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**Francis Building Corporation, Francis Brothers Sewer and Drainage, Inc., and Island Bay Development Corp. and Diego Matos.** Case 29–CA–20480

December 20, 1999

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On January 29, 1999,<sup>1</sup> the National Labor Relations Board issued a Decision and Order, 327 NLRB No. 89, finding that the Respondent violated Section 8(a)(1) of the Act and directing that the Respondent, inter alia, offer immediate and full reinstatement to Diego Matos and make him whole, with interest, for any loss of earnings and other benefits resulting from the Respondent's unlawful discrimination. By stipulation dated July 15, the Respondent waived its right under Section 10(e) and (f) of the Act to file a petition for review of the Board's decision.

On August 25, the Acting Regional Director for Region 29 issued a compliance specification and notice of hearing, which was duly served on the Respondent. The compliance specification alleged, inter alia, the compensatory amounts and contributions owed by the Respondent, pursuant to the Board's decision, to Matos and to various benefit funds, and the wage and hour derivation of those amounts. On September 22, counsel for the General Counsel sent written notice to the Respondent that an answer had not been timely filed and that the General Counsel would file a Motion for Summary Judgment unless an answer was filed by October 1.

On September 28, the Respondent filed an answer in which it summarily denied the allegations in the compliance specification and raised four affirmative defenses. The first affirmative defense denied the Board's jurisdiction over Francis Brothers Sewer and Drainage, Inc. and Island Bay Development Corp. The second affirmative defense alleged that Matos had received "funds from other sources which should be considered in reduction and mitigation of any damages awarded." The third affirmative defense alleged that "the hours indicated are not reflective of the actual hours of work available" for Matos. The fourth affirmative defense alleged that the "number of hours of work" available for Matos, "upon consideration of his overall lack of skill and the needs of the project must be considered in diminution of the sums sought herein."

On October 7, the Regional Director issued an order rescheduling the hearing on this matter from October 20 to January 12, 2000. On October 25, the General Counsel

filed the instant Motion for Partial Summary Judgment, seeking summary judgment on all the allegations in the compliance specification, except those pertaining to the Respondent's second affirmative defense, which addresses interim earnings received by Matos during the backpay period.

On October 27, the Board issued an order and notice to show cause, transferring the proceeding to the Board and postponing indefinitely the hearing scheduled for January 12, 2000. The Respondent filed an "affidavit in opposition," signed by its counsel.

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

Ruling on Motion for Partial Summary Judgment

Board Rule 102.56(b) states that with respect to "all matters within the knowledge of the respondent" concerning "factors entering into the computation of gross backpay, a general denial [to a compliance specification] shall not suffice." The rule continues:

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.

Under Rule 102.56(c), to the extent that a respondent's answer fails to comply with the specificity requirements of Rule 102.56(b), "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."

The Respondent's answer contains no "supporting figures" or specific statement of "the basis for its disagreement" with respect to the accuracy of the General Counsel's premises and figures pertaining to the backpay period, wage and contribution rates, hours worked, or the computation of gross backpay. All such information is within the knowledge and possession of the Respondent. The General Counsel is accordingly entitled to summary judgment on these matters under Board Rule 102.56 (b) and (c). *Emsing's Supermarket*, 299 NLRB 569, 570–572 (1990).

With respect to the single employer issue raised in the Respondent's first affirmative defense, the judge in the underlying decision and, by adoption, the Board, specifically found that Francis Building Corporation, Francis Brothers Sewer and Drainage, Inc., and Island Bay Development Corp. were a single employer. The Respondent by stipulation waived its right under Section 10(e) and (f) to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying that order. The Board's ruling on this issue is ac-

<sup>1</sup> All dates herein are in 1999 unless otherwise noted.

cordingly final and not subject to relitigation in a compliance proceeding. *Thalbo Corp.*, 323 NLRB 630, 634 (1997), *enfd.* 171 F.3d 102 (2d Cir. 1999).

#### ORDER

It is ordered that the General Counsel's Motion for Partial Summary Judgment is granted with respect to all allegations in the compliance specification, except those concerning the amount of interim earnings received by Matos during the backpay period and the required offset of such earnings.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 29 for the purpose of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence concerning the interim earnings received by Matos during the backpay period.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supple-

mental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 to 102.51 of the Board's Rules shall be applicable.

Dated, Washington, D.C. December 20, 1999

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Sarah M. Fox, Member

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Wilma B. Liebman, Member

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Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD