

Yonkers Associates, 94 L.P. and Local 32E, Service Employees International Union, AFL–CIO.
Cases 2–CA–27156 and 2–CA–27564

December 4, 2003

SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN
AND SCHAUMBER

On September 29, 1995, the National Labor Relations Board issued a Decision and Order¹ directing the Respondent, Yonkers Associates, 94 L.P., to make whole Jose Borbon, Francisco Machado, and Ariel Rivera for any loss of earnings suffered as a result of the Respondent's unfair labor practices in violation of Section 8(a)(5), (3), and (1).

In the underlying unfair labor practice case, the Board adopted the judge's findings that the Respondent was a successor to Messiah Development Co. Inc., which employed a unit of maintenance employees under a collective-bargaining agreement with the Union; that in violation of Section 8(a)(3) and (1) of the Act, the Respondent refused to hire Messiah's unit employees in December 1993 solely in order to avoid an obligation to bargain with the Union; and that it violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union and by making unlawful unilateral changes in the terms and conditions of employment of the unit employees when it subsequently hired them in March 1994, some 3 months later. To remedy the violations found, the Board, inter alia, ordered the Respondent to make the discriminatees whole for any losses they suffered and, with respect to the unlawful changes in working conditions, to reestablish the status quo ante.

On August 15, 1996, the Respondent partly complied with the Board's Order by paying certain sums to the present backpay claimants. However, it did not make the claimants whole for losses they suffered as a result of the Respondent's unilateral changes to their wages, hours, and terms and conditions of employment after it employed them in March 1994. Then, on March 11, 1998, the Respondent filed a motion to reopen and continue the [unfair labor practice] hearing, contending that the Board's Order requiring restoration of the status quo ante was not the preferable backpay remedy in light of language, quoted and discussed below, found in *NLRB v. Staten Island Hotel Limited Partnership*, 101 F.3d 858 (2d Cir. 1996). On January 23, 2001,² the Board denied the Respondent's motion as untimely and irrelevant to

the Board's finding of unfair labor practices. In addition, the Board found that, to the extent the motion raised remedial matters, they were premature in the absence of a compliance/backpay specification.

A controversy having arisen over the amount of backpay due under the Board's Order, the Acting Regional Director for Region 2, on March 30, issued a compliance specification and notice of hearing. The compliance specification notified the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. The Respondent subsequently filed a timely answer generally denying the allegations in the compliance specification and asserting affirmative defenses, inter alia, that the Board's Order was unenforceable pursuant to *NLRB v. Staten Island Hotel*, supra.

On October 17, the General Counsel filed a Motion for Summary Judgment. The General Counsel argues that the Respondent's answer fails to meet the specificity requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations. The General Counsel also contends that the Respondent is attempting to relitigate matters that were resolved in the underlying unfair labor practices proceeding. Therefore, the General Counsel moves that summary judgment be granted against the Respondent as to all matters in the compliance specification.

On October 29, the Board issued an order transferring proceeding to the Board and Notice to Show Cause.

On December 6, the Respondent filed an opposition to the General Counsel's Motion for Summary Judgment, contending that its answer was detailed and specific. The Respondent also argues that pursuant to *Staten Island Hotel*, supra, the status quo ante—"unilateral change remedy" in the compliance specification is unenforceable. It claims that in 1998 it had negotiated a collective-bargaining agreement with the Union, whose terms mirrored those accepted by discriminatees Borbon, Machado, and Rivera in March 1994. Renewing the contention first raised in its March 1998 motion to reopen the record, the Respondent asserts that the terms of the 1998 collective-bargaining agreement are the "preferable" basis for calculating gross backpay amounts, rather than basing the calculation on the rates earned by the discriminatees before the Respondent offered them employment in December 1993. The Respondent further contends that now that the compliance specification has issued, granting the General Counsel's Motion for Summary Judgment would deprive the Respondent of the opportunity to create a record relevant to its *Staten Island Hotel* argument. In addition, the Respondent argues that the compliance proceeding is premature prior to a court review of the underlying Board Decision and Order.

¹ 319 NLRB 108.

² All dates are 2001 unless otherwise indicated.

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 for Summary Judgment

1. Section 102.56(b) and (c) of the Board's Rules and Regulations states, in pertinent 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 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 computations 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.

Contrary to the Respondent's claim, we find that the Respondent's responses to the allegations of the compliance specification are general denials of matters within the Respondent's knowledge and that the Respondent has failed to file an answer that complies with the requirements of the Board's Rules and Regulations as stated above. Accordingly, we find that the allegations of the Motion for Summary Judgment are uncontroverted, and we deem the allegations in the compliance specification to be admitted as true.

2. We find no merit in the Respondent's affirmative defense that the status quo ante remedy sought here is unenforceable pursuant to the Second Circuit's opinion in *Staten Island Hotel*, supra. Although we are sensitive

to the Respondent's suggestion of unfairness in denying it the opportunity to develop a further record in this case, we have concluded that the record the Respondent wishes to make would not affect our ruling on the summary judgment motion. As explained below, the court's dicta, understood in context, have no bearing on this case.

