

Aztec Concrete, Inc., and E.M.L. Construction Company, Joint Employers and William Stewart.
Case 31-CA-13987

28 September 1987

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND BABSON

On 23 December 1985 the National Labor Relations Board issued a Decision and Order in this proceeding¹ in which the Board, inter alia, ordered the Respondents to reinstate William Stewart, George Grisnik, and Kenneth Ward, and to make whole Stewart, Grisnik, Ward, and Martin Pollack for any loss of pay suffered by reason of the Respondents' discrimination against them. On 11 November 1986 the United States Court of Appeals for the Ninth Circuit entered its judgment enforcing the Board's Order. A controversy having arisen over the amount of backpay due under the Board's Order, as enforced by the court, the Regional Director for Region 31 on 29 April 1987 issued and caused to be served on the parties a backpay specification and notice of hearing alleging the amounts of backpay due the discriminatees under the terms of the Board's Order. Subsequently, the Respondents filed an answer to the backpay specification generally denying several allegations, including the allegation with respect to gross backpay.

On 12 June 1987 the General Counsel filed with the Board a "Motion to Transfer Case to and Continue Proceedings Before the Board, and for Partial Summary Judgment on Backpay Specification." The General Counsel alleges that the Respondents' answer fails to comply with Section 102.54(b) of the Board's Rules and Regulations. The General Counsel moves that the Respondents' answer to paragraph 3 of the backpay specification be stricken; that paragraph 3 and the gross backpay amounts detailed in an appendix to the backpay specification be deemed to be admitted to be true without taking of evidence to support those allegations; that the Respondents be precluded from introducing any evidence controverting those allegations; and that partial summary judgment be granted concerning such gross backpay allegations. On 16 June 1987 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.

On 23 June 1987 the Respondents filed an opposition to the General Counsel's motion and at-

tached an affidavit and an amended answer to the backpay specification. The Respondents deny that certain rates of pay for specified quarters of the backpay period, as stated in the appendix to the backpay specification, are the appropriate hourly rates for the discriminatees. The Respondents assert they have never paid an hourly employee over \$17 per hour for regular time and have not worked any jobs since the underlying proceeding which required wage payments at a higher prevailing rate. The Respondents also deny that hours allocated to the foregoing rates of pay are proper. No specific alleged alternative rates of pay or allocation of hours is set forth in the amended answer. The General Counsel filed no response to the Respondents' amended answer.

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

On the entire record in this case, the Board makes the following

Ruling on the Motion for Summary Judgment

Section 102.54(b) and (c) of the National Labor Relations Board Rules and Regulations states:

(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 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, 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

¹ 277 NLRB 1244 (1985)

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 duly served on the Respondents states "that pursuant to Section 102.54 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to said Specification within 21 days from the service thereof. To the extent that such answer fails to deny allegations of the Specification in the manner required under the Board's Rules and Regulations, and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondents shall be precluded from introducing any evidence controverting them."

The Respondents' answer, even as amended, fails to satisfy the requirements of Section 102.54(b) and (c). The Respondents' amended answer fails to raise with the requisite degree of specificity any issue warranting a hearing with respect to paragraph 3 and the related appendix of the backpay specification concerning gross backpay. The amended answer generally denies the accuracy of the gross backpay figures contained in the specification without providing any specific alternative computation of the discriminatees' hours or formula for computing the amounts of gross backpay due them. These matters are within the Respondents' knowledge and control and their failure to set forth

fully their position as to the applicable premises or to furnish appropriate supporting figures is contrary to the specificity requirements of Section 102.54(b). As the Respondents have failed to deny specifically the gross backpay allegations or to explain adequately their failure to do so, Section 102.54(c) requires that these allegations be deemed to be admitted true. Therefore, we find them to be correct and strike the Respondents' answer with respect to paragraph 3 of the backpay specification.² Accordingly, we will grant the General Counsel's motion for partial summary judgment as to the amount of gross backpay due discriminatees Stewart, Grisnik, Ward, and Pollack.

The General Counsel's motion recognizes that the Respondents' general denial is sufficient to place the discriminatees' interim earnings in issue because that information is generally not within the knowledge of the Respondents. Accordingly, we shall order a hearing limited to the determination of the discriminatees' interim earnings and related matters, including calendar quarter expenses and net backpay.³

ORDER

It is ordered that the General Counsel's motion to strike Respondents' answer in part is granted.

IT IS FURTHER ORDERED that the General Counsel's motion for partial summary judgment as to gross backpay specifications for the discriminatees is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 31 for the purpose of arranging and issuing notice of a hearing before an administrative law judge, at which hearing the issues shall be limited to the interim earnings of William Stewart, George Grisnik, Kenneth Ward, and Martin Pollack, and related matters.

² *Tiffany Handbags*, 271 NLRB 621, 622 (1984).

³ In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after 1 January 1987 shall be computed at the "quarterly 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 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).