

A.N. Electric Corp. and its successor or alter ego Ozone Electric Corp. and Jose Gonzalez and Ray Edwin Coffie and Ismael DeJesus. Cases 2-CA-19011, 2-CA-19227, 2-CA-19387, and 2-CA-19429

10 August 1989

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS STEPHENS AND CRACRAFT

On 30 September 1985 the National Labor Relations Board issued its Decision and Order¹ in the above-entitled proceeding in which it concluded, inter alia, that Respondent A.N. Electric Corp. (A.N.) had violated Section 8(a)(1) of the Act by discharging employees Jose and John Gonzalez, Ray Coffie, Jose Robles, Rupert Allen, and Ismael DeJesus. The Board ordered Respondent A.N., inter alia, to make whole these unlawfully discharged employees for any loss of pay suffered as a result of its unlawful conduct. On 16 May 1986² the United States Court of Appeals for the Second Circuit entered a consent judgment enforcing the Board's Order.³ A controversy having arisen over the amount of backpay due under the terms of the Board's Order, on 29 August the Acting Regional Director for Region 2 issued and duly served on Respondent A.N. and on Respondent Ozone Electric Corp. (Ozone) a backpay specification and notice of hearing alleging the backpay due under the Order up to 30 June, and alleging Respondent Ozone's joint and several liability for the unfair labor practices of Respondent A.N. as A.N.'s successor or alter ego. The backpay specification also notified each Respondent that it should file a timely answer to the specification within 15 days of service. On 15 September the Region notified Respondent A.N. by certified letter that no answer to the specification had been received and that counsel for the General Counsel intended to move for summary judgment if no answer was received by 29 September. Also on 15 September counsel for Respondent Ozone requested an extension of time within which to serve its answer. Subsequently, the Regional Director issued and duly served on the Respondents an order extending the time for each Respondent to file an answer until 3 October. On 10 October Respondent Ozone filed its answer

with the Region.⁴ Respondent A.N. did not file an answer to the specification.

On 15 January 1987 counsel for the General Counsel filed with the Board a Motion for Summary Judgment with respect to Respondent A.N. and a motion to strike in part Respondent Ozone's answer to the specification. On 20 January 1987 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motions should not be granted. Respondent Ozone filed a timely response to the Board's Notice to Show Cause. Respondent A.N. did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment and Motion to Strike

At the time of the issuance of the backpay specification, Section 102.54 of the Board's Rules and Regulations provided, in relevant part, as follows.⁵

(a) *Filing and service of answer to specification.*—The respondent shall, within 15 days from the service of the specification, if any, file an answer thereto; an original and four copies shall be filed with the regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent 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 denied. 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 back-

⁴ Counsel for the General Counsel does not contest the timeliness of Respondent Ozone's 10 October answer

⁵ Subsequent to the issuance of the specification, the Board, effective 29 September 1986, revised Sec 102.54 of the Rules and Regulations to provide for the filing of an answer within 21 days of service of the specification

¹ 276 NLRB 887 (1985).

² All dates hereinafter are in 1986 unless otherwise noted

³ *NLRB v. A.N. Electric Corp.*, No 86-4034, unpublished.

pay, 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, he shall specifically state the basis for his disagreement, setting forth in detail his 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 the 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 notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (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 said allegation.

The backpay specification issued and served on Respondents A.N. and Ozone states that each Respondent shall, within 15 days from the service of the specification, file an answer thereto with the Regional Director for Region 2, and that to the extent such answer fails to deny the specification's allegations in the manner prescribed by the Board's Rules and Regulations, and does not adequately explain that failure, the allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them.

Respondent A.N. has failed to answer the backpay specification and has not responded to the Board's Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. In the absence of good cause being shown for Respondent A.N.'s failure to file any answer, the specification's allegations are deemed to be admitted to be true in accordance with the rule set forth above. Thus we grant the General Counsel's Motion for Summary Judgment with respect to Respondent A.N., and conclude that the net backpay due each of the employees, and Respondent A.N.'s liability therefor, is as stated in the computations of the specification.

With respect to Respondent Ozone, the General Counsel contends in the motion to strike that certain portions of Ozone's 10 October answer to the

backpay specification should be stricken because they do not conform to the requirements of Section 102.54(b) and (c), above. The portions of the answer at issue are those that respond to the specification's allegations in paragraphs I and II, concerning the backpay periods for the discharged employees and the backpay formula and computations of gross backpay for the employees, and to the allegations in paragraph VI, asserting Ozone's joint and several liability based on its alleged status as an alter ego of Respondent A.N. or A.N.'s successor with knowledge of its unremedied unfair labor practices. In the 10 October answer, Respondent Ozone pleaded lack of knowledge with respect to the allegations concerning the backpay periods and the backpay formula and gross backpay computations, and denied that it was an alter ego or successor of Respondent A.N. In its response to the Board's Notice to Show Cause, Respondent Ozone contends that it was not a party to any prior proceedings and that the General Counsel had not offered any evidence of its successor or alter ego status, and thus it properly pleaded absence of knowledge concerning the allegations involving backpay for Respondent A.N.'s unlawfully discharged employees.

We note that Respondent Ozone was not a named party in the underlying unfair labor practice proceeding and that the evidence on this record and that of the underlying proceeding is not sufficient to resolve the matter of Respondent Ozone's status as it may relate to Respondent A.N. for purposes of liability. Accordingly, we shall order that a hearing be held to determine the alter ego or successor status and liability of Respondent Ozone. See, e.g., *Dews Construction Corp.*, 246 NLRB 945, 946 (1979). The hearing will also address any other matters concerning the backpay specification that the administrative law judge deems appropriate in light of a determination of Respondent Ozone's status. At this time we find that the 10 October answer to the specification meets the requirements of Section 102.54(b) and (c) and, accordingly, we deny the General Counsel's motion to strike, with leave to renew it before the judge at an appropriate time.

ORDER

It is ordered that the Respondent, A.N. Electric Corp., New York, New York, its officers, agents, successors, and assigns, shall make whole each of the employees named below by payment to them of the amounts set forth adjacent to their names, plus interest to be computed in the manner pre-

scribed in *New Horizons for the Retarded*⁶ and accrued to the date of payment, minus the tax withholdings required by Federal, state, and city laws:⁷

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|----------------|------------|
| Jose Gonzalez | \$ 144,353 |
| John Gonzalez | 160,287 |
| Ray Coffie | 207,942 |
| Jose Robles | 100,334 |
| Rupert Allen | 185,735 |
| Ismael DeJesus | 207,784 |

IT IS FURTHER ORDERED that this proceeding be remanded to the Regional Director for Region 2

⁶ In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after 1 January 1987 will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁷ We note the backpay specification's statement that backpay for these employees continues to accrue on a daily basis, and that the net backpay figures herein reflect the backpay computations only through 30 June 1986.

for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge, which hearing shall be for the purpose of taking evidence as to the status and liability of Respondent Ozone Electric Corp. as an alter ego or successor of Respondent A.N. Electric Corp., and for the further purpose of taking evidence as to any other matters concerning the backpay specification in this proceeding which the administrative law judge deems appropriate in light of the determination of the status of Respondent Ozone Electric Corp.

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 and Regulations shall be applicable.