No. 19-

IN THE

Supreme Court of the United States

MICHAEL CETTA, INC.,
D/B/A SPARKS STEAKHOUSE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JON SCHUYLER BROOKS
Counsel of Record
MARC B. ZIMMERMAN
FREEBORN & PETERS LLP
230 Park Avenue, Suite 630
New York, NY 10169
(212) 218-8760
jbrooks@freeborn.com

Counsel for Petitioner

292511

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding striking employees had been discharged in violation of the National Labor Relations Act ("NLRA"), even though none of the striking employees ever claimed they had been discharged, by finding a hypothetical prudent employee reasonably could have concluded the employer's allegedly ambiguous statements meant striking employees had been discharged?

2. Whether the "mutual understanding" of "permanent employment" required by *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and its progeny is established under the NLRA when an employer issues offer letters of permanent employment to replacement employees, and those employees thereafter commence (or continue) employment, all prior to the time striking employees deliver to the employer an unconditional offer of return to work?

PARTIES TO THIS PROCEEDING

The caption of this case contains the names of all the parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

Michael Cetta Inc. d/b/a Sparks Steakhouse ("Sparks") has no parent company, and no publicly held corporation owns 10% or more of the shares of Sparks.

STATEMENT OF RELATED CASES

Michael Cetta, Inc. v. NLRB, No. 18-1165 (Consolidated with 18-1171), United States Court of Appeals for the District of Columbia Circuit, Judgment Entered May 20, 2019 (Appendix at 1a), *petition for rehearing denied*, United States Court of Appeals for the District of Columbia Circuit, Order Entered August 14, 2019 (Appendix at 87a).

Michael Cetta, Inc. and United Food and Commercial Workers Local 342, Cases 02-CA-142626 and 02-CA-144852, National Labor Relations Board, Decision and Order of the Board (Amended), dated May 24, 2018 (Appendix at 10a).

Michael Cetta, Inc. and United Food and Commercial Workers Local 342, Cases 02-CA-142626 and 02-CA-144852, National Labor Relations Board, Decision of the Administrative Law Judge, dated November 18, 2016 (Appendix at 17a).

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Statutes and Other Authorities

Cited Authorities

OPINIONS BELOW

The unpublished *per curiam* decision of the United States Court of Appeals for the District of Columbia Circuit affirming the Decision and Order of the National Labor Relations Board, that held Michael Cetta Inc. d/b/a Sparks Steakhouse violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, is reproduced in the Appendix at 1a-9a. The unpublished order of the United States Court of Appeals for the District of Columbia Circuit denying the petition for rehearing *en banc* is reproduced in the Appendix at 87a-88a.

The decision and order of the National Labor Relations Board, affirming the rulings, findings, and conclusions of the Administrative Law Judge, is reported at 366 NLRB No. 97, 2018 NLRB LEXIS 200 (N.L.R.B., May 24, 2018), and reproduced in the Appendix at 10a-16a. The decision and order of the Administrative Law Judge is reported at 366 NLRB No. 97, 2016 NLRB LEXIS 825 (N.L.R.B., Nov. 18, 2016), and reproduced in the Appendix at 17a-86a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 20, 2019. (App. 1a.) The order of the Court of Appeals for the District of Columbia Circuit denying the petition for rehearing *en banc* was entered on August 14, 2019. (App. 87a.)

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The text of the relevant statutes is set forth in the Appendix at 89a – 96a.

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are the National Labor Relations Act §§ 8, 10, 29 U.S.C. §§ 158, 160, reproduced in the Appendix at 89a – 90a and 91a-93a, respectively; the Administrative Procedures Act, 5 U.S.C. § 706, reproduced in the Appendix at 94a-95a; and regulations of the National Labor Relations Board, 29 C.F.R. §§ 102.48(c) and 102.45(b), reproduced in the Appendix at 95a-96a, respectively.

PRELIMINARY STATEMENT

The National Labor Relations Act ("NLRA") arguably impacts, or has the potential to impact, more people in the United States than any other federal law.

The Court of Appeals for the District of Columbia Circuit has issued an unprecedented ruling that introduces grave uncertainty into the NLRA, penalizes an employer for its good-faith reliance on legal precedent under the NLRA, eliminates an employer's ability to rely on representations made by unions (thereby effectively negating the role of unions as the exclusive collective-bargaining representative of employees), and undermines long-established precedent of this Court and the Circuit Courts.

The ruling ushers in what may be the most important NLRA "discharge" case since the Supreme Court implicitly recognized "constructive discharge" in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). In contrast to *Sure-Tan* and every other discharge case, the D.C. Circuit held the National Labor Relations Board (the "NLRB" or "Board") may "infer" an employer discharged a striking employee even when, as here, the record (a) is devoid of a single instance in which any one of thirty-six striking employees ever claimed discharge, (b) demonstrates neither the striking employees nor their union ever filed a charge with the Board claiming discharge (even though the union filed multiple other charges), and (c) demonstrates also the union – in fulfilling its role as the exclusive collective-bargaining representative of the striking employees – repeatedly told the employer the striking employees were "locked out," a legal status the NLRB considers mutually exclusive with being discharged. *Douglas Autotech Corp.*, 357 NLRB 1336, 1342-43 (2011).

This decision departs from an unbroken line of precedent finding discharge – whether "actual" or "constructive" – only when an aggrieved employee, directly or through the union, has claimed discharge, and when that claim survives an objective test predicated on whether it was reasonable for the aggrieved employee to believe she or he had been discharged. *See*, *e.g.*, *NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990), *as amended* (May 20, 1991) (actual discharge) (the test "depends on the reasonable inferences that ***the employee*** could draw from the statements or conduct of the employer.") (emphasis added); *Aliotta v. Bair*, 614 F. 3d 556, 566 (D.C. Cir. 2010) (constructive discharge) ("The test for constructive discharge is an objective one: whether a reasonable person

in ***the employee's position*** would have felt compelled to resign under the circumstances.") (emphasis added). Neither the D.C. Circuit's decision nor the NLRB's brief on appeal identified a single case applying the objective test in the absence of at least one aggrieved employee who claimed to have been discharged. None exists.

Yet the D.C. Circuit's decision diverges from, and fundamentally changes, that standard, eliminating the need for an allegedly aggrieved employee who claims discharge, and allowing the Board to apply the objective test retrospectively to a hypothetical reasonable employee. That change not only breaks with long-established precedent on factual predicate required to find a discharge in violation of the NLRA, but also jettisons the long-accepted standard imposing the burden of proving discharge on the General Counsel.

Furthermore, the decision does so even though the union took the position (and repeatedly told the employer) the striking employees were "locked out," meaning they were not discharged. This aspect of the D.C. Circuit decision in effect negates the role of the union as the striking employees' exclusive-bargaining representative, and creates uncertainty in the collective-bargaining process.

This issue, therefore, is of exceptional importance to the entire construct and purpose of the NLRA.

Moreover, the decision held the employer's qualified rejection "at this time" of the union's unconditional offer of return to work created "ambiguity" about the employment status of the striking employees, and thereby exposed

Sparks to a claim of discharge. The decision thus creates uncertainty as to how an employer is to exercise its right to hire permanent replacements for striking employees (see *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346 (1938)), and its right to withhold the fact of such hires (see *New England Health Care Emps. Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006) ("*Avery Heights*"), without creating such ambiguity. This issue, too, is of exceptional importance to the entire construct and purpose of the NLRA.

Separately, the decision conflicts with the precedent recognized in *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 390-91 (D.C. Cir. 1995). In that case, the court held the "mutual understanding" required to demonstrate replacement workers were hired on a permanent (rather than temporary) basis is satisfied by the unilateral declaration of permanence by the employer, and the continuation or commencement of work thereafter by the replacement worker. Although that fact pattern is replicated here, the decision below ignores it, and insists the mutual understanding is not satisfied unless the replacement worker countersigns an offer letter before the striking employees make an unconditional offer to return to work.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, Michael Cetta, Inc. d/b/a Sparks Steakhouse ("Sparks") is multigenerational, family-owned restaurant located at 210 East 46th Street in New York, New York. Sparks employs Maitre D's, waiters, bartenders, chefs, food preparers and dishwashers. (App. 18a-19a.)

United Food and Commercial Workers Local 342 ("Local 342" or the "Union") "was certified as the exclusive collective bargaining representative of a unit of waiters and bartenders at Sparks on July 11, 2013," and thereafter Sparks and the Union held multiple negotiating sessions. (App. 20a.)

This case arose from an economic strike against Sparks that began on Friday, December 10, 2014, during the busy holiday season dinner shift. (App. 2a.)[1]

When the striking employees did not immediately return, Sparks was unsure of their intentions. Accordingly, Sparks hired permanent replacements for the striking employees, who began working as early as December 11, 2014. (R 7A-HH at A437-470; A103-116).[2] Sparks offered "permanent employment" to each of the permanent replacements, as evidenced by offer letters ("Offer Letters") issued to each of the permanent replacements between December 11 and December 19, 2014. (App. 7a., 39a-41a.)

---

1. A prior economic strike on December 5, 2014 ended after about two hours, when Sparks accepted without hesitation the unconditional offer of return to work of the striking employees. (App. 20a.)

2. Cites "R__" are to Respondents' Exhibits introduced into evidence at the ALJ Hearing. Cites "GC__" are to General Counsel's Exhibits introduced into evidence at the ALJ Hearing. Cites "A___" are to the Joint Appendix filed in the United States Court of Appeals for the District of Columbia Circuit.

On Friday night, December 19, 2014, the Union's Secretary-Treasurer sent an email to Sparks' counsel in which she made an unconditional offer of return to work on behalf of the striking employees (the "Unconditional Offer"). (GC-9 at A232-233; App. 6a-7a.) After discussing the email with Sparks, Sparks' counsel responded on December 22, 2014 (the "Sparks Response"), stating Sparks "must reject the union's offer to return the striking employees to work ***at this time***." (GC-9 at A231) (emphasis added). Given the picket line misconduct that already had occurred, and in reliance on *Avery Heights*, the Sparks Response did not mention Sparks already had hired permanent replacements. Neither Sparks nor its counsel ever stated – or even implied – the striking employees were discharged, including in the Sparks Response.

The Union replied to the Response on December 22, 2014 (the "Strikers Reply"). Notably, in the Strikers Reply, the Union volunteered, "our position is that Sparks employees are locked out." (GC-9 at A231; App. 5a.)

In the Charge filed with the NLRB on January 22, 2015 (the "Lock Out Charge"), the Union reiterated its position the striking employees were locked out – not discharged – since "on or about December 19, 2014," and alleged Sparks continued to "lock out for discriminatory purposes all of those employees" who participated in the strike. (A32.) Nothing in the Lock Out Charge alleges Sparks ever discharged any, let alone all, of the striking employees. *Ibid.*[3]

3. The Union filed three other Charges, one of which became the Solicitation Charge. (See A21, A27, A29, A33). As with the Lock Out Charge, none of them alleged Sparks discharged any of the striking employees.

Sparks and the Union had at least three subsequent bargaining sessions: January 8, January 20, and February 25, 2015. During at least two of them, Sparks told the Union the striking employees remained active employees, and discussed returning them to work. (A198-A200 [Tr. 658:4-7; 659:17-20; 660:6-14].)

B. Procedural History

The Consolidated Complaint, issued a full four months after the Union filed the last of its Charges against Sparks, is based only on the Solicitation Charge and the Lock Out Charge. (A35.) Nonetheless, in paragraph 7.d. it asserts a separate allegation appearing in neither of those (or any of the other) Charges: Sparks discharged the striking employees on December 22, 2014.

> On about December 22, 2014, Respondent by its counsel, by email to the Union, discharged the 36 striking employees ….

(A38.)

Some nine months after the Union filed the Lock Out Charge, the Board amended the Complaint. (A47.) The amendment did not add any new factual allegations, did not assert new violations, and did not advance any new theories of liability. Rather, the only change was to expand the remedy.

The following paragraph is inserted in the Remedy section, after the first paragraph:

> As part of the remedy for the unfair labor practices alleged in paragraph 7 of the Complaint, the General Counsel seeks an order requiring that Respondent offer reinstatement to all 36 discharged strikers, and that Respondent make whole all 36 discharged strikers from the date of their discharge – December 22, 2014 – with interest, ***despite the fact that Respondent had hired permanent replacement workers before the date of discharge***.

Ibid (emphasis added).

Notwithstanding the limitation of the hearing to the two issues expressly set forth in the Amended Complaint, the GC raised a new issue in its post-hearing brief: whether Sparks even hired permanent replacements to replace the striking employees prior to the Unconditional Offer. In support of this new issue, the GC asserted Sparks had not introduced documentary evidence, specifically Weekly or Daily Tip sheets, for the period December 15 through December 21, 2014, and asked the ALJ to draw an adverse inference from the fact Sparks had not done so.

The ALJ issued her decision on November 18, 2016. In it, the ALJ considered the new issue on the merits – even though it never was litigated during the hearing – and held Sparks had not met its burden of proof to show it hired permanent replacements prior the making of the Unconditional Offer. (App. 41a.)

Additionally, the ALJ held Sparks, by and through the Sparks Response, discharged all striking employees on December 22, 2014. (App. 61a-70a). Although the Amended

Complaint alleges Sparks effectuated the discharge by only the Sparks Response (App. 61aa-62a; A38), the ALJ relied also on events that occurred weeks and months after the Response to establish a December 22, 2014 discharge. (App. 64a-65a.)

Having made these holdings, the ALJ found Sparks violated NLRA §§ 8(a)(1) and (3) by: 1) failing and refusing to reinstate the striking employees despite an unconditional offer to return to work; 2) denying the striking employees the right to be placed on a preferential hiring list; and 3) discharging them. The ALJ ordered a make-whole remedy of immediate reinstatement and backpay from the date of the alleged discharge, December 22, 2014. (App. 77a-82a.)

Sparks filed Exceptions to the ALJ's Decision. Sparks also filed a Motion to Reopen the Record for the limited purpose of including in the Record certain documentary evidence Sparks produced to the GC prior to the hearing (A99-116) (notwithstanding the erroneous statements by the ALJ (App. 45a)); specifically, the Weekly and Daily Tip sheets for the period December 15 through December 21, 2014 that, as the ALJ anticipated, proved Sparks hired permanent replacements who started working before the Unconditional Offer.

On May 24, 2018, the Board issued its Decision and Order. (App. 10a). It denied Spark's request for oral argument (n.2), denied Sparks' Motion to Reopen the Record (n.3), and stated summarily it "has decided to affirm the [ALJ's] rulings, findings, and conclusions …." *Ibid* (footnotes omitted).

Sparks appealed the Board's Decision and Order to the United States Court of Appeals for the District of Columbia Circuit. That court had jurisdiction pursuant to NLRA §§ 10(e) and (f), 29 U.S.C. §§ 160(e) and (f).

On appeal, Sparks challenged the Board's Decision and Order. A panel of the D.C. Circuit affirmed the Board's holdings that Sparks discharged the striking employees and had not demonstrated it hired permanent replacements. (App. 1a.)

In affirming the discharge, the court held "the Board's general counsel was under no obligation to call any employees to testify to the subjective belief that they had been discharged …." (App. 5a.) Furthermore, and notwithstanding the finding made by the ALJ regarding the role of the Union as the "exclusive collective bargaining representative" of the striking employees (App. 20a), the court held "statements by union officials suggesting they believed the workers were 'locked out' rather than discharged offer no basis to disturb the Board's finding. … [C]haracterizations by the union's officers are not dispositive of what the employees might have concluded." *Ibid.*

In affirming the Board's holding Sparks did not demonstrate it hired permanent replacements prior to the time the Union made the Unconditional Offer, the court identified "the crucial evidentiary issue in this case: when ***the replacements understood*** their arrangement with Sparks to be permanent." (App. 8a.) Although the court acknowledged all the Offer Letters were delivered to the replacement workers prior to the time the Union made the Unconditional Offer (App. 7a), and although the

Offer Letters specified permanent employment (App. 39a-41a), the court nonetheless held the replacement workers would not have understood the offer to be for permanent employment prior to the time the Union made the Unconditional Offer. (App. 7a-8a.)

