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**Michael Cetta, Inc. d/b/a Sparks Restaurant and  
United Food and Commercial Workers Local  
342.** Cases 02–CA–142626 and 02–CA–144852

November 9, 2020

BY CHAIRMAN RING AND MEMBERS KAPLAN AND  
EMANUEL

SUPPLEMENTAL DECISION AND ORDER

On May 24, 2018, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> in which it found, *inter alia*, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging 36 employees for engaging in an economic strike and by failing and refusing to reinstate the striking employees. Accordingly, the Board ordered the Respondent, its officers, agents, successors, and assigns, to reinstate and make whole 36 employees, specifically Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adam Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivce, Amir Jakupi, Bardhyl Kelmendi, Jeton Karahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj, Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlali El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj, in addition to compensating those employees for any adverse tax consequences of receiving lump-sum backpay awards and fulfilling certain other remedial obligations.<sup>2</sup> On May 20, 2019, the United States Court of Appeals for the District of Columbia Circuit issued a judgment enforcing that Order in full.<sup>3</sup>

On April 8, 2020,<sup>4</sup> a controversy having arisen over the validity of the Respondent's reinstatement offers and the amount of moneys owing under the Board's Order, the Regional Director of the Board for Region 3 issued a compliance specification and notice of hearing. The Respondent filed an answer on May 13.

On May 14, the General Counsel advised the Respondent that its answer did not satisfy the standards set forth in Section 102.56(b) of the Board's Rules and Regulations. The General Counsel further advised that if the Respondent did not file an amended answer by May 21, he would

file a motion to strike and for summary judgment, in whole or in part. After twice requesting and receiving an extension of time to file an amended answer, the Respondent filed its amended answer to the compliance specification on June 18, admitting in part and denying in part the allegations in the specification and raising two affirmative defenses.

On July 9, the General Counsel filed with the Board a Motion for Partial Summary Judgment with exhibits attached. On August 19, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the motion should not be granted. On September 22, the Respondent filed an opposition to the motion.

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

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Sections 102.56(b) and (c) of the Board's Rules and Regulations provide as follows:

(b) Form and contents of answer. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) Failure to answer or to plead specifically and in detail to backpay allegations of specification. If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further

<sup>1</sup> 366 NLRB No. 97.

<sup>2</sup> The Board's 2018 Decision and Order inadvertently misspelled the names of discriminatees Ante Ivce, Jeton Karahoda, and Youssef Semlali El Idrissi. We have substituted the correct spellings here.

<sup>3</sup> 805 Fed. Appx. 2 (D.C. Cir. 2019).

<sup>4</sup> All subsequent dates refer to 2020 unless otherwise indicated.

notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

We find merit in the General Counsel's contention that the Respondent's amended answer does not meet these criteria with respect to various allegations in the compliance specification pertaining to the backpay period, gross backpay, the method of calculating interim earnings and net backpay, benefits, and adverse tax consequences.<sup>5</sup> Rather, for these allegations, the amended answer simply amounts to a general denial.

As the Board has recognized,

It is well settled that a respondent's general denial of the backpay computations contained in a compliance specification will be deemed insufficient if the answer fails to specify the basis for the disagreement with the backpay computations contained in the specification, fails to offer any alternative formula for computing backpay, fails to furnish appropriate supporting figures for amounts owed, or fails adequately to explain any failure to do so.

*Mining Specialists, Inc.*, 330 NLRB 99, 101 (1999) (citing *Best Roofing Co.*, 304 NLRB 727 (1991)); accord *Flaum Appetizing Corp.*, 357 NLRB 2006, 2007 (2011) ("A general denial is not sufficient to refute allegations pertaining to gross backpay calculations.") (citing *South Coast Refuse Corp.*, 337 NLRB 841 (2002); *U.S. Service Industries*, 325 NLRB 485, 486 (1998)); *Robincrest Landscaping & Construction*, 303 NLRB 377 (1991).

The Respondent has failed to adequately support its general denials with specific alternative formulas, supporting figures, or calculations as to the allegations

contained in each of the paragraphs listed in footnote 5, all of which pertain to matters within the Respondent's knowledge. Nor has the Respondent adequately explained its failure to do so.<sup>6</sup> Because the Respondent has failed to deny the allegations in the specific paragraphs of the compliance specification enumerated above as prescribed in Section 102.56(b) of the Board's Rules, and its failure to do so has not been adequately explained, we deem those allegations to be admitted to be true under Section 102.56(c). Accordingly, we grant the Motion for Partial Summary Judgment as to the allegations in each such paragraph. See *Flaum Appetizing Corp.*, 357 NLRB at 2007; *Ybarra Construction Co.*, 347 NLRB 856, 857 (2006); *Paolicelli*, 335 NLRB 881, 883 (2001); see also *Baumgardner Co.*, 298 NLRB 26, 27 (1990) (finding partial summary judgment appropriate where respondent's answer to compliance specification failed to set forth an alternative number of applicable hours), enf. mem. 972 F.2d 1332 (3d Cir. 1992).

Further, regarding compliance specification paragraphs 1(a) and 7(a), we reject the Respondent's attempt to relitigate the Board's previous legal determinations. Specification paragraph 1(a) alleges that the backpay period for all discriminatees begins on December 19, 2014, the date of the unconditional offer to return to work. In its amended answer, the Respondent argues that the date should be based on the "actual number of 'Laidlaw' vacancies." However, this issue was addressed by the Board in its underlying decision and cannot be relitigated at this stage of the proceedings. Nor did the Respondent provide an alternative start date or facts for determining an alternative backpay period as required by Section 102.56(b) of the Board's Rules. Similarly, specification paragraph 7(a) alleges that employees are to be compensated for any adverse tax consequences of receiving backpay as a lump sum, in accordance with the Board's decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).<sup>7</sup> The Respondent contends in its amended answer that this decision was wrongly decided and should be

<sup>5</sup> Specifically, the Respondent generally denies allegations contained in compliance specification pars. 1(b)(2)(A), 1(b)(2)(B), 1(b)(2)(C), 1(b)(3)(A), 1(b)(3)(D), 1(b)(4), 2(a), 2(d)(1), 2(e), 2(j), 2(l), 3(a), 3(e), 4(a), 6(b), 6(d), 6(e)(4), 6(f), 6(g), 6(h), 6(i), 6(k), and 7(b).

<sup>6</sup> The Respondent's opposition brief includes a footnote stating that "[d]ue to the global pandemic and various Executive Orders of the State of New York, Respondent's only location has been closed in its entirety for the duration of these formal Compliance issues[.]" and the Respondent is unable to access relevant physical documents "because the restaurant is literally nailed shut" by "[h]eavy plywood." Without questioning that in certain circumstances a business owner may be unable to access his restaurant if necessary to do so, we find that the Respondent's blanket statement fails to assert a sufficient basis for excusing its deficient answer in this case. The Respondent does not offer evidence that the restaurant is nailed shut by order of the State of New York, nor any other

specific explanation why no one could have entered the facility for months. Neither does it claim that the necessary records are unavailable electronically.

We further note that the Respondent was twice granted extensions of time to file an amended answer to the Region's compliance specification. Moreover, the Respondent had until September 22, 2020, to respond (or to explain why it could not adequately respond) to the General Counsel's July 9 motion regarding the April 8 compliance specification.

<sup>7</sup> We observe that the Board subsequently modified its Social Security Administration (SSA)-reporting remedy in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Specifically, the Board revised its remedial provision so that (1) respondents are now required to provide the backpay report to the Region (rather than to the SSA) for transmission to the SSA, and (2) the report allocates backpay to the appropriate calendar year (rather than to the appropriate calendar quarters).

reconsidered. We decline the Respondent's invitation to revisit settled law. Accordingly, we deem the allegations contained in compliance specification paragraphs 1(a) and 7(a) to be true, and we grant the Motion for Partial Summary Judgment as to the allegations in each of these paragraphs.

Finally, in its amended answer to the compliance specification, the Respondent admits the allegations contained in paragraphs 1(b)(1) (as related to discriminatees Marko Beljan and Adnan Nuredini), 1(b)(3)(B), 1(b)(3)(C), 1(b)(5), 2(b), 2(c), 2(d), 2(f), 2(g), 2(h), 2(i), 2(k), 3(d), 3(f), 5(a), 5(e), 5(e)(1), 6(a), 6(c), 6(e), and 6(j). The General Counsel moves for summary judgment on these paragraphs based on the Respondent's unqualified admissions. We grant the General Counsel's motion as to each of these paragraphs.<sup>8</sup>

#### ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to the following paragraphs of the compliance specification: 1(a), 1(b)(2)(A), 1(b)(2)(B), 1(b)(2)(C), 1(b)(3)(A), 1(b)(3)(B), 1(b)(3)(C), 1(b)(3)(D), 1(b)(4), 1(b)(5), 2(a), 2(b), 2(c), 2(d), 2(d)(1), 2(e), 2(f), 2(g), 2(h), 2(i), 2(j), 2(k), 2(l), 3(a), 3(d), 3(e), 3(f), 4(a), 5(a), 5(e), 5(e)(1), 6(a), 6(b), 6(c), 6(d), 6(e), 6(e)(4), 6(f), 6(g), 6(h), 6(i), 6(j), 6(k),

7(a), and 7(b) and the portions of the appendices incorporated therein.<sup>9</sup>

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is denied as to paragraphs 5(c) and 5(d) of the compliance specification.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 3 for the purpose of arranging a hearing before an administrative law judge limited to taking evidence concerning the paragraphs of the compliance specification as to which summary judgment was not granted.

Dated, Washington, D.C. November 9, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>8</sup> Although the Notice to Show Cause appears to have inadvertently omitted specification par. 2(d), we grant summary judgment based on the Respondent's unqualified admission of the calculation method allegation contained in that paragraph.

Regarding specification pars. 5(c) and 5(d), which pertain to reimbursement of employees' employment agency fees and fees incurred in seeking interim employment, the General Counsel seeks summary judgment based on the Respondent's admissions of the calculation methods described, but not on the amounts provided because they would be outside the scope of the Respondent's knowledge. The Notice to Show Cause omitted these paragraphs from consideration. Because it is not clear from the Respondent's amended answer that the Respondent

admitted the calculation method aspect of either paragraph, we deny summary judgment as to each of these paragraphs.

<sup>9</sup> The General Counsel does not move for summary judgment as to matters outside the Respondent's knowledge, specifically those allegations set forth in compliance specification pars. 3(b)(1), 3(c), 3(d)(1), 3(d)(2), 3(d)(3), 3(g), and 3(h) pertaining to interim earnings; 4(b) pertaining to net backpay; 5(b), 5(e)(2), 5(e)(3) pertaining to employee expenses; 7(c)—(j) pertaining to adverse tax consequences; paragraph 8 summarizing the facts and calculations set forth in the compliance specification; and the footnote to par. 6(c) pertaining to the status of discriminatee Iber Mushkolaj's 401(k) account.