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Issue Date: 13 March 2024

Case Nos.: 2021-TNE-00027
2021-TNE-00028

In the Matters of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR
Prosecuting Party,

v.

GOLDSTAR AMUSEMENTS, INC.

and

LEE'S CONCESSIONS, INC.
Respondents.

Appearances:

Kevin M. Wilemon, Senior Trial Attorney
Lydia J. Faklis, Trial Attorney
Rachel S. Murphy, Trial Attorney
Office of the Solicitor
U.S. Department of Labor
Chicago, Illinois
For the Administrator

R. Wayne Pierce, Esq.
Annapolis, Maryland
For Respondents

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER

These consolidated matters arise under the H-2B provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) et seq., and the implementing regulations. The Administrator of the Wage and Hour Division of the United States Department of Labor ("Administrator") alleges that Respondents GoldStar Amusements, Inc. and Lee's Concessions, Inc. violated the INA in 2016 and 2017. The Administrator seeks to recover back wages allegedly owed to dozens of H-2B employees who worked for Respondents in 2016 and 2017. In addition, the Administrator seeks to impose civil penalties on each of the Respondents.

Respondents deny the allegations.

Regulatory Requirements to Employ H-2B Workers.

The H-2B program permits employers to hire nonimmigrant workers to perform temporary nonagricultural work on a one-time, seasonal, peak load, or intermittent basis, all as defined by the Department of Homeland Security ("DHS"). DHS requires that employers petitioning for H-2B visas obtain a labor certification from the U.S. Department of Labor ("DOL") before applying for H-2B visas through DHS.[1] To obtain a labor certification, employers first obtain a prevailing wage determination for the job opportunity from DOL's Employment and Training Administration ("ETA") by submitting an Application for a Prevailing Wage Determination. Employers must offer and pay H-2B workers the highest of the determined prevailing wage or the applicable federal, state, or local minimum wage.[2]

After obtaining a prevailing wage determination, the employer must submit to the Department of Labor an Application for Temporary Employment Certification (ETA Form 9142B, referred to hereafter as a "TEC"). The TEC specifies the conditions of employment for the foreign workers, and requires, among other things, non-discriminatory hiring practices, prohibition against preferential treatment of foreign workers, rates of pay, abandonment/termination of employment, area of intended employment and job opportunity, transportation and visa fees, transportation from the place of employment, disclosure of job order, contracts with third parties, and retention of documents and records. The foregoing conditions become applicable upon the date that the employer's TEC is accepted.

Each of the TEC's submitted by the Respondents in this case[3] contain an Appendix B, captioned "Employer Declaration." For example, the "Employer Declaration" to GoldStar's 2016 TEC can be found in JX 5, beginning at page 11. Appendix B to GoldStar's 2016 TEC contains a list of 27 conditions which GoldStar committed to fulfill regarding GoldStar's employment of its H-2B workers during the 2016 season.

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[1] 8 C.F.R. § 214.2(h)(6)(iii)(A)
[2] 20 C.F.R. §655.20(a)(1).
[3] Joint Exhibit ("JX") 5 (GoldStar 2016), JX 6 (Lee's Concessions 2016), JX 7 (Lee's Concessions 2017) and Administrator's Exhibit ("AX") 5 (GoldStar 2017).

Respondents' signatures on these Attestations contains each Respondent's representation that the Attestations are accurate, and that the Respondent understands and accepts the obligations of the H-2B program.

At the top of the list of Attestations is the following language:

> By virtue of my signature below, **I HEREBY CERTIFY** my knowledge of and compliance with the following conditions of employment applicable to H-2B workers and/or U.S. workers in corresponding employment, as defined in 20 C.F.R. 655.5, including any approved extension thereof.[4]

At the end of the list of Attestations is the following language:

> **I** declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate.[5]

The 2016 and 2017 GoldStar TECs at issue in this case have each been signed by Michael Featherston.[6] The 2016 and 2017 Lee's Concessions TECs have been signed by Connie Featherston.[7]

The Violations Alleged by The Administrator

The Administrator began an investigation of GoldStar and Lee's Concessions in the summer of 2017.[8] Six investigators from the Wage and Hour Division made a site visit on August 2, 2017, during which the GoldStar and Lee's Concessions worksites were toured. Approximately one-half of the companies' H-2B workers were interviewed during this site visit.[9] Wage and Hour investigators also interviewed Melissa Erasmus, who handled payroll for the companies.[10]

At the conclusion of the Wage and Hour investigation, a Determination letter was sent to each of the Respondents.[11] Appended to each of the September 16, 2020, Determination letters is a "Summary of Violation and Remedies Chart." This chart contains the specific allegations being made by the Administrator against each of the Respondents. In summary, the September 16, 2020, Determination letters allege the following:

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[4] JX 5 at page 11. Emphasis in original.
[5] Id at page 13. Emphasis in original.
[6] JX 5 at page 13 and AX 5 at page 13.
[7] JX 6 at page 13, JX 7 at page 14.
[8] Tr. 587.
[9] Tr. 588.
[10] Tr. 588.
[11] The September 16, 2020, Determination letter issued to GoldStar is JX 14. The September 16, 2020, Determination letter issued to Lee's Concessions is JX 15.

1. Violation #1: That in the 2016 and 2017 seasons, each Respondent substantially failed to comply with the prohibition against preferential treatment of foreign workers in violation of Attestation #4 on Respondents' TECs.

2. Violation #2: That in the 2016 and 2017 seasons, each Respondent substantially failed to pay to their respective H-2B workers the wages listed on their respective I-129 Petitions in violation of Attestation #5 on Respondents' TECs.

3. Violation #3: That in the 2016 and 2017 seasons, each of the Respondents substantially failed to comply with their respective statements of temporary need in violation of Attestation #12 on Respondents' TECs.

4. Violation #4: That in the 2016 and 2017 seasons, each of the Respondents substantially failed to comply with the requirement to provide their workers with accurate earnings statements in violation of Attestation #17 on Respondents' TECs.

5. Violation #5: That in the 2016 and 2017 seasons, each of the Respondents substantially failed to pay the outbound travel costs of their H-2B workers in violation of Attestations #17 and #18 on Respondents' TECs.

6. Violation #6: That in the 2016 and 2017 seasons, each of the Respondents substantially failed to pay the inbound travel costs of their H-2B workers in violation of Attestations # 17 and #18 on Respondents' TECs.

Amendments of the Determination Letters

These cases were assigned to me on September 13, 2021. With my permission, the Determination letters were amended by the Administrator on two occasions. The first amended Determination letters are dated October 25, 2021, and are in the record as JX 12 (GoldStar) and JX 13 (Lee's Concessions). The Administrator said that it was amending the Determination letters for the following reasons:

> The amendments: (1) reduce back wages related to alleged violations of Respondents' attestations regarding overtime obligations under their respective 2017 Form 9142B Applications for Temporary Employment Certification (the 2017 "TECs"); (2) recalculate back wages owed under the GoldStar Amusement Inc.'s ("GoldStar's") 2017 TEC to include the period from August 8, 2017, through November 14, 2017; (3) recalculate back wages owed under Lee's Concessions, 2 Inc.'s ("Lee's Concessions'") 2017 TEC to include the period from August 8, 2017, through November 13, 2017; (4) recalculate back wages owed under Respondents' 2016 and 2017 TECs to conform to the Deputy Administrator's policy against providing credits for overpayments in some workweeks to cover underpayments in other workweeks; and (5) increase

> the civil money penalties ("CMPs") assessed against Respondents GoldStar and Lee's Concessions under their respective 2016 TECs due to the increase in back wages associated with removing credits.[12]

The second amended Determinations are dated October 19, 2022, and are in the record as AX 14 (GoldStar) and AX 15 (Lee's Concessions). The Administrator said that it was amending the Determination letters for the following reasons:

> The amendments: (1) recalculate back wages owed by GoldStar Amusements, Inc. ("GoldStar") to 5 workers under its 2016 and 2017 Form 9142B Applications for Temporary Employment Certification ("TECs") to correct Excel spreadsheet computational errors; (2) remove Missouri state overtime premiums from the back wages owed by GoldStar and Lee's Concessions, Inc. ("Lee's Concessions") 2 under their 2017 TECs; (3) reduce back wages owed under GoldStar's 2016 TEC, and Lee's Concessions' 2017 TEC to correct for instances where 9 workers were erroneously double counted as working for both GoldStar and Lee's Concessions; and (4) reduce civil money penalties ("CMPs") assessed against GoldStar under its 2016 TEC, and Lee's Concessions under its 2017 TEC corresponding to the reduction in back wages associated with correcting the double counting of 9 workers.[13]

Neither the first Amended Determination nor the Second Amended Determination changed the substantive allegations being made by the Administrator. In the Second Amended Determinations, the Administrator alleges that GoldStar owes $98,254.57 in back wages and $67,665.00 in Civil Monetary Penalties ("CMP"). The Administrator alleges that Lee's Concessions owes $47,988.78 in back wages and $64,467.10 in CMPs. The hearing was held on the allegations contained in the Second Amended Determination letters. Each of the Respondents has denied the allegations made in each of the Determinations.

The Admissibility of Respondents' 2018 Wage and Hour Data

An evidentiary issue arose before the hearing commenced. The resolution of this issue plays an important part of the calculation of back wages owed to the Respondent's H-2B workers.

In this case, the Administrator's claims concern the wages paid to Respondents' H-2B employees in 2016 and 2017. However, the Administrator's proposed trial exhibits

[12] Administrator's September 30, 2021, Motion for Leave to Amend at pages 1-2.
[13] Administrator's October 11, 2022, Motion for Leave to Amend at pages 1-2

included wage and hour information from 2018. Respondents filed a Motion asking that I exclude, as irrelevant, the 2018 wage and hour data.

On January 17, 2023, I conducted a hearing on Respondents' Motion to exclude the 2018 wage and hour data. During the hearing, I said the following about the potential use of the 2018 wage and hour data:

> Respondent has filed Respondents' motions in limine 1 through 19, and these motions in limine generally are dealing with whether evidence of time records and payroll records maintained by Respondents in 2018 may be admissible as a proxy for the actual time and attendance allegedly worked by the H-2B workers in 2016 and 2017. At this point, I can't rule on the Respondents' motions in limine 1 through 19, and I want to -- this is, I think, an important point. It seems important to the overall cases of the parties, so I want to make sure that I give you an explanation to why I can't rule on the motions in limine 1 through 19 which have been filed by Respondents.
>
> In order for me to even think about the 2018 wage and hour data, which is, you know, the allegations in the case in the second amended determination letters deal with the treatment of H-2B workers during the 2016 and 2017 seasons. 2018 is not included in that group. In order for me to hear testimony about 2018 wage and hour data, I would first need to be convinced that there is such [inaccuracy] of the 2016 and 2017 data that it would be appropriate for me to look at other information to make a determination about hours worked and wages earned by the H-2B workers in 2016 and 2017. I'm not there yet.
>
> I've been pointed to deposition testimony -- I'm trying to give you the page cite -- it's Mr. Featherston's deposition, where Mr. Featherston is being asked about the use of a time recording device in 2018 and whether Mr. Featherston believes that the 2018 data would serve as a valid proxy for 2017 and 2018. Mr. Featherston's testimony is vague, to say the least. That's the only cite that the Administrator has provided me in support of the Administrator's claim that I should look at the 2018 wage and hour data of the H-2B employees.
>
> I'm not saying it can't be proven. I'm just saying it hasn't been proven yet. And until such time as I think the Administrator has come forward with sufficient evidence to call into question whether I should be relying on the 2016 and 2017 wage and hour data, and until such time as the Administrator

> comes forward with evidence showing me that the 2018 data is more reliable and should be used as a proxy for 2016 and 2017, I'm not going to do it.
>
> I've read the Supreme Court decision in Anderson v. Mt. [Clemens] Pottery, 328 U.S. 680, a 1946 case. I appreciate the point that's being made there, which is that if I -- because an employer has superior knowledge of the wages and hours worked by employees, that the employer's records are very often the most valuable source of information, but that in cases where the employer's records are demonstrated to not be accurate, and if the employer cannot come forward with evidence to show the accuracy of the wage and hour records, then a plaintiff, or in this case the H-2B employees, in a sense represented by the Administrator, can use whatever valid method may allow them to approximate wages and hours. And I appreciate the mechanics of how that's done. What I'm saying is that I am not now at the point where I'm willing to say that I'm going to look at the 2018 data because I'm not at the point where I feel comfortable saying that the 2016 and 2017 wage and hour data is so inaccurate that I shouldn't rely on it.
>
> So I'm not in a position to rule on the Respondents' motions in limine which are all tied to that issue of using the 2018 wage data. The Administrator will ultimately have the burden of proof to prove by a preponderance of evidence that the allegation it has made in this case, that Respondents failed to maintain adequate earnings statements in 2016 and 2017 to Respondents' H-2B employees is something that's been proven by a preponderance of the evidence. The Administrator would then also bear the burden to prove by a preponderance of the evidence the amount of any unpaid wages that are due to be paid to Respondents for the 2016 and 2017 seasons. If we get to that point where I'm satisfied that 2018 data can be used as a proxy for 2016 and 2017, I will let the parties know that I feel a sufficient production of that evidence has been made to allow the evidence into the record.[14]

I issued an Order formalizing what I had said at the hearing:

> For the reasons stated during the January 17, 2023, hearing, I am not now able to make rulings on Respondents' Motions in Limine 1 through 19. As explained during the hearing, I will exclude as irrelevant any evidence of Respondent's time and pay records for its H-2B workers for the

[14] Transcript of January 17, 2023, hearing at pages 42-42.

> 2018 season unless the Administrator first comes forward with evidence (1) showing that Respondents' time and pay records for the 2016 and/or 2017 seasons are not accurate, (2) that Respondents have no time records for 2016 and/or 2017 that are more accurate than those that have been produced, and (3) Respondents' 2018 time and pay records provide a reasonably accurate approximation of the hours worked and wages paid to Respondents' H-2B workers in 2016 and/or 2017. The Administrator's burden is initially one of production – I must be provided with some evidence satisfying points 1, 2 and 3 before I will allow evidence about Respondent's 2018 time and pay records. I am not satisfied that the Administrator has yet come forward with sufficient evidence as to points 1, 2 or 3.
>
> The Administrator ultimately bears the burden to prove by a preponderance of evidence that Respondents did not keep adequate time records for their H-2B workers during 2016 and/or 2017, and that a reasonable approximation of the back wages owed to the H-2B workers for 2016 and/or 2017 can be proven by a preponderance of evidence by reference to the 2018 time and pay data.[15]

During the hearing, the Administrator introduced testimonial evidence that Respondents' 2016 and 2017 wage and hour data was inaccurate, and that the 2018 wage and hour documents maintained by Respondents would provide a good measure of the 2016 and 2017 wage and hour data.[16]

After hearing this testimony, I revisited the issue about the admissibility of the 2018 wage and hour data during the hearing:

> I now find that the Administrator came forward with evidence tending to show that the Respondents' time and pay records for 2016 and 2017 are not accurate, and that the Administrator has come forward with evidence showing that there are no additional time records for 2016 and/or 2017 that are more accurate than those in the record. And three, that the Administrator has come forward with evidence showing that Respondents' 2018 time and pay records may provide a reasonably accurate approximation of hours worked and wages paid to Respondents' H-2B workers in 2016 and/or 2017.[17]

I have admitted the 2018 wage and hour information into the record.

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[15] Order of January 17, 2023, at page 2.
[16] *See e.g.* Tr. at pages 567, 591-2, 623 and 729.
[17] Tr. 1453.

The Imposition of Civil Monetary Penalties

The Administrator argues that the imposition of civil monetary penalties is appropriate in this case. The Regulations, at 29 CFR § 503.23,[18] define the circumstances under which I may impose civil penalties:

> Civil money penalty assessment.
>
> (a) A civil money penalty may be assessed by the Administrator, WHD for each violation that meets the standards described in § 503.19. Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the *H–2B Registration, Application for Prevailing Wage Determination, Application for Temporary Employment Certification, or H–2B Petition,* constitutes a separate violation. Civil money penalty amounts for such violations are determined as set forth in paragraphs (b) to (e) of this section.
>
> (b) Upon determining that an employer has violated any provisions of § 503.16 related to wages, impermissible deductions or prohibited fees and expenses, the Administrator, WHD, may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s), not to exceed $15,445 per violation.
>
> (c) Upon determining that an employer has terminated by layoff or otherwise or has refused to employ any worker in violation of § 503.16(r), (t), or (v), within the periods described in those sections, the Administrator, WHD may assess civil money penalties that are equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed $15.445 per violation. No civil money penalty will be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.
>
> (d) The Administrator, WHD, may assess civil money penalties in an amount not to exceed $15,445 per

[18] The Regulation quoted here is the version of the Regulation which became effective on January 15, 2024. 89 Fed. Reg. 1810. The Regulation was amended on January 11, 2024, in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990. In its Post-Hearing Brief, the Administrator says that in calculating CMPs not based on back wages, the Administrator used "the 2018 CMP maximum to account for some of the delays with the investigation and the original determination letter that was sent in 2020." For violations involving back wages, the Administrator used the $12,383 cap from 2018, 83 Fed. Reg. 7 (January 2, 2018). Administrator's Post-Hearing Brief at 45.

violation for any other violation that meets the standards described in § 503.19.

