

**United States Service Industries and Service Employees International Union, Local 525, AFL-CIO.** Cases 5-CA-21399 and 5-CA-21691

March 20, 1998

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On September 30, 1994, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> in which it ordered the Respondent, *inter alia*, to offer reinstatement to certain economic strikers who had unconditionally offered to return to work and to make them whole for any loss of earnings suffered by reason of the Respondent's discrimination against them. On November 21, 1995, the United States Court of Appeals for the District of Columbia entered a judgment enforcing the Board's Order. A controversy having arisen over the amounts of backpay due under the terms of the Board's Order, the Regional Director for Region 5 issued a compliance specification and notice of hearing, identifying certain individuals as the discriminatees who are entitled to backpay, 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. The Respondent subsequently filed an answer to the compliance specification.

By letter dated November 27, 1996, the Region notified the Respondent that its answer was inadequate and that if it failed to correct the deficiencies by December 9, 1996, the Region would move for summary judgment. By letter dated December 2, 1996, the Respondent, by its counsel, responded to the November 27, 1996 letter, requested the Region to advise it precisely which denials of the Respondent's answer were inadequate and asserted that the Respondent believes it made specific denials and stated its position in detail.

On August 18, 1997, the General Counsel filed with the Board a Motion to Transfer and Continue Case before the Board, Motion for Partial Summary Judgment and to Strike Part of Respondent's Answer to Compliance Specification. On August 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 September 2, the Respondent filed a memorandum in opposition to the General Counsel's motion.

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

<sup>1</sup> 315 NLRB 285.

Ruling on Motion to Strike Part of Respondent's Answer and for Partial Summary Judgment

Section 102.56(b) and (c) of the National Labor Relations Board's Rules and Regulations states, in pertinent part:

(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. . . . 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 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.

1. In its answer and its response to the Notice to Show Cause<sup>2</sup> the Respondent has offered general denials to the General Counsel's allegations concerning the backpay period and the amount of backpay due each of the discriminatees, arguing that it had made offers of reinstatement to all discriminatees and further arguing that the backpay computation is inaccurate because it does not take into account interim earnings and mitigation of damages. The Respondent also disputes the

<sup>2</sup> In considering the sufficiency of the Respondent's denials, we shall examine its response to the Notice to Show Cause as well as its answer. A respondent may cure defects in its answer before a hearing either by an amended answer or by a response to a Notice to Show Cause. See *Ellis Electric*, 321 NLRB 1205, 1206 (1996), and cases cited there.

wage rates used by the General Counsel, but supplies no alternative figures.<sup>3</sup>

The General Counsel contends that the general denials do not comply with the requirements of Section 102.56(b) and (c). Thus, the General Counsel argues that the Respondent has failed to specify what positions were offered to the discriminatees, the terms of the offers or any details about the offers other than the purported date and whether some were rejected. Further, the Respondent failed to furnish supporting alternative figures to calculate gross backpay.

We agree with the General Counsel that the Respondent's answer to the compliance specification and its response to the Notice to Show Cause are substantively deficient, except as specifically set forth below. A general denial is not sufficient to refute allegations pertaining to the backpay period and the gross backpay calculations. Inasmuch as the data at issue is within the Respondent's knowledge and control, its failure to set forth fully its position as to the applicable premises or to furnish appropriate supporting figures is contrary to the specificity requirements of Section 102.56(b) and (c). *DeMuth Electric.*, 319 NLRB 942 (1995); *Ornamental Iron Work Co.*, 307 NLRB 20 (1992). Thus, we shall grant the General Counsel's Motion for Summary Judgment as to the backpay period and the amount of gross backpay due the following discriminatees for whose claims the Respondent asserted only a general denial: Howard Adams, Atricia Armstead, Sheila Bell, Willie Bell, Doris Brown, Dye Carr, Melita Christmas, Dave Cousley, Andres Gonzalez, Sherwin Jackson, Randolph James, Bertram Madden, Kelly Marshall, Melinda Moore, Howard Murray, Bernice Noble, Merida Lee Ramirez, Phillip Scott, Robert Taylor, Andrew Terry, Angela Williams, and James Wilson.<sup>4</sup>

2. By contrast, we find that the Respondent has raised an issue warranting a hearing concerning the length of the backpay period for Mary Burrell, Gisela Sawyer, and Ade Thomas. The Respondent contends that Mary Burrell, Gisela Sawyer, and Andres Gonzalez were each offered reinstatement twice and that the second set of reinstatement letters was provided to the General Counsel. The General Counsel contends

<sup>3</sup> The Respondent states that the General Counsel "had everyone's wage rate. . . . In the 10 months he took to prepare his motion, he could have ascertained the correct wage rate."

<sup>4</sup> As requested in the General Counsel's motion we correct the following typographical errors in the compliance specification: Exh. A, p. 22, the correct amount of gross backpay for the third quarter of 1994 for Bernice Noble should be \$1365, and the total gross backpay should be \$30,326. In Exh. A, p. 24, the correct amount of gross backpay for Merida Lee Ramirez is \$31,979. In par. 4(d) of the compliance specification the appropriate time frame for the alleged wage rate should be August 3, 1990, to September 30, 1993. In par. 4(e) of the compliance specification the appropriate time frame for the alleged wage rate should be August 3, 1990, to September 30, 1993.

that the Respondent's answer constitutes a general denial because it fails to specify the circumstances surrounding the purported offers of employment. However, unlike the 22 discriminatees discussed above, the record in the underlying unfair labor practice proceeding contains letters to Mary Burrell, Gisela Sawyer, and Ade Thomas which purportedly constitute offers of reinstatement.<sup>5</sup> We find these letters sufficient to warrant a denial of summary judgment as to the length of the backpay period for these employees. The issue of whether or not the letters to Burrell, Sawyer, and Thomas constitute valid offers of reinstatement sufficient to toll the backpay period for these employees shall be determined at the hearing. Accordingly, we deny the General Counsel's Motion for Summary Judgment as to the backpay period for Burrell, Sawyer, and Thomas and remand for hearing the issue of the sufficiency of the offers of reinstatement.<sup>6</sup>

3. The compliance specification identifies Marvin Beeman and Rosa Lee Bunn as two of the discriminatees entitled to backpay. The Respondent alleges that Beeman and Bunn never ceased working for USSI. Thus, the Respondent claims that because they did not lose any work, they are not entitled to backpay. We reject the Respondent's contention. In the underlying unfair labor practice proceeding, the Board affirmed the judge's findings that Beeman and Bunn were part of the group of employees who engaged in an economic strike on July 26, 1990, who unconditionally offered to return to work on August 3, 1990, and whom the Respondent failed and refused to reinstate or place on a preferential hiring list. It is well settled that "[i]ssues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding." *Transport Service Co.*, 314 NLRB 458, 459 (1994). See also *Hobbs & Oberg Mining Co.*, 316 NLRB 542 (1995); *Baumgardner Co.*, 298 NLRB 26, 27-28 (1990), enfd. 972 F.2d 1332 (3d Cir. 1992). Accordingly, we shall grant the General Counsel's motion to strike this portion of the Respondent's answer and grant the General Counsel's Motion for Summary Judgment as to Beeman and Bunn.

4. The Respondent states that employee Evelyn Barnett moved to North Carolina and employee Albert Williamson moved to South Carolina prior to their respective retirement dates alleged in the compliance specification as the ending date for backpay. The Respondent offers no information as to when either employee moved, but argues in its opposition to the General Counsel's motion that "[a]s with death, moving relates to interim earnings for which a general denial is adequate." We disagree. The fact that an employee

<sup>5</sup> The record does not contain a copy of a letter to Gonzalez.

<sup>6</sup> Because the record contains no purported reinstatement letter to Gonzalez, we grant the General Counsel's Motion for Summary Judgment as to Gonzalez.

had moved and was living in another state during the backpay period is not conclusive that he was unavailable for work. The Respondent has not demonstrated that these employees had removed themselves from the labor market and that they would not have returned to their former positions upon a valid offer of reinstatement. *Mohawk Steel Fabricators*, 289 NLRB 1193 fn. 9 (1988); *Preterm, Inc.*, 273 NLRB 683, 698 (1984), enfd. 784 F.2d 426 (1st Cir. 1986). Because moving does not per se toll backpay, we grant summary judgment as to the backpay period and gross backpay due discriminatees Evelyn Barnett and Albert Williamson. However, to the extent that the Respondent is able to demonstrate that the employees, by moving, removed themselves from the labor market and thereby incurred a willful loss of earnings, that issue can be litigated at the hearing along with other issues of mitigation of damages.

5. The compliance specification identifies Douglas Spencer as one of the discriminatees entitled to backpay. The Respondent has attached to its opposition to the Motion for Summary Judgment a copy of a Douglas Spencer's death certificate showing that he died November 9, 1990. The Board has stated on various occasions that backpay is based not on a private right but rather on a public right established to vindicate the policies of the Act. *Lauderdale Lakes General Hospital*, 239 NLRB 895 (1978). The death of a discriminatee does not obviate the need for backpay that is intended to reestablish the situation as it would have existed absent the unfair labor practices. *St. Regis Paper Co.*, 285 NLRB 293, 295 (1987). The backpay period for a deceased discriminatee is limited to the period from the date of the discrimination until the date of death. *Id.* A determination shall be made at the hearing in this proceeding whether or not the death certificate is authentic for this employee. Assuming that the Douglas Spencer who is a discriminatee in this proceeding is deceased, the backpay due him shall be paid to the legal administrator of the estate or to any person authorized to receive such payment under applicable state law. *ABC Automotive Products Corp.*, 319 NLRB 874, 878 fn. 8 (1995). We deny the Motion for Summary Judgment as to Douglas Spencer for the limited purpose of determining at a hearing whether this discriminatee is deceased, and, if so, to adjust the backpay period accordingly.

6. In the Respondent's answer to paragraph 4(c) of the compliance specification and in its response to the Motion for Summary Judgment, the Respondent specifically argued: that Rosa Berrios worked only 4 hours per night, 5 nights per week; that Donald Monroe earned \$4.75 per hour, not \$5 per hour, and that he only worked 4 hours per night, 5 nights per week; and that Ketzi Ortiz worked 4 hours per night, not 8 hours. These replies provide alternative figures and are

specific enough to warrant a hearing. Therefore, we grant the General Counsel's Motion for Summary Judgment as to the backpay period for discriminatees Berrios, Monroe, and Ortiz, but deny as to the hours of these employees, as well as the wage rate of Monroe, and remand these issues for a hearing.<sup>7</sup>

7. The Respondent's general denial is sufficient to place interim earnings and expenses into issue for all the discriminatees because that information is not generally within the knowledge of the Respondent. *DeMuth Electric*, supra at 943. Accordingly, we shall order a hearing for determination of the discriminatees' interim earnings and expenses, including the availability to discriminatees of interim employment and the discriminatees' failure to seek and/or retain such interim employment. *Tiffany Handbags*, 271 NLRB 621, 622 (1984).

#### ORDER

It is ordered that the General Counsel's Motion to Strike Part of Respondent's Answer to Compliance Specification is granted as to paragraphs 1(a) except as to Douglas Spencer, 1(b), 1(c), and 1(d); 2(b) as to Andres Gonzalez; 3; 4(a) and 4(c) except as to Rosa Berrios, Donald Monroe, and Ketzi Ortiz, 4(d), 4(e), 4(g), and 4(h) except as to Donald Monroe, 4(i) and 4(j).<sup>8</sup>

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment concerning all allegations in the backpay specification is granted except as to the amount of interim earnings and expenses of each of the discriminatees and any issues concerning mitigation of damages and willful loss of earnings; a determination of whether discriminatee Douglas Spencer is deceased and, if so, the date of his death; the hours of Rosa Berrios, Donald Monroe, and Ketzi Ortiz; the wage rate of Donald Monroe; and a determination of whether the letters to Mary Burrell, Gisela Sawyer, and Ade Thomas which are in the record constituted valid offers of reinstatement sufficient to toll backpay.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 5 for the purpose of arranging a hearing before an administrative law judge limited to the issues of interim earnings and expenses and mitigation of damages; a determination of whether Douglas Spencer is deceased and, if so, the date of his death; the hours of Rosa Berrios, Donald Monroe, and Ketzi Ortiz; the wage rate of Donald Monroe; and consideration of whether the let-

<sup>7</sup> The Respondent also argued that David Cousley never worked 40 hours per week but did not provide the number of hours that the Respondent contends Cousley worked or any supporting figures. We find that the Respondent's answer as to Cousley is a general denial and is insufficient to warrant a hearing.

<sup>8</sup> The Respondent admitted the allegations of pars. 2(a), 4(b), and 4(f) of the compliance specification.

ters to Mary Burrell, Gisela Sawyer, and Ade Thomas constituted valid offers of reinstatement sufficient to toll backpay. The administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommenda-

tions based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.