

Vibra-Screw, Incorporated and International Ladies' Garment Workers' Union, AFL-CIO.
Cases 22-CA-16137, 22-CA-16203, 22-CA-16259, 22-CA-16267, 22-CA-16278, 22-CA-16285, 22-CA-16335, and 22-CA-16428

August 10, 1992

SUPPLEMENTAL DECISION AND ORDER
REMANDING

BY MEMBERS DEVANEY, OVIATT, AND
RAUDA BAUGH

On January 25, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding¹ in which it ordered the Respondent, inter alia, to make whole six named discriminatees for any loss of earnings suffered by reason of the Respondent's discrimination against them. A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order, the Regional Director for Region 22 on January 31, 1992, issued a compliance specification and notice of hearing alleging the amounts of backpay due and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. After an extension of time, the Respondent filed an answer to the compliance specification.

After reviewing the Respondent's answer and finding that it did not comply with Section 102.56(b) and (c) of the Board's Rules and Regulations, the compliance supervisor for Region 22 sent the Respondent a letter advising it that its answer was deficient and provided a copy of the applicable rules and regulations and a relevant case citation. The letter advised that if a proper answer was not filed by March 18, 1992, the Region would file a Motion for Partial Summary Judgment. The Respondent failed to file a proper answer by March 18.

On April 6, 1992, the General Counsel filed with the Board a Motion for Partial Summary Judgment, with exhibits attached. The General Counsel's motion contends that the Respondent's answer to the compliance specification leaves only the issue of interim earnings to be litigated, and that the remaining paragraphs of the specification have either been admitted or the denials do not conform to the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations.² The General Counsel moved that the Board deem those portions not properly denied to be admitted as true, grant its request for partial summary judgment as to the admitted allegations, and limit the hearing to the issue of interim earnings.

¹ 301 NLRB 371.

² The General Counsel cited Sec. 102.54 instead of Sec. 102.56. The Board amended the Rules effective November 13, 1988. This inadvertent error does not affect our decision in this case.

On April 9, 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. On April 22, 1992, the Respondent timely filed a "Response to the Regional Director's Motion for Partial Summary Judgment and the Board's Order to Show Cause" (also entitled "Statement in Opposition to Motion for Partial Summary Judgment").³ On April 30, 1992, the General Counsel filed a reply to the Respondent's response.⁴ On May 4, 1992, the Charging Party filed a letter in support of the General Counsel's reply.⁵

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

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the 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

³ The Respondent submits that the General Counsel's Motion for Partial Summary Judgment should be denied because: (1) the Respondent's previous counsel did not show the Respondent the answer submitted on its behalf; and (2) the Respondent has now retained counsel for the purpose of representing it in the compliance proceeding. The Respondent also requests leave to file an amended answer. We grant the Respondent's motion for leave to file an amended answer to the extent that we deem the response to the Notice to Show Cause to be an amended answer. See discussion, infra.

⁴ The General Counsel contends that his Motion for Partial Summary Judgment should be granted because the Respondent was advised that its original answer was deficient and subsequently failed to file a timely amended answer. The General Counsel asserts that while the Board has allowed a respondent to amend an answer after a Notice to Show Cause has issued, as in *Aquatech, Inc.*, 306 NLRB 975 (1991), that case involved a special factual situation and should not be interpreted as standing for the proposition that a respondent may substitute an entirely new answer at any time before the hearing. The General Counsel argues that allowing the Respondent to submit a new answer to the specification at this time renders the requirements of Sec. 102.56 meaningless.

⁵ The Charging Party, the International Ladies' Garment Workers' Union, concurs with the General Counsel's position and additionally alleges that the Respondent has protracted this case over 3 years, has employed at least four separate law firms to represent it during those 3 years, and should not be allowed to prevail on a claim of incompetent counsel at this stage of the proceedings.

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.

In its answer to the original compliance specification the Respondent generally denied the majority of the allegations of the specification.⁶ As an affirmative defense, the Respondent contended it was entitled to “setoffs” and “credits” for discriminatee interim earnings, for the failure of certain discriminatees to mitigate their damages, and for interest which accrued because of unreasonable delay in calculating backpay for the discriminatees.

Based on this original answer, the General Counsel filed his Motion for Partial Summary Judgment. We find the Respondent's original answer is deficient insofar as it contains general denials concerning those matters within the Respondent's knowledge. The denials are insufficient because they do not fairly meet the substance of the allegations of the specification, nor do they reveal the basis on which the Respondent disagrees with the specification's allegations, as required by our rules. Additionally, the Respondent failed to offer or set forth in detail any figures or alternatives in support of its general claim for “setoffs” and “credits.” Further, the mere contention that the Re-

spondent would not have granted wage increases or bonuses is deficient as the Respondent failed to supply any alternative figures or supporting information. If we were faced only with the original answer to the compliance specification, we would grant the General Counsel's Motion for Partial Summary Judgment.

In this case, however, the Respondent has filed a response to the Notice to Show Cause and in opposition to the Motion for Partial Summary Judgment that is sufficiently specific under our Rules fairly to join the issues. 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.⁷ The Board has also treated a response to a Notice to Show Cause as an amended answer.⁸

We do so here. Thus, while the Respondent's original answer was deficient in certain respects, we shall construe the Respondent's response to the Notice to Show Cause as an amended answer. We find that this amended answer suffices to raise issues which can best be resolved by a hearing.

Our decision in this case is well grounded in precedent as evidenced by *Aquatech*, *Bentley's Lounge*, and *Standard Materials*. In support of its decision in *Bentley's*, the Board quoted with approval the language of *Standard Materials*, at 632, that “even in the absence of an amended backpay specification, a respondent may amend its answer prior to a hearing in the matter. In this case, we construe Respondent's response to the Notice to Show Cause as an amended answer.” That is this case. The Respondent here has amended its answer prior to hearing and has raised issues best resolved before an administrative law judge.

In response to our dissenting colleague, we note that, contrary to his suggestion, the instant case does not involve an original answer that was wholly deficient. That answer was partially valid and partially deficient.⁹ Hence, this case, like the others cited, involves an effort to *amend* a partially valid answer that was previously filed. In addition, we note that the attorney who filed the previous answer is no longer Respondent's counsel, and Respondent never saw that answer. Respondent's new counsel filed a timely response to the General Counsel's Motion for Partial Summary Judgment. In these circumstances, we would not penalize Respondent by granting the General Counsel's motion.

Accordingly, we deny the General Counsel's Motion for Partial Summary Judgment and order a hearing on the issues raised by the amended answer to the compliance specification.

⁶The Respondent admitted to certain specified backpay periods for several discriminatees. It also acknowledged that it granted wage increases to certain employees, but denied it would have necessarily granted those increases to the discriminatees. It admitted that it granted bonuses to some employees but denied it would have granted bonuses to the discriminatees in the amounts specified.

⁷*Bentley's Lounge*, 265 NLRB 632 (1982); *Standard Materials*, 252 NLRB 679 (1980).

⁸*Aquatech, Inc.*, supra at 976.

⁹Because of this, the General Counsel filed a Motion for Partial Summary Judgment.

ORDER

It is ordered that the General Counsel's Motion for Partial Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 22 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 the issues raised in the compliance specification. 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.

MEMBER OVIATT, dissenting.

I do not agree with my colleagues' disposition of this case and their reliance on *Aquatech, Inc.*, 306 NLRB 975 (1991). In *Aquatech*, in which I did not participate, the Board decided to construe the respondent's response to the Notice to Show Cause as an amended answer. By its amendment, the *Aquatech* respondent provided a date for the tolling of backpay based on alleged offers of reinstatement. The amendment involved one issue of backpay for two discriminatees. The respondent had allegedly spoken to the Region's compliance officer about the reinstatement of the discriminatees and the backpay cutoff date.

From this limited factual situation, the *Aquatech* Board broadly stated that, even in the absence of an amended backpay specification, a respondent may amend its answer prior to a hearing in the matter. In support of its decision in *Aquatech* the Board cited *Bentley's Lounge*, 265 NLRB 632 (1982), and *Standard Materials*, 252 NLRB 679 (1980).

I believe the Board took a leap in relying on these cases to support *Aquatech*, and an even greater leap in using *Aquatech* to justify the result in the present case. In *Bentley's*, the Board permitted a respondent's response to the Notice to Show Cause to clarify the answer's general denial by referring specifically to one

matter (i.e., employee tips) not within the respondent's knowledge. In *Standard Materials*, the Board merely allowed a respondent's response to a Notice to Show Cause to correct an answer's being unsworn and its failure to provide the respondent's address. *Bentley's Lounge* and *Standard Materials* obviously involved more limited amendments than that permitted in *Aquatech*. Thus, those cases plainly were no support for the Board's permitting the *Aquatech* respondent to use its response to the Notice to Show Cause substantially to amend its answer by changing the substance of its response, in derogation of the Board's Rules. If those Rules were to have any meaning at all, they should have been followed in *Aquatech*, not ignored. In my view, *Aquatech* was incorrectly decided, and I would now overrule it.

But even assuming for argument's sake that *Aquatech* is good law, I would distinguish this case from *Aquatech* rather than to proceed any farther down the dangerous path charted by *Aquatech*. The Board in this case, rather than permitting a minor amendment to the deficient answer, is permitting the Respondent to substitute its response to the Notice to Show Cause as an entirely new answer. The Respondent has made no good cause showing of why it earlier failed to file a timely amended answer to the specification. Additionally, the information supplied in the "amended answer" has always been within the Respondent's knowledge. Thus, the Respondent's amendment in this case is far broader even than that permitted in *Aquatech*.

What we have here is a Respondent who originally filed a deficient answer to the specification, was advised by the Region that the answer was deficient, and then failed to file a timely amended answer. The Respondent then delayed until the Notice to Show Cause issued and filed a completely new answer. Such a cavalier attitude toward the Board's processes and such dilatory conduct by the Respondent, and the Board's subsequent acceptance of it, makes meaningless the Board's Rules and Regulations. I would grant the General Counsel's Motion for Partial Summary Judgment.