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW DEPARTS FROM EVERY PRIOR NLRA "DISCHARGE" HOLDING, AND IMPROPERLY RELIEVES THE GENERAL COUNSEL OF ITS BURDEN TO PROVE A DISCHARGE

The D.C. Circuit's holding – that the Board may infer discharge even in the absence of at least one striking employee who claimed s/he was discharged – departs from every prior discharge holding under the NLRA. That decision must not stand.[4]

Historically, a claim of discharge by at least one employee has been a *sine qua non* of any case in which the Court (or the NLRB) has found a discharge. Indeed, that essential factual predicate is found in every case cited by the D.C. Circuit in its decision. *Kolka Tables & Fin.-Am. Saunas*, 335 NLRB 844 (2001); *Elastic Stop Nut*, supra; *NLRB v. Champ Corp.*, 933 F.2d 688 (9th Cir. 1990); *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626 (10th Cir. 1984). It is found also in each of

4. The decision has the unintended collateral effect of relieving the General Counsel of its burden of proving a discharge, in that it no longer would have to prove someone actually was aggrieved by the words or conduct of an employer.

the cases relied upon below by the ALJ and (by adoption) the Board. *See Pride Care Ambulance*, 356 NLRB 1023 (2011); *Leiser Construction, LLC*, 349 NLRB 413 (2007); *Tri-State Wholesale Bldg. Supplies, Inc.*, 362 NLRB 730 (2015); and *Grosvenor Resort*, 336 NLRB 613 (2001).

In all prior "discharge" cases involving something other than a formal discharge, the employer made one or more statements that caused an actual employee to have a subjective belief she or he had been fired. *Kolka Tables*, 335 NLRB at 847 (telling employee "go back to work or go home"; "you will lose your job"); *Elastic Stop Nut*, 921 F.2d at 1283 (letter stating "employment status 'changed immediately'"); *Champ Corp.*, 933 F.2d at 691-92 (telling employee he "didn't work here anymore"; telling another, "you're fired too"); *Pennypower Shopping News*, 726 F.2d at 628 ("final checks will be mailed"; remove personal items from desk).

The employee's subjective belief, however, does not determine whether a discharge occurred. Rather, courts test the employee's subjective belief against an objective test: was the allegedly-aggrieved employee's belief reasonable. *See Elastic Stop Nut*, 921 F.2d at 1282.

The D.C. Circuit's decision abandons this historical approach, eliminating the need for the existence of at least one employee who believed she or he had been discharged. "Contrary to Sparks's argument, the Board's general counsel was under no obligation to call any employees to testify to their subjective belief that they had been discharged ...." (App. 5a.) Instead, the court applied the "reasonableness" test to a non-existent employee: would a hypothetical reasonable employee have understood the

employer's words or conduct to mean she or he had been discharged. This Court should grant the Petition to review and, Petitioner submits, repudiate this drastic sea change.[5]

The elimination of the need for an aggrieved employee claiming discharge also permitted the court to disregard the statements the Union repeatedly made to Sparks that the employees were "locked out."

> [S]tatements by union officials suggesting they believed the workers were "locked out" rather than discharged offer no basis to disturb

---

5. The decision states "Sparks challenge[d] the Board's factual finding the striking workers would reasonably have concluded that their employment status was ambiguous." (App. 4a.) That is incorrect. Sparks challenged the application of the legal standard – i.e., the objective reasonableness test – in the absence of at least one striking worker claiming to have been discharged.

Various policy considerations support Sparks' challenge. If an administrative agency is permitted to "infer" discharge in the absence of an actual employee claiming to be so aggrieved, on what basis may the agency seek a remedy of reinstatement with backpay (and not simply a civil penalty)? (If an agency is so permitted, then why is constructive discharge – similarly predicated on the "statements or conduct of the employer" – limited to situations in which there is an actual employee claiming to be aggrieved?) Given the borrowing of labor law legal principles in Title VII law, would not the EEOC be permitted to seek such a monetary-damages remedy (rather than a civil penalty) without the need to have an employee claiming to be aggrieved? Does the judicial review of such agency determinations involving only a hypothetical employee place Article III courts at risk of exercising jurisdiction over a matter that does not present an actual case or controversy? These policy considerations compel repudiating the court's departure from the need of having an employee who believes she or he had been discharged.

> the Board's finding. The test "depends on the reasonable inferences that the *employee* could draw," and characterizations by the union's officers are not dispositive of what the employees might have concluded.

(App. 5a) (emphasis in original).

This portion of the opinion in effect ignores the role of the Union as the employees' exclusive collective-bargaining representative (App. 20a), and in effect negates the Union's long-recognized statutory duty of fair representation of all employees. If, on behalf of employees, a union has the right and/or the duty to file charges with the NLRB, how is possible the union does not speak for those same employees when it states they are "locked out," a legal status that precludes the possibility of the employees having been discharged?

> [I]t is well settled that ***a lockout does not sever the employer-employee relationship***. ... Indeed, ***a lockout pre-supposes the existence of an employment relationship between the employer and the employees it has locked out***. Persons who are not employed by an employer may no more be locked out by the employer than strike against the employer. Thus, ***persons who are locked out by an employer are viewed as having "permanent employee status***." In short, ***the declaration of a lockout makes no sense with respect to persons who are not employees of the employer***. By declaring the employees locked out, the Respondent was necessarily, as a matter of Board law, declaring them to be its employees ....

Douglas Autotech, 357 NLRB at 1342-43 (footnotes omitted) (emphases added). If the subjective view of the employer binds the employer, certainly the subjective view of the union certified as the "exclusive collective-bargaining representative" of the striking employees likewise must bind the striking employees.

In making those statements to Sparks, the Union officials represented no employees were claiming discharge, and, in the absence of contrary evidence (and none exists), the Union's characterization is dispositive of the question whether any striking Sparks employees claimed discharge. If, as historically has been the standard, the objective reasonableness test is applied only when there is at least one aggrieved employee actually claiming discharge, then the Union's characterization is indirectly determinative also of the question whether the striking Sparks employees were discharged. Accordingly, they were locked out and, therefore, Sparks could not be found to have discharged them.

Finally, the decision creates grave uncertainty for employers who rely on judicial precedent under the NLRA; specifically, by exercising their right to hire permanent replacements for economic strikers (*see Mackay Radio*, 304 U.S. at 346), and their right not to disclose such hiring to the striking employees (*see Avery Heights*, 448 at 195).

Here, in reliance on *Avery Heights*, Sparks withheld from the Union (and therefore the striking employees) the fact it hired permanent replacements. Indeed, the Board concedes "[t]here is no claim in this case that Sparks acted with unlawful intent in hiring the [permanent] replacements." *See* NLRB Brief on Appeal at 47 n.27.

Yet, in exercising that right lawfully, Sparks somehow created ambiguity about the employment status of the striking employees, and thereby exposed itself to an unfair labor practice charge. (App. 5a.) This issue is of exceptional importance, in that employers who follow *Avery Heights* may nonetheless violate the NLRA.

On this issue, the Court should grant the Petition.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION CONFLICTS WITH *MACKAY RADIO* AND ITS PROGENY

> An economic striker who offers unconditionally to return to work is entitled to immediate reinstatement unless his employer can show a "legitimate and substantial business justification[ ]" for refusing to reinstate him. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 546, 19 L.Ed.2d 614 (1967). That he was replaced by a permanent employee during the strike is such a justification, *id.* at 379, 88 S.Ct. at 546; an economic striker who is permanently replaced thus loses his right to immediate reinstatement. *NLRB v. International Van Lines*, 409 U.S. 48, 50, 93 S.Ct. 74, 76, 34 L.Ed.2d 201 (1972); *General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1311 (D.C.Cir.1991).

Gibson Greetings, Inc. v. NLRB, 53 F.3d 385, 389 (D.C. Cir. 1995).

The D.C. Circuit's decision correctly summarizes the controlling law regarding the limits on an economic striker's right to return to work.

> The National Labor Relations Act requires an employer to "reinstate strikers" following their voluntary and unconditional offer to return. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). An employer, however, may refuse reinstatement if "it can demonstrate that it acted to advance a legitimate and substantial business justification." *New England Health Care Employees Union*, 448 F.3d at 191 (internal quotation marks omitted). …
>
> … Sparks claimed that it lawfully hired permanent replacements. *See Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995) ("That [the striker] was replaced by a permanent employee during the strike is [a legitimate and substantial business] justification . . . ."). Under unchallenged Board precedent, to succeed on that claim, Sparks had to prove "there was a mutual understanding between the [employer] and the replacements that the nature of their employment was permanent." *Target Rock Corp.*, 324 NLRB 373, 373 (1997), *enforced sub nom. Target Rock Corp. v. NLRB*, 172 F.3d 921 (D.C. Cir. 1998) (unpublished per curiam decision). Crucially, Sparks had to demonstrate that the understanding was reached "before [the strikers] made unconditional offers to return to work." *Supervalu, Inc.*, 347 NLRB 404, 405 (2006).

(App. 6a).[6]

Under long-standing precedent, Sparks demonstrated the required understanding was reached before the striking employees made their Unconditional Offer. Sparks delivered written letters offering permanent employment to the replacement workers prior to the time the Union made its Unconditional Offer. (App. 7a; App. 39a-41a.)

---

6. Sparks argued it was relieved from this burden because "the general counsel [of the NLRB] conceded that Sparks timely hired replacements and therefore that the Board was not entitled to make a contrary finding." (App. 6a.) The D.C. Circuit did not reject the theory posited by Sparks; rather, it found, "[a]though the general counsel's attorney agreed that Sparks had hired replacements at some point, she never conceded when that happened. *See* Hearing Tr. 17, Joint Appendix 122 (general counsel's opening statement: 'You will also learn that at the time the employees offered to return to work on December 19th, Sparks had not replaced all the strikers and that positions were available for the former striker[s] to return to work.')." (App. 6a-7a.)

The court misinterpreted the sentence, as that sentence clearly states "Sparks had not replaced ***all*** the strikers" "at the time the employees offered to return to work on December 19th," thereby conceding Sparks had hired at least some permanent replacements prior to that time. Consequently, the reinstatement remedy is not available to all the strikers.

Furthermore, the decision ignores the NLRB's unqualified concessions in the Complaint and in the Amendment to the Complaint. In the former, the NLRB alleges as a factual matter Sparks denied the strikers their right to be placed onto a preferential hiring list; as a matter of law, that right that comes into being only if permanent replacements have been hired. In the latter, the NLRB states seeks back-pay damages for discharge "despite ***the fact [Sparks] had hired permanent replacements before the date of discharge***." (Emphasis added.)

"[A]n employer's unilateral statements can establish the necessary mutual understanding" between the employer and the replacements. *Gibson Greetings*, 53 F.3d at 390–91. In *Gibson Greetings*, some months after hiring replacements, the employer issued a memorandum unilaterally declaring the replacements hired were permanent. The memorandum was issued prior to the time the strikers made an unconditional offer of return to work. *Ibid.* It never was countersigned by any of the replacements. Nonetheless, the employer's unilateral declaration, apparently coupled with the replacements continuing to work after it was issued, satisfied the requirement of mutual understanding. *Ibid.*

The facts here are even more compelling than in *Gibson Greetings*. Here, the evidence demonstrates Sparks delivered an Offer Letter to each replacement worker prior to the Unconditional Offer. (A39a-41a; R 7A-HH at A437-470; A103-116.)[7]

Here, each Offer Letter made plain Sparks ***at inception*** considered the replacement workers to be permanent (and not merely temporary) hires. *Ibid.* The replacement workers then continued or commenced their work, and – as in *Gibson Greetings* – by doing so, and without anything more, thereby manifested their assent to the terms in the Offer Letters. *Gibson Greetings*, 53 F.3d at 390–91 (*and citing J.M.A. Holdings, Inc.*, 310 NLRB 1349 (1993) (employer's unilateral notice sufficient)).

7. As the ALJ found, "[t]wo of the letters were dated December 11, 2014, 26 were dated December 15, and six were dated December 19." (App. 41a; *see* R 7A-HH at A437-470.)

As the D.C. Circuit acknowledged, the tip records from the week of December 15-21, 2014 (A105, A109-111, A113-115, & A116), "'would have established the precise dates that the newly hired employees *began working*.'" (App. 8a, *quoting In re Michael Cetta, Inc.*, 366 NLRB 97 (2015), slip op. at 10) (emphasis in original).) In the context of *Gibson Greetings*, the Offer Letter (in which Sparks unambiguously declared the hires to be permanent), coupled with the fact that, after receiving them, the replacement workers continued or commenced work, demonstrates the required mutual understanding.

The ALJ, to her credit, apparently understood this point, stating "[s]uch records, by establishing any shifts worked by alleged replacement employees, ***would tend to substantiate [Sparks'] claim that the striking employees were permanently replaced prior to their [the striking employees] unconditional offer to return on December 19*** …." (App. 47a.) (Emphasis added.)[8]

The decision below, however, ignored the *Gibson Greetings* "assent-through-work" precedent, and instead looked only to the alleged lack of certainty as to the date the replacement workers countersigned and returned the Offer Letters. (App. 7a.) In doing so, the decision is in direct conflict with *Gibson Greetings*.

Even if the decision were not in conflict with established precedent, the issue is nonetheless of such

8. The D.C. Circuit, therefore, erred in concluding the exclusion of the tip records, and the ALJ's adverse inference drawn from the erroneous belief Sparks never produced them to the Board, were harmless errors. (App. 8a.)

importance it merits review and consideration by this Court. Employers such as Petitioner, against whom there is no allegation of anti-union animus, and who in the midst of an economic strike deliver written offers of permanent employment to replacement workers prior to receiving from striking employees an unconditional offer of return to work, certainly have established the mutual understanding required by *Mackay Radio* and its progeny. Here, the Offer Letters alone demonstrate the replacement workers "understood their positions to be permanent" (App. 8a) before the Union made the Unconditional Offer; moreover, the improperly excluded tip sheets (App. 7a-8a) demonstrate the replacement workers not only understood the nature of their positions, but also accepted those positions when they commenced (or continued) work after receiving the Offer Letters.

On this issue, the Court should grant the Petition.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

Jon Schuyler Brooks
Counsel of Record
Marc B. Zimmerman
Freeborn & Peters LLP
230 Park Avenue, Suite 630
New York, NY 10169
(212) 218-8760
jbrooks@freeborn.com

Counsel for Petitioner

APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED MAY 20, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1165

MICHAEL CETTA, INC.,
D/B/A SPARKS RESTAURANT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Consolidated with 18-1171

May 20, 2019, Filed

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board.

Before: ROGERS, TATEL, and PILLARD, *Circuit Judges.*

Appendix A

JUDGMENT

This case was considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board ("NLRB" or "Board") and was briefed and argued by counsel. Michael Cetta, Inc. d/b/a Sparks Restaurant ("Sparks") petitions for review of the Board's Decision and Order finding Sparks committed unfair labor practices in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3). The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons that follow, it is

ORDERED and **ADJUDGED** that the petition for review is denied, and the Board's cross-application for enforcement is granted.

In December 2014, Sparks and the union representing its waiters and bartenders had been unsuccessfully attempting to negotiate a contract for a year and a half. Following a brief, two-hour strike on December 5, a Sparks manager tried to convince an employee to leave the union. That effort failed, and no contract agreement resulted.

On December 10, thirty-six of Sparks's waiters and bartenders went on strike to protest the lack of progress in negotiations. After nine days, the strikers made a voluntary and unconditional offer to return to work. Sparks's management refused the offer, accusing the

strikers of having committed picket-line violence and intimidation. At a January negotiation session, Sparks's representatives again refused to allow the strikers to return to work, repeating their insinuation that the striking employees posed a threat. When union officials asked Sparks to identify a particular violent incident, the restaurant refused.

It later became clear that Sparks had hired workers to replace the strikers. And although several of those replacement employees left in early 2015, Sparks waited until August before it invited a single striking worker to return.

As relevant to this petition, the Board found that Sparks committed three unfair labor practices in violation of the National Labor Relations Act: (1) discharging striking workers; (2) failing to reinstate striking workers following a voluntary and unconditional offer to return to work; and (3) soliciting workers to withdraw their support from the union. Sparks's petition challenges the Board's findings with respect to discharge and failure to reinstate the strikers.

We begin with discharge. Sparks does not challenge the governing legal framework. For purposes of the Act, an employee is considered discharged "if the words or conduct of the employer would reasonably lead an employee to believe that he had been fired." *Elastic Stop Nut Division of Harvard Industries, Inc. v. NLRB*, 921 F.2d 1275, 1282, 287 U.S. App. D.C. 287 (D.C. Cir. 1990). The test is an objective one: it "depends on the reasonable

inferences that the employee could draw from the statements or conduct of the employer." *NLRB v. Champ Corp.*, 933 F.2d 688, 692 (9th Cir. 1990), *as amended* (May 20, 1991) (emphasis omitted) (internal quotation marks omitted). Board precedent—uncontested by Sparks—supplements this rule by providing that "the employer will be held responsible when its statements or conduct create an uncertain situation for the affected employees" leading to "a climate of ambiguity and confusion" that would "reasonably cause[] strikers to believe . . . that their employment status was questionable because of their strike activity." *In re Kolkka*, 335 NLRB 844, 846 (2001) (internal quotation marks omitted).

Sparks challenges the Board's factual finding that the striking workers would reasonably have concluded that their employment status was ambiguous. But "we may not disturb the Board's findings of fact when those findings are supported by substantial evidence based upon the record taken as a whole." *Elastic Stop Nut*, 921 F.2d at 1279. "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935, 396 U.S. App. D.C. 205 (D.C. Cir. 2011) (internal quotation marks omitted).

Here, ample evidence supported the Board's discharge finding, including Sparks's repeated rejections of the employees' offer to return, its "shifting explanations" for those rejections, and its ban on the employees "returning to the restaurant for any purpose." *In re Michael Cetta, Inc.*, 366 NLRB No. 97, 2018 NLRB LEXIS 200 at *73

(May 24, 2018). Contrary to Sparks's argument, the Board's general counsel was under no obligation to call any employees to testify to their subjective belief that they had been discharged; as Sparks concedes, the test is objective. *See Champ Corp.*, 933 F.2d at 692. Similarly, statements by union officials suggesting they believed the workers were "locked out" rather than discharged offer no basis to disturb the Board's finding. The test "depends on the reasonable inferences that the *employee* could draw," and characterizations by the union's officers are not dispositive of what the employees might have concluded. *Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629 (10th Cir. 1984). Nor did the Board unfairly punish Sparks for exercising the right to decline to disclose the existence of replacement workers. Assuming such a right exists, the Board is still entitled to consider how an employer exercises that right as evidence of a different unfair labor practice. *See New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006) (concluding that an employer's concealment of a replacement campaign might be evidence of "an independent unlawful purpose," such as "an illicit motive to break a union").

With respect to the failure-to-reinstate charge, Sparks again does not contest the controlling law. The National Labor Relations Act requires an employer to "reinstate strikers" following their voluntary and unconditional offer to return. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S. Ct. 543, 19 L. Ed. 2d 614 (1967). An employer, however, may refuse reinstatement if "it can demonstrate that it acted to advance a legitimate and substantial business justification." *New England Health*

Care Employees Union, 448 F.3d at 191 (internal quotation marks omitted). "The burden of proving justification is on the employer." *Fleetwood Trailer*, 389 U.S. at 378. Sparks offered two independent justifications to the Board.

First, Sparks claimed that it lawfully hired permanent replacements. *See Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389, 311 U.S. App. D.C. 314 (D.C. Cir. 1995) ("That [the striker] was replaced by a permanent employee during the strike is [a legitimate and substantial business] justification . . . ."). Under unchallenged Board precedent, to succeed on that claim, Sparks had to prove "there was a mutual understanding between the [employer] and the replacements that the nature of their employment was permanent." *Target Rock Corp.*, 324 NLRB 373, 373 (1997), *enforced sub nom. Target Rock Corp. v. NLRB*, 172 F.3d 921, 335 U.S. App. D.C. 320 (D.C. Cir. 1998) (unpublished per curiam decision). Crucially, Sparks had to demonstrate that the understanding was reached "before [the strikers] made unconditional offers to return to work." *Supervalu, Inc.*, 347 NLRB 404, 405 (2006).

Sparks argues that the general counsel conceded that Sparks timely hired replacements and therefore that the Board was not entitled to make a contrary finding. This argument misses the mark. Although the general counsel's attorney agreed that Sparks had hired replacements *at some point*, she never conceded *when* that happened. *See* Hearing Tr. 17, Joint Appendix 122 (general counsel's opening statement: "You will also learn that at the time the employees offered to return to work on December 19th, Sparks had not replaced all

the strikers and that positions were available for the former striker[s] to return to work."). Thus, Sparks still had to present evidence establishing that it reached the necessary mutual understanding with the replacements before the December 19 offer to return to work.

The Board found that Sparks failed to meet that burden, and substantial evidence supports that finding. Although Sparks introduced offer letters for the replacements that it had issued on or before December 19, those letters did not indicate when the replacements signed them and the testimony of Sparks's human resources officer fell short of filling the gap. Sparks cites *Gibson Greetings* for the proposition that an employer's unilateral statements can establish the necessary mutual understanding. And so they may, depending on the context. 53 F.3d at 390-91. But this case is very different from *Gibson Greetings*, where the replacements had been working for several months and had received confirmation of their jobs' permanency more than a month before the strikers offered to return. *Id.* at 387-91. The rapidly evolving events and compressed timeline here make it more critical to establish exactly when the replacements reached a mutual understanding with Sparks.

Sparks now contends that certain tip records from the week of December 15-21 would have helped clarify this timing issue. But Sparks failed to introduce those records into evidence at the hearing. Based in part on that omission, the ALJ drew an adverse inference against Sparks, assuming that the records would not have supported its position. To be sure, the ALJ also

thought (erroneously, as it turns out) that Sparks had failed to even produce those records during discovery. Even if that mistaken impression contributed to the ALJ's decision to draw the adverse inference, however, any error was harmless because admitting the tip records would not have affected the outcome. *See Ozark Auto. Distribs. v. NLRB*, 779 F.3d 576, 582, 414 U.S. App. D.C. 243 (D.C. Cir. 2015) ("In administrative law, as in federal civil and criminal litigation, there is a harmless error rule: [section] 706 of the Administrative Procedure Act instructs reviewing courts to take due account of the rule of prejudicial error." (alteration, citation, and internal quotation marks omitted)). At most, the missing records would have shown that some of the replacements started work before December 19. Such evidence would not have resolved the crucial evidentiary issue in this case: when the replacements understood their arrangement with Sparks to be permanent. *See In re Michael Cetta, Inc.*, 366 NLRB No. 97, 2018 NLRB LEXIS 200 at *44 (records "would have established the precise dates that the newly hired employees *began working*," not when they understood their positions to be permanent (emphasis added)); *see also* Oral Arg. Rec. 13:18-14:54 (offering no explanation for how Sparks was prejudiced by the inference). Nor was the Board obligated to reopen the record for Sparks to introduce the tip sheets. Sparks's only excuse for failing to introduce them the first time around was the general counsel's supposed concession. Since that concession never happened, there was no reason to reopen the record.

Sparks argues that it had a second legitimate business reason for not reinstating its employees: a decline in

business after December 2014. But the Board reasonably found based on five years' worth of sales records that Sparks's business suffered a downturn every year after the holiday rush. Despite this cyclical pattern, Sparks had never before reduced its staffing levels during off-peak periods. Thus, the Board found, the downturn in business failed to explain Sparks's failure to rehire the strikers. Sparks has given us no basis to upset that finding. *See Bally's Park Place*, 646 F.3d at 935 (Board accorded "a very high degree of deference" (internal quotation marks omitted)).

Finally, as Sparks chose not to challenge the unlawful solicitation finding in its petition for review, the Board is entitled to summary enforcement on that issue. *See CC1 Limited Partnership v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (finding "summary enforcement is appropriate" when an issue is not raised in petitioner's "opening[] brief").

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED MAY 24, 2018

NATIONAL LABOR RELATIONS BOARD

Cases 02-CA-142626 and 02-CA-144852

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342.

May 24, 2018

DECISION AND ORDER

BY MEMBERS OF PEARCE, MCFERRAN, AND EMANUEL

On November 18, 2016, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a brief in support. The General Counsel filed an answering brief, and the Respondent filed a reply. The General Counsel filed a cross-exception and a brief in support, and the Respondent filed an answering brief.

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

Appendix B

The Board has considered the decision and the record in light of the exceptions[1] and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions and

1. The judge recommended a broad cease-and-desist order. We adopt the judge's recommendation in the absence of a specific exception. See *Leiser Construction*, 349 NLRB 413, 418 fn. 28 (2007), enfd. 281 Fed. Appx. 781 (10th Cir. 2008).

2. The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel moves to strike the Respondent's brief in support of its exceptions on the ground that it fails to comply with the Board's Rules and Regulations in that it does not contain references to the specific exceptions to which its arguments relate. Although the Respondent's brief does not comply in all particulars with Sec. 102.46(a)(2), we accept it because the Respondent's brief is otherwise substantially compliant. See *Metta Electric*, 338 NLRB 1059, 1059 (2003).

The General Counsel moves to strike the appendix to the Respondent's brief in support of its exceptions. We agree with the General Counsel that the documents comprising the appendix were not introduced as evidence at the hearing and, therefore, cannot be introduced into the record at this point. See Sec. 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's motion to strike them. *S. Freedman Electric, Inc.*, 256 NLRB 432, 432 fn. 1 (1981).

3. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We deny the Respondent's motion to reopen the record to receive additional evidence. The evidence the Respondent seeks to adduce has not been shown to be newly discovered or previously unavailable, as required by Sec. 102.48(c)(1) of the Board's Rules and Regulations.

The Respondent excepts to the judge's finding that it violated Sec. 8(a)(1) by soliciting employees to withdraw their support for the Union. The Respondent, however, does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous finding should be overturned. Therefore, in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to reinstate and by discharging the striking employees, we find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(3) and (1) by denying employees their right to be placed on a preferential hiring list. Finding the additional 8(a)(3) violation would not materially affect the remedy. Member Pearce agrees that it is unnecessary to pass, but he further notes that it is undisputed the Respondent did not provide evidence of a preferential hiring list prior to September 11, 2015.

Member Emanuel agrees that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to reinstate the striking employees after their unconditional offer to return to work. He finds that the Respondent failed to carry its burden to prove, as an affirmative defense, that it hired permanent replacements before the unconditional offer to return. The Respondent was required to prove "a mutual understanding with the replacements that they are permanent," and it failed to do so. See *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007), pet. for rev. denied. 544 F.3d 841 (7th Cir. 2008); *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524 (2002), enfd. 63 Fed. Appx. 520 (D.C. Cir. 2003). Member Emanuel observes that the Respondent's letters to the replacements offering them employment would have been adequate to establish a mutual understanding if the Respondent had provided specific evidence of

to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Michael Cetta, Inc. d/b/a Sparks Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in an economic strike.

(b) Failing and refusing to reinstate striking employees to their former or substantially equivalent

---

when the letters were signed by the replacements and returned. Member Emanuel also finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(3) and (1) by discharging the striking employees because the additional violation would not materially affect the remedy.

We shall modify the judge's remedy and recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to our findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

4. The General Counsel filed a limited cross-exception asking the Board to reconsider its remedy for unlawfully discharged economic strikers who were permanently replaced prior to their discharge. In view of our finding that the Respondent failed to establish it had permanently replaced the striking employees, we find it unnecessary to pass on this exception because it would not affect the remedy.

positions of employment in the absence of a legitimate and substantial business justification.

(c) Soliciting employees to withdraw their support for the United Food and Commercial Workers Local 342 (Union).

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer 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 Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, 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 Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in

the remedy section of the judge's decision as amended in this decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms

5. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant

provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 24, 2018

---

to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX C — DECISION OF THE ADMINISTRATIVE LAW JUDGE, DATED NOVEMBER 18, 2016

Cases 02-CA-142626 and 02-CA-144852

MICHAEL CETTA, INC. D/B/A SPARKS RESTAURANT AND UNITED FOOD AND COMMERCIAL WORKERS LOCAL 342.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 02-CA-142626, filed on December 10, 2014, and amended on January 9, 2015, and upon a charge in Case 2-CA-144852, filed on January 22, 2015, by United Food and Commercial Workers Local 342 ("Local 342" or "the Union"), an Order consolidating cases, consolidated complaint, and notice of hearing issued on May 29, 2015 (the "complaint"). The complaint alleges that Michael Cetta, Inc. d/b/a Sparks Restaurant ("Sparks" or "Respondent") violated Sections 8(a)(1) and (3) of the Act by failing and refusing to reinstate striking employees despite an unconditional offer to return to work, denying the striking employees their right to be placed on a preferential hiring list, and discharging the striking employees. The complaint further alleges that Sparks violated Section 8(a)(1) by soliciting employees to withdraw their support for the Union. On September 18, 2015, the Regional Director, Region 2 issued an Order amending complaint and amendment to complaint stating that as part of the Remedy General Counsel seeks an order requiring that Respondent offer reinstatement to all of the

striking employees and make them whole from the date of their discharge, despite the fact that Respondent had previously hired permanent replacement employees. This case was tried before me on October 7, 9, and 13 through 16, 2015, in New York, New York.

After the conclusion of the trial, the parties filed briefs, which I have read and considered. Base on those briefs, and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Sparks is a restaurant located at 210 East 46th Street, New York, New York, engaged in the sale of food and beverages. Sparks admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Sparks stipulated at the hearing and I find that Local 342 is a labor organization within the meaning of Section 2(5) of the Act (Tr. 7).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent operates a steakhouse restaurant at its 210 East 46th Street location, preparing and serving

food and drinks to individual customers and for private parties arranged on its premises (Tr. 245-246, 250). The restaurant is on two floors with some rooms for individual or "a la carte" dining and other small rooms for private events (Tr. 249-250). Sparks is open Monday through Friday for both lunch and dinner, and on Saturday for dinner only (Tr. 246). Lunch begins around 11:30 a.m. or noon, and runs until approximately 3 p.m. (Tr. 246). Dinner begins at around 5 p.m., and continues until the customers with the last reservation finish their meals (Tr. 246). Sparks employs waiters and bartenders, as well as kitchen workers such as cooks/chefs, dishwashers, and prep workers (Tr. 246-247). Respondent also employs an office manager, Shailesh Desai, and an assistant to Desai (Tr. 248). Desai testified at the hearing on behalf of Sparks.

Michael and Steven Cetta are owners of Sparks, and its president and vice president, respectively. Sparks stipulated at the hearing that Michael and Steven Cetta, as well as Maitre'd Valter Kapovic, were at all material times supervisors within the meaning of Section 2(11) of the Act, and agents of Sparks acting on its behalf within the meaning of Section 2(13) (Tr. 7). Steven Cetta testified at the hearing that as vice president he is responsible for overseeing "everything" and "everybody." (Tr. 244.) In addition to Kapovic, Sparks employs managers named Abdul, Ricardo (Cordero), Octavio, and Nick, all of whom report to Steven Cetta (Tr. 244-245). In addition, since 2009, Sparks has engaged Susan Edelstein as a human resources consultant (Tr. 287-288). Edelstein testified in that capacity and as Custodian of Sparks' personnel records (Tr. 288).

Appendix C

2. Events prior to the December 10, 2014 strike

Local 342 was certified as the exclusive collective-bargaining representative of a unit of waiters and bartenders at Sparks on July 11, 2013, and since then the parties have had approximately 8 negotiating sessions but have not entered into a collective-bargaining agreement (Tr. 32-34, 174-175). Negotiations have been generally attended by Director of Contracts, Louis LoIacono, his executive assistant Mary Ann Kelly, representative Carolina Martinez, and Shop Stewards Kristofer Fuller and Valjon Hajdini for Local 342 (Tr. 99-100, 154, 175-176). Attorneys Marc Zimmerman and Regina Faul, Steven Cetta, and Susan Edelstein have attended negotiations for Sparks. (Tr. 100, 176, 251.)