(e) In determining the amount of the civil money penalty to be assessed under paragraph (d) of this section, the Administrator, WHD will consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties will be reserved for willful failures to meet any of the conditions of the *Application for Temporary Employment Certification and H–2B Petition* that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, or the regulations in this part;

(2) The number of H–2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1184(c), 20 CFR part 655, subpart A, and the regulations in this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

The Administrator may assess a civil money penalty for each violation of the work contract or regulations. 8 U.S.C.A. §§ 1184(c)(14)(A)(i); 20 C.F.R. § 655.65(a)-(c). In determining the penalty, the Administrator "shall consider the type of violation committed and other relevant factors." 20 C.F.R. § 655.65(g). "[T]he highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers." 8 U.S.C.A. § 1184(c)(14)(C); 20 C.F.R. § 655.65(g).

After the Administrator assesses civil money penalties, a party may seek an ALJ's review of the assessment. 20 C.F.R. § 655.71(a). The ALJ "may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator," with the "reason or reasons for such order" to be stated in the decision. *Id.* § 655.75(b).

I may review the civil penalty factors de novo,[19] and I may reduce civil penalties assessed by the Administrator in a Determination letter.[20]

The Hearing

Before scheduling the hearing, I was asked to resolve several discovery matters. The Administrator took an interlocutory appeal to the Administrative Review Board from one of my discovery rulings.[21] The ARB denied the interlocutory appeal.

The Administrator and each of the Respondents filed cross Motions for Summary Decision, and I denied those Motions.

The hearing was conducted by video conference. The hearing began on January 23, 2023. I heard the testimony of several of the H-2B workers employed by Respondents in 2016 and 2017. On the second day of the hearing, Melissa Erasmus was called as a witness by the Administrator. Ms. Erasmus was an employee of Respondents who, among other things, was responsible for recording her estimate of the number of hours worked by Respondents' H-2B workers in 2016 and 2017. During her testimony, Ms. Erasmus revealed that Respondents had not produced in discovery a series of documents showing the number of hours worked by Respondents' H-2B workers in 2016 and 2017. The Administrator immediately moved for the imposition of severe sanctions. I paused the hearing so the Administrator's Motion for Sanctions could be briefed and considered. I granted in part and denied in part the Administrator's Motion for Sanctions, and I ordered the hearing to be resumed.

The hearing resumed on July 5, 2023, and I heard testimony through July 11, 2023. On July 11, 2023, I issued an Order describing the exhibits that I had admitted into the record and establishing a schedule for the submission of post-hearing briefs.[22] On November 20, 2023, I asked the parties to submit additional post-hearing briefs discussing how the Administrator had calculated the back wages allegedly owed to the H-2B workers employed by Respondents in 2016 and 2017. The Administrator filed a brief on December 21, 2023. Respondents did not file a brief. On January 22, 2024, I issued an Order closing the record.

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[19] *Administrator v. John Peroulis*, ARB Cases 14-076 and 14-077, ALJ Case No. 2012-TAE-004 (ARB, September 12, 2016), 2016 DOL Ad, Rev. Bd. LEXIS 50 at page *4.

[20] *Id*. at page *7.

[21] ARB Case No. 2022-0027, decided September 30, 2022.

[22] I allowed counsel significant time to submit their post-hearing briefs so they could have access to the transcript of the hearing before filing their briefs. The final volumes of the transcript were filed on August 28, 2023.

The Regulations require me to issue a written decision which "will include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision will also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD. The reason or reasons for such order will be stated in the decision."[23]

Relevant Factual Background

Respondent GoldStar Amusements, Inc. ("GoldStar") is an outdoor amusement company which provides Ferris wheel and other rides at carnivals and fairs.[24] GoldStar is 100% owned by Michael Featherston,[25] and has its principal offices in Fairbault, Minnesota. Michael Featherston has worked in the carnival industry for more than 40 years.[26]

Respondent Lee's Concessions, Inc. ("Lee's Concessions") provides food and games at carnivals and fairs.[27] Lee's Concessions is 100% owned by Connie Featherston,[28] and also has its principal offices in Minnesota. Connie Featherston's parents and grandparents were involved in the outdoor amusement industry as early as the 1940's, and Connie Featherston has worked in the carnival industry for her entire adult life. Michael Featherston and Connie Featherston are husband and wife.[29] Michael and Connie Featherston have three adult children (Melissa Erasmus, Jessica Bessette and Michael Featherston Jr.)[30] who were all involved in the operations of GoldStar and Lee's Concessions during 2016 and 2017 – the years in which the violations of the INA are alleged to have occurred.

The operations of GoldStar and Lee's Concessions are seasonal. Administrator's Exhibit ("AX") 36 is a schedule of the "shows" which were "played" by GoldStar and Lee's Concessions in 2017. GoldStar and Lee's Concessions frequently (but not always) are present at the same shows during the season.[31] The 2017 season began in February in Texas. The companies then moved north with warming weather, playing a number of shows in Minnesota during the summer. The companies then retreated to Louisiana with the approach of Fall. The 2017 season ended in early November 2017. The 2016 season is essentially the same as the 2017 season.

The seasons were slow in the Spring and became busier as the weather warmed. The peak attendance at shows played by Respondents occurred after the Fourth of July

[23] 29 C.F.R. § 503.50(b).
[24] Transcript of Hearing ("Tr.") at 17. *See* Fairs & Festivals - GoldStar Amusement (last visited March 12, 2024).
[25] Id.
[26] Id. at 18.
[27] Id.
[28] Id.
[29] Id.
[30] Id. at 19
[31] Some shows do not serve food, and Lee's Concessions may thus not have a presence at such a show.

and lasted until approximately Labor Day. The hours of operation of the "shows" is highly variable:

> Q: Do you typically have an explanation to recruits as to the variability of a workweek in the mobile carnival segment?
>
> A. Well, the hours are extreme in peak season. So typically it depends on the client as well. Some of our clients have got peak seasons in odd times, but typically your first four months, let's say you going in February. This one four months, February to June is going to be average hours. So you probably only going to work Friday, Saturday, Sunday evenings. So it's afternoons or Thursday, Friday, Saturday, Sunday afternoons and evenings. You tear down on a Sunday, move to the new location on Monday. You usually have the Tuesday off then, and then they start setting up on Wednesday, and then they open on Thursday. Once you hit peak season, those hours go up extensively because then you're opening up in the week. So you're opening up like on a Tuesday or Wednesday instead of Thursday and you're opening earlier in the day. So that is for June -- well, July -- say from the 4th of July, you're getting really busy. So July, August, September, those three months.[32]

GoldStar and Lee's Concessions employed large numbers of H-2B workers.[33] In 2016, GoldStar employed 29 H-2B workers.[34] In that same year, Lee's Concessions employed 34 H-2B workers.[35] In 2017, GoldStar employed 38 H-2B workers[36], while Lee's Concessions employed 35 H-2B workers.[37] The H-2B workers employed by Respondents in 2016 and 2017 were recruited from the Republic of South Africa.

In 2016 and 2017, Respondents used a timekeeping convention Respondents refer to as "gang time." In their Post-Hearing Brief, Respondents define "gang time" to mean "that the entire crew starts and ends at the same time, and it works the same amount."[38]

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[32] Tr 917,

[33] An H-2B employee is an individual "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country…." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The H-2B program permits employers to hire such nonimmigrant workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peak load, or intermittent basis, as defined by the Department of Homeland Security ("DHS"). 8 C.F.R. § 214.2(h)(6)(ii)(B).

[34] JX 21.

[35] JX 19.

[36] JX 22.

[37] JX 20.

[38] Respondents' Post-Hearing Brief at 52.

The “gang time” convention used by Respondents in 2016 and 2017 was not intended to, nor did it, accurately track hours worked on a daily basis by individual employees. Not all employees worked the same number of hours as their co-workers in a given week. Employee Robyn Maasburg prepared and served food, such as lemonade, funnel cakes and ice cream. She testified that the food workers worked longer hours than their co-workers:

> Q. Did the fairs always have specific times that they would close?
>
> A. There was, but there was times that sometimes it would go on a little bit later if it's busy. They don't want to -- obviously you want to make as much money as possible. But there was times that the wagons had to stay open even though the show was closed. If we have lines, we still have to stay open and sell products until we were basically like sold out of what we had up.[39]

Ms. Maasburg also testified that the food wagons would occasionally serve customers before the fair would officially open for the day.[40] She testified that the food workers typically worked more hours than other workers.[41] She estimated that the food workers stayed later than other workers about 50% of the workdays.[42] She also testified that on certain days, ride workers would work two to three hours longer than other employees.[43]

Respondents’ H-2B Employees do not believe they were paid for all the hours they worked, and Respondents acknowledge that such underpayments occurred. These hours were missed because Respondents did not employ any system designed to accurately record the time worked by individual employees. Melissa Erasmus testified:

> Q. In 2016, what do you mean by the phrase ‘straight gang time’?
>
> A. Where I don't believe there was any difference between each employee week to week between them. I think it was, you know, we consulted with each other and figured out what everybody did and if it was 49 or 50 hours, then all employees got wrote down for that amount in 2016. **Like if a guy went in a couple hours early, we might've missed that. We didn’t really pay attention to all those little things.**[44]

[39] Tr. 123.
[40] Tr. 124.
[41] Tr. 128.
[42] Tr. 129.
[43] Tr. 137-8.
[44] Tr. 462-3. Emphasis added.

Sometimes the “little things” overlooked by the “gang time” construct meant that hours worked weren’t recorded by Respondents’ timekeepers. Kyle Wait, a former employee, submitted a declaration in which he testified “I was not paid for all my hours worked in 2016 and 2017.”[45] Dieter Christopher Eitz submitted a declaration stating: “I was not paid for all my hours worked in 2016 and 2017.”[46] Donovan Leach testified similarly.[47]

Robyn Maasburg testified:

> Q. Okay. So going back to 2016 and 2017, did the pay that you received during those two years, did they match your expectations?
>
> A. Oh, no.
>
> Q. Why not?
>
> A. Because we were working long hours. I mean, it was days that we didn't -- we worked seven days a week. It was times that we never got off. So we were working like crazy and, yeah, I'm only getting $350, where I was under the impression that I was getting paid per hour and it was a lot different. But like it's easy to sit back and complain, but it's a lot more than what I would have been earning here in South Africa. So that's why we just did. We sucked it up and we did it because it was a lot more money than what we would get here.[48]

Marcus Dennett worked as a ride operator for GoldStar in 2016 and 2017. In 2016, he occasionally drove a passenger van for GoldStar.[49] In 2017, he began regularly driving a truck that pulled the bunkhouses.[50] Dennett was not paid on a weekly basis for the hours he spent doing this driving:

> Q. Okay. And when you -- and you said in 2017, when you started pulling bunkhouses, were your hours tracked when you drove?
>
> A. No.
>
> Q. Were you paid extra for driving?

[45] AX 21 at paragraph 21.
[46] AX 20 at paragraph 21.
[47] AX 22 at paragraph 20.
[48] Tr. 153.
[49] Tr. 179.
[50] Tr. 179.

A. We were paid at the end of the year. They would have like a driving bonus you would get.

Q. Okay. So you didn't receive anything extra weekly while you were actually driving?
A. No.

Q. And your pay wasn't based on how many trips you did or how many hours you drove? It was just based on the weekly pay?

A. On the weekly, yeah.[51]

Respondents argue that they maintained "accurate" and "reliable" records of the hours worked by the H-2B workers.[52] Respondents argue that the records were accurate because the time entered for the employees was based upon the "personal observations" of the "timekeepers," Melissa Erasmus and Jessica Bessette.

Respondents say that all employees were paid for all hours worked.

I disagree with Respondents. The "gang time" convention did not accurately capture the number of hours worked by Respondents' individual H-2B employees during the 2016 and 2017 seasons. Without accurate records of the hours worked by their employees, it was not possible for Respondents to have accurately paid their employees on an hourly basis.

Violation #1 – Preferential Treatment of Foreign Workers

The Administrator alleges that in the 2016 and 2017 seasons, each Respondent substantially failed to comply with the prohibition against preferential treatment of foreign workers in violation of Attestation #4 on Respondents' TECs. Specifically, the Administrator charges that Respondents failed to notify potential U.S. workers that some of those hired by Respondents might make more money than disclosed in the job advertisements by driving Respondents' trucks. The Administrator also alleges that Respondents showed preferential treatment to some H-2B workers by allowing those workers to arrive at Respondents' work sites later in the summer when wages were higher.

The Administrator bears the burden to prove these allegations by a preponderance of evidence.

It is a fundamental requirement of the H-2B program that U.S. workers may not be discriminated against. Respondents had no right to hire H-2B workers in 2016 and 2017 without first demonstrating that there were not U.S. workers available to perform the job. The regulations provide:

[51] Tr. 185.
[52] Respondents' Post-Hearing Brief at pages 52-54.

> [A]n employer's petition to employ H–2B nonimmigrant workers for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor (Secretary).
>
> > (a) ***Purpose.*** The temporary labor certification reflects a determination by the Secretary that:
> >
> > (1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that
> >
> > (2) The employment of the H–2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.[53]

In order to determine whether there are U.S. workers interested in the employment opportunity, employers are required to advertise the job availability, providing:

> A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity.[54]

An employer of H-2B workers must certify compliance with these requirements not to discriminate against U.S. workers. Attestation #4 states:

> The employer has not/will not offer terms, wages, and working conditions to U.S. workers that are less favorable than those offered or will be offered to H-2B workers or impose restrictions or obligations on U.S. workers that are not imposed on H-2B workers. This does not relieve the employer from providing H-2B workers with at least the minimum benefits, wages, and working conditions that must be offered to U.S. workers under 20 CFR 655.18, except for those required by 20 CFR 655.18(b)(17).[55]

A. Alleged Preferential Treatment for Earning Extra Wages for Driving Trucks

[53] 20 C.F.R. § 655.1.
[54] 20 C.F.R. § 655.41(b)(3).
[55] See AX 5 at page 12.

In 2016 and 2017, Respondents sought to hire H-2B workers to fill one job title: Traveling Carnival Attendant. There was not a separate job classification for those who drove Respondent's trucks. It seems that those who drove Respondents' trucks did so only occasionally, and that these workers also performed all the other duties of a Traveling Carnival Attendant.[56]

I am not able to specifically identify the number of trucks operated by Respondents in 2016 and 2017. The amusement rides, food stands, game stands and bunkhouses all needed to be moved by truck.[57] There were a "handful"[58] of passenger vans which were used to transport employees.[59] There was a pickup truck used to pull the bunkhouse trailer.[60] There was a food truck.[61] There were two trucks that moved rides, tents and games.[62] There was a "cargo truck," also referred to as a "material transport truck."[63] This totals 8 trucks. There is no evidence that Respondents used more employees to drive than the total number of trucks in Respondents' fleet.

Neither the recruitment newspaper advertisements placed by Respondents[64] nor the Job Orders[65] mention that the Traveling Carnival Attendant jobs might allow one to earn extra money by driving one of Respondents' trucks. The record is clear that a few of the H-2B Traveling Carnival Attendants did wind up earning additional wages by driving trucks for Respondents.

Michael Featherston testified:

> Q. What about extra pay for driving? Is that a material term or condition of employment at Lee's and GoldStar?
> A. Yes, that's a benefit, and when they -- when the employees come, we didn't -- originally we didn't know that they could drive. And then later on, we found out they could get U.S. driver's licenses and they were able to drive, and then we were able to reward them with their -- what did you say? Material --
> Q. Terms. Material terms.
> A. Yes.
> Q. Well, what year did H-2B workers actually start driving for you?
> A. That I don't know exactly, but approximately 2015 or '14.
> Q. Okay. It was before 2016, right?

[56] For example, Marcus Dennett occasionally drove trucks for Respondents in 2016 and 2017, but his primary job was as a ride operator. Tr. 179.
[57] Tr. 1177.
[58] Tr. 548.
[59] Tr. 362, 548.
[60] Tr. 362.
[61] Tr. 321.
[62] Tr. 368.
[63] Tr. 816.
[64] JX 1, 2, 3 and 4.
[65] AX 1 through 4.

A. Yes, I --
Q. 2016 was not the first year that they drove?
A. Correct. They had to get here and they had to go and qualify to get the license.
Q. And when H-2B workers did that prior to 2016, they got paid more for it, right?
A. Yes.
Q. They could earn $20 to $50 up to an extra $100 per week, correct?
A. Yes.
Q. And U.S. workers could also earn that for driving?
A. They could, yes.
Q. And you said that -- did you recruit U.S. workers throughout the season?
A. Always.
Q. When you were recruiting potential U.S. workers, you told them about the potential extra pay for driving in 2016 and 2017, right?
A. U.S. workers?
Q. Yes.
A. Yes, we'd ask them if they had a driver's license, yes.

