

Workroom for Designers, Inc. and Sidney H. Sisselman, and International Ladies' Garment Workers Union, AFL-CIO. Cases 1-CA-19731, 1-CA-19797, 1-CA-19903, 1-CA-20007, 1-CA-20157, 1-CA-20218, 1-CA-20442, 1-CA-20521, and 1-CA-21438

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 12, 1985, the National Labor Relations Board issued a Decision and Order in Cases 1-CA-19731, 1-CA-19797, 1-CA-19903, 1-CA-20007, 1-CA-20157, 1-CA-20218, 1-CA-20442, and 1-CA-20521¹ ordering the Respondents, *inter alia*, to make whole various discriminatees for any loss of pay suffered as a result of the Respondents' unfair labor practices. On April 30, 1985, the Board issued an Order adopting, in the absence of exceptions, the decision of the judge in Case 1-CA-21438 directing the Respondents to make whole one of the discriminatees for losses resulting from the Respondents' discrimination against her. On July 10 and September 18, 1985, the United States Court of Appeals for the First Circuit entered its judgments, enforcing in full the provisions of the Board's Orders. A controversy having arisen over the amount of backpay due the discriminatees, the Acting Regional Director for Region 1, on March 27, 1986, issued a backpay specification and notice of hearing. Subsequently, Respondent Sisselman filed letters containing answers to the specification on behalf of himself and Respondent Workroom for Designers, Inc.

By letter dated December 19, 1986, the Region's compliance officer informed Sisselman that his answers did not conform to the requirements of Sections 102.52 through 102.59 of the Board's Rules and Regulations governing backpay proceedings. In particular, the letter directed Sisselman's attention to Section 102.54 concerning the contents of an answer to a specification. It stated that the answers lacked the specificity required, for example, as the answers neither admitted nor denied the gross backpay formula or proposed an alternative. It additionally stated that the Respondents neither admitted nor denied the interim earnings claimed for the discriminatees or offered any other facts concerning interim earnings. Finally, it sought to remind the Respondents that the backpay hearing was not an opportunity to relitigate the unfair labor

practice case. The Respondents were given until the close of business on December 30, 1986, to file an amended answer. Sisselman, in letters dated December 23 and 30, 1986, responded that his answers were as specific as he could make them, contending that the Board had subpoenaed and had possession of all his records, thereby denying him access to them. In response, by letter of January 8, 1987, counsel for the General Counsel reminded Sisselman that, with only three exceptions, his records, which were earlier subpoenaed by a special master appointed by the U.S. district court, were still in the custody of the court and remained available for his inspection. Sisselman was also reminded that three of his payroll records were released by the district court to the Regional Office for the purpose of preparing the backpay specification and were also available for his inspection. Sisselman was given an extension of time for filing an amended answer. Sisselman did not do so.

Thereafter, on April 23, 1987, the General Counsel filed with the Board a Motion to Strike Answer and Motion for Summary Judgment. The General Counsel argued that the Respondents' answers are totally deficient because they are not sworn to and fail to specifically address the allegations in the backpay specification as required by Section 102.54(b) and (c) of the Board's Rules and Regulations. The General Counsel moved that the Respondents' answers be stricken in their entirety and that summary judgment be granted as to all matters contained in the backpay specification. Alternatively, the General Counsel moved that the Respondents' answers be stricken and that summary judgment be granted as to the gross backpay calculations and as to those discriminatees concerning whom no valid issue regarding interim earnings has been raised. On April 30, 1987, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. By letter of May 4, 1987, the Respondents filed a response to the Notice to Show Cause contending that the Board's further litigation of this proceeding is futile, essentially based on the previously asserted inability to pay.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. On the entire record in this proceeding, the Board makes the following

Ruling on the Motion for Summary Judgment

Section 102.54(b) and (c) of the Board's Rules and Regulations states, in pertinent part, that:

