

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Sumo Container Station, Inc. d/b/a Sumo Airlines and Sumo Trucking and Cargo, Personnel & Equipment Leasing, Inc. and Sumo Cargo Services, Inc. and Sumo Air Cargo, Inc. and Teamsters Local No. 25, International Brotherhood of Teamsters, AFL-CIO. Cases 1-CA-29985 and 1-CA-30236

August 1, 2002

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS COWEN
AND BARTLETT

On May 10, 1995, the National Labor Relations Board issued a Decision and Order in this proceeding¹ directing the original Respondent, Sumo Container Station, Inc. d/b/a Sumo Airlines, inter alia, to offer full and immediate reinstatement to Joseph M. Warren, Dennis P. Sheehan, Matthew Sarno, Kathryn Pettis Mogan, Charles Lloyd, Ronald Dearden, and Stephen Rea; to make them whole for any loss of pay or benefits resulting from the discrimination against them in violation of the National Labor Relations Act; to reestablish its entire business operation at its East Boston, Massachusetts terminal; and to restore the work formerly performed at that location before bargaining unit employees were terminated.

On October 16, 1996, Respondent Sumo Container, Inc., d/b/a Sumo Airlines entered into a stipulation waiving its right under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order or the findings of fact and conclusions of law underlying the Board's Order, and providing for a compliance hearing to resolve any disputes concerning the amount of backpay due under the terms of the Board's Order.

A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order and the identity of the entities responsible for payment, the Acting Regional Director for Region 1 issued a compliance specification and notice of hearing on September 30, 1999, alleging the amounts due under the Board's Order. The specification also alleges that four additional Respondents² are derivatively liable for the backpay due the discriminatees because they are each alter egos of, single employers with, and successor employers to the original Respondent. Thereafter, all five Respondents

¹ 317 NLRB 383.

² The four additional Respondents are: Sumo Trucking; Cargo, Personnel & Equipment Leasing, Inc.; Sumo Cargo Services, Inc.; and Sumo Air Cargo, Inc.

filed an answer and a first amended answer to the compliance specification.

On March 28, 2000, the General Counsel filed with the Board a motion to strike portions of the Respondents' answer to the compliance specification and for partial summary judgment, with exhibits attached. The General Counsel moves to strike those parts of the Respondents' first amended answer which fail to meet the specificity requirements of the Board's Rules and Regulations. The General Counsel further moves for partial summary judgment on those allegations of the compliance specification for which the Respondents have answered with denials that the General Counsel moves to strike, and on those allegations of the compliance specification that the Respondents have admitted. The General Counsel states that, once the motion to strike and for partial summary judgment is granted, items remaining for litigation before an administrative law judge include, inter alia, the alter ego, single employer, and/or successor employer status of the Respondents, the calculation of the backpay claimants' interim earnings and interim expenses, and the final amount of backpay.

On March 30, 2000, the Respondents filed an opposition to the motion to strike and for partial summary judgment, asserting that its pleadings raise genuine issues of material fact concerning the tolling of the backpay period and warranting the denial of summary judgment.

On March 30, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Motion for Partial Summary Judgment should not be granted. By letter dated April 4, 2000, the Respondents informed the Board that its March 30, 2000 opposition to the motion to strike and for partial summary judgment would serve as its response to the Board's Notice to Show Cause. On April 13, 2000, the Charging Party filed a brief in support of the General Counsel's Motion to Strike and for Partial Summary Judgment.

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 the Motion to Strike Portions of Respondents'
Answer to the Compliance Specification and for Partial
Summary Judgment

1. Paragraphs 13, 14 and 15

These three paragraphs of the compliance specification set forth the wage rate paid to the discriminatees immediately prior to their unlawful discharges; the wage rates adjusted for increases which the discriminatees would have received each year during the backpay period; and the formula for determining the amount of va-

cation pay the discriminatees would have received each year during the backpay period.³

In their first amended answer to paragraphs 13 through 15, the Respondents claim that they are without sufficient knowledge to either admit or deny the allegations because they have been “unable to locate the appropriate payroll records of the defunct Sumo [Sumo Container Station, Inc. d/b/a Sumo Airlines].” The General Counsel moves to strike these answers on the grounds that they do not comport with the specificity requirement of Section 102.56 of the Board’s Rules and Regulations.