After a bargaining session on December 5, 2014, frustrated with what they perceived of a lack of movement on the part of Sparks in negotiations, the waiters and bartenders decided to go on strike that evening (Tr. 34). The waiters and bartenders went on strike for approximately 2 hours on the evening of December 5, 2014, from roughly 7 to 9 p.m., returning to work after making an unconditional offer (Tr. 34-35, 47, 55-56, 101-102).

Waiter Valjon Hajdini testified that the next day, December 6, 2014, Manager Valter Kapovic asked to speak with him when he arrived at work. The two spoke in the Madison Room downstairs, one of the rooms used for private parties. Hajdini testified that Kapovic said he was concerned about the waiters and bartenders' going on

strike. According to Hajdini, Kapovic stated that he was interested in buying the restaurant, and had investors, but that the strike would "drag the business down" and the investors would "back off." Hajdini stated that the waiters and bartenders "were not looking to go on strike again," but were only looking for "a simple contract." Hajdini stated that, "if you don't want us to go on strike . . . make an offer that is easy for us to accept." Kapovic said that he was going to talk to Steve Cetta, "and see if we can do something about that." Kapovic then asked "can we vote the Union out" if he and his investors bought the restaurant. Hajdini responded, "I don't see why the Union bothers you. All we want is a simple contract—that we get treated fairly."[1] [Tr. 39-40.]

3. The December 10, 2014 strike and subsequent events

Frustrated with the lack of progress in negotiations, the waiters and bartenders began another strike at approximately 7 p.m. on December 10, 2014 (Tr. 35-36, 102-105, 154-155, 252). A total of 36 employees engaged in the strike, 34 waiters and 2 bartenders.[2] The nonstriking

1. Kapovic did not testify at the hearing.

2. The bartenders and waiters who engaged in the strike beginning December 10, 2014, are Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, Milazim Kukaj, Rachid Lamniji, Valon Lokaj, Silvio Lustica, Iber Mushkolaj, Gani Neziraj, Kenan Neziraj, Xhavit Neziraj, Adnan Nuredini, Juan Patino, Sadik Prelvukaj,

employees consisted of bargaining unit employees who decided not to participate in the strike and 5 employees referred to by Respondent as "seasonal" (Respondent's posthearing br. at 34). Respondent stipulated at the hearing and I find that the strike which began on December 10, 2014, was concerted in nature (Tr. 7-8).

On December 19, 2014, the striking employees together with union representatives Steve Boris and John decided to make an unconditional offer to return to work. Bartender Elvi Hoxhaj testified that between 3:30 and 4:30 p.m. that day, he and the two union representatives decided that they would go into the restaurant and make an unconditional offer to return to work. As they entered the restaurant, they were stopped in the vestibule by a security guard. Boris explained to security that Hoxhaj was a worker and they were union representatives, and that "they wanted to talk to management and ownership about an unconditional offer to return to work." According to Hoxhaj, security told the group to stay where they were, and the security guard would go inside and convey the message. Hoxhaj then saw the security guard speak to Kapovic, who was on the phone. After they spoke, one of the security guards returned to speak with Hoxhaj and the union representatives, who stated, "we're just trying to get an unconditional offer to return to work." The security guard responded, "I know, but they don't want you in here." [Tr. 156-159.] Other employees were subsequently informed by Boris that Local 342 had made

---

Francisco Puente, Ermal Qelia, Nagip Resulbegu, Khalid Seddiki, Youssef Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj.

an unconditional offer for the striking employees to return to work, which Sparks had rejected (Tr. 59-60, 82-85).

On December 19, 2014, at 8:55 p.m., Local 342 Secretary-Treasurer sent the following email to Marc Zimmerman:

> Good evening. I am Lisa O'Leary, Secretary Treasurer of UFCW Local 342 and I am authorized to send you this email on behalf of Local 342. Local 342 today has made an unconditional offer to return to work, and that offer remains. President Abondolo shared with me his email exchange with you earlier today. I write again to confirm that the offer to return to work is unconditional, and tied to no additional action being performed by your client. UFCW Local 342 continues its offer to bargain prior to your January 8th date, but this continuing offer to bargain, which has at all times been rejected by your client, is separate from Local 342's unconditional offer to return to work. I suspect you are aware of this, but if not I am telling you so here.
>
> * * *
>
> The community groups, NYPD, and the local Councilman have all spoken with Local 342 at various times in the last week to inquire if the Union and your client are talking, and at least make an attempt to resolve the dispute. We

have sadly had to report that you rejected the free services of Federal Mediation, and are in fact not interested in communication prior to January 8th. Because various people in the community have expressed concern about the situation, UFCW made the unconditional offer to return to work today as a demonstration of good faith. Your client has so far rejected the offer. It is the Union's position that the employees are locked out, unless or until the employer should accept the unconditional offer to return to work.

I close by telling you that since your client has rejected the free services of a professional labor mediator, Local 342 believes we should at this time restrict communications with you to one person at Local 342. We do this with the intent of reducing opportunity for unintentional misunderstandings. President Abondolo requested I provide you with my cell number [...] in the event your client wishes to communicate with the Union prior to January 8th. You have my email address. Should your client wish to accept the unconditional offer to return, I would be your contact person. Should any other matter arise, I am your contact person. At this time Local 342 will of course meet on January 8th if your client is willing to do so. We will need to find a neutral, acceptable place to meet, so at some point prior to the 8th of January you can let me know when that can

> be discussed. We can use the Federal Mediation offices in Woodbridge New Jersey for free, even if your client will not permit the assistance of a Federal Mediator. If that is not acceptable then we will have to agree to a hotel. Thank you for your time.

The next morning at 10:31 a.m., Zimmerman wrote to O'Leary acknowledging receipt of her email, and on Monday, December 22, 2014, at 10:53 a.m. sent O'Leary the following response:

> I write in response to your e-mail Friday evening and apologize for not getting back to you sooner.
>
> The e-mails I received on Friday from Janel D'Ammassa (on Rich's behalf) did not propose an unconditional offer to return to work of the striking employees. Rather, Rich's offer was conditioned on Sparks' agreement to "meet for a bargaining session some time between Christmas and New Year's Eve." Nonetheless, I understand from your e-mail that the union has since revised that position and now proposes an unconditional return of the striking employees.
>
> Due to serious misconduct and unprotected activity by the union, its representatives and the striking employees during the two separate strikes at Sparks between December 5 and December 19, including without limitation,

violence, threats and intimidation towards patrons and employees, destruction of property and trespass, be advised that Sparks must reject the union's offer to return the striking employees to work at this time. After much consideration, Sparks has determined this option best protects the safety and security of its patrons, employees and delivery people from the conduct described above, and reserves all legal rights in connection with the union's and Sparks' employees' conduct.

Sparks' decision has no bearing on its desire to continue to bargain in good faith with the union for an initial contract, and we look forward to meeting in person on January 8. Alternatively, Sparks would be able to reschedule our next bargaining session to January 7, if the union would be willing to push our normal start time back a bit to 11:30 a.m. Please let me know if that date/time works for the union. Woodbridge, New Jersey is not a convenient location for us to meet. If the union is unwilling to use our offices (as has been our custom to alternate between our place and yours), we can arrange for a "neutral" site that is more accessible to both parties. In the interim, I fully expect to provide you with Sparks' written counter-proposals to the union's December 10 bargaining proposals early this week and welcome any written response the union sees fit to make in advance of our in-person bargaining session.

O'Leary responded at 11:14 a.m.:

> UFCW Local 342 disagrees with your characterization of events in the second and third paragraphs below. I restate: UFCW Local 342 continues to make an unconditional offer to return to work, and that our position is that Sparks employees are locked out. I restate: UFCW Local 342 urges your client to reconsider its position regarding mediation services. I will need to make sure January 7th is good before I confirm, but will get back to you without unreasonable delay. Thank you for your response, and I will pass it on.

[GC Exh. 9.]

The parties also discussed the return of the striking employees at the next negotiating session, on January 8, 2015. Louis LoIacono, the union's spokesperson at this session, testified that much of the session consisted of the Union's requesting information necessary for it to formulate bargaining proposals (Tr. 176-178). LoIacono testified that after bargaining concluded he had asked Marc Zimmerman to speak with him. Zimmerman approached with Sparks attorney, Regina Faul, and LoIacono asked Zimmerman if he was going to respond to the Union's unconditional offer to return to work, and return the striking employees to their jobs. Zimmerman responded that he was protecting Sparks' property at the time and could not do so, and suggested that LoIacono "put it in writing." LoIacono asked Zimmerman whether he

had any "proof or evidence of anything," and Zimmerman again told him to put an information request in writing. [Tr. 176-177; see also Tr. 36-37, 106-107, 126-127.] LoIacono and the shop stewards informed the striking employees of the events of this negotiating session (Tr. 38-39, 107-108, 177-178).

Subsequently on January 9, 2015, Jhana Branker, Abondolo's executive assistant, sent an email on Abondolo's behalf to Zimmerman, requesting information on a number of different topics (Tr. 179; GC Exh. 3). The email contained the following request for information:

> 7. Copy of any evidence and/or videos that the employer has pertaining as evidence to support the employer's representative's response to the Union's unconditional return to work. We were told in writing by the employer representative that the employees could not return to work due to the fact that the representative was protecting his client's property due to incidents that took place at Sparks which had nothing to do with the employees or the strike or the lockout.

GC Exh. 3, p. 22. On February 5, 2015, Zimmerman responded to this request for information as follows:

> Response and Objections: Sparks objects to Request 7 as it facially seeks irrelevant information "which had nothing to do with the employees or the strike or the lockout."

> Subject to the foregoing objection and the General Objections above, Sparks responds that all terms and conditions of employment for bargaining unit employees are subjects of bargaining presently being negotiated with the union.

GC Exh. 3, p. 19. LoIacono testified that the Union never received any information from Sparks in response to this request (Tr. 229-230).

LoIacono testified that during the negotiating sessions he attended after the strike began—on January 8 and 20, and February 25, 2015—Sparks never stated that it had prepared a list or an order for the recall of the striking employees, or that it would return the striking employees to work at all (Tr. 181-182). On August 25, 2015, LoIacono received a copy of a letter from Steven Cetta to striking employee Adnan Nuredini (Tr. 182-183; GC Exh. 4). This letter stated that "As a result of the departure of a permanent replacement employee,"[3] Sparks was offering Nuredini "full reinstatement to a position as a waiter, effective immediately, consistent with your preferential rehire rights as an economic striker under the National Labor Relations Act" (GC Exh. 4). LoIacono wrote to Cetta that same day, requesting a copy of Sparks' preferential rehire list and information regarding its preparation, and a list of the permanent replacement employees (Tr.

3. The evidence establishes that Sparks hired and reassigned employees to replace the economic strikers. Because so much of the evidence regarding the replacement employees is contested in various ways, it will be discussed infra.

183; GC Exh. 5). LoIacono also stated, "Notwithstanding the above demand, Local 342 considers all the employees who are subjects of the pending NLRB case[4] to have been illegally discharged and to be entitled to reinstatement with full back pay" (GC Exh. 5). On September 11, 2015, Faul responded to LoIacono's information request, and attached a "Preferential Rehire List" and a list of permanent replacements (GC Exh. 6). Faul sent LoIacono an amended list of permanent replacements on October 5, 2015 (GC Exh. 7). LoIacono testified that prior to September 11, 2015, he had never seen or been told of the preferential rehire list by Sparks (Tr. 186).

B. Discussion and Analysis

1. Failure to reinstate the striking employees after their unconditional offer to return to work

The complaint alleges that since on or about December 19, 2014, Sparks has failed and refused to reinstate any of the striking employees, despite their having made an unconditional offer to return to their former or substantially equivalent positions of employment on that date, in violation of Sections 8(a)(1) and (3) of the Act. Complaint P 7(a-b). It is wellsettled that economic strikers are entitled to immediate reinstatement to their former positions after making an unconditional offer to return to work, absent a "legitimate and substantial" business justification. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd.

4. The charges in the instant case had already been filed.

414 F.2d 99 (7th Cir. 1969); *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007); *Supervalu, Inc.*, 347 NLRB 404, 405 (2006). The hiring of permanent replacement employees in order for the employer to continue its business operations prior to an unconditional offer to return to work constitutes a legitimate and substantial business justification. *Jones Plastic & Engineering Co.*, 351 NLRB at 64; *Supervalu, Inc.*, 347 NLRB at 405. The burden of proving the existence of a legitimate and substantial business justification for failing to reinstate economic strikers lies with the employer. *Supervalu, Inc.*, 347 NLRB at 405, citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379, 88 S. Ct. 543, 19 L. Ed. 2d 614 (1967); *Peerless Pump Co.*, 345 NLRB 371, 375 (2005). In order to satisfy this burden, the employer must provide "specific" proof that it reached a "mutual understanding" with the replacements that they were permanent employees prior to the unconditional offer to return to work. *Jones Plastic & Engineering Co.*, 351 NLRB at 64; *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), enfd. 63 Fed Appx. 520 (D.C. Cir. 2003); *Towne Ford*, 327 NLRB 193, 204 (1998).

In addition, it is well settled that in the event that no vacancy in the striking employees' classifications exists, the employer is required to place them "on a nondiscriminatory recall list until a vacancy occur[s]." *Peerless Pump Co.*, 345 NLRB at 375. Subsequently, reinstatement is contingent upon the occurrence of a "genuine job vacancy" or a "Laidlaw vacancy," which is engendered when the employer expands its workforce, discharges an employee, or when an employee quits or

leaves the employer.[5] *Pirelli Cable Corp.*, 331 NLRB 1538, 1540 (2000), quoting *NLRB v. Delta-Macon Brick & Tile Co.*, 943 F.2d 567, 572 (5th Cir. 1991). General Counsel bears the burden of establishing that a Laidlaw vacancy exists.[6] *Pirelli Cable Corp.*, employees are entitled to full reinstatement, unless they have "acquired regular and substantially equivalent employment" or the employer proves that there were legitimate and substantial business reasons for failing to offer the striking employees reinstatement at the time. *Peerless Pump Co.*, 345 NLRB at 375, quoting *Laidlaw Corp.*, 171 NLRB at 1369-1370. Here, the Complaint alleges that since December 19, 2014, Sparks has denied the striking employees their right to be placed on a preferential hiring list, and General Counsel asserts that Sparks has failed to reinstate the striking employees to vacant positions as they have occurred. Complaint ¶ 7(c).

---

5. Temporary transfers of employees, by contrast, do not create a *Laidlaw* vacancy. *Pirelli Cable Corp.*, 331 NLRB at 1540.

6. General Counsel contends that under *Kurz-Kasch, Inc.*, 301 NLRB 946, 949 (1991), a decline in the employer's workforce below prestrike levels "creates the presumption that vacancies existed," which can be rebutted by proof on the employer's part of "substantial and legitimate business reasons" for the existing number of employees. However, that analysis was part of the decision of the Sixth Circuit remanding the case. *Kurz-Kasch, Inc.*, 301 NLRB at 946, 948-949; *Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757 (6th Cir. 1989). Thus, while the Sixth Circuit's burden-shifting analysis constituted the law of that particular case, it has not been subsequently applied with any degree of uniformity. I note that the Sixth Circuit's analysis in *Kurz-Kasch, Inc.* was cited at length by the ALJ in *Laidlaw Waste Systems*, but the Board did not discuss it in upholding her decision. See *Laidlaw Waste Systems*, 313 NLRB 680, 680-682 fns. 3, 7, and at 694 (1994).

Sparks argues that it had permanently replaced the striking employees prior to their December 19, 2014 unconditional offer to return to work. Sparks further contends that a downturn in its business overall obviated the need for the level of waitstaff that had been employed prior to the December 10, 2014 strike. Additionally, Sparks claims that it had been "overstaffed" in the past due to the striking employees' lack of reliability, which required a larger group of employees to cover during unanticipated absences. Sparks asserts that it therefore had fewer available waitstaff and bartender positions after the strike, and thus a legitimate business justification for refusing to reinstate the striking employees.

Sparks and General Counsel base their contentions regarding the pre-strike employee complement and existing Laidlaw vacancies after the December 19, 2014 unconditional offer on different types of records created by Sparks in the ordinary course of its operations, and dispute the documents' probative value accordingly. General Counsel argues that Weekly Tip records—spreadsheets recording the weekly tips of all employees—most accurately reflect Sparks' complement of waistaff and bartenders at any given point in time (GC Posthearing Br. p. 23). Sparks asserts that Daily Tip records—handwritten notes of tip calculations made on a daily basis—more accurately depict the staffing needs of the restaurant, in that they record how many employees worked each day (RS Posthearing Br. at p. 37). I find that the Weekly Tip records more accurately reflect the overall number of Sparks' waitstaff and bartender employees for any particular period. The Daily Tip records only

indicate the employees working any particular day and shift, and thus do not establish the full complement of Sparks employees.[7] Because every Sparks employee does not work every single shift, the Daily Tip records do not encompass the entire workforce. The Weekly Tip records, by contrast, list every waiter and bartender employed by Sparks, regardless of the individual days they worked during the week in question.

In addition, the Daily Tip sheets produced by Respondent and submitted into evidence were not complete, and were not provided for critical time periods. For example, the one week of Daily Tip sheets in September, November, and December 2014 Sparks submitted for the purposes of comparison with Weekly Tip records submitted by General Counsel were actually Daily Tip sheets for September, November, and December 2013. (RS Exh. 25.) The December 1, 2014, through December 6, 2014 Daily Tip sheets were included elsewhere in the record (RS Exh. 8), but not the Daily Tip sheets for the comparator weeks in September and November. Therefore, it is not apparent that Sparks' records submitted for these weeks provide a comprehensive and reliable reflection of

7. The case of Sparks waiter Joanna is illustrative. Edelstein testified at the hearing that Joanna was out of work on an extended medical leave, and her name was therefore redacted from the Daily Tip record (Tr. 530-531; RS Exh. 8). However, during her testimony Edelstein also stated that Joanna was still an employee of Sparks, regardless of her having been removed from the Daily Tip record, and her name appears on the Weekly Tip record (Tr. 536-539; GC Exh. 13(b)). This evidence indicates that the Daily Tip record does not contain a complete record of Sparks' waiters and bartenders during the pertinent periods.

the waitstaff and bartenders employed during the stated periods. As a result, the Weekly Tip records provide a more comprehensive account of Sparks' waitstaff and bartender employees overall.

Furthermore, the evidence does not support Sparks' contention that it kept an inflated roster of employees prior to the strike, which was no longer necessary because the replacement employees were more reliable. Sparks argues in its Post-Hearing Brief that the employees who participated in the strike called out of work and took time off "at their discretion," forcing Respondent to rely on "backup" workers which were no longer necessary after the replacement employees began (RS Posthearing Br. at p. 38-39). Sparks therefore contends that the total number of waiters and bartenders employed prior to the strike was artificially inflated, and is not probative with respect to the ultimate number of Laidlaw vacancies which existed subsequently. However, the record establishes that, as Sparks states in its Posthearing brief, "Sparks daily staffing needs fluctuate throughout the year" (RS Posthearing Br. at 40). The record evidence in the form of credible employee testimony further establishes that Sparks' practice in the past was to allow employees to take extended vacations or other forms of time off during periods which were not as busy, as opposed to laying them off (Tr. 41-42, 117-118, 160-161). For example, waiter Valjon Hajdini credibly testified that he began his employment with Sparks in September 2008, and worked about 42 hours per week—six dinners and one lunch—until the December 10, 2014 strike (Tr. 26). During this time he observed that while more employees were hired immediately before the busy season, during the slower

season not a single employee was terminated (Tr. 41-42). Instead, the roster of employees simply rotated days of work, and employees took longer vacations or time off (Tr. 41-42). Hajdini testified that more employees were hired every fall only because some employees left Sparks for better jobs, became ill, or were fired, creating a shortage of staff prior to the busier months (Tr. 42). Waiter Kristopher Fuller similarly testified that since the inception of his employment with Sparks in 2007 employees were kept on from the busy period into the slower period, and the only turnover that occurred happened naturally as employees left for better jobs or were fired (Tr. 120-122). Bartender Elvi Hoxhaj also testified that during the 12 years he was employed by Sparks, employees were never laid off during the slower months (Tr. 152). Based on his observations, Hoxhaj testified that the available work was distributed evenly, so that each waitstaff employee worked 4 or 5 days per week rather than 6, or the employees each took longer vacations. Hoxhaj stated that he only witnessed employees leave their employment with Sparks when they were discharged or "because of personal reasons" (Tr. 160-161). Sparks offered no explanation for its departure from this practice after the inception of the strike. Thus, I am not persuaded by its contention that its prestrike employee complement was artificially enlarged, and therefore not useful to determine the existence of Laidlaw vacancies.

Sparks' Weekly Tip records establish that the restaurant employed a total of 46 waiters and bartenders immediately prior to December 10, 2014 (GC Exh. 13(b)).[8]

8. The payroll for this period contains only 45 waiters and bartenders, because Joanna did not work and therefore was not paid (GC Exh. 13(d)).

The payroll for the period immediately after the strike began (December 15 through 21, 2014) lists a total of 37 waiters and bartenders (GC Exh. 16).[9] Therefore, the record establishes that from the inception of the strike on December 10, 2014, and through the time of the striking employees' unconditional offer to return to work on December 19, 2014, there were at least 9 vacant waiter/bartender positions.

Respondent contends that it did not return the striking employees to work after their unconditional offer to return for substantial and legitimate business reasons. First, Sparks asserts that it hired permanent replacements for the striking employees prior to their unconditional offer to return to work on December 19. Sparks further argues that a downturn in its overall business obviated the need for the amount of waiters and bartenders it had previously employed, thereby justifying its refusal to reinstate the striking employees. As discussed above, the employer bears the burden of proving the existence of a legitimate and substantial business justification for failing to reinstate economic strikers following an unconditional offer to return to work. *Supervalu, Inc.*, 347 NLRB at 405; *Peerless Pump Co.*, 345 NLRB at 375. For the following reasons, I find that Sparks has failed to satisfy this standard.

---

9. There were no Weekly Tip records produced for this or any other week until the week of January 19 through 24, 2015. Information was therefore culled from both the Weekly Tip records (which constitute the most accurate reflection of the roster of employees) and the payroll records (reflecting the wages actually paid for a given week) to establish that there were 46 employees immediately prior to the strike and 37 immediately thereafter.

Appendix C

In order to establish that economic strikers were not returned to work after an unconditional offer because their positions had already been filled by permanent replacements, the employer must present "specific" proof of having reached a "mutual understanding" with the replacements to that effect. *Jones Plastic & Engineering Co.*, 351 NLRB at 64; *Consolidated Delivery & Logistics*, 337 NLRB at 526. Thus, the employer must present evidence that the circumstances of the replacement employees' hiring show that the replacements "were regarded by themselves and [the employer] as having received their jobs on a permanent basis." *Consolidated Delivery & Logistics*, 337 NLRB at 526, quoting *Target Rock Corp.*, 324 NLRB 373 (1997), enfd. 172 F.3d 921, 335 U.S. App. D.C. 320 (D.C. Cir. 1998). Evidence of the employer's intent to hire the replacements on a permanent basis is insufficient. *Consolidated Delivery & Logistics*, 337 NLRB at 526. Furthermore, evidence of an offer of work on a permanent basis is inadequate absent a showing that the replacement employee accepted the offer prior to the striking employees' unconditional offer to return to work. *Choctaw Maid Farms, Inc.*, 308 NLRB 521, 527-528 (1992), citing *Solar Turbines*, 302 NLRB 14 (1991), affd. sub nom. *Machinists v. NLRB*, 8 F.3d 27 (9th Cir. 1993) (employer's statement to replacements that they "had a job" insufficient to establish hiring on a permanent basis without evidence that replacements accepted offer).

The evidence establishes that Sparks obtained replacement employees via three different methods. Six kitchen employees were reassigned to waitstaff positions,[10]

10. These employees had been employed by Sparks in kitchen positions for some time prior to being reassigned to waitstaff work.

five purportedly "seasonal" employees hired before the strike began became replacements, and 23 replacement employees were hired directly after the strike began. The available evidence establishes that Sparks used similar documents when it hired or reassigned these employees to permanent replacement positions, and Sparks contends that these employees thereby constituted permanent replacements for the economic strikers prior to the unconditional offer to return to work on December 19, 2014. In particular, the replacement employees were provided with a letter stating as follows:

> It is a pleasure to extend to you an offer of employment in a permanent position as Waiter [Bartender], for Michael Cetta, Inc. dba Sparks Steak House.
>
> Your start date will be December 15, 2014. Your compensation will be paid based on a weekly basis (52 pay period per year) of $8.00/hour (less tip credit) and applicable tips.
>
> Eligibility for medical insurance benefits will begin following ninety (90) days of continued employment. The Company's employee benefits programs are described under separate cover, and the terms of the official plan documents

---

See GC Exh. 6 and 7; Tr. 264-265. Because the evidence establishes that Sparks hired new employees to replace the kitchen workers who were transferred into waitstaff positions, the waitstaff positions into which they transferred constituted *Laidlaw* vacancies. GC Exh. 14 and 23(B). See *Pirelli Cable Corp.*, 331 NLRB at 1540; *K-D Lamp Co.*, 229 NLRB 648, 650 (1977).

govern all issues of eligibility and benefits, in the event of a conflict between the contents of this letter and the terms of the plan documents.

Based on the Company's time-off policies, employees become eligible for paid time off as explained fully in our employee handbook. If the Company develops other benefit programs for which you may be eligible, the Company will advise you accordingly. The Company reserves the right to modify, supplement, and discontinue all employee benefits programs in its sole discretion.

In accordance with the Immigration Reform and Control Act, we are required to verify that you are legally entitled to work in the United States. You will be required to complete an I-9 form on your first day of employment, and present original documents establishing identity and employment eligibility.

This offer is not a contract for employment; your employment is "at-will" and may be terminated at any time for any reason by you or Michael Cetta, Inc.

Congratulations on your new position! We are very excited to have you join our organization, and we are sure that you will be a valuable addition to Sparks Steak House. Please do not hesitate to call me at 212.687.4806 should you have any questions.

Sincerely,

Shailesh Desai

RS Exh. 7(a-hh). These letters were signed by both Desai and all but one were signed by the individual employees. All of the letters contained typewritten dates across the top preceding the text. Two of the letters were dated December 11, 2014, 26 were dated December 15, and six were dated December 19.[11] The letters were signed by the replacement employees, but the signatures were not dated.

Again, it is Sparks' burden to establish that it reached a mutual understanding with these employees regarding their status as permanent replacements for the economic strikers prior to 4 p.m. on December 19, 2014, when the unconditional offer to return to work was made. I find that the evidence adduced by Sparks to attempt to elucidate the understanding it reached with the replacement employees, and the time at which the agreement regarding their employment status was arrived at, is insufficient to do so.

---

11. The alleged "seasonal employees" were given two offer letters. The first, distributed in October and November 2014 depending upon the employee, begins, "It is a pleasure to extend you an offer of seasonal employment as a Waiter for Michael Cetta, Inc. dba Sparks Steak House. Your start date will be DATE. Your compensation will be paid on a weekly basis (52 pay periods a year) of $ 8.00/hour (less tip credit) and applicable tips." [R.S. Exh. 6(a-d)] There is no end date or time period for employment specified in the letter. Furthermore, the evidence establishes that prior to the December 10, 2014 strike Sparks had never hired employees on a seasonal basis whose employment terminated after the busiest months. Instead, the evidence establishes that employees hired from October to December were always maintained on the roster and allowed to take vacation or unpaid time off as business slowed.

Sparks did not call any of the replacement employees to testify regarding the process by which they were hired or reassigned, and their understanding regarding the nature of their employment thereafter. Edelstein testified that she was responsible for finding, interviewing, and "going through the process of hiring waiters" on December 11, 2014 (Tr. 419).[12] She testified that she "contacted staffing agencies" and sought referrals from Sparks' current staff, and that she "did a series of many, many, many interviews in the course of the day," ultimately offering positions to prospective employees (Tr. 419). She was not asked for and did not provide any additional information about her interactions with candidates during the interviews. According to Edelstein, this process began on December 11, 2014, and continued "over the course of a few days," but she could not recall with any more specificity how long the process took, or how many replacement employees were hired (Tr. 419-420).

Edelstein was no more detailed with respect to the letters offering permanent replacement positions, and their distribution, signature, and return. Edelstein testified that she and Desai prepared the letters offering permanent employment[13] (Tr. 421; RS Exh. 7(a-hh)). She further testified that she handed the letters to replacement employee candidates (Tr. 423-424). However, she did not witness their signatures on the letters, and did not know whether the replacement employees signed the letters on

12. Edelstein testified that she was not at Sparks on December 10, 2014, when the strike began (Tr. 418-419).

13. Desai testified on behalf of Sparks, but was not questioned regarding the offer letters or his involvement in the interview and hiring process.

the date that, presumably, either she or Desai placed at the top of the text (Tr. 424, 534-535; R.S. Exh. 7(a-hh)). Nor could she testify with any specificity regarding when the individual letters were returned with the replacement employees' signatures. Her testimony regarding the receipt of the signed offer letters comprising Respondent's Exhibit 7 was nebulous and significantly equivocal:

> Q: And do you recall the last day that you received any of these documents returned to you?
>
> A: I know that the last person — I don't it. It was — you know, whenever it was issued, it was within a day or so that we got them back. So whenever the last one was issued is when I got it back. I don't know the exact last day. I think it was — let me just take — can I just look at something?
>
> Q: Sure.
>
> A: Thanks.
>
> (The witness examined the document.)
>
> THE WITNESS: It was — I believe it was the 19th of December. The last day that we got this one — these back.
>
> Tr. 426.

I simply do not find Edelstein's testimony regarding the hiring process and the offer letters probative. She provided virtually no information regarding her interactions with the replacement employee candidates, which would elucidate whether and when a mutual understanding regarding their employment status arose. Although Edelstein's testimony ostensibly encompassed all of the offer letters—including those provided to the reassigned kitchen workers and the "seasonal" employees—her narrative testimony appeared to pertain solely to the newly hired replacement employees, and not to either of the former groups.[14] Her testimony regarding when Sparks received the offer letters signed by the replacement employees was vague and equivocal. In particular, I note that the list of permanent replacement employees provided to LoIacono on September 11, 2015, contains hiring dates for the replacement employees at odds with the dates of the offer letters (GC Exh. 6; R.S. Exhs. 7(a-hh)). And because several of the offer letters are dated December 19, 2014, if Sparks received them signed by the employee "within a day or so," it is doubtful that all of the offer letters were received with employee signatures as of that date, as Edelstein claims (RS Exhs. 7(l, m, x, aa, bb, hh)).

Furthermore, the available payroll records do not illuminate the situation. For example, four of the six ostensibly reassigned kitchen employees and all 23 of the newly hired replacement employees appear

14. The only evidence regarding the reassignment of the kitchen employees is Steve Cetta's testimony that their reassignment to waitstaff positions took place after December 10, 2014 (Tr. 264-265).

on the payroll as waitstaff for the period December 15 through 21, 2014. However, the payroll evidence does not establish the date that the newly hired employees began working, or that the kitchen employees began working as waitstaff, with any further specificity (GC Exh. 16; Tr. 300-301). Furthermore, one of the former kitchen employees first appears as waitstaff on the payroll for the period December 22 through 28, 2014, and another does not appear as waitstaff on the payroll until the period January 5 through 11, 2015, well after the unconditional offer to return to work (GC Exh. 18 and 20). In addition, Daily Tip sheets and Weekly Tip records which would have established the precise dates that the newly hired employees began working and that former kitchen employees worked as waitstaff by virtue of their receipt of tips were not produced by Respondent. As a result, the available documentary evidence does not establish that the former kitchen workers and the 23 newly hired employees constituted permanent replacements for the striking waitstaff and bar tenders prior to the unconditional offer to return to work on December 19, 2014.

General Counsel asserts that an adverse inference should be drawn based upon Sparks' failure to produce documents—in particular Weekly and Daily Tip records-which would have shown the exact date that the kitchen workers and newly hired replacements began working as waitstaff and bartenders during the period from December 15 through 19, 2014. General Counsel also asks that I draw an adverse inference based on Sparks' failure to call as a witness manager Ricardo Cordero, who signed the letters offering "seasonal" employment

and hired Jonathan Sturms in February 2015. For the following reasons, I find that such adverse inferences are appropriate.

Succinctly stated, the adverse inference rule consists of the principle that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Auto Workers v. NLRB*, 459 F.2d 1329, 1335-1336, 1972 U.S. App. LEXIS 11659 (D.C. Cir. 1972) (describing the adverse inference rule as "more a product of common sense than of the common law"); see also *Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at p. 2-3 and at fn. 13 (2014); *SKC Electric*, 350 NLRB 857, 872 (2007). An adverse inference may be drawn based upon a party's failure to call a witness within its control having particular knowledge of the facts pertinent to an aspect of the case. See *Chipotle Services, LLC*, 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015) (adverse inference is particularly warranted where uncalled witness is an agent of the party in question); *SKC Electric, Inc.*, 350 NLRB at 872-873. An adverse inference may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 at p. 2-3 (failure to produce subpoenaed accident reports pertinent to the "treatment of similarly situated employees" warrants adverse inference that records would have established that such employees were treated more leniently than discriminatee); *Massey Energy Co.*, 358 NLRB 1643, 1692, fn. 63 (2012); see also *Zapex Corp.*, 235 NLRB 1237, 1239 (1978).

Appendix C

The adverse inference rule does not require that the party seeking the adverse inference have sought the witness testimony or documents via subpoena. *Auto Workers v. NLRB*, 459 F.2d at 1338 (applicability of the adverse inference rule "in no way depends on the existence of a subpoena compelling production of the evidence in question"). However, where a subpoena applicable to the particular witness or documentary evidence in question has been served, the rationale for drawing an adverse inference is strengthened. *Auto Workers v. NLRB*, 459 F.2d at 1338 ("the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference"); *People's Transportation Service, Inc.*, 276 NLRB 169, 223 (1985). An adverse inference has been deployed as a discovery sanction in such cases. See, e.g., *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005).

In the instant case, Sparks failed to produce or enter into evidence either Weekly or Daily Tip records for one of the most significant weeks in question, December 15 through 21, 2014. Such records, by establishing any shifts worked by alleged replacement employees, would tend to substantiate Respondent's claim that the striking employees were permanently replaced prior to their unconditional offer to return on December 19 at 4 p.m. Not only were such records subpoenaed by General Counsel, but I denied Sparks' petition to revoke and ordered the production of these documents on October 1, 2015. Although Sparks subsequently produced copious documents involving employee payroll and tips for 5

years dating back to January 2010, it failed to introduce evidence with regard to this critical week. Furthermore, there was no indication from Sparks' witnesses that such documents had not been created or maintained in the ordinary course of its business. Edelstein testified that Weekly Lunch and Dinner Tip records (GC Exh. 13(b)) are kept for every week the restaurant is open (Tr. 294, 321). She also testified that it would be impossible to determine, from the payroll records alone, what day of any given week an employee worked (Tr. 300-303). Cetta stated in his testimony that schedules such as the dinner schedule in evidence as GeneralCounsel Exhibit 13(a) are kept in the ordinary course of business for every week the restaurant is open (Tr. 266). Sparks entered into a similar stipulation with respect to Weekly Tip records (GC Exh. 13(b)), and employee hours summaries (GC Exh. 13(c)) (Tr. 284). Because there was no documentary or testimonial evidence to elucidate the specific date that replacement employees signed and returned their offer letters, or the date on which a mutual understanding that employees were permanent replacements was reached, evidence establishing the specific dates of employment during the period December 15 through 21 was critical. Yet Sparks failed to produce records having a direct probative bearing on this issue, records which were admittedly made and kept in the ordinary course of its business, despite my order denying the Petition to Revoke and requiring that they do so. Such a course of events militates in favor of drawing an adverse inference to the effect that if the records in question had been produced, they would not have established that reassigned kitchen employees and newly hired replacements employees were performing

waitstaff and bartending work prior to the unconditional offer to return to work on December 19. See *Zapex Corp.*, 235 NLRB at 1239 (failure to produce personnel files of alleged permanent replacement employees warrants inference that records would have tended to show that replacements were not in fact permanent).

I further find it appropriate to draw an adverse inference based on Sparks' failure to call its Manager Ricardo Cordero as a witness.[15] As discussed above, Cordero was both the signatory to the seasonal offer letters and the manager who hired Jonathan Sturms in February 2015. Edelstein testified that she created the "seasonal employment offer" template used by Cordero and signed by him[16] (Tr. 411-413; RS Exh. 6(a)-(d)). As a result, Cordero would most likely have had information regarding the understanding between the "seasonal" hires and Sparks prior to their allegedly obtaining a permanent replacement position. Edelstein testified that she only interviewed one of the five alleged "seasonal employees," Luis Calle, whose offer letter was never signed and returned (Tr. 416-418). Edelstein further testified that she did not recall giving the seasonal employment letters to employees Andrew Globus, Mostafa

15. Cetta testified that Ricardo Cordero was still employed by Sparks as a manager at the time of the hearing (Tr. 244).

16. Desai testified that he signed offer letters in fall 2014 in anticipation of the busy season at Sparks, but his signature does not appear on the "seasonal" offer letters (Tr. 649-650). This leads me to conclude that in his testimony he was referring to offer letters he gave to the former kitchen workers, the other newly hired replacements, or to the "seasonal" employees in mid-December 2014.

Belabez, Luis Vasconez, or Anass Kesley (Tr. 463; RS Exh. 6(a)-(d)). As Cordero's signature was on the offer letters for these four "seasonal" employees, his testimony would have illuminated the status of their employment. Testimony could have also been elicited regarding his general experience in hiring for Sparks as related to positions of "seasonal employment." For example, some of the "seasonal" offer letters contain dated signatures, indicating that this process differed from the hiring and reassignment process for the alleged permanent replacement employees in December (RS Exh. 6(a, b, d)). Thus I find it appropriate to infer that had Cordero testified, his testimony would not have supported a finding that the "seasonal" employees' understanding regarding their status was consistent with that of a legitimate permanent replacement.

I also find it appropriate to draw an adverse inference based upon Sparks' failure to call Cordero given Cordero's hiring of employee Jonathan Sturms in February 2015. Although Edelstein testified that Cordero hired Sturms without the proper authorization, her testimony was inconsistent on this point (Tr. 427). Edelstein initially contended that Sparks changed the process for hiring after the strike, and that she explained the new procedures, which required Steve Cetta's specific approval for hiring staff, at a management meeting (Tr. 473-474, 476). According to Edelstein, the managers responded, "we need people, what do we do? What do we do?" She testified that she responded by attempting to "alleviate their anxiety and stress about what was going on," and to "help them understand that we

are short waiters or we need people or whatever it is, we understand" (Tr. 478). However, Edelstein and Cetta then purportedly discharged Sturms after discovering that Cordero had hired him without consulting Cetta, in violation of this policy, because, "No one should have been hired" and "We didn't need anybody" (Tr. 502-505). When questioned further regarding why Strums was hired if Sparks did not need additional help, Edelstein claimed that Cordero apologized, saying he had made a mistake (Tr. 555-556). Thus, Cordero's testimony regarding how the hiring of Sturms came about—whether Sparks was actually "short waiters" or whether Sturms' hiring was a "mistake" because Respondent "didn't need anybody"—would have been illuminating. I thus find that Sparks' failure to call Cordero to testify regarding the hiring of Sturms warrants an adverse inference that Cordero's testimony would not have supported Sparks' contentions regarding these issues.

The record evidence establishes additional Laidlaw vacancies, as identified by General Counsel. For example, General Counsel contends that the replacement employees Andreas Zenteno, Freddy Guzhnay, Carlos "Alex" Ruiz, and Maximillian Vainshtub left Sparks sometime between December 22, 2014, and January 18, 2015, creating Laidlaw vacancies that Sparks did not recall striking employees to fill (GC Br. 34-35). Edelstein confirmed this in her testimony (Tr. 328-335). General Counsel further contends that a striking employee should have been recalled to work when waiter Helene DeLillo left Sparks' employment on or before January 4, 2015. Edelstein confirmed in her testimony that DeLillo did not appear

on or after the January 5-11, 2015 payroll (GC Exh. 20; Tr. 325, 327, 331). Sparks adduced no evidence as to why DeLillo's position or the four others identified above were not offered to striking employees, other than general arguments regarding overstaffing and seasonality which I am rejecting herein. I therefore find that departure of Zenteno, Guzhnay, Ruiz, Vainshtub, and DeLillo created Laidlaw vacancies, to which Sparks was obligated to respond by offering these positions to striking employees. I further find that because there is no evidence that DeLillo was hired as a permanent replacement prior to the unconditional offer to return to work, her position should have been made available to a striking employee upon the unconditional offer to return to work on December 19, 2014.

Sparks further claims that a downturn in its business necessitated a smaller staff, so that its failure to recall the striking employees after their unconditional offer to return to work can be justified on this basis. The evidence adduced at the hearing, however, does not satisfy Sparks' burden to prove that strained financial circumstances obviated the need for what had previously been a full complement of employees, either at the time of the unconditional return to work or thereafter.

First of all, it is undisputed that December is the busiest month of the year at Sparks due to holiday parties and celebrations. Financial records introduced into evidence establish that, as is typical, December 2014 was the month of that year with Sparks' highest sales (Tr. 646-648, G.C. Appendix A, and RS Exh. 16). Thus,

the December 10, 2014 strike and December 19, 2014 unconditional offer to return to work took place during the time that Sparks did its highest volume of business for the year. It is also undisputed that Sparks transferred kitchen workers and hired employees to work in lieu of the striking employees, both during this time and thereafter. There is no question that Sparks did so out of necessity. As Edelstein testified, when she met with management personnel after the strike began and told them that all new hires in the future must be approved by Cetta, the managers responded, "we need people, what do we do? What do we do?" (Tr. 478). Edelstein testified that her response attempted "to not only alleviate their anxiety and stress about what was going on, but to help them understand that we understand that we are short waiters or we need people" (Tr. 478). Furthermore, although December is the busiest month of the year for Sparks, the "slow" season takes place over the summer, and not in January and February (Tr. 41, 115, 645-646; GC Appendix A). Thus, while Sparks' financial records establish that its total gross profit declined from December 2013/January 2014 to December 2014/January 2015, the restaurant was still at the height of its busy season when the strike and unconditional offer to return to work took place, and had not yet entered its slowest season when striking employees were not recalled to replace employees whose employment terminated in early 2015.

Furthermore, the evidence establishes, as General Counsel argues, that the decline in sales which Sparks experienced from December 2014 to January 2015 was not as drastic as Sparks contends. The documentary

evidence establishes that over the past five years the December 2014 to January 2015 decline is actually the second smallest decline for that period (GC Appendix A; RS Exh. 16). And, as discussed above, the evidence establishes that Sparks has never before laid off waitstaff and bartenders, even during its slow season over the summer. Instead, these employees remained employed, taking long vacations or leaves of absence and dividing the available work. The evidence does not support any reason for Sparks' departure from this practice, even during periods of larger or more dramatic declines in business from December of one year to January of the next. See *Kurz-Kasch, Inc.*, 301 NLRB 946, n. 3, 951 fn. 6 (evidence did not establish previously-existing practice of temporarily shifting employees, which Respondent contended obviated the necessity of recalling striking employees); *Austin Powder Co.*, 141 NLRB 183, 186 (1963), enfd. 350 F.2d 973 (6th Cir. 1965) (Respondent's claim that economic decline necessitated layoffs was suspect, where it did not discharge employees at a different plant which suffered a similar decline in business). I further note that there is no evidence that Sparks took other steps to address purported issues of overstaffing caused by the decline in business, such as transferring the former kitchen workers back to their previous positions.[17] Therefore Sparks' attempt to justify its refusal to recall the striking employees to work on this basis is not persuasive.

17. This is particularly the case given that, as General Counsel argues and calculations based on payroll records confirm, kitchen workers ultimately "cost" Sparks 4.5 times more in payroll than waitstaff and bartenders, because Sparks is ineligible for a tip credit with respect to the kitchen workers. See RS Exhs. 15, 17; GC Posthearing Br. at p. 46, fn. 33.

Appendix C

The cases cited by Sparks in support of its defense that a decline in its business constituted a substantial business justification for failing to return the striking employees to work as vacancies arose are inapposite. For example, in *Providence Medical Center*, 243 NLRB 714, 738-739 (1979), the workload in the laboratory where the striking technologists were employed was reduced due to the simultaneous strike of a separate bargaining unit of nurses at the Respondent hospital, and Respondent hired only one short-term laboratory employee during the 2 1/2 months after both strikes concluded. Similarly, in *Bushnell's Kitchens, Inc.*, 222 NLRB 110, 117 (1979), the employer hired no replacement employees during the strike in question, employees responsible for sales instead performed production work during the strike resulting in a decline in orders, and an OSHA inspector ordered the employer to cease using certain production equipment. In *William O. McKay Co.*, 204 NLRB 388, 389, 393 (1973), Respondent reduced its overall workforce by almost forty percent (from 100 to 65 employees) during the year before the strike began. Finally, in *Colour IV Corp.*, 202 NLRB 44, 44-45 (1973), the Board found that the striking employee not returned to work lacked the qualifications Respondent required for the poststrike work available. As a result, I find that these cases are not analogous to the circumstances at issue here.

For all of the foregoing reasons, I find that Sparks has failed to establish that an economic decline constituted a legitimate and substantial business justification for failing to reinstate the striking employees.

Finally, I find that Sparks has offered shifting rationales for its refusal to reinstate the striking employees after their December 19, 2014 unconditional offer to return to work that render its various explanations suspect. In December 2014, Sparks was contending that picket line misconduct constituted its sole reason for failing to reinstate the striking employees. Zimmerman's December 22, 2014 email declining to reinstate the striking employees provides only this justification, asserting that they engaged in "violence, threats," "intimidation," "destruction of property and trespass." Nowhere does Zimmerman mention that permanent replacement employees had been hired prior to the striking employees' unconditional offer, or that an economic downturn of some sort had eliminated the need for the previous complement of waitstaff and bartender employees. At the January 8, 2015 negotiating session Zimmerman continued to insist that he could not return the striking employees to work because he was "protecting Sparks property." I further note that Sparks did not provide any information in response to Local 342's request for information pertaining to the incidents of, according to Zimmerman, "violence, threats and intimidation . . . destruction of property and trespass" that purportedly engendered Sparks' decision to refuse to reinstate the striking employees. The evidence establishes that on January 9, 2015, Local 342 requested "any evidence and/or videos . . . to support the employer's representative's response to the Union's unconditional return to work," namely the assertion that Zimmerman "was protecting his client's property due to incidents that took place at Sparks" which the Union contended were not caused by the strike or the striking employees (GC Exh.

3, p. 22). It is well settled that the Board considers such information to be necessary for a Union's performance of its duties as bargaining representative. See, e.g., *NTN Bower Corp.*, 356 NLRB 1072, 1139 (2011); *Page Litho, Inc.*, 311 NLRB 881, 891 (1993). Zimmerman's response that the requested information was "irrelevant" based upon the Union's contention that its activities and those of the striking employees were not responsible for any alleged incidents is legalistic circumlocution, as is his assertion that "all terms and conditions for bargaining unit employees are . . . presently being negotiated" (GC Exh. 3, p. 19). Thus, the evidence establishes that Sparks never provided anything to the Union in order to substantiate its contention that "violence, threats and intimidation . . . destruction of property and trespass" justified the its refusal to reinstate the striking employees. Now in its Posthearing Brief, Sparks has abandoned its picket line misconduct argument, and contends that the permanent replacement of the striking employees and an economic downturn constitute its legitimate business justifications for declining to offer reinstatement. I find that the shifting explanations asserted by Sparks at the time of the unconditional offer and January 2015 negotiating sessions, the hearing in this matter, and its Posthearing Brief militate against crediting any one as a legitimate and substantial business justification for failing to reinstate the striking employees.

