

**Yerger Trucking, Inc. and Yerger Landscaping and Paving, Inc. and Teamsters Local Union No. 429 a/w International Brotherhood of Teamsters, AFL-CIO. Case 4-CA-19810**

September 19, 1995

**SUPPLEMENTAL DECISION AND ORDER  
REMANDING**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On May 15, 1992, the National Labor Relations Board issued a Decision and Order<sup>1</sup> in this proceeding in which the Board ordered the Respondent, inter alia, to make whole employees for their losses resulting from the Respondent's unfair labor practices. On July 25, 1994, the United States Court of Appeals for the Third Circuit entered its judgment enforcing the Board's Order.

A controversy having arisen over the amounts due under the terms of the Board's Order, the Regional Director for Region 4 issued a compliance specification and notice of hearing on March 30, 1995, alleging the amounts due and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. On April 27, 1995, the Respondent filed an answer to the compliance specification, admitting in part and denying in part the allegations in the compliance specification. By letter dated May 12, 1995, counsel for the General Counsel informed the Respondent that its answer did not appear to comply with Section 102.56 of the Board's Rules and Regulations, provided a copy of Section 102.56, advised the Respondent that it should file an amended answer by May 25, 1995, to correct the deficiencies in its answer, and further advised the Respondent that a Motion for Partial Summary Judgment would be filed if the Respondent failed to file an amended answer that comported with Section 102.56. The Respondent has not filed an amended answer and did not respond to the letter. On or about June 5, 1995, the Respondent was again advised, by telephone, of the deficiencies in its answer and of the General Counsel's intention to file a Motion for Partial Summary Judgment. The Respondent has not responded.

On August 9, 1995, the General Counsel filed with the Board a Motion to Strike Portions of Answer and for Partial Summary Judgment, with exhibits attached. On August 15, 1995, 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. The Respondent has failed to file a response. The allegations in the motion are therefore undisputed.

<sup>1</sup> 307 NLRB 567.

319 NLRB No. 2

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 Motion to Strike Portions of Answer  
and for Partial Summary Judgment**

Section 102.56(b) and (c) of the Board's Rules and Regulations provides, inter alia,

(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. . . . 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 be precluded from introducing any evidence controverting the allegation.

The General Counsel alleges that the Respondent's answer is insufficient to raise any litigable issues regarding paragraphs 1 through 5 of the compliance specification. Paragraphs 1 and 2 concern the length of the discriminatees' backpay periods, and paragraphs 3 and 4 set forth the formula for calculating the discriminatees' gross backpay. Paragraph 5 sets forth the method for calculating the discriminatees' net backpay. The General Counsel does not seek summary judgment concerning interim earnings and the appropriate interest rate to be assessed.

In paragraph 1 of its answer, the Respondent denies that it is liable for backpay for G. Wartzluft from July 4, 1991, "since both parties worked for Respondent during that time." The General Counsel contends

that this answer is insufficient because the Respondent does not explain who both parties are and does not furnish supporting figures. We agree with the General Counsel that this answer does not comport with Section 102.56 of the Board's Rules. Accordingly, we shall strike the Respondent's answer to paragraph 1 and deem that allegation to be true.

In its answer to paragraph 2 of the compliance specification, the Respondent admits that the dates of the backpay periods are correct, but contends that "the weekly amount allegedly earned by individuals from Respondent is excessive." The Respondent further maintains that it is without sufficient knowledge "to determine if the amounts earned by the individuals during the periods stated are accurate." The General Counsel argues that this answer does not comport with Section 102.56 of the Board's Rules because it does not set forth in detail the Respondent's position as to the applicable premises and is not supported by any alternative figures. To the extent that the Respondent is arguing that it is without knowledge of the amounts set forth in the gross backpay calculations, the General Counsel submits that such a contention is not credible because the Respondent's payroll records are within its possession. The Respondent has not explained why it could not support its position with the necessary figures. We agree with the General Counsel that the Respondent's answer to paragraph 2 is insufficient because it does not set forth in detail the Respondent's position as to the applicable premises and does not furnish the appropriate supporting figures. Accordingly, we find the allegations in paragraph 2 to be true and the Respondent shall be precluded from introducing evidence controverting them.

The Respondent's answer to paragraph 3 of the compliance specification disputes the premise on which the gross backpay calculation is based. The Respondent states that the determination should have been based on the individuals' July 1990 earnings, rather than their June 1991 earnings. The Respondent also notes that the Wartzenufts received pay for the holiday. The General Counsel contends that this answer is insufficient because it is not supported by any records, specific alternative figures, or calculations. The Respondent also failed to establish any amounts of holiday pay allegedly received by the Wartzenufts. We agree with the General Counsel that this answer is insufficient under Section 102.56 of the Board's Rules because the Respondent failed to provide details about the application of its alternative method of backpay calculation and failed to furnish any appropriate supporting figures. The Board has held that respondents are required to do more than simply criticize the bases for the specification, and must affirmatively provide an alternative formula and supporting figures.<sup>2</sup> Because

<sup>2</sup> *United Enviro Systems*, 314 NLRB 1130 (1994).

the Respondent has failed to provide supporting figures for its alternative formula we find the Respondent's answer to be inadequate under Section 102.56 of the Board's Rules. Accordingly, we shall strike the Respondent's answer to paragraph 3 of the compliance specification and shall deem that allegation to be true.

In its answer to paragraph 4 of the compliance specification, the Respondent contends that the appropriate measure of weekly earnings should have been based on an entire year period rather than the 6-month period contained in the specification. The Respondent failed to support this contention with any specific figures or alternative calculations. For the reasons set forth above with regard to paragraph 3, we shall strike the Respondent's answer to paragraph 4 and deem the allegation true.

Paragraph 5 of the compliance specification sets forth the method of calculating net backpay, i.e., the difference between gross backpay and interim earnings for each calendar quarter. The Respondent's answer admits "as to how the calculations were made, but denied as to the method used" and states that the Respondent is without knowledge to determine the accuracy of the discriminatees' interim earnings. The General Counsel does not seek to preclude the Respondent from presenting defenses concerning issues of interim earnings or the applicable interest rate.<sup>3</sup> We grant the General Counsel's motion to strike the Respondent's answer to paragraph 5 of the compliance specification to the extent that it contests the method of calculating net backpay. The Respondent will not, however, be precluded from presenting evidence concerning the amount of interim earnings and the applicable interest rate.

For these reasons, we grant the General Counsel's Motion for Partial Summary Judgment and shall remand this proceeding for a hearing limited to the issues of the discriminatees' interim earnings and the resulting net backpay, and the applicable interest rate to be assessed.

#### ORDER

It is ordered that the Respondent's answers to paragraphs 1 through 5 of the compliance specification are stricken, those allegations are deemed to be true and the General Counsel's Motion for Partial Summary Judgment is granted with respect to all issues except interim earnings and the appropriate interest rate to be assessed.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 4 for the purpose of arranging a hearing before an administrative law judge limited to the issues of interim earnings and the appropriate interest rate to be assessed. The

<sup>3</sup> In par. 7 of its answer the Respondent contends that the interest rate charged is confiscatory.

administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administra-

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