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.

Consolidated Delivery & Logistics, Inc. *and* Teamsters Local Union No. 481, a/w International Brotherhood of Teamsters, AFL–CIO. Case 22–CA–23543

April 28, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The issue in this backpay proceeding is whether the General Counsel is entitled to summary judgment as to the backpay period, gross backpay formula, and gross backpay calculations. The General Counsel seeks summary judgment on the basis that the Respondent's answer to the compliance specification is inadequate under the Board's Rules and Regulations. As explained below, we grant summary judgment as to the backpay period, but deny summary judgment as to the gross backpay formula and calculations.

The Respondent operated a driving and delivery business that provided services from multiple terminals, including a terminal known as the "Neuman" terminal. During an economic strike at the Neuman terminal in August 1999, the Respondent discharged 13 strikers and later refused to reinstate them after their unconditional offer to return to work. During the strike, the Respondent began using a labor supplier, Labor Ready, to provide temporary replacements. The Respondent continued using Labor Ready until the Neuman terminal closed in February 2000. On May 15, 2002, the National Labor Relations Board issued a Decision and Order concluding that the Respondent had violated Section 8(a)(3) and (1) of the Act by discharging the 13 strikers and by refusing to reinstate them.[1] The Board ordered the Respondent to make the 13 discriminatees whole for their losses resulting from the Respondent's unfair labor practices.[2] On May 16, 2003, the United States Court of Appeals for the District of Columbia Circuit entered a judgment enforcing the Board's Order.[3]

A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order, the Regional Director for Region 22 issued a compliance specification and notice of hearing on April 30, 2004. The specification sets forth backpay calculations for the 13 discriminatees. The specification alleges that the backpay period begins on August 9, 1999, and ends on February 21, 2000, the date the Neuman terminal closed. The specification further alleges the following gross backpay formula: "An appropriate measure of the gross backpay due each discriminatee is the hours worked (40) per week in 1999 multiplied by the hourly rate times the number of weeks or parts of a week in the backpay period for each calendar quarter of the backpay period." The specification computes gross backpay for each discriminatee based on that formula.

In the compliance specification, the General Counsel also notified the Respondent that the Respondent was required to file a timely answer pursuant to Section 102.56 of the Board's Rules and Regulations. On May 19, 2004, the Respondent filed an answer, in which the Respondent generally denied certain allegations of the specification and claimed insufficient knowledge as to the truth of other allegations.

By letter dated May 20, 2004, the General Counsel advised the Respondent that portions of the Respondent's answer were insufficient under Section 102.56(b) of the Board's Rules and Regulations, because those portions failed to plead specifically as to information within the Respondent's knowledge. The letter stated that the General Counsel would seek summary judgment if the Respondent failed to correct the deficiencies in the answer by May 27, 2004.

On May 27, 2004, the Respondent submitted a letter to the General Counsel supplementing the Respondent's answer. In the letter, the Respondent objected to the backpay period in the specification. The Respondent stated briefly that the Respondent was "winding down" its operation before February 21, 2000, "resulting in lack of work for the discriminatees prior to that date." The Respondent did not allege any alternative backpay dates. The Respondent also objected to the specification's backpay calculations. The Respondent contended that the calculations were "in error since many of the discriminatees worked less than 40 hours per week."

On December 13, 2004, the General Counsel filed with the Board a Motion for Partial Summary Judgment and a supporting memorandum. The General Counsel asserted in that motion and memorandum that the Respondent's answer and May 27 letter, considered together, still failed to comply with Section 102.56(b) of the Board's Rules and Regulations as to all issues except the discriminatees' interim earnings and expenses. Specifically, as to the backpay period, the General Counsel contended that the Respondent failed to furnish any figures to support its assertion that business was winding down and gave no alternative beginning or ending date for the backpay pe-

[1] 337 NLRB 524.
[2] Id.
[3] 63 Fed. Appx. 520.

riod. As to the gross backpay formula and calculations, the General Counsel contended that the Respondent failed to provide an alternative backpay formula, alternative calculations, or supporting figures. Accordingly, the General Counsel moved that the Board grant summary judgment on all paragraphs in the specification except those that refer to the discriminatees' interim earnings and expenses.[4]

On December 20, 2004, 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 January 3, 2005, the Respondent filed a Response to Notice to Show Cause and Opposition to General Counsel's Motion for Summary Judgment (Response and Opposition). The Respondent again objected to the backpay period in the specification on the basis that business was winding down prior to February 21, 2000. Again, however, the Respondent did not provide any alternative backpay dates. The Respondent also objected to the gross backpay formula and calculations alleged in the specification. The Respondent expanded on the argument raised in its May 27 letter that the specification's use of a 40-hour workweek to calculate backpay was inappropriate. In the Response and Opposition, the Respondent noted that 40 hours per week for 13 discriminatees was a total of 520 hours per week. The Respondent contended that because operations at the Neuman terminal were "winding down" during the alleged backpay period, the replacement workers supplied by Labor Ready worked fewer than 520 total hours per week during that period. To support that contention, the Respondent attached copies of weekly invoices received from Labor Ready throughout the backpay period. Each invoice covers 1 week during the backpay period and lists, among other things, the total number of hours of work for which Labor Ready billed the Respondent for that week. The Respondent argues that the invoices show that Labor Ready billed the Respondent for only about 201 to 336 hours per week—not 520 hours per week—during the backpay period. Therefore, the Respondent contends, the General Counsel's gross backpay formula and calculations are incorrect.

On January 21, 2005, the General Counsel filed a Motion to Strike Records, asking the Board to strike the Labor Ready invoices and the portions of the Respondent's Response and Opposition that rely on the invoices. The General Counsel argues that by attaching the invoices, the Respondent is attempting to litigate issues that were not properly raised in the Respondent's answer or in its May 27 letter supplementing its answer.

Ruling on Motion to Strike

"It is well established . . . that a respondent in a compliance proceeding may properly cure defects in its answer before a hearing by an amended answer or a response to a Notice to Show Cause." *Daufuskie Island Club & Resort, Inc.*, 341 NLRB No. 81, slip op. at 2 (2004); see also *Mining Specialists*, 330 NLRB 99, 101 fn. 12 (1999); *Ellis Electric*, 321 NLRB 1205, 1206 (1996). Therefore, we shall deny the General Counsel's Motion to Strike Records. In determining whether the Respondent's denial of the allegations in the compliance specification is sufficient to avoid summary judgment, we shall consider the Respondent's answer, its May 27 letter supplementing the answer, and its Response and Opposition.

Ruling on the Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states in relevant 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. 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 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

[4] The General Counsel concedes that a hearing is proper as to interim earnings and expenses.

be precluded from introducing any evidence controverting the allegation.

We now examine whether the Respondent's answer, as supplemented by the May 27 letter and the Response and Opposition, satisfies the requirements of Section 102.56(b).

1. Backpay period
(Paragraph 1 of Specification)

Paragraph 1 of the specification identifies the 13 discriminatees and alleges that the backpay period for all discriminatees begins on August 9, 1999, and ends on February 21, 2000. In denying paragraph 1, the Respondent contends that operations in the Neuman terminal were "winding down" before February 21, 2000, and that "in most instances" the available work ceased before that date. The Respondent argues that the Labor Ready invoices prove the "winding down" by showing that the total number of hours worked by the Labor Ready workers was less than the number of hours worked by the discriminatees before their termination. The Respondent offers no alternative beginning or ending dates for the backpay period in its answer, May 27 letter, or Response and Opposition.

The backpay period is a "matter[] within the knowledge of the respondent," and therefore a general denial is insufficient. See Section 102.56(b). If a respondent disagrees with the alleged backpay period, the respondent must "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." Id. The Board has found that this requirement is not satisfied and has granted summary judgment as to the backpay period when the respondent denies the backpay dates alleged in the specification, but fails to propose any alternative dates. See *Paolicelli*, 335 NLRB 881, 883 (2001) ("Since the Respondent has failed to support its denial with any specific alternative date of employment on which the backpay period should end (and, concomitantly, any basis for that date), the Respondent has failed to comply with the requirements of Section 102.56(b)."); *Aspen*, 310 NLRB 775, 776 (1993) ("To the extent that the Respondent has failed to support its backpay period contentions with specific alternative dates on which the backpay period should end, it has failed to comply with the requirements of Section 102.56(b).").

In the present case, the Respondent has not complied with Section 102.56(b). As to the beginning date for the backpay period, the Respondent has neither stated a basis for disputing the date in the specification nor offered an alternative date. As to the ending date, the Respondent also has not offered an alternative date. Moreover, although the Respondent contends that business was winding down before February 21, 2000, the Respondent does not appear to contend that all available work ceased before that date. Instead, the Respondent contests the amount of available work.[5]

Therefore, we deem the allegations in paragraph 1 of the specification to be true, and we grant the General Counsel's Motion for Summary Judgment as to that paragraph.

