

E.L.C. Electric, Inc. and International Brotherhood of Electrical Workers, AFL–CIO and All Trades Staffing, Inc., Party in Interest.

E.L.C. Electric, Inc. and International Brotherhood of Electrical Workers, Local Union No. 481, a/w International Brotherhood of Electrical Workers, AFL–CIO. Cases 25–CA–28270–1, 25–CA–28270–2, 25–CA–28283–1 Amended, 25–CA–28283–2 Amended, 25–CA–28283–4 Amended, 25–CA–28397–1 Amended, 25–CA–28567, 25–CA–28582, 25–CA–28637, Amended, 25–CA–28406, 25–CA–28532 Amended, and 25–RC–10131

September 28, 2006

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On July 29, 2005, the National Labor Relations Board issued a Decision, Order, and Direction of Second Election in *E.L.C. Electric, Inc.*, 344 NLRB 1200 (2005). In that decision, the Board, inter alia, affirmed the administrative law judge’s finding that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by laying off three named employees on various dates in January and February 2003, and an undetermined number of unnamed employees on March 14, 2003, all because of their union activities. Accordingly, the Board adopted the judge’s order that the Respondent make the affected individuals whole for any lost earnings and other benefits resulting from their unlawful layoffs.

A controversy having arisen regarding the amounts of backpay and benefits due under the order, the Regional Director for Region 25 issued a compliance specification and notice of hearing on November 30, 2005. On or about December 20, 2005, the Respondent filed an answer to the specification. In its answer, the Respondent generally denied “that any sum is due or owing to any” of the discriminatees.¹

In a letter dated December 23, 2005, the General Counsel advised the Respondent that its answer was deficient under Section 102.56(b) of the Board’s Rules and Regulations, and that because of this deficiency the allegations in the compliance specification could be deemed admitted to be true under Section 102.56(c). The General Counsel further advised the Respondent that its fail-

ure to file an amended answer in compliance with Section 102.56(b) by January 6, 2006, would result in the filing of a motion for default judgment or partial default judgment.² The General Counsel later extended the Respondent’s filing deadline to February 14.

On or about February 10, the Respondent filed an amended answer. In its amended answer, the Respondent asserted generally, as to each of several discriminatees,³ that the individual “was not eligible to work all of the hours set forth in any of the quarters identified,” that his “rate of pay as listed [in the compliance specification] is not accurate and should be consistent with that set forth in E.L.C.’s records,” and that the compliance specification’s “calculations of gross backpay are inaccurate, as are interim earnings.” As to each of several others,⁴ the Respondent’s amended answer asserted generally that the discriminatee “is not entitled to any backpay.” As to three discriminatees,⁵ the amended answer asserted specifically an hourly pay rate different from that alleged in the compliance specification.

On June 20, the General Counsel filed with the Board a motion for partial summary judgment and a supporting memorandum. By its motion, the General Counsel seeks summary judgment with respect to certain specified paragraphs in the compliance specification concerning the elements of gross backpay and an order remanding this proceeding to the Regional Director to schedule a hearing on the remaining allegations in the specification. On June 23, 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 filed a response to the Notice to Show Cause, and the General Counsel filed a reply to that response.

The 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 Partial Summary Judgment

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

¹ The Respondent’s answer did not dispute, however, the identity of the discriminatees as to whom the General Counsel alleges that backpay is owing. In par. 9(a) of the compliance specification, the Regional Director alleged that the employees found by the Board to have been unlawfully laid off by the Respondent on March 14, 2003, included 13 named individuals. In its answer, the Respondent admitted the material allegations contained in paragraph 9(a).

² All dates below are in 2006, unless otherwise specified.

³ Bruce Sanderson, Jonathan Trinosky, Benjamin Adair, Ronald Hamilton, Todd Bailey, Ryan Chambers, Timothy Grow, Jonathan White, Troy Whittaker, and Matthew Aldrich.

⁴ Gregory Frazier, Benjamin Mullins, Rory Navratil, David Wilson, and Mark Herche.

⁵ Ronald Hamilton, Matthew Aldrich, and Benjamin Adair.

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 found so 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's compliance specification at issue here sets forth a formula for calculating gross backpay. In addition, for each discriminatee and broken down by calendar quarter, it alleges specific amounts for gross backpay, net interim earnings, and net backpay; and it also alleges, for each discriminatee, the specific total amount owed by the Respondent for net backpay. The compliance specification also alleges the affected employees' hourly pay rates, hours worked, and backpay periods. In addition, it alleges that certain named employees would have received employer contributions to their 401(k) funds, and sets forth the specific amounts that the Respondent would have contributed to those funds.

With certain exceptions discussed below, the Respondent's answer and amended answer to the compliance specification's gross backpay allegations fail to comply with the requirements of Section 102.56(b). In its answer, the Respondent generally denies that it owes any amounts to any of the individuals named in the compliance specification. Section 102.56(b) expressly states that, concerning the factors entering into the computation of gross backpay, such a general denial shall not suffice.

Turning to the Respondent's amended answer, although the Respondent therein asserts that some employ-

ees were "not eligible to work all of the hours" set forth in the compliance specification or were "not available for 80 hours" during certain periods, and that for some employees the General Counsel's "calculations of gross backpay are inaccurate," the Respondent does not provide support for these assertions or alternative figures as to what hours the individuals were eligible or available to work, or (except as explained below) what amounts the Respondent contends are proper for gross backpay. Accordingly, the Respondent's assertions fail to satisfy Section 102.56(b), and therefore, under Section 102.56(c), the corresponding allegations in the compliance specification are deemed admitted to be true. To this extent, summary judgment is therefore warranted.⁶

The Respondent's amended answer does set forth, however, specific alternative figures for the pay rates of three individuals: Ronald Hamilton (\$18 per hour, not \$27.55 per hour as alleged by the General Counsel); Matthew Aldrich (\$15 per hour, not \$19.16 per hour as alleged by the General Counsel); and Benjamin Adair (\$13 per hour, not \$23 per hour as alleged by the General Counsel). This is sufficient to raise a factual issue regarding these employees' pay rates. See, e.g., *United States Service Industries*, 325 NLRB 485, 487 (1998). In addition, several paragraphs and appendices of the compliance specification utilize the pay rates alleged by the General Counsel—rather than the rates asserted by the Respondent—in calculating gross backpay and other amounts for these three employees. Accordingly, summary judgment is not appropriate as to those paragraphs and appendices.⁷

For the foregoing reasons, the General Counsel's Motion for Partial Summary Judgment is granted in part and denied in part.

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to the following paragraphs and Appendixes of the compliance specifica-

⁶ Specifically, summary judgment is warranted as to the following paragraphs and appendices of the compliance specification: Pars. 1–5, 6(b), 7(b), 8(b), 9(b)–(e), 10–11, 15–16, 20–21, 34(a), 36–37, 41–42, 46–47, 50(a) and (b), 52–53, 57–58, 62–63, 67–68, 71(a) and (b), 73–74, 78–79, 88–89; apps. A, C, E, K, M, O, Q, S, U, W, Y, AA, EE.

The Respondent asserts that it has ceased business operations and no longer has the financial resources to defend itself or satisfy any claims. However, it is well settled that the issue in a backpay proceeding is the amount due, not a respondent's ability to pay. See *Scotch & Sirlain Restaurant*, 287 NLRB 1318, 1320 (1988). Therefore, the Respondent's financial situation is not a basis for denying the General Counsel's Motion for Partial Summary Judgment. See *Judd Contracting, Inc.*, 338 NLRB 676 fn. 3 (2002), enf'd. 76 Fed. Appx. 651 (6th Cir. 2003).

⁷ Specifically, summary judgment is not warranted as to pars. 25–26, 30–31, 34(b), and 83–84; and apps. G–J and CC–DD.

tion: paragraphs 1–5, 6(b), 7(b), 8(b), 9(b)–(e), 10–11, 15–16, 20–21, 34(a), 36–37, 41–42, 46–47, 50(a) and (b), 52–53, 57–58, 62–63, 67–68, 71(a) and (b), 73–74, 78–79, 88–89; Appendices A, C, E, K, M, O, Q, S, U, W, Y, AA, EE.

IT IS ALSO ORDERED that the General Counsel’s Motion for Partial Summary Judgment is denied as to the following paragraphs and appendices of the compliance specifi-

cation: paragraphs 25–26, 30–31, 34(b), 83–84; Appendices G–J and CC–DD.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 25 for the purpose of arranging a hearing before an administrative law judge limited to taking evidence concerning the paragraphs of the compliance specification as to which summary judgment was not granted.