

King Manor Care Center and District 6, International Union of Industrial, Service, Transport and Health Employees. Case 22-CA-16834

March 3, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

On September 18, 1992, the National Labor Relations Board issued its Decision and Order¹ in Case 22-CA-16834, which, inter alia, directed the Respondent to reimburse the Union's welfare plan for any interest lost as a result of the Respondent's failure to make timely contributions to the plan pursuant to the terms of the February 19, 1988, to February 19, 1991 collective-bargaining agreement with the Union, and to make whole unit employees for any expenses they incurred as a result of the Respondent's failure to make timely payments. The Board left to compliance the determination of whether the Respondent's failure to make timely payments resulted in a delinquency in the payments.² On December 31, 1992, the Respondent entered into a stipulation with the General Counsel which stated, in pertinent part,

2. Respondent hereby waives its right under Section 10(e) and (f) of the Act (29 U.S.C. 160 (e) and (f)[]) to contest either the propriety of the Board's Order issued on September 18, 1992[,] or the findings of fact and conclusions of law underlying that Order.

On January 27, 1993, the Regional Director issued a compliance specification and notice of hearing (specification) alleging the amount of money owed by the Respondent to the Union's welfare plan for the period beginning on September 1, 1989,³ through December 30, 1991, when the Union was decertified,⁴ and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. On February 8, 1993, the Respondent filed its answer to the compliance specification. Subsequently, by letter

¹ 308 NLRB 884. Member Devaney did not participate in the underlying case.

² In the underlying case, the Respondent argued that it was not liable to make any contributions, because it had overpaid the funds; the Union argued that the Respondent had not overpaid and was in fact in arrears. In his decision, the administrative law judge stated that "[a]lthough it appears that eventually Respondent *may* have paid about \$2,000 over the amount owed through December 1990, *this is a circumstance not fully explained.*" (Emphasis added.) See 308 NLRB at 886-887.

³ Six months prior to the date the charge was filed in the case.

⁴ On that date a Second Supplemental Decision and Certification of Representative issued in Case 22-RC-9913 which certified District 1115, Nursing Home and Hospital Employees Union as the representative of a unit which includes the nursing aides and dietary workers who were formerly represented by District 6 and who are the subject of the Board's Order.

dated February 17, 1993, the General Counsel advised the Respondent that its answer was deficient, and that the General Counsel would file a Motion for Summary Judgment if a proper answer was not filed by February 24, 1993. By letter dated February 22, 1993, the Respondent filed an amended answer.

Thereafter, on May 21, 1993, the General Counsel filed a Motion to the Board for Summary Judgment, with exhibits attached. In support of the motion, the General Counsel submits that the Respondent's answer and amended answer to the compliance specification "leave no issues which can be litigated" because the paragraphs of the specification either are admitted or are not answered in compliance with Section 102.56(b) and (c) of the Board's Rules and Regulations. On May 26, 1993, 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 July 2, 1993, the Respondent filed its response to the Notice to Show Cause.

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

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

Paragraph 2 of the specification alleges that the Respondent is liable for contributions to the Union's welfare plan for all nursing aides and dietary workers who worked at least 136 hours in a calendar month, at the rate of \$45 per month per eligible employee.⁵ Paragraph 5 summarizes the quarterly amounts of welfare contributions due, which are alleged to total \$38,286.68. Paragraph 6 alleges that the Respondent is also liable for interest on the late payments and unpaid amounts, and paragraph 7 summarizes the facts and calculations alleged in the previous paragraphs and alleges that the Respondent's total obligations will be discharged by a payment to the plan in the amount of \$38,386.68, plus interest to the date of payment. The Respondent's answer and amended answer denies paragraph 2 asserting that "liability cannot be measured in terms of the contract . . . in these circumstances." It does not describe the "circumstances" or set forth an alternative calculation. Thus, the answers do not comply with the specificity requirements of the Board's Rules. The Respondent's answer and amended answer deny paragraphs 5, 6, and 7 without explanation except for the following affirmative defense:

The Respondent is not liable for contributions in these circumstances. Liability cannot be measured in terms of the contract. Making these payments will result in a windfall to the Union funds and a penalty to the Respondent. Interest is also inappropriate in this context. Moreover, the contract expired in February 1991.

The Respondent's answers to these allegations are similarly deficient because they do not set forth in detail its position as to the applicable premises nor furnish the appropriate supporting figures. See *Best Roofing Co.*, 304 NLRB 727, 728 (1991).

We find no merit in the Respondent's argument, made in response to the Board's Notice to Show Cause, that it is not liable for any contributions to the fund because the Union has been decertified and the employees no longer have an interest in the continued viability of the fund. Cf. *Manhattan Eye, Ear &*

⁵This formula was agreed to by the parties during the hearing in the underlying case. 308 NLRB 885 and fn. 2.

Throat Hospital v. NLRB, 942 F.2d 151 (2d Cir. 1991), denying enf. of 300 NLRB 201 (1990). The Respondent failed to raise this argument in its exceptions to the Board in the underlying case. Moreover, in the December 31, 1992 stipulation, the Respondent has clearly and unmistakably waived its right to contest the Board's Order or the facts underlying the Order.⁶ Thus, the only issue at compliance is the amount of contributions owed the plan, not whether the contributions are owed, the latter issue having been settled by the Board's Order.⁷

Finally, paragraph 4 of the specification explains appendix B, which shows that the Respondent was given credit for two welfare plan payments it made in the amounts of \$5000 each on August 16 and December 4, 1990, and the amounts due after the credits. The Respondent's answer denies this paragraph and in its affirmative defense states that the appendix is incorrect because the calculation "arbitrarily prorates [one of] the \$5,000 payment[s] . . . so that a balance is due and Respondent does not reap a \$5,000 credit on payments made." In its amended answer, the Respondent reiterates its affirmative defense and asserts that "[o]bviously giving full credit for the \$5,000 payment, would not be an erroneous formula."

In its response to the Notice to Show Cause the Respondent further contends that

For no apparent reason a \$5,000 payment made on August 16, 1990 was credited for the period July 1989–December 1989 into six equal parts. Accordingly since the back-pay period commenced in September 1989 only \$3332 of the \$5,000 payment is being credited to Respondent.

Rather, the Respondent argues, the entire \$5000 payment should be applied during the backpay period, thereby reducing the amount owed for the period an additional \$1668.

⁶We reject the Respondent's contention that its liability to the fund is litigable because the Board left to compliance the determination of whether the Respondent owed "any additional payments and interest to District 6's welfare plan." The Respondent argued on exception to the Board in the underlying case that, not only did it not owe any contributions, but that it had *overpaid* the plan. The Union, on the other hand, argued that the Respondent's contributions were still in arrears. The judge found that the Respondent, though consistently late in making payments to the fund, "eventually . . . may have paid about \$2,000 over the amount owed through December 1990[.]" but that the circumstances were not fully explained. 308 NLRB at 886. It was, therefore, the amount of the contributions, if any, not the liability of the Respondent to *make* the contributions, that the Board left to compliance.

⁷For the same reasons, we reject the Respondent's argument that it is not liable for any payments after the contract expired in February 1991. In addition, we note that the Respondent's answer *admits* par. 1 of the specification, which states that the backpay period runs until December 30, 1991, and also par. 3 of the specification, which in its three subsections explains the calculations made on appendixes A-1 through A-28 that are attached to the specification.

The Respondent has failed to explain why the payment should be credited in its entirety to the backpay period. Moreover, even assuming that the Respondent's answer and amended answer to paragraph 4 as elaborated in its response to the Notice to Show Cause is adequate, we find that the General Counsel acted reasonably in applying the August 16, 1990 payment to amounts due for the period July through December 1989. The judge found that the period covered by the check was either *written on the check itself or based on the testimony of the Respondent's own witness*⁸ and that such evidence indicated that the August 16 check covered the exact period for which it was credited in appendix B. As we discussed, the Respondent has provided no basis to support an alternative application of the payment.

We find, therefore, that the answer and amended answer are deficient insofar as they deny the appropriateness of the formula and the allocation of \$5000 payments set forth in paragraphs 2 and 4, respectively, of the specification, and the calculations set forth in paragraphs 5, 6, and 7 of the specification. Those denials are insufficient because they do not set forth any alternative formula for computing the amount owed to the

⁸ 308 NLRB at 886 fn. 3.

Union's welfare plan and do not provide any appropriate alternative figures.⁹ Thus, we agree with the General Counsel that the Respondent's answer to paragraphs 2, 4, 5, 6, and 7 do not comply with the requirements of Section 102.56(b) and (c), and that they are insufficient to raise any litigable issues.

Accordingly, we deem the Respondent to have admitted the allegations of paragraphs 2, 4, 5, 6, and 7 of the specification to be true, and because the Respondent has admitted all other allegations in the specification, we grant the General Counsel's Motion for Summary Judgment.

ORDER

The National Labor Relations Board orders that the Respondent, King Manor Care Center, Neptune, New Jersey, its officers, agents, successors, and assigns, shall pay into the welfare plan the amounts stated in the compliance specification.

⁹ See, e.g., *J. Huizinga Cartage Co.*, 308 NLRB 106 (1992); *Heck's Inc.*, 282 NLRB 263 (1986). We note that the denials also, with respect to pars. 5-7, conflict with the Respondent's admission of par. 3 of the specification containing the basis for the welfare payments calculated in appendixes A-1 through A-28, which calculations are summarized in pars. 5, 6, and 7 of the specification.