2. Gross backpay formula and calculations
(Paragraphs 2–4 of Specification)

Paragraph 2 of the specification alleges: "An appropriate measure of the gross backpay due each discriminatee is the hours worked (40) per week in 1999 multiplied by the hourly rate times the number of weeks or parts of a week in the backpay period for each calendar quarter of the backpay period." Paragraphs 3 and 4, together with worksheets attached to the specification, calculate gross backpay for each of the 13 discriminatees based on the formula in paragraph 2.

As explained above, the Respondent objects to the premise that the 13 discriminatees would have worked 40 hours per week during the backpay period. The Respondent has provided the Labor Ready invoices to support the Respondent's position that the formula and calculations in the specification overstate the amount of work available during the backpay period.

In order to avoid summary judgment, the Respondent's answer to the compliance specification must be "sufficiently specific to raise a litigable issue of fact." *Aneco, Inc.*, 330 NLRB 969, 971 (2000). As explained above, Section 102.56(b) sets forth the applicable specificity requirements. Section 102.56(b) provides in relevant part that "factors entering into computation of gross backpay" are within the respondent's knowledge. Therefore, if a respondent disputes the General Counsel's computation of gross backpay or the premises on which the computation is based, the respondent must "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." Id. In determining whether the Respondent has satisfied these requirements, we shall construe the pleadings "in the light most favorable to the nonmoving party"—in this case, the Respondent. *Eldeco, Inc.*, 336 NLRB 899, 900 (2001).

[5] Indeed, the Labor Ready invoices, on which the Respondent itself relies as evidence of the amount of available work, show that Labor Ready billed the Respondent for 246 hours for the workweek of February 14–18, 2000.

Applying those standards here, we find summary judgment inappropriate as to the gross backpay formula and calculations. First, the Respondent specifically stated the basis for its disagreement with the specification's gross backpay formula and calculations. The Respondent contends that there were fewer than 40 hours of work per week available for each discriminatee. Second, the Respondent sets forth its position as to the applicable premise, suggesting that the hours worked per week by the Labor Ready workers are a more appropriate measure of available work than the 40-hour formula alleged in the specification. Third, the Respondent supplies the Labor Ready invoices as supporting figures for the total number of hours of work available each week during the backpay period.

Our dissenting colleague complains that the Respondent has not set forth an alternative to the General Counsel's figures. She is in error. As shown, the Respondent has set forth the number of hours worked by Labor Ready employees during the relevant time period. The Respondent asserts that the number of hours worked by Labor Ready employees during the relevant period is a measure of the number of hours that would have been worked by the discriminatees if they, rather than Labor Ready employees, had been employed. Of course, it may not be certain, at this juncture, how those hours would have been apportioned among the 13 discriminatees. It would seem to depend, inter alia, on their individual schedules and their individual abilities to do specific kinds of work. It may be that these matters will not be known, with mathematical certainty, even after a hearing. However, the one thing that is clear is that there is a need for a hearing to resolve these issues.

To the extent the General Counsel contends that the Respondent must now set forth an alternative number of hours per week for *each* individual discriminatee in order to avoid summary judgment, we reject that argument. First, the General Counsel has cited summary judgment decisions in which the respondent contested the number of hours lost, but failed to provide alternative figures.[6] As explained above, the Respondent in the present case has provided alternative figures through the Labor Ready invoices.

Unlike our colleague, we do not now pass on how the total number of hours would have been allocated among the 13 discriminatees. The General Counsel asserts that, if the number of hours would have been 40 per week, each discriminatee would have worked the 40 hours. However, as discussed above, we do not know, at this juncture, whether the 40-hour figure is correct. The General Counsel does not set forth the allocation for each discriminatee if the figure turns out to be less than 40 hours per week. Just as we believe that there are questions of fact as to the total number of hours, we also believe that there are questions of fact as to how the total number of hours would have been allocated among the 13 discriminatees.[7]

Therefore, the Response and Opposition satisfies the requirements of Section 102.56(b) as to the gross backpay formula and calculations. Accordingly, we shall deny the General Counsel's Motion for Partial Summary Judgment on those issues.

