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Random Acquisitions, LLC and Sherrie Cvetnich.
Case 07–CA–052473

January 28, 2013

SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On August 2, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging employees Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich on October 16, 2009. The Board ordered the Respondent to offer reinstatement to Sherrie Cvetnich, Teresa Burge, and Eric Cvetnich and to make them whole for any loss of earnings or other benefits they may have suffered as a result of the unlawful discharges. On March 16, 2012,² the United States Court of Appeals for the Sixth Circuit issued its judgment enforcing the Board's Decision and Order.

On June 29, based on noncompliance with the Board's order as enforced, the Regional Director for Region 7 issued a compliance specification and notice of hearing, alleging the amounts due and notifying the Respondent of its obligation to file a timely answer complying with the Board's Rules and Regulations. On July 18, the Respondent filed an answer to the compliance specification.

By a letter dated July 19, the Acting Regional Attorney for Region 7 notified the Respondent that its answer did not satisfy the specificity requirements set forth in Section 102.56(b) of the Board's Rules and Regulations and stated that failure to file an appropriate amended answer by July 26 would prompt a motion for summary and/or default judgment. In particular, the Acting Regional Attorney advised that the Respondent's answer provided only general denials "without further explanation or alternate calculations." Having received no response from the Respondent, counsel for the Acting General Counsel, by letter dated July 26, reiterated the request for an amended answer and extended the filing deadline to August 2. The Respondent did not file an amended answer.

On August 13, the Acting General Counsel moved for partial summary judgment. The Acting General Counsel contends that the Respondent's answer failed to comport

with the specificity requirements of Section 102.56(b) because it offered only a general denial of the gross backpay allegations set forth in paragraphs 6 and 7 of the compliance specification. On August 15, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Acting General Counsel's motion should not be granted. The Respondent did not file a response to the Notice to Show Cause.

On the entire record, the National Labor Relations Board makes the following

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

(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 *Random Acquisitions, LLC*, 357 NLRB No. 32 (2011).

² All dates are in 2012, unless otherwise noted.

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Paragraph 6(a) of the compliance specification alleges, inter alia, rates of pay, hours customarily worked, a backpay period of October 16, 2009 to about June 23, 2012, and a resulting gross backpay amount for discriminatee Sherrie Cvetnich. Paragraphs 6(b) and (c) include similar allegations for discriminatees Eric Cvetnich and Teresa Burge, respectively.³ Paragraph 7 alleges net backpay amounts due each discriminatee and the total amount of the Respondent's net backpay obligation for the period covered by the compliance specification.

The Respondent's answers to paragraphs 6⁴ and 7 state that it is "[w]ithout knowledge and therefore Respondent demands strict proof." In addition, the answers affirmatively allege that the Respondent has no employee positions with which to offer reinstatement, that it is without employees or income, and that its sole asset is a building located in Battle Creek, Michigan. The Acting General Counsel submits that he is entitled to partial summary judgment on the gross backpay allegations in paragraphs 6 and 7 because the Respondent's answers to those allegations do not comply with the specificity requirements of Section 102.56(b) of the Board's Rules.⁵

We agree with the Acting General Counsel and find that the Respondent's answers to paragraphs 6 and 7 fail to comport with Section 102.56(b). The answers to both paragraphs merely recite that the Respondent is "[w]ithout knowledge and therefore Respondent demands strict proof." Under Section 102.56(b), an assertion that a respondent is without knowledge of an allegation operates as a denial and must meet the specificity requirements of the rule. The rate of pay and customary hours worked by each discriminatee is information that is within the knowledge of the Respondent and available from its own records. See, e.g., *Mining Specialists, Inc.*, 330 NLRB 99, 101 (1999). The Respondent, however, offers no explanation for its asserted lack of knowledge regarding these matters. In addition, it takes no position on the gross backpay calculations in the compliance specification or the premises on which they are based, and fails to provide alternate figures or premises regard-

ing the amount of gross backpay owed to the discriminatees. See *SRC Painting, LLC*, 356 NLRB No. 74, slip op. at 2 (2011). Because the Respondent had knowledge of and access to the relevant data, its answers to paragraphs 6 and 7 are insufficient to meet the specificity requirements of Section 102.56(b). See *United States Service Industries*, 325 NLRB 485, 486 (1998). Notably, these deficiencies occurred despite numerous notifications from the Region advising the Respondent of its obligations under Section 102.56(b) and the need to further explain its answers.

In addition to its purported lack of knowledge regarding the gross backpay allegations in paragraphs 6 and 7 of the compliance specification, the Respondent affirmatively alleges that it has no employee positions with which to offer reinstatement, that it is a real estate holding company without employees or income, and that its sole asset is a building located in Battle Creek, Michigan. Although not entirely clear, the Respondent appears to contend (1) that the discriminatees are not entitled to reinstatement and backpay because the Respondent has no available employee positions, and (2) that the discriminatees are not entitled to backpay because the Respondent has no income with which to pay them. To the extent the Respondent makes such contentions, we find that neither is sufficient to warrant denying the Acting General Counsel's motion.

The Respondent's assertions that it has no employees or employee positions do not warrant denial of the Acting General Counsel's motion. As stated, paragraphs 6 and 7 of the compliance specification involve a backpay period of October 16, 2009 to about June 23, 2012. It is clear that, as of October 16, 2009, the date on which the Board found that the Respondent unlawfully discharged the discriminatees, the Respondent had employees and employee positions. The Respondent's answer supplies no date or dates when it purportedly eliminated those positions, nor does it explain the reason or reasons for such elimination. See *Demi's Leather Corp.*, 333 NLRB 89, 90 (2001). Even assuming the Respondent eliminated its employee positions at some point after the unfair labor practice hearing, it was nonetheless obligated to provide alternative gross backpay calculations for the period of time before the positions were eliminated. See id. The Respondent has failed to do so.

As to the Respondent's claim that it lacks income and assets (other than a building), the Respondent's financial resources have no bearing on the question of the calculation of gross backpay due to the discriminatees for the period of October 16, 2009 to June 23, 2012. What is relevant now is the amount due, not the Respondent's ability to pay. See *Diversified Enterprises*, 358 NLRB

³ Pars. 6(a), (b), and (c) also allege interim earnings and net backpay amounts for the discriminatees. The Acting General Counsel does not seek partial summary judgment as to these amounts.

⁴ The Respondent combines its answer to pars. 6(a) through (c) into a single paragraph.

⁵ Par. 7 does not allege gross backpay amounts. As stated above, it alleges net backpay amounts. Obviously, however, those net amounts are based on the gross backpay amounts alleged in par. 6. Thus, we construe the Acting General Counsel's motion with respect to par. 7 as seeking partial summary judgment on the net backpay amounts alleged in that paragraph only to the extent of precluding the Respondent from contesting the gross backpay component of those amounts.

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No. 48, slip op. at 2 (2012). Therefore, the Respondent's financial situation is not a basis for denying the Acting General Counsel's motion. See *E.L.C. Electric, Inc.*, 348 NLRB 301, 302 fn. 6 (2006).

Based on the foregoing, we find that the Respondent has failed to deny the gross backpay allegations in paragraphs 6 and 7 of the compliance specification in the manner prescribed by the Board's