

ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:)	
)	
ADMINISTRATOR, WAGE & HOUR)	ARB Case No. 2020-0018
DIVISION,)	
)	
Prosecuting Party,)	ALJ Case No. 2017-TAE-00003
)	
v.)	
)	
SUN VALLEY ORCHARDS, LLC,)	
)	
Respondent.)	

ADMINISTRATOR’S RESPONSE BRIEF

KATE S. O’SANNLAIN
Solicitor of Labor

RACHEL GOLDBERG
Counsel for Appellate Litigation

JENNIFER S. BRAND
Associate Solicitor

AMELIA BELL BRYSON
Attorney

SARAH K. MARCUS
Deputy Associate Solicitor

U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Suite N-2716
Washington, DC 20210
(202) 693-5336
Bryson.Amelia.B@dol.gov

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vi
JURISDICTION.....	2
ISSUES TO BE REVIEWED.....	2
STATEMENT OF THE CASE.....	3
A. Statement of Facts	3
<i>i. Respondent’s Inaccessible Kitchen; Undisclosed Meal Plan; and Sale of Drinks to Workers</i>	<i>5</i>
<i>ii. Respondent’s Termination of Workers and False Resignation Forms.....</i>	<i>7</i>
<i>iii. Respondent’s Substandard Housing and Dangerously Deficient Work Transport.....</i>	<i>9</i>
B. ALJ Proceedings and Decision	10
STANDARD OF REVIEW	11
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(g), (p), AND (q) BY MAKING FALSE PROMISES ABOUT KITCHEN ACCESS AND FAILING TO DISLCOSE MEAL CHARGES AND, AS A RESULT OF THESE VIOLATIONS, AWARDED BACK WAGES.....	13

- A. The ALJ Correctly Held That Respondent Violated Sections 655.122(g) and (q) by Not Providing the Promised Kitchen Access.15
- B. The ALJ Correctly Held That Respondent Violated Sections 655.122 (g), (p), and (q) by Falling to Disclose Meal Charges in the Job Orders and Making Undisclosed Deductions for Meals from Workers’ Wages.17
 - i. *The ALJ Correctly Held That Hernandez Acted as Respondent’s Agent in Administering the Meal Plan and Charging Workers for the Meals.*18
 - ii. *The ALJ Correctly Held That Hernandez Unlawfully Made Deductions—Either Constructive or Actual—from the Workers’ Pay.*21
- C. The ALJ Properly Awarded Back Wages of \$128,285 for the Meal Plan Disclosure and Deductions Violations.23

II. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(p) BY SELLING DRINKS AT A PROFIT AND IN VIOLATION OF STATE OF LAW AND, AS A RESULT OF THESE VIOLATIONS, AWARDED BACK WAGES.28

- A. The ALJ Correctly Held That Respondent Violated Section 655.122(p) by Deducting Payments for Non-Alcoholic Beverages and Beer from Workers’ Wages.29
- B. The ALJ Properly Awarded \$64,960 in Back Wages for the Non-Alcoholic Beverages the Farmworkers Purchased.31

	Page
C. The ALJ Properly Awarded \$8,972.61 in Back Wages for the Profit Hernandez Made on the Beer Sales.....	34
III. THE ALJ PROPERLY ASSESSED CMPs FOR RESPONDENT’S MEAL PLAN AND DRINK VIOLATIONS.....	36
IV. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(i)(1) BY DISCHARGING TWENTY-FOUR WORKER BEFORE THEY HAD WORKED AT LEAST THREE-FOURTHS OF THE WORKDAYS SPECIFIED IN THE WORK CONTRACT AND, AS A RESULT OF THESE VIOLATIONS AWARDED BACK WAGES AND ASSESSED CMPs.....	41
A. The ALJ Correctly Held That Because Respondent Terminated or Otherwise Constructively Discharged Nineteen Workers in May 2015, Respondent Violated the Three-Fourths Guarantee for Such Workers.....	42
i. <i>Substantial Evidence Supports the ALJ’s Finding That in May 2015, Respondent Terminated Nineteen Workers Without Cause.</i>	42
ii. <i>Substantial Evidence Supports the ALJ’s Finding That Even Assuming, Arguendo, Respondent Did Not Terminate the Workers in May 2015, Respondent Constructively Discharged Such Workers.</i>	44
B. The ALJ Correctly Held That in August 2015, Respondent Laid Off Four Workers Without Meeting the Three-Fourths Guarantee for Such Workers.....	49

	Page
C. The ALJ Correctly Held That Respondent Violated the Three-Fourths Guarantee Concerning Jose Islas Larraga.	50
D. The ALJ Properly Awarded \$142,728 in Back Wages and Assessed a Single CMP of \$1,350.....	51
V. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 29 C.F.R. 501.5 BY ATTEMPTING TO OBTAIN WAIVERS FROM ITS EMPLOYERS OF THE THREE-FOURTHS GUARANTEE AND, AS A RESULT OF THESE VIOLATIONS, ASSESSED CMPs.....	52
VI. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(d)(1) BY PROVIDING INADEQUATE HOUSING AND, AS A RESULT OF THESE VIOLATIONS, ASSESSED CMPs.....	54
A. The ALJ Correctly Held That Respondent Failed to Maintain Worker Housing in the Conditions Required	54
B. The ALJ Properly Assessed \$3,150 In CMPs... ..	56
VII. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(h)(4) THROUGH ITS USE OF SUBSTANDARD TRANSPORTATION AND UNLICENSED DRIVERS AND, AS A RESULT OF THESE VIOLATIONS, ASSESSED CMPs.....	57
A. The ALJ Properly Held That Respondent Used Substandard Transportation and Unlicensed Drivers.....	57
B. The ALJ Properly Assessed \$7500 in CMPs.	58

	Page
CONCLUSION	59
CERTIFICATE OF SERVICE	60

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Anderson v. Mt. Clemens Pottery Co.</i> , 328 U.S. 680 (1946)	34, 35
<i>Arriaga v. Fla. Pac. Farms</i> , 305 F.3d 1228 (11th Cir. 2002).....	22
<i>Castillo v. Case Farms of Ohio, Inc.</i> , 96 F. Supp. 2d 578 (W.D. Tex. 1999).....	18
<i>Clowes v. Allegheny Valley Hosp.</i> 991 F.2d 1159 (3d Cir. 1993).....	44, 45, 46, 47
<i>Donovan v. New Floridian Hotel, Inc.</i> , 676 F.2d 468 (11th Cir. 1982).....	30
<i>Escobar v. Baker</i> , 814 F. Supp. 1491 (W.D. Wash. 1993).....	23
<i>Howard v. Malcolm</i> , 658 F. Supp. 423 (E.D.N.C. 1987).....	55
<i>Global Horizons, Inc., No.</i> , 2010-TAE-0002 (OALJ Dec. 17, 2010), <i>aff'd</i> , ARB No. 11-058 (ARB May 31, 2013)	26, 39
<i>Global Horizons, Inc., No.</i> , 2010-TAE-0002 (OALJ Dec. 13, 2011).....	25, 26
<i>Nuness v. Simon & Schuster, Inc.</i> , 325 F. Supp. 3d 535 (D.N.J. 2018).....	45, 46

	Page
<i>Cases--Continued:</i>	
<i>OPM v. Richmond</i> , 496 U.S. 414 (1990)	39
<i>Ortiz v. Paramo</i> , No. 06-3062, 2008 WL 4378373 (D.N.J. Sept. 19, 2008)	30
<i>Ortiz v. Paramo</i> , No. 06-3062, 2009 WL 4575618 (D.N.J. Dec. 1, 2009)	28, 30
<i>Overdevest Nurseries, LP</i> , 2015-TAE-00008 (OALJ Feb. 18, 2016)	36
<i>Pa. State Police v. Suders</i> , 542 U.S. 129 (2004)	44, 48
<i>Ramos-Barrientos v. Bland</i> , 661 F.3d 587 (11th Cir. 2011)	18
<i>Seasonal Ag. Servs., Inc.</i> , No. 2014-TAE-00006 (OALJ Dec. 5, 2014)	26
<i>Utah Power & Light Co. v. United States</i> , 243 U.S. 389 (1917)	39
<i>Weeks Marine, Inc.</i> , ARB No. 12-093, 2015 WL 2172482 (ARB Apr. 29, 2015)	22, 23
<i>WHD v. Fernandez Farms, Inc.</i> , ARB No. 2016-0097, 2019 WL 4924120 (ARB Sept. 16, 2019)	11
<i>WHD v. Kutty</i> , ARB No. 03-022, 2005 WL 135123 (ARB May 31, 2005)	36

Cases--Continued:

<i>WHD v. Seasonal Ag. Servs., Inc.</i> , ARB No. 15-023, 2016 WL 5887688 (ARB Sept. 30, 2016)	11
---	----

Statutes:

Administration Procedure Act, 5 U.S.C. 557(b)	11
--	----

Immigration & Nationality Act, 8 U.S.C. 1188	1, 36, 52
8 U.S.C. 1101(a)(15)(H)(ii)(a)	1

Code of Federal Regulations:

20 C.F.R. 654.404	54
20 C.F.R. 654.405	54
20 C.F.R. 654.406	54
20 C.F.R. 654.407	54
20 C.F.R. 654.408	54
20 C.F.R. 654.408(a)	55
20 C.F.R. 654.408(b)	55
20 C.F.R. 654.409	54
20 C.F.R. 654.410	54
20 C.F.R. 654.411	54
20 C.F.R. 654.412	54
20 C.F.R. 654.412(a)	55
20 C.F.R. 654.413	54
20 C.F.R. 654.414	54
20 C.F.R. 654.414(a)	55
20 C.F.R. 654.415	54
20 C.F.R. 654.416	54
20 C.F.R. 654.417	54
20 C.F.R. Part 655, Subpart B	1, 36, 52

	Page
Code of Federal Regulations--Continued:	
20 C.F.R. 655.102(b)(13) (2005).....	26
20 C.F.R. 655.103.....	14
20 C.F.R. 655.120.....	24, 32
20 C.F.R. 655.122.....	38
20 C.F.R. 655.122(d)(1).....	3, 12, 54, 56
20 C.F.R. 655.122(g).....	passim
20 C.F.R. 655.122(h)(4).....	3, 12, 57, 58
20 C.F.R. 655.122(i).....	12, 42, 52
20 C.F.R. 655.122(i)(1).....	3, 41, 49
20 C.F.R. 655.122(i)(5).....	48
20 C.F.R. 655.122(j)(1).....	50
20 C.F.R. 655.122(n).....	41, 50
20 C.F.R. 655.122(p).....	passim
20 C.F.R. 655.122(p)(1).....	13, 21, 25, 26
20 C.F.R. 655.122(p)(2).....	passim
20 C.F.R. 655.122(q).....	13, 14
29 C.F.R. 500.105(b)(1)(iii).....	57
29 C.F.R. Part 501.....	1
29 C.F.R. 501.16(a)(1).....	24
29 C.F.R. 501.16(a)(2).....	32
29 C.F.R. 501.19(a).....	36
29 C.F.R. 501.19(b).....	36, 37, 40, 56, 58
29 C.F.R. 501.42.....	2
29 C.F.R. 501.5.....	passim
29 C.F.R. Part 531.....	28
29 C.F.R. 531.31.....	28

Other Authorities:

U.S. Dep’t of Labor,

Emp’t & Training Admin.,

Information about the DOL Notification Process for Worker Abandonment, or Termination for Cause for H-2A Temporary Agricultural Labor Certifications
76 Fed. Reg. 21,041, 2011 WL 1397931 (Apr. 14, 2011)41

Workforce Innovation & Opportunity Act,

81 Fed. Reg. 56,072, 2016 WL 4398251 (Aug. 19, 2016).....54

Sec’y’s Order No. 01-2019,

Delegation of Auth. & Assignment of Responsibility to the Admin. Review Bd.

84 Fed. Reg. 13072, 2019 WL 1453417 (Apr. 3, 2019)2

Wage & Hour Div.,

Field Assistance Bulletin, No. 2012-3 (May 17, 2012)..... 22, 29

N.J. Statutes Annotated,

Section 33:1-2(a)31

Section 39:3-10 (2015).....57

ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:)	
ADMINISTRATOR, WAGE & HOUR DIVISION,)	ARB Case No. 2020-0018
Prosecuting Party,)	ALJ Case No. 2017-TAE-00003
v.)	
SUN VALLEY ORCHARDS, LLC,)	
Respondent.)	

ADMINISTRATOR’S RESPONSE BRIEF

This case arises under the H-2A provisions of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(a), 8 U.S.C. 1188, and the U.S. Department of Labor’s (“Department”) H-2A regulations, 29 C.F.R. Part 501; 20 C.F.R. Part 655, Subpart B. On October 28, 2019, Administrative Law Judge Theresa Timlin (“the ALJ”) issued a Decision and Order (“D&O”) affirming in part and modifying in part the Administrator of the Department’s Wage and Hour Division’s (“Administrator”) findings. The ALJ ruled that Respondent, Sun Valley Orchards, LLC, violated six of the H-2A program’s requirements and, as a result,

Respondent owed back wages and civil money penalties (“CMPs”). The Administrative Review Board (“ARB” or “Board”) should affirm the ALJ’s decision in its entirety.

JURISDICTION

The Board has jurisdiction to review an ALJ’s decision and issue the final determination of the Secretary of Labor under the H-2A program. U.S. Dep’t of Labor, Sec’y’s Order No. 01-2019 (Feb. 15, 2019), 84 Fed. Reg. 13072, 2019 WL 1453417 (Apr. 3, 2019); 29 C.F.R. 501.42.

ISSUES TO BE REVIEWED¹

1. Whether the ALJ correctly concluded that Respondent violated 20 C.F.R. 655.122(g), (p), and (q) by making false promises about kitchen access and failing to disclose meal charges and, as a result of these violations, awarded back wages?
2. Whether the ALJ correctly concluded that Respondent violated 20 C.F.R. 655.122(p) by selling drinks at a profit and in violation of state law and, as a result of these violations, awarded back wages?

¹ The issues to be reviewed encompass those identified by the Board in its Notice of Appeal, but are phrased and organized slightly differently.

3. Whether the ALJ correctly assessed CMPs for Respondent's meal and drink violations?
4. Whether the ALJ correctly concluded that Respondent violated 20 C.F.R. 655.122(i)(1) by discharging twenty-four workers before they had worked at least three-fourths of the workdays specified in the work contract and, as a result of these violations, awarded back wages and assessed CMPs?
5. Whether the ALJ correctly concluded that Respondent violated 29 C.F.R. 501.5 by attempting to obtain waivers from its employees of the three-fourths guarantee and, as a result of these violations, assessed CMPs?
6. Whether the ALJ correctly concluded that Respondent violated 20 C.F.R. 655.122(d)(1) by providing inadequate housing and, as a result of these violations, assessed CMPs?
7. Whether the ALJ correctly concluded that Respondent violated 20 C.F.R. 655.122(h)(4) through its use of substandard transportation and unlicensed drivers and, as a result of these violations, assessed CMPs?

STATEMENT OF THE CASE

A. Statement of Facts

Respondent, Sun Valley Orchards, LLC, is one of New Jersey's largest produce growers, with about a dozen fields totaling at least 2,500 acres. PX-15, at

383:23-384:6; JX-1, at 18. Sun Valley is owned and operated by four members of the Marino family: brothers Russell Jr. and Joseph, their uncle Harry, and their father Russell, Sr. Tr. 787:18-21; ALJ Ex. 1 ¶ 2. Sun Valley's management also includes Agustin Hernandez, who is the lead supervisor of Sun Valley's farmworkers and has worked for Sun Valley for twenty-seven years. Tr. 170:24-171:2, 172:9-13, 799:19-23; PX-15, at 425:23-25.

Respondent filed two job orders with the Department to hire 100 H-2A workers in 2015, covering overlapping time periods: April 13, 2015 to October 10, 2015, JX-1, and June 1, 2015 to October 10, 2015, JX-3, (collectively, the "job orders" or "job offers"). The job orders represented to prospective H-2A workers that Respondent would "furnish free cooking and kitchen facilities to those workers who are entitled to live in the employer[']s] housing so that workers may prepare their own meals." JX-1, at 2, 9 ¶ 14; JX-3, at 43, 50 ¶ 14. Respondent checked a series of boxes on the job orders identifying whether certain deductions would be made from workers' pay. For the box corresponding to "Meals," Respondent checked "No" to indicate that it would not provide and charge for meals. JX-1, at 4 ¶ 17; JX-3, at 45 ¶ 17. Nowhere in the job orders did Respondent state that it would provide meals and charge workers for the meals, or the amount that it would charge. The Department approved the job orders, and

Respondent used them to hire approximately 147 workers during the 2015 growing season.

At Respondent's farm, Hernandez supervised the farmworkers and virtually every aspect of the farmworkers' lives and work. Tr. 172:9-13. Among other duties, Hernandez oriented Respondent's workers when they arrived at the farm and told them the rules, D&O 11; Tr. 174:19-175:24, maintained the workers' housing facilities, D&O 11; Tr. 172:22-173:20, sold Respondent's workers meals and drinks, D&O 11; Tr. 190:24-191:1, 223:25-224:1, oversaw the transportation of workers between Respondent's housing and the fields, D&O 11; Tr. 205:5-15, and distributed pay to Respondent's workers, Tr. 211:24-212:9.

i. Respondent's Inaccessible Kitchen; Undisclosed Meal Plan; and Sale of Drinks to Workers

The kitchen that Respondent promised in its two job orders to furnish to its workers was not large enough to allow for Respondent's large workforce to cook its own meals, D&O 12; Tr. 175:22-176:13, 743:25-744:8, particularly given that workers returned to the dormitories around the same times to eat meals during and after twelve-hour shifts in the fields, Tr. 175:22-176:6, 804:2-4; *see also* PX-7, at 188:23-189:2-6; PX-15, at 447:10-14. (The workers did not have a choice as to when to work because Hernandez set their work schedules. *E.g.*, Tr. 17:19-22.) Instead of providing the promised kitchen access, Respondent tasked Hernandez

with managing a meal plan for the workers. D&O 10. Respondent instructed Hernandez to buy groceries and hire cooks to provide workers with meals for a fee. *Id.*; *see also* Tr. 176:24-177:10. Respondent's workers all participated in Respondent's meal plan for at least some of the season. Tr. 263:24-264:18, 444:6-445:5, 804:8-9, 967:13-22. The workers participated in the meal plan because, as Hernandez and his wife and cook Elia Pinon admitted, the workers "cannot cook their own meals in the kitchen." Tr. 176:4-6; *see also* PX-19, at 809.

While managing the kitchen and providing the meal plan was primarily delegated to Hernandez, Respondent continued to be heavily involved in the meal plan's administration. D&O 10; *see also, e.g.*, Tr. 186:25-187:2, 738:10-12, 742:22-743:8, 808:8. Respondent paid the kitchen's utility bills. D&O 10. To help Hernandez administer the meal plan program, Respondent's payroll office provided him with company payroll sheets (with the header "Sun Valley Orchards LLC") for employees to sign when they paid for meals. PX-17-2, at 799-800; Tr. 181:10-183:3. Moreover, Russell Marino, Jr. followed up with Hernandez during the season to ensure that Hernandez was creating and maintaining these records regarding who participated in the meal plan. Tr. 186:25-187:2, 187:7-10. Hernandez did not, however, maintain any records relating to the meal plan beyond who participated. Tr. 250:11-251:4, 463:7-14.

Hernandez also sold non-alcoholic beverages and beer, along with other small items, to the workers from a store located inside Respondent's kitchen on Respondent's property. D&O 10; Tr. 358:8-359:16. Hernandez also sold soft drinks to workers several times a day while he supervised them in the fields. D&O 16; *see also, e.g.*, PX-7, at 176:7-177:4; Tr. 22:16-22, 139:22, 195:9-11. The workers bought these beverages, in part, because at times Respondent did not provide drinking water and, even when water was available, workers were concerned about the water's taste and cleanliness. D&O 18-19; Tr. 19:5-9, 91:14-21, 139:21-22, 262:6-13. Hernandez also sold beer at the company store, even though neither he nor Respondent had a license to do so. D&O 7-8; Tr. 97:17-21, 145:7; PX-20, at 823 ¶ 21; PX-20, at 828 ¶ 5. Hernandez sold these non-alcoholic drinks and beer to workers at a profit, but did not maintain records of these sales. D&O 16; Tr. 450:20-23.

ii. Respondent's Termination of Workers and False Resignation Forms

The workers engaged in the hard work of harvesting produce. D&O 20. Clean drinking water and clean bathroom facilities were not consistently available to the workers, especially while they were working in the fields. *Id.* In May, a group of nineteen workers sought a meeting with Respondent's management to raise concerns about their living and working conditions, including the lack of

drinking water, accessible kitchen facilities, and transportation to a laundromat or store (the farm is geographically isolated). Tr. 22:23-34:6, 106:18-107:4, 122:7-13, 147:9-15. When Russell Marino, Jr. arrived at the meeting, he was “very angry” and “screaming.” Tr. 35:4-5, 21-22. He did not afford the workers the opportunity to explain their concerns, and instead fired them on the spot. *E.g.*, Tr. 39:8-10, 107-18-20, 125:11-13.

Russell Marino, Jr. left the meeting and, as he put it, “started the process of letting the guys go.” Tr. 768:9-11. He distributed forms that did not give the workers the option of indicating that they had been fired and, instead, falsely memorialized that the workers were resigning. D&O 20-21; *see also* Tr. 732:10-12, 768:24-769:4. Russell Marino, Jr. and Hernandez ensured that each of the nineteen workers filled out and signed the forms, explaining that the forms were mandatory to receive transportation to Mexico, “in order for [the workers] not to have any problems,” and to prevent “caus[ing] ... trouble to the company.” Tr. 108:18-19, 149:4-6, 769:21-23. The workers returned to Mexico shortly after signing the forms. ALJ Ex. 1 ¶¶ 27, 35.

In August 2015, Respondent laid off another group of workers after a crop failure reduced the amount of available work. D&O 21; Tr. 207:11-14, 746:15-21, 748:11-14; 754:23-24. Respondent had those workers sign the same departure

forms that falsely memorialized that the workers had “resign[ed their] job[s].” JX-9, at 152; *see also* Tr. 272:3-10, 274:9-12, 747:3-8, 747:17-20.

Consistent with the false information that Respondent directed the workers to provide on the departure forms, Respondent sent required notifications to government agencies that falsely stated the reason that these employees’ employment ended. D&O 20; Tr. 409:5-12, 748:20-24, 753:12-754:2.

Additionally, Respondent did not send a notice at all for one worker, Jose Islas Larraga, who stopped working as of June 9, 2015, four months before the end of the job order. Tr. 419:16-22, 436:4-10, 558:9-561:10.

iii. Respondent’s Substandard Housing and Dangerously Deficient Work Transport

Respondent provided inadequate housing to its workers. The dormitories they lived in had dirty bathrooms without adequate hot water for all the workers. D&O 18-19, 21. The windows and doors lacked screens and the garbage cans lacked lids, causing problems with flies and other pests in the dormitories. *Id.* Respondent transported the workers from the dormitory area to the fields and shuttled them throughout the fields in unsafe school buses, driven by unlicensed drivers. D&O 8-9, 21; Tr. 104:13-17, 377:1-9, 377:15-21, 380:13-381:1.

B. ALJ Proceedings and Decision

On June 22, 2016, after an investigation by the Wage and Hour Division, the Administrator issued a Notice of Determination against Respondent alleging multiple violations of the H-2A program, assessing back wages and civil money penalties. Respondent timely contested the Notice of Determination and requested a hearing.

On December 23, 2016, the Administrator referred the matter to the Office of Administrative Law Judges for docketing. After a July 2017 evidentiary hearing, the ALJ issued a Decision and Order on October 28, 2019 Affirming in Part and Modifying in Part the Administrator's Findings. The ALJ found the Administrator's determination of violations, back-wage awards, and CMP assessments to be "reasonable and accurate," except for the back-wage calculation for the sale of non-alcoholic beverages, which she reduced slightly, and the CMP assessed for a mattress violation, which she found was not supported by the evidence. D&O 54. Accordingly, the ALJ modified, in part, the Administrator's finding, but held that Respondent owed a total of \$344,945.80 in back wages and \$211,800 in civil money penalties. D&O 53-54.

On November 27, 2019, Respondent petitioned the Board for review of the ALJ's Decision and Order. On December 6, 2019, the Board granted the petition for review.

STANDARD OF REVIEW

The Board reviews an ALJ's legal conclusions de novo and acts with "all the powers [the Secretary] would have in making the initial decision." 5 U.S.C. 557(b); *see also WHD v. Seasonal Ag. Servs., Inc.*, ARB No. 15-023, 2016 WL 5887688, at *5 (ARB Sept. 30, 2016) ("The Board has plenary power to review an ALJ's legal conclusions de novo[.]"). The Board will affirm an ALJ's factual findings if supported by substantial evidence. *WHD v. Fernandez Farms, Inc.*, ARB No. 2016-0097, 2019 WL 4924120, at *1 (ARB Sept. 16, 2019).

SUMMARY OF ARGUMENT

Respondent used the H-2A program to recruit workers to its farm with the promise of free and convenient cooking and kitchen facilities, safe and habitable living conditions, and a guarantee that the workers would be allowed to work and receive pay for at least three-fourths of the growing season. Nearly 150 H-2A and domestic workers relied on the promises in Respondent's job offers. These workers arrived, however, to find no kitchen facilities available, charges for meals, substandard housing conditions, and unsafe transportation. When nineteen of these

workers attempted to raise concerns about these living and working conditions to Respondent early in the growing season, they were fired and then instructed to sign forms falsely stating that they had resigned for personal reasons. Respondent also laid off dozens of other workers later in the season and similarly instructed these workers to sign forms falsely stating that they had resigned. Respondent lied to government agencies about the reasons for the workers' departures.

The ALJ properly held that Respondent committed serious violations of the H-2A program. Specifically, Respondent's undisclosed meal charges and false promises about kitchen access violated 20 C.F.R. 655.122(g), (p), and (q); its charges for drinks sold at a profit and in violation of state law violated section 655.122(p); its discharge of workers before they had met their three-fourths guarantee violated section 655.122(i); its attempt to have workers waive that guarantee violated 29 C.F.R. 501.5; its inadequate housing violated section 655.122(d)(1); and its substandard transportation and use of unlicensed drivers violated section 655.122(h)(4). D&O 54-55. The ALJ reasoned, "serious violations call for serious penalties" and properly held that Respondent owed a total of \$344,945.80 in back wages and \$211,800 in civil money penalties for the above violations. *Id.* at 53-54. The Board should affirm the ALJ's holdings in full.

ARGUMENT

I. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(g), (p), AND (q) BY MAKING FALSE PROMISES ABOUT KITCHEN ACCESS AND FAILING TO DISCLOSE MEAL CHARGES AND, AS A RESULT OF THESE VIOLATIONS, AWARDED BACK WAGES.

Employers seeking the benefits of the H-2A program must agree to comply with the conditions and requirements of the H-2A program. The H-2A regulations require an employer to either:

- (1) “provide each worker with three meals a day”; or
- (2) “furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals.”

20 C.F.R. 655.122(g). In the job order that it submits to the Department for approval and to prospective H-2A workers, the employer must disclose which of these two options it will do. *Id.* If an employer chooses to provide workers with three meals a day, it may charge workers for those meals, but must disclose in the job order “the charge, if any, to the worker for such meals.” *Id.* Relatedly, section 655.122(p)(1) provides that the employer’s “job offer must specify all deductions not required by law which the employer will make from the worker’s paycheck,” such as deductions for meals. *Id.* at 655.122(p)(1). Section 655.122(q) further provides that the employer must provide workers with a copy of the work contract

(here, the job offer, 20 C.F.R. 655.103; PX-20, at 816-817 ¶ 3), when workers apply for an H-2A visa and when domestic workers arrive at the job. 20 C.F.R. 655.122(q). “At a minimum, the work contract must contain all of the provisions required by” section 655.122, including disclosure of any meals deductions. *Id.* at 655.122(q). These disclosures ensure that workers have an accurate representation of their pay and benefits before accepting a job and traveling to the United States.

Here, Respondent’s two job orders each stated that Respondent “will furnish free cooking and kitchen facilities ... so that workers may prepare their own meals.” JX 1, JX 3. Russell Marino, Jr. signed both job orders in his role as Respondent’s “owner/manager,” and the job orders were provided to both the Department and prospective H-2A workers. *Id.* The substantial evidence shows, however, that Respondent failed to do as it promised in the job orders and instead, through its agent Hernandez, charged workers for meals without having previously disclosed to the workers that it would impose these charges, and deducted the payment for the meals from the workers’ pay. Therefore, the ALJ correctly concluded that Respondent violated these regulatory requirements. D&O 35-40. Because these undisclosed meal charges reduced the workers’ wages below the applicable minimum wage, the ALJ properly awarded back wages corresponding to the amount of the meal charges. The back-wage award in this amount ensures

that the workers earn their applicable minimum wage. *Id.* at 39. The Board should affirm that holding and back-wage award.

A. The ALJ Correctly Held That Respondent Violated Sections 655.122(g) and (q) by Not Providing the Promised Kitchen Access.

In its job orders, Respondent promised to furnish workers with free and convenient cooking and kitchen facilities. JX-1 at 9, ¶ 14; JX-3, at 43, 50 ¶ 14. This promise satisfied Respondent’s regulatory requirement and formed part of its contract with workers, and was therefore binding on Respondent. 20 C.F.R. 655.122(g), (q). However, as the record clearly demonstrates and as the ALJ found, when the workers arrived at Respondent’s farm, they discovered that Respondent would not provide them with kitchen access, but instead would provide meals through a meal plan costing each worker \$75 to \$80 a week. D&O 35; Tr. 176:4-13, 263:24-264:3; PX-13, at 339:5-340:4; PX-7, at 173:21-174:13. Hernandez, in charge of the kitchen for Respondent, testified that workers could not cook their own meals in the kitchen because it was too small. Tr. 175:22-176:13. His wife, Elia Pinon, who worked in Respondent’s kitchen, explained that “[w]orkers are not allowed to enter the kitchen to cook their own meals.” PX-19, at 809. The workers also understood that cooking their own meals in the kitchen was forbidden. *E.g.*, Tr. 92:19-95:3; PX-13, at 339:5-340:4. Some employees asked to use the kitchen and were specifically told no, PX-5, at 127:12-17; others

observed without needing to ask that there was no room for workers to prepare their own meals alongside the kitchen staff preparing meals for the meal plan, PX-11, at 321:9-11. Accordingly, the evidence does not support Respondent's contention, Resp't Br. 8, that the employees had kitchen access but some employees just never asked to use the kitchen.

Respondent's additional attempt to overcome this substantial evidence is equally unavailing. Respondent contends that some workers testified they were "allowed to and actually did use the kitchen to store and prepare food." Resp't Br. 8 (citing Tr. 176:17-20). The evidence in the record, however, tells a different story. The testimony on which Respondent relies for this point is from Hernandez; he testified that workers could only sometimes store very small items in the kitchen, such as a container of milk. Tr. 176:17-22. Moreover, in that same testimony, Hernandez admitted that workers were not allowed to use the kitchen and there was no room in the kitchen refrigerators for the workers to store food. Tr. 175:22-176:22. A few workers testified that they did manage to cook, but on a hot plate set up in their bedroom that they bought with their own money after their requests to use the kitchen were denied. PX-34, at 1103-1106; Tr. 263:24-264:18. Taken together, substantial evidence in the record supports the ALJ's finding that "the express terms of the job orders ... were clearly not in line with the realities

facing the farmworkers upon arrival at Respondent’s dormitory” and, therefore, Respondent failed to provide workers with the kitchen access promised in the job orders. D&O 35-36. Accordingly, the ALJ correctly held that Respondent violated sections 655.122(g) and (q).²

B. The ALJ Correctly Held That Respondent Violated Sections 655.122(g), (p), and (q) by Failing to Disclose Meal Charges in the Job Orders and Making Undisclosed Deductions for Meals from Workers’ Wages.

Because Respondent did not provide its workers with kitchen access, section 655.122(g) required Respondent to provide meals, and sections 655.122(g), (p), and (q) required Respondent to have disclosed any meal charges or deductions in the job orders. The record shows that Respondent had its supervisor Hernandez, acting as its agent, provide workers with meals and collect payment for the meal plan from the workers. ALJ Ex. 1 ¶ 22; PX-15 at 454:13-15 (Hernandez referring

² Respondent also appears to argue, in passing and without citing any evidence, that the workers could have cooked “in shifts” at meal times and that this possibility is sufficient to establish that Respondent provided the promised kitchen access. Resp’t Br. 24. Respondent did not offer this arrangement to the workers and even if had, it would not have been the “convenient” cooking and kitchen facilities the regulations require. 20 C.F.R. 655.122(g). Given the large size of Respondent’s workforce, the required twelve-hour work shifts and group transportation to and from the fields that made it impossible for workers to have time to cook in shifts, and the lack of access to a grocery store, this arrangement would not have been plausible. *E.g.*, Tr. 774:6-8 (kitchen not big enough for many workers to cook simultaneously), 214:14-18, 175:22-176:6, 804:2-4; PX-7, at 188:23-189:6; PX-15, at 447:10-14.

to Respondent's meal plan as "the meal plan that I provide, that Sun Valley Orchards offers the men on behalf of Sun Valley Orchards"). Respondent did not, however, disclose in the job orders that the workers would have to buy meals from Respondent or how much they would cost. Tr. 763:5-9. Accordingly, the ALJ correctly held that Respondent violated sections 655.122(g), (p), and (q) by failing to disclose the \$75 to \$80 weekly meal charges in the job orders. D&O 38-40. And, as explained below, Respondent, through its agent Hernandez, violated section 655.122(p) by making undisclosed deductions from the workers' wages for the meals.

i. The ALJ Correctly Held That Hernandez Acted as Respondent's Agent in Administering the Meal Plan and Charging Workers for the Meals.

Respondent is responsible for the charges and deductions made by its agent Hernandez. While Respondent contends, Resp't Br. 9-10, that common law agency principles do not apply in this case, the ALJ correctly concluded that agency principles apply to violations arising under the Immigration and Nationality Act. D&O 36 (citing *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578, 593 (W.D. Tex. 1999)); *see also Ramos-Barrientos v. Bland*, 661 F.3d 587, 601 (11th Cir. 2011). Accordingly, the ALJ properly relied on the Restatement (Third) of Agency as instructive in this case. D&O 36.

The ALJ correctly concluded that Hernandez was Respondent's agent because he acted with Respondent's actual authority. D&O 36-37. An agent has actual authority "when at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement 2.01. Respondent had a legal duty to provide kitchen access or three meals a day to its farmworkers. 20 C.F.R. 655.122(g). Because Respondent did not provide the promised kitchen access, it was required to provide the workers with meals. *Id.* The record shows that to do so, Respondent tasked Hernandez with operating a meal plan. Tr. 713:15-25, 742:22-743:11, 808:12-15. Before the workers arrived, Respondent instructed Hernandez to continue to operate a meal plan generally as he had for years (i.e., before Respondent hired H-2A workers) by charging workers for meals, maintaining records of charges, and not earning a profit on the meals. Tr. 176:23-177:10, 186:25-187:2, 738:10-12, 808:8-15. Now that Respondent was an H-2A employer, Respondent also instructed Hernandez not to charge above H-2A program limits. Tr. 742:22-743:8. Respondent argues that the "entire kitchen operation" was "independent[] from Sun Valley's farming operations" and because Hernandez used the money he collected from workers to purchase food and pay the kitchen staff, he was not acting as an agent of

Respondent. Resp't Br. 9. Hernandez oversaw the kitchen and bought food, however, to make the meals because he administered the meal plan on Respondent's behalf and at Respondent's direction and those tasks were a necessary part of administering the meal plan. Moreover, Respondent's farming operations would not meet its legal obligation to provide meals to its workers without Hernandez's "entire kitchen operation." Accordingly, the preponderant evidence supports the ALJ's conclusion that in all of his duties "and especially concerning the operation of the meal plan," Hernandez acted with Respondent's actual authority. D&O 37.

The ALJ also correctly concluded, in the alternative, that Hernandez was Respondent's agent because he acted with Respondent's apparent authority. D&O 37-38. An actor has apparent authority to act on a principal's behalf when "a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Restatement 2.03. Here, the farmworkers reasonably believed that Hernandez had authority to act on Respondent's behalf. D&O 37-38. Russell Marino, Jr. attended orientation sessions where he and Hernandez together explained to the workers the meal plan and charges, which would have made clear to any worker that this was Respondent's meal plan and that Hernandez was administering it on Respondent's

behalf. *E.g.*, Tr. 403:8-14. When workers paid for their meals, they were required to sign Respondent's payroll forms with Respondent's name at the top. PX-17-2, at 799-800; Tr. 182:5-12. Additionally, Hernandez supervised the workers, oriented them about living and working conditions and rules when they arrived at Respondent's farm, and was generally the intermediary between the workers and Respondent in every aspect of their lives at Respondent's farm. D&O 37.

Accordingly, the ALJ properly concluded "the farmworkers held reasonable beliefs that Hernandez had authority to act on Respondent's behalf," and because he acted under Respondent's apparent authority, "he worked as Respondent's agent, and any legal effect of his actions are imputed to Respondent." D&O 38.

ii. The ALJ Correctly Held That Hernandez Unlawfully Made Deductions—Either Constructive or Actual—from the Workers' Pay.

The regulations prohibited Respondent from making any deductions from the workers' paychecks that were not specified on Respondent's job orders. 20 C.F.R. 655.122(p)(1). Neither the fact that workers would be charged for meals, nor the amount to be charged were specified on the job orders. Yet, Respondent does not dispute that Hernandez charged workers for the meal plan. Therefore, when Hernandez, as Respondent's agent, charged the workers for meals,

Respondent made undisclosed deductions from the workers' pay in violation of this regulation.

Contrary to Respondent's assertion, Resp't Br. 7, 9, it is irrelevant whether Hernandez deducted the charges directly from workers' paychecks or charged workers for the meal plan after paying them their wages. As the Board has explained, "there is no legal difference between an employer directly deducting a cost from a worker's wages, and shifting to the employee a cost that the employer could not lawfully directly deduct from wages." *Weeks Marine, Inc.*, ARB No. 12-093, 2015 WL 2172482, at 4 (ARB Apr. 29, 2015); *see also Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002) (finding "no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear").³ Deductions and after-the-fact charges are equivalent because "[s]hifting a cost to the employee that cannot be lawfully deducted directly from ... the employee's wages constitutes an unlawful de facto deduction that impermissibly drives the employee's pay below

³ This principle applies uniformly across several wage statutes, including the Davis Bacon Act, the Fair Labor Standards Act ("FLSA"), the Migrant and Seasonal Agricultural Workers Protection Act ("MPSA"), and the H-2A program. *E.g.*, Wage and Hour Division, Field Assistance Bulletin ("WHD Bulletin") No. 2012-3, at 1 (May 17, 2012). The H-2A regulations specifically incorporate by reference FLSA standards for permissibility of deductions. 20 C.F.R. 655.122(p).

the required prevailing wage.” *Weeks Marine*, 2015 WL 2172482, at *4. As one court explained in the context of MSPA:

One of the purposes of the statute is to prevent the exploitation of migrant farm workers’ labor by farm labor contractors or agricultural employers, who deduct from their pay exorbitant amounts of money for daily necessities such as housing, food, and electricity but who refuse to account for the exact amount charged or consumed. To make a technical distinction between money deducted *before* paychecks are issued and money requested *after* paychecks are issued is to disregard the purpose of [MSPA].

Escobar v. Baker, 814 F. Supp. 1491, 1506 (W.D. Wash. 1993) (emphasis in original). Here, because Respondent failed to disclose the meal plan charge or deduction in the job orders, it could not lawfully charge workers or deduct anything from the workers’ pay for the meal plan. Thus, the deductions that Hernandez made violated the regulations’ disclosure requirements. Accordingly, the ALJ held that “[r]egardless of the mechanism by which Hernandez deducted the meal . . . purchases, deductions of the farmworkers’ pay—constructive or actual—still occurred,” and because Hernandez made these deductions as Respondent’s agent, Respondent violated section 655.122(p). D&O 39.

C. The ALJ Properly Awarded Back Wages of \$128,285 for the Meal Plan Disclosure and Deduction Violations.

When an H-2A employer makes improper deductions from a worker’s wages and these deductions push the worker’s wages below the rate promised in

the job order, the amount of the deductions necessary to raise their wages to the required minimum must be returned to the workers as back wages. 20 C.F.R. 655.120, 655.122(p)(2) (“The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required”); 29 C.F.R. 501.16(a)(1) (recovery of back wages “directly from” employer). Here, the undisclosed meal deductions reduced the wages of Respondent’s workers below the required minimum wage (i.e., the wage promised in the job offers). Thus, there is no merit to Respondent’s argument, Resp’t Br. 11, that it already paid the workers’ their required minimum wage. The ALJ appropriately held that “because Respondent made deductions of the farmworkers’ pay for the meals ... Respondent is required to provide back pay to the [a]ffected farmworkers.” D&O 39. As the ALJ explained, “a less severe consequence would deny the farmworkers their contractual right to the ... minimum wage promised in the job order ... and would provide a decreased deterrent effect to future employers who may also attempt to alter the terms of the job order upon the workers’ arrival.” *Id.* Accordingly, the ALJ correctly affirmed the Administrator’s award of \$128,285 in back wages, which is the amount that the workers’ wages fell below their contractual minimum wage due to Respondent’s undisclosed meal deductions.

Respondent asserts that because the meal deductions did not result in a profit to Respondent, an award for the full amount of the undisclosed deductions is improper. Resp't Br. 11. Respondent's argument reflects a misunderstanding of its obligations when participating in the H-2A program. The regulations require disclosure of meal charges or deductions and separately prohibit an employer from profiting from any deductions (even if the deductions are disclosed). *Compare* 20 C.F.R. 655.122(p)(1) (prohibiting undisclosed deductions without regard to the reasonableness of those deductions), *with id.* at 655.122(p)(2) (separately prohibiting deductions from which the employer or an affiliated person profits). Thus, as the ALJ explained, "the violation consists of the deduction itself"; the remedy for such violation is for the employer to return the undisclosed deductions sufficient to pay the workers their required minimum wage. D&O 39. Back wages are owed for the undisclosed deductions regardless of whether the employer profited from the deductions.

Respondent's reliance on *WHD v. Global Horizons, Inc.*, to support its argument on this point, Resp't Br. 10-11, is misplaced. Indeed, *Global Horizons* supports the ALJ's decision, not Respondent's position. In *Global Horizons*, the H-2A employer failed to disclose meal charges in the job orders, just as Respondent did here. *WHD v. Global Horizons, Inc.*, No. 2010-TAE-0002, slip

op. at 2 (OALJ Dec. 13, 2011) (“*Global Horizons II*”) (discussing 20 C.F.R. 655.102(b)(13) (2005), which is substantially identical to current section 655.122(g)); *Global Horizons, Inc.*, No. 2010-TAE-0002, slip op. at 4 (OALJ Dec. 17, 2010) (“*Global Horizons I*”), *aff’d*, ARB No. 11-058 (ARB May 31, 2013). Respondent incorrectly asserts that the court in *Global Horizons* preconditioned a back-wage award on the employer having profited from the meals. Resp’t Br. 11 (citing *Global Horizons I*, slip op. at 9). In reality, the *Global Horizons* court acknowledged that the employer did not profit from the meal plan, but still awarded back wages in the full amount of the undisclosed meal charges. *Global Horizons I*, slip op. 9.⁴ Moreover, the *Global Horizons* court specifically rejected the arguments that an amount less than the full amount of undisclosed deductions would be proper or that the back wages should take into account the cost or fair market value of the meals. *Global Horizons II*, slip op. at 2 n.7; *see also Seasonal Ag. Servs., Inc.*, No. 2014-TAE-00006, slip op. at 3 (OALJ Dec. 5, 2014) (awarding back wages in the full amount of undisclosed deductions pursuant to section 655.122(p)(1)).