Q. And you told them if you drive, you make more money, right?
A. Yes.
Q. And it made them easier to recruit when you told them that, right?
A. Sometimes, yeah.
Q. Would you say that extra money for driving was an additional benefit that would make the job more attractive?
A. Extra money, yes.[66]

Respondents employed a substantial number of U.S. workers in addition to the H-2B workers.[67] Michael Featherston testified that U.S. workers might be assigned to drive Respondent's trucks if those U.S. workers had a commercial driver's license ("CDL").[68] Others testified that both U.S. and H-2B workers drove Respondents' trucks.[69]

Joint Exhibit 18 shows that 18 employees of both companies had CDLs in the 2016 season. Seven of those holding CDL's were H-2B workers. The other 11 CDLs were held

[66] Tr. 61-3.
[67] Compare JX 18 (Respondents' roster of employees for 2016) with JX 19 (a list of Lee's Concessions' H-2B employees for 2016) and JX 21 (a list of GoldStar's H-2B employees for 2016). Those persons listed on JX 18 who are not also listed on either JX 19 or JX 21 are U.S. workers.
[68] Tr. 62-3.
[69] Tr. 553.

by Respondents' U.S. workers.[70] In 2016, then, more than 60% of the employees of Respondents who held commercial driver's licenses were U.S. workers. This undermines the Administrator's argument that H-2B workers were offered driving opportunities to the disadvantage of U.S. workers. There is no evidence suggesting that Respondents steered the truck driving opportunities toward their H-2B workers and away from the U.S workers as part of a deliberate effort to discriminate against the U.S. workers.

The specific allegation made by the Administrator is that Respondents "failed to comply with the prohibition against preferential treatment. Specifically, [Respondents] offered more favorable terms, including more working hours and additional pay options for driving and other types of work activities that were not offered to U.S. workers."[71] In defining this alleged violation, the Administrator references Attestation #4 of the TEC. The requirement of Attestation #4 at issue is this:

> The employer has not/will not offer terms, wages, and working conditions to U.S. workers that are less favorable than those offered or will be offered to H-2B workers or impose restrictions or obligations on U.S. workers that are not imposed on H-2B workers.

Attestation #4 does not define the point in time at which the "offer" of the wages or terms of employment is made. Michael Featherson testified that U.S. workers received the same opportunity as H-2B workers to earn extra money by driving Respondents' trucks.[72] It seems those offers of driving opportunities were not made (either to U.S. or H-2B workers) until after the person (either U.S. or H-2B) had already been hired by Respondents.

Marcus Dennett was an H-2B worker in both the 2016 and 2017 seasons. Dennett maintained the amusement rides by "assisting with getting generators and rides on location, getting electrical boxes on location, cables pulled to the boxes to get the rides started up, and then basically assembling the ride until its complete, doing maintenance on the rides and operating."[73]

Dennett testified that in 2016 he drove a passenger van "once or twice."[74] Dennett testified that driving was not "a regular activity" for him in 2016.

---

[70] To perform this calculation, I have compared JX 18 (the list of Respondents' employees with commercial driver's licenses in 2016) with JX 19 (a list of Lee's Concessions' H-2B employees for 2016) and JX 21 (a list of GoldStar's H-2B employees for 2016).
[71] Summary of Violations and Remedies Chart, attached to the Determination letters issued to each Respondent.
[72] Tr. 62.
[73] Tr. 178.
[74] Tr. 179.

In 2017, Dennett testified that he began "pulling bunkhouses."[75] It appears this involved driving a pickup truck with the bunkhouse trailing behind.[76] It does not appear Mr. Dennett was formally appointed as a driver by anyone in Respondent's management ("nobody from the company actually talked to you about how you'd be paid for driving").[77] Respondents did not keep track of the hours spent by Dennett on his driving duties,[78] and Dennett received no additional weekly wage for "pulling bunkhouses" ("so you didn't receive anything extra weekly while you were actually driving").[79] Dennett said he was told that he would receive a "bonus" at the end of the year to compensate him for his driving.[80]

Claudia Rhoode was an H-2B worker who worked for Respondents in 2016 and 2017.[81] She was a concession stand operator[82] who occasionally drove a truck. She drove a van to transport co-workers[83] and also drove a pickup truck which pulled the bunkhouses.[84] No record was kept of the number of hours Ms. Rhoode spent driving a truck.[85] She was not paid hourly for her driving.[86] She testified that she received a bonus at the end of the season for her driving.[87]

JX 28 is an employee-by-employee summary of wages paid to Respondent's workforce in 2017. Page 45 of the Exhibit is the page which summarized Marcus Dennett's pay for calendar year 2017, the year in which he was regularly driving Respondents' trucks. As Dennett testified, his weekly wages do not seem to be higher than those of any other employees who were not driving trucks. I see no indication on page 45 of RX 28 that Dennett explicitly received anything called a year-end "bonus" to compensate him for his driving.

Page 1 of JX 28 is the page which summarizes Ms. Rhoode's pay for the 2017 season, the year in which she was regularly driving Respondents' trucks. Her weekly wages do not seem to be higher than those of any other employees who were not driving trucks. I see no indication on page 1 of RX 28 that Ms. Rhoode explicitly received anything called a year-end "bonus" to compensate her for her driving.

The Administrator alleges that those persons who drove Respondent's trucks made as much as $100 per week in extra compensation. Leo Kerwan testified that he made "$100 every week if I drove or not." [88] Mr. Dennett's payroll records do not substantiate that allegation. The payroll records show that in 2017 Mr. Dennett had the same weekly

[75] Tr. 179.
[76] Tr. 186.
[77] Tr. 186.
[78] Tr. 187.
[79] Tr. 185.
[80] Tr. 185.
[81] Tr. 360.
[82] Tr. 361.
[83] Tr. 362.
[84] Tr. 362.
[85] Tr. 363.
[86] Tr. 363.
[87] Tr. 363.
[88] Tr. 1005.

wage as his non-driving co-workers. Ms. Rhoode's payroll records do not substantiate that allegation. The payroll records show that in 2017 Ms. Rhoode had the same weekly wage as her non-driving co-workers.

I do not believe the Administrator has proven by a preponderance of the evidence that there actually were any U.S. workers who did not pursue the Traveling Carnival Attendant job because he thought there was no opportunity to drive one of Respondents' trucks, or because he otherwise could see no way to make more than minimum wage in the job. I do not believe it is appropriate for me to assume or infer that these facts have been proven. Commercial truck drivers typically make more than minimum wage, and I don't think it is probable that a U.S. worker with a commercial driver's license would be interested in the minimum-wage-paying Traveling Carnival Attendant job.

B. Alleged Preferential Treatment for Beginning Work Later in the Season

The Administrator alleges that a few H-2B workers had a "special arrangement" where those few H-2B workers "arrived during peak fair season, and opportunity not afforded to U.S. workers **or other H-2B workers**."[89]

***First*,** whether Respondents treated some of their H-2B workers differently than Respondents treated some of their other H-2B workers is not the violation that has been charged in the "Summary of Violations and Remedies Chart" attached to the Second Amended Determination letter.[90]

***Second*,** The Administrator cites no provision of the H-2B regulations which prohibits an employer from treating some H-2B employees in a different manner than that employer treats other H-2B employees. I find nothing which suggests any such disparate treatment is a matter for my consideration in this case.

***Third*,** the alleged "special arrangement" which allowed several H-2B workers to arrive later in the season meant that those H-2B workers earned *less*, not *more*, in wages paid by Respondents than other workers who began working when Respondents' season began in the late winter. The Administrator identifies two employees who were the beneficiaries of the alleged "special arrangement.:" Simone and Aloyseus "Leo" Kerwan.[91] According to JX 29 at page 8, in 2017, Simone Kerwan began working for Respondents in early July. Leo Kerwan began working for Respondents that same week.[92] Neither of the Kerwans received any pay from Respondents from February 2017 (when Respondents

[89] Administrator's Post-Hearing Brief at page 8. Emphasis added.
[90] The charging document alleges: "Specifically, [Respondents] offered more favorable terms, including more working hours and additional pay options for driving and other types of work activities to the H-2B workers that were not offered to U.S. workers." Summary of Violations and Remedies Chart (attached to Administrator's Second Amended Determination at numbered page 7).
[91] Administrator's Post-Hearing Brief at page 8.
[92] JX 28 at page 7. Tr. 996.

began their business operations for the season) until they showed up for work in July.[93] The alleged "special arrangement" meant that the Kerwans did not receive paychecks from Respondents for 5 months, while many other employees of Respondents (presumably including and US workers who were hired in response to Respondents' advertisements run in the United States) were getting paid every week. I do not see how the Kerwans' "special arrangement" benefitted the Kerwans or disadvantaged any U.S. employees.

As to Violation #1, I make the following Findings of Fact:

1. Respondents each recruited and hired H-2B workers for the 2016 and 2017 season to fill one job description: Traveling Carnival Attendant.

2. In 2016 and 2017, Respondents assigned truck driving duties to those who were already working for one of Respondents.

3. Only about 10% of Respondents' H-2B workers (7 out of 63) held CDLs during the 2016 season. I do not have a list of Respondents' H-2B employees who held CDLs for the 2017 season, but I am unaware of any factors that would have made the distribution of CDLs across Respondents' workforces materially different in 2017.

4. Sixty-one percent of the CDLs held by Respondents' total workforce were held by U.S. workers in 2016. I do not have a list of Respondents' H-2B employees who held CDLs for the 2017 season, but I am unaware of any factors that would have made the distribution of CDLs across Respondents' workforces materially different in 2017.
.

5. In 2016 and 2017, the evidence suggests that Respondents collectively had approximately 10 vehicles in their combined fleet.

6. The record does not reveal what percentage of Respondents' trucks were driven by U.S employees as compared the number of trucks driven by H-2B employees.

7. The payroll records of Respondents' H-2B workers do not show that those who drove trucks received a higher hourly wage than did their co-workers who did not drive trucks.

[93] The Kerwans worked for Nuhorizon Staffing Service in South Africa during the winter months. Tr. 1019. Nuhorizon was the company in South Africa which recruited South Africans to work as H-2B Traveling Carnival Attendants for Respondents. Leo Kerwan testified that he would come to the United States to begin work for Respondents once his recruiting work for Nuhorizon in South Africa had concluded. Tr. 1019. Leo and Simone Kerwan were married on June 4th of 2016, which Leo Kerwan said was the reason why he did not join Respondents until later in the summer of 2016. Tr. 1012, 1027. Simone Kerwan had worked for Respondents since 2005. Tr. 1047. She had also worked for Nuhorizon in South Africa since 2014. Tr. 1047. Simone Kerwan had another job is South Africa in 2016 and did not work at all for Respondents in that year. Tr. 1047.

8. The payroll records of Respondents' H-2B workers do not show that those who drove trucks received any additional compensation paid on a weekly basis throughout the season.

9. The documentary evidence, specifically Joint Exhibit 28, does not show that H-2B drivers Claudia Rhoode or Marcus Dennett, received any additional weekly compensation for driving trucks.

10. If Respondents were to make a full disclosure in the Job Order or advertisements of the driving opportunity, the disclosure would say something like this: "A small number of Traveling Carnival Attendants may have the opportunity to drive [Respondent's] trucks. This is extra duty. Those who will drive may be required to obtain a Commercial Driver's License at their own expense. No increase in weekly wage will be paid to those who are driving trucks. A bonus of unknown amount may be paid at the end of the season to those who have driven during the year."

11. For the 2016 and 2017 seasons, Michael Featherston and Connie Featherston signed the documents for their respective companies containing Attestation #4.

12. Michael Featherston and Connie Featherston signed Attestation #4 for their respective companies under penalty of perjury.

13. In the newspaper advertisements placed before the 2016 and 2017 seasons, neither GoldStar nor Lee's Concessions made mention that employees of their respective companies might earn additional wages by driving trucks operated by Respondents.

14. The Job Orders created by Respondents for the 2016 and 2017 seasons did not mention that employees of their respective companies might earn additional wages by driving trucks operated by Respondents.

15. Respondents did not recruit or hire any workers (H-2B or U.S.) whose job was primarily to drive Respondents' trucks. Respondents recruited and hired only Traveling Carnival Attendants.

16. The workers who drove trucks for Respondents also performed other duties of a Traveling Carnival Attendant.

17. Respondents made truck driving opportunities available to H-2B workers who were already employed by Respondents.

18. Respondents made truck driving opportunities available to the U.S. workers already employed by Respondents.

19. There is no document, testimony, or other direct evidence that Respondents steered trick driving opportunities towards their H-2B workers in order to discriminate against U.S. workers.

20. There is no evidence in the record from which an inference might permissibly be drawn that Respondents steered truck driving opportunities towards their H-2B workers in order to discriminate against U.S. workers.

21. Simone Kerwan did not work for Respondents in 2016.

22. Leo Kerwan was not paid for the weeks when he did not work for Respondents in 2016.

23. Simone and Leo Kerwan were not paid for the weeks when they did not work for Respondents in 2017.

24. There is no evidence in the record that the Kerwans were paid by Respondents for any week in which the Kerwans did not work for Respondents.

As to Violation #1, I reach the following Conclusions of Law:

1. Each of the Respondents offered driving opportunities to both U.S. and H-2B workers in 2016 and 2017. U.S. workers held significantly more CDLs in 2016 than did H-2B workers. The Administrator has not proven by a preponderance of evidence that Respondents gave preferential treatment to the H-2B workers when driving opportunities were filled.

2. The Administrator has not proven by a preponderance of evidence that Respondents' H-2B employees were offered better terms, wages or working conditions when compared to Respondents' U.S. workers.

3. The Administrator has not proven by a preponderance of evidence that any U.S. worker did not apply for a job with Respondents because the advertising or Job Orders failed to disclose that extra money might be made by driving.

4. I am not persuaded that an accurate disclosure of the type set forth in Finding of Fact 11, above, would have caused any U.S. worker to find Respondents' Traveling Carnival Attendant position to be any more attractive.

5. Given the small portion of Respondents' work force that drove trucks (about 10%), Respondents' failure to include in their recruiting materials any information about truck driving opportunities was not a substantial violation.

6. Respondents paid their workforce of H-2B and U.S. workers only for weeks when those employees worked for Respondents. H-2B workers who showed up later in the season did not get paid for weeks earlier in the season when those H-2B

employees had not worked. I see no evidence that Respondents' employees were ever paid for weeks when they did not work.

7. I see no evidence that Respondents' employees who showed up later in the season received any benefit by their late arrival. To the contrary, the evidence is that those late-arriving H-2B employees were not compensated for the weeks in which they had not worked. This would be detrimental to the late-arriving employees' financial interests.

8. The Administrator has not proven by a preponderance of evidence that Respondents substantially failed to comply with the prohibition against preferential treatment.

9. I **REVERSE** the Administrator's determination that Respondents gave preferential treatment to foreign workers in violation of 29 C.F.R. § 503.16(q) and TEC Attestation 4.

Violation #2 – Failure to Pay Prevailing Wage in 2016 and 2017

The Administrator alleges that in each of the 2016 and 2017 seasons, each Respondent substantially failed to pay to their respective H-2B workers the wages listed on their respective I-129 Petitions in violation of Attestation #5 on Respondents' TECs.

The Administrator bears the burden to prove these allegations by a preponderance of evidence.

Prior to the 2016 and 2017 seasons, each of the Respondents signed TECs under penalty of perjury. These TECs are in the record as JX 5 (GoldStar 2016), JX 6 (Lee's Concessions 2016), JX 7 (Lee's Concessions 2017) and AX 5 (GoldStar 2017). Blocks G of these TECs unequivocally represent that Respondents' respective H-2B employees would be paid on an hourly basis. The Forms I-129 submitted by Respondents state that Respondents will be paying their H-2B employees an "hourly wage" which will vary given the state in which the workers will be employed.[94]

The H-2B workers employed by Respondents in 2016 and 2017 were typically recruited in South Africa by a company called Nuhorizon Staffing Services.[95] Kim Langford, a South African, is the head of Nuhorizon. Langford had worked with Respondents as a recruiter of Respondents' South African workers since 2003.[96] In 2016 and 2017, Nuhorizon recruited and placed South African workers with approximately 16 mobile carnival companies in the United States, including Respondents.[97]

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[94] *See, e.g*. AX 7 at page 5, Part 5, paragraph 9.
[95] Tr 907. There were some H-2B employees who returned to employment with Respondents year after year. These returning employees were not recruited by Nuhorizon for their second year of employment.
[96] *Id*.
[97] Tr. 910

Langford testified that in 2016 and 2017, she provided the South African workers bound for employment with Respondents with a copy of the Job Order.[98] The Job Orders are in the record as AX 1 (GoldStar 2016), AX 2 (GoldStar 2017), AX 3 (Lee's Concessions 2016) and AX 4 (Lee' Concessions 2017). Each of the Job Orders represents that the "Traveling Carnival Attendant" position is paid on a variable hourly rate depending on the state where the work is performed.[99]

Langford also supplied the workers with a list of the locations where the workers would be working, and with the hourly wage that would be earned by the worker in each of the locations.[100] Langford testified that these recruited employees "get an offer of employment from the client which is basically a letter that says, you know, you've been offered this position and this is the hourly rate that you're going to be paid."[101]

Robyn Maasburg testified that during her recruitment by Nuhorizon, she was told that she would be paid hourly by Respondents.[102] She did not understand that she would be paid the same amount every week until she began work with Respondents.[103] Many of Respondents' H-2B employees similarly were not told they would be receiving the same amount of pay each week, regardless of the number of hours they had worked.[104]

Before traveling more than 9,000 miles[105] to take up their jobs with Respondents, the South African workers believed they had accepted a job that would pay them on an hourly basis, and that their wages would vary depending on the prevailing wage in each of the states in which they would work.[106]

Despite these clear pre-employment representations that Respondents' H-2B workers would be paid on an hourly basis, that is not how Respondents actually paid these employees in 2016 and 2017. Instead, during the 2016 and 2017 seasons, Respondents' H-2B employees typically earned the same amount of money each week, regardless of the number of hours each employee had worked, and regardless of the location in which the employee was working.

The pay card reproduced below[107] shows that the employee (Charmone Moore)[108] had "Gross Wages" of $400 in each week and received net pay of $340 per week

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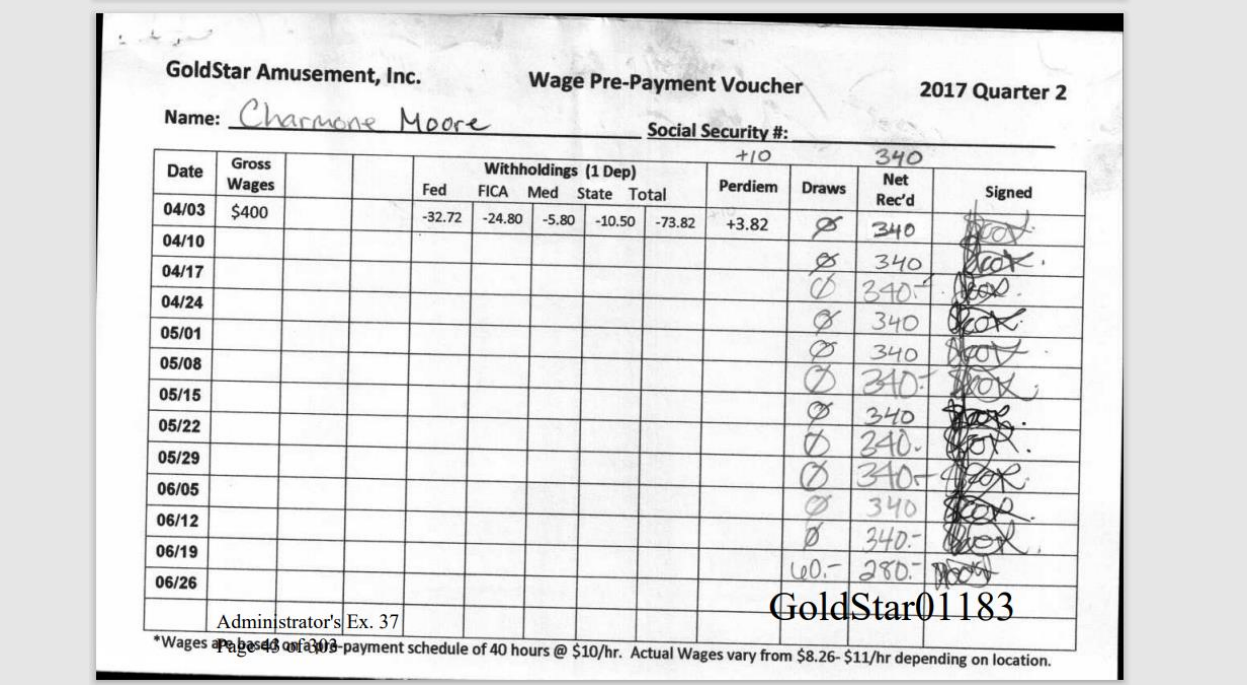
[98] Tr. 912.
[99] AX 1 at page 2. AX 2 at page 2. AX 3 at page 2. AX 4 at page 2.
[100] Tr. 913. Langfrod presumably provided the H-2B workers with something like AX 36, which shows the hourly wages to be earned by GoldStar's H-2B workers during the 2017 season.
[101] *Id.*
[102] Tr. 141.
[103] Tr. 142.
[104] *See e.g.* Tr. at page 142.
[105] Google says the distance from Johannesburg to Houston is 9,006 miles.
[106] See AX 36, which shows the hourly wages to be earned by GoldStar's H-2B workers during 2017.
[107] AX 37 at 43. "Pay card" is the phrase used by several witnesses to describe this piece of paper, and I will use that phrase throughout this Decision and Order.
[108] Ms. Moore was an H-2B employee of Lee's Concessions in 2016 (JX 19) and an H-2B employee of GoldStar in 2017 (JX 22).

consistently between April 3, 2017, and June 12, 2017. No effort has been made to record the number of hours worked by this employee in any pay period shown on this pay card. The net wages received by the employee are not tied to the number of hours worked by the employee. The "Gross Wages" remain the same throughout the entire period, even though the employee worked in Texas, Louisiana, Tennessee, and Minnesota during the period tracked on the pay card.[109] The hourly wage rate to be paid by Respondents in those locations varied from a low of $8.68 per hour to a high of $11.05 per hour during the period shown on the pay card.[110] Yet neither the "Gross Wages" nor the "Net Rec'd" by the employee changed as the employee moved from one taxing authority to another.



GoldStar Amusement, Inc. Wage Pre-Payment Voucher 2017 Quarter 2

Name: Charmone Moore Social Security #:

Date	Gross Wages			Withholdings (1 Dep) Fed	FICA	Med	State	Total	Perdiem	Draws	Net Rec'd	Signed
04/03	$400			-32.72	-24.80	-5.80	-10.50	-73.82	+3.82	Ø	340	
04/10										Ø	340	
04/17										Ø	340	
04/24										Ø	340	
05/01										Ø	340	
05/08										Ø	340	
05/15										Ø	340	
05/22										Ø	340	
05/29										Ø	340	
06/05										Ø	340	
06/12										Ø	340	
06/19										Ø	340	
06/26										60.-	280.-	

+10 340

Administrator's Ex. 37
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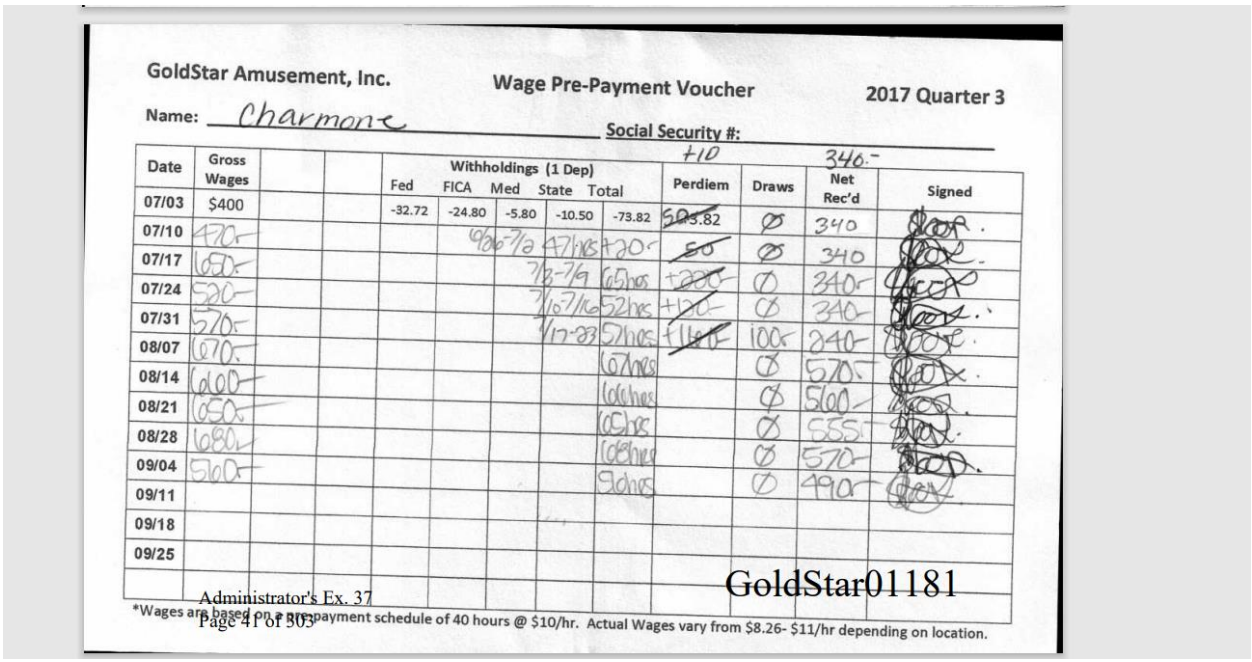
GoldStar01183

*Wages are based on a pre-payment schedule of 40 hours @ $10/hr. Actual Wages vary from $8.26- $11/hr depending on location.

Ms. Moore's next 2017 pay card is reproduced below.[111]

[109] *See* JX 24.
[110] AX 36.
[111] AX 37 at page 41.



GoldStar Amusement, Inc. Wage Pre-Payment Voucher 2017 Quarter 3

Name: Charmone Social Security #:

Date	Gross Wages			Withholdings (1 Dep) Fed	FICA	Med	State	Total	Perdiem	Draws	Net Rec'd	Signed
07/03	$400			-32.72	-24.80	-5.80	-10.50	-73.82	~~50~~ 73.82	Ø	340	
07/10	470								~~50~~	Ø	340	
07/17	650								+220	Ø	340	
07/24	520								+120	Ø	340	
07/31	570								+140	100	240	
08/07	670									Ø	570	
08/14	600									Ø	560	
08/21	650									Ø	555	
08/28	680									Ø	570	
09/04	560									Ø	490	
09/11												
09/18												
09/25												

+10 346

GoldStar01181

Administrator's Ex. 37
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*Wages are based on a pre-payment schedule of 40 hours @ $10/hr. Actual Wages vary from $8.26- $11/hr depending on location.

This second pay card (AX 37 at page 41) is very different from the first one reproduced above (AX 37 at page 43), as this second pay card purports to record the number of hours said to have been worked by Ms. Moore during her workweeks. The number of hours said to have been worked by Ms. Moore is recorded in the ninth column from the left on the pay card. Ms. Moore is said to have worked 52 hours during the week of July 24, and her "Net Rec'd" for that week was $340. The week before, Ms. Moore was said to have worked 65 hours, but her "Net Rec'd" for that week was $340 – the same net pay as the week where she had substantially fewer hours worked.

Respondents argue that they had adopted, and implemented, a "prepayment plan" for the H-2B employees who worked for them in 2016 and 2017.[112] Respondents argue that as a result of this "prepayment plan," their respective H-2B workforces had been "handsomely overpaid" for the 2016 and 2017 seasons.

Respondents have not entered into the record any written "prepayment plan." No witness testified that they had ever written, read, or seen a written "prepayment plan." Respondents' attempts to describe the "prepayment plan" uniformly devolve into a chaotic mess of "examples" of how the "prepayment plan" was implemented. Melissa Erasmus – one of Respondents' paymasters – gave this description of the "prepayment plan:"

> A: So we would do our calculation, like the first week of that quarter was based on like, I don't know, a basic workweek, 40 hours or something, and then the week after that, we started using the real hours of the gang time from the previous week and then paid it out the following week. I'm not sure if I can

[112] Respondents' Post-Hearing Brief at pages 55-57.

explain that very well. So those numbers for the hours weren't the hours worked that week. It was the hours worked the week prior, and then Jessie estimated say the $10 per hour estimate after taxes. So you'll see the gross was estimated at like $10 an hour or something because we didn't have the real time tax information per person to put on the cards. I don't know if that's clear or not.

Q. So the $10 an hour that you're saying, in 2016 and 2017, you were never paying the prevailing wage for the specific location each workweek, correct?

A. It was calculated on my side, but we were paying an estimate in real time. And then we balanced it out either sometimes monthly, or at very least by the end of the year if there was any difference in overpayment or underpayment. We never re-collected for an overpayment but, you know, we definitely made sure everybody was covered by the end if we felt there was an underpayment.[113]

Kim Langford of Nuhorizons Staffing Services recruited the H-2B workers employed by Respondents in 2016 and 2017. Ms. Langford described the "prepayment plan" in this manner:

Q. Could you tell us how you would commonly explain orally to recruits banking of hours, credits of hours, and how a prepayment plan worked?

A. The prepayment agreement is basically set on a 40 hour week, okay. So I would actually sit down and I would draw this up for them. I wouldn't just orally say it. I would take the wage, whatever it is, say now this week $15 and next week it's $12, and the next week it's $15. If you work 40 hours this week, 40 hours next week, 40 hours the following week, the client will -- let's just say 50 every wage in the RAFT is going to be -- I'm just going to use a simple amount so that I don't confuse myself -- is going to be $10. So now the client is going to owe you $400 per week. If you go above those hours, the client has to pay in the difference in the following week. So if you work 40 hours, you're getting paid $10 an hour. Regardless of whether you work or not, the client is going to give you $400. They're going to say now this week you work 45 hours. Then the following week they're going to pay you for those additional five hours on top of that.[114]

[113] Tr. 563.
[114] Tr. 916

One of Respondents' H-2B workers, Simone Kerwan, described her understanding of the "prepayment plan:"

> Q. Ms. Kerwan, are you aware of the term banking of hours?
>
> A. Yes, I am.
>
> Q. What does that mean to you?
>
> A. It means that you can -- so like a wage payment, is you get paid for a set amount of hours, and if you work more than that in that week, or if you work -- say you work less in one week, you can bank what you were paid in that overpayment to use in other weeks.
>
> Q. And the end result is that you have a fairly level or predictable amount of pay?
>
> A. That's correct.[115]

I am not persuaded that Respondents ever utilized a "prepayment plan" to calculate the weekly wages to be paid to their H-2B workers in 2016 or 2017. I reach this conclusion for the following reasons: **First**, there is no written prepayment plan in the record. **Second**, no one testified that they had ever written or read a prepayment plan. The Job Orders say "Wage prepay at employer's discretion"[116] with no other detail. These 5 words, without more, are insufficient to establish that Respondents' H-2B employees might be paid under a "prepayment plan." **Third**, Respondents' efforts to orally explain how the "prepayment plan" was implemented failed to explain how such a "prepayment plan" had been implemented on a week-to-week basis. **Fourth**, the accurate implementation of the type of plan described by Respondents would require scrupulously accurate time records for the H-2B workforce, and Respondents did not make any effort to keep scrupulously accurate time records in 2016 and 2017. **Fifth** – and perhaps most important – the implementation of a prepayment plan of the type suggested by Respondents would require the creation of a mountain of payroll records, and those types of payroll records are just not in evidence. If there were really a prepayment plan in place, I would expect to consistently see entries in the weekly payroll records showing the movement of paid wages from one pay period to another with notations as to the reasons for those short-term wage credits and debits. Imagine the bookkeeping nightmare of debiting and crediting hours that had been worked in different states and thus had different rates of pay. I have looked at all the pay cards that are in the record, and I just don't see evidence of the detailed recordkeeping that would need to be part of an operational prepayment plan. Looking at Charmone Moore's pay cards reproduced above (AX 37 at pages 41 and 43)

[115] Tr. 1055-56.
[116] AX 1 at page 2.

shows no re-allocation of wages or hours over the 5-month period documented on those pay cards.

I don't find evidence of a "prepayment plan" being implemented by Respondents. If such a plan had been put in place and had the prepayment plan operated in the manner described by the witnesses, Respondents' H-2B employees would not have received all the wages earned by them in the same pay period were wages for that work would have been paid. The refusal to pay wages when earned would have violated Attestation #5,[117] which required Respondents to pay the H-2B workers wages "free and clear." Respondents were aware as early as 2016 that they needed to pay the wages earned by their H-2B employees each workweek.[118] The Job Orders said that "wages due calculated by single workweek, paid bi-weekly."[119] This requirement is inconsistent with having a "prepayment plan." At the time I denied Respondents' Motion for Summary Decision, I observed that a "prepayment plan" of the type described by Respondents would have "great potential for abuse."[120] I believe Attestation #5 and the representations made in the Job Order would prohibit Respondents from the debiting and crediting of pay from one pay period to another that is a "feature" of their alleged "prepayment plan."

