

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

SMOKEY’S GREATER SHOWS, INC.

and

**COMITE DE APOYO A LOS
TRABAJADORES AGRICOLAS (CATA)**

Case 01-CA-129998

**COUNSEL FOR THE GENERAL COUNSEL’S REPLY TO RESPONDENT’S
OPPOSITION TO SUMMARY JUDGMENT AND RESPONSE TO NOTICE TO
SHOW CAUSE**

Pursuant to Section 102.24(c) of the Board’s Rules and Regulations, the undersigned Counsel for the General Counsel files this Reply to Respondent’s Opposition to Summary Judgment and Response to Notice to Show Cause filed on August 31, 2020 (“Opposition”).

I. INTRODUCTION

As argued herein, Respondent’s Opposition and Response do not support dismissal of the General Counsel’s June 17, 2020 Motion (“Motion”). Respondent’s arguments that the Region overstepped its authority by interpreting the Fair Labor Standards Act (FLSA) and that the Board lacks jurisdiction because the parties had

agreed to settle their dispute are unsupported by the facts and the law. Respondent's contention that it is not bound by the requirements of Section 102.56(b) both because it failed to maintain records of crucial information required to compute its backpay liability, and because it owes no backpay, are also not supported by the law. Finally, Respondent's claims about the Region's unexplained methodology based on its misreading of the plain language of the Specification, and its claim that the Region's failure to correctly identify the days that constitute a work week fatally undermines the Region's backpay calculations, do not support dismissal of the Motion.

Accordingly, Paragraphs 1-6 and 9-11 of the Compliance Specification ("Specification") should be stricken and deemed admitted as true, without the taking of additional evidence, and the Board should grant Counsel for the General Counsel's Motion and the relief sought therein.

II. BACKGROUND

On June 17, 2020 Counsel for the General Counsel filed a Motion to Strike Respondent's Answers to Paragraphs 1-6 and 9-11 of the Specification and for Summary Judgment.

On July 28, 2020, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause, requiring any party seeking to show cause why Counsel for the General Counsel's Motion should not be granted to do so in writing on or before August 17, 2020.

On August 14, 2020, Respondent filed a request for an extension of time until September 4, 2020 to respond to the Board's Notice to Show Cause. The Board granted Respondent's request on August 17, 2020.

III. ARGUMENT

As set forth in Counsel for the General Counsel's Motion, paragraphs 1-6 and 9-11 of Respondent's Answer do not satisfy the requirements of Section 102.56(b) of the Board's Rules and Regulations. Accordingly, they should be stricken and deemed to be admitted as true, without the taking of further supporting evidence. Additionally, because once these allegations are deemed admitted, no genuine issues remain for hearing, the Board should grant Counsel for the General Counsel's Motion for Summary Judgment and order Respondent to make the discriminatees whole, as set forth in the Specification.

Counsel for the General Counsel's Motion addresses most of the issues raised by Respondent in its Opposition. Accordingly, this brief is limited to aspects of Respondent's Opposition that particularly warrant a response.

Respondent's argument that the Specification is "replete with vague and contradictory information" regarding the backpay calculations, and that its methodology to compute the amount of backpay due is "utterly incomprehensible" is without merit and does not support denial of the Motion. Contrary to Respondent's representation, the Specification clearly sets forth the facts, premises, and methodology relied upon by the Region in computing Respondent's backpay liability. Moreover, at no time after the Specification issued did Respondent reach out to Counsel for the General Counsel seeking clarification of the Region's methodology, or of the premises or data relied upon by the Region.

Board law does not support Respondent's assertion that because it failed to maintain certain business records it is not bound by the requirements of Section

102.56(b). As argued in her Motion, Counsel for the General Counsel is entitled to Summary Judgment because Respondent failed to adequately explain its denials of the disputed allegations by furnishing information and/or formulas necessary for the Region to accurately compute its backpay liability. Despite Respondent's repeated characterizations to the contrary, the presumption that the various factors entering into the computation of backpay, including, for example, hours worked, rates of pay, and start and end dates, are within a respondent's knowledge originates with the Board, and not Counsel for the General Counsel. See *Denart Coal Co.*, 301 NLRB 391, 392 (1991) and *Marine Machine Works*, 256 NLRB 15, 17 (1981).