⁴ While the court in *Global Horizons* discussed the significance of an employer’s profit from the meal plan, the profit was relevant only to its decision to deny CMPs (discussed in detail *infra*), not to its back-wage award. *Global Horizon I*, slip op. at 9.

Respondent further argues that the Administrator improperly awarded back wages to all employees without establishing that the workers would have made a different choice had they known they would not have kitchen access and instead would have to participate in the meal plan. Resp't Br. 12. This argument is likewise misplaced. As discussed above, Respondent's violations were the failure to disclose the meal charges and the undisclosed deductions for the meals. 20 C.F.R. 655.122(g), (p), and (q). All of the workers who Respondent hired received the inaccurate disclosure and all of the workers who participated in the meal plan suffered reduction in their wages below the required minimum as a result of the undisclosed meal charges. The fact that some workers may have decided to come to the United States and work for Respondent had they known they would have to pay for the meal plan has no bearing on whether Respondent did or did not disclose the meal plan charges in the job orders as required or make undisclosed deductions from workers' pay. Thus, Respondent owes back wages to all of those workers.⁵ As the ALJ concluded, a less severe consequence would deny the farmworkers

⁵ As discussed *supra*, a few workers cooked on a hot plate in the dormitories and did not participate in the meal plan for a period. The Administrator's back-wage calculations did not include those workers for the periods in which they did not participate in Respondent's meal plan.

their contractual wage and encourage future employers to attempt to alter the terms of a job order upon the workers' arrival. D&O 39.

II. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(p) BY SELLING DRINKS AT A PROFIT AND IN VIOLATION OF STATE LAW AND, AS A RESULT OF THESE VIOLATIONS, AWARDED BACK WAGES.

The H-2A regulations provide that charges or deductions from workers' wages by employers are allowed only if they are "reasonable." 20 C.F.R. 655.122(p)(2). There are at least two circumstances where a deduction or charge is *per se* unreasonable and therefore prohibited:

- (1) "if it includes a profit to the employer or to any affiliated person"; or
- (2) if it is made for items sold "in violation of any Federal, State, or local law."

20 C.F.R. 655.122(p)(2) (incorporating by reference 29 C.F.R. Part 531 for determining whether deductions are reasonable); 29 C.F.R. 531.31; *cf. Ortiz v. Paramo*, No. 06-3062, 2009 WL 4575618, at *4 (D.N.J. Dec. 1, 2009) ("*Ortiz II*") (disallowing employer from crediting employees' beer purchases towards employer's FLSA wage obligations because employer was prohibited under New Jersey law from selling alcohol without a license).

Acting as Respondent's agent and affiliated person, Hernandez sold workers non-alcoholic drinks and beer at a profit and sold beer in violation of state law,

which made the charges for the drinks and beer unreasonable deductions from the workers' wages in violation of section 655.122(p). These unlawful deductions reduced the workers' wages below their applicable minimum wage. Accordingly, the ALJ correctly concluded that Respondent violated section 655.122(p) and ordered Respondent to pay back wages for the amount charged for the non-alcoholic drinks and the profit from the beer. D&O 54. The Board should affirm the ALJ's holding and back-wage award.

A. The ALJ Correctly Held That Respondent Violated Section 655.122(p) by Deducting Payments for Non-Alcoholic Beverages and Beer from Workers' Wages.

Through its agent Hernandez, Respondent sold non-alcoholic beverages and beer to the workers at a profit, in violation of 20 C.F.R 655.122(p)(2). As discussed *supra*, Hernandez acted as Respondent's agent and was acting in that agent capacity while selling beverages to Respondent's workers.⁶ Even assuming, *arguendo*, that he was not acting as Respondent's agent when selling beverages, he was clearly an "affiliated person" under the regulations. D&O 38; *see also* WHD Bulletin No. 2012-3 ("The term 'affiliated person' includes but is not limited to

⁶ The ALJ found that Hernandez acted as Respondent's agent at all relevant times. D&O 36-38. The evidence supports the conclusion that Hernandez acted with Respondent's apparent authority, at a minimum, when selling drinks because Hernandez sold drinks stored in Respondent's refrigerators from the company store located in Respondent's kitchen. Tr. 358:8-359:16.

agents, ... [and] any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship."); Tr. 233:25-224:1. Therefore, there is no merit to Respondent's contention, Resp't Br. 16, that because the workers did not purchase drinks directly from Respondent, Respondent was not liable under section 655.122(p)(2) for Hernandez's profiteering.

By prohibiting deductions that include a profit to the employer or an affiliated person, the regulation prevents the employer or affiliated person from profiting off the employer's workforce. That is exactly what Hernandez did with the sale of each drink, and he admitted as much. Tr. 195:11-196:8. Moreover, it is the employer's burden to demonstrate that charges do not include a profit and are therefore reasonable. *Ortiz v. Paramo*, No. 06-3062, 2008 WL 4378373, at *6 (D.N.J. Sept. 19, 2008) ("*Ortiz I*") (employer failed to meet its burden that meal charges were reasonable because it failed to maintain records regarding those charges); *Ortiz II*, 2009 WL 4575618, at *3-4 (trial verdict awarding employees the full amount of charges given employer's lack of records regarding cost); see also *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 474 (11th Cir. 1982) (strictly holding an employer to its burden). Respondent failed to require Hernandez to keep records of the prices of drinks that he bought and re-sold or the number of drinks sold to each of Respondent's workers. Nor did Hernandez keep

such records. Tr. 209:18-21, 361:22-24, 371:12-16. Respondent knew, moreover, that Hernandez was profiting from selling its workers drinks. PX-15, at 452:15-453:9; RX-23, at 325.

Hernandez's charges to workers for his sale of beer were also unreasonable under section 655.122(p)(2) because Hernandez sold beer without a license, in violation of state law. N.J. Stat. Ann. 33:1-2(a) (license required to sell beer in New Jersey). This is undisputed. PX-20, at 823 ¶ 21; PX-20, at 828 ¶ 5; *see also* D&O 7.

Thus, substantial evidence supports the ALJ's finding that Hernandez, acting as Respondent's agent and an affiliated person, sold non-alcoholic beverages and beer to the farmworkers at a profit and sold beer in violation of state law. D&O 7-8, 16, 20, 40-41, 42. Because section 655.122(p)(2) provides that charges or deductions are unreasonable if they include a profit to the employer or affiliated person or if they violate state law, the ALJ correctly concluded that the charges to Respondent's workers for these beverages were unreasonable and, therefore, Respondent violated section 655.122(p)(2). D&O 40-42, 54.

B. The ALJ Properly Awarded \$64,960 in Back Wages for the Non-Alcoholic Beverages the Farmworkers Purchased.

As explained *supra*, when an H-2A employer makes improper charges or deductions that reduce the worker's wages below the rate promised in the job

order, the employer is required to pay the workers the amount improperly charged or deducted to raise the workers' wages back to the promised minimum rate. 20 C.F.R. 655.120, 655.122(p)(2); 29 C.F.R. 501.16(a)(2). Respondent challenges the calculation of back wages for the various non-alcoholic drinks that workers bought from Hernandez, arguing that Respondent was not required to "provide unlimited free energy drinks to its workers." Resp't Br. 15. Again, Respondent's argument reflects a fundamental misunderstanding of an H-2A employer's obligations. Nothing in the regulation or the ALJ's decision requires an employer to provide free unlimited drinks to employees. But if an employer does sell drinks to employees, it is prohibited from profiting from the sales (and from violating state law). 20 C.F.R. 655.122(p)(2). If the employer runs afoul of these requirements, through its own actions or those of an affiliated person, the employer is liable for the amount charged to employees for the drinks that reduced the employees' wage below the required minimum.⁷

⁷ Furthermore, the employer is not entitled to any credit for the cost of items sold to employees (in this case, the cost of the drinks). The H-2A regulations strictly prohibit unreasonable charges or deductions and specify that "the cost" of an item underlying an unreasonable deduction "may not be included in computing wages." 20 C.F.R. 655.122(p)(2).

Respondent focuses on the availability of water in the fields in arguing that the sale of drinks did not violate the H-2A requirements. Resp't Br. 14-16. This argument is misplaced because Respondent's failure to consistently provide clean, drinkable water to its workers was not the basis for the violation or the back-wage award. Rather, the ALJ's finding regarding the lack of consistent access to clean water simply bolstered the appropriateness of awarding the full amount charged for these non-alcoholic drinks. D&O 40-41.⁸ Even if Respondent had consistently provided its workers with clean, drinkable water, Hernandez's sale of beverages at a profit would still have violated the H-2A requirements and, therefore, it would still be proper to award back wages for the full amount of the drink charges that brought the workers' wages below the applicable minimum wage.

⁸ Substantial evidence supports the ALJ's finding that the workers did not have access to potable water at certain times. D&O 18-19, 41. Workers consistently testified to clean water being unavailable, including all of the workers who testified before the ALJ. Tr. 52:15-19, 60:21-61:7 (one worker testifying he complained to Hernandez about the water's bad taste on the first day); Tr. 96:4-6, 139:21-22, 141:5-6, 162:8-11 (another worker testifying water was unavailable, and that "if a different truck would drive into the fields to sell...beverages to us, [Hernandez] would tell them to go away. We could only purchase from him."); Tr. 261:9-13 (another worker testifying about the water's bad taste); PX-11, at 287:4-7, 291:6-11 (another worker testifying the water was not clean); PX-5, at 134:2-4 (another worker testifying water was not available in eating area). While the Administrator did not dispute that there was potable water available to workers at some points, the evidence shows that it not always available to all workers.

The ALJ also properly affirmed the Administrator’s back-wage calculation for the non-alcoholic drink violations. D&O 41-42. Because Hernandez and Respondent could not produce records of the workers’ drink purchases, the Administrator reasonably followed the *Mt. Clemens* burden-shifting framework to determine the amount of back wages owed for the drink violations. D&O 41 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-89 (1946)).⁹ Respondent does not appear to challenge the use of the *Mt. Clemens* framework to calculate the \$64,960 that Respondent owes in back wages for non-alcoholic drinks.

C. The ALJ Properly Awarded \$8,972.61 in Back Wages for the Profit Hernandez Made on the Beer Sales.

The ALJ correctly held that the Administrator reasonably calculated \$8,972.61 in back pay for the profit Hernandez made on the sale of beer to

⁹ Under the *Mt. Clemens* burden-shifting framework, when an employer owes back wages to employees but has failed to maintain records, an employee need only produce “sufficient evidence” to show the amount of back wages owed “as a matter of just and reasonable inference[,]” at which point the burden shifts to the employer to produce evidence of the “precise amount” of back wages owed or to negate the reasonableness of the inferences drawn from the employees’ evidence. 328 U.S. at 687-88. If the employer fails to meet this burden, the court may award damages based on results that are “only approximate.” *Id.* at 688.

workers. D&O 42.¹⁰ Respondent mounts a passing challenge to the ALJ's conclusion that the Administrator's back-wage calculations regarding the beer sales were reasonable. Resp't Br. 19-20. Specifically, Respondent appears to argue that the Wage and Hour Division Investigator incorrectly calculated the costs of the beer, the number of workers who purchased beer, and the number of beers purchased. Resp't Br. 20. The Board should reject these passing arguments. As with the non-alcoholic drinks, Hernandez and Respondent failed to keep accurate records of the number of beers sold to workers and therefore the *Mt. Clemens* burden-shifting framework applies. D&O 42. As the ALJ noted, "the *Mt. Clemens* standard only requires estimates"; "precision is not required." *Id.* at n.151. For example, the ALJ concluded "it is irrelevant whether the Administrator calculated prices using numbers derived from Costco rather than Sam's Club, where Hernandez shopped" because both are "wholesale clubs and likely sell at similar prices." *Id.* Additionally, the Administrator did not include back wages for workers who testified that they did not buy beer. D&O 42. The ALJ correctly held that Respondent was unable to rebut the Administrator's calculations, *id.*, and

¹⁰ The Administrator exercised her discretion in seeking back wages only for the profit earned from the illegal beer sales. As explained *supra*, the regulations permit the Administrator discretion to seek full back wages for unreasonable deductions (as the Administrator did for the unreasonable deductions for the non-alcoholic drinks).

on appeal, Respondent fails to point to any evidence or support for its position that the Administrator's calculations were unreasonable.

III. THE ALJ PROPERLY ASSESSED CMPs FOR RESPONDENT'S MEAL PLAN AND DRINK VIOLATIONS.

The H-2A regulations provide the Administrator discretion to assess CMPs “for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 C.F.R. Part 655, subpart B Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 C.F.R. Part 655, subpart B ... constitutes a separate violation.” 29 C.F.R. 501.19(a). In determining the amount of CMPs to impose, the regulations direct the Administrator to consider factors including the type and gravity of violation, the employer's history of violations, the number of workers affected, efforts made to comply, commitment to future compliance, and any financial gain to the employer or loss to the workers. *Id.* at 501.19(b). Thus, in assessing CMPs, “the Administrator is vested with enforcement discretion and is able to consider the totality of circumstances in fashioning an appropriate remedy for a violation.” *Overdevest Nurseries, LP*, 2015-TAE-00008, at *18 (OALJ Feb. 18, 2016) (citing *WHD v. Kutty*, ARB No. 03-022, 2005 WL 1359123 (ARB May 31, 2005)).

The ALJ properly affirmed the Administrator’s assessment of CMPs for Respondent’s meal- and drink-related violations of section 655.122. D&O 42-43. After considering all the facts and appropriately applying the mitigating factors, the Administrator reasonably assessed one CMP for Respondent’s combined meal- and drink-related violations of section 655.122, in the amount of \$1,350, for each of Respondent’s 147 workers. Indeed, as the ALJ concluded, the Administrator reviewed each of the mitigation criteria at 29 C.F.R. 501.19(b) and allowed a ten percent reduction as Respondent had no prior history with the H-2A program. D&O 43.

The Administrator calculated CMPs on a per-worker basis because of the seriousness of the violations, the large number of workers affected, and because Respondent made a false statement on the face of its job orders, recruiting workers to travel thousands of miles based in part on false pretenses. D&O 42-43; Tr. 849:15-23. Additionally, the Administrator reasonably combined the CMP for the various meal-and drink-related violations of sections 655.122(g), (p), and (q) into one amount per worker. As the ALJ aptly noted, however, “it was likely within the Administrator’s reasonable discretion to assess separate CMPs for each violation of 20 C.F.R. 655.122(g), (p), and (q)[.]” D&O 42.

Respondent maintains that the CMP for these violations should not be assessed for each worker because the violation was a single deficient disclosure rather than each worker not being properly paid. Resp't Br. 7-8. Respondent also argues that because the Administrator assessed a single CMP for the twenty-four violations of the three-fourths guarantee, discussed *infra*, it was unreasonable for the Administrator to assess a single CMP for each worker affected by the meal and drink violations of section 655.122. Resp't Br. 8. Neither argument is persuasive. Respondent violated section 655.122 for each worker to whom it provided a job order that misrepresented how meals would be made available, and from whom undisclosed meal charges were deducted from his pay, reducing his wages below the required minimum. Similarly, Respondent violated section 655.122 for each worker whose wages were reduced below the minimum when they were charged for drinks that included a profit or were sold in violation of state law. Therefore, it was reasonable, and within the Administrator's discretion, to assess a CMP for each affected worker, especially considering the seriousness of the violation and "the large amount of workers affected." D&O 43.¹¹

¹¹ Under a heading of "Estoppel/Laches/Mitigation," Respondent argues that the "prolonged delay" between the time Wage and Hour Investigators first became aware of the meal plan arrangement and the time when the Administrator notified Respondent the meal charges constituted a violation of the H-2A regulations "should call into question the Administrator's later claim as to the urgency and

Respondent also appears to argue that CMPs are improper because, it contends, it did not profit from the meal plan. Resp't Br. 10-11 (citing *Global Horizons I*, slip op. at 8-9). The court in *Global Horizons* denied the imposition of CMPs because "nothing on the record show[ed] that Global Horizons profited from" its meal plan. *Global Horizons I*, slip op. at *9.¹² Here, in contrast, substantial evidence supports the ALJ's finding that Respondent *did* profit from the meal plan. D&O 39-40. When there were surplus funds from the meal charges, Hernandez, acting as Respondent's agent, retained those funds for himself, thereby permitting Respondent to save money by paying him a lower wage, and

seriousness of the alleged violation." Resp't Br. 13-14. This argument has no merit. The H-2A regulations contain no requirement that Respondent be notified the moment the investigator suspects there is a violation. Thus, "the regulatory scheme contemplates a time period in which an employer may continue to violate applicable regulations, and thus accrue liability for violations" while the Administrator completes her investigation. *ME Global, Inc.*, 2013-LCA-00039, at *10 (OALJ Jul. 29, 2016), *aff'd by ME Global, Inc.*, ARB No. 2016-0087 (ARB Mar. 22, 2019). Moreover, the Supreme Court has long recognized that "[a]s a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit to enforce a public right or protect a public interest." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *cf. OPM v. Richmond*, 496 U.S. 414, 422 (1990) (the Supreme Court has "reversed every finding of estoppel [against the government] that [it has] reviewed").

¹² Respondent incorrectly states in a footnote, without support, that the workers in *Global Horizons* "paid more for the food provided to them than it cost the employer to purchase/prepare it." Resp't Br. 11-12 n.8. In fact, the court in *Global Horizons* denied CMPs, in part, precisely because the employer did *not* profit from the meal plan. *Global Horizons I*, slip op. 9.

Hernandez's wife received paid employment in Respondent's kitchen. D&O 39; Tr. 229:19-23, 721:10-11, 742:13-21. Moreover, the meal plan allowed Respondent to avoid a costly kitchen expansion that would have been necessary to fulfill the terms of the job orders to provide kitchen access to accommodate Respondent's large number of workers. D&O 39. As the ALJ found, "Respondent did in fact profit from the sale of meals" and the Administrator "appropriately recognized the financial gain to Respondent from the meal plan" in making her CMP calculations. D&O 40, 43.¹³

Accordingly, the ALJ correctly held that the Administrator rationally considered the facts of the violations, the large number of workers affected, and all of the mitigation criteria at 29 C.F.R. 501.19(b) and reasonably assessed a total of \$198.450 in CMPs. The Board should affirm this assessment.

¹³ The Administrator's CMP assessment is also appropriate in light of Respondent having profited from the sale of drinks and beer.

IV. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(i)(1) BY DISCHARGING TWENTY-FOUR WORKERS BEFORE THEY HAD WORKED AT LEAST THREE-FOURTHS OF THE WORKDAYS SPECIFIED IN THE WORK CONTRACT AND, AS A RESULT OF THESE VIOLATIONS, AWARDED BACK WAGES AND ASSESSED CMPs.

The H-2A regulations require employers “to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period ... specified in the work contract.” 20 C.F.R. 655.122(i)(1). An employer is absolved of liability for the three-fourth’s guarantee only when a worker “voluntarily abandons employment” or is “terminated for cause,” and the employer timely and properly notifies the Departments of Labor and Homeland Security. 20 C.F.R. 655.122(n); *see also* Information about the DOL Notification Process for Worker Abandonment or Termination for Cause for H-2A Temporary Agricultural Certifications, 76 Fed. Reg. 21,041, 2011 WL 1397931 (Apr. 14, 2011) (required notifications to Department of Labor).

The ALJ correctly held that Respondent violated the three-fourths requirement with regard to three groups of workers: (1) nineteen workers that Respondent terminated in May 2015; (2) four workers that Respondent laid off in August 2015; and (3) one worker who worked for Respondent until June 9, 2015. D&O 43. The substantial evidence supports the ALJ’s finding that Respondent

terminated or otherwise discharged these twenty-four employees rather than them voluntarily abandoning their employment or being terminated for cause. *Id.* Based on this evidence, the ALJ correctly concluded that Respondent violated section 655.122(i), and properly affirmed the Administrator’s reasonable assessment of back wages and CMPs. D&O 43. The Board should affirm that conclusion, the back-wage award, and the CMP assessment.

A. The ALJ Correctly Held That Because Respondent Terminated or Otherwise Constructively Discharged Nineteen Workers in May 2015, Respondent Violated the Three-Fourths Guarantee for Such Workers.

- i. Substantial Evidence Supports the ALJ’s Finding That in May 2015, Respondent Terminated Nineteen Workers Without Cause.*

Substantial evidence supports the ALJ’s finding that Respondent terminated nineteen workers without cause during a May 2015 meeting between Respondent and the workers. D&O 14, 44. The nineteen workers asked for a meeting with Hernandez, Russell Marino, Jr., and Joseph Marino to share their concerns about their working and living conditions. D&O 14, 43-44. The meeting became “heated” and Russell Marino, Jr. became angry at the workers’ concerns and terminated the nineteen workers. D&O 44. While Respondent argues that the testimony about what happened at the May 2015 meeting was inconsistent between the workers and Respondent’s witnesses, Resp’t Br. 16-18, the ALJ appropriately

made a credibility determination and credited the testimony of the workers over the testimony of Respondent's witnesses. D&O 14-15, 43-44.¹⁴ The ALJ explained her rationale for this credibility determination, stating that "the employee witnesses were consistent in describing the heated events at the meeting" while, for example, "Joseph Marino was unable to remember specifically what was said" and his hearing testimony contradicted his deposition testimony. D&O 44.

Respondent further argues that it would have been illogical for it to terminate these nineteen workers "at the peak of harvesting." Resp't Br. 17-18. The ALJ rejected this argument, finding that the evidence established that management got angry during this May 2015 meeting and "made a decision, albeit

¹⁴ In a footnote, Respondent falsely states that the workers who testified in Mexico did so "under the close supervision of an anti-employer group," Centro do los Derechos del Migrant ("CDM"). Resp't Br. 17 n.10. The Board should not countenance these spurious accusations. CDM is an independent Mexican workers' advocacy group that helped the Administrator identify and locate certain witnesses. See ALJ Order Granting Motion for Leave to Administer Oaths Remotely in De Bene Esse Depositions, at 3 (Apr. 21, 2017). The ALJ permitted CDM to assist the workers in travelling to deposition sites in Mexico (*i.e.*, conference rooms at a hotel, government office, and co-working space) and to provide technical support for the videoconference technology, but did not allow CDM to be present in the deposition room while the workers testified. *Id.* For the hearing itself, Respondent consented to the use of the same conditions (with which the Administrator scrupulously complied at all times) for the worker witnesses who testified remotely from Mexico. See Letter to ALJ Timlin from Counsel for Administrator (Jun. 15, 2017). In addition, the first two employees who testified at the hearing were physically present in the courtroom, and CDM had no role in locating these witnesses or facilitating their testimony.

a rash, and perhaps illogical, decision to terminate this group of workers and then quickly replace the terminated workers.” D&O 44. Ultimately, “considering the entirety of the evidence,” the ALJ found that Respondent terminated the nineteen workers before they had worked the guaranteed three-fourths of the hours promised in their work contracts. *Id.*

ii. Substantial Evidence Supports the ALJ’s Finding That Even Assuming, Arguendo, Respondent Did Not Terminate the Workers in May 2015, Respondent Constructively Discharged Such Workers.

Substantial evidence also supports the ALJ’s alternative finding that even assuming, *arguendo*, Respondent did not terminate the workers in May 2015, Respondent constructively discharged such workers. D&O 44-46. “Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes.” *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004). “The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?” *Id.* The ALJ properly relied on the Third Circuit’s nonexclusive factors from *Clowes v. Allegheny Valley Hosp.* in finding that the nineteen workers were constructively discharged. 991 F.2d 1159 (3d Cir. 1993). These factors include: “(1) a threat of discharge; (2) suggestions or encouragement of resignation; (3) a

demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; (6) unsatisfactory job evaluations.”

Nuness v. Simon & Schuster, Inc., 325 F. Supp. 3d 535, 560 (D.N.J. 2018)

(summarizing *Clowes*, 991 F.2d at 1161).

The ALJ correctly concluded that the first *Clowes* factor was satisfied because during the workers’ first days on the job Hernandez threatened to send the workers home to Mexico and several of the nineteen workers testified that after the May 2015 meeting they understood that Russell Marino, Jr. had decided they would not be allowed to continue working and “needed to leave.” Tr. 39:8-10, 65:16-17, 80:24-81:3, 107:18-20, 107:21-108:1, 125:11-13, 125:21-23, 129:1-12; PX-3, at 101:16; PX-9, at 232:20-21, 233:12-15, 258:17-23; PX-11, at 305:6-8. This evidence supports the ALJ’s finding that this factor “weighs considerably toward a finding of constructive discharge.” D&O 45.

The ALJ also correctly concluded that the third and fifth *Clowes* factors concerning a reduction of benefits and an alteration of job responsibilities, respectively, were satisfied. D&O 45-46. As outlined *supra*, the record shows that “[d]espite assurances Respondent made on the job order—the employment agreement both sides agreed upon prior to the summer 2015 growing season,” workers did not, in fact, have the promised kitchen access and instead had to pay

for a meal plan. D&O 45. Thus, the ALJ concluded that the change to the meal arrangement “materially reduced the workers’ benefits[,]” satisfying the third *Clowes* factor. *Id.* Furthermore, while the job orders stated that the workday was seven hours on weekdays and only five hours per weekend and that workers would “not be required to” work additional hours, JX-1, at 1, 9 ¶ 11; JX-3, at 42, 50 ¶ 11, Respondent required the workers to regularly work twelve-hour days. D&O 46. Although the job orders did provide that workers “may be requested” to work overtime, the ALJ found that “Hernandez told the workers where, when, and how long to work and ... often directed them to work twelve hour days.” *Id.* Accordingly, the ALJ concluded that this “material change to the workers’ responsibilities as listed on the job orders” satisfied the fifth *Clowes* factor. *Id.*

The ALJ explained that although the other *Clowes* factors were not satisfied, such as involuntary transfer and unsatisfactory job evaluations, those factors were not applicable to “the working situation at Respondent’s farm.” D&O 46. Not all *Clowes* factors have to be satisfied to sustain a finding of constructive discharge, as they are “neither absolute nor comprehensive.” *Nuness*, 325 F. Supp. 3d at 560. Instead, the court should consider the factors relevant to the employee’s particular job position when analyzing whether working conditions were so intolerable that a reasonable employee would have felt forced to leave. Here, the ALJ did just that

and concluded that the Administrator had “preponderantly established” that Respondent constructively discharged the nineteen workers in May 2015. D&O 46.

In addition to the *Clowes* factors, the ALJ properly considered Wage and Hour Division guidance on constructive discharge in the H-2A context. D&O 46. WHD Bulletin 2012-1 provides that “[c]onstructive discharge may exist when a worker leaves the job because the housing conditions in which the worker is required to live are intolerable and violate applicable safety and health standards.” WHD Bulletin 2012-1, at 5 (Feb. 28, 2012). As explained *infra*, the ALJ held that Respondent violated numerous provisions of the H-2A regulations concerning housing conditions and transportation safety. The record shows that the nineteen workers’ living conditions included broken screens and uncovered trashcans, which encouraged the presence of insects and other pests, and the bathrooms lacked adequate hot water. Additionally, Respondent used unlicensed drivers and unsafe vehicles to transport workers between the dormitories and the fields. The ALJ also found that when the workers first arrived at Respondent’s farm, there were no bathrooms facilities in the fields and no drinking water. D&O 46. The ALJ correctly concluded that these “intolerable” conditions violating “applicable safety and health standards” are the type contemplated by the Wage and Hour

Division that cause workers to be constructively discharged. *Id.* (citing WHD Bulletin 2012-1, at 5).

Respondent argues that because some of Respondent's workers endured these same conditions but worked for Respondent for the entire season, a "reasonable person" could not have felt compelled to leave. Resp't Br. 18. The Board should reject this argument. The constructive discharge inquiry is objective, *Suders*, 542 U.S. at 141, and does not require the court to look to whether some workers decided to endure awful conditions. Instead, the constructive discharge inquiry focuses on whether the workers who actually departed did so after enduring objectively intolerable conditions. *Id.* Moreover, the nineteen workers were the only workers who actually raised concerns about their working conditions, asked for the May 2015 meeting with Respondent, attended the meeting where Russell Marino, Jr. yelled at them, and had their concerns ignored. Thus, an objective person in those nineteen workers' position would have felt compelled to leave.

Whether formally terminated or constructively discharged, the ALJ correctly found, D&O 46, that none of the nineteen workers who left Respondent's farm in May 2015 "voluntarily abandon[ed] employment" or were "terminated for cause." 20 C.F.R. 655.122(i)(5). Because this termination or constructive discharge

occurred in May 2015, just a few weeks into the growing season, the ALJ concluded that Respondent violated section 655.122(i)(1)'s three-fourths guarantee to these workers. D&O 46.

B. The ALJ Correctly Held That in August 2015, Respondent Laid Off Four Workers Without Meeting the Three-Fourths Guarantee for Such Workers.

The ALJ correctly held that of the forty-four workers that Respondent conceded that it laid off in August 2015 “due to inclement weather and lack of work[,]” Respondent did not meet the three-fourths guarantee for four of them. D&O 47; PX 1; Tr. 702-04. As an initial matter, it bears noting that Respondent essentially conceded this violation before the ALJ. At the hearing before the ALJ, Respondent’s counsel agreed that “the Administrator provided accurate calculations as to the Respondent’s three-fourths violations concerning” the four workers. D&O 47. Because these calculations necessarily encompassed the three-fourths violations themselves, Respondent effectively agreed that it had committed these violations. Further, in its post-hearing brief, Respondent “did not discuss or otherwise defend against the alleged three-fourths guarantee violation concerning these four workers.” *Id.* Accordingly, the ALJ properly held that Respondent violated the three-fourths guarantee concerning four of the forty-four workers it laid off in August 2015 and, therefore, back pay was warranted. *Id.*

Despite having arguably waived any challenge to this finding of violation, Respondent alleges that these four workers had been sick or injured for some period before August 2015 and thus were *offered* at least three-fourths of the workdays specified in the contract, but did not *work* three-fourths of the workdays. Resp't Br. 19. Respondent cites to no evidence, however, to support this contention. Indeed, there is no support in the record for any such contention because Respondent admitted that it did not keep records of "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)" required to assert this defense. 20 C.F.R. 655.122(j)(1); *see also* PX-16 (Deposition of Sun Valley Pursuant to Rule 18.64(b)(6)) at 540:21–541:7, 557:25–558:13; Tr. 645:24–646:3, 648:16–649:5, 706:5–13 (neither of Respondent's two payroll systems "keep track of the number of hours that a worker at Sun Valley is offered").

C. The ALJ Correctly Held That Respondent Violated the Three-Fourths Guarantee Concerning Jose Islas Larraga.

The ALJ correctly found that the record contained no evidence that Jose Islas Larraga abandoned his job in June 2015, but even if he did, the ALJ noted that the regulations "would only relieve Respondent of the three-fourths guarantee liability if it provided timely notice to the Department" that Islas Larraga's employment had ended. D&O 47 (citing 20 C.F.R. 655.122(n)). On appeal,

Respondent does not specifically address the ALJ's holding that Respondent violated the three-fourths guarantee concerning Islas Larraga. Instead, without naming Islas Larraga specifically, Respondent appears to group him with the four workers laid off in August 2015 and assert the same argument for him that it asserted for the four workers (i.e., that it offered sufficient hours to meet the three-fourths guarantee, but due to illness or injury, the workers did not work all the hours offered). Resp't Br. 19. As with the four laid-off workers, however, Respondent failed to keep the records required to assert that defense.¹⁵ Moreover, the record shows that Respondent did not provide the requisite governmental notice of Islas Larraga's departure. Tr. 419:16-22, 436:4-10, 558:9-561:10. Therefore, the Board should affirm the ALJ's holding that Respondent violated the three-fourths guarantee concerning Islas Larraga.

D. The ALJ Properly Awarded \$142,728 in Back Wages and Assessed a Single CMP of \$1,350.

The ALJ correctly affirmed the Administrator's reasonable computation of \$142,728 in back wages for the twenty-four workers and assessment of a single \$1,350 CMP for the violations of the three-fourths guarantee. D&O 47-49. On

¹⁵ Additionally, Islas Larraga's last day of work for Respondent was June 9, 2015, not "near the end of the season" as Respondent asserts. Resp't Br. 19. Given this timing, it is unlikely that Islas Larraga was offered sufficient work to satisfy the three-fourths guarantee.

appeal, Respondent challenges only the ALJ's conclusion that Respondent violated the three-fourths guarantee for these twenty-four workers, and not the ALJ's conclusion that the Administrator properly calculated back wages and CMPs. The Board should affirm the ALJ's back-wage award and CMP assessment.

V. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 29 C.F.R. 501.5 BY ATTEMPTING TO OBTAIN WAIVERS FROM ITS EMPLOYEES OF THE THREE-FOURTHS GUARANTEE AND, AS A RESULT OF THESE VIOLATIONS, ASSESSED CMPs.

The H-2A regulations prohibit an employer from seeking “to have an H-2A worker ... waive any rights conferred under 8 U.S.C. 1188, 20 C.F.R. part 655, subpart B,” which includes the three-fourths guarantee provided in section 655.122(i). 29 C.F.R. 501.5. That, however, is exactly what Respondent did. By having the workers sign forms falsely stating that they were voluntarily resigning, Respondent effectively sought to have these workers waive their three-fourths guarantee. Substantial evidence supports the ALJ's finding that after the May 2015 meeting in which Respondent terminated nineteen workers, Respondent had the nineteen workers sign worker departure forms that “mischaracterized the reasons for their leaving as needing to return home to care for a sick or dying loved one.” D&O 19-21; *see also* D&O 49 (noting that Respondent admitted that the workers had no sick or deceased family members). Respondent also had the

workers it laid off in August 2015 sign similar forms. D&O 21. The record shows that Respondent did not allow the workers to attest to the true reason they left. D&O 19-20; Tr. 83:10-13, 108:7-11, 109:25-110:15, 149:13-14, 225:23-25, 274:9-12, 21-23, 732:15-16, 768:24-769:4, 769:13-20. Consistent with the false information provided on their forms, Respondent notified the Departments of Labor and Homeland Security that the workers left voluntarily, rather than after being terminated. PX-39, at 1191-95, 1198-1200 (notifications); Tr. 409:5-12, 748:20-24, 753:12-754:2; *cf.* Tr. 754:23-34 (Respondent conceding that the August workers were “terminated without cause”). Respondent admitted that the purpose of the forms was to absolve itself of the three-fourths guarantee requirement and “to protect against ... this lawsuit.” D&O 19-20; PX 15 at 475; Tr. 748.

Contrary to Respondent’s contention, Resp’t Br. 21, it is irrelevant whether Respondent used the forms to prove to the Wage and Hour Division Investigator or the ALJ that the workers voluntarily abandoned their jobs. Because 29 C.F.R. 501.5 prohibits *attempting* to coerce workers to waive their rights, the violation was complete when Respondent convinced the workers to sign the form. As the ALJ explained, “the worker departure forms effectively waived the farmworkers’ right to the three-fourths guarantee; Respondent coerced the farmworkers into doing so.” D&O 50. Therefore, the ALJ correctly held that Respondent violated

29 C.F.R. 501.5 by attempting to obtain waivers from the workers of the three-fourths guarantee and that the Administrator's imposition of a single \$1,350 CMP was reasonable. D&O 50. The Board should affirm the ALJ's holding.

VI. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(d)(1) BY PROVIDING INADEQUATE HOUSING AND, AS A RESULT OF THESE VIOLATIONS, ASSESSED CMPs.

A. The ALJ Correctly Held That Respondent Failed to Maintain Worker Housing in the Conditions Required.¹⁶

H-2A employers are required to provide housing to their H-2A workers. 20 C.F.R. 655.122(d)(1). There are specific standards that employer-provided housing must meet. *Id.* at 655.122(d)(1)(i) (incorporating by reference the housing standards set out at 20 C.F.R 654.404-.417).¹⁷ Respondent failed to provide housing to its workers that was compliant with four of these housing standards.

¹⁶ Respondent failed to brief this issue in detail, saying only “[t]here are some CMP-only claims included in the Decision with respect to the number of ... torn screens ... that will be identified briefly here, and discussed further in Respondent’s brief on appeal later.” Resp’t Br. 20. It devoted one sentence to disputing the housing violation. *Id.*

¹⁷ The standards were revised slightly in 2016, solely to “update[e] outdated terminology.” Workforce Innovation & Opportunity Act, 81 Fed. Reg. 56,072, 56,280 (Aug. 19, 2016). This brief cites to the version of the regulations in effect in 2015.

“All outside openings” in Respondent’s housing facility were required to “be protected with screening of not less than 16 mesh,” 20 C.F.R. 654.408(a), and “[a]ll screen doors ... be tight fitting, in good repair, and equipped with self-closing devices,” *id.* at 654.408(b). The record shows, and Respondent admitted at the hearing, that the bathroom windows lacked screens, Tr. 202:20-203:1, and several photographs and testimony from the Wage and Hour Division Investigator proved that at least two dormitory screen doors were ripped or had holes, PX-28, at 1048-52; Tr. 324:3-5. D&O 18.

The regulations also required Respondent to maintain “fly-tight, clean containers [for garbage and refuse] in good condition” near the worker housing. 20 C.F.R. 654.414(a). The record shows that Respondent failed to maintain “fly-tight, clean containers” as it provided large refuse containers, but then left them completely uncovered and provided no lids. D&O 13, 18; Tr. 324:12-15, 329:1-10, 332:1-6; PX-28, at 1053-55; *see also Howard v. Malcolm*, 658 F. Supp. 423, 433 (E.D.N.C. 1987) (“garbage cans ... without tops” violated Occupational Safety and Health Administration’s comparable “fly-tight” container requirement.).

Respondent was also required to provide “all occupants” with “[b]athing and hand washing facilities, supplied with hot and cold water under pressure.” 20 C.F.R. 654.412(a). The record shows that Respondent’s workers frequently had no

hot water with which to shower. D&O 6-7; *see also* Tr. 30:8-11, 103:24-104:5, 199:22-200:2, 200:25-201:1; PX-7, at 189:2-6; PX-11, at 288:2-6.

The record evidence shows that Respondent failed to provide housing that met the applicable housing standards, and Respondent has pointed to no evidence suggesting otherwise. D&O 50. Accordingly, the ALJ correctly held that Respondent violated 20 C.F.R. 655.122(d)(1). D&O 50-51. The Board should affirm the ALJ's holding.

B. The ALJ Properly Assessed \$3,150 In CMPs.

The Administrator assessed \$3,150 in CMPs for four violations of 20 C.F.R. 655.122(d)(1)—the unscreened bathroom windows, the faulty dormitory screen windows and doors, the uncovered garbage cans, and the hot water shortage. D&O 50. The ALJ correctly held that the Administrator clearly established each of the four violations and reviewed and applied the various applicable mitigation factors at 29 C.F.R. 501.19(b) and “reasonably reduced the CMPs to \$3,150.” D&O 50-51. The ALJ correctly affirmed the imposition of \$3,150 in CMPs for these four violations and Respondent has pointed to no evidence suggesting otherwise. The Board should accordingly affirm the ALJ's CMP assessment.

VII. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED 20 C.F.R. 655.122(h)(4) THROUGH ITS USE OF SUBSTANDARD TRANSPORTATION AND UNLICENSED DRIVERS AND, AS A RESULT OF THESE VIOLATIONS, ASSESSED CMPs.

A. The ALJ Properly Held That Respondent Used Substandard Transportation and Unlicensed Drivers.¹⁸

The H-2A regulations require “[a]ll employer-provided transportation” to “comply with all applicable Federal, State or local laws and regulations.” 20 C.F.R. 655.122(h)(4). The ALJ found, and the record supports, that “Respondent transported the workers from the dormitory area to the fields in unsafe vehicles with unlicensed drivers,” in violation of state and federal law. D&O 21; 29 C.F.R. 500.105(b)(1)(iii) (drivers of H-2A-employer-provided transportation must have a “valid permit qualifying the driver to operate the type of vehicle driven by him in the jurisdiction by which the permit is issued”) (incorporated by reference in 20 C.F.R. 655.122(h)(4)); *see also* N.J. Stat. Ann. 39:3-10 (2015) (prohibiting driving on a “public highway” in New Jersey absent a license or permit). Specifically, the ALJ found that of the five buses used to transport farmworkers from the dormitories to the fields and that the Wage and Hour Division Investigator

¹⁸ Respondent does not address this issue in its opening brief beyond one sentence stating that “[t]here are some CMP-only claims included in the Decision, with respect to ... van drivers ... that will be identified briefly here, and discussed further in Respondent’s brief on appeal later.” Resp’t Br. 20.

inspected, three had worn, unsafe tires and one had a broken rear turn signal.

D&O 8. Substantial evidence also supports the ALJ's finding that Hernandez would allow any of Respondent's workers to drive "if the worker had a Mexican driver's license or driving experience" and that when the Investigator requested the driver's licenses of each driver he observed driving a bus, "none of the five workers ... could provide him with a U.S. driver's license." D&O 8-9; Tr. 401:4-14. Accordingly, the ALJ properly held that Respondent used substandard transportation and unlicensed drivers in violation of section 655.122(h)(4) and Respondent has pointed to no evidence suggesting otherwise. D&O 52. The Board should affirm the ALJ's holding.

B. The ALJ Properly Assessed \$7,500 in CMPs.

The Administrator assessed \$7,500 in CMPs for the transportation violations. The ALJ correctly held that the "Administrator reasonably assessed CMPs against Respondent" given the clear violations and "reasonably assessed reductions of the CMPs" after reviewing the mitigation factors at 29 C.F.R. 501.19(b). D&O 52-53. The ALJ noted that, given the gravity of the vehicle violations "involving a threat to the health and safety of Respondent's workers," the Administrator was "lenient" to apply *any* of the mitigation factors. D&O 53 (emphasis added). The Board should affirm the ALJ's CMP assessment.

CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Board affirm the ALJ's determination that Respondent engaged in six serious violations of the H-2A program and, accordingly, Respondent owes the \$344,945.80 in back wages and \$211,800 in civil money penalties determined by the ALJ.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH K. MARCUS
Deputy Associate Solicitor

RACHEL GOLDBERG
Counsel for Appellate Litigation

/s/ Amelia Bell Bryson
AMELIA BELL BRYSON
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, NW
Suite N-2716
Washington, DC 20210
(202) 693-5336
Bryson.Amelia.B@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, the foregoing Administrator's Response Brief was served, by consent, via e-mail on the following:

Christopher J. Schulte, Esq.
CJ Lake, LLC
cschulte@cj-lake.com

/s/Amelia Bell Bryson
AMELIA BELL BRYSON
Attorney