After reviewing the entire record, I agree with the Administrator that "Respondents paid H-2B workers a flat rate each week, regardless of the number of gang time hours recorded by managers or the amount of time H-2B workers spent driving."[121] Evidence of such a "flat rate" wage is abundant in the record. One H-2B employee[122] told the Wage and Hour investigators that he received a "flat salary for all of our hours,"[123] and that "I get paid $330 a week no matter how many hours we work."[124] Another employee told Wage and Hour investigators: "We don't get paid by the hr – we get paid a fixed salary. For July 2017 [it] was $330 per week."[125] Another employee told Wage and Hour investigators "I am not paid hourly. I am paid [$]340.00 [per] week."[126] Another employee said "I get the same flat salary no matter how many hours I work. I've never asked why they pay that way because it wouldn't matter."[127]

Donovan Leach, an H-2B worker for Respondents in 2016, 2017 and 2018 testified at the hearing:

> Q. So during the recruitment process at Nuhorizon, were you told about your pay?

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[117] *See e.g.* AX 5 at page 12.
[118] Tr. 585.
[119] AX 1 at page 2.
[120] Match 7, 2022 Order Denying Motion for Partial Summary Decision at page 4.
[121] Administrator's Post-Hearing Brief at page 22.
[122] AX 16 at 10.
[123] AX 16 at 11.
[124] AX 16 at 10. One employee told Wage and Hour investigators that the $330 weekly salary is what was paid to H-2B workers in their first year of employment with Respondents, and that second and third year employees are paid $340 per week. AX 16 at page 23.
[125] AX 16 at 13.
[126] AX 16 at 17.
[127] AX 16 at 25.

> A. They gave us the breakdown of -- what was it? I think it was like hourly wages different states, different states, et cetera, like that. I don't remember them telling us that we were just going to get a set pay for a week. Yeah, I don't remember that. So it was a little bit -- it was a little bit confusing because I thought, depending on the state, so might be a little more, it might be a little more less.
>
> Q. So you said you got paid, though, when you arrived in the U.S., a set rate. So were you paid the same weekly amount every week?
>
> A. Yeah, it was. My first year it probably was 350 or $340 per week.
>
> Q. When you were at Nuhorizon during the recruitment process, were you told approximately how many hours per week you would work?
>
> A. I think they did tell us maybe roughly how many hours a week we would work. I don't remember the exact number.[128]

Based upon my review of the entire record, I conclude that each of the Respondents substantially failed to pay the wages owed to ther H-2B employees in 2016 and 2017. Those employees had been told they would be paid on an hourly basis depending on the number of hours worked and the wage rate where the work was performed. This is not how they were actually paid. The evidence shows: ***First***, Respondents did not pay their H-2B employees on an hourly basis. ***Second***, Respondents did not keep "accurate" or "reliable" records of the hours worked by their H-2B employees when making payroll each week. When one of Respondents' H-2B employees received a pay card which recorded hours, those recorded hours had nothing to do with the amount of pay the H-2B worker would have in their pay envelope. The H-2B workers typically received a set amount of pay each week regardless of the number of hours shown on the pay card. Not even Respondents relied on the hours they had recorded when making weekly payroll. Respondents have admitted that they occasionally failed to record hours that were worked by some of their H-2B employees. Melissa Erasmus testified that sometimes she may have not known about "hours" that were worked by an employee, and the employee was thus not credited as having worked those "hours."[129] ***Third***, Respondents' "gang time" construct meant that every employee would be credited with working the exact same number of hours as all their co-workers. My review of the evidence convinces me that not all employees worked the same number of hours each day as all their co-workers. Some employees came in earlier than others to set up. Some employees stayed later than other to clean up. If any employee worked either more or fewer hours than any of his co-workers, the "gang time" methodology is not "accurate." ***Fourth***, I find the Administrator

[128] Tr. 425-6.
[129] Tr. 462-3.

has proven by a preponderance of evidence that no contemporaneous time records were kept when some H-2B workers were driving Respondents' equipment.

Respondents argue that there is no evidence that "the [gang time] timekeeping method was willfully inaccurate." I disagree. Melissa Erasmus knew in 2016 that her time records were not accurate,[130] but there is no evidence Respondents took any steps to change their systems until the Wage and Hour investigators appeared at Respondents' worksite in the late summer of 2017. Continuing to use a timekeeping system one knows to be inaccurate is evidence of willfulness.

For the 2018 season,[131] Respondents implemented a system to accurately record the hours worked by their H-2B workforce. This 2018 timekeeping system involved the employee putting their thumbprint on a reading device which then created the type of timecards seen in AX 39.

As to Violation #2, I make the following findings of fact:

1. For each of the 2016 and 2017 seasons, each of the Respondents submitted to DOL a Form ETA-9142B – an application for Temporary Employment Certification ("TEC").

2. For the 2016 and 2017 seasons, Section G of each of the TECs submitted by Respondents represented that the jobs which would be held by Respondents' respective H-2B employees would be paid on an hourly basis. These hourly wages described in Section G of the TECs are "the offered wage" as that phrase is used in Attestation #5 of the TEC.

3. For the 2016 and 2017 seasons, nothing in the TECs disclosed that Respondents intended to pay H-2B workers under a "prepayment plan."

4. Respondents did not have a written prepayment plan during the 2016 or 2017 seasons.

5. Respondents did not implement a prepayment plan during the 2016 or 2017 seasons.

6. Each of the TECs submitted by Respondents contains Attestation #5, in which each Respondent commits that it will pay their respective H-2B employees "at least the offered wage." Respondents signed these TECs under penalty of perjury.

7. At the time Respondents signed the TECs for the 2016 and 2017 seasons, Respondents knew that they were not going to pay their H-2B workers on an hourly basis during those seasons.

[130] *Id.*

[131] Wage and Hour had begun its investigation of Respondents in the late Summer of 2017.

8. At the time Respondents signed the TECs for the 2016 and 2017 seasons, Respondent knew that they did not have in place any systems or means to accurately record the number of hours worked on a given workday by any given H-2B employee.

9. At the time Respondents signed the TECs for the 2016 and 2017 seasons, Respondents knew that their failure to implement any system to accurately record the number of hours worked on any given workday by any given H-2B worker was causing some H-2B workers to not be paid for all the hours they were working.

10. For the 2016 and 2017 seasons, each of the Respondents retained Nuhorizon to recruit H-2B workers from South Africa.

11. For the 2016 and 2017 seasons, Respondents created Job Orders which described the position Traveling Carnival Worker,

12. DOL approved hiring H-2B workers based, in part, on Respondents' representations that their respective H-2B workers would be paid the offered wage on an hourly basis.

13. For the 2016 and 2017 seasons, the Job Orders created by Respondents informed potential applicants that, if they were hired, they would be paid the offered wage on an hourly basis.

14. For the 2016 and 2017 seasons, Nuhorizon provided copies of the applicable Job Orders to potential applicants for Respondents' Traveling Carnival Worker positions.

15. For the 2016 and 2017 seasons, Nuhorizon discussed orally with potential applicants for Respondents' Traveling Carnival Worker positions that, if employed, Respondents' Traveling Carnival Workers would be paid the offered wage calculated on an hourly basis.

16. At the time Respondents made offers of employment to the H-2B workers hired for the 2016 and 2017 seasons, Respondents knew they were making a misrepresentation of a material fact about how those H-2B employees were going to be paid.

17. The "gang time" method employed by Respondents for the 2016 and 2017 seasons willfully and deliberately did not record the start time, break time, lunch time or end time of any individual H-2B employee on any workday.

18. During the 2016 and 2017 seasons, Respondents willfully and deliberately did not have in place any system to accurately record the start time, break time, lunch time or end time of any specific H-2B worker.

19. During the 2016 and 2017 seasons, Respondents willfully and deliberately did not create or maintain records which accurately recorded the number of hours worked by each of their H-2B employees on any given workday.

20. During the 2016 and 2017 seasons, Respondents willfully and deliberately made no effort to accurately record the number of hours worked by any individual H-2B worker on any given workday.

21. During the 2016 and 2017 seasons, Respondents willfully and deliberately did not pay their respective H-2B employees on an hourly basis.

22. In many cases, it was only after Respondents' respective H-2B workers had traveled to the United States to begin employment with Respondents that the workers learned that they would not be paid on an hourly basis for the 2016 and 2017 seasons.

23. During the 2016 and 2017 seasons, H-2B workers employed by Respondents were often not paid for hours those workers had actually worked.

24. During both the 2016 and 2017 seasons, each of the Respondents substantially failed to pay their respective H-2B workers the wages listed on the I-129 Petition in violation of Attestation #5 on each of Respondents' TECs.

25. Prior to 2017, neither Respondent had any history of prior violations of the H-2B program.

26. The systematic underpayment of wages to their respective H-2B workers by each Respondent in both the 2016 and 2017 seasons workers is a violation of substantial gravity.

27. In 2018, months after the Administrator's investigation of Respondents was commenced, Respondents did implement a system which would allow Respondents to accurately record the hours worked by Respondents' H-2B workers.

28. During the 2016 and 2017 seasons, each Respondent substantially failed to pay its H-2B workers all the wages owed to those H-2B workers. The systematic underpayment of wages to the H-2B workers in 2016 and 2017 allowed each Respondent to realize a financial gain.

29. As a consequence of Respondents not creating or maintaining accurate records of the number of hours worked by their respective H-2B workers, it cannot be accurately ascertained how much in back wages is owed to any particular H-2B worker for the 2016 or 2017 season.

30. I find the wage and hour data collected by Respondents in 2018 provide a reasonable approximation of the hours worked by Respondents' respective H-2B workforces in 2016 and 2017, and that use of the 2018 data represents the best possible means for

ascertaining the amount of back wages owed to Respondents' H-2B employees for the 2016 and 2017 seasons.

As to Violation #2, I reach the following conclusions of law:

1. I **AFFIRM** the Administrator's determination that in 2016 GoldStar substantially failed to pay to its H-2B workers the wages listed on their respective I-129 Petitions in violation of Attestation #5 on Respondents' TECs. I **AFFIRM** the Administrator's determination that back wages are owed to the H-2B workers who worked for GoldStar in 2016. I **FIND** the methodology employed by the Administrator to calculate the amount of back wages owed to GoldStar's H-2B employees for the 2016 season (which has been exhaustively described in the testimony of the Administrator's witnesses and the Post-Hearing Briefs filed by the Administrator, and which is set forth in the Administrator's hearing exhibits) is reasonable and reliable. I **AFFIRM** the Administrator's determination that $12,397.13 in back wages is to be paid to GoldStar's H-2B workers for 2016. I **FIND** the Administrator's calculation of the civil penalty to be imposed on GoldStar for Violation #2 for 2016 is reasonable and appropriate. I **AFFIRM** the Administrator's imposition of a civil monetary penalty in the amount of $12,383.00 on GoldStar for Violation #2 for the 2016 season.

2. I **AFFIRM** the Administrator's determination that in 2017 GoldStar substantially failed to pay to its H-2B workers the wages listed on their respective I-129 Petitions in violation of Attestation #5 on Respondents' TECs. I **AFFIRM** the Administrator's determination that back wages are owed to the H-2B workers who worked for GoldStar in 2017. I **FIND** the methodology employed by the Administrator to calculate the amount of back wages owed to GoldStar's H-2B employees for the 2017 season (which has been exhaustively described in the testimony of the Administrator's witnesses and the Post-Hearing Briefs filed by the Administrator, and which is set forth in the Administrator's hearing exhibits) is reasonable and reliable. I **AFFIRM** the Administrator's determination that $80,107.44 in back wages is to be paid to GoldStar's H-2B workers for 2017. I **FIND** the Administrator's calculation of the civil penalty to be imposed on GoldStar for Violation #2 for 2017 is reasonable and appropriate. I **AFFIRM** the Administrator's imposition of a civil monetary penalty in the amount of $12,383.00 on GoldStar for Violation #2 for the 2017 season.

3. I **AFFIRM** the Administrator's determination that in 2016 Lee's Concessions substantially failed to pay to its H-2B workers the wages listed on their respective I-129 Petitions in violation of Attestation #5 on Respondents' TECs. I **AFFIRM** the Administrator's determination that back wages are owed to the H-2B workers who worked for Lee's Concessions in 2016. I **FIND** the methodology employed by the Administrator to calculate the amount of back wages owed to Lee's Concessions' H-2B employees for the 2016 season (which has been exhaustively described in the testimony of the Administrator's witnesses and the Post-Hearing Briefs filed by the Administrator, and which is set forth in the Administrator's hearing exhibits) is

reasonable and reliable. I **AFFIRM** the Administrator's determination that $8,210.10 in back wages is to be paid to Lee's Concessions' H-2B workers for 2016. I **FIND** the Administrator's calculation of the civil penalty to be imposed on Lee's Concessions for Violation #2 for 2016 is reasonable and appropriate. I **AFFIRM** the Administrator's imposition of a civil monetary penalty in the amount of $8,210.00 on Lee's Concessions for Violation #2 for the 2016 season.

4. I **AFFIRM** the Administrator's determination that in 2017 Lee's Concessions substantially failed to pay to its H-2B workers the wages listed on their respective I-129 Petitions in violation of Attestation #5 on Respondents' TECs. I **AFFIRM** the Administrator's determination that back wages are owed to the H-2B workers who worked for Lee's Concessions in 2017. I **FIND** the methodology employed by the Administrator to calculate the amount of back wages owed to Lee's Concessions' H-2B employees for the 2017 season (which has been exhaustively described in the testimony of the Administrator's witnesses and the Post-Hearing Briefs filed by the Administrator, and which is set forth in the Administrator's hearing exhibits) is reasonable and reliable. I **AFFIRM** the Administrator's determination that $33,053.68 in back wages is to be paid to Lee's Concessions' H-2B workers for 2017. I **FIND** the Administrator's calculation of the civil penalty to be imposed on Lee's Concessions for Violation #2 for 2017 is reasonable and appropriate. I **AFFIRM** the Administrator's imposition of a civil monetary penalty in the amount of $12,383.00 on Lee's Concessions for Violation #2 for the 2017 season.

5. In assessing the amount of civil penalties to be paid by each Respondent for that Respondent's substantial failure to pay their respective H-2B employees the wages listed on the I-129 Petition in violation of Attestation #5, I have considered and weighed the factors discussed in Findings of Fact Numbers 25, 26, 27 and 28, above. I have concluded that the civil penalty assessed for those violations is appropriate.

Violation #3 That in the 2016 and 2017 seasons, each of the Respondents substantially failed to comply with their respective statements of temporary need in violation of Attestation #12 on Respondents' TECs.

The Administrator alleges that each of the Respondents substantially failed to comply with its temporary need statement on the 8142B, H-2B Registration, and I-129 Petition regarding dates of temporary need for 9142Bs and I-129 Petition for both years. The Administrator alleges this is a violation of Attestation #12 and 20 C.F.R. § 655.6 and 8 C.F.R. 214.2(h)(6)(ii)(B).

The Administrator bears the burden to prove these allegations by a preponderance of evidence.

Attestation #12 states:

> The employer has demonstrated that it has a temporary need, as defined in 20 C.F.R. 655.6 on Form ETA-9142B or an H-2B Registration, as applicable, and has been granted the H-2B Registration, when applicable.[132]

The regulation referenced in Attestation #12 states:

> Temporary need:
>
> (a) An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.
>
> (b) The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations. Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.
>
> (c) A job contractor will only be permitted to seek certification if it can demonstrate through documentation its own temporary need, not that of its employer-client(s). A job contractor will only be permitted to file applications based on a seasonal need or a one-time occurrence.
>
> (d) Nothing in this paragraph (d) is intended to limit the authority of the Secretary of Homeland Security, in the course of adjudicating an H–2B petition, to make the final determination as to whether a prospective H–2B employer's need is temporary in nature.[133]

8 CFR 214.2(h)(6)(ii)(B)[134] provides:

> ***Nature of petitioner's need.*** Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case

[132] JX 5 at page 12.
[133] 20 C.F.R. § 655.6.
[134] This regulation is cited in the Administrator's Summary of Violations and Remedies Chart" attached to the Determination letters.

> of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

The Administrator has never taken the position in this case that Respondents did not have a need for seasonal workers in 2016 and 2017, and I find that each Respondent had satisfactorily demonstrated to the Certifying Officer that it had a seasonal need for foreign labor in both 2016 and 2017. Given the Administrator's position, I find that neither Respondent violated the literal language of Attestation #12 in either 2016 or 2017. For the same reason, I find that neither Respondent violated the literal requirements of 20 C.F.R. § 655.6(a) or (b) in either 2016 or 2017. For the same reason, I find that neither Respondent violated the literal requirements of 8 CFR §214.2(h)(6)(ii)(B) in either 2016 or 2017.

These findings do not end my inquiry.

