

Women Care, Inc. and Retail Clerks Union Local No. 698, United Food and Commercial Workers International Union, AFL-CIO. Case 8-CA-12321

September 29, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On December 5, 1979, the National Labor Relations Board issued a Decision and Order¹ in the above-entitled proceeding in which the Board, *inter alia*, ordered Respondent to make whole certain discriminatees for losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended. On December 3, 1980, Respondent and the General Counsel entered into a stipulation that the Board's Order is binding. A controversy having arisen over the amount of backpay due under said Order, the Regional Director for Region 8 on May 26, 1981, issued a backpay specification and notice of hearing alleging certain amounts of backpay due the discriminatees under the Board's Order and notifying Respondent that it should file a timely answer complying with the Rules and Regulations and Statements of Procedure, Series 8, as amended. Prior to the hearing, Respondent executed a stipulation setting forth the amount of backpay that Respondent owes to each discriminatee. The stipulation also contains the terms for making the payments. Additionally, it provides that "the Board, at its discretion, may utilize this stipulation to issue a Supplemental Decision and Order and, thereafter, obtain a Judgment enforcing the backpay provisions of this Stipulation in the United States Court of Appeals for any appropriate Circuit."

On April 28, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment in which she alleges that Respondent breached the stipulation by untimely delivering checks, failing to provide certified checks, providing a check that was subsequently dishonored for insufficient funds,² and failing to make certain payments required by the stipulation.³ Sub-

¹ 246 NLRB 753.

² This check, in the amount of \$383.32, was made payable to discriminatee Tammy Francisco.

³ The Motion for Summary Judgment also alleges that Women Care was sold by Arthur and Carole Kafrisen, Harvey and Marcia Levy, and Chemical Equipment Installation Company to Andrew Steiner after the unfair labor practices litigation, and that the firm as owned and operated by Steiner is also responsible for remedying the predecessor employer's unfair labor practices. In support of these allegations, the motion averred that Kafrisen informed counsel for the General Counsel that an agreement had been entered into on or about November 1, 1981, providing for the sale of Women Care to Steiner. It also averred that a notice of pend-

sequently, on May 14, 1982, the Board issued an order transferring the proceeding to the Board and Notice To Show Cause why the General Counsel's motion should not be granted. Respondent failed to file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

As noted above, Respondent executed a stipulation which provides that the Board may rely on it in issuing a Supplemental Decision and Order.⁴ In pertinent part, the stipulation states "[t]he Respondent further stipulates that the Board, at its discretion, may utilize this Stipulation to issue a Supplemental Decision and Order, and, thereafter, obtain a Judgment enforcing the backpay provisions of this Stipulation in the United States Court of Appeals for any appropriate Circuit." Counsel for the General Counsel relies on this provision and alleges that Respondent has not adhered to its obligations to tender backpay to the discriminatees as required by the stipulation.⁵ Since Respondent failed to file a response to the Notice To Show Cause, the allegations of the Motion for Summary Judgment stand uncontroverted. Therefore, the allegations are deemed to be true and are so found by the Board without the taking of evidence in support of the said allegations.

Accordingly, we grant the General Counsel's Motion for Summary Judgment and conclude that

ing lawsuits, initiated by both buyer and seller and including "*N.L.R.B. v. Women Care, Inc.*" was appended to the sale agreement. Copies of the agreement and the notice of pending lawsuits were attached to the Motion for Summary Judgment. The agreement recites that it was made on November 30, 1981. The bill of sale is dated December 2, 1981, and the schedule that contains the pending lawsuits is also dated December 2, 1981. The Motion for Summary Judgment averred that since on or about December 10, 1981, Steiner has continued to operate Women Care as the same business, under the same name, at the same location, on the same premises, and with the same equipment and physical assets as the predecessor employer. The backpay stipulation, as noted, was entered into on December 14, 1981, after Steiner had taken control of Women Care.

⁴ Respondent did not forward the copy of the stipulation that it executed to the Regional Office until after it had breached the terms of the stipulation. Consequently, the Regional Director did not sign the stipulation. We find that his failure to execute the stipulation is immaterial. When Respondent signed the stipulation, it acknowledged that it was liable for the backpay set forth therein. Respondent even made partial payment of the backpay award. Thus, we find that Respondent is bound to pay the amounts set forth in the stipulation.

⁵ Counsel for the General Counsel maintains that Respondent owes \$4,054.11 under the stipulation. Respondent actually owes \$4,054.14. This amount is computed as follows: \$6,674.23 is the total amount due pursuant to the stipulation, and Respondent tendered checks for \$3,003.41. However, one of those checks, in the amount of \$383.32 was dishonored for insufficient funds. See fn. 2, *supra*. Thus, Respondent's liability is \$4,054.14.

the net backpay due each of the discriminatees is as stated in the stipulation, less the amount already paid.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Women Care, Inc., Akron, Ohio, its officers, agents, successors, and assigns, shall make whole each of the discriminatees named below by payment to each of them the following amounts, specified in the stipulation, less amounts already paid, with interest thereon⁶ computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), until payment of all backpay due is made as

⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on the backpay owed the discriminatees on the basis of the position set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

provided for in *F. W. Woolworth Company*, 90 NLRB 289 (1950), less tax withholdings required by Federal and state laws:⁷

	Total	Backpay	Interest
Barbara Phillips	\$2,542.01	\$2,188.41	\$353.60
Francine Lucas	1,732.64	1,479.44	253.20
Lauren Swirsky	1,017.06	863.60	153.46
Tammy Francisco Davis	1,382.52	1,174.10	208.42

⁷ We find that the predecessor, or seller, of Women Care, Inc., and the successor, or buyer, are jointly and severally liable for the backpay. The Board found that the predecessor committed unfair labor practices when it discharged several employees for engaging in protected concerted activity and refused to reinstate unfair labor practice strikers upon their application to return to work. On December 3, 1980, the predecessor stipulated that the Board's Order is binding. The successor, the firm as owned and operated by Steiner, acknowledged liability when it entered into the backpay stipulation on December 14, 1981.

We note that the agreement by which Steiner purchased Women Care contains an indemnity clause that purports to apportion liability for the backpay between seller and purchaser. The meaning and scope of this clause and its effect, if any, upon backpay liability of the predecessor and successor is left to the compliance stage.