

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

SWYEAR AMUSEMENTS, INC.

and

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

Case 01-CA-130018

**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 September 4, 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 required to furnish alternative formulas or supporting information because it failed to maintain records of information essential to the computation of its backpay liability, and because it owes no backpay, are also not supported by the law.

The same is true of Respondent's assertion that it is not required to furnish an alternative list of discriminatees after denying that the discriminatees identified in the Specification were its employees. Respondent's argument that the Region's methodology is fatally flawed is unsubstantiated and does not support denial of the Motion. Finally, Respondent is not relieved of its obligations under Section 102.56(b) because its owner and custodian of records is unavailable to assist in its defense.

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 August 3, 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 21, 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.

On September 4, 2020, Respondent filed its Opposition to Summary Judgment and Response to Notice to Show Cause.

On September 10, 2020, Counsel for the General Counsel filed a request for an extension of time until September 25, 2020 to file its Reply to Respondent's Opposition to Summary Judgment and Response to Notice to Show Cause. On September 11, 2020, the Board granted Counsel for the General Counsel's request.

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.

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 Department of Labor (DOL).¹

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 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

¹ Respondent concedes in its Answer to paragraph 6(c) of the 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.

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.² This methodology is consistent with the FLSA.

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 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.

Respondent's assertion that the Board lacks jurisdiction over this matter because

² 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.

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 over this matter.

Board law also does not support Respondent's claim 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. Moreover, 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 claim in its Answer to paragraph 1 that it provided employees with additional compensation in addition to a cash wages is perplexing. Because Respondent specifically states that it is not seeking to reduce its backpay liability for having provided "additional compensation" under the now-invalidated collective-bargaining agreement, it is unclear how any such "additional compensation" it may have

paid its employees, and whether DOL recognizes benefits such as lodging as compensation, is relevant to the Board's consideration of Counsel for the General Counsel's Motion. Nevertheless, 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, and which employees received it, and it has failed to furnish an alternative hourly wage rate for those employees. Under these circumstances, Respondent cannot rely on its assertions with respect to such alleged additional compensation to support dismissal of the Motion.

Respondent's assertion that its alleged exemption from certain FLSA record-keeping requirements exempts it from the requirements of Section 102.56(b) of the Rules to furnish certain information necessary to compute its backpay liability is also unfounded. In response to paragraphs 2, 3, and 5 of the Specification, Respondent argues that because it maintained no records, information regarding the locations where it actually worked, the dates when it moved from one location to another, the dates when work started and ended at each location, and the end date of the backpay period are not within its knowledge. 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).

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, Respondent's repeated assertions that it has no information at its disposal to identify the locations where it actually worked during the 2014 season, the dates when it moved from one location to another, the dates when the discriminatees' work started and ended at each location, the start and end dates of the backpay period, or even, in response to paragraph 6(a), the average number of hours that the discriminatees worked, is simply not credible.

Having denied the allegations in paragraph 2, Respondent argues in its Opposition that its Answer meets the requirements of Section 102.56(b) because, to the extent that additional information might exist regarding the allegations in this or any other paragraph of the Specification, it is not "reasonably available" because Respondent's owner and custodian of business records has been unavailable as a result of acute medical care. As argued in Counsel for the General Counsel's Motion, Respondent's Answer to this paragraph is deficient because Counsel's mere assertion that Respondent is unavailable to assist in its own defense does not satisfy its obligations under Rule 102.56(b). There is no evidence that Respondent tried to obtain the information it needed to respond adequately to these allegations, which are premised on documents Respondent filed with the Department of Labor and with the Regional NLRB office during the investigation of this case, either from Counsel for the General Counsel or from any other source. Nor did Respondent request an extension

of time to file its Answer to the Specification upon completion of its medical treatment. See *Frenchy's K&T*, supra, at 413; *O.R. Cooper & Son*, supra, at 1256. Therefore, Respondent's Answer to paragraph 2 should be stricken, and the allegations should be deemed admitted.

In its Answers to paragraphs 2 and 3, Respondent admits only that as part of its H-2B application for the 2014 season, it provided the Department of Labor with a list of prospective worksites and expected start and end dates at each worksite, asserting that it "lacks the information" regarding the precise dates and locations where it actually worked, the dates when it moved from location to location, and the dates when work ended at specific locations. It is beyond dispute that Respondent is in the best position of anyone to produce this information or, if such 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.³ 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

³ 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).

satisfied its obligations under Section 102.56(b) and its Answers to paragraphs 2, 3, 4, 5, and 6(a) should be stricken and deemed admitted.

In its Answer to paragraph 4, Respondent denies both the start date of the backpay period for the various discriminatees and, remarkably, that it employed any of them. In its Opposition, Respondent does not offer alternative backpay period start dates. More significantly, Respondent does not dispute Counsel for the General Counsel's assertion that it provided the Region payroll records or that the names of the discriminatees were derived from those records. Finally, Respondent does not dispute Counsel for the General Counsel's assertion that it made no effort to obtain copies of its payroll records or other documents that might contain the information necessary to adequately respond to the allegations from other sources, including from the Regional Office. For all of the reasons set forth herein and in Counsel for the General Counsel's Motion, Respondent's Answer to paragraph 4 is insufficient and should be stricken, and the allegations of paragraph 4 regarding the identities of the discriminatees should be deemed admitted.

Respondent also denies the backpay period end dates alleged in paragraph 5, and offers no alternative dates. Section 102.56(b) requires Respondent to provide the beginning and end dates of the discriminatees' backpay periods, whether it does so using records of its own, or by obtaining the information from records maintained by another entity. Having failed to do so, Respondent has fallen short of its obligations under Section 102.56(b), and its Answer should be stricken and paragraphs 4 and 5 should be deemed admitted.

Similarly, in paragraph 6(a) of the Specification, Respondent denies allegations setting forth the average number of hours worked by the discriminatees. In its Opposition, Respondent reiterates that because it is allegedly exempt from the FLSA's record-keeping requirements, it was not required to maintain or furnish the information required under Section 102.56(b). The hours worked by a respondent's employees and their rates of pay are normally within an employer's knowledge. *Lorain Area Ambulance Co., Inc.* 304 NLRB 1139, 1140 (1991). If Respondent does not possess the information, it must make an effort to locate it. *Id.*⁴ Nowhere in its Opposition does Respondent suggest that it made any such effort. Consequently, for the reasons articulated herein and in Counsel for the General Counsel's Motion, the Board should strike Respondent's Answer to paragraph 6(a) and deem it admitted.

Respondent also denies the allegations in paragraph 6(b) and 6(f). It contends that it satisfied the requirements of Section 102.56(b) by admitting that its work week was calculated from Tuesday to Monday rather than from Sunday to Saturday. Since Respondent has set forth no other basis for disputing the allegation, and no alternative formula for calculating the number of hours to be paid at the straight time hourly rate for each work location, its Answer should be stricken and the allegations of paragraph 6(b) should be deemed admitted.

Although Respondent denies the allegations in paragraph 6(c), nowhere in its Answer or its Opposition does it specifically deny that it is subject to DOL's prevailing wage rates for H-2B visa employees. As argued in Counsel for the General Counsel's Motion, Respondent was required to state the basis for its disagreement, and to furnish

⁴ See also *Schnabel Assoc.*, *supra*, at 631 and *Master Food Serv.*, 276 NLRB 1160, 1162 (1985).

an alternative wage rate because it denied the allegations in paragraph 6(c). Since Respondent failed to do so, its Answer to paragraph 6(c) should be stricken and the allegations in that paragraph should be deemed to be admitted.

In its Answers to paragraphs 4, 6(d), 6(g), 6(h), 6(j), 6(k), 6(l), 10, and 11, Respondent argues that Section 102.56(b) does not require it to furnish alternative formulas or appropriate supporting figures because it owes no backpay. The plain language of Section 102.56(b), as well as cases interpreting that language, make clear that such general denials are inadequate, especially as to matters within Respondent's knowledge. Following Respondent's logic, any respondent could avoid its obligations under Section 102.56(b) by claiming it has no records and by 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, if accepted by the Board, would render the requirements of Section 102.56(b) meaningless, allowing respondents to effortlessly skirt their obligations, and therefore cannot serve as a basis for denying the Motion. Consequently, the Board should strike Respondent's Answer to paragraph 6(d) and deem it admitted as true.⁵

Respondent contends in its Opposition that the Region's methodology as set forth in paragraphs 6(h) and 6(j) is "obviously and fatally flawed on its face." Having

⁵ Based on this same rationale, the Board should reject this argument by Respondent wherever Respondent relies upon it as a basis for defeating Counsel for the General Counsel's Motion.

made this argument, Respondent offers no alternative formula to compute the amount of weekly gross backpay owed, as required by Section 102.56(b).⁶

Respondent's Answers to paragraphs 6(e), (f), (g), (h), (j), (k), and (l) all are founded on its claim that it is exempt from the FLSA's overtime requirements. If the Board finds Respondent's Answers as they relate to its alleged exemption from the FLSA's overtime requirements to be 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 the hours 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 the Region overstepped its authority by interpreting the FLSA or that the Board lacks

⁶ The "fatal flaw" cited by Respondent - that in paragraph 6(h) of the Specification the Region alleged that the weekly gross backpay total owed for overtime hours worked is the product of regular (rather than overtime) hours worked and the prevailing wage rate (rather than the overtime prevailing wage rate) - is obviously nothing more than an administrative or typographical error. It is clear from the Specification that the Region correctly computed the discriminatees' weekly gross backpay total owed for overtime hours by multiplying the number of overtime hours worked by the overtime prevailing wage rate. Hence, no basis exists for denying Counsel for the General Counsel's Motion based on Respondent's Answer to either paragraphs 6(h) or 6(j). As stated, if Respondent's position is that the formula that was used to calculate its backpay liability was incorrect, Section 102.56(b) requires it to provide an alternative formula, which Respondent failed to do.

jurisdiction over this matter are supported by Board law. Similarly, 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) are without merit. Moreover, Board law makes clear that, having denied that it employed the discriminatees, Respondent is required to furnish an alternative list of discriminatees. Respondent's argument that the Region's methodology is fatally flawed is unsubstantiated and does not support denial of the Motion. Finally, Respondent is not relieved of its obligations under Section 102.56(b) because its owner and custodian of records is unavailable to assist in its defense.

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.

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Date: September 24, 2020

Respectfully submitted,



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