The body of the Determination letters sent to each Respondent charges each Respondent with "a substantial failure to comply with the following requirement: accuracy of temporary need,"[135] and says that "[t]he enclosed Summary of Violation and Remedies indicates the specific violations regarding the I-129 Petition and the 9142B application and the remedy imposed for each violation."[136] The Summary of Violations and Remedies charges that each Respondent:

> substantially failed to comply with its temporary need statement on the 9142B, H-2B Registration and I-129 Petition regarding dates of temporary need for 9142Bs and I0129 Petition for both years.[137]

Put in more colorful language, the Administrator charges that Respondents "gamed the system to share H-2B workers under the different entities and to stagger the H-2B workers' arrivals."[138]

The Administrator alleges that "Respondents failed to provide accurate temporary need,"[139] and that Respondents had "intentionally misrepresented . . . the number of workers actually required."[140]

AX 47 shows dates when Respondent's H-2B employees began arriving in USA to begin work in 2016 and 2017.

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[135] Second Amended Determination at page 1.
[136] Second Amended Determination at page 1.
[137] Summary of Violations and Remedies.
[138] Administrator's Post-Hearing Brief at page 27.
[139] Administrator's Post-Hearing Brief at page 26,
[140] Administrator's Post-Hearing Brief at page 32.

For the 2016 season, GoldStar was authorized to employ 38 H-2B workers.[141] According to AX 47, GoldStar was only able to employ 27 H-2B workers in 2016, which is 71% of the H-2B workers GoldStar had said it would need for that season. Nineteen of these workers arrived in the United States in the month of April. Four arrived in May. Two arrived in June and two arrived in July. GoldStar had identified March 8, 2016, as the date when it would need all of its H-2B workers.

For the 2017 season, GoldStar was authorized to employ 38 H-2B workers.[142] In 2017, According to AX 47 (page 3) GoldStar employed 38 H-2B workers, which is 100% of the H-2B workers GoldStar had said it needed. GoldStar had identified January 31, 2017, as the date of need for these workers. According to AX 47 (page 3), twelve H2-B workers arrived in February. Twenty-six arrived in March.

For the 2016 season, Lee's Concessions was authorized to employ 35 H-2B workers.[143] In 2016, Lee's Concessions employed 34 H-2B workers, which is 97% of the H-2B workers Lee's Concessions said it would need. According to AX 47 (page 2), fourteen of the H-2B workers arrived in April, while the remaining 20 H-2B workers arrived in the United States in June. Lee's Concessions had stated that it would need all of its H-2B workers as of February 8, 2016

For the 2017 season, Lee's Concessions was authorized to employ 35 H-2B workers.[144] AX 47 (page 1) shows that Lee's Concessions employed 35 H-2B workers in 2017, which is 100% of the H-2B workers Lee's Concessions had said it would need. Twenty-four H-2B workers arrived in April. Six arrived in June. Five arrived in July. Lee's Concessions had stated that it would need all of its H-2B workers as of April 1, 2017.

Respondents point to significant problems they faced hiring H-2B workers from South Africa for the 2016 and 2017 seasons.

The recruiting of new workers for 2016 season began in November 2015.[145] Respondents' hiring agency, Nuhorizons Staffing, used Facebook, radio and television advertising to recruit workers.[146] Interested applicants were given an "orientation" where they were advised about the hard, outdoor, work and the "carnival life."[147] Persons provisionally selected for employment went through a criminal background check, drug screening and an occupational health check.[148] The candidates then began the process of securing the visas they would need to work in the United States.

In 2016, Respondents encountered difficulty getting visas issued by the United States Embassy. In 2016, a consular official at the U.S. Embassy in South Africa tried to

[141] JX 5.
[142] AX 5.
[143] JX 6.
[144] JX 7.
[145] Tr. 970.
[146] Tr. 908.
[147] Tr. 908.
[148] Tr. 909.

block the issuance of visas to H-2B workers bound to work in the outdoor amusement industry in the United States. Kim Langford explained the problem with this consular official:

> Q. Did you attempt to mediate with Mr. Jeffrey Allen to determine what the problem was so that it could be solved?
>
> A. I did, and a number of my clients did as well.
>
> Q. Can you say what it was that you undertook to break the log jam?
>
> A. There were multiple telephone calls, emails sent up and down. We tried to explain the prepayment system to him. The problem was it didn't matter what we explained, how we explained it. It didn't matter how the Africans answer the questions. It was never right. He would never -- as far as he was concerned -- in a nutshell as far as he was concerned, all temporary worker agents were human traffickers and all our Africans were just weak and manipulated and abused. So it was very difficult to get him to respond because that was his personal opinion.[149]

A sizeable backlog of visa applications was created.[150] The U.S. Embassy in Cape Town, South Africa (where most of Respondents' H-2B applicants came from[151]) closed for a month in early 2016,[152] and Cape Town eventually stopped processing any visa applications at all.[153] The refusal of the Cape Town Embassy to process the visa applications for Respondents' H-2B candidates meant that their visa applications needed to be sent to Johannesburg, South Africa for processing.[154] Many of Respondents' H-2B candidates had to fly from Cape Town to Johannesburg for their interviews at the U.S. Embassy.[155] The Johannesburg Embassy became overwhelmed with visa applications.[156] The Johannesburg Embassy offered only a limited number of applicant interviews.[157]

A meeting between the U.S. State Department and the trade group representing Respondents was held in Washington, D.C. on May 23, 2016.[158] The purpose of the meeting was to find a way to begin an orderly processing of the backlogged visa applications for the H-2B workers still in South Africa. After this meeting, visas began to be

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[149] Tr. 950.
[150] Tr. 944.
[151] Tr. 929.
[152] Tr. 946.
[153] Tr. 944.
[154] Tr. 944.
[155] Tr. 944. Google says the distance from Cape Town to Johannesburg is 870 miles.
[156] Tr. 944.
[157] Tr. 944.
[158] Tr. 947.

approved.[159] It takes 2 weeks for a visa to be physically issued after it is approved.[160] Once the visas were approved, the H-2B candidates began planning their travel to the United States.

Similar problems processing visa applications occurred for the 2017 season.[161] Ms. Langford testified:

> Q. Ms. Langford, what were your efforts in trying to identify the cause, and was Jeffrey Allen the cause of the delays in 2017?
>
> A. Yes, he was the cause of the delays in 2017. He was the cause of the delays from 2014 to 2017. Every single year he would come up with a new strategy to delay the process, putting people under administration, closing down consulates, requiring SAP-365s. I don't know if that better answers the question.[162]

The Administrator does not dispute that these visa processing delays occurred in 2016 and 2017. The Administrator says only that in bringing this enforcement action "the Administrator took [these consular delays] into account and gave Respondents a grace period of two months."[163]

As to Violation #3, I make the following findings of fact:

1. In 2016 and 2017, Respondents each demonstrated that they had a seasonal need for H-2B employees.

2. In 2016 and 2017, Respondents each retained Nuhorizons Staffing Services in Cape Town, South Africa to recruit the H-2B workers Respondents needed for their business operations.

3. In 2016 and 2017, Nuhorizons assisted candidates for employment in the United States to submit the paperwork required to obtain the required visas.

4. In 2016 and 2017, employees of the United States Department of State took actions intentionally designed to impede and impair the ability of Respondents' H-2B candidates to secure the visas required for those candidates to become employed by Respondents.

[159] Tr. 947
[160] Tr. 961.
[161] Tr. 953.
[162] Tr. 955.
[163] Administrator's Post-Hearing Brief at page 31.

5. In 2016 and 2017, the intentional actions of the United States Department of State to "slow walk" the visa applications of Respondents' H-2B candidates significantly delayed the ability of Respondents' H-2B candidates to begin employment with Respondents in the United States.

6. For the 2016 season, GoldStar identified the "Dates of Intended Employment"[164] and the "Period of Intended Employment"[165] for its H-2B employees as March 8, 2016, through November 4, 2016.[166]

7. For the 2016 season, GoldStar did not employ all of its H-2B workers during the "Dates of Intended Employment" or the "Period of Intended Employment."

8. For the 2017 season, GoldStar identified the "Dates of Intended Employment" and the "Period of Intended Employment" for its H-2B employees as April 1, 2017, through November 30, 2017.[167]

9. For the 2017 season, GoldStar did not employ all of its H-2B workers during the "Dates of Intended Employment" or the "Period of Intended Employment."

10. For the 2016 season, Lee's Concessions identified the "Dates of Intended Employment" and the "Period of Intended Employment" for its H-2B employees as February 8, 2016, through November 6, 2016.[168]

11. For the 2016 season, Lee's Concessions did not employ all of its H-2B workers during the "Dates of Intended Employment" or the "Period of Intended Employment."

12. For the 2017 season, Lee's Concessions identified the "Dates of Intended Employment" and the "Period of Intended Employment" for its H-2B employees as April 1, 2017, through November 30, 2017[169]

13. For the 2017 season, Lee's Concessions did not employ all of its H-2B workers during the "Dates of Intended Employment" or the "Period of Intended Employment."

14. For the 2016 season, GoldStar was able to onboard 27 of the 38 H-2B workers it was authorized to employ.

15. For the 2016 season, Lee's Concessions was able to onboard 34 of the 35 H-2B workers it was authorized to employ.

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[164] The phrase used in the USCIS Form I-129, Part 5, Question 11.
[165] The phrase used in the ETA Form 9142B, Part B, Boxes 5 and 6.
[166] JX 5 at page 1.
[167] JX 7 at page 1.
[168] JX 6 at page 1.
[169] JX 7.

16. For the 2017 season, GoldStar was able to onboard 38 of the 38 H-2B workers it was authorized to employ.

17. For the 2017 season, Lee's Concessions was able to onboard 35 of the 35 H-2B workers it was authorized to employ.

18. For the 2016 season, GoldStar's H-2B employees all arrived after the "Begin Date" specified in box B5 of GoldStar's ETA Form 9142B.

19. For the 2017 season, GoldStar's H-2B employees all arrived after the "Begin Date" specified in box B5 of GoldStar's ETA Form 9142B.

20. For the 2016 season, Lee's Concessions' H-2B employees all arrived after the "Begin Date" specified in box B5 of Lee's Concessions' ETA Form 9142B.

21. For the 2017 season, Lee's Concessions' H-2B employees all arrived after the "Begin Date" specified in box B5 of Lee's Concessions ETA Form 9142B.

22. For the 2016 season, there is no testimonial or other direct evidence in the record that GoldStar willfully "gamed the system"[170] by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

23. For the 2017 season, there is no testimonial or other direct evidence in the record that GoldStar willfully "gamed the system" by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

24. For the 2016 season, there is no testimonial or other direct evidence in the record that Lee's Concessions willfully "gamed the system" by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

25. For the 2017 season, there is no testimonial or other direct evidence in the record that Lee's Concessions willfully "gamed the system" by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

26. For the 2016 season, there is no testimonial evidence in the record that GoldStar willfully "plotted to share H-2B workers and stagger TEC's"[171] by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

[170] This accusation is made on page 27 of the Administrator's Post-Hearing Brief.
[171] This accusation is made on page 27 of the Administrator's Post-Hearing Brief.

27. For the 2017 season, there is no testimonial or other direct evidence in the record that GoldStar willfully "plotted to share H-2B workers and stagger TEC's" by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

28. For the 2016 season, there is no testimonial or other direct evidence in the record that Lee's Concessions willfully "plotted to share H-2B workers and stagger TEC's" by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

29. For the 2017 season, there is no testimonial or other direct evidence in the record that Lee's Concessions willfully "plotted to share H-2B workers and stagger TEC's" by scheduling their H-2B employees to arrive in the United States after the "Begin Date" specified in box B5 of their respective ETA Forms 9142B.

As to Violation #3, I reach the following conclusions of law:

1. Attestation #12 states: "The employer has demonstrated that it has a temporary need, as defined in 20 C.F.R. 655.6 on Form ETA-9142B or an H-2B Registration, as applicable, and has been granted the H-2B Registration, when applicable."[172]

2. For the 2016 season, GoldStar demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 38 H-2B workers. GoldStar did not violate Attestation #12 for the 2016 season.

3. For the 2017 season, GoldStar demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 38 H-2B workers. GoldStar did not violate Attestation #12 for the 2017 season.

4. For the 2016 season, Lee's Concessions demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 35 H-2B workers. Lee's Concessions did not violate Attestation #12 for the 2016 season.

5. For the 2017 season, Lee's Concessions demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 35 H-2B workers. GoldStar did not violate Attestation #12 for the 2017 season.

6. 20 C.F.R. 655.6[173] states:

> Temporary need:

[172] JX 5 at page 12.

[173] The Administrator alleges that Respondents violated this regulation. The regulation is cited in the "Administrator's Summary of Violations and Remedies Chart" attached to the Determination letters.

> (a) An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.
>
> (b) The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations. Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.
>
> (c) A job contractor will only be permitted to seek certification if it can demonstrate through documentation its own temporary need, not that of its employer-client(s). A job contractor will only be permitted to file applications based on a seasonal need or a one-time occurrence.
>
> (d) Nothing in this paragraph (d) is intended to limit the authority of the Secretary of Homeland Security, in the course of adjudicating an H–2B petition, to make the final determination as to whether a prospective H–2B employer's need is temporary in nature.[174]

7. For the 2016 season, GoldStar demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 38 H-2B workers. GoldStar did not violate 20 C.F.R. § 655.6 for the 2016 season.

8. For the 2017 season, GoldStar demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 38 H-2B workers. GoldStar did not violate 20 C.F.R. § 655.6 for the 2017 season.

9. For the 2016 season, Lee's Concessions demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 35 H-2B workers. Lee's Concessions did not violate 20 C.F.R. § 655.6 for the 2016 season.

10. For the 2017 season, Lee's Concessions demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 35 H-2B workers. GoldStar did not violate 20 C.F.R. § 655.6 for the 2017 season.

[174] 20 C.F.R. § 655.6.

11. 8 C.F.R. § 214.2(h)(6)(ii)(B)[175] provides:

> *Nature of petitioner's need.* Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

12. For the 2016 season, GoldStar demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 38 H-2B workers. GoldStar did not violate 8 CFR § 214.2(h)(6)(ii)(B) for the 2016 season.

13. For the 2017 season, GoldStar demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 38 H-2B workers. GoldStar did not violate 8 C.F.R. § 214.2(h)(6)(ii)(B) for the 2017 season.

14. For the 2016 season, Lee's Concessions demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 35 H-2B workers. Lee's Concessions did not violate 8 C.F.R. § 214.2(h)(6)(ii)(B) for the 2016 season.

15. For the 2017 season, Lee's Concessions demonstrated that it had a temporary need for H-2B workers, and it was authorized by the Certifying Officer to employ 35 H-2B workers. GoldStar did not violate 8 C.F.R. § 214.2(h)(6)(ii)(B) for the 2017 season.

16. For the 2016 season, GoldStar did not fully comply with the period of temporary need set forth in GoldStar's I-129 and ETA 9142B for the 2016 season, but I do not believe these to have been substantial violations.

17. For the 2016 season, I conclude that at least some of the delay in getting GoldStar's H-2B employees on the job in a timely manner was due to the visa processing issues in the United States Embassy in South Africa. I do not have enough information to quantify how many of GoldStar's H-2B candidates were affected by these visa processing issues.

[175] The Administrator alleges that Respondents violated this regulation. The regulation is cited in the "Administrator's Summary of Violations and Remedies Chart" attached to the Determination letters.

18. In the 2016 season, GoldStar increased the number of H-2B workers it employed as the season progressed.[176] During that season, GoldStar had 23 of its 27 (85%) H-2B employees on the job by Memorial Day, which is the earliest date one could say the fair season began to get busy. For GoldStar's 2016 season, the Administrator has not proven by a preponderance of evidence that GoldStar willfully delayed bringing H-2B workers to the United States until the 2016 fair season got busy. The vast majority of GoldStar's H-2B employees in 2016 were on the job during the slower part of the fair season.

19. For the 2017 season, GoldStar did not fully comply with the period of temporary need set forth in GoldStar's I-129 and ETA 9142B for the 2017 season, but I do not believe these to have been substantial violations.
.

20. In the 2017 season, GoldStar had 100% of its H-2B employees on the job by March 24, 2017. The fair season is slow in March. For GoldStar's 2017 season, the Administrator has not proven by a preponderance of evidence that GoldStar willfully delayed bringing H-2B workers to the United States until the 2017 fair season got busy. All GoldStar's H-2B employees in 2017 were on the job during the slower part of the fair season.

21. For the 2016 season, Lee's Concessions did not fully comply with the period of temporary need set forth in GoldStar's I-129 and ETA 9142B for the 2016 season, but I do not believe these to have been substantial violations.

22. For the 2016 season, I conclude that the delay in getting Lee's Concessions' H-2B employees on the job in a timely manner was due, at least in part, to the visa processing issues in the United States Embassy in South Africa. I do not have enough information to quantify how many of Lee's Concessions' H-2B candidates were affected by these visa processing issues. Based upon my review of the entire record, I believe the visa processing issues were largely resolved by the end of June 2016.

