

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

**METRO DEMOLITION CONTRACTING CORP.,
PHANTOM DEMOLITION CORP., CIRCLE
INTERIOR DEMOLITION INC., WORLD CLASS
DEMOLITION CORPORATION, ALTER EGOS**

and

**Case Nos. 29-CA-27317
29-CA-27375
29-CA-27472**

**PRIVATE SANITATION UNION LOCAL 813,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO**

Kathy Drew-King, Esq., Brooklyn, New York
for the General Counsel

SUPPLEMENTAL DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. This supplemental proceeding was heard before me on September 23, 2009, in Brooklyn, New York. A compliance specification and notice of hearing was issued on October 23, 2008, based upon an unpublished order of the Board dated September 13, 2007 adopting, in the absence of exceptions, the administrative law judge's decision. The judge found that the named Respondents were alter egos and ordered that they offer discriminatees Joseph Angrisani and Jack Baiamonte reinstatement to their former, or substantially equivalent positions of employment and make them whole for the discrimination against them. The judge further ordered that Respondents give retroactive effect to the collective-bargaining agreement between Metro Demolition Contracting Corp., (Respondent Metro Demolition) and Private Sanitation Union Local 813, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union) effective July 1, 2005 through June 30, 2008 (the "2005 collective-bargaining agreement), making whole unit employees for any loss of earnings and other benefits because of Respondents' failure to apply the terms and conditions of the collective-bargaining agreement. Respondents were further ordered to make payments to any benefit funds established by the 2005 collective-bargaining agreement. On December 6, 2007, the United States Court of Appeals for the Second Circuit entered its judgment enforcing the Board's Order.

I. Background

The compliance specification herein issued on October 23, 2008. After requesting, and receiving, an extension of time to file an answer, on November 24, Respondents filed an answer denying the compliance specification without providing alternate calculations or the basis of their disagreement with the compliance specification's backpay and other calculations. By letter dated November 25, counsel for the General Counsel notified Respondents that the answer

failed to meet the specificity requirements of Section 102.56 of the Board's Rules and Regulations, and afforded the Respondents additional time to file an amended answer. No amended answer was filed.

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On December 15, 2008, the General Counsel moved for partial summary judgment (the Motion)¹ and 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 Respondent's opposition to the Motion, and the General Counsel filed a reply to Respondent's opposition.

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On July 16, 2009, the Board issued a Supplemental Decision and Order, granting in part and denying in part the General Counsel's Motion.² The issues denied and reserved for hearing before an administrative law judge included paragraph X of the compliance specification, which alleges that there is a 20 percent liquidated damages obligation under the 2005 collective-bargaining agreement for any delinquency in contributions to contractual benefit funds that are not received by the 15th of each month. In addition, the Board noted that its grant of summary judgment as to paragraphs VII, VIII and IX did not preclude the Respondents from contesting whether amounts to be contributed to contractual benefit funds for Angrisani and Baiamonte should be reduced by amounts contributed to these funds by interim employers. The Board also declined to include in its Order the amounts owed to the discriminatees and benefit funds as the General Counsel had not sought to include its summary paragraph setting forth such amounts in its Motion.

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At the hearing, the Respondents did not appear in person or by counsel.³ Counsel for the General Counsel moved to amend the compliance specification, which is the backpay computation for Jack Baiamonte, to include additional interim earnings that had not been previously accounted for.⁴ Neither Angrisani nor Baiamonte testified regarding their search for interim employment. At the hearing, counsel for the General Counsel made a closing statement in lieu of filing a brief in this matter.

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II. Facts

A. Liquidated Damages

In paragraph X of the compliance specification, the General Counsel alleges 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.'" The Respondents' answer denied this allegation and, referencing the 2005 collective-bargaining agreement, contended that the claimed liquidated damages "are discretionary in nature" and are "only imposed after arbitration." The Board found that this answer was sufficient to raise a litigable issue of fact. 354 NLRB no. 48, slip op. at 3.

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¹ The General Counsel did not seek summary judgment on the following paragraphs of the compliance specification: paragraphs IV (Interim Earnings), V (Net Backpay) and XI (Summary).

² The Motion was granted with respect to paragraphs I (Discriminatees), II (Backpay Period), III (Computation of Gross Backpay), VI (Backpay Due), VII (Contributions Owed to the Local 813 Health Insurance Fund); VIII (Contributions Owed to the Local 813 Severance Fund) and IX (Contributions Owed to the Local 813 Pension Fund) of the compliance specification.

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³ By letter dated September 21, 2009, Respondents' counsel of record withdrew from representing Respondents in this matter.

⁴ This amendment is reflected in a revised "Appendix B" introduced into the record at the hearing.

5 The 2005 collective-bargaining agreement provides for monthly employer contributions to three Union benefit funds: the Private Sanitation Union Local 813 Insurance and Trust Fund; the Local 813 and Local 1034 Severance and Retirement Trust Fund and the Pension Trust Fund Private Sanitation Union Local 813 (the Health, Severance and Pension funds, respectively and collectively, the Funds). There is a default provision which the General Counsel relies upon to support its claim that liquidated damages should be part of the make whole remedy here, which provides as follows:

10 In the event the Employer is in default of any contributions due the Funds, it shall be liable and shall pay to the respective Funds as to which there is a default, an additional 20% of the amount due as liquidated damages for the additional bookkeeping or processing expense required by the Funds. A default shall occur when payment is not
15 actually received by the 15th of each month.

20 The sole witness presented by the General Counsel was Minerva Rivera, assistant to the administrator for the Local 813 Funds. She has held this position for 27 years and, in that capacity, oversees the collection of monies due to the Funds.

25 Rivera testified that the 2005 collective-bargaining agreement contains a liquidated damages provision, as set forth in paragraph 23(d) (quoted above). Payment to the contractual benefit funds is due on the 10th of every month. In the event an employer has not remitted such payments by the 15th day of each month, liquidated damages are charged. Rivera testified that the fund administrator does not have discretion over the assessment of such liquidated damages. Nor is an arbitration award required to enable the Funds to impose liquidated damages.

30 Rivera further testified that the Fund has a collection committee comprised of a union trustee and an employer trustee. This collection committee is empowered to waive the imposition of liquidated damages. Rivera testified that no such vote had been held to waive the assessment of liquidated damages for Respondent Metro Demolition.

35 III. Analysis and Conclusions

A. Backpay Owed to Respondents' Employees

40 In the litigation of a compliance matter, the General Counsel bears the burden of establishing the gross backpay due to each discriminatee. *J.H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 230-231 (5th Cir.) cert. denied, 414 U.S. 822 (1973). Once the gross backpay amounts are established, the burden shifts to the employer to establish facts that would negate or mitigate its liability. *United States Can Co.*, 328 NLRB 334, 337 (1999), enfd. 254 F.3d 626 (7th Cir. 2001). Thus, in challenging the General Counsel's calculations, the burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due
45 for gross backpay. *Atlantic Limousine*, 328 NLRB 257, 258 (1999), enfd. 243 F.3d 711 (3d Cir. 2001); *Florida Tile Co.*, 310 NLRB 609 (1993), enfd. 19 F.3d 36 (11th Cir. 1994). Any uncertainty about how much backpay should be awarded a discriminatee should be resolved in his or her favor and against the respondent, whose violation caused the uncertainty. *Alaska Pulp Corp.*, 326 NLRB 522 (1998), enf. in part, 231 F.3d 1156 (9th Cir. 2000); *Intermountain Rural Electric Ass'n.*, 317 NLRB 588, 590-591 (1995), enfd. mem. 83 F.3d 432 (19th Cir. 1996).
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In the instant case, the Board has already found that the General Counsel has met its burden in establishing the amounts of gross backpay due to the discriminatees herein. With

regard to the unit as a whole, the Board’s grant of partial summary judgment is sufficient to meet the General Counsel’s initial burden. Thus, the only issues remaining for litigation involve the mitigation of Respondents’ obligation, an issue to which the Respondent bears the burden of proof and has presented no evidence.

As noted above, discriminatees Angrisani and Baiamonte did not testify herein regarding their search for work. In *St. George Warehouse*, 351 NLRB 961, 964 (2007), the Board altered the burden of production of evidence relating to the issue of mitigation. Where a respondent produces evidence that there were substantially equivalent jobs within a relevant geographic area during the backpay period, the burden will then shift to the General Counsel to produce evidence concerning the discriminatee’s job search. In this case, however, Respondents have not have not come forward with any evidence regarding the availability of substantially equivalent employment; thus, any further burden on the General Counsel, beyond the initial establishment of gross backpay, has not been triggered.⁵

Accordingly, I find that the General Counsel has established that the amounts set forth in paragraph XI (Summary) of the compliance specification, as amended, are due to the named discriminatees.

