**1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center *and* 1199 SEIU United Healthcare Workers East, New Jersey Region.** Cases 22–CA–029599, 22–CA–029628, and 22–CA–029868

March 24, 2022

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

In this compliance proceeding, the Acting General Counsel filed a Motion to Strike and for Partial Summary Judgment against Respondent 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center. In the motion, the Acting General Counsel asserts that the Respondent's amended answer to the compliance specification seeks to relitigate settled issues and established Board law, provides only conclusory statements and general denials of the allegations without specifying the basis for its disagreement with appropriate alternative figures and formulas, and fails to specify alternative end dates for the backpay period, all in contravention of the Board's Rules and Regulations. For the reasons that follow, we grant the Acting General Counsel's motion in part and deny it in part.

On June 11, 2015, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which it found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging four employees (Sheena Claudio, Jillian Jacques, Shannon Napolitano, and Valarie Wells), accelerating the resignation of another employee (Lynette Tyler), and reducing the work hours of five per diem employees (Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs) during a union organizing campaign because of the Respondent's animus against 1199 SEIU United Healthcare Workers East, New Jersey Region (the Union). Accordingly, the Board ordered the Respondent, its officers, agents, successors, and assigns, to reinstate employees Claudio, Jacques, Napolitano, and Wells and make whole employees Claudio, Jacques, Napolitano, Wells, Tyler, Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, including compensating those employees for any adverse tax consequences of receiving lump-sum backpay awards and fulfilling certain other remedial obligations. On June 6, 2016, the United States Court of Appeals for the Third Circuit issued a judgment enforcing that Order in full.[2]

On February 17, 2021,[3] a controversy having arisen over the amount owing under the Board's Order, the Acting Regional Director of the Board for Region 1 issued a compliance specification and notice of hearing, to which the Respondent filed an answer on March 10.[4] By letter dated March 18, the compliance officer, on behalf of the Acting Regional Director, advised the Respondent that its March 10 answer did not satisfy the standards set forth in Section 102.56(b) of the Board's Rules and Regulations. The compliance officer further advised that if the Respondent did not file an amended answer by March 25, the Acting Regional Director may file a motion to strike and/or for summary judgment, in whole or in part. In response to a letter from the Respondent asking for identification of the specific paragraphs in its answer that were deficient, on March 24 the compliance officer notified the Respondent by email of the paragraphs deemed to be deficient and granted an extension of time until April 1 for it to file an amended answer. On April 1, the Respondent filed its amended answer to the compliance specification, admitting in part and denying in part the allegations in the specification and raising twenty separate defenses.

On June 23, the Acting General Counsel filed with the Board a Motion to Strike and for Partial Summary Judgment with exhibits attached. On August 18, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the motion should not be granted. On September 1, the Respondent filed an opposition to the motion. On September 22, the General Counsel filed a reply to the Respondent's opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[5]

On the entire record, the Board makes the following

Ruling on Motion to Strike Portions of the Respondent's Amended Answer

The Acting General Counsel moves to strike portions of the Respondent's amended answer to the specification, asserting that the Respondent is attempting to relitigate settled issues decided in the underlying unfair labor practice proceeding or issues not in dispute. "It is well settled that a respondent may not relitigate matters in the compliance

[1] 362 NLRB 961, adopting and incorporating by reference *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361 (2012).

[2] 825 F.3d 128 (3d Cir. 2016).

[3] All dates hereinafter are in 2021 unless otherwise indicated.

[4] On April 14, 2017, the then-General Counsel transferred this matter from Region 22 to Region 16. On February 1, 2021, the Acting General Counsel transferred this matter from Region 16 to Region 1.

[5] Member Wilcox did not participate in the consideration of this case.

stage that were decided in an underlying unfair labor practice proceeding." *M. D. Miller Trucking & Topsoil, Inc*., 363 NLRB 446, 447 (2015) (citing *Convergence Communications, Inc*., 342 NLRB 918, 919 (2004)), enfd. 728 Fed. Appx. 2 (D.C. Cir. 2018). Accordingly, we find merit in the Acting General Counsel's position as to separate defenses 9, 10, 13, and 19 as described below and strike those portions of the Respondent's amended answer. We also grant the Acting General Counsel's motion to strike separate defenses 11 and 12 to the extent the Respondent asserts that the per diem employees are not entitled to any backpay under the court-enforced Board Order, which provides for the per diem employees to be made whole.[6]