23. In the 2016 season, Lee's Concessions increased the number of H-2B workers it employed as the season progressed. During that season, Lee's Concessions had only 14 of its 34 (41%) H-2B employees on the job by Memorial Day, which is the earliest date one could say the fair season began to get busy. All of Lee's Concessions' H-2B workers were on the job by the end of June. I believe the visa processing issues in the U.S. Embassy in Cape Town played a substantial role in Lee's Concessions having H-2B employees arriving for work in the United States as late as June 30, 2016. I find the Administrator has failed to prove by a preponderance of evidence that Lee's Concessions willfully delayed bringing workers to the United States in 2016.

[176]In paragraphs 18, 20, 23 and 26 of these Conclusions of Law, I have derived information about the arrival dates of Respondents' H-2B workers from AX 47.

24. For the 2017 season, Lee's Concessions did not fully comply with the period of temporary need set forth in Lee's Concessions' I-129 and ETA 9142B for the 2017 season. I believe there were substantial violations with respect to a portion of Lee's Concessions onboarding of H-2B employees in 2017.

25. I have no evidence specifically suggesting that visa delay issues affected Lee's Concessions' hiring of H-2B employees in 2017. It seems that many of the visa delay issues had been resolved by the end of June 2016. Based upon my review of the entire record, I conclude that Lee's Concessions' hiring of H-2B workers in 2017 was not adversely impacted by the visa delay issues that had affected Lee's Concessions hiring of H-2B workers in 2016.

26. In the 2017 season, Lee's Concessions increased the number of H-2B workers it employed as the season progressed. During that season, Lee's Concessions had 24 of its 35 (69%) H-2B employees on the job by April 22, 2017. The fair season is slow in April. Lee's Concessions brought 6 H-2B employees to the United States in June 2017, and an additional 5 H-2B employees in July.

27. Based upon my review of the entire record, I conclude that in 2017, Lee's Concessions willfully staggered the arrival of 11 of its 35 H-2B employees so that those 11 H-2B employees would arrive during the busy part of the fair season. Based on my review of the entire record, I conclude that the visa delay issues did not impact Lee's Concessions hiring of H-2B employees in 2017. I find the Administrator has proven by a preponderance of evidence that these 11 late-arriving H-2B employees were willfully not employed by Lee's Concessions until the busy part of the fair season. These willful actions violated the periods of temporary need set forth in Lee's Concessions' 9142B and I-129 forms for the 2017 season.

28. I **REVERSE** the Administrator's determination that GoldStar substantially failed to comply with the periods of temporary need in 2016.

29. I **REVERSE** the Administrator's determination that GoldStar substantially failed to comply with the periods of temporary need in 2017.

30. I **REVERSE** the Administrator's determination that Lee's Concessions substantially failed to comply with the periods of temporary need in 2016.

31. I **AFFIRM** the Administrator's determination that Lee's Concessions substantially failed to comply with the periods of temporary need in 2017 for a portion of its H-2B workforce. I **AFFIRM** the Administrator's determination that no back wages are to be assessed for this violation. I **MODIFY** the civil penalty assessed on Lee's Concessions for this Violation from the $5,572.35 assessed by the Administrator to $1,750. The Administrator's civil penalty assessment was premised on its belief that the arrival dates for all 35 of Lee's Concessions H-2B workers had been "staggered." I have found that only 11 of Lee's Concessions'

H-2B workers had their start-work dates "staggered" in 2017. I have proportionally reduced the civil penalties.

Violation #4 That in the 2016 and 2017 seasons, each of the Respondents substantially failed to comply with the requirement to provide their workers with accurate earnings statements in violation of Attestation #17 on Respondents' TECs

The Administrator alleges that Respondents have substantially failed to comply with the requirement to provide their respective employees with earning statements in violation of Attestations #17.

The Administrator bears the burden to prove these allegations by a preponderance of evidence.

Attestation #17 states:

> The employer will keep a record of workers' earnings and provide the workers with the required earning statements on or before each payday, which must be at least every 2 weeks . . . .[177]

The regulations, at 29 C.F.R. § 503.16, specifies the content of the earning statements:

> The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: records showing the nature, amount and location(s) of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from or additions made to the worker's wages.[178]

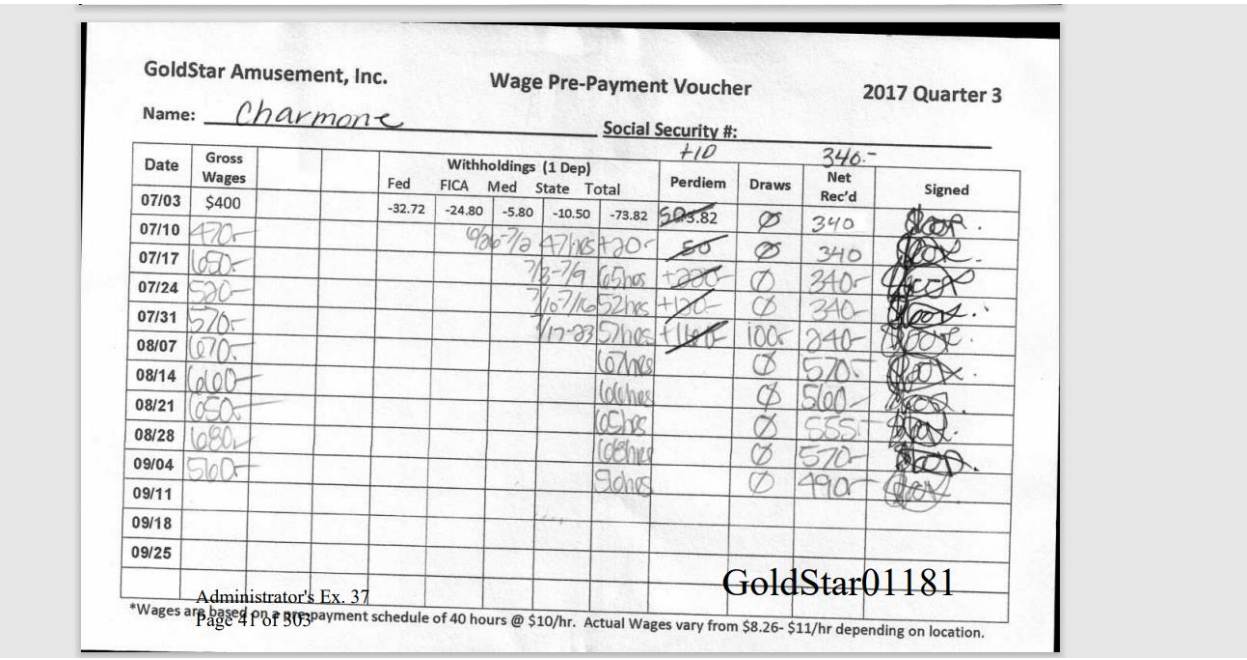
As discussed above, Respondents obtained approval to hire H-2B employees who would be paid on an hourly basis. Respondents recruited a large number of workers from

[177] JX 5 at page 12.
[178] 29 C.F.R. § 503.16(i).

South Africa. During the recruitment process, the H-2B workers were told they would be paid on an hourly basis.

Respondents' H-2B workers were not paid on an hourly basis in 2016 and 2017. As discussed above, the H-2B workers were all paid a set amount each week that did not change depending on the number of hours each individual had worked, and which did not change based on the state(s) in which the H-2B employee had worked during the pay period.

I invite an examination of a typical GoldStar pay card:



GoldStar Amusement, Inc. Wage Pre-Payment Voucher 2017 Quarter 3

Name: Charmone Social Security #:

Date	Gross Wages	Withholdings (1 Dep) Fed	FICA	Med	State	Total	Perdiem	Draws	Net Rec'd	Signed
07/03	$400	-32.72	-24.80	-5.80	-10.50	-73.82	+10 ~~50~~ 73.82	Ø	340	
07/10	470-				7/2	47hrs	+20- ~~50~~	Ø	340	
07/17	650-				7/8-7/9	65hrs	+200-	Ø	340-	
07/24	520-				7/10-7/16	52hrs	+120-	Ø	340-	
07/31	570-				7/17-23	57hrs	+140-	100-	240-	
08/07	670-					67hrs		Ø	570-	
08/14	600-					60hrs		Ø	560-	
08/21	650-					65hrs		Ø	555-	
08/28	680-					68hrs		Ø	570-	
09/04	560-					56hrs		Ø	490-	
09/11										
09/18										
09/25										

GoldStar01181

*Wages are based on a pre-payment schedule of 40 hours @ $10/hr. Actual Wages vary from $8.26- $11/hr depending on location.

Administrator's Ex. 37
Page 41 of 303

The document is called a "Wage Pre-Payment Voucher," but that is not how the card was used by Respondents. The card was shown to Respondents' H-2B employees at the time the employees collected their pay, which was given to them free and clear in cash. The employee signed the card as an acknowledgement of receipt of the cash. The card was not used to keep track of wages that were pre-paid (as the title of the card would suggest) because I have found no evidence of any system of wage prepayment. The seventh column from the left has a typed heading "Med," but seems on one (and only one) occasion to have some dates entered. The next column has a typed heading "State," but once (and only once) appears to have a notation about the alleged number of hours worked. On three other occasions, the column labeled "State" has what appears to be a range of dates which is then discontinued after the entry for July 31, even though it appears this H-2B worker received wages through early September. The next column has a heading "Total," but mostly (but not always) seems to record the number of hours alleged to have been worked by the H-2B worker during a given week. As discussed above, the "gang time" convention adopted by Respondents was not intended to, and did

not, accurately capture the number of hours worked by an H-2B worker.[179] The next column is labeled "Perdiem," but on 5 occasions contains unexplained numbers that are crossed out for unexplained reasons. One ordinarily thinks of a "per diem" as an allowance paid to an employee to cover expenses when the employee is traveling. It does not seem that the numbers under the "Perdiem" heading represent expenses to be paid back to the H-2B employee because the net pay received by the employee (12th column) does not change based on the (crossed-out) number contained in the "Perdiem" column. The last column contains the heading "Signed," by which the H-2B employee acknowledges receipt of the amount of money contained in the "Net Rec'd" column.

Based upon my understanding of the evidence, the only accurate information on the card is the employee's name, the week for which the employee is being paid and the amount of cash received in the employee's pay envelope (under the "Net Rec'd" heading). The employee signed the card indicating that payment had been received.

The Lee's Concessions pay cards were filled-out by the same paymasters and contain the same types of errors, omissions, and misstatements.

As to Violation #4, I make the following findings of fact:

1. The payroll cards shown by Respondents to their respective H-2B employees in 2016 and 2017 do not contain the information required by the regulations, 29 C.F.R. § 503.16(l).

2. The payroll cards shown by Respondents to their respective H-2B employees in 2016 and 2017 contain inaccurate information about the number of hours that had been worked by the H-2B workers during the pay period for which the employee was being paid.

3. In 2016 and 2017, Respondents did not give the payroll cards (or copies thereof) to their respective H-2B employees.

4. Prior to 2017, neither Respondent had any history of prior violations of the H-2B program.

5. The failure of Respondents to keep accurate payroll records aided Respondents in the systematic underpayment of wages to their respective H-2B workers in both the 2016 and 2017 seasons. As such, it is a violation of substantial gravity.

6. In 2018, months after the Administrator's investigation of Respondents was commenced, Respondents did implement a system which would allow Respondents to accurately record the hours worked by Respondents' H-2B workers.

[179] Even a stopped clock is right twice a day. It's possible that an entry in the "Total" column accurately recorded the number of hours worked by an H-2B employee, but such an instance would be accidental.

7. During the 2016 and 2017 seasons, the inaccurate pay records aided each Respondent to substantially fail to pay its H-2B workers all the wages owed to those H-2B workers. The poor pay records played a significant role in the systematic underpayment of wages to the H-2B workers in 2016 and 2017 and allowed each Respondent to realize a financial gain.

As to Violation #4, I make the following conclusions of law:

1. In 2016, GoldStar substantially violated the regulations, 29 C.F.R. § 503.16(l), and Attestation #17 by maintaining incomplete and inaccurate payroll records.

2. In 2017, GoldStar substantially violated the regulations, 29 C.F.R. § 503.16(l), and Attestation #17 by maintaining incomplete and inaccurate payroll records.

3. In 2016, Lee's Concessions substantially violated the regulations, 29 C.F.R. § 503.16(l), and Attestation #17 by maintaining incomplete and inaccurate payroll records.

4. In 2017, Lee's Concessions substantially violated the regulations, 29 C.F.R. § 503.16(l), and Attestation #17 by maintaining the incomplete and inaccurate pay payroll records.

5. In 2016 and 2017, Lee's Concessions substantially violated Attestation #17 by failing to provide to its H-2B employees payroll records containing the information required by the regulations, 29 C.F.R. § 503.16(l).

6. In 2016 and 2017, GoldStar substantially violated Attestation #17 by failing to provide to its H-2B employees payroll records containing the information required by the regulations, 29 C.F.R. § 503.16(l).

7. I **AFFIRM** the Administrator's Determination that no back wages are owed to GoldStar's employees for GoldStar's failure to provide employees with full and accurate pay records in 2016. I **AFFIRM** the Administrator's Determination that a civil penalty should be assessed on GoldStar for failing to communicate accurate payroll information to GoldStar's H-2B workforce by handing-over to each employee a document accurately explaining how that employee's wages had been computed. The root cause of the inaccuracy of the information contained on these pay cards is GoldStar's payment of wages on a salary basis instead of on the promised hourly basis. I have already punished GoldStar for the underpayment of wages to its H-2B workforce in 2016 by assessing a substantial civil penalty for Violation #2. I believe there is overlap between the civil penalty assessed by the Administrator for this willful record-keeping violation and the civil penalty I have previously affirmed for GoldStar's willful failure to pay to its H-2B workers the full wages earned by that employee. To avoid punishing GoldStar twice for the same or allied conduct, I **MODIFY** the amount of civil penalty imposed for this violation. I **REDUCE** the

amount of the civil penalty imposed on GoldStar for the violations of 29 C.F.R. § 503.16(l) and Attestation #17 for the year 2016 to $1,000.

8. I **AFFIRM** the Administrator's Determination that no back wages are owed to GoldStar's employees for GoldStar's failure to provide employees with full and accurate pay records in 2017. I **AFFIRM** the Administrator's Determination that a civil penalty should be assessed on GoldStar for failing to communicate accurate payroll information to GoldStar's H-2B workforce by handing-over to each employee a document accurately explaining how that employee's wages had been computed. The root cause of the inaccuracy of the information contained on these pay cards is GoldStar's payment of wages on a salary basis instead of on the promised hourly basis. I have already punished GoldStar for the underpayment of wages to its H-2B workforce in 2017 by assessing a substantial civil penalty for Violation #2. I believe there is overlap between the civil penalty assessed by the Administrator for this willful record-keeping violation and the civil penalty I have previously affirmed for GoldStar's willful failure to pay to its H-2B workers the full wages earned by that employee. To avoid punishing GoldStar twice for the same or allied conduct, I **MODIFY** the amount of civil penalty imposed for this violation. I **REDUCE** the amount of the civil penalty imposed on GoldStar for the violations of 29 C.F.R. § 503.16(l) and Attestation #17 for the year 2017 to $1,000.

9. I **AFFIRM** the Administrator's Determination that no back wages are owed to Lee' Concessions' employees for Lee's Concessions' failure to provide employees with full and accurate pay records in 2016. I **AFFIRM** the Administrator's Determination that a civil penalty should be assessed on Lee's Concessions for failing to communicate accurate payroll information to Lee's Concessions H-2B workforce by handing-over to each employee a document accurately explaining how that employee's wages had been computed. The root cause of the inaccuracy of the information contained on these pay cards is Lee's Concessions' payment of wages on a salary basis instead of on the promised hourly basis. I have already punished Lee's Concessions for the underpayment of wages to its H-2B workforce in 2016 by assessing a substantial civil penalty for Violation #2. I believe there is overlap between the civil penalty assessed by the Administrator for this willful record-keeping violation and the civil penalty I have previously affirmed for Lee's Concession's willful failure to pay to its H-2B workers the full wages earned by that employee. To avoid punishing Lee's Concessions twice for the same or allied conduct, I **MODIFY** the amount of civil penalty imposed for this violation. I **REDUCE** the amount of the civil penalty imposed on Lee's Concessions for the violations of 29 C.F.R. § 503.16(l) and Attestation #17 for the year 2016 to $1,000.

10. I **AFFIRM** the Administrator's Determination that no back wages are owed to Lee' Concessions' employees for Lee's Concessions' failure to provide employees with full and accurate pay records in 2017. I **AFFIRM** the Administrator's Determination that a civil penalty should be assessed on Lee's Concessions for failing to communicate accurate payroll information to Lee's Concessions H-2B workforce by handing-over to each employee a document accurately explaining how that

employee's wages had been computed. The root cause of the inaccuracy of the information contained on these pay cards is Lee's Concessions' payment of wages on a salary basis instead of on the promised hourly basis. I have already punished Lee's Concessions for the underpayment of wages to its H-2B workforce in 2017 by assessing a substantial civil penalty for Violation #2. I believe there is overlap between the civil penalty assessed by the Administrator for this willful record-keeping violation and the civil penalty I have previously affirmed for Lee's Concession's willful failure to pay to its H-2B workers the full wages earned by that employee. To avoid punishing Lee's Concessions twice for the same or allied conduct, I **MODIFY** the amount of civil penalty imposed for this violation. I **REDUCE** the amount of the civil penalty imposed on Lee's Concessions for the violations of 29 C.F.R. § 503.16(l) and Attestation #17 for the year 2017 to $1,000.

11. In assessing the amount of civil penalties to be paid by Respondents for Violation #4, I have considered and weighed the factors set forth in Findings of Fact numbers 4, 5, 6 and 7, above.

Administrator's Allegation #5 That in the 2016 and 2017 seasons, each of the Respondents substantially failed to pay the outbound travel costs of their H-2B workers in violation of Attestations #17 and #18 on Respondents' TECs

Administrator's Allegation #6 That in the 2016 and 2017 seasons, each of the Respondents substantially failed to pay the inbound travel costs of their H-2B workers in violation of Attestations # 17 and #18 on Respondents' TECs

The Administrator alleges that in the 2016 and 2017 seasons, each of the Respondents substantially failed to pay the outbound travel costs of their H-2B workers in violation of Attestations #17 and #18 on Respondents' TECs

The Administrator also alleges that in the 2016 and 2017 seasons, each of the Respondents substantially failed to pay the inbound travel costs of their H-2B workers in violation of Attestations # 17 and #18 on Respondents' TECs.

The Administrator bears the burden to prove these allegations by a preponderance of evidence.

Attestation #18, 29 C.F.R. §§ 503.16(j)(1)(i)-(ii) and (2), and Respondents' Job Orders for 2016 and 2017, required each Respondent to pay all visa-related expenses and the transportation and subsistence costs for its H-2B workers to travel from their homes in South Africa to the place of employment in the United States ("inbound") and for the travel cost to return them to their homes at the end of the season ("outbound").

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Attestation #18 states:

> The employer has disclosed how it will provide transportation and subsistence costs in the job order. The

> employer will either advance all visa, visa-related, border crossing, subsistence, and transportation expenses to workers traveling to the employer's worksite from the workers' place of recruitment, pay for them directly, or reimburse such expenses, other than travel and subsistence, in the first workweek and reimburse the remainder of the expenses no later than the time workers complete 50 percent of the period covered by the job order. (Advancement of transportation and subsistence costs to U.S. workers employed under this application is required when it is the prevailing practice of non H-2B employers in the occupation in the area of intended employment or when the employer extends such benefits to similarly situated H-2B workers.) Provided that workers work until the end of the certified period of employment or are dismissed from employment for any reason before the end of that period, the employer will pay for such workers' return transportation to the place of recruitment and daily subsistence if the workers have no immediate subsequent H-2B employment. All employer-provided transportation must comply with all applicable Federal, State, and local laws and regulations.[180]

The Job Orders provide:

> H-2B workers reimbursed in the 1st paycheck for all visa, visa processing, border crossing, and other related fees, but not for passport expenses of other charges primarily for the benefit of the worker. If the worker completes 50% of the work contract period, employer will reimburse the worker for subsistence and provide advance payment for transportation from the place of recruitment to the place of work. Upon completion of the work contract or where the worker is dismissed earlier, employer will provide or pay for worker's reasonable costs of return transportation and subsistence back home or to the place the worker originally departed to work . . .[181]

The Administrator alleges that each of the Respondents failed to fully pay the inbound and outbound costs in 2016 and 2017.

Inbound (beginning of season) Expenses: In 2016 and 2017, Respondents frequently did not pay the full cost for their H-2B workers to travel to the U.S. consulate for interviews required for the issuance of their visas and did not pay for the H-2B workers travel to the airports in South Africa from which the H-2 workers departed for employment with Respondents. The Administrator presented testimony from Wage and Hour

[180] JX 7 at page 13.
[181] AX 1 at page 2

investigator Matt Jones about these unpaid inbound costs, and Mr. Jones has prepared spreadsheets detailing the unpaid expenses. The total amount of inbound costs the Administrator seeks to recover from both Respondents for 2016 and 2017 is $9,183.

Respondents have presented no evidence showing thar these inbound costs were paid by Respondents in 2016 or 2017. Respondents have presented no evidence challenging the calculation of unpaid inbound expenses made by Mr. Jones.

Outbound (end of season) Expenses: In 2016 and 2017, Respondents failed to pay the full cost for their H-2B workers to return to their homes in South Africa at the end of the fair season. Respondents did not pay the cost for the H-2B workers to go from the airport in South Africa to their respective homes in South Africa. The Administrator presented testimony from Wage and Hour investigator Matt Jones about these unpaid outbound costs, and Mr. Jones has prepared spreadsheets detailing the unpaid expenses. The total amount of outbound costs the Administrator seeks to recover from both Respondents for 2016 and 2017 is $3,292.

Respondents have presented no evidence showing thar these outbound costs were paid by Respondents in 2016 or 2017. Respondents have presented no evidence challenging the calculation of unpaid outbound expenses made by Mr. Jones.

The Administrator also seeks civil penalties for Respondents' failure to pay these inbound and outbound costs in 2016 and 2017. Respondents oppose the imposition of these civil penalties, arguing they were unaware of the requirement to pay these expenses.

As to Allegations #5 and #6, I make the following findings of fact:

1. Attestation #18 is contained in Appendix B to the ETA Form 9142B signed by GoldStar before the 2016 season. Attestation #18 refers to the Job Order issued by GoldStar before the 2016 season.

2. Attestation #18 is contained in Appendix B to the ETA Form 9142B signed by GoldStar before the 2017 season. Attestation #18 refers to the Job Order issued by GoldStar before the 2017 season.

3. Attestation #18 is contained in Appendix B to the ETA Form 9142B signed by Lee's Concessions before the 2016 season. Attestation #18 refers to the Job Order issued by Lee's Concessions before the 2016 season.

4. Attestation #18 is contained in Appendix B to the ETA Form 9142B signed by Lee's Concessions before the 2017 season. Attestation #18 refers to the Job Order issued by GoldStar before the 2017 season.

5. Each of the Attestations #18 signed by GoldStar before the 2016 and 2017 seasons required GoldStar to pay all "visa-related" costs for the H-2B workers it

intended to employ, and also required GoldStar to pay all the "transportation expenses to workers traveling to the employer's worksite."

6. Each of the Job Orders issued by GoldStar before the 2016 and 2017 seasons disclosed that GoldStar would reimburse the H-2B workers in their first paycheck for all "visa processing" expenses incurred by those H-2B workers. The Job Order also disclosed that GoldStar would "provide advance payment for transportation from the place of recruitment to the place of work."

7. Each of the Attestations #18 signed by Lee's Concessions before the 2016 and 2017 seasons required Lee's Concessions to pay all "visa-related" costs for the H-2B workers it intended to employ, and also required Lee's Concessions to pay all the "transportation expenses to workers traveling to the employer's worksite."

8. Each of the Job Orders issued by Lee's Concessions before the 2016 and 2017 seasons disclosed that Lee's Concessions would reimburse the H-2B workers in their first paycheck for all "visa processing" expenses incurred by those H-2B workers. The Job Order also disclosed that Lee's Concessions would "provide advance payment for transportation from the place of recruitment to the place of work."

9. In 2016, GoldStar did not pay or reimburse for all the visa-related expenses incurred by GoldStar's H-2B employees. Nor did GoldStar pay all the travel expenses incurred by H-2B workers traveling to the airport in South Africa to come to the United States. The total amount of GoldStar's unpaid outbound costs for 2016 is $1,770.

10. In 2017, GoldStar did not pay or reimburse for all the visa-related expenses incurred by GoldStar's H-2B employees. Nor did GoldStar pay all the travel expenses incurred by H-2B workers traveling to the airport in South Africa to come to the United States. The total amount of GoldStar's unpaid outbound costs for 2017 is $2,529.

11. In 2016, Lee's Concessions did not pay or reimburse for all the visa-related expenses incurred by Lee's Concessions' H-2B employees. Nor did Lee's Concessions pay all the travel expenses incurred by H-2B workers traveling to the airport in South Africa to come to the United States. The total amount of Lee's Concessions' unpaid outbound costs for 2016 is $1,503.

12. In 2017, Lee's Concessions did not pay or reimburse for all the visa-related expenses incurred by Lee's Concessions' H-2B employees. Nor did Lee's Concessions pay all the travel expenses incurred by H-2B workers traveling to the airport in South Africa to come to the United States. The total amount of Lee's Concessions' unpaid outbound costs for 2017 is $3,381.

13. The methods used by the Administrator to calculate the amount of Respondents' unpaid outbound costs for 2016 and 2017 are reasonable and reliable, and I adopt the Administrator's calculations.

14. In 2016, GoldStar did not pay the travel expenses incurred by H-2B workers traveling to their homes from the airport in South Africa at the end of the season. The total amount of GoldStar's unpaid inbound costs for 2016 is $608.

15. In 2017, GoldStar did not pay the travel expenses incurred by H-2B workers traveling to their homes from the airport in South Africa at the end of the season. The total amount of GoldStar's unpaid inbound costs for 2017 is $843.

16. In 2016, Lee's Concessions did not pay the travel expenses incurred by H-2B workers traveling to their homes from the airport in South Africa at the end of the season. The total amount of Lee's Concessions' unpaid outbound costs for 2016 is $714.

17. In 2017, Lee's Concessions did not pay the travel expenses incurred by H-2B workers traveling to their homes from the airport in South Africa at the end of the season. The total amount of Lee's Concessions' unpaid inbound costs for 2017 is $1,127.

18. The methods used by the Administrator to calculate the amount of Respondents' unpaid inbound costs for 2016 and 2017 are reasonable and reliable, and I adopt the Administrator's calculations.

19. Respondents' obligation to pay or reimburse the outbound and inbound travel expenses described above was clearly articulated in the Attestations signed by each of the Respondents in 2016 and 2017. None of the evidence or argument advanced by Respondents excuses Respondents from their obligation to pay or reimburse for these outbound and inbound travel expenses.

20. Prior to 2017, neither Respondent had any history of prior violations of the H-2B program.

21. The systematic failure of Respondents to pay the outbound and inbound expenses of their respective H-2B workers in both the 2016 and 2017 seasons is a violation of substantial gravity.

22. The systematic failure of Respondents to pay the outbound and inbound expenses of their respective H-2B workers in both the 2016 and 2017 seasons allowed each Respondent to realize a financial gain.

As to Allegations #5 and #6 I enter the following conclusions of law:

1. I **AFFIRM** the Administrator's determination that GoldStar is liable to pay all of the inbound and outbound travel expenses for 2016 and 2017 in the amounts described in Findings of Fact 9, 10, 14 and 15.

2. I **AFFIRM** the Administrator's determination that Lee's Concessions is liable to pay all the inbound and outbound travel expenses for 2016 and 2017 in the amounts described in Findings of Fact 11, 12, 16 and 17.

3. I **AFFIRM** the Administrator's imposition of a civil penalty on each of the Respondents for Respondents not paying the inbound and outbound travel expenses of their H-2B workers in 2016 and 2017, and I **AFFIRM** the Administrator's imposition of a civil penalty in the same amount of the costs of the inbound and outbound travel which was avoided by each of the Respondents.

4. In assessing the amount of civil penalties to be paid by Respondents for Violations 5 and 6, I have considered and weighed the factors set forth in Findings of Fact numbers 20, 21 and 22, above.

The chart below summarizes my findings and conclusions.

Summary Chart of Back Wages and Penalties

GoldStar

Violation	Back Wages To Be Paid	Civil Penalties To Be Paid
Violation #1		
2016 **2017**	0 0	0 0
Violation #2		
2016 **2017**	$12,397.13 80,107.44	$12,383.00 12,383.00
Violation #3		
2016 **2017**	0 0	0 0
Violation #4		
2016 **2017**	0 0	$1,000.00 1,000.00
Violations #5 and #6		
2016 Outbound **Inbound**	$1,770.00 608.00	$1,770.00 608.00
2017 Outbound **Inbound**	2,529.00 843.00	2,529.00 843.00
TOTAL	**$98,254.57**	**$32,516.00**

Lee's Concessions

Violation	Back Wages To Be Paid	Civil Penalties To Be Paid
Violation #1		
2016 **2017**	0 0	0 0
Violation #2		
2016 **2017**	$8,210.10 33,053.68	$8,210.10 12,383.00
Violation #3		
2016 **2017**	0 0	0 1,750.00
Violation #4		
2016 **2017**	0 0	$1,000 1,000
Violations #5 and #6		
2016 Outbound **Inbound**	$1,503.00 714.00	$1,503.00 714.00
2017 Outbound **Inbound**	3,381.00 1,127.00	3,381.00 1,127.00
TOTAL	**$47,988.78**	**$31,068.10**

ORDER

I have affirmed in part, reversed in part, and modified in part, the Violations alleged by the Administrator in the Second Amended Determination Letters of October 19, 2022.

It is hereby **ORDERED:**

1. Respondent GoldStar is to pay back wages in the total amount of $98,254.57 for the Violations affirmed in this Decision and Order.

2. These back wages are to be paid by GoldStar to the H-2B workers identified in AX 26.

3. The back wages are to be paid by GoldStar to the H-2B workers in the amounts stated in AX 26.

4. GoldStar is to pay civil monetary penalties in the total amount of $32,516.00 for the Violations affirmed and the Violations modified in this Decision and Order.

5. Respondent Lee's Concessions is to pay back wages in the total amount of $47,988.78 for the Violations affirmed in this Decision and Order.

6. These back wages are to be paid by Lee's Concessions to the H-2B workers identified in AX 24.

7. The back wages are to be paid by Lee's Concessions to the H-2B workers in the amounts stated in AX 24.

8. Lee's Concessions will pay civil monetary penalties in the total amount of $31,068.10 for the Violations affirmed and the Violations modified in this Decision and Order.

9. Counsel for the Administrator is to contact counsel for Respondents when this Decision and Order is served on counsel. Counsel for the parties are to immediately meet and confer to discuss the process for making payment of the back wages to the H-2B workers. A stipulated plan would be welcome.

10. On or before 2:00 p.m. Eastern Time on Wednesday March 20, 2024, the Administrator will submit a plan for the implementation of this Order. This plan will describe the mechanics of, and schedule for, making the prompt payment of back wages to the H-2B workers identified in AX 24 and 26. The plan will identify whether Respondents or the Administrator or some other party will be responsible for creating and mailing the checks to the H-2B workers, or whether some other means of payment will be used. The plan will identify the earliest possible date when mailing of checks to the H-2B workers can begin. The plan will identify what is to be done with the monies allocated for payment of back wages to an individual if that individual cannot be located, or if that individual otherwise cannot be paid.

11. Respondents may submit any objections to the Administrator's plan for distribution of back pay on or before 2:00 p.m. Eastern Time on Friday, March 22, 2024.

12. I will issue further Orders requiring implementation of a plan for the prompt payment of back wages to the H-2B workers.

Digitally signed by Steven D. Bell
DN: CN=Steven D. Bell, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

Steven D. Bell
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision and order, including judicial review, shall file a Petition for Review ("Petition") with the Administrative

Review Board ("ARB"). The ARB must receive the Petition within 30 calendar days of the date of this decision and order. 29 C.F.R. § 503.51(a).

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. No particular form is prescribed for any petition for the ARB's review permitted by this part. However, any such petition will:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the ALJ decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Include as an attachment the ALJ's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

29 C.F.R. § 503.51(b). If the ARB does not issue a notice accepting a petition for review of the decision within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action. 29 C.F.R. § 503.51(c). Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same will be served upon the ALJ and upon all parties to the proceeding. 29 C.F.R. § 503.51(d).

FILING AND SERVICE OF AN APPEAL

1. **Use of EFS System:** The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

   A. **Attorneys and Lay Representatives:** Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R. § 26.3(a)(1), (2).

   B. **Self-Represented Parties: Use of the EFS system is strongly encouraged for all self-represented parties** with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the

time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

Administrative Review Board
Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFS System, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

- **Service on Registered EFS Users:** Service upon registered EFS users is accomplished automatically by the EFS system.

- **Service on Other Parties or Participants:** Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.

SERVICE SHEET

Case Name: **ADMINISTRATOR_v_GOLDSTAR_AMUSEMENTS__**

Case Numbers: **2021TNE00027, 2021TNE00028**

Document Title: **DECISION AND ORDER**

I hereby certify that a copy of the above-referenced document was sent to the following this 13th day of March, 2024:

Digitally signed by RAYMOND WILKE
DN: CN=RAYMOND WILKE, OU=LEGAL ASSISTANT, O=US DOL Office of Administrative Law Judges, L=Cincinnati, S=OH, C=US
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