¹ 274 NLRB 840

(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 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 General Counsel argues in support of her motion to strike the answers in their entirety that the Respondents' answers are not sworn to as required by Section 102.54(b) of the Board's Rules. As quoted above, that section states that an answer to a backpay specification shall be sworn to by a respondent or a duly authorized agent. The Board has recently emphasized that a pleading that substantially fails to conform to the Board's procedural rules will normally be stricken in its entirety.² However, we decline to strike the answers based on the Respondents' failure to have the answers sworn to under the particular circumstances pre-

sented. When Sisselman, who was proceeding pro se, was informed by the compliance officer by letter of December 19, 1986, that his answers did not conform to the requirements of Section 102.54(b), the letter then specified certain deficiencies as to the contents of the answers. These specified deficiencies did not include the failure of the answers to be sworn to. Thus, under the particular circumstance here, we find that Sisselman may reasonably have been led to believe that this procedural deficiency would not lead to the striking of his answers. Therefore, we decline to strike the answers in their entirety on that ground.³ Moreover, although the Respondents' answers, as the General Counsel argues, are unnumbered and fail to explicitly admit, deny, or explain the allegations made, we find that his answers are sufficiently specific to fairly meet the substance of certain of the allegations of the specification and, thus, we deny the General Counsel's motion to strike them in their entirety.

At the outset, however, we must reject two general arguments made by the Respondents. Regarding the assertions as to the financial inability to satisfy the backpay order, it is well settled that the issue in a backpay proceeding is the amount due and not a respondent's ability to pay.⁴ With respect to Sisselman's claimed inability to obtain records that would enable him to prepare more detailed answers, Sisselman's letters to the Region clearly indicated that he was aware that the Board had subpoenaed his records and that some of them were in the possession of the district court. Moreover, counsel for the General Counsel, by letter dated January 8, 1987, in response to Sisselman's letters to the Region's compliance officer, reminded Sisselman of the location of his records and that they were available for his inspection. There is no indication that Sisselman has ever attempted to inspect his records, and he has offered no explanation of his failure to do so. Thus, we reject the Respondents' contention that the failure to provide answers containing specific denials, as required by the Board's Rules, was justified because Sisselman's records were not in his possession.⁵

Further, notwithstanding our acceptance of these answers, we agree with the General Counsel that, with limited exceptions, the answers to the backpay specification are deficient insofar as they do not conform to the Board's requirements as to those compliance matters within the Respondents' knowl-

² *Scotch & Sirlorn Restaurant*, 287 NLRB 1318 (1988)

³ See *Lobster Trap & Casa Sirena Marina Hotel*, 287 NLRB 1322 (1988)

⁴ See, e.g., *Scotch & Sirlorn Restaurant*, supra at 1319 and cases cited there

⁵ *Master Foods Service*, 276 NLRB 1160, 1162 (1985)

edge. The answers do not specifically dispute the general accuracy of the gross backpay due. Section 102.54(b) specifies that a respondent's answer concerning all matters within its knowledge, including the various factors entering into the computation of gross backpay, must be specifically drawn and that a general denial about those matters will not suffice. Accordingly, as the Respondents have not specifically denied the allegations pertaining to the general computation of gross backpay, nor adequately explained the failure to do so, we strike the answers to the extent that they can be construed as addressing those general allegations of the backpay specification and deem those general allegations to be admitted as true.

However, with respect to the backpay due certain individual discriminatees, we find the answers are sufficiently specific to call into question the backpay period used to compute the gross backpay due these discriminatees, and thus sufficient to deny the General Counsel's motion with respect to these individuals. In this regard, the Respondents allege that the following specifically named discriminatees either refused or did not respond to the Respondents' offer of reinstatement or, alternatively, accepted such an offer and subsequently quit:⁶ David Amlaw, Hannah Bontempo, Catherine Carlo, Christina Chrostowski, Gloria Civello, Donna Crawford, Leola Demary, John Descensi, Irma Dinicola, Linda Garneau, Sherry Briggs Gardner, Marie Moore Hebert, Charles Holmes, Valerie Johnson, Regima Lysecka, Rose Marchetti, Teresa McCormack, Deborah McGivern, William Paradysz, Donna Passons, Linda Peaslee, Yolanda Potter,⁷ Kathleen Sabin, Ruth Sabin, Marion Smith, Ronald Smith, Thomas Spargo, Catherine Troiano, and Deborah Wood.

Similarly, we find the Respondents' answers sufficiently specific to raise issues covering employee⁸ or job availability⁹ with respect to the following named discriminatees: employee availability—Stefan Ashley, Leroy Barnes, Daniel Corrado, David Heath, Marie Moore Hebert, Deborah McGivern,

and Connie Ruperto; job availability—Olive Bailey, Maria Blefari, Ann DeMarsico, Chong Gray, Jack Haskell, Rosa Palano, and Guiseppina Polce. Thus, with respect to the gross backpay formula used with respect to the above-named individuals, we deny the General Counsel's Motion for Summary Judgment and shall direct a hearing limited to (1) determining if these employees received a valid offer of reinstatement, which they did not accept or accepted such an offer and thereafter quit the Respondents' employ; and/or (2) determining if these employees were available for employment or if jobs were available to them during all or part of the backpay period, as appropriate.¹⁰

Finally, the Respondents essentially argue that certain named discriminatees received interim earnings affecting their backpay entitlement beyond the amounts set forth as interim earnings in Appendix A of the backpay specification. Such claims are sufficient to warrant a hearing on those matters.¹¹ Accordingly, we shall order a hearing limited to determining the amounts of interim earnings of the following individuals: Leroy Barnes, Daniel Corrado, Patricia Gage, Ruth Sabin, and Marion Smith.

With respect to the remaining discriminatees, we find that the Respondents' answers raise no valid issues. We therefore deem every allegation as to those discriminatees to be admitted as true and, thus, grant the General Counsel's motion as to these individuals. In this regard, the answers do not raise any valid claims as to the allegations contained in the backpay specification regarding Candace Cook, Kevin Fowler, Dianna Grace, Kathleen Hoffman, Stella Hoffman, Thelma Leveille, Steve Mathes, Gregory Smith, Michael Soules, and Bernadette Williams. Further, it is well settled that matters litigated in the unfair labor practice proceeding cannot be relitigated under the guise of avoiding backpay.¹² With respect to the following discriminatees, the only claims made by Respondent Sisselman were litigated in the underlying proceeding: Susan Barnes,¹³ Josephine Daley, George Fiehrer, Juanita Fortune, Rose Galvagni, Anita Burnham Girard, Bernadette Holmes, Diane Andr-

⁶ See *United Hydraulic Services*, 282 NLRB 645 (1987), in which the Board denied a Motion for Summary Judgment because the answer alleged that an offer of reinstatement was made to a discriminatee.

⁷ With respect to this discriminatee, the Respondents also argue that she received pension benefits. Pension benefits, which are, in effect, delayed compensation for earlier employment, are not earnings and thus do not affect the Respondents' backpay liability. *F & W Oldsmobile*, 272 NLRB 1150, 1152 (1984). We therefore reject the Respondents' argument in this regard.

⁸ See, e.g., *Big Three Industrial Gas*, 263 NLRB 1189, 1200 (1982) (disallowance of backpay for periods of unavailability because of illness is proper under certain circumstances).

⁹ See *Victoria Medical Group*, 274 NLRB 1006, 1008 (1985), overruled on other grounds in *Scotch & Sirlain*, supra at fn 5 (issue of job availability during the backpay period is a valid matter for litigation at the compliance stage, therefore Motion for Summary Judgment denied where issue is raised).

¹⁰ We emphasize, however, that at any hearing on such matters the burden is on the Respondents to establish facts that would negate or mitigate their backpay liability. See, e.g., *Niagara Falls Sightseeing*, 279 NLRB 35 (1986), and *Overseas Motors*, 277 NLRB 552, 559 (1985).

¹¹ See generally *Lobster Trap*, supra; *United Hydraulic Services*, supra.
¹² See, e.g., *Scotch & Sirlain*, supra at fn 7, and *Overseas Motors*, 277 NLRB 552, 554, 557 (1985).

¹³ With respect to discriminatee Barnes, as well as Walter Manning and Laura Pike, the Respondents claim that they have received unemployment compensation. It is well settled that unemployment compensation is not an offset to backpay. See, e.g., *Howard R. Singer Legal Services*, 278 NLRB 902, 904 (1986). We therefore reject the argument in this regard.

zejewski Hostetter, Ann Marie Jamros, Walter Manning, Rose Noto, Laura Pike, Robert Sabin, Rose Sayers, and Louise Whelan.

ORDER

IT IS ORDERED that the General Counsel's Motion for Summary Judgment is granted as to all allegations in the backpay specification with respect to the following discriminatees and that pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board orders that the Respondents, Workroom for Designers, Inc. and Sidney H. Sisselman, Pittsfield, Massachusetts, their officers, agents, successors, and assigns, shall make whole the following discriminatees, by payment of the amounts set forth in the backpay specification,¹⁴ plus interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*,¹⁵ until payment of all backpay is made, less tax withholdings required by Federal and state laws:

Susan Barnes	Ann Marie Jamros
Candace Cook	Thelma Leveille
Josephine Daley	Walter Manning
George Fiehrer	Steve Mathes
Juanita Fortune	Rose Noto
Kevin Fowler	Laura Pike
Rose Galvagni	Robert Sabin
Anita Burnham	
Girard	Rose Sayers
Dianna Grace	Gregory Smith
Kathleen Hoffman	Michael Soules
Stella Hoffman	Louise Whelan
Bernadette Holmes	Bernadette Williams
Diane Andrzejewski Hostetter	

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is granted as to the gross backpay due Patricia Gage and that this proceeding be remanded to the Regional Director for Region 1 for the purpose of arranging a hearing before an administrative law judge, and that such proceeding be limited to a determination of the amounts of her interim earnings.

¹⁴ The backpay due discriminatees George Fiehrer, Anita Burnham Gerard, and Bernadette Holmes shall be computed in accordance with the General Counsel's clarification to the backpay specification made in the Motion for Summary Judgment.

¹⁵ 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall 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 January 1, 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).

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied as to the backpay due the following discriminatees and that this proceeding be remanded to the Regional Director for Region 1 for the purpose of arranging a hearing before an administrative law judge, and that such proceeding be limited to determinations as to the proper backpay period and the amounts of their interim earnings, as detailed in our decision above:

Leroy Barnes
Daniel Corrado
Ruth Sabin
Marion Smith

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied as to the backpay due the following discriminatees and that this proceeding be remanded to the Regional Director for Region 1 for the purpose of arranging a hearing before an administrative law judge, and that such proceeding be limited to determinations as to the proper backpay period, as detailed in our decision above:

David Amlaw	Charles Holmes
Steffan Ashley	Valerie Johnson
Olive Bailey	Regima Lysecka
Marie Blefari	Rose Marchetti
Hannah Bontempo	Teresa McCormack
Catherine Carlo	Deborah McGivern
Christina	
Chrostowski	Rosa Palano
Gloria Civello	William Paradysz
Donna Crawford	Donna Passons
Ann DeMarsico	Linda Peaslee
Leola Demary	Guisepina Polce
John Descensi	Yolanda Potter
Irma Dinicola	Connie Ruperto
Linda Garneau	Kathleen Sabin
Sherry Briggs	
Gardner	Ronald Smith
Chong Gray	Thomas Spargo
Jack Haskell	Catherine Troiano
David Heath	Deborah Wood
Marie Moore	
Hebert	

The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.