In *Staten Island Hotel*, the court enforced the Board's remedy ordering a successor employer that had discriminatorily refused to hire its predecessor's employees to pay backpay at the rate reflected in the predecessor's collective-bargaining agreement is the same status quo ante remedy ordered here. The remedy was within the Board's discretion, the court held, because it was not certain what rate the successor would have paid to employees had it not discriminated against them, and because the successor employer had caused this uncertainty. As the court observed,

[I]f the Company had not violated the Act, it would indeed have been free to offer former employees wages at whatever levels it chose; but those applicants, in turn, would have been free to accept or decline those offers, or to negotiate for different wages. If it were possible to determine the terms of employment contracts to which former employees might have agreed, we might prefer an award of backpay at those hypothetical contracts rates. But the fact is that the Company made its hiring decisions on a basis that unlawfully discriminated against former employees . . . and it is hardly clear what terms would have been reached *had the Company not so discriminated*.

101 F.3d at 862 (citation omitted; emphasis added).

The Respondent argues that here it is "possible to determine the terms of employment contracts to which former employees might have agreed" because the three discriminatees actually accepted employment in March 1994 on the Respondent's offered terms, and in March 1998 the Respondent and the Union entered into a collective-bargaining agreement that reflected essentially the same terms. Thus, according to the Respondent, the Second Circuit would deem the Board's remedy punitive under the "hypothetical contract rate" standard announced in *Staten Island Hotel*, supra. The Respondent's argument fails for several reasons.

First, *Staten Island Hotel* did not announce a "hypothetical contract rate" standard for calculating backpay. It merely stated what the Second Circuit might do under different facts.³

³ The Second Circuit may have unintentionally created some confusion by referring to "the terms of employment *contracts* to which former employees may have agreed." Id. (emphasis added.) Obviously, the

Second, even if *Staten Island Hotel* did announce such a standard, the Board's Order in this case requires the Respondent, for the duration of the backpay period, to restore the status quo prior to its March 1994 unilateral changes. Regardless of how the Second Circuit might view them, the terms of the Order may not be relitigated before the Board in this compliance-stage proceeding.⁴ See *Paolicelli*, 335 NLRB 881, 883 (2001) (and cases cited).

Third, assuming that the Second Circuit would apply a "hypothetical contract rate" standard in the appropriate case, it is far from clear that this is that case. Nothing here makes it possible to fairly ascertain what that rate would be. The Respondent unlawfully denied employment to Borbon, Machado, and Rivera for several months. When these three accepted employment on the terms the Respondent unilaterally offered to them in March 1994 without notifying their collective-bargaining representative, the memory of their discriminatory rejection for employment by the Respondent was fresh (less than 3 months old). Because of the lingering coercive effects of that rejection, it is still "hardly clear what terms would have been reached had the [Respondent] not so discriminated." *Staten Island Hotel*, supra. Nor is the Union's subsequent agreement to contract terms mirroring those instituted in 1994 probative of the remedial issue either.⁵ At that point (according to the General Counsel, in December 1997; according to the Respondent, by March 1998), the Board had ordered a backpay remedy that reflected the predecessor's higher rates. Accepting the Respondent's position here would mean holding that the Union's agreement to the lower rates would automatically waive its claim, on behalf of the

court did not mean the contract terms that a law-abiding *Burns* successor would agree to after bargaining with an incumbent union, but rather the noncontractual employment terms that the successor potentially could have set initially prior to bargaining.

⁴ Chairman Battista and Member Schaumber did not participate in the underlying decision and they express no views as to the merits of the Board's Order. They agree, however, that it would be inappropriate to reopen the underlying decision at this stage of the case. Accordingly, they agree that the issues resolved by the Board's original Order in this case are res judicata.

⁵ The backpay period covered by this compliance specification ends in early December 1997, and does not appear to cover any period following the parties' agreement to the terms of a contract.

discriminatees, to the remedy granted by the Board. The Respondent does not contend that the parties to the negotiated agreement included any language indicating that it was intended to be a comprehensive settlement of remedial issues encompassed by the present case, or even that the contract rates were to be applied retroactively. In the absence of any proffer of evidence sufficient to constitute an informal settlement, we will not construe the negotiated agreement to deprive the backpay claimants of the Board's established remedies. In any event, the terms the Union agreed to in 1998 are not probative of the hypothetical terms the discriminatees might have accepted initially in 1994, had the Respondent acted as a law abiding *Burns* successor.

Finally, we will also not defer the processing of this compliance proceeding pending the outcome of a court review of the underlying decision and order. No party to this proceeding has sought either court review or court enforcement of the Board's original Decision and Order issued in 1995, and there is no requirement that an appeals court consider a Board's backpay order before a compliance proceeding may be initiated.

Accordingly, we grant the General Counsel's Motion for Summary Judgment. We further conclude that the net backpay due the discriminatees is as stated in the compliance specification and we will order the Respondent to pay the discriminatees those amounts, plus interest on those amounts to the date of payment.

ORDER

The National Labor Relations Board orders that the Respondent, Yonkers Associates, 94 L.P., Yonkers, New York, its officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amount following their names, plus interest to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and minus tax withholdings required by Federal and State laws:

Jose Borbon	\$16,220.19
Francisco Machado	19,151.73
Ariel Rivera	16,294.38