Separate Defense 9

The Acting General Counsel alleges that the backpay period should run from the date of the employees' unlawful discharge or reduction in hours to the date the Respondent made a valid offer of reinstatement or restored the employees' hours to the level worked prior to the unlawful discrimination against them. In its amended answer, the Respondent asserts that the backpay period should be shortened based on factors unique to this case and not attributable to the Respondent, including the Board's lack of a valid quorum during a substantial portion of the backpay period, resulting in a substantial delay in the Board's issuance of its final Decision and Order. By its defense, the Respondent seeks to relitigate the remedy in the Board's Decision and Order providing that employees should be made whole for "*any* loss of earnings and other benefits," irrespective of when the Board issued its final Decision and Order. Moreover, as the Supreme Court stated in *NLRB v. J.H. Rutter-Rex Mfg. Co*., 396 U.S. 258, 264–265 (1969), "[t]his Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." Accordingly, we grant the Acting General Counsel's motion to strike separate defense 9 from the Respondent's amended answer.

Separate Defense 10

The Acting General Counsel alleges that backpay should be computed on a quarterly basis in accordance with the quarterly backpay formula prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950). In its amended answer, the Respondent asserts that, based on factors unique to this case and not attributable to the Respondent, including the Board's lack of a valid quorum during a substantial portion of the backpay period, the Board should depart from *F.W. Woolworth* and subtract interim earnings during the entire backpay period from the gross backpay amounts for the entire backpay period. By its defense, the Respondent impermissibly seeks to relitigate the remedy in the Board's court-enforced Decision and Order providing that employees should be made whole in the manner set forth in the remedy section of the judge's decision, which provided for backpay to be computed on a quarterly basis under *F.W. Woolworth*. Even if relitigation of the remedy were otherwise permissible, which it is not, we have no jurisdiction to modify a court-enforced order. See, e.g., *Interstate Bakeries Corp.*, 360 NLRB 112, 112 fn. 3 (2014); *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001). Accordingly, we grant the Acting General Counsel's motion to strike separate defense 10 from the Respondent's amended answer.

Separate Defenses 11 and 12

The Respondent in separate defenses 11 and 12 disputes the interim expenses claimed by the Acting Regional Director on behalf of the employees, including the per diem employees, to the extent any such expenses were not reasonably incurred in securing interim employment or were willfully incurred for reasons unrelated to the Respondent's unfair labor practices. The Acting General Counsel moves to strike separate defenses 11 and 12 to the extent that the Respondent asserts that the per diem employees are not entitled to any backpay. As explained in further detail below, the Board's court-enforced Order requires that the per diem employees be made whole. Accordingly, we grant the Acting General Counsel's motion to strike separate defenses 11 and 12 to the extent that the Respondent seeks to argue that the per diem employees are not entitled to any backpay.

Separate Defense 13

The Acting General Counsel alleges that the employees are entitled to be made whole for the loss of 401(k) plan contributions that, but for their unlawful discharges, the Respondent would have deposited into their 401(k) accounts based on their gross backpay during the backpay period. In its amended answer, the Respondent asserts that

[6] We decline to rule on the Acting General Counsel's motion to strike separate defenses 7 and 14, in which the Respondent seeks to challenge established Board law. Instead, as discussed below, we grant summary judgment as to the paragraphs in the specification pertaining to those defenses because we see no reason to revisit settled Board law. See *Michael Cetta, Inc. d/b/a Sparks Restaurant*, 370 NLRB No. 46, slip op. at 2—3 (2020). In addition, we deny the Acting General Counsel's motion to strike Respondent's separate defense 16, which concerns the backpay period for discriminatee Wells. As discussed further below in our denial of the Acting General Counsel's motion for summary judgment as to paragraph 1(d) of the specification, the Respondent can present evidence in support of its assertion that Wells' backpay period stopped running as of the date it acquired evidence of her purported dischargeable misconduct. Member Prouty would grant the motion to strike separate defense 16 for the same reason that, as discussed below, he would grant summary judgment on par. 1(d) of the specification.

the 401(k) plan contribution amounts alleged in the compliance specification "should be disallowed, in whole or in part, based on 401(k) or similar contributions" made on the employees' behalf during their interim employment. The Acting General Counsel does not dispute that the amount of 401(k) contributions the Respondent owes to the employees should be offset against any 401(k) contributions the employees earned during their interim employment. In fact, the Acting General Counsel included such offsets in his computations, and he does not seek summary judgment as to the amounts of those offsets. There being no dispute with respect to this issue, we grant the Acting General Counsel's motion to strike separate defense 13 from the Respondent's amended answer.

Separate Defense 19

The Acting General Counsel alleges that the backpay amounts should be computed using daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In its amended answer, the Respondent asserts that, based on equitable reasons, including administrative delay in the issuance of the Board's final Decision and Order, the Board should depart from calculating backpay using daily compound interest. By its defense, the Respondent impermissibly seeks to relitigate the remedy in the court-enforced Board Order providing that employees should be made whole in the manner set forth in the remedy section of the judge's decision, which provided for backpay to be computed using daily compound interest under *Kentucky River Medical Center*. Moreover, even if relitigation were permissible, which it is not, we have no jurisdiction to modify a court-enforced order. *Interstate Bakeries*, supra; *Grinnell Fire Protection Systems,* supra. Accordingly, we grant the Acting General Counsel's motion to strike separate defense 19 from the Respondent's amended answer.

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 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.

As discussed below, we find merit in the Acting General Counsel's contention that parts of the Respondent's amended answer do not meet these criteria. Accordingly, we grant summary judgment with respect to the backpay period end date for employees Claudio, Jacques, and Napolitano (paragraphs 1(a)-(c)); the allegation that Jacques' backpay period did not toll while she collected workers' compensation from her interim employer (paragraph 2(d)(3)); the allegation that gross backpay of the per diem employees should not be reduced because the Respondent's certified nursing assistants (CNAs) purportedly worked fewer total hours during the backpay period than they had previously (paragraphs 2(h), 2(i)(1), 2(i)(3), 2(i)(5), 2(i)(7), 2(i)(9));[7] and allegations pertaining to the Respondent's obligation to make the employees whole for interim medical expenses (paragraphs 4(d)(1) and 4(d)(2)) and lost investment earnings on 401(k) contributions (paragraphs 5(b), 5(c), 5(d)(1), 5(d)(4), 5(d)(6), and 5(d)(8)). However, we deny the motion for partial summary judgment with respect to the backpay period end date for employee Wells (paragraph 1(d)), the backpay period end

[7] For reasons explained below, Member Ring would deny summary judgment on this allegation.

date for the per diem employees (pars. 1(e)-(i)), and whether the per diem employees received a 2 percent pay increase on the anniversary of their employment date (pars. 2(h), 2(i)(1), 2(i)(3), 2(i)(5), 2(i)(7), 2(i)(9)).[8]

Backpay Period End Date for Claudio, Jacques, and Napolitano (Pars. 1(a)-(c) of the specification)

The Acting General Counsel alleges that the backpay period for unlawfully discharged employees Claudio, Jacques, and Napolitano begins on the date of their discharge and ends for all of them on October 13, 2016, the deadline for each of them to respond to the Respondent's September 13, 2016 valid offers of reinstatement. The Respondent admits to the start dates of the backpay period and the date when the employees were offered reinstatement, their deadlines to respond to those offers, and finally, that their respective backpay periods cannot extend past October 13, 2016. However, the Respondent contends that the backpay periods ended before October 13, 2016, because the employees failed to mitigate damages by seeking and securing interim employment.

The Respondent conflates the backpay period end date used to calculate gross backpay with whether the employees adequately mitigated damages. Mitigation of damages is a separate and distinct issue from the backpay period end date. The Acting General Counsel is only seeking summary judgment as to the duration of the backpay period, not as to the figures and computations in the specification regarding the employees' interim earnings or whether the employees made reasonable efforts to mitigate damages. Moreover, the Respondent's amended answer is deficient under Section 102.56(b) because it did not provide an alternative backpay period end date for each of the employees, together with alternative gross-backpay amounts. As a result, the Respondent's amended answer regarding the backpay period end dates for Claudio, Jacques, and Napolitano amounts to a general denial that fails to set forth in sufficient detail the Respondent's position with appropriate supporting figures.

Additionally, in its denial of paragraph 4(c)(2) of the specification and in its separate defense 7, the Respondent contends that the backpay period end date for employees Claudio and Napolitano should be, at the latest, the date on which they moved out of state. The Acting General Counsel correctly notes that established Board law provides that discharged employees are not confined to the geographic area of former employment and can seek work in any area with comparable employment opportunities without jeopardizing their entitlement to backpay. See *Best Glass Co.*, 280 NLRB 1365, 1370 (1986), enfd. sub nom. *NLRB v. Searle Auto Glass, Inc.*, 833 F.2d 1016 (9th Cir. 1987). We see no reason to disturb this precedent. The Respondent, citing to *United Supermarkets, Inc.*, 287 NLRB 394, 400 (1987), argues that an employee could be penalized for leaving the geographical area where previously employed if the move "resulted in a failure to mitigate the backpay liability of [r]espondent by seeking and accepting substantially equivalent employment." Although the Respondent can challenge whether Claudio and Napolitano failed to mitigate damages by arguing that their move out-of-state affected their interim earnings, the move did not result in their backpay periods ending any earlier than October 13, 2016, or necessitate a reduction in their gross backpay. Accordingly, we grant the Acting General Counsel's motion for summary judgment as to this issue.[9]

[8] The Acting General Counsel does not move for summary judgment as to matters outside the Respondent's knowledge, specifically the Acting Regional Director's figures and/or computations for interim earnings, interim expenses, offsets for 401(k) employer contributions made by interim employers, and excess taxes owed on the employees' lump-sum backpay. The Acting General Counsel is also not challenging the Respondent's right to litigate the adequacy of the employees' mitigation efforts. Accordingly, we do not grant summary judgment as to pars. 3(a), 3(c), 4(c)(1), 4(c)(2), 4(c)(3), 4(c)(7), 4(c)(8), 4(c)(9), 4(c)(11), 5(d)(2), 5(d)(3), 5(d)(5), 5(d)(7), 5(d)(9), 6(c), 6(d), 6(e), 6(g), 6(h), 6(i), 6(k), and 7 of the specification.

In its amended answer, the Respondent admits that, if necessary to make them whole for their losses, employees are entitled to be made whole for interim expenses incurred in seeking employment, including additional mileage costs to commute to their interim employment, as a result of the Respondent's unlawful conduct as alleged in pars. 4(a), 4(b), and 4(c)(preamble). The Respondent also admits to the allegations in pars. 4(c)(4), 4(c)(10), 4(c)(12), and 4(c)(13) that certain employees did not incur interim employment expenses because of the Respondent's unlawful conduct. We grant summary judgment as to those paragraphs. In addition, we grant summary judgment as to paragraph 6(b), which alleges the method for computing an excess tax award, and which the Respondent admits.

[9] The Respondent either accepts or admits to the allegations in pars. 2(a), 2(b), 2(c), and 2(d) (preamble) regarding gross backpay for employees Claudio, Jacques, and Napolitano. As to the accepted and admitted allegations, we grant summary judgment. The Respondent also admits that if the backpay end date for Claudio, Jacques, and Napolitano is correct, then the specification correctly sets forth the rates and calculations of their gross backpay in pars. 2(d)(1), 2(d)(2), 2(d)(4), and 2(e). Because we grant summary judgment as to the backpay period end date for Claudio, Jacques, and Napolitano, we also grant summary judgment as to those paragraphs with respect to Claudio, Jacques, and Napolitano.

The Respondent also generally accepts or admits the Acting General Counsel's allegations in pars. 3(b), 5(a), 6(a), 6(f), and 6(j) of the specification but denies them in part because it disputes the backpay period end date. We also grant summary judgment as to these paragraphs. Par. 3(b) states that calendar quarter net backpay is the difference between calendar quarter gross backpay and calendar quarter interim earnings. This is correct as a matter of law. Pars. 5(a), 6(a), 6(f), and 6(j) correctly specify the Respondent's obligations to compensate the employees for lost 401(k) benefits and the adverse tax consequences of receiving a lump-sum backpay award for a period of over 1 year.

*Backpay Period End Date for Wells* (Par. 1(d) of the specification)

The Acting General Counsel alleges that the backpay period for unlawfully discharged employee Wells begins on the date of Wells' discharge and ends on October 13, 2016, her deadline to respond to the Respondent's September 13, 2016 valid offer of reinstatement. The Respondent admits to the start date of the backpay period, the date Wells was offered reinstatement, her deadline to respond to the offer, and finally, that the backpay period cannot extend past October 13, 2016. However, the Respondent contends that the backpay period for Wells ended before October 13, 2016, when it acquired evidence, presented by the Respondent at the underlying unfair labor practice hearing, that Wells forwarded to her home email address a number of email messages concerning the events leading up to her discharge, which the Respondent alleges would have resulted in her termination for violating its confidentiality policy.

The Acting General Counsel contends that, although the Board reserved to compliance the issue of whether Wells is entitled to reinstatement in light of the after-acquired evidence, the Respondent has waived this defense by failing in its amended answer to furnish an alternative backpay period end date for Wells. Contrary to the Acting General Counsel's assertion, the Respondent did, in fact, provide alternative backpay calculations for Wells, premised on the tolling of her backpay after it had discovered evidence of Wells' alleged misconduct. The Respondent does not pin down the precise date it acquired evidence of Wells' allegedly dischargeable offense. In its amended answer, the Respondent provides two alternatives, one that tolls backpay as of the fourth quarter of 2010, and the other that tolls backpay as of the second quarter of 2011. Although the amended answer is less than definitive, "the pleadings must be read in the light most favorable to the nonmoving party" in determining whether that party has complied with Section 102.56. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001). Additionally, in the underlying merits decision, the Board expressly reserved to compliance the litigation of the Respondent's after-acquired evidence claim.[10] Although the issue is close, we conclude that the Respondent is entitled to a hearing on its after-acquired evidence claim concerning Wells. Accordingly, we deny the Acting General Counsel's motion for summary judgment as to Wells' backpay period end date.[11]