We find it unnecessary to address the General Counsel’s specificity argument as it pertains to paragraphs 13 through 15 of the compliance specification. Considering the Respondents’ pleadings as a whole, including their opposition to the General Counsel’s Motion to Strike and for Partial Summary Judgment⁴, we find that the Respondents have effectively admitted the allegations of these three paragraphs.

The Respondents state in their opposition that they “are not contesting the legal standards or formulas utilized by the General Counsel in computing the gross back pay (sic) alleged in the Compliance Specification,” and that they do not challenge “the premise on which gross back pay, interim earnings, or net back pay is to be calculated.” In fact, the Respondents explicitly state that they dispute only the amount of gross and net backpay and that their disagreement is based solely on the tolling argument discussed below. The Respondents concede that “gross back pay, subject to a determination of if, and when, gross back pay is to be tolled, is readily subject to calculation.”

We find, based on these statements, that the Respondents no longer contest the allegations of paragraphs 13 through 15. Accordingly, we deem these allegations to be admitted to be true, and we grant the General Counsel’s Motion to Strike and for Partial Summary Judgment as to paragraphs 13 through 15.

2. Paragraphs 19(a)-(b); 20(a)-(b); 21(a)-(b); 22(a)-(b); 23(a)-(b); 24(a)-(b) and 25(a)-(b)

Paragraphs 19 through 25, subsection (a), allege that the backpay period for each discriminatee commences on

³ The Respondents admit that the backpay period begins on November 30, 1992. For purposes of computing the amount of backpay due the discriminatees, the General Counsel uses December 30, 1999 as the end of the backpay period, but specifically notes that the backpay period is continuing because the Respondents have not offered to reinstate the discriminatees.

⁴ It is well established that in ruling on a General Counsel’s Motion for Summary Judgment on a compliance specification, the Board will examine not only the respondent’s answer, but also the respondent’s opposition to the General Counsel’s motion. See *Mining Specialists, Inc.*, 330 NLRB 99, 101, fn. 12 (1999).

November 30, 1992, the date of the unlawful discharge. Subsection (a) further alleges that the Respondents have failed to comply with the reinstatement provisions of the Board’s Order in the underlying unfair labor practice case and that “by this failure [have] not tolled the accrual of backpay for” each discriminatee.⁵ paragraphs 19 through 25, subsection (b), set forth the gross backpay by calendar quarter due each discriminatee.⁶

In their answer to subsections (a) and (b) of paragraphs 19 through 25, the Respondents admit the beginning date of the backpay period and admit that each discriminatee has not been reinstated. The Respondents deny, however, that the backpay period has not been tolled, asserting that the backpay period was, in fact, tolled on January 1, 1993, when each discriminatee would have been terminated due to legitimate, nondiscriminatory reasons, or, alternatively, that the backpay period would have been tolled on or about October 1993, when the original Respondent ceased its operations.

The General Counsel argues that the Respondents’ answers to subsections (a) and (b) of paragraphs 19 through 25 are insufficient because they do not comply with the specificity requirement of the Board’s Rules and Regulations.

We find it unnecessary to address the General Counsel’s specificity argument as it pertains to paragraphs 19 through 25 of the compliance specification. Looking at the entirety of the Respondents’ argument, we find that the only genuine issue in dispute is the allegation of the compliance specification that backpay has not been tolled. In other words, the Respondents have made it clear, through their admissions and their affirmative defenses, that the only ground on which they oppose the Motion for Partial Summary Judgment is their claim that backpay was tolled on either one of two dates.

We address first the Respondents’ claim that backpay was tolled on January 1, 1993, when each discriminatee allegedly would have been terminated for legitimate, non discriminatory reasons. This argument was raised and rejected in the underlying unfair labor practice proceeding. Thus, the judge “discredited [president Anthony] Evangelista’s statement—made without any documentary evidence or other reliable corroboration—that he would have closed the Boston operation on January 1, [1993,] even if the Union had not filed a representation petition. Statements made by his principal supervisor in Boston to various employees belie this assertion and

⁵ The only exception is Stephen Rea, whose backpay period was tolled by his death on December 2, 1998.

⁶ The two remaining subsections of Paragraphs 19 through 25 set forth interim earnings and interim expenses. The General Counsel does not seek summary judgment as to these issues.

phatically.”⁷ The Board specifically affirmed the judge’s credibility findings, including his discrediting of Evangelista’s testimony.⁸

“Issues 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). Accordingly, as the Board has already rejected the claim that the employees would have been lawfully discharged in any event on January 1, 1993, the Respondent may not relitigate that issue in this proceeding.

We turn now to the Respondents’ alternative claim that backpay should be tolled on or about October 1993, when the original Respondent allegedly ceased all operations. The unfair labor practice hearing was held on October 18-20, 1993. According to the judge’s findings, which the Board adopted, the original Respondent had not entirely ceased its operations at its East Boston, Massachusetts terminal at that time. 317 NLRB at 388, 394. The Respondents, however, allege that there are changed circumstances since the date of the hearing which have resulted in the cessation of all operations. The Respondents urge that there are genuine issues of fact on this issue and that they should not be precluded from introducing evidence on facts which have arisen since the date of the unfair labor practice hearing.

We agree with the Respondents that the issue of whether the original Respondent ceased all operations after October 20, 1993, has not been decided. In general, the Board’s policy is to permit a respondent the opportunity at the compliance stage to introduce evidence concerning the continued appropriateness of the reinstatement provisions of a Board Order, “provided of course that such evidence was not available prior to the unfair labor practice hearing.” *Lear Siegler*, 295 NLRB 857, 862 (1989). Accordingly, we find that the issue of whether the original Respondent ceased all operations after October 20, 1993, effectively tolling backpay at that time, should be resolved at a hearing.⁹ Consequently, we deny the General Counsel’s Motion to Strike and for Partial Summary Judgment as to paragraphs 19 through 25, subsections (a) and (b), of the compliance specifica-

tion insofar as they allege that backpay has not been tolled.¹⁰

In sum, as the General Counsel does not seek summary judgment with respect to the alter ego, single employer, and/or successor employer status of the Respondent companies, or with respect to the calculation of the discriminatees’ interim earnings and interim expenses, we shall order a hearing on those issues. We shall also order a hearing on the issue raised by the Respondents concerning the tolling of backpay because the original Respondent, Sumo Container Station, Inc. d/b/a Sumo Airlines, allegedly ceased all operations after October 20, 1993. Because there are issues remaining to be decided after a hearing, we shall not make a determination of final backpay liability at this time. *Hahn Motors*, 314 NLRB 511, 513 (1994).

Accordingly, we grant the General Counsel’s Motion to Strike and for Partial Summary Judgment against the Respondents, except to the extent that issues concerning the tolling of backpay after October 20, 1993 have been remanded for a hearing.

ORDER

It is ordered that the General Counsel’s Motion to Strike and for Partial Summary Judgment is granted, except to the extent that the issues of the Respondents’ alter ego, single employer, and/or successor employer status, tolling of backpay after October 20, 1993, interim earnings, and interim expenses are remanded to be decided at a hearing.

It is further ordered that this proceeding is remanded to the Regional Director for Region 1 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, limiting such proceeding to the determination of the issues of the Respondents’ alter ego, single employer, and/or successor employer status, tolling of backpay after October 20, 1993, interim earnings, and interim expenses.

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 all the record evidence.

⁷ *Sumo Airlines*, supra, 317 NLRB at 394.

⁸ Id. at 383 fn. 2, 384.

⁹ Although the General Counsel is correct that the Respondents have failed to comply with Sec. 102.56(b) to the extent that they have failed to furnish “the appropriate supporting figures” for calculating gross backpay as of the October 1993 date that the original Respondent allegedly ceased operations, we believe that it would be overly technical to grant summary judgment on this ground. As the Respondents correctly point out in their opposition, once the tolling issue is resolved at a hearing, gross backpay “is readily subject to calculation.”

¹⁰ We grant the General Counsel’s motion with respect to all other allegations of these paragraphs.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

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.

Dated, Washington, D.C. August 1, 2002

Peter J. Hurtgen, Chairman

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD