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Triple A Fire Protection, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL–CIO. Case 15–CA–11498

January 30, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On October 31, 1994, the National Labor Relations Board issued a Decision and Order[1] that, inter alia, ordered the Respondent, Triple A Fire Protection, Inc., to bargain with the Union, resume contributions to employee benefit funds, rescind if requested unilateral changes in wage rates for new employees, and make employees and the benefit funds whole. On March 3, 1998, the United States Court of Appeals for the Eleventh Circuit entered its judgment enforcing the Board's Order.[2]

A controversy having arisen regarding the amounts of backpay and benefit fund payments due under the Order, the Regional Director for Region 15 issued a third compliance specification and notice of hearing on July 1, 2008, alleging the amount due under the Board's Order, and notifying the Respondent that it should file a timely answer complying with the Board's Rules and Regulations.

On August 18, 2008, the Respondent filed its answer to the third amended compliance specification, admitting in part and denying in part the allegations in the specification, and asserting certain affirmative defenses.

On November 12, 2008, the Charging Party Union filed a motion to strike portions of the Respondent's answer to the third amended compliance specification and motion for partial summary judgment. On November 21, 2008, the General Counsel filed a motion in support of the Union's motions. On December 5, 2008, the Board issued an Order granting in part the motion to strike and granting in full the motion for partial summary judgment.

On December 11, 2008, the Respondent filed a Motion to file an out of time response to the Union's motions. On December 17, 2008, the Board issued an Order rescinding the December 5, 2008 Order, and a Notice to Show Cause why the Union's motions should not be granted. Further, the Order stated that in light of these rulings, the Respondent's motion to file a response out of time was moot.[3]

On December 19, 2008, the Respondent filed a response to the Union's motion for partial summary judgment, which we shall treat as a response to the Notice to Show Cause. The Union filed a brief in reply. In addition, on January 5, 2009, the Respondent filed a Motion for Summary Judgment. The General Counsel and the Union filed briefs in opposition.

On the entire record, the Board makes the following

Rulings on Motions for Partial Summary Judgment and to Strike Portions of Respondent's Answer and Motion for Summary Judgment[4]

1. The Union's motion for partial summary judgment.

Section 102.56(a) of the National Labor Relations Board's Rules and Regulations provides that a respondent shall file an answer within 21 days from service of a compliance specification. Section 102.56(b) and (c) of the Board's Rules and Regulations states:

> (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.

[1] 315 NLRB 409 (1994).

[2] 136 F.3d 727 (1998), cert. den. sub nom. *Triple A Fire Protection v. NLRB*, 525 U.S. 1067 (1999).

[3] Accordingly, the General Counsel's opposition to the motion to file a response out of time, and the Respondent's reply to the General Counsel's opposition, are also moot. Further, although the Respondent's reply is directed to "Local 669's and the General Counsel's oppositions" to its motion to file out of time, there is no indication that the Union filed an opposition to this motion.

[4] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

(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 order 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.

In its motion, the Union argues that the Respondent's answers to paragraphs 7–10 of the third compliance specification, which concern the calculation of backpay and payments to the fringe benefit funds, fail to meet the specificity requirements of the Board's Rules and Regulations. Paragraphs 7–10 of the Respondent's answer each state as follows: "Triple A denies the averments of paragraph __ of the Third Amended Compliance Specification."[5]

A general denial is not sufficient to refute allegations pertaining to gross backpay calculations. See *Carnival Carting, Inc.,* 345 NLRB 910, 911 (2005). Here, the Respondent's answer failed to provide alternative figures or calculations, or to specify the basis for its disagreement with the General Counsel's calculations. Further, the Respondent failed to deny that the data at issue is within its knowledge and control. Thus, the Respondent's answer, taken alone, fails to meet the specificity requirements of Section 102.56(b) and (c).

However, the Board has long held 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." *Consolidated Delivery & Logistics, Inc*., 334 NLRB 544, 545 (2005), citing *Daufuskie Island Club & Resort, Inc.*, 341 NLRB 595, 596 (2004). Thus, we assess the Respondent's additional arguments raised in its response to the Union's motion (which we consider as its response to the Notice to Show Cause).

First, the Respondent maintains that paragraph 9 of the specification is inaccurate because it incorrectly assumes that all of the "incumbent" and "replacement" employees have the same interest in each of the funds. The Respondent argues that there are actually three classes of incumbent employees, based on their status as apprentices or journeymen, and the number of hours worked under a union contract, and that there are two classes of "replacement" employees. It then claims that the best evidence to categorize each employees' status is the records of the benefit funds.

The Respondent also argues that the General Counsel bears the burden of proving by a preponderance of evidence the reasonableness of the gross backpay amount claimed under the specification, citing *Oil Capitol Sheet Metal, Inc*., 349 NLRB 1348 (2007). The Respondent then asserts that none of the compliance specification paragraphs state a cause of action for payments to fringe benefit funds, because the specification does not aver that any employee has a "nonspeculative economic interest" in any of the funds; the specification does not allege that the funds are mandatory subjects of bargaining; and the specification does not state when any employee obtained an economic interest in any of the funds.