For all of the foregoing reasons, I find that since December 19, 2014, Sparks has failed and refused to reinstate the striking employees, despite their having made an unconditional offer to return to work on that

date, in violation of Sections 8(a)(1) and (3) of the Act. I further find that Sparks violated Sections 8(a)(1) and (3) by failing to reinstate the striking employees to vacant waitstaff and bartender positions as they have occurred.[18]

2. The preferential hiring list

The complaint alleges at Paragraph 7(c) that Sparks violated Sections 8(a)(1) and (3) of the Act by failing and refusing to place the striking employees on a preferential hiring list. It is well settled that economic strikers making an unconditional offer to return to work at a time when their positions are filled by permanent replacements remain employees, and "are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantial equivalent employment." *Laidlaw Corp.*, 171 NLRB at 1369-1370. To this end, the employer must maintain a "non-discriminatory recall list" such that when openings become available, "the unreinstated striker could be recalled to his or her former or substantially equivalent position." *Peerless Pump Co.*, 345 NLRB at 375. The burden of offering reinstatement in this context rests with the employer; strikers and the union are not required to approach the employer regarding available positions. *Laidlaw Corp.*, 171 NLRB at 1369; see also *Alaska Pulp Corp.*, 326 NLRB 522, 528 (1998) (employer required to "seek out strikers as their prestrike or substantially equivalent positions become available to offer reinstatement").

---

18. The precise number of *Laidlaw* vacancies to which economic strikers should have been reinstated is a matter for compliance. *Chicago Tribune Co.*, 304 NLRB 259, 277-278 (1991); *Concrete Pipe & Products Corp.*, 305 NLRB 152, 154 fn. 9 (1991).

The evidence here fails to establish that Sparks created or maintained a preferential hiring list prior to September 11, 2015, when it provided a seniority list it was purportedly using as a preferential hiring list to the Union in response to the Union's information request (GC Exhs. 5-7; Tr. 186). Sparks argues in its Posthearing Brief that it had no obligation to inform the economic strikers or the Union that permanent replacement employees had been hired, citing *Avery Heights*, 343 NLRB 1301, 1305-1306 (2004), vacated and remanded on other grounds, 448 F.3d 189, 195 (2nd Cir. 2006).[19] That case, however, addressed an employer's refusal to disclose its intention or plan to hire permanent replacement employees; the employer there informed the union that it was hiring permanent replacement employees two weeks after the hiring began. *Avery Heights*, 343 NLRB at 1306-1307. Here, by contrast, Sparks declined for months to inform the Union regarding its hiring of permanent replacement employees and the existence of any preferential hiring list. It pursued this course despite the Union's reiteration of its unconditional offer to return to work at the January 8, 2015 negotiating session, the Union's subsequent request for information regarding Sparks' rationale for refusing to reinstate the striking employees, and subsequent bargaining sessions (on February 25 and March 20, 2015,[20] for example).

---

19. The Second Circuit upheld the Board's determination that the employer in *Avery Heights* was not required to inform the employees or the union prior to hiring permanent replacements, but reversed the Board's conclusion that its having done so did not violate the Act.

20. Sparks attempted to elicit testimony from LoIacono to the effect that on or about March 20, 2015, Abondolo told him that

Furthermore, the evidence as discussed above establishes that Sparks not only hired replacement employees, but continued to do so through February 2015 (when it hired Sturms) without informing the Union or the striking employees. I also note that, if Sparks had truly eliminated waitstaff and bartender positions for legitimate business reasons such as a financial decline, the failure to notify the Union "tends to militate against Respondent's good faith in dealing with the strikers." *Transport Service Co.*, 302 NLRB 22, 29 (1991). As a result, the evidence establishes that Sparks failed to satisfy its obligation to create and implement a preferential hiring list with respect to the striking employees.

Sparks further argues that it discharged its duty to create and maintain a preferential hiring list when it notified the Board Agent by letter of March 5, 2015, that the economic strikers had been permanently replaced.[21] I disagree. First of all, it is baffling that Sparks would

---

Zimmerman had stated that Sparks had permanently replaced the striking employees (Tr. 208-213, 357). As Zimmerman chose not to address this issue in his testimony, I credit LoIacono's statement that Abondolo never did so. In any event, affirmative testimony on LoIacono's part would have been nonprobative hearsay.

21. Sparks attached a copy of this letter to its Post-Hearing Brief and raised this argument for the first time therein. General Counsel subsequently moved to strike based upon Sparks' failure to enter the evidence into the record during the hearing. Respondent countered that the ALJ may take judicial notice of records within the agency's own files. I have considered the letter submitted by Sparks, but do not ultimately find it material to my conclusions on the issue for the reasons which follow in the text.

provide this information to the Board Agent during the course of the investigation without providing it to the Union, with whom it was interacting at least once per month for contract negotiations. Notice provided to a Board Agent during the investigation of an unfair labor practice charge does not constitute notice to the Union or the striking employees. Furthermore, in the March 5, 2015 letter itself, Sparks attempts to turn the evidentiary burdens in this area on their head by complaining that the Union had not actively sought bargaining regarding returning the striking employees to work. As the above-described caselaw makes clear, the onus for creating the preferential hiring list and making offers of reinstatement to economic strikers falls on the employer.

For all of the foregoing reasons, I find that Sparks failed to and refused to place the striking employees on a preferential hiring list in violation of Sections 8(a)(1) and (3) of the Act.

3. The alleged discharge of the strikers

The complaint further alleges at Paragraph 7(d) that Respondent violated Sections 8(a)(1) and (3) of the Act by discharging the striking employees on December 22, 2014. See *Tri-State Wholesale Bldg. Supplies, Inc.*, 362 NLRB No. 85 at p. 1, fn. 1, p. 5 (2015) (enfd. 657 Fed. Appx. 421, 2016 WL 4245468 (6th Cir. 2016)); *Pride Care Ambulance*, 356 NLRB No. 128 at p. 1-3 (2011). General Counsel contends that on December 22, 2014, Sparks violated Sections 8(a)(1) and (3) by discharging the striking employees via Zimmerman's email to O'Leary. In order

to determine whether a striker has been discharged, the Board evaluates whether the employer's statements and actions "would logically lead a prudent person to believe his [or her] tenure has been terminated." *Pride Care Ambulance*, 356 NLRB 1023, 1024, quoting *Leiser Construction LLC*, 349 NLRB 413, 416 (2007), petition for review denied, enfd. 281 Fed. Appx. 781 (10th Cir. 2008); see also *Tri-State Wholesale Bldg. Supplies, Inc.*, 362 NLRB No. 85, at p. 5. In order to determine whether a prudent person would reasonably believe that their employment had been terminated, "it is necessary to consider the entire course of relevant events from the employee's perspective." *Pride Care Ambulance*, 356 NLRB supra at 1024, quoting *Leiser Construction LLC*, 349 NLRB at 416. In addition, the Board has held that any uncertainty created by the employer's statements or actions will be construed against it. *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 846 (2001). As the Board stated in Brunswick Hospital Center, if the employer's conduct engenders "a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer."[22] 265 NLRB 803, 810 (1982); see also *Kolkka Tables & Finnish-American Saunas*,

22. In its Posthearing Br., Sparks attempts to effectively reverse the well settled rule construing ambiguities in this respect against the employer by contending that the conduct of the Union and the 401(k) plan administrator "inflamed" the employees and caused any confusion regarding their employment status. RS Posthearing Brief at 21-23 and 24-25. I decline to do so.

335 NLRB at 846-847; *Grosvenor Resort*, 336 NLRB 613, 617-618 (2001).

I find under the above standard that Zimmerman's December 22 email on behalf of Sparks to O'Leary constituted a discharge of the striking employees. In this email, Zimmerman informs the Union, "be advised that Sparks must reject the union's offer to return the striking employees to work at this time," without using the words "discharge" or "terminate." However, Zimmerman attributes Sparks' refusal to return the striking employees to work to "serious misconduct and unprotected activity by . . . the striking employees during the two separate strikes at Sparks between December 5 and December 19, including . . . violence, threats and intimidation towards patrons and employees, destruction of property and trespass." Zimmerman goes on to describe the refusal to return the striking employees to work as the "option" that "best protects the safety and security of its patrons, employees and delivery people from the [striking employees'] conduct," and raises the possibility of legal action by stating that Sparks "reserves all legal rights in connection with . . . Sparks' employees' conduct." I find that the striking employees could reasonably interpret Zimmerman's statements accusing them of "violence, threats," "intimidation," "destruction of property and trespass," declining to return them to work to ensure "the safety and security of [Sparks] patrons, employees and delivery people," and intimating potential legal action as discharging them from employment. Thus, in the context of the caselaw Zimmerman's statements in his December 22 email, in conjunction with Respondent's refusal to admit

the employees onto Sparks' premises on December 19 after their unconditional offer to return to work, would lead the employees to reasonably believe that Sparks had terminated their employment.[23]

In reaching this conclusion, I reject Sparks' argument that Zimmerman's December 22 email should be the only piece of evidence considered in order to determine whether Respondent discharged the striking employees (RS Posthearing Br. at p. 18-20). Respondent contends that because the consolidated complaint alleges at ¶ 7(d) that Sparks, by Zimmerman's email, discharged the striking employees on December 22, no other evidence regarding the status of the striking employees, or their interactions with Sparks representatives, should be evaluated. However, Sparks, having heard the evidence presented by General Counsel, had a full and fair opportunity to adduce its own

23. I further note that some striking employees were provided with contradictory information regarding their employment status via Sparks' health insurance plan administrator which, at the very least, would raise the possibility that they had been discharged. The evidence establishes that in January 2015, some employees who participated in Sparks' group health insurance plan received letters stating that their coverage was being terminated based upon a qualifying event in the form of a "termination," and notifying them of their rights under COBRA (GC Exh. 8; Tr. 196). One month later, at least one employee was sent a second COBRA letter, describing the qualifying event in question as a "reduction in hours" (RS Exh. 2). The employee to whom the second COBRA letter was addressed testified that he never received it (Tr. 200-201). Nevertheless, I find it unreasonable to place on the employees the onus for discerning the meaning of different qualifying events under COBRA in order to dispel the confusion regarding their employment status which these letters doubtless engendered.

evidence relevant to the alleged discharge of the striking employees at the hearing. Sparks tacitly acknowledges as much; at the hearing and in its Posthearing Brief, Sparks stated, "neither [the December 22 email] nor any other action by Sparks could have led a reasonable person to believe Sparks had terminated any economic striker" (Tr. 352-354; Posthearing Br. at p. 18). In its Posthearing Brief Sparks goes on to address, in addition to Zimmerman's December 22 email, the parties' remarks at the January 20 bargaining session, and "confusion" which may have been caused by the striking employees' interactions with the benefits plan administrator (Posthearing Br. at 25). These arguments illustrate that, despite the wording of the complaint's allegation, Sparks had an opportunity to respond to additional evidence presented by the General Counsel which would tend to establish a reasonable belief on the part of the striking employees that they had been discharged.

Nor do I find persuasive the other evidence presented by Sparks in support of its contention that the striking employees could not have reasonably believed that they were discharged. Sparks argues that as of January 8, 2015, the striking employees' personal belongings remained in the employees' lockers at Sparks, indicating that they were still employed. However, this fact is irrelevant when the employees had been barred by Sparks from returning to the restaurant for any purpose in order to, according to Zimmerman, protect the current employees and Sparks' property.[24] Sparks' recall of one of the striking

24. Hajdini testified that at the time he did not know whether his belongings remained in his locker, because he had not been allowed back on Sparks' premises (Tr. 64).

employees in August 2015 cannot possibly be relevant to the employees' reasonable belief as to their employment status during the seven intervening months. Furthermore, the fact that termination letters, which had been issued in the past, were not issued to the striking employees does not clarify the ambiguity in their employment status created by Sparks' conduct. There is no evidence that termination letters had been issued by Sparks as a long-standing practice,[25] and Edelstein admitted that sending such letters to discharged employees was a practice only recently implemented (Tr. 472). As discussed above, it is the perspective of the employees, and not the specific conduct of the employer, that is considered in determining whether they reasonably believed that they were discharged. Given Sparks' refusal to permit the striking employees to enter the premises on December 19 and Zimmerman's December 22 email, Sparks' declining to issue termination letters is insufficient to clarify the ambiguity created by its other conduct in the minds of the striking employees.

I am also unpersuaded by Sparks' contention that the language of the December 22 email is less explicit than the statements at issue in Tri-State Wholesale Building Supplies, Inc. and Grosvenor Resort which were found to engender a reasonable belief that economic strikers had been terminated. Tri-State Wholesale Building Supplies, Inc. involved an unequivocal statement that the economic

25. Sparks introduced two letters threatening employees who were apparently absent from work for two months with discharge if they did not return to work within a stated period of time, but both are dated September 24, 2014 (RS Exhs. 10, 11).

strikers had been discharged. 362 NLRB No. 85 at p. 4 ("Please be advised you should not report for work at Tri-State Wholesale for any future shifts as your position has been filled and your employment terminated"). However, as discussed above, the standard requires not a definitive statement of discharge, but only circumstances engendering a reasonable belief on the part of the economic strikers that they have been terminated, with ambiguities created by the employer's conduct construed against them. The ambiguity created by Sparks' conduct here—the refusal to allow the striking employees on the premises on December 19 and Zimmerman's December 22 email—was sufficient to create a reasonable belief that the striking employees had been discharged. The situation at issue in Grosvenor Resort, also cited by Sparks, is more analogous to the events established by the credible evidence here. In that case, the employer's communication to the striking workers stated "that they had been permanently replaced . . . that they should bring 'all their uniforms, hotel ID/timecard, and any other [of the Respondent's] property' to the Respondent's office," to receive "their 'final check' for their 'final wages,' including any outstanding vacation pay" contractually available only upon termination. Grosvenor Resort, 336 NLRB at 617-618. The Board concluded that the employer's references to a "final check" for "final wages" and "outstanding vacation pay" remittable solely upon discharge was sufficient to create a reasonable belief that the striking employees had been terminated. Here the references in Zimmerman's December 22 email to violence, threats, destruction of property, and other unlawful conduct, together with the implication of legal action, served a similar purpose.

The issue of the striking employees' understanding is further complicated here by the fact that Sparks did not inform the union or the strikers that it was hiring permanent replacement employees. Of course, Sparks was not required to do so. *Avery Heights*, 343 NLRB at 1305-1306. However, after December 19, 2014, Sparks continued to rebuff the striking employees' unconditional offers to return to work at the parties' January 8, 2015 negotiating session. The evidence also establishes that at subsequent negotiating sessions on January 20 and February 25, Sparks did not inform the union that it had prepared a preferential hiring list or an order for the recall of the striking employees. Sparks was within its rights when it did not disclose its intent to hire permanent replacement employees prior to doing so. However, this does not somehow remove from consideration the effect of its continued failure to provide this information to the striking employees and the union, together with the failure to provide a preferential hiring list, on the perception of the striking employees regarding their employment status.

In this regard, I find that Sparks' shifting explanations for its refusal to recall the striking employees particularly pertinent. As discussed above, Zimmerman's December 22 email provided one rationale for refusing to allow the striking employees to return to work—picket line misconduct, including "violence, threats," "intimidation," "destruction of property and trespass." The hiring of permanent replacements—which had allegedly occurred prior to that time—and a downturn in business which resulted in the need for a smaller staff were not mentioned.

At the January 8, 2015 negotiating session Zimmerman reiterated this rationale, telling LoIacono that he could not return the striking employees to work because he was "protecting Sparks property." When the Union subsequently wrote to request information regarding Zimmerman's claim, Zimmerman responded with legal sophistry, and never provided information. Now, however, in its Posthearing Brief, Sparks does not even assert that some sort of picket line misconduct constituted its legitimate business justification for refusing to return the striking employees to work. Instead, Sparks contends that its legitimate business justifications consist of having hired permanent replacement employees prior to the striking employees' unconditional offer to return to work, and its economic downturn. These shifting contentions support the conclusion that Sparks' conduct with respect to the union and the striking employees created ambiguity regarding their status which should be construed against Respondent.

Finally, Sparks contends that the striking employees could not have interpreted the December 22 email as discharging them because the email was sent to Charging Party UFCW Local 342, and not to the employees. I find this argument unpersuasive as well. The record indicates that UFCW Local 342 was certified as the exclusive collective-bargaining representative of Sparks' waitstaff and bartenders on July 11, 2013, and the parties have been negotiating a collective-bargaining agreement since that time. Shop stewards and striking employees Kristofer Fuller and Valjon Hajdini attended collective-bargaining negotiations with Local 342 representatives.

In this context, an assertion that email communications with Local 342 regarding the ongoing strike and contract negotiations were somehow insufficient to constitute notice to the striking employees is contrary to the legal status of the parties and simply defies common sense.

For all of the foregoing reasons, I find that Sparks discharged the striking employees on December 22, 2014, in contravention of their rights under Laidlaw and its progeny, in violation of Sections 8(a)(1) and (3) of the Act.

4. Kapovic's alleged unlawful statement soliciting employees to withdraw their support for the union

The complaint further alleges at Paragraph 5 that Sparks violated Section 8(a)(1) when Kapovic solicited employees to withdraw their support for the union on December 6, 2014. I find that during the meeting that Kapovic initiated with shop steward and negotiating committee member Valjon Hajdini, Kapovic solicited Hajdini and the employees to abandon their support for Local 342. I credit Hajdini's uncontradicted testimony that Kapovic asked to speak with him, and expressed his opinion that another strike of the waiters and bartenders would "drag the business down" and that the investors with whom he was considering buying the restaurant would "back off" as a result. I further credit Hajdini's testimony that Kapovic asked him whether the employees would "vote the Union out" if Kapovic and the other investors bought the restaurant.

Appendix C

It is well settled that employer attempts to convince employees to abandon their support for a union, or to convince other employees to abandon their union support or activities, violate Section 8(a)(1). See *Ozburn-Hessey Logistics LLC*, 357 NLRB 1456, 1489 (2011) (solicitation of employee to persuade another employee to abandon her support for the union violated Section 8(a)(1)). In addition, employer predictions of adverse business consequences as a result of union representation violate Section 8(a)(1) if they are not supported by an "objective factual basis." *Tradewest Incineration*, 336 NLRB 902, 907 (2001) (statement that union representation would make it "unlikely that our parent company will view [employer] as an appropriate location to invest in long-term capital" coercive); see also *General Electric Co.*, 321 NLRB 662, fn. 5, 666-667 (1996) (upholding ALJ finding of 8(a)(1) violation based on General Manager's remarks that "the company that supplies the investment dollars for our growth . . . [is] watching what happens here" and encouraging employees to vote against the union); *Limestone Apparel Group*, 255 NLRB 722, 730-731 (1981) (investor's statement that he would not commit any additional resources to the plant if the union came in violated Section 8(a)(1)).

I find that Kapovic's statements were unlawful given this legal context. Sparks admitted that Kapovic was at all material times a supervisor within the meaning of Section 2(11), and an agent within the meaning of Section 2(13) acting on Sparks' behalf. Kapovic approached Hajdini doubtless aware that Hajdini was a shop steward and a member of the union's negotiating committee, and by asking Hajdini whether the employees as a group would

"vote the Union out" appears to have been addressing Hajdini in his representative capacity. Kapovic and Hajdini also discussed the strike in the context of the ongoing contract negotiations. When Hajdini stated to Kapovic that the employees "were not looking to go on strike again," only for "a simple contract," and that, "if you don't want us to go on strike . . . make an offer that is easy for us to accept," he was addressing Kapovic as a representative of Sparks. Kapovic responded in that capacity, stating that he would going to talk to Steve Cetta, "and see if we can do something about that." Accordingly, after Kapovic then asked Hajdini whether the employees could "vote the Union out" if Kapovic and his investors bought the restaurant, Hajdini again referred to the ongoing negotiations, stating, "All we want is a simple contract—that we get treated fairly."

Sparks contends in its Posthearing Brief that the evidence does not establish a violation, because Hajdini could not have reasonably believed that Kapovic was "reflecting company policy and speaking and acting for" Sparks' management, given Kapovic's comments regarding purchasing the business himself. Posthearing Brief at 46-47. However, Sparks admitted on the record that Kapovic was a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) (Tr. 7). As General Counsel points out, it is well settled that "an employer is bound by the acts and statements" of statutory supervisors, "whether specifically authorized or not." *Coastal Sunbelt Produce*, 362 NLRB No. 126 at p. 33 (2015); see also *Grouse Mountain Lodge*, 333 NLRB 1322, 1328 fn. 7 (2001); *Manhattan Hospital*,

280 NLRB 113, 118 (1986). There is also authority for the proposition that an employer is bound by the acts of supervisors that are contrary to the employer's directions. See *Rosedev Hospitality, Secaucus, LP*, 349 NLRB 202 fn. 3, 210-211 (2007); *Dixie Broadcasting Co.*, 150 NLRB 1054, 1076-1079 (1965).

By contrast, the cases discussed by Sparks in its Brief involve situations where the individual in question was neither a statutory supervisor nor an agent of the employer, and the allegations that their statements violated Section 8(a)(1) were dismissed on that basis. See *Pan-Oston Co.*, 336 NLRB 305, 305-307 (2001) (employee who allegedly committed Section 8(a)(1) violations neither a statutory supervisor nor an agent of Respondent pursuant to Section 2(13)); *Waterbed World*, 286 NLRB 425, 426-427 (1987) (same). While, as discussed in *Pan-Oston Co.*, an employee may function as an agent of the employer pursuant to Section 2(13) for one purpose but not another, Sparks provides no support for the position that that principle also applies to statutory supervisors within the meaning of Section 2(11). 336 NLRB at 305-306. The Board did apply this particular agency principle to a statutory supervisor in *Sea Mar Community Health Center*, 345 NLRB 947 (2005). However, that case involved a renegade supervisor who established an expanded dental lab and created a dental lab technician position, in direct contravention of specific orders by employer's CEO and Deputy Director prohibiting him from doing so. *Sea Mar Community Health Center*, 345 NLRB at 949-950. Characterizing the case as involving "unique circumstances," and an "unusual factual scenario," the

Board held that the employer did not violate Section 8(a)(1) and (5) by refusing to provide the union with notice and the opportunity to bargain regarding the closure of the "rogue" dental lab and its effects.[26] *Sea Mar Community Health Center*, 345 NLRB at 947, 949-951. As a result, I do not find that case to be applicable here.

Instead, I find that the circumstances surrounding Kapovic's comments to Hajdini fall more appropriately within the scope of cases ruling that an employer is bound by the comments of a supervisor, even when unauthorized. Kapovic and Hajdini were on Sparks' premises and in a work area when Kapovic initiated the conversation. Although Kapovic referred to his interest in buying the restaurant and potential investors, Hajdini responded in terms of the current contract negotiations, stating that an offer from Sparks that the employees could accept would obviate the possibility of another strike. Kapovic in turn did not respond as an individual seeking to establish his

26. I note that recently in *Postal Service*, 364 NLRB No. 62 (2016), the Board affirmed an ALJ's order finding that a statutory supervisor was acting in her personal interest, and not as an agent within the scope of her employment, when she obtained a stalking order against a union steward. The ALJ found, based on the supervisor's testimony, that the supervisor obtained the stalking order as "an act of desperation...to alleviate her own personal fears." *Postal Service*, 364 NLRB No. 62 at p. 18. As a result, the ALJ found that the only conduct of the supervisor imputable to the employer was the supervisor's enforcement of the terms of the protective order on the employer's premises, which interfered with the union steward's contract administration activities. *Postal Service*, 364 NLRB No. 62 at p. 1, 18-19. However, the Board noted that there were no exceptions filed with respect to this particular conclusion. *Postal Service*, 364 NLRB No. 62 at p. 1, fn. 2. As a result, I do not consider the case to have precedential import on the issue.

own business; instead he said that he would speak to Cetta and "see if we can do something about that." Therefore, it was reasonable for Hajdini to believe that Kapovic was addressing him as a supervisor on behalf of Sparks, as well as a possible purchaser of the business. I therefore find that Sparks is bound by Kapovic's comments.

For all of the foregoing reasons, I find that Sparks violated Section 8(a)(1) when Kapovic unlawfully solicited of employees to abandon their support for the Union on December 6, 2014.

5. Remedial issues

Under current Board law, lawful economic strikers that have been unlawfully discharged are entitled to, "full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements, and mak[ing] them whole for any loss of earnings and other benefits." *Tri-State Wholesale Building Supplies*, 362 NLRB No. 85 at p. 1 (2015). However, remedies available to economic strikers are contingent upon whether the economic striker was permanently replaced before or after their unlawful discharge. *Detroit Newspapers*, 343 NLRB 1041-1042 (2004). If the strikers were permanently replaced after the unlawful discharge, they are "entitled to immediate reinstatement and backpay running from the date of the discharge (regardless of when, or if, [they] unconditionally offer[] to return to work)." *Detroit Newspapers*, 343

NLRB at 1041-1042, citing *Hormigonera del Toa, Inc.*, 311 NLRB 956, 957-958, fn. 3 (1993). If the strikers were lawfully permanently replaced prior to the discharge, they are entitled to reinstatement upon the departure of the employee that permanently replaced them, with backpay running from the date that the replacement employee leaves. *Detroit Newspapers*, 343 NLRB at 1041-1042.

Here, the economic strike began on December 10, 2014. The striking employees made an unconditional offer to return to work on December 19, 2014, and were subsequently discharged on December 22, 2014, in violation of Sections 8(a)(1) and (3) of the Act. However, in this case the remedial distinction articulated in Detroit Newspapers is irrelevant given my conclusion that Respondent has not satisfied its burden to prove that it had permanently replaced the economic strikers prior to the unconditional offer to return to work on December 19, 2014. As a result, the economic strikers were not permanently replaced prior to their discharge on December 22, 2014. The striking employees are therefore entitled to immediate reinstatement and backpay running from December 19, 2014, the date of their unconditional offer to return to work.

General Counsel asks me to review and overturn the "Board's current remedial rule" as applied to unlawfully discharged economic strikers, so that the available remedies are no longer contingent upon whether the economic strikers were permanently replaced prior to the date of their discharge. As discussed above, such a venture is unnecessary. In any event, as an Administrative Law Judge, I am bound to follow existing Board law which

has not been overruled by the Supreme Court. *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); see also *Gas Spring Co.*, 296 NLRB 84, 97-98 (1989), enfd. 908 F.2d 966 (4th Cir. 1990).

General Counsel also urges that I award search-for-work and work-related expenses to the economic strikers who were unlawfully discharged, regardless of the discharged strikers' interim earnings and separately from taxable net backpay, with interest. Such a component of the remedy is appropriate based upon the Board's recent ruling to that effect in *King Soopers, Inc.*, 364 NLRB No. 93 at p. 8-9 (2016) (providing for such a remedy, to be ordered on a retroactive basis). Backpay shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), being awarded on a quarterly basis with interest accruing as set forth in *New Horizons*, 283 NLRB 1173 (1987), and compounded in accordance with *Kentucky River Medical Center*, 356 NLRB 6 (2010). Interest on search-for-work and work-related expenses shall be calculated in the same manner. Respondent will also be required to absorb the adverse tax consequences, if any, of receiving a lump-sum backpay award covering periods longer than one year as set forth in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 361 NLRB No. 10 (2014), and to file a report with the Social Security Administration allocating the payments to the appropriate calendar quarters.

CONCLUSIONS OF LAW

1. Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant ("Respondent") is an employer engaged in

commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers ("the Union") is a Labor Organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to reinstate Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, 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 Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj since their unconditional offer to return to work on December 19, 2014, Respondent violated Sections 8(a)(1) and (3) of the Act.

4. By denying the employees listed above their right to be placed on a preferential hiring list since December 19, 2014, Respondent violated Sections 8(a)(1) and (3) of the Act.

5. By discharging the employees listed above on or about December 22, 2014, Respondent violated Sections 8(a)(1) and (3) of the Act.

6. By soliciting employees to withdraw their support for the Union, Respondent violated Section 8(a)(1) of the Act.

7. The above violations are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in an unfair labor practice, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to reinstate Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, 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 Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj, upon their unconditional offer to return to work, and that Respondent unlawfully discharged these employees, I shall order Respondent to offer them full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to

their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any replacements, and make them whole for any loss of earnings and other benefits. Backpay shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest accruing at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 361 NLRB No. 10 (2014), Respondent shall also compensate the unlawfully discharged employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee. Pursuant to *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall further compensate the employees named above for search-forwork and interim employment expenses, separately from taxable net backpay and regardless of whether they exceed the employees' interim earnings, with interest at the rate prescribed in *New Horizons*, compounded daily as prescribed in *Kentucky River Medical Center*, above.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[27]

27. If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

Appendix C

ORDER

Respondent Michael Cetta, Inc. d/b/a Sparks Restaurant, New York, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in an economic strike.

(b) Denying employees engaged in an economic strike their right to be placed on a preferential hiring list.

(c) Failing and refusing to reinstate employees engaged in an economic strike after their unconditional offer to return to work.

(d) Soliciting employees to withdraw their support for the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl

Kelmendi, Jeton Kerahoda, 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 Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and discharging if necessary any replacements.

(b) Make the above employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place

designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post, at its facility in New York, New York, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent at any time since December 19, 2014.

---

28. If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in an economic strike or other protected concerted activities.

Appendix C

WE WILL NOT deny you the right to be placed on a preferential hiring list when engaged in an economic strike.

WE WILL NOT unlawfully refuse to reinstate you if you are engaged in an economic strike and make an unconditional offer to return to work.

WE WILL NOT solicit you to withdraw your support for the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in your exercise of the rights listed above.

WE WILL within 14 days of the Board's Order, offer Gerardo Alarcon, Fredy Albarracin, Marko Beljan, James Campanella, Ian Collins, Elvis Cutra, Arlind Demaj, Kristofer Fuller, Adem Gjevukaj, Valjon Hajdini, Elvi Hoxhaj, Juan Iriarte, Ante Ivre, Amir Jakupi, Bardhyl Kelmendi, Jeton Kerahoda, 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 Semlalo El Idrissi, Fatlum Spahija, Andrzej Stepien, Alim Tagani, and Mergim Zeqiraj full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and discharging if necessary any replacements.

Appendix C

WE WILL make those employees whole for any loss of earnings and other benefits resulting from our failure to reinstate them after their unconditional offer to return to work and from their discharge, less any net earnings, plus interest.

WE WILL compensate those employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of those employees, and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MICHAEL CETTA, INC.
D/B/A SPARKS RESTAURANT

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-142626 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[SEE MATERIAL IN ORIGINAL SOURCE]

APPENDIX D — DENIAL OF PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED ON AUGUST 14, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1165

MICHAEL CETTA, INC.,
D/B/A SPARKS RESTAURANT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

September Term, 2018

NLRB-02CA142626,
NLRB-02CA144852

Filed On: August 14, 2019

Consolidated with 18-1171

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges

Appendix D

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/_____
Scott H. Atchue
Deputy Clerk

APPENDIX E — RELEVANT STATUTORY PROVISIONS

ADDENDUM

NLRA § 8, 29 U.S.C. § 158:

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

…

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such

agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership….

Appendix E

NLRA § 10, 29 U.S.C. § 160:

(a) Powers of Board generally.

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order,

and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its

judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court.

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Appendix E

Administrative Procedures Act, 5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393).

29 C.F.R. § 102.48(c):

Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

Appendix E

29 C.F.R. § 102.45(b):

Contents of record. The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.