

**Paint America Services, Inc., SRS Group, Inc., Paint America, Paint America, Inc., and Paint America of Michigan, Inc. and District Council 22, International Union of Painters and Allied Trades, AFL-CIO, CLC.** Case 7-CA-47564

February 29, 2008

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On September 30, 2004, the National Labor Relations Board issued a Decision and Order<sup>1</sup> that, inter alia, ordered Respondent Paint America Services, Inc. (PASI) to make whole discriminatee George Lancaster for any loss of earnings and other benefits that he may have suffered as a result of his discharge by the Respondent in violation of Section 8(a)(3) and (1) of the Act. On April 28, 2005, the United States Court of Appeals for the Sixth Circuit entered its judgment enforcing the Board's Order.<sup>2</sup>

A controversy having arisen regarding the amounts of backpay and benefits due under the Order, the Regional Director for Region 7 issued a compliance specification and notice of hearing on December 20, 2006, naming as Respondents not only PASI, but also SRS Group, Inc. (SRS), Paint America (PA), and Dutchman Waterproofing & Restoration, Inc. (Dutchman) alleging that all four entities constitute a single employer; alleging the amounts due under the Board's Order; and notifying the Respondents that they should file a timely answer complying with the Board's Rules and Regulations. On January 17, 2007,<sup>3</sup> PASI, SRS, PA, and Dutchman filed an answer to the compliance specification. That answer denied the allegation that PASI, SRS, PA, and Dutchman constitute a single employer, claimed that Lancaster had not been the victim of unlawful discrimination, asserted that it had received no proof that Lancaster had suffered any loss, denied that the Respondents had any obligation to contribute to a union vacation fund, and denied the compliance specification's allegations regarding the amounts due.

On May 14, the Regional Director for Region 7 issued an amended compliance specification, which again named PASI, SRS, and PA as Respondents. The amended compliance specification dropped Dutchman as a Respondent; added Paint America Inc. (PAI) and Paint America of Michigan, Inc. (PAMI) as Respondents; alleged that all five Respondents constitute a single employer; described Lancaster's interim earnings, alleged

that make-whole relief necessitates contributions to a union vacation fund, and set forth the net backpay allegedly due to the discriminatee and to the vacation fund through December 31, 2006. The amended compliance specification notified the Respondents that they must file a timely answer complying with the Board's Rules and Regulations by June 4.

On June 4, SRS and PA filed an answer to the amended compliance specification. That answer denied, inter alia, the allegation that PASI, SRS, PA, PAI, and PAMI constituted a single employer. It also denied that the Union had a collective-bargaining agreement with any Respondent during Lancaster's employment, and therefore further denied that the remedy should include contributions to a union vacation fund. By letter dated June 8, the General Counsel informed SRS and PA that their answer was deficient under Section 102.56(a) and (b) of the Board's Rules and Regulations, and that because of this deficiency the allegations in the compliance specification could be deemed to be true under Section 102.56(c). The General Counsel further advised SRS and PA that, unless they filed an amended answer in compliance with Section 102.56(b) by June 15, he would file a motion for summary judgment.

SRS and PA submitted a letter (amended answer) to the General Counsel on June 15 further responding to the amended compliance specification. By letter dated July 2, the General Counsel informed SRS and PA that their amended answer, like their answer, was deficient under Section 102.56(b) and that, unless they filed a sufficient answer by July 9, he would file a motion for partial default judgment. Neither SRS nor PA responded to the General Counsel's July 2 letter.

By letter dated June 29, the General Counsel informed Respondents PAMI and PAI that no answer to the amended compliance specification had been received from them and that, unless they filed an answer by July 5, he would file a motion for default judgment. Neither PAMI nor PAI ever filed an answer to the amended compliance specification.

By letter dated July 6, the General Counsel informed Respondent PASI that no answer to the amended compliance specification had been received from it and that, unless it filed an answer by July 13, he would file a motion for default judgment. PASI never filed an answer to the amended compliance specification.

On July 24, the General Counsel filed with the Board a Motion for Partial Summary Judgment against Respondents SRS and PA and a Motion for Partial Default Judgment and/or Partial Summary Judgment against Respondents PASI, PAI, and PAMI. On August 6, the Board issued an order transferring the proceeding to the

<sup>1</sup> *Paint America Services*, 343 NLRB No. 41 (2004) (not reported in Board volumes).

<sup>2</sup> No. 05-1241.

<sup>3</sup> All dates are in 2007, unless noted otherwise.

Board and a Notice to Show Cause why the General Counsel's motions should not be granted. On August 17, SRS filed an answer to Notice to Show Cause. PASI, PA, PAI, and PAMI did not respond to the Notice to Show Cause. The General Counsel filed an opposition to SRS's answer.

On the entire record, the Board<sup>4</sup> makes the following  
Rulings on Motions for Partial Summary Judgment and  
Partial Default 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. Sections 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.

(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 an-

swer 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 his Motion for Partial Summary Judgment against Respondents SRS and PA, the General Counsel argues that their answer and amended answer to the amended compliance specification fail to meet the specificity requirements of Section 102.56(b) and (c) in certain respects discussed below. In his Motion for Partial Default Judgment and/or Partial Summary Judgment against Respondents PASI, PAI, and PAMI, the General Counsel claims that they failed to file an answer to the amended compliance specification, as required by Section 102.56(a). In both motions, the General Counsel seeks summary judgment and/or default judgment on only those allegations in the amended compliance specification regarding the amount of backpay due to the discriminatee and to the vacation fund. The motions do not request judgment on the allegation that all five Respondents constitute a single employer.

It is clear that Respondents PAI and PAMI have failed to file an answer to the amended compliance specification, and they have not shown good cause for their failure to do so.<sup>5</sup> Therefore, we grant the General Counsel's Motion for Partial Default Judgment as to PAI and PAMI and deem all the allegations in the amended compliance specification to be admitted as true against them, except for the single-employer allegations—as to which the General Counsel does not seek judgment—and except as further set forth below. See *Kolin Plumbing Corp.*, 337 NLRB 234, 235 (2001).

As stated above, Respondent PASI filed an answer to the original compliance specification but did not file an answer to the amended compliance specification. A respondent's failure to file an answer to an amended compliance specification does not negate its timely answer to the original compliance specification where the allegations of the two specifications are substantially the same. See *id.*; *MFP Fire Protection, Inc.*, 337 NLRB 984, 985–986 (2002). We assume for argument's sake that the allegations of the two specifications are substantially the same and that it is therefore inappropriate to enter default

<sup>4</sup> 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, Members Liebman and 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.

<sup>5</sup> PAI and PAMI were not named as Respondents in the original compliance specification.

judgment against PASI for failing to file an answer to the amended compliance specification.

However, we shall grant in part the General Counsel's alternative Motion for Partial Summary Judgment against PASI because PASI's answer to the original compliance specification fails to satisfy the requirements of Section 102.56(b) and otherwise fails to raise an issue warranting a hearing. The General Counsel's amended compliance specification sets forth a formula for calculating gross backpay. It alleges the discriminatee's hourly wage rate, the hours he would have worked but for his unlawful discharge, and the backpay period. For each calendar quarter, the amended compliance specification alleges specific amounts for gross backpay, net interim earnings, and net backpay; and it also alleges the specific total amount owed to the discriminatee as net backpay.

PASI's responses to the corresponding allegations in the original compliance specification fail to deny those allegations with the specificity required by Section 102.56(b). PASI's answer fails to set forth an alternative backpay formula, an alternative backpay period, an alternative applicable wage rate, or an alternative applicable number of hours that Lancaster would have worked but for the unlawful discrimination. Those are matters within the Respondent's knowledge, and PASI's failure to furnish such alternative supporting figures and premises renders summary judgment appropriate. *Ybarra Construction Co.*, 347 NLRB 856, 857 (2006); *Paolicelli*, 335 NLRB 881, 883 (2001); *Baumgardner Co.*, 298 NLRB 26, 27 (1990), *enfd.* 972 F.2d 1332 (3d Cir. 1992).

The amended compliance specification also alleges that, but for the discriminatory discharge, the discriminatee would have received a specific amount of employer contributions to his union vacation fund. PASI's answer denies that allegation, asserting that no collective-bargaining agreement existed between it and the Charging Party during Lancaster's employment. In the underlying proceeding, the Board found that PASI discharged Lancaster on May 20, 2004, during the term of a collective-bargaining agreement between the parties that was effective from June 1, 1998 to May 31, 2004. PASI may not relitigate the Board's finding. Thus, PASI's answer fails to warrant a hearing on this allegation. For those reasons, we grant the General Counsel's Motion for Partial Summary Judgment against PASI, except to the extent that we remand the issue of interim earnings, which issue was adequately raised by Respondents SRS and PA, as explained below.

With respect to the General Counsel's Motion for Partial Summary Judgment against Respondents SRS and PA, we need not decide the question of the adequacy of

their answer and amended answer to the gross backpay allegations of the amended compliance specification. Resolution of the derivative-liability issue on remand will necessarily resolve that question as well. If SRS and PA are not found to constitute a single employer together with PASI, then SRS and PA will not be liable for any backpay. If, on the other hand, the General Counsel proves that such a relationship exists, then SRS and PA will be bound by the failure of PASI to file an adequate answer here. *Kolin Plumbing*, *supra* at 236; *Carib Inn Tennis Club & Casino*, 320 NLRB 1113, 1114 *fn.* 4 (1996), *enfd.* 114 F.3d 1169 (1st Cir. 1997).

The adequacy of SRS and PA's response to the allegations regarding interim earnings remains to be addressed. *Kolin Plumbing*, *supra* at 236. The General Counsel does not seek summary judgment with respect to paragraphs 4 and 7 of the amended compliance specification which relate to Lancaster's interim earnings. Although the General Counsel does not specifically so state, it seems that he does not seek to preclude litigation of the interim earnings issue by SRS and PA. In any event, we find that the answer of SRS and PA timely placed into issue the discriminatee's interim earnings. That answer generally denies the interim earnings allegations. Because interim earnings are generally not matters within the knowledge of a respondent, a general denial is sufficient to defeat a motion for summary judgment. *Id.* (citing *Dews Construction Corp.*, 246 NLRB 945, 947 (1979)). For that reason, we shall not grant summary judgment against SRS and PA on the interim earnings allegations.

In sum, we grant the General Counsel's Motion for Partial Default Judgment against Respondents PAI and PAMI and his Motion for Partial Summary Judgment against Respondent PASI, except to the extent that issues raised by SRS and PA have been remanded for a hearing.<sup>6</sup> In all other respects, we deny the General Counsel's motions. Accordingly, we shall not make a determination of final backpay liability at this time.<sup>7</sup>

<sup>6</sup> Our ruling does not, however, permit Respondents PASI, PAI, and PAMI to participate in that hearing. See *Kolin Plumbing*, *supra* at 236 *fn.* 9.

<sup>7</sup> Member Schaumber agrees that, under extant Board precedent, the Board will not decide the question of the adequacy of SRS and PA's answers to the backpay allegations of the amended compliance specification, and, if a single-employer relationship is found to exist, will bind SRS and PA by the failure of PASI to file an adequate answer to those allegations. See *Kolin Plumbing*, 337 NLRB 234 (2001) (citing *Carib Inn Tennis Club & Casino*, 320 NLRB 1113 (1996), *enfd.* *mem.* 114 F.3d 1169 (1st Cir. 1997)). In his view, however, *Kolin Plumbing* should be revisited. The Board provided no rationale for the rule it adopted and strict application of the rule can have inequitable results, such as that here: a *pro se* respondent that has filed an arguably adequate answer to the gross backpay allegations is automatically deprived

## ORDER

It is ordered that the General Counsel's Motion for Partial Default Judgment against Respondents Paint America Inc. and Paint America of Michigan, Inc. is granted, except to the extent that the issue of interim earnings is remanded to be decided at a hearing.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment against Respondent Paint America Services, Inc. is granted, except to the extent that the issue of interim earnings is remanded to be decided at a hearing.

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of the potential benefit of that answer. In *Kolin Plumbing*, there was no possibility of an inequitable result because the bound entities' answer with respect to gross backpay was deemed inadequate. See *Kolin Plumbing*, supra at 236 fn. 8 (former Chairman Hurtgen, concurring, noted that the additional respondents' answer was independently "insufficient to defeat summary judgment"). However, in the absence of a three-member majority of the Board willing to revisit *Kolin Plumbing*, Member Schaumber applies that precedent in deciding this case.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment and Motion for Partial Default Judgment and/or Partial Summary Judgment are denied in all other respects.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 7 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, which shall be limited to the determination of derivative liability and interim earnings.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.