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Metro Demolition Contracting Corp., Phantom Demolition Corp., Circle Interior Demolition Inc., World Class Demolition Corporations, alter egos and Local 813, International Brotherhood of Teamsters. Cases 29–CA–27317, 29–CA–27375, and 29–CA–27472

July 16, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel filed a motion seeking partial summary judgment in this compliance case on the ground that the Respondents' answer is inadequate under the Board's Rules and Regulations. For the reasons that follow, we grant the motion in part and deny it in part.

On September 13, 2007, the National Labor Relations Board issued an unpublished Order adopting, in the absence of exceptions, an administrative law judge's decision. Among other things, the Order required the Respondents to make whole unit employees for any loss of earnings and other benefits suffered as a result of their unlawful discharges, and to give retroactive effect to the terms and conditions of the collective-bargaining agreement between Respondent Metro Demolition Contracting Corp., Inc., and Local 813, International Brotherhood of Teamsters (the Union), effective July 1, 2005, through June 30, 2008 (the "2005 collective-bargaining agreement").¹ On December 6, 2007, the United States Court of Appeals for the Second Circuit entered its judgment enforcing this Order.²

A controversy having arisen over the amount of backpay and contributions due the discriminatees and funds, on October 23, 2008,³ the Regional Director for Region 29 issued a compliance specification and notice of hearing identifying 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. Thereafter, by letter dated November 13, Respondent World Class Demolition Group requested an extension of time to file an answer and, by Order dated

¹ To give full retroactive effect to the terms of the 2005 collective-bargaining agreement, the Board further adopted the judge's recommended Order requiring the Respondents to make all fringe benefit fund contributions, and to make all unit employees whole for any expenses resulting from the Respondents' failure to make the required pension and other fringe benefit contributions, with interest.

² 07–4932.

³ All dates hereafter are in late 2008 and early 2009, unless otherwise specified.

November 14, the Regional Director granted this request and extended the answer deadline to November 24.

On November 24, the Respondents filed an answer denying the compliance specification allegations without providing alternative calculations or the basis of their disagreement with the compliance specification's backpay calculations.

By letter dated November 25, counsel for the General Counsel notified the Respondents that their answer failed to satisfy the specificity requirements of Section 102.56(b) of the Board's Rules and Regulations, and stated that if the Respondents failed to file an amended answer by December 8, the Regional Director might seek partial summary judgment from the Board on the issues of gross back pay and computations set forth in the compliance specification. The Respondents did not file an amended answer.

On December 15, the General Counsel moved for partial summary judgment, contending that the Respondents' general denials in their answer failed to: identify any erroneously named unit employees; specify the basis of their disagreement with the backpay period or the backpay computation; specify the basis of their disagreement with the computation of the payments owed to the health insurance fund, severance fund, and pension fund on behalf of unit employees; offer any alternative formula for computing these amounts; or, furnish appropriate supporting figures for the amount owed. Further, the General Counsel contended that the Respondents had knowledge of the calculations for the health insurance, severance, and pension funds alleged in the compliance specification, because those calculations were set forth in the 2005 collective-bargaining agreement.⁴

On December 18, 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 March 13, 2009, the Board accepted the Respondents' opposition to the motion.⁵ By letter dated

⁴ In his Motion for Partial Summary Judgment, the General Counsel inadvertently cites the amount the Respondents owe to the Local 813 Pension Trust Fund as \$37,004.84. The compliance specification clearly states that the amount owed to the Pension Trust Fund is \$44,160.80; \$37,004.84 represents the additional amount of liquidated damages the General Counsel asserts is owed the funds.

The General Counsel does not seek partial summary judgment with respect to pars. IV (Interim Earnings), V (Net Backpay), and XI (Summary) of the compliance specification.

⁵ The Respondents' opposition to the motion was due at the Board by January 15, 2009. The Respondents initially incorrectly e-filed their opposition with Region 29 and attempted to e-file the opposition with the Board on January 20, after they learned that filing with the Region was insufficient. On January 22, the Board's Office of the Executive Secretary advised the Respondents to file a motion under Sec. 102.111(c) by January 27 if they wished to request that the late-filed

March 17, the General Counsel filed a reply to the Respondents' opposition.

In their opposition to the General Counsel's motion, the Respondents contend that they could not have specifically denied certain of the compliance specification's allegations or computations because: (a) they could not determine which unit employees were included in the compliance specification; and (b) certain paragraphs in the compliance specification are contradicted by the terms of the 2005 collective-bargaining agreement.

Ruling on Motion for Partial Summary Judgment⁶

Section 102.56(b) and (c) of the Board's Rules and Regulations provides that:

(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 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 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.

1. The Respondents have offered general denials to the compliance specification's paragraphs I, II, III, VI, VII, VIII, and IX, which pertain to the identity of the discriminatees, the backpay period, and the computation of backpay and fund contributions. Thus, while stating that they "specifically" dispute the allegations in these paragraphs, the Respondents' denials neither provide a position as to the General Counsel's premises nor furnish supporting figures. The General Counsel contends that these denials do not comply with the requirements of Section 102.56(b) and (c). We agree.

A general denial of allegations regarding the backpay period and gross backpay calculations is insufficient to comply with the specificity requirements of Section 102.56(b) and (c). See *United States Service Industries*, 325 NLRB 485, 486 (1998). A general denial of allegations regarding the health insurance, pension fund, and severance plan contribution amounts is also insufficient to comply with the specificity requirements of Section 102.56(b) and (c). These amounts enter into the computation of total gross backpay and are clearly within the Respondents' knowledge. See *Mining Specialists, Inc.*, 330 NLRB 99, 101-102 (1999). Although the Respondents stated that they "specifically" disagreed with the computations in the compliance specification, they failed to furnish supporting figures or fully set forth their position regarding the applicable premises, as required by Section 102.56(b) and (c), and we thus find their answer to be inadequate under that section.

We find unavailing the Respondents' contention that they could not determine which unit employees were included in the compliance specification's allegations. The compliance specification provided the names and computations in paragraph II(B)(1), the summary, and the appendices.

response be accepted. The Respondents filed such a motion after the close of business on January 27 and perfected service on other parties on January 30. On February 4, the General Counsel filed an opposition to the Respondents' 102.111(c) motion. On March 13, the Board agreed to grant the Respondents' motion and accept their untimely response to the Notice to Show Cause.

⁶ 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, Chairman Liebman and Member 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. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed ___ U.S.L.W. ___ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

We further find unavailing the Respondents' contention that the allegations in paragraphs I, II, III, VI, VII, VIII, and IX of the compliance specification contradict the paragraphs in the 2005 collective-bargaining agreement. First, while the Respondents' answer to these paragraphs generally directed the Board to "the terms of the Order and 2005 [collective-bargaining agreement]," the answer (with one exception) did not state which of the agreement's terms were contradictory, and it did not state the basis of their disagreements.

Second, although the Respondents cite, in their opposition to the General Counsel's Motion for Partial Summary Judgment, one term of the collective-bargaining agreement on which they relied, they failed to provide a sufficient basis for refuting the General Counsel's computation. Thus, the Respondents contend that paragraph VI(A)(1) of the compliance specification erroneously cited section 3(A)(4) of the 2005 collective-bargaining agreement to establish the "rate of pay for all unit employees, except new hires." The Respondents assert that section 3(A)(4) of the collective-bargaining agreement applies to chauffeurs of a specific type of 10-wheel, open truck, and that discriminatees Jack Baiamonte and Joseph Angrisani performed different work. However, the compliance specification refers to Baiamonte and Angrisani in a different section (sec. III), which uses "their hourly rate of pay at the time they were discharged." The Respondents provided no details to refute this section's computation. Further, the Respondents' answer failed to specify any other unit employees who fell outside the scope of section 3(A)(4).

In sum, the Respondents' answer failed to specifically deny or set forth the basis of their disagreement with the backpay period or with the backpay computations included in the compliance specification. Further, their answer failed to specify the Respondents' disagreement with the computation of payments owed to the health insurance fund, severance fund, or pension fund, and failed to offer any alternative formula for computing these amounts.

Because the Respondents failed to furnish supporting figures or fully set forth their position regarding the applicable premises as required by Section 102.56(b) and (c), we find the Respondents' answer to be inadequate under that section. Accordingly, we grant the General Counsel's motion and deem that the allegations in paragraphs I, II, III, VI, VII, VIII, and IX of the compliance specification are admitted as true, and the Respondents

are precluded from introducing evidence challenging them.⁷

2. On this record, however, we do not grant the General Counsel's Motion for Summary Judgment as to paragraph X of the compliance specification. The General Counsel alleges in paragraph X that "Section 23(d) of the 2005 [collective-bargaining agreement] requires that Respondents pay Health Insurance and/or Severance Fund and/or Pension Fund Liquidated damages at the rate of 20% for any contribution delinquency that is not received 'by the 15th of each month.'"⁸ The Respondents' answer denies this allegation and, referencing the 2005 collective-bargaining agreement, contends that the claimed liquidated damages "are discretionary in nature to recoup bookkeeping expenses and [are] only imposed after arbitration."

Here, and unlike the denials to paragraphs I, II, III, VI, VII, VIII, and IX, discussed above, the Respondents set forth the basis of their denial to paragraph X, contending that the amounts allegedly owed were "discretionary in nature" and were "only imposed after arbitration." Further, the actual terms of section 23(d) of the 2005 collective-bargaining agreement are not presented in the compliance specification. In these circumstances, we find that the Respondents' answer disputing the existence of a 20-percent liquidated damages obligation under the contract is "sufficiently specific to raise a litigable issue of fact." *Aneco, Inc.*, 330 NLRB 969, 971 (2000). Accordingly, we shall deny summary judgment on this issue.

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, as set forth above, the General Counsel's Motion for Partial Summary Judgment is granted as to the following paragraphs of the compliance specification: I, II, III, VI, VII, VIII, and IX.

⁷ The compliance specification states that, with respect to paras. VII, VIII, and IX, fund contributions owed on behalf of Angrisani and Baiamonte are reduced by contributions paid to the funds by their interim employers. The Respondents do not have the ability to deny with specificity these amounts. Accordingly, our grant of partial summary judgment as to those paragraphs does not include the General Counsel's computations of the offset amounts, and the Respondents shall have the right to contest them at the compliance hearing.

In view of the fact that the General Counsel does not seek partial summary judgment with respect to certain paras. of the compliance specification, in particular par. XI which summarizes the specification's facts and computations, we decline the General Counsel's request to include in our Order the amounts owed to the discriminatees and the benefit funds.

⁸ The General Counsel also specified the amount of liquidated damages allegedly owed by Respondents.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is denied as to paragraph X of the compliance specification.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 29 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 is not granted.

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 evi-

dence. 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.

Dated, Washington, D.C. July 16, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD