

R. B. Contracting Co. and Laborers' International Union of North America, Local No. 373, AFL-CIO. Case 6-CA-25436

May 20, 1996

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On August 17, 1993, the National Labor Relations Board issued a Decision and Order¹ finding that the Respondent, R. B. Contracting Co., violated Section 8(a)(1), (3), and (5) of the Act. The Board ordered the Respondent, among other things, to offer immediate reinstatement to unlawfully discharged employee Robert E. Whitsett, and to make Whitsett whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. On February 14, 1994, the United States Court of Appeals for the Third Circuit enforced the Board's Order.² A controversy having arisen over the amount of backpay due under the Board's Decision and Order, the Regional Director for Region 6 issued a backpay specification and notice of hearing on June 13, 1994, alleging the amount of backpay due Whitsett and the amount of contributions owed on Whitsett's behalf to The Laborers' Combined Funds of Western Pennsylvania. The specification informed the Respondent that it must file a timely answer complying with the Board's Rules and Regulations.

The specification was personally served on the Respondent on January 23, 1996.³ An accompanying notice informed the Respondent that a hearing on the backpay specification would be held February 27. In addition, the specification notified the Respondent that, under Section 102.56 of the Board's Rules and Regulations, it had 21 days from service of the specification to file an answer and serve it on the parties. The specification further provided that:

To the extent that such Answer fails to deny 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.

When the Respondent failed to file a timely answer, the Region wrote it on February 20, stating that unless

it received an answer by February 23, it might seek summary judgment.

On February 21, the Region filed a motion to postpone the February 27 hearing in order to permit the General Counsel to file for summary judgment. On February 22, Associate Chief Administrative Law Judge Bernard Reis granted that motion. On February 29, the Respondent filed a motion for reconsideration of the decision to postpone the backpay hearing. The Respondent argued in its motion that the General Counsel had assured it that it could file a response to the specification at any time prior to the February 27 hearing date.⁴ The Respondent further asserted that it had planned to file a response at that hearing.

On March 7, Associate Chief Judge Reis denied the motion for reconsideration, finding that the Respondent was fully and timely aware of its imminent need to oppose the General Counsel's motion to postpone the February 27 backpay hearing, that the Respondent did not promptly act, and that the Judges' Division no longer had jurisdiction over the case.⁵

On March 18, the General Counsel filed a Motion for Summary Judgment based on the Respondent's failure to file an answer to the backpay specification as required under Section 102.56.

On March 20, 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 1, the Respondent filed an answer to Motion for Summary Judgment and order transferring case to the Board. In its "Answer," the Respondent admitted that it had employed Whitsett at the rate set forth in the specification, but argued that it fired Whitsett 5 days after employing him when Whitsett complained about the Respondent's attempts to deduct union membership dues and fees from his pay. The Respondent asserted that it had planned to present this argument at the February 27 backpay hearing and that, by obtaining a continuance of this hearing and filing for summary judgment, the General Counsel had deprived it of its due process rights.

On April 3, the General Counsel filed a response, arguing that the Respondent's attempt to answer the specification in its response to the Notice to Show Cause was untimely and deficient because it failed to adequately explain why the Respondent was unable to file a proper and timely answer. The General Counsel

¹ This summary judgment decision, 311 NLRB No. 169, is not included in the bound Board volumes. A copy of the decision can be obtained from the NLRB, Division of Information, Washington, D.C., 20570.

² The judgment of the Third Circuit is unpublished.

³ The Region's previous efforts to locate and effect service on the Respondent had been unsuccessful.

All subsequent dates are in 1996 unless otherwise indicated.

⁴ In her statement in opposition to the Respondent's motion for reconsideration, counsel for the General Counsel denied ever advising the Respondent that it could file a response to the specification at any time prior to the February 27 hearing.

⁵ The Respondent's motion was denied on the ground that because the scheduled February 27 hearing date had already passed when the Respondent sought reconsideration, the Judges' Division no longer had jurisdiction over the case, which was then properly before the Board.

further asserted that, in any event, the Respondent's April 1 response was insufficient to constitute an answer, and that what the Respondent really sought was to litigate the merits of the underlying unfair labor practice allegations.

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 Summary Judgment

Section 102.56(a), (b), and (c) of the Board's Rules and Regulations specify, in relevant part, that:

(a) *Filing and service of answer; form.*—Each respondent alleged in the specification to have compliance obligations shall, within 21 days from the service of the specification, file an original and four copies of an answer thereto with the Regional Director issuing the specification, and shall immediately serve a copy thereof on the other parties. . . .

(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 orders 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.

Based on these Rules and Regulations, we agree with the General Counsel that summary judgment is appropriate.

Initially, we note that the Respondent failed to file a timely answer to the backpay specification as required by Section 102.56(a). Thus, the specification, which was served on the Respondent on January 23, 1996, expressly stated that the Respondent was required to file an answer within 21 days. When a timely answer was not filed, the General Counsel sent the Respondent a reminder letter on February 20, stating that summary judgment could be sought unless an answer was filed by February 23. Again, the Respondent failed to submit an answer. Although the Respondent subsequently argued in its February 29 motion for reconsideration that the General Counsel had assured it that an answer could be filed prior to the February 27 hearing—an allegation that the General Counsel denies—the Respondent did not file an answer before February 27, or indeed, even after its motion for reconsideration was denied.⁶ Nor is there any claim or evidence that the February 29 motion for reconsideration was intended to serve as an answer.⁷

Furthermore, even assuming *arguendo* that we were to treat the Respondent's April 1 response to the Notice to Show Cause as a timely filed answer, we would nonetheless find that summary judgment is appropriate. Thus, the April 1 response fails to specifically admit, deny, or explain the allegations in the specification, as required in Section 102.56(b). Indeed, to the extent that it can be construed as substantively responding to any allegation of the specification—i.e., that Whitsett was employed at the rate set forth by the contract with Laborers' International Union No. 373—it admits a specification allegation. Moreover, to the extent that the April 1 response asserts that Whitsett was fired because he complained about union dues' deductions rather than—as found by the judge, Board, and Third Circuit Court of Appeals—because he joined and supported the Union, the Respondent impermissibly seeks to litigate in compliance an issue that properly should have been raised in the underlying unfair labor practice proceeding.⁸ See generally *Baumgardner Co.*, 298

⁶ Thus, we need not resolve the credibility conflict.

⁷ On the contrary, the Respondent's counsel made clear in the February 29 motion that what her client sought was the rescheduling of the backpay hearing.

⁸ Although the Respondent contends that the length of the backpay period is at issue, it is clear that what it actually challenges is the determination that Whitsett was unlawfully discharged. Thus, the

NLRB 26, 27–28 (1990); *Ricks Construction*, 272 NLRB 424, 425 (1984).

Accordingly, under all these circumstances, we find that summary judgment is appropriate.

ORDER

The National Labor Relations Board orders that the Respondent, R. B. Contracting Co., Pittsburgh, Penn-

Board determined in its underlying decision that the Respondent recognized the Union on the Homewood Mini Mall project on January 7, 1993, thereafter hired Whitsett, and discharged him on January 15, 1993. Similarly, in its response to the Notice to Show Cause, the Respondent admits that it employed Whitsett for 5 working days and then discharged him. Although the Respondent contends that it does not dispute backpay figures for Whitsett's 5 days of employment—which are not alleged as owing in the specification—but only amounts alleged as owing after that time, what it thereby seeks is to relitigate in the backpay proceeding whether Whitsett's termination was unlawful.

sylvania, its officers, agents, successors, and assigns, shall pay the amount specified below to Robert Whitsett, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws. The Respondent is also ordered to pay to the Mellon Bank Laborers' Contribution Account 182-9347 the following amount, plus any additional amount accruing to the date of payment as computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Robert E. Whitsett	\$5,534.37
Mellon Bank Laborers' Contribution Account 182-9347	\$1,972.49
TOTAL	<hr/> \$7,506.86