Backpay Period End Date for Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs (Pars. 1(e)-(i) of the specification)

The Acting General Counsel alleges that the backpay period for per diem employees Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs, whose hours were unlawfully reduced, begins on the date their work hours were eliminated and continues to run until the Respondent makes an unconditional offer to restore their hours to the level they worked prior to the discrimination against them. The Respondent challenges the backpay period end date for the per diem employees, contending that, at most, they are entitled to backpay for hours they should have been but were not scheduled to work in September and October 2010, not for any additional hours. The Respondent advances two grounds in support of its contention: first, that the per diem employees did not have an established regular work schedule, and second, that the Board's Order in the underlying merits decision did not require the Respondent to restore to the per diem employees their prior work hours. The Acting General Counsel replies that the Board, in its Decision and Order, affirmed the judge's finding that the per diem employees worked a regular schedule before their hours were unlawfully reduced because of their union activities. 358 NLRB at 1363, 1392. The Acting General Counsel further asserts that the Board's Order provides for the per diem employees to be made whole for any loss of earnings and other benefits suffered as a result

[10] *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB at 1363 fn. 11, incorporated by reference in *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB 961 (2015).

[11] The Respondent either accepts or admits to the allegations in pars. 2(a), 2(b), 2(c), and 2(d)(preamble) regarding gross backpay for Wells. As noted above, we grant summary judgment as to those paragraphs. The Respondent also admits to the allegations in par. 2(d)(5) that Wells received a 2 percent pay increase on the anniversary of her employment date but denies this paragraph of the specification because of its challenge to the alleged backpay period end date. Because this paragraph only pertains to Wells' 2 percent pay increase, regarding which there is no dispute, we grant summary judgment as to it as well. Par. 2(e) of the specification sets forth the calculation of the gross backpay amounts for not only Claudio, Jacques, and Napolitano, but also Wells. Because we deny summary judgment as to the backpay period end date for Wells, we also deny summary judgment as to par. 2(e) with respect to Wells.

Member Prouty would grant the Acting General Counsel's motion for summary judgment with respect to Wells' backpay period end date. The Respondent's amended answer fails to meet the specificity required under Sec. 102.56(b) of the Board's Rules and Regulations because it did not "furnish[] the appropriate supporting figures" necessary to make an alternative gross backpay calculation. Instead, the Respondent only provided generally that Wells' backpay should be cut off from "quarter 2 2011 - present," without stating the specific date on which it learned of Wells' purported misconduct, a matter that necessarily is within the Respondent's knowledge. Assuming arguendo that there is merit to the Respondent's after-acquired defense, the date on which to cut off Wells' backpay is necessary to calculate the amount of backpay that Wells should receive, and the date has a meaningful impact on that amount, which necessitates that the pleading of the precise date is required under the Board's rules. Because the Respondent fails in its amended answer to provide such a date, Member Prouty would find that summary judgment is appropriate.

of the Respondent's unlawful discrimination against them, which would include the loss of hours they would have worked as a part of their regular schedule.

We agree with the Acting General Counsel that the Respondent's first ground is meritless. The Board found, in the underlying Decision and Order, that, although classified as per diem, Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs worked a regular schedule prior to the September 2010 election and that the Respondent unlawfully reduced their hours after the election. The Respondent cannot relitigate these issues in compliance. As to the Respondent's second ground, on the existing record we cannot conclude, as a matter of law, that the Acting General Counsel's position is correct, i.e., that the make-whole provision in the underlying Order, absent a provision in that same Order requiring the Respondent to restore the per diem employees' work hours to the status quo before they were unlawfully reduced, causes the backpay period to run until the Respondent makes an unconditional offer to do something the underlying Order did not require it to do. We also do not say that the Acting General Counsel's position is incorrect. We find only that this novel question deserves fuller consideration than is possible in this summary judgment proceeding, and that it should be litigated and decided in a supplemental proceeding, after the parties have had an opportunity to introduce further relevant evidence, if any, and to brief the legal issue identified above. Therefore, we deny the Acting General Counsel's motion for summary judgment as to this issue. We observe, however, that the court-enforced Board Order provides for the per diem employees to be made whole, and therefore they are presumptively entitled to some backpay.[12]

*Tolling of Jacques' Gross Backpay* (Par. 2(d)(3) of the specification)

The Acting General Counsel alleges that gross backpay for employee Jacques should accrue for the entire backpay period. The Respondent contends that the backpay for Jacques should toll based on her failure to mitigate damages during a 6-month period while she collected workers' compensation from her interim employer. The Acting General Counsel notes that that under established Board law, Jacques did not have to mitigate damages while she was collecting workers' compensation from her interim employer, citing *American Mfg. Co. of Texas*, 167 NLRB 520, 522–523 (1967) (finding that period of disability that is closely related to an employee's interim employment will not be excluded from backpay). Accordingly, because we see no reason to disturb this precedent, we grant the Acting General Counsel's motion for summary judgment as to this issue.

*Gross Backpay Amounts for the Per Diem Employees* (Pars. 2(h), 2(i)(1), 2(i)(3), 2(i)(5), 2(i)(7), 2(i)(9) of the specification)

The Acting General Counsel alleges that the calculation of the gross backpay for per diem employees Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs should include a 2 percent pay increase on the anniversary of their employment date each year. The Acting General Counsel contends that it relied on representations made by, and documents provided by, the Respondent showing that the five per diem employees would have received annual 2 percent pay increases if their hours had not been unlawfully reduced. In its amended answer, the Respondent asserts that, based upon its further review of its payroll records, its per diem employees did not receive regular annual 2 percent pay increases. Furthermore, the Respondent contends that the documents it provided do not support the Acting General Counsel's claim that these employees received annual 2 percent wage increases. Separately, the Respondent contends that the gross backpay for the per diem employees should be reduced 35 percent to

[12] See, e.g., *St. George Warehouse*, 351 NLRB 961, 963 (2007) ("When loss of employment is caused by a violation of the Act, a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed.").

The Respondent admits to the Acting General Counsel's figures for the average bi-weekly gross earnings of per diem employees Aguilar, Joseph, Onyeike, Rodriguez, and Stubbs alleged in par. 2(f)(1)-(5). The Respondent also admits that the appendices referenced in paragraph 2(g) of the specification accurately set forth the per diem employees' gross pay for the referenced pay periods, the total gross pay amounts for each of the pay periods shown, and the average gross bi-weekly pay for each of the pay periods shown. In addition, the Respondent admits to the Acting General Counsel's allegations in pars. 2(i)(2), 2(i)(4), 2(i)(6), 2(i)(8), and 2(i)(10) that, for various reasons, the backpay period for the per diem employees should be tolled for specified time periods. As to the admitted allegations in these paragraphs, we grant summary judgment. Moreover, the Respondent denies the allegation in par. 2(f)(preamble) that calendar quarter gross backpay for the per diem employees is their average gross bi-weekly earnings for the 12 months preceding the Respondent's unlawful conduct, plus annual wage increases. The Acting General Counsel's allegation is correct as a matter of law, and we grant summary judgment as to this paragraph. However, in light of the outstanding issues as to the per diem employees' gross backpay amounts, we deny summary judgment as to par. 2(j), which sets forth the Acting General Counsel's figures for the gross backpay amounts owed to the per diem employees.

Member Prouty would grant the Acting General Counsel's motion for summary judgment as to the backpay period end date for the per diem employees because there is no additional evidence that could be offered at the hearing that would be probative on this issue. The Board in the underlying proceeding found that the per diem employees worked a regular schedule until the Respondent's unlawful reduction of their hours. As such, in order to make the per diem employees whole as required under the court-enforced Board Order, the backpay period must continue until the Respondent offers the per diem employees restoration of their former hours, which the Respondent has indisputably failed to do.

correspond to the Respondent's reduction in the total hours worked by CNAs from 2010 to 2016.

Because whether the per diem employees received a 2 percent pay increase is a genuine factual issue in dispute, we deny the Acting General Counsel's motion for summary judgment on this issue. At the hearing, the Respondent can submit into evidence its payroll records and other documents, if any, that purportedly show that the per diem employees did not receive regular annual 2 percent pay increases. We leave it to the judge to review those records and determine what, if any, pay increases the per diem employees received.[13]

However, as to the Respondent's broad contention that the gross backpay of the per diem employees must be reduced by 35 percent because the Respondent had reduced the total hours worked by CNAs, we grant the Acting General Counsel's motion for summary judgment. The Respondent's amended answer fails to support this assertion with the specificity required under Section 102.56(b) of the Board's Rules and Regulations. Even if the total number of hours worked by CNAs was less in 2011–2016 than in 2010, this does not demonstrate that any of the five per diem employees whose hours were unlawfully reduced would have worked any less. The Respondent "may not rely on statistical formulas" to reduce its backpay obligations; instead, it "must make a showing as to each claimant." *Boland Marine & Mfg. Co.*, 280 NLRB 454, 461 (1986). Moreover, as noted in NLRB Casehandling Manual (Compliance) Section 10536.1, "[b]ackpay awards are intended to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation." What happened to CNAs as a classification does not necessarily have any bearing on the per diem employees. After all, if the Respondent had not unlawfully discriminated against them, the per diem employees may have worked the same number of hours but with fewer coworkers. In the absence of countervailing evidence that the Respondent fails to offer in its amended answer, making the per diem employees whole requires assuming that they would have worked the same number of hours but for the Respondent's unlawful discrimination. As such, the Respondent's amended answer lacks the specificity needed for the Respondent to be able to offer evidence on the matter at the hearing. Accordingly, we grant the Acting General Counsel's motion for summary judgment as to this issue.[14]

*Interim Medical Expenses* (Pars. 4(d)(1) and 4(d)(2) of the specification)

The Acting General Counsel alleges that employees are entitled to be made whole for medical expenses they would not have incurred but for the Respondent's unlawful conduct. The Respondent does not dispute that established Board law provides "that employees should be made whole for expenses they incurred due to the loss of medical insurance due to a respondent's unlawful action," citing *Smoke House Restaurant, Inc.,* 365 NLRB No. 166, slip op. at 10 (2017). Instead, the Respondent seeks to challenge whether the employees' additional cost in insurance premiums was for a reason other than its unlawful conduct. But it is only reasonable to impute the increased insurance costs to the Respondent. If the Respondent had not unlawfully discharged them, the employees would have retained their Respondent-provided insurance without having to pay the higher costs for insurance from their interim employers. Although it can dispute the figures and computations in the specification as to the amount of reimbursement, the Respondent cannot contest that it is responsible for reimbursing the employees for the higher

[13] Member Prouty would grant the Acting General Counsel's motion for summary judgment on the specification paragraphs providing that the per diem employees received a 2 percent annual pay increase. Whether the per diem employees had received a 2 percent annual pay increase while they worked for the Respondent is clearly a matter within the Respondent's knowledge. For such matters, the Respondent does not need a hearing to be able to challenge the Acting General Counsel's evidence. The Respondent must already have that evidence. Under Sec. 102.56(b) of the Board's Rules and Regulations, the burden is on the Respondent to put forth that evidence in enough detail in its answer to the specification to determine whether there is a genuine factual issue in dispute. Here, the Respondent only provided a perfunctory and unsupported claim that further review of its payroll records evidenced that the per diem employees did not receive regular annual 2 percent pay increases. This is not sufficient detail to adequately contest the specification allegations.

[14] Member Ring joins the Chairman in finding that summary judgment is not warranted with respect to the 2 percent annual wage increase allegation, but he would also deny the Acting General Counsel's motion for summary judgment on the issue of whether gross backpay for the five per diem employees, who are CNAs, should be reduced by 35 percent to reflect the reduction in hours worked by CNAs. In its amended answer, the Respondent provided the total number of hours worked by CNAs from 2010–2016, showing that the annual average number of hours worked was highly variable and decreased from 2011 to 2016. The Respondent also included this 35 percent reduction in its Alternate Gross Back Pay Calculation for these employees. Member Ring believes that granting the Acting General Counsel's motion on this issue requires an overly exacting reading of Sec. 102.56(b). He believes the Respondent has sufficiently demonstrated the existence of a factual issue warranting a hearing, and that the evidence the majority faults the Respondent for not providing in its amended answer may be introduced at that hearing. *Boland Marine & Mfg. Co.*, 280 NLRB 454 (1986), cited by the majority, is not to the contrary. That case was before the Board on exceptions to an ALJ's supplemental decision after a compliance-stage hearing. There, the Board found that the evidence the respondent introduced at the hearing was insufficient to meet its burden of proof. Here, the issue is whether the Respondent is entitled to a hearing in the first place. Whether the evidence the Respondent would introduce at the hearing would prove to be sufficient to warrant the reduction the Respondent claims remains to be seen, but Member Ring would allow the Respondent the opportunity to litigate this issue.

premium insurance costs they incurred because of its unlawful action. This is essential to make the employees whole for their medical expenses during their interim employment. Accordingly, we grant the Acting General Counsel's motion for summary judgment as to this issue.[15]

Lost 401(k) Investment Earnings (Pars. 5(b), 5(c), 5(d)(1), 5(d)(4), 5(d)(6), and 5(d)(8) of the specification)

The Acting General Counsel alleges that employees are entitled to be compensated for lost investment earnings on 401(k) plan contributions that the Respondent would have deposited into their 401(k) accounts based on their gross backpay if the Respondent had not engaged in its unlawful conduct. In its amended answer to paragraph 5(b) of the specification and separate defense 14, the Respondent contends that any compensation for lost investment earnings requires knowledge of the employees' investment preferences and/or investment history during the backpay period. It also argues that compensating employees for their lost investment earnings on what would have been their personal contributions to their 401(k) account would provide them with a double recovery or would otherwise be the product of undue speculation.