In addition, the Respondent contends that it is not required to make payments to fringe benefit funds for "replacement" employees, and that the remedial order with respect to "replacement" employees is punitive and will result in a windfall to each employee named in Exhibit A of the specification. The Respondent further argues in this regard that the union-security provisions of the collective-bargaining agreement did not survive its expiration, and since none of the "replacement" employees were hired until after the contract's expiration, the union-security clause does not apply to them. The Respondent also argues that union-security clauses are unlawful under Alabama State law.

Finally, the Respondent argues that Rule 102.56 of the Board's Rules and Regulations is not applicable in this case; that the Respondent does not owe any backpay or fringe benefit payments; that the specification does not set forth the terms of the fringe benefit agreements and therefore it cannot ascertain whether a particular employee has a "nonspeculative future economic interest in those funds."

We find that these arguments do not raise any matter that cures the defects in the Respondent's answer to the compliance specification. The Respondent's general denials of the appropriate figures and formulas in its answer have been expanded, but this expansion primarily

[5] In addition to the above denial, par. 9 contains an argument that the Board lacks the authority to remedy an employer's unlawful failure to make payments to employee benefit funds. This argument is unresponsive to the allegations in the compliance specification, and it is insufficient to defeat the Union's Motion for Summary Judgment on this paragraph.

relies on arguments that have been litigated and rejected in the underlying unfair labor practice proceedings or are not relevant to this proceeding.[6] As the Board stated in *Convergence Communications, Inc.*, 342 NLRB 918, 919 (2004):

> Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. *Paolicelli*, 335 NLRB 881, 883 (2001) (citing *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1617 (2001); *Arctic Framing*, 313 NLRB 798, 799 (1994)). Moreover, even assuming no relitigation bar, we are powerless in any event to revisit the merits and alter our Order accordingly. That Order has been enforced by the court of appeals. Under Section 10(e) of the Act, we are without jurisdiction to modify a court-enforced Board Order. *Scepter Ingot Castings, Inc.*, 341 NLRB 997 (2004)(citing *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997); *Haddon House Food Products*, 260 NLRB 1060 (1982)).

Thus, to the extent that the Respondent characterizes some employees as "replacement employees," this argument is misplaced, because the Board has found that the Union did not engage in a strike against the Respondent, and therefore there are no replacement employees involved in this proceeding. The later-hired employees are simply unit employees. In addition, the Respondent's argument appears to rely in part on the assumption that the Respondent is only required to make fringe benefit payments for employees who have a vested interest in receiving the benefits that the funds provide. However, the Board has never made such a distinction in awarding a make-whole remedy to benefit funds. Rather, if a respondent unilaterally stops making required payments to benefit funds on behalf of any employee, the standard remedy is to require that the funds be made whole for the missed payments, without regard to the "eligibility status" of the employees to actually receive benefits from the funds.

In addition, although we agree with the Respondent that General Counsel bears the burden of proof in a compliance proceeding, the Respondent's citation to *Oil Capitol* is inapposite, because that case addresses the specific burden of proof in a compliance proceeding involving union salts. Further, the Respondent's argument avoids the matter at issue, which is whether the Respondent's answer or response specifically admits, denies, or explains the allegations of the specification at issue here, as required by Rule 102.56(b). We find that with respect to paragraphs 7–10, it does not.

Accordingly, we grant the motion for partial summary judgment with respect to the calculations set forth in paragraphs 7–10 of the third amended compliance specification, and find these allegations to be substantiated.

2. The Union's motion to strike

In its answer to the third amended compliance specification, the Respondent sets forth numerous affirmative defenses, several of which the Union asserts are efforts to relitigate issues previously litigated and decided in the proceedings below. The Union moves that the Board strike the following affirmative defenses:

> First defense: The Regional Director had no authority to include paragraphs in the underlying complaint that alleged that the Union was the Section 9(a) representative of an appropriate unit and that the Respondent violated Section 8(a)(5) and (1).
>
> Second defense: The Union terminated the parties' contract at midnight, March 31, 1991, and struck the Respondent.
>
> Fourth defense: The union-security clause of the parties' contract expired on March 31, 1991. That clause provides, inter alia, that nonmember employees shall be paid at the contractual journeyman's rate with contributions to the benefit plans. The fourth defense alleges that the journeyman's rate provision cited in the third defense "became inoperable" on April 1, 1991, when the employees engaged in a strike of the Respondent.
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> Eighth Defense: The Union lost its majority status on or before January 17, 1992; none of the employees hired after April 1, 1991 paid dues; no grievances were filed after April 8, 1991; and on November 15, 1999, a decertification petition was filed on behalf of 25 of 28 bargaining unit employees.
>
> Twelfth Defense: The Union attempted to force or require the Respondent to select National Fire Sprinkler Association as its representative for collec-

[6] In the course of the underlying proceedings, the Board found, inter alia, that (1) the Union was the 9(a) representative of the employees in the unit; (2) the Union did not engage in a strike of the Respondent on April 1, 1991; (3) in bargaining for a new contract in April 1991, the parties did not reach legal impasse; and (4) there was no merit in the Respondent's arguments that the Union bargained in bad faith either through piecemeal bargaining or by negotiating without intent to agreeing to any contract other than its national agreement with a multiemployer bargaining group. All of these findings were affirmed by the Eleventh Circuit. The Respondent's expanded arguments against the Union's motions, set out in its response to the Notice to Show Cause, are dependent on the theory that the above findings are erroneous as a matter of fact and law. Thus, these arguments fail to bolster the Respondent's original answers to the compliance specification.

tive bargaining in violation of Section 8(b)(1)(B); and the Union engaged in piecemeal bargaining.

The Union further moves to strike paragraph 4 of the answer, in which the Respondent asserts that the Union "commenced a strike against Triple A .. . ."[7]

The Union's motion to strike is granted in part and denied in part. The motion is granted with respect to the first, second, and fourth defenses; paragraph 4 of the Respondent's answer insofar as it denies that the Respondent unilaterally reduced wages or asserts that the Union commenced a strike against the Respondent at midnight on March 31, 1991; and with respect to the 12th defense insofar as it depends on the contentions that the Union unlawfully engaged in piecemeal bargaining or that the Union bargained in bad faith with no intention to agree to a contract other than one which mirrored the national collective-bargaining agreement between the Union and the National Fire Sprinkler Association.

These defenses raise issues litigated and decided in the underlying unfair labor practice proceeding.[8] As noted above, it is well settled that a respondent in a compliance proceeding may not relitigate issues previously decided in an underlying unfair labor practice proceeding. *Paolicelli*, supra, 335 NLRB at 883. Therefore, the Respondent is barred from raising these defenses in this proceeding.

Finally, we find that the Union's motion to strike the eighth affirmative defense is denied without prejudice to its raising these arguments before the administrative law judge.

3. The Respondent's Motion for Summary Judgment.

The Respondent's motion primarily relies on the following arguments. First, the Respondent maintains that the third amended compliance specification does not aver that any incumbent or replacement employee has any economic interest in the fringe benefit funds; does not allege that the funds are a mandatory subject of bargaining; and does not state when any employee obtained an economic interest in any fund.

Second, the Respondent argues that the specification does not state a cause of action for backpay for replacement employees because the only basis for such claim is contained in the union security provisions of the expired national agreement, which did not survive the expiration of the parties' collective-bargaining agreement, and that the union-security provision is null and void under Alabama State law.

Third, the Respondent maintains that backpay and fringe benefit payments should be tolled during the time that the union was committing unfair labor practices by failing to bargain in good faith.

The Respondent's first argument was included as an affirmative defense to the compliance specification, and itself raises issues of material fact. The Respondent's second and third arguments raise issues litigated and rejected in the underlying unfair labor practice proceeding,[9] and, as noted above, such issues cannot be relitigated in this compliance proceeding. *Paolicelli*, supra, 335 NLRB at 883. Thus, the Respondent has failed to establish that there are no genuine issues of material fact in dispute with respect to the remaining paragraphs of the third amended compliance specification, and that it is entitled to summary judgment as a matter of law. Accordingly, its Motion for Summary Judgment is denied.

ORDER

IT IS ORDERED that the Union's motion for partial summary judgment with respect to the calculations set forth in paragraphs 7–10 of the third amended compliance Specification is granted, and that those allegations are deemed to be true.

IT IS FURTHER ORDERED that the Union's motion to strike portions of the Respondent's answer to the third amended compliance specification is granted with respect to the first, second, and fourth defenses; paragraph 4 of the Respondent's answer insofar as these defenses deny that the Respondent unilaterally reduced wages or asserts that the Union commenced a strike against the Respondent at midnight on March 31, 1991; and with respect to the 12th defense insofar as it depends on the contentions that the Union unlawfully engaged in piecemeal bargaining or the Union bargained in bad faith with no intention of entering into a contract other than one which mirrored the national collective-bargaining agreement between the Union and the National Fire Sprinkler Association.

IT IS FURTHER ORDERED that the Union's motion to strike the Eighth Affirmative Defense is denied without prejudice to raising these arguments before the administrative law judge.

IT IS FURTHER ORDER that the Respondent's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 15 for the

[7] The General Counsel joins the Union in arguing that the Board should strike the first, second, fourth, thirteenth, and fourteenth defenses. The General Counsel does not join in the Union's motion to strike the eighth defense or to strike par. 4 of the answer.

[8] See 315 NLRB 409, supra.

[9] See 315 NLRB 409, supra.

purpose of proceeding to a hearing on the remaining issues in the third amended compliance specification.

Dated, Washington, D.C. January 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD