

Toledo 5 Auto/Truck Plaza, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 20, a/w International Brotherhood of Teamsters, AFL-CIO. Case 8-CA-20261

March 25, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 30, 1988, the National Labor Relations Board issued its Decision and Order in this case directing the Respondent, Toledo 5 Auto/Truck Plaza, Inc., to make whole the discriminatee, Doris Dunlap, for any losses she may have incurred as a result of the Respondent's unfair labor practices.¹ On May 30, 1991, the United States Court of Appeals for the Sixth Circuit entered its judgment enforcing the Board's Order.² A controversy having arisen over the amount of backpay due the discriminatee under the Board's Order, as enforced by the court, the Regional Director for Region 8 issued a compliance specification and notice of hearing alleging the amount of backpay due the discriminatee. Subsequently, on September 18, 1991, the Respondent filed an answer to the compliance specification, generally denying the allegations of the compliance specification.

On December 18, 1991, the General Counsel filed with the Board a motion to strike Respondent's answer in part and for Partial Summary Judgment. The General Counsel's motion alleged that, with the exception of the Respondent's general denial of the allegations concerning the amount of interim earnings and medical expenses of the discriminatee, the Respondent's answer does not comply with the specificity requirements of Section 102.56(b) of the Board's Rules and Regulations. Thereafter, on December 26, 1991, the Respondent filed with the Board a motion in opposition to the General Counsel's motion to strike and motion for leave to file amended answer.

On December 30, 1991, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. On January 13, 1992, the Respondent filed its memorandum to show cause why the General Counsel's motion to strike should not be granted.

Also on January 13, 1992, the General Counsel filed a motion to strike and motion in opposition to Respondent's motion in opposition to General Counsel's motion to strike and for leave to file amended answer. In his motion, the General Counsel argues that the Board's Rules and Regulations do not permit the Respondent to file an amended answer and accordingly

asks that the Respondent's amended answer be stricken in its entirety. Alternatively, the General Counsel moves to strike paragraph 2 of the Respondent's amended answer, which relates to the gross earnings the discriminatee would have earned during the backpay period. The General Counsel further requests that summary judgment be granted on all allegations of the compliance specification not appropriately denied in the Respondent's amended answer.

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 Partial Summary Judgment

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

(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 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

¹ 291 NLRB 319.

² The court's judgment was not published.

of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

As noted above, the Respondent's original answer to the backpay specification offers a general denial to each of the allegations in the compliance specification. In its amended answer and memorandum to show cause, however, the Respondent does set forth an alternative date and theory for determining the backpay period, and also sets forth alternative figures for calculating gross backpay. The Board has held that, even in the absence of an amended backpay specification, a respondent may amend its answer prior to the hearing in the matter.³ Accordingly, we deny as lacking in merit the General Counsel's motions to strike the Respondent's answer in part and its amended answer in its entirety, and we grant the Respondent's motion for leave to file an amended answer.

The General Counsel has also moved to strike paragraph 2 of the Respondent's amended answer, which denies the calculation of gross earnings the discriminatee would have received during the backpay period. Specifically, the General Counsel argues that the Respondent has failed to state the basis for its denial and fails to set forth an alternative theory for calculating backpay. In its amended answer and in its memorandum to show cause, however, the Respondent does furnish alternative figures to measure the amount of gross backpay due the discriminatee in compliance with Section 102.56(b). Therefore, we find that the Respondent's amended answer to the allegation in the compliance specification concerning the gross earnings of the discriminatee is sufficient to raise a genuine issue of material fact that may best be resolved after a hearing before an administrative law judge. Accordingly, we deny the General Counsel's motion to strike paragraph 2 of the Respondent's amended answer and for Partial Summary Judgment concerning the gross earnings the discriminatee would have earned during the backpay period.

As the Respondent's amended answer admits that the number of straight-time hours the discriminatee

would have worked during the backpay period is 40 hours per week and that the number of overtime hours the discriminatee would have worked is 5 hours per week, we shall grant the General Counsel's Motion for Partial Summary Judgment as it pertains to these matters as set forth in paragraphs 2(c) and (f) of the compliance specification. Further, as neither the Respondent's answer nor its amended answer denies that the discriminatee's overtime rate is the product of the applicable straight-time rate times 1.5, we shall deem the allegation in paragraph 2(g) of the compliance specification to be admitted to be true under Section 102.56(c) and shall grant the General Counsel's Motion for Partial Summary Judgment as it pertains to paragraph 2(g) of the compliance specification. We also deem paragraphs 2(a), (b), (e), and (h) to be admitted and grant the General Counsel's Motion for Partial Summary Judgment in that respect.

ORDER

It is ordered that the General Counsel's motions to strike the Respondent's answer in part, to strike the amended answer in its entirety, and, alternatively, to strike the amended answer in part are denied.

IT IS FURTHER ORDERED that the General Counsel's alternative Motion for Partial Summary Judgment is granted except with respect to the allegations concerning the applicable backpay period, wage rates, interim earnings, expenses, insurance premiums, and medical expenses of Doris Dunlap.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 8 for the purpose of scheduling a hearing before an administrative law judge, to take evidence concerning the applicable backpay period, wage rates, interim earnings, expenses, insurance premiums, and medical expenses of Doris Dunlap.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

³ *Rainbow Coaches*, 266 NLRB 585, 586 (1983); *Bentleys Lounge*, 265 NLRB 632 (1982), *enfd. mem.* 725 F.2d 684 (6th Cir. 1983); *Standard Materials*, 252 NLRB 679, 680 (1980).