

T. A. Byrne Chevrolet, Inc. and John Myrick. Case 2-CA-23439

July 14, 1992

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 31, 1991, the Board issued its Decision and Order in which the Board, *inter alia*, ordered the Respondent, its officers, agents, successors, and assigns, to make whole employee John Myrick for his losses resulting from the Respondent's unlawful discharge of Myrick.¹ On September 5, 1991, the United States Court of Appeals for the Second Circuit, pursuant to a stipulation of the parties,² entered its judgment enforcing the Board's Order.

On September 19, 1991, Region 2, by letter to the Respondent's counsel, Perry S. Heidecker, requested that the Respondent comply with the court's order and also requested that the Respondent provide to the Region certain information and documents. On September 30, 1991, the Region received a letter from Heidecker stating his understanding that the Respondent had ceased operations in August or early September 1991 and that his firm no longer represented the Respondent.

About October 28, 1991, the Region received a letter, from Timothy A. Byrne, principal of the Respondent, confirming that the Respondent was no longer in business, that Byrne had been unable to sell the Respondent's assets, but that the assets might be sold at auction. According to the letter, any and all proceeds from a sale would be used to pay the Respondent's debts to the Internal Revenue Service and the New York sales tax. The letter also noted that the filing of bankruptcy was "a very real possibility."

On October 29, 1991, a Board agent sent a letter to the Respondent, addressed to the attention of Timothy Byrne, president. The letter stated that the Respondent's closure did not relieve the Respondent of its obligations under the court's judgment to make whole John Myrick for any loss of earnings he suffered as a result of the unlawful discharge. The letter also requested that the Respondent contact the Region by November 12, 1991, to arrange for the Board to depose an officer, accountant, or representative who had knowledge of the Respondent's business operations and financial condition. The Respondent never agreed to a deposition.

On January 30, 1992, the Regional Director for Region 2 issued and served on all interested parties a

¹ 303 NLRB 282.

² The parties stipulated that the Respondent withdrew its answer to the petition for enforcement, dated July 22, 1991, and its opposition to the enforcement proceeding brought by the Board.

compliance specification and notice of hearing, alleging, among other things, that a controversy had arisen regarding the amount of backpay due and the duration of the backpay period. About February 20, 1992, Region 2 received from Robert I. Eber, counsel for the Respondent, a purported answer to the compliance specification and notice of hearing. In substance, the answer stated that the Respondent had permanently closed its business and had no assets that it could use to pay the judgment. The answer failed, however, to specifically admit, deny, or explain any of the allegations in the specification.

On March 2, 1992, a Board agent informed the Respondent's counsel, Robert Eber, by letter, that a sufficient answer to the specification had not been received. The letter explained the requirements of Section 102.56 of the Board's Rules and Regulations and that if the Respondent failed to file an amended answer by March 12, 1992, counsel for the General Counsel would move for summary judgment. As of April 8, 1992, there had been no response to the letter.

On April 13, 1992, the General Counsel filed with the Board a Motion for Summary Judgment to backpay specification and petition in support with exhibits attached. On April 16, 1992, 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 has filed no response. The allegations in the motion are therefore undisputed.

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) of the Board's Rules and Regulations states that an answer to a compliance specification "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." Further, Section 102.56(c) provides:

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.

Further, the compliance specification states that

[t]o the extent that the answer fails to deny allegations of the Specification (including the Appendices) in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained such allegations shall be deemed to be admitted to be true and Respondent shall be precluded from introducing any evidence controverting them.

The Respondent's answer here merely suggests a plea of inability to pay. However, "the issue [in a backpay proceeding] is the amount due and not whether [the Respondent is] able to pay." *Star Grocery Co.*, 245 NLRB 196, 197 (1979).³ Accordingly, we grant the Motion for Summary Judgment, conclude that the

³See also *Postmasters/Same Day Plus*, 295 NLRB 1169 (1989); and *Columbia Engineers*, 268 NLRB 337 (1983).

net backpay due discriminatee John Myrick is as set forth in the backpay specification, and order that the Respondent pay this amount, plus interest.

ORDER

The National Labor Relations Board orders that the Respondent, T. A. Byrne Chevrolet, Inc., Mt. Kisco, New York, its officers, agents, successors, and assigns, shall make whole John Myrick by payment to him of \$39,919 plus interest, computed in the manner prescribed in *New Horizons For the Retarded*, 283 NLRB 1173 (1987), accrued on net backpay to the date of payment, minus tax withholdings required by law.⁴

⁴Further, because the Respondent has not yet validly offered to reinstate Myrick, determination of additional backpay due, if any, subsequent to August 1, 1991, is specifically reserved.