Respectfully submitted,

DATED: September 4, 2020

By: 

One of Its Attorneys

John J. Toner
Seyfarth Shaw LLP
975 F Street, N.W
Washington, DC 20004
202-463-2400

Leon Sequeira, Esq.
11205 Highway 329
Prospect, KY 40059
(202) 255-9023