

Fayard Moving & Transportation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Locals 991, 270, and 988, AFL-CIO. Case 15-CA-10357

September 28, 1990

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On July 29, 1988, the National Labor Relations Board ordered¹ the Respondent, inter alia, to make whole unit employees for their losses resulting from the Respondent's violation of Section 8(a)(5) and (1) of the Act.

On March 7, 1990,² the Respondent entered into a stipulation, approved by the Regional Director on April 3, waiving its rights under Section 10(e) and (f) of the Act to contest the Board's July 29, 1988 Order or its underlying findings of fact and conclusions of law. The stipulation further provided that the Respondent retained its right to a hearing before an administrative law judge to determine the amount of its backpay liability.

On April 11, the compliance officer for Region 15 wrote to the Respondent that, for purposes of settlement only, the Region would accept payments amounting to less than 100 percent of the Respondent's backpay liability, as specified in that letter, provided that the Respondent remitted the enumerated amounts to the Region by April 19. In the absence of payment by that date, the compliance officer advised that the Region would issue a backpay specification seeking 100 percent of the backpay owing, plus interest.

The Respondent did not settle the backpay claim. The Regional Director for Region 15 issued a backpay specification and notice of hearing on April 27, alleging the backpay due. The backpay specification, which was duly served on the Respondent, directed the Respondent to file an answer within 21 days of service pursuant to the requirements of Section 102.56 of the Board's Rules and Regulations.³

On May 18, the Region's compliance officer telephoned the Respondent concerning its failure to file an answer to the backpay specification. The Respondent was given until May 25 to file an answer. In a confirming letter of the same date, counsel for the Region informed the Respondent that summary judgment would be sought unless a timely answer was filed.

¹ 290 NLRB 26.

² All dates are in 1990 unless noted.

³ The backpay specification further provided that "[t]o the extent that such answer fails to deny allegations of the specification in the manner required under the Board's Rules and Regulations and the failure so to do is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them."

On May 24, the Respondent wrote the Region's compliance officer, stating that it agreed to the backpay figures in his April 11 letter and that it was attempting to collect the owed moneys. The Respondent further specified, however, that "[f]or the record, I repeat again, that I feel some employees listed have received other means of overpayment."

On June 13, counsel for the Region wrote the Respondent that its May 24 letter did not satisfy the requirements for an answer under Section 102.56(b). The Respondent was given an extension of time until June 26 to file an answer comporting with the Board's Rules and Regulations.

On June 21, the Respondent wrote to counsel for the Region that, as to Section 102.56, "Respondent is without knowledge, because I do not understand. We agree on the figures except as stated in letter dated May 24, 1990." The Respondent further requested that the Region not seek summary judgment because it was experiencing cash-flow problems. The Respondent asserted that it needed until August 21 to fulfill its backpay obligations.

On August 2, the General Counsel filed with the Board a motion to transfer proceedings to the Board and Motion for Summary Judgment, together with supporting memorandum and exhibits. This motion asserts that neither the Respondent's May 24 nor June 21 letter meets the specificity requirements of Section 102.56(b).

The motion further asserts that the April 11 letter referred to in the Respondent's May 24 and June 21 correspondence was issued for settlement purposes only, and is inadmissible as evidence. Fed.R.Evid. 408. Finally, the motion asserts that the Respondent's alleged inability to satisfy its backpay obligation, cited in its June 21 letter, is not a proper issue for a backpay proceeding. *Workroom for Designers*, 289 NLRB 1437 (1988). Accordingly, the General Counsel requests that the Board find that the allegations in the backpay specification have been admitted to be true, and enter summary judgment on the backpay specification.

On August 7, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent filed no response.

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

On the entire record in this proceeding, the Board makes the following

Ruling on Motion for Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations state, in pertinent part, that:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain

each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

We agree with the General Counsel that the Respondent's May 24 and June 21 letters do not constitute sufficient answers within the meaning of the Board's Rules and Regulations. Thus, contrary to the requirements of Section 102.56(b), the Respondent's letters do not fairly meet the substance of the allegations of the Region's compliance specification, set forth in detail any alternative computations, or ade-

quately explain the Respondent's failure to do so. See, e.g., *Challenge-Cook Bros.*, 295 NLRB 435, 436 (1989); *Sneva's Rent-A-Car*, 270 NLRB 1316, 1317 (1984). Moreover, the Region's April 11 offer to settle the Respondent's backpay obligation is neither relevant to the Respondent's obligations under Section 102.56, nor is it admissible for purposes of the backpay specification. See generally *East Wind Enterprises*, 250 NLRB 685 fn. 2 (1980). Finally, the Respondent's alleged current inability to fund its backpay liability is not a sufficient response to a backpay specification. It is well settled that the issue in a backpay proceeding is the amount due and not a respondent's ability to pay. *Scotch & Sirloin Restaurant*, 287 NLRB 1318, 1320 (1988), and cases cited.

Accordingly, the Board finds that the allegations in the backpay specification are true and grants the General Counsel's unopposed Motion for Summary Judgment.

ORDER

The National Labor Relations Board orders that Fayard Moving & Transportation, Gulfport, Mississippi; New Orleans, Louisiana; and Houston, Texas, its officers, agents, successors, and assigns, shall make whole the following discriminatees by paying the amounts detailed in the compliance specification, plus interest accrued to date of payment, minus tax withholdings required by law: Larry Arnold, Elbert E. Blair, Eddie Brown, Melvin Brumfield, Nolan Brumfield, James O. Brumfield, Jerry Butler, Pete D. Castiglia, Herbert Crain, Oscar Lee Fairley, Billy R. Foxworth, Freeman Hines, Sam Huddleston, Azria Ladner Jr., Azria Ladner Sr., Ronald J. Ladner, Wilbon Ladner, Howard Lane, Ronnie Lewis, Hubert Lindsey, Scott Edward Magee, Leroy McKay Jr., Clarence Necaie, Paul C. Necaie, Emmet Norwood, Rob D. Reed, Gary D. Robinson, John E. Sibley Jr., Allen Stockstill, Harold Sullivan, James L. Taylor, Anthony Vespo, and Dwight White. Interest shall be computed in accordance with the formula in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).