Conclusion

In sum, we shall deny the General Counsel's Motion to Strike Records. We shall grant the General Counsel's Motion for Partial Summary Judgment as to paragraph 1 of the compliance specification. We shall deny the motion in all other respects and remand for a hearing. Because the General Counsel does not seek summary judgment with respect to the discriminatees' interim earnings and expenses, we shall order a hearing on those issues as well.

ORDER

IT IS ORDERED that the General Counsel's Motion to Strike Records Attached to Respondent's Response to Notice to Show Cause and Opposition to General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to the allegations contained in paragraph 1 of the compliance specification.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is denied in all other respects.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 22 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, which shall be limited to taking evidence concerning the paragraphs of the compliance specification as to which summary judgment was not granted.

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. Following service of the administrative law

[6] See *Robincrest Landscaping & Construction*, 303 NLRB 377, 378 (1991); *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990), enfd. 972 F.2d 1332 (3d Cir. 1992).

[7] The cases cited by the dissent are clearly distinguishable. In those cases, the Board granted summary judgment because the respondent submitted no evidence to support its position that the General Counsel's calculations were incorrect.

judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

Dated, Washington, D.C. April 28, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

I join the majority in denying the General Counsel's Motion to Strike Records and in granting summary judgment as to paragraph 1 of the specification. However, I dissent from the denial of summary judgment as to the gross backpay formula and calculations.

Section 102.56(b) provides that "factors entering into computation of gross backpay" are within the respondent's knowledge. Therefore, if a respondent disagrees with the General Counsel's gross backpay computation or the premises on which it is based, the respondent's answer must "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." Id. The Board has found summary judgment appropriate when the respondent has contested the premise on which backpay calculations are based, but has "failed to provide details about the application of its alternative method of backpay calculation and failed to furnish any appropriate supporting figures." *Yerger Trucking*, 319 NRLB 5, 6 (1995). The Board has also granted summary judgment when the respondent has contested the number of days or hours of work alleged in the compliance specification, but has failed to provide an alternative number of days or hours. See *Robincrest Landscaping & Construction*, 303 NLRB 377, 378 (1991) (respondent contended in part that discriminatee did not work 6 days per week as alleged in specification; partial summary judgment granted, because respondent "fail[ed] to offer an alternative formula for computing the backpay amount with appropriate alternative figures, including . . . an alternative number of days which would have been worked by the discriminatee involved"); *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990), enfd. 972 F.2d 1332 (3d Cir. 1992) (partial summary judgment granted; "[a]lthough the Respondent disputes the number of hours Welsh would have worked, it does not set forth alternatives with supporting figures"); *Harding Glass Co.*, 337 NLRB 1116, 1117 (2002) (partial summary judgment granted; respondent denied the hours worked by the employees, but provided "neither an alternative formula nor alternative figures").

In the present case, the Respondent has failed to satisfy Section 102.56(b). The Respondent objects to the premise that the 13 discriminatees would have worked 40 hours per week during the backpay period, but the Respondent does not allege an alternative number of hours that any of the individual discriminatees would have worked. Instead, the Respondent simply refers to the weekly Labor Ready invoices, states that they show a range of 201 to 336 total hours per week, and contends that a hearing is necessary to determine the exact number of hours the discriminatees would have worked. The specificity requirements of Section 102.56(b) apply to "all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay." The allocation of available hours of work among the discriminatees is information uniquely in the possession of the Respondent. Yet, the Respondent has not proposed any method for allocating the Labor Ready hours among the 13 discriminatees. Thus, the Respondent has "failed to provide details about the application" of its alternative method of backpay calculation.[1] See *Yerger*, supra at 6. Because the information provided by the Respondent is not sufficiently specific to meet the requirements of Section 102.56(b), the General Counsel is entitled to summary judgment as to the gross backpay formula and calculations.

Dated, Washington, D.C. April 28, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[1] The General Counsel's position, as set forth in the specification, is that all 13 discriminatees would have worked the same number of hours per week—40—during the backpay period. The Labor Ready invoices set forth the Respondent's position as to the total number of hours of work available per week. Therefore, an alternative number of hours per week for each individual discriminatee could be calculated by dividing each of those weekly totals by 13. However, the Respondent has not proposed that the Labor Ready hours be allocated in that manner, and the majority does not adopt the General Counsel's premise of an equal number of hours for each discriminatee.