B. Liquidated Damages

As noted above, the General Counsel seeks, as part of the remedy herein, payment of contractually-mandated liquidated damages to the Union Funds. In its answer, Respondent asserted that such liquidated damages are discretionary and subject to an arbitrator’s award. The plain language of the relevant contract provision, taken together with the testimony adduced at the hearing is sufficient to establish that liquidated damages are traditionally assessed under such circumstances. The default provision, quoted above, is not subject to an arbitrator’s award and, in this instance, there is no evidence that the liquidated damages assessment has been waived. By its terms, article 23(d) provides that such liquidated damages are to compensate the funds for bookkeeping and processing expenses caused by an employer’s default.

In *Ryan Iron Works*, 345 NLRB 893, 894-895 (2005), the Board held that liquidated damages set forth in a compliance specification were remedial and that such payments were necessary to make the benefit fund whole. There, the fund’s rules and regulations specified liquidated damages in the amount of 20 percent. In determining whether the payment of liquidated damages was appropriate, the Board relied, in part, upon the following passage from *Merriweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979):

[T]he Board does not provide at the adjudicatory stage . . . for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance [stage] the question of whether Respondent must pay any additional amounts into the benefit funds to satisfy our “make whole” remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to the provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action . . .

⁵ As the compliance specification reflects, the General Counsel has taken into consideration the interim employment of discriminatees Angrisani and Baiamonte and their earnings for such employment. See *Florida Tile*, supra.

Here, the 2005 collective-bargaining agreement sets forth Respondents' obligation to pay liquidated damages in the event of a default, thus this document "show[s] an agreed upon method for determining the additional costs to the funds." The stated purpose of the liquidated damages provision is to reimburse the Funds for additional costs incurred by virtue of Respondents' default. Thus, "it is appropriate that the remedy . . . take that agreement into consideration." *Ryan Iron Works*, supra at 895 (quoting *Peerless Roofing Co., Ltd.*, 247 NLRB 500, 505 (1980), enfd. 641 F.2d 734 (9th Cir. 1981)).

Accordingly, I find that the liquidated damages sought by the compliance specification are an appropriate part of the make-whole remedy herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

It is hereby ordered that Respondents Metro Demolition Contracting Corp., Phantom Demolition Corp., Circle Interior Demolition Inc., World Class Demolition Corporation, alter egos, and their officers, agents, successors and assigns shall pay the individuals named below the indicated amounts of total gross backpay and other reimbursable sums, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment and minus tax withholdings as required by federal and state law.

Joseph Angrisani	\$ 32,550.76
Jack Baiamonte	\$ 63,513.18
Renato Cassara	\$ 2,272.00
Angel Castro	\$ 572.50
Dominick Derosa	\$ 478.00
Dennis Freeman	\$ 505.00
Stanislaw Jablonski	\$ 3,984.00
Andrew Kluzinski	\$ 8,255.00
Francesco Lopis	\$ 10,645.50
Wieslaw Paliwoda	\$ 4,611.50
Roberto Pilatasig	\$ 1,544.00
Michael Puccio	\$ 14,054.00
Joroslaw Sierzputowfki	\$ 168.00
Degnis Tello	\$ 58.00
Francisco Zhagnay	\$ 132.50

Respondents shall also pay to the below-described Union benefit funds the following sums, including liquidated damages:⁷

Private Sanitation Union Local 813 Insurance and Trust Fund: \$112, 991.40

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷ The compliance specification reflects that the contributions owed on behalf of Angrisani and Baiamonte to the Funds have been reduced by contributions paid by interim employers.

Local 813 and Local 1034 Severance and Retirement Trust Fund: \$ 27,872.00

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Pension Trust Fund Private Sanitation Union Local 813: \$ 44,160.80

Liquidated Damages [20 percent of Insurance, Severance
And Pension Liability]: \$ 37004.84

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Dated, Washington, D.C., November 12, 2009.

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Mindy E. Landow
Administrative Law Judge

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