

Bestway Trucking, Inc. and Douglas McDaniel and John S. Bouchey and Michael R. Murphy and Edward Carney and Jimmie Story and Richard W. Stump and Donald Walker and Elijah Pasley. Cases 9-CA-28843-1, 9-CA-28843-2, 9-CA-28843-3, 9-CA-29255-1, 9-CA-29255-2, 9-CA-29255-3, 9-CA-29255-4, and 9-CA-29255-5

May 10, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On March 12, 1993, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ in which the Board ordered the Respondent, *inter alia*, to reinstate and make whole the above-named discriminatees for all losses of earnings suffered as a result of the Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On April 24, 1994, the United States Court of Appeals for the Seventh Circuit entered a judgment enforcing the Board's Order. A controversy having arisen over the amounts of backpay due the discriminatees under the terms of the Board's Order, enforced by the court, the Acting Regional Director for Region 9 on November 23, 1994, issued a compliance specification and notice of hearing alleging the amounts of backpay due to the discriminatees and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations.

On December 12, 1994, the Respondent filed an answer to the compliance specification which stated in its entirety:

1. Bestway Trucking, Inc. denies each and every allegation in the Compliance Specification.
2. All allegations not specifically admitted are hereby denied.

Wherefore, Bestway Trucking, Inc. demands that the Compliance Specification be dismissed.

Thereafter, on December 22, 1994, the General Counsel filed with the Board a Motion for Summary Judgment. The General Counsel alleges that the Respondent's answer completely fails to comport with the substantive requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations, and raises no litigable issues. Therefore, the General Counsel moves that the answer be stricken, the allegations in the compliance specification be deemed to be admitted as true without the taking of evidence, and that summary judgment be granted.

On December 28, 1994, the Respondent filed an objection and response to the General Counsel's motion,

a motion for an extension of time in which to file an answer, a motion to file an amended and supplemental answer, and an amended and supplemental answer which admits in part and denies in part the allegations in the compliance specification and argues affirmatively against the compliance specification. On December 29, 1994, 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 not filed a response.

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

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 state:

(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

¹ 310 NLRB 651.

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.

The compliance specification duly served on the Respondent states that, pursuant to Section 102.56 of the Board's Rules and Regulations, the Respondent "shall, within 21 days of this specification, file . . . an answer To the extent that such answer fails to deny [the] allegations of the specification 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."

As indicated above, the General Counsel filed a motion to strike the Respondent's December 12 answer on the basis of alleged substantive deficiencies. Specifically, the General Counsel alleges that the answer is substantively deficient because it contains only a general denial concerning those matters within the Respondent's knowledge and, further, that the general denial is insufficient because it does not fairly meet the substance of the specification allegations, nor does it reveal any specific basis for disagreement with the specification's allegations, or offer or set forth in detail supporting figures or alternative premises.²

Also, as noted above, the Respondent filed an objection and response to the General Counsel's Motion for Summary Judgment, a motion for an extension of time in which to file an answer, a motion to file an amended and supplemental answer, and an amended and supplemental answer. In these filings, the Respondent argues that it should be permitted to amend its December 12 answer, and it proffers an amended answer which essentially purports to comply with the specificity required of Section 102.56(b) and (c).

We agree with the General Counsel that the Respondent's December 12 answer was substantively deficient as alleged.³ However, the Board has held that a respondent may amend its answer prior to the hearing even in the absence of an amended backpay specification.⁴ Accordingly, we grant the Respondent's motion to file an amended and supplemental answer. Having accepted the amended and supplemental answer,

we find that it is substantively sufficient except as follows.

First, in paragraphs 3 and 4 of the Respondent's amended and supplemental answer, the Respondent generally denies the allegation of the specification regarding wage increases which the discriminatees would have received during the backpay period. Thus, in paragraph 3, the Respondent denied the specific amounts of the alleged wage increases for Bouchey, Murphy, Carney, Story, Stump, Walker, and Pasley; and in paragraph 4, the Respondent denied the general allegations of the specification that both classes of drivers (e.g., "City" and "Bloomington") would have received wage increases during the backpay period. Further, in paragraph 5 of the Respondent's amended and supplemental answer, the Respondent generally denied the amounts of average weekly earnings alleged in the specification for McDaniel, Bouchey, Murphy, Carney, Story, and Stump. We find that those paragraphs are substantively deficient because they contain only general denials concerning matters within the Respondent's knowledge. Those denials are insufficient because they do not fairly meet the substance of the allegations of the specification, nor do they reveal any specific basis for disagreement with the specification's allegations, or offer or set forth in detail supporting figures or alternative premises. Accordingly, we will strike paragraphs 3, 4, and 5 of the Respondent's amended and supplemental answer as substantively deficient, and we will deem those allegations to be admitted as true.

Second, in paragraph 15 of the Respondent's amended and supplemental answer, the Respondent affirmatively argues that Michael R. Murphy is not entitled to any backpay because of the alleged false pretenses of his employment (i.e., his intent to organize employees on behalf of the Union). To the extent that the Respondent is arguing that Murphy is not an employee within the meaning of Section 2(3) of the Act and, therefore, is not entitled to the Act's protection or traditional remedies, we shall strike that paragraph because it does not present even a colorable legal defense. The Board has held that paid union organizers are employees within the meaning of Section 2(3) of the Act.⁵ Murphy's intent to organize, either overt or covert, would have been no bar to his employment nor would it have provided a defense to his unlawful discharge. Accordingly, Murphy's intent to organize is simply not relevant to his right to backpay in this proceeding and certainly is no bar to his right to receive that backpay.

²We note that interim earnings are not generally within the knowledge of a respondent and, therefore, a general denial regarding interim earnings would be sufficient. *Dews Construction Corp.*, 246 NLRB 945, 947 (1979).

³*Robincrest Landscaping & Construction*, 303 NLRB 377 (1991); *Challenge-Cook Bros. of Ohio*, 295 NLRB 435, 436 (1989).

⁴See generally *Aquatech, Inc.*, 306 NLRB 975, 976 (1992); *Toledo 5 Auto/Truck Plaza*, 306 NLRB 842, 843 (1992); *Bentley's Lounge*, 265 NLRB 632 (1982), *enfd. mem.* 725 F.2d 684 (6th Cir. 1983); *Rainbow Coaches*, 266 NLRB 585, 586 (1983).

⁵*Sunland Construction Co.*, 309 NLRB 1224 (1992).

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is denied, except as noted above.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 9 for the purpose of noticing and scheduling a hearing before an administrative law judge.

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 the record evidence. Following service of the administrative law judge's decision on the parties, the provision of Section 102.46 of the Board's Rules shall apply.