Respondent's assertion that because it was exempt from certain FLSA record-keeping requirements, it is not bound by the requirements of Section 102.56(b) of the Rules to furnish certain information necessary to compute its backpay liability is also unfounded. In its Opposition with respect to paragraphs 2 and 3 of the Specification, Respondent argues that it lacks information regarding the dates when it moved from one location to another, and the dates on which work ended at specific locations. As articulated previously in Counsel for the General Counsel's Motion, a respondent is not absolved of its obligations under Section 102.56(b) simply because it failed to maintain records of information necessary to compute its backpay liability. *Remington Lodging & Hosp., LLC*, 367 NLRB No. 91, fn. 7 (2019). If such information is not in its possession, Section 102.56(b) requires Respondent to make an effort to locate it from other sources. *Schnabel Assoc.*, 286 NLRB 630, 631 (1987).

Respondent argues that because it maintained no records of the locations where it actually worked, such information as the dates employees worked, or when

Respondent moved from one location to the next, is not within its knowledge, and it is therefore not required to furnish it. It is undisputed that Respondent has been in the carnival business for decades, and that it operates its business by travelling from town to town, setting up carnivals, operating them for a variable number of days, disassembling them, and then travelling to the next location, where it starts this process all over again. Hence, its repeated assertion that it has no information at its disposal to identify the dates when it operated at the various locations, the dates when it moved to a new location, or even to estimate the hours spent by its employees setting up, operating, and disassembling the carnival at each location, is simply not credible. Although Respondent's Answer to paragraph 5 provides some information about the various carnivals' operating dates and hours, the information provided does not encompass hours when the discriminatees worked setting up or disassembling the various carnivals. Paragraphs 6(a) through 6(d) of the Specification allege backpay sought on behalf of the discriminatees for all of their work, not just the hours they spent operating the carnivals at the various locations.

Moreover, it is beyond dispute that Respondent is in the best position of anyone to produce that information or, if that information is not in its possession, to identify where answers to the relevant questions can be found. Information such as the dates and locations where Respondent's employees worked during the 2014 season, and when they moved from one location to the next, for example, would likely be found in contracts that Respondent would have entered into with the various venues, safety inspection records maintained by the various localities where it operated carnivals, expense records or invoices, and even in insurance documents, as it undoubtedly was

required to maintain insurance coverage throughout each of its commitments.¹ There is no evidence that Respondent made any effort to locate the information from any of these sources, or from any others. Indeed, Respondent does not suggest that it attempted to do so before filing its Answer. Consequently, Respondent has not satisfied its obligations under Section 102.56(b) and its Answers to paragraphs 2, 3,4, and 5 should be stricken and deemed admitted.

Similarly, applying these same principles, Respondent's defense of its failure to furnish information related to its employees' hours of work and rates of pay set forth in paragraph 6, and elsewhere in its Opposition, must be rejected. *Schnabel Assoc.*, supra, at 631.²

Respondent's argument that the premises underlying Counsel for the General Counsel's Motion and its allegations are erroneous, and that the Board does not possess the authority to interpret the FLSA, are also unsupported. Paradoxically, Respondent cites *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) in support of its claim that the NLRB does not possess the authority to interpret the FLSA. In *Hoffman*, the U.S. Supreme interpreted the Immigration Reform and Control Act of 1986 (IRCA) to foreclose the NLRB from awarding backpay or reinstatement to a discriminatee on the basis of his immigration status. *Id.* at 152. The Court's decision is premised on the notion that, if the Board were to award backpay and reinstatement to an employee who, by virtue of his or her immigration status, was not authorized to work

¹ This is not intended to be an exhaustive list of where Respondent might be able to find information necessary to fulfill its obligations under Section 102.56(b).

² See also *Lorain Area Ambulance Co., Inc.* 304 NLRB 1139, 1140 (1991); and *Master Food Serv.*, 276 NLRB 1160, 1162 (1985) (payroll records).

in the United States, such an award would “unduly trench upon explicit statutory prohibitions critical to federal immigration policy.” *Id.* No such conflict exists in the instant case, where the Region devised a backpay remedy consistent with the FLSA to remedy unfair labor practice allegations that resulted in Respondent paying the discriminatees significantly lower wages than the FLSA required.

In determining backpay liability, the Region’s objective is to reconstruct as accurately as possible the employment and earnings that the discriminatees would have had, but for the unlawful action, during the backpay period. Here, in order to avoid litigating the merits of the case, the parties entered into a Formal Stipulation, subsequently adopted by the Board, in which Respondent admitted to sufficient facts from which the Region could conclude that the Union representing the discriminatees, the Association of Mobile Entertainment Workers (AMEW), was employer-dominated, and that, therefore, the collective-bargaining agreement between the parties was not negotiated at arms’ length, as required by 20 CFR §655.10(b)(1). In the absence of a valid collective-bargaining agreement, 20 CFR § 655.10(b)(2) dictates that the hourly rate that Respondent owed its employees was the prevailing wage rate determined by the DOL – WHD.³

In crafting make-whole remedies for unfair labor practice violations, the NLRB’s regional offices routinely apply minimum wage rates, overtime rates, and prevailing wage rates dictated by State and Federal law. To arrive at a reasonable estimate of a

³ Respondent concedes in its Answer to paragraph 6(f) of the Compliance Specification that the DOL’s prevailing wage data website, likely a reference to the OFLC Online Wage Library, which can be found at <https://www.flcdatacenter.com/>, is the best source of information for determining prevailing wage rates in a particular county and state in 2014. It does not, however, specifically deny that it is subject to the prevailing wage rates for H-2B visa employees set by DOL.

respondent's backpay liability the Region determines the number of hours, weeks, or months of wages due, and the applicable pay rate. In the instant case, the Region multiplied the prevailing wage rate for each work location where the discriminatees worked by the number of hours they worked each week, and subtracted from that number the amount that the discriminatees were actually paid (referenced in the Specification as their interim earnings). This calculation did not require the Region to *interpret* the FLSA, but rather to identify the applicable prevailing wage rate for each work location during the 2014 season and apply it.⁴ This methodology is consistent with the FLSA.

Respondent's assertion that the Board lacks jurisdiction over this matter because the Respondent and the Region had agreed in writing to a settlement over the amount of backpay due is patently false. It is axiomatic that a settlement requires a meeting of the minds, or a genuine agreement between the parties. *McDonalds USA, LLC*, 368 NLRB No. 134 (Dec. 12, 2019). In the instant case, Respondent has offered no evidence that the parties had agreed to a settlement over backpay because no such settlement exists. As such, there is no basis for Respondent's assertion that the Board lacks jurisdiction in this matter.

Respondent's general denial that it owes any backpay so that it is under no obligation to construct and offer an alternative methodology for calculating pay that is not due, is without merit. The plain language of Section 102.56(b), as well as cases interpreting that language, makes clear that such general denials are inadequate, especially as to matters within Respondent's knowledge. Following Respondent's logic,

⁴ Respondent has never previously raised a concern about the Region's authority to interpret the FLRA, or to the Region's reliance on DOL's prevailing wage rates to compute Respondent's backpay liability.

any respondent could avoid its obligations under Section 102.56(b) by claiming it has no records and simply denying any backpay liability. By failing to offer both an alternative formula and alternative figures to support its denials, Respondent takes the unsustainable position that Counsel for the General Counsel must simply accept its assertions at face value. Respondent's argument that it is not required to furnish alternative figures or formulas because it owes no backpay would, if accepted by the Board, render the requirements of Section 102.56(b) meaningless if respondents could so easily escape their obligations and therefore cannot serve as a basis for denying the Motion.

Respondent's assertions that it provided employees with additional compensation in addition to a cash wages are perplexing. If Respondent is seeking to reduce its backpay obligation under the Specification on the basis of this alleged additional compensation, it has not met its burden under Section 102.56(b) of the Rules because it has failed to identify with specificity the nature of the compensation, its value, which employees received it and it has failed to furnish an alternative hourly wage rate for those employees.⁵ Under these circumstances, Respondent cannot rely on its assertions with respect to such alleged additional compensation to support dismissal of the Motion.⁶

⁵ If Respondent is not seeking "credit," or an offset, then nothing in its Opposition serves to clarify what role this defense should play, if any, in the Board's consideration of the Region's Motion.

⁶ Respondent's citation of 29 C.F.R. §531.29 in its Answer, and its footnote 1 in its Opposition suggest that at least some of the additional benefits it references are related to lodging. Neither of these references explains the relevance of this information to Respondent's obligations under the Specification. Moreover, the collective-bargaining agreement Respondent referenced in footnote 1 was invalidated as part of the parties' settlement on the merits of this case and in a related case that was filed against the Union in Case 01-CB-130161, copies of which are attached as Exhibits A and B respectively. As such, the contents of those collective-bargaining agreements, cannot be relied upon to explain any aspect of Respondent's backpay liability.

Respondent's claim that the Region's failure to correctly identify the days that constitute a work week fatally undermines all of its subsequent backpay calculations, is also without merit, and cannot serve as a basis for dismissing Counsel for the General Counsel's Motion. Respondent contends in its discussion of paragraph 6(e) that its employees' work week was calculated from Thursday to Wednesday, rather than from Sunday through Saturday as the Region alleged, and that the Region's failure to allege the correct start and end days to its work week warrants rejection of all of its subsequent backpay calculations. Respondent's failure to furnish alternative supporting figures or formulas, in the instant case, to demonstrate how the Region's reliance on this premise inappropriately skewed its backpay calculations, falls short of the requirements of Section 102.56(b). This is especially true since Respondent appears to contradict its own assertion when, in footnote 5 of its Opposition, it concedes that the number of hours in a 7 day work week is the same, regardless of whether the work week is calculated from Sunday to Saturday or Thursday to Wednesday.⁷

Respondent's claims with respect to paragraphs 6(e) and 6(i) in footnotes 4 and 5 respectively that the Region's "unexplained methodology" leads to "improbable conclusions" which "become absurd," are also unsupported. Respondent's description of the Region's "improbable conclusions" in these two footnotes demonstrates its incorrect reading of the plain words of those allegations, rather than a flaw in Counsel for the General Counsel's methodology. Paragraphs 2 and 3 of the Specification allege the start and end dates at each location, while paragraphs 6(e) and 6(i) allege,

⁷ It is worth noting here that, despite the Region's repeated requests, to date Respondent has only furnished the Region with a single week of payroll records for the discriminatees.

respectively, the number of hours to be paid at the straight time and overtime hourly rates at each work location. Thus, the number set forth in the “regular hours” column of paragraph 6(e) alleges the number of hours to be paid at the straight time hourly rate over a period of multiple days when Respondent operated at the specified location. Likewise, the number set forth in the “overtime hours” column of paragraph 6(i) alleges the number of hours to be paid at the overtime hourly rate over a period of multiple days when Respondent operated at the specified location.⁸

Finally, if the Board finds that Respondent’s Answer as it relates to Respondent’s alleged exemption from the FLSA’s overtime requirements is sufficient, such a finding does not defeat Counsel for the General Counsel’s claim that it is entitled to summary judgment on the remaining disputed paragraphs. Based on the deficiencies in Respondent’s Answer, summary judgment would still be warranted for such things as the total number of hours employees worked, the prevailing wage rates, and the methodology relied upon by the Region to calculate backpay. If it were to be determined that Respondent is exempt from the FLSA’s overtime requirements, Respondent would nevertheless remain liable for those overtime hours, but they would be compensated at the straight time rather than the overtime rate.

IV. CONCLUSION

Respondent has failed to establish any basis for the Board to deny Counsel for the General Counsel’s Motion. Neither its affirmative defenses nor its arguments that

⁸ Although in its Answer to paragraph 2, Respondent disputes some of the work locations listed in paragraphs 2, 3, 6(e), 6(f), 6(i) and 6(j) of the Specification, neither its Answer nor its Opposition provides any clarity about alternative work locations during the dates previously set aside for Concord, New Hampshire (22 day), Ellsworth, Maine (6 days), Fort Kent, Maine (7 days), and Strong, Maine (20 days in April and 18 days in October), or for any other gaps in its carnival schedule, during which times it seems unlikely that the discriminatees remained idle.

the Region overstepped its authority by interpreting the FLSA or that the Board lacks jurisdiction over this matter are supported by Board law. The same is true of its claims that because it owes no back pay, and because it maintained no records of crucial information required to compute its backpay liability, it is not bound by the requirements of Section 102.56(b). Finally, Respondent's complaints about the Region's methodology and conclusions are unsubstantiated and do not support denial of the Motion.

In conclusion, Respondent's general denials as to the disputed paragraphs of the Specification are insufficient under Section 102.56(b) of the Rules and, therefore, should be stricken and deemed admitted. Once they are deemed admitted, no genuine issues remain for hearing, and the Board should grant Counsel for the General Counsel's Motion and the relief sought therein.

Boston, Massachusetts

Date: _____

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