To measure the employees' lost investment earnings, the Acting General Counsel used the S&P 500 rate of return during the backpay period. Contrary to the Respondent's suggestion, although calculations as to lost investment earnings can be made by relying on individual investment selections, Section 10544.3 of the NLRB's Casehandling Manual (Compliance) provides that, because the calculation of lost 401(k) plan benefits may be complex, it is reasonable to consider alternative means of estimating the benefit. The use of the S&P 500 rate of return is one such alternative means. See *Alameda Center for Rehab and Healthcare*, 370 NLRB No. 25, slip op. at 1 fn. 5, 5 (2020) (finding it reasonable for the Region to calculate lost investment growth of back contributions "by pegging them to the S&P 500 index"). In addition, compensating employees for lost 401(k) investment income is not a windfall. Id., slip op. at 1 ("Providing relief for lost 401(k) investment growth on the missed employee contributions compensates employees for their loss without a punitive, windfall payment of any kind.") (internal footnote omitted). The Respondent's unlawful conduct caused the employees to be deprived of investment growth on what would have otherwise been their own personal contributions and the Respondent's matching contributions to a 401(k) investment vehicle. The Acting General Counsel properly seeks to ensure that the employees are placed in the position they would have been in but for the Respondent's unlawful conduct. Accordingly, we grant the Acting General Counsel's motion for summary judgment as to this issue.[16]

ORDER

IT IS ORDERED that the Acting General Counsel's motion to strike is granted with respect to the Respondent's separate defenses 9, 10, 13, and 19 of its amended answer.

IT IS FURTHER ORDERED that the Acting General Counsel's motion to strike is granted with respect to the Respondent's separate defenses 11 and 12 to the extent the Respondent seeks to argue that per diem employees Daysi Aguilar, Dominique Joseph, Rita Onyeike, Gertrudis Rodriguez, and Annie Stubbs are not entitled to any backpay.

IT IS FURTHER ORDERED that the Acting General Counsel's Motion for Partial Summary Judgment is granted as to the following paragraphs of the compliance specification as described above: 1(a)-(c), 2(a)-(d), 2(e) with respect to employees Sheena Claudio, Jillian Jacques, and Shannon Napolitano, 2(f), 2(g), 2(h), 2(i)(1), 2(i)(2), 2(i)(3), 2(i)(4), 2(i)(5), 2(i)(6), 2(i)(7), 2(i)(8), 2(i)(9), 2(i)(10), 3(b), 4(a), 4(b), 4(c)(preamble), 4(c)(4), 4(c)(10), 4(c)(12), 4(c)(13), 4(d), 5(a)-(c), 5(d)(preamble), 5(d)(1), 5(d)(4), 5(d)(6), 5(d)(8), 6(a), 6(b), 6(f), and 6(j).

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 1 for the purpose of arranging a hearing before an administrative law judge limited to taking evidence concerning paragraphs of the compliance specification as to which summary judgment was denied.

[15] As to pars. 4(d)(1) and (2) of the specification, we grant summary judgment only with respect to the Respondent's responsibility for employees' higher costs for health insurance resulting from its unlawful conduct. We do not grant summary judgment as to the Acting General Counsel's figures and computations as to the amount of those higher costs.

The Respondent admits the allegation in paragraph 4(d)(preamble) of the specification that Claudio, Jacques, Napolitano, and Wells are entitled to be made whole for medical expenses incurred as a result of the Respondent's unlawful conduct and admits the allegations in pars. 4(d)(3) and 4(d)(4) that Napolitano and Wells did not incur interim medical expenses and that the per diem employees are not entitled to interim medical expenses. Because these issues are not in dispute, we grant summary judgment as to them.

[16] We grant summary judgment on the preamble to par. 5(d), as to which the Respondent admits that the total amount of 401(k) contributions that the Respondent owes to employees should be paid directly to them as backpay wages because they no longer participate in the Respondent's 401(k) plan. Moreover, we grant summary judgment on pars. 5(d)(1), 5(d)(4), 5(d)(6), and 5(d)(8), as to which the Respondent admits that Claudio, Jacques, Napolitano, and Wells contributed a certain percentage of their gross wages to their 401(k) plan while employed by the Respondent.

Dated, Washington, D.C. March 24, 2022

_____
John F. Ring, Member

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD