

Lorain Area Ambulance Company, Inc. and International Union, Allied Industrial Workers, AFL-CIO and Mark J. Turner and Lorain Life Care Ambulance Service, Inc. Party in Interest. Cases 8-CA-19596,¹ 8-CA-19771, and 8-CA-19845

September 30, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On September 13, 1988, the National Labor Relations Board issued a Decision and Order in this proceeding,² directing Lorain Area Ambulance Company, Inc., the Respondent, inter alia, to make whole nine employees for loss of pay and other benefits resulting from its unfair labor practices. The United States Court of Appeals for the Sixth Circuit enforced the Board's Order on August 9, 1989.³ On November 20, 1990, the Regional Director for Region 8 issued a compliance specification and notice of hearing, setting forth allegations with respect to the backpay period and the amount of backpay due the discriminatees. On December 20, 1990, the Party in Interest filed its answer to the complaint specification and on January 7, 1991, the Respondent filed its answer. On June 4, 1991, the General Counsel notified the Party in Interest and the Respondent that their answers did not appear to be sufficient to place in issue certain allegations of the specification, including various factors entering into the computation of gross backpay. The General Counsel advised the parties of the date by which their amended answers were to be filed, as well as of his intention to seek summary judgment with regard to allegations requiring more than a general denial that were not properly denied by the amended answers and with regard to allegations about which issues for hearing were not raised by the amended answers. On June 7, 1991, the Respondent and the Party in Interest filed amended answers to the compliance specification.

On June 17, 1991, the General Counsel filed with the Board in Washington, D.C., a motion to strike in part the amended answers of the Respondent and the Party in Interest and a Motion for Partial Summary Judgment, with brief in support and exhibits attached. The General Counsel submits that the amended answers of the Respondent and the Party in Interest fail to conform to the requirements of Section 102.56 of the Board's Rules and Regulations relating to various factors entering into the computation of backpay, including the backpay period. The General Counsel thus

submits that certain paragraphs of the Respondent's and the Party in Interest's amended answers should be stricken and that all allegations of the specification should be found to be true with the exception of the amount of interim earnings and the amount of medical expenses of the discriminatees.

On June 19, 1991, 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 and the Party in Interest each filed a timely response.

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the National Labor Relations Board's Rules and Regulations states, in pertinent part:

(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. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial 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 plead specifically and in detail to backpay allegations of specification.*— . . . 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.

As indicated above, the General Counsel has filed a motion to strike in part the Respondent's and the Party in Interest's amended answers on the basis of alleged substantive deficiencies. A review of the Respondent's and the Party in Interest's amended answers reveals that each party disputes the specification's calculation

¹ The case number is corrected pursuant to the General Counsel's unopposed motion.

² 290 NLRB No. 132 (not published in Board volumes.)

³ 881 F.2d 1076 (unpublished).

of the backpay period for the employees but fails to offer alternative dates. The Respondent and the Party in Interest also dispute the specification's calculation as to gross earnings but have failed to state the basis for their disagreement with the figures used to compute the gross earnings each employee would have received and have failed to furnish figures concerning the appropriate measure of gross earnings for the employees. In addition, the Respondent and the Party in Interest deny that the General Counsel has used the proper straight time and overtime wage rates for employees, but fail to explain why they are incorrect or to provide any asserted proper rates. Similarly, the Respondent and the Party in Interest dispute the General Counsel's measure of average weekly straight time and overtime hours for each employee, but provide no alternative measure of straight time or overtime hours. The Respondent and the Party in Interest dispute the General Counsel's definition of both net interim earnings and net backpay but fail to offer alternative formulations. Further, the Respondent and the Party in Interest dispute the General Counsel's inclusion within their backpay liability, the cost to employees of alternative insurance premiums as well as employees' out-of-pocket medical expenses. Finally, in disputing the amounts set forth in the specification for medical insurance and expense reimbursement, the Respondent challenges the bases upon which the figures were derived, but offers no alternative basis for making such calculations.

We agree with the General Counsel that the above-described aspects of the Respondent's and the Party in Interest's amended answers fail to comply with the requirements of Section 102.56(b) and (c). With regard to the Party in Interest, which was not the employer at the time the underlying unfair labor practices occurred or were litigated, Section 102.56(b) requires that if an employer is without knowledge regarding an allegation of the backpay specification, its answer "shall so state, such statement operating as a denial." The Party in Interest's amended answer does not state that it is without knowledge of the wages and hours of the discharged employees, nor does its answer contain any explanation for the failure to deny specifically the backpay allegations.

In its response to the Notice to Show Cause, however, the Party in Interest claims that it did not have notice of the Board's September 1988 Decision and Order or of the court's August 1989 judgment enforcing that Order. It further asserts that it had no opportunity to review any proof of the claims made for wages, and had not seen any numbers, employment records, or affidavits relating to the employees' interim earnings and, therefore, should be afforded an opportunity to see proof of each claim. We find these assertions unpersuasive. In its answer and amended answer, the Party in Interest admits that it learned of the under-

lying litigation at the time it purchased the Respondent's assets in October 1987, that it hired some of the same employees who had previously worked for the Respondent, and that it continues to operate an ambulance service from the same premises that the Respondent had occupied. In these circumstances, the Party in Interest's denial of its successor status and liability (and the Respondent's denial that the Party in Interest is its successor) are inconsistent with the admitted facts.⁴ The Party in Interest's claims that it lacked knowledge about and access to employment and wage records are insufficient to operate as a denial to the compliance specification. Accordingly, because the Party in Interest has failed to deny specifically the above-described allegations, or to explain adequately its failure to do so, Section 102.56(c) requires that these allegations be deemed to be admitted as true.

In its amended answer, the Respondent does not assert that it lacks knowledge of the backpay period or of the appropriate figures to be used to determine employees' gross backpay; however, the Respondent fails to provide any alternative backpay dates or formula for computing the amounts of gross backpay owed. The dates marking the beginning of the employees' backpay period were established in the underlying unfair labor practice proceeding and the Respondent would certainly know whether and when it offered those employees reinstatement so as to toll the backpay period. In addition, the hours worked by the Respondent's employees and their rates of pay are normally within an employer's knowledge. In its response to the Notice to Show Cause, the Respondent asserts that it no longer has knowledge of these matters, as it previously gave certain original payroll records to the General Counsel during the litigation of this matter and some of them have not been returned. The Respondent asserts that it was therefore unable to dispute more specifically the accuracy of the backpay figures or provide alternative formulas for computing the amounts of gross backpay.

Although the Respondent may no longer possess some of its original payroll records allegedly in the General Counsel's possession, and states that it has notified the General Counsel by telephone about these records but has not yet been provided with them, the Respondent fails to specify when such notification was given, whether the General Counsel was advised of the reason it needed those records, or whether the Respondent ever requested copies or access to those records before filing its amended answer. The Respondent also implicitly admits that some of the records have been returned. Thus, we do not find the Respondent's belated assertion of lack of knowledge to

⁴ See *Appelbaum Industries*, 294 NLRB 981 (1989); *Good N' Fresh Foods*, 287 NLRB 1231 (1988), *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enfd. sub. nom.*, *United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

be an adequate explanation for its failure to comply with the requirements of Section 102.56 in its answer or amended answer.⁵

The General Counsel contends that, because the Respondent's and the Party in Interest's general denials to these allegations do not comply with the requisites of Section 102.56, these answers should be stricken, that the related allegations of the specification should be deemed admitted as true, and that summary judgment should be granted as to those parts of the backpay specification.

We agree with the General Counsel that as to allegations of the backpay specification involving the formula for gross backpay and the resulting computations, as well as the formula for net backpay, including provisions relating to backpay liability for employee insurance premiums and out-of-pocket medical expenses, the Respondent's and Party in Interest's amended answers should be stricken as insufficient under Section 102.56(b) and (c) of the Board's Rules and Regulations, and we deem such allegations to be admitted as true.

Accordingly, we shall grant the General Counsel's motion to strike in part and Motion for Partial Sum-

mary Judgment and shall direct a hearing limited to issues concerning interim earnings and the amount of medical expenses of the discriminatees.

ORDER

It is ordered that the General Counsel's motion to strike in part the Respondent's and the Party in Interest's amended answers to the backpay specification is granted.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment concerning all allegations in the compliance specification except amounts of interim earnings and amounts of medical expenses of the discriminatees is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 8 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence concerning interim earnings and medical expenses of the discriminatees. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

⁵ See *Schnabel Associates*, 286 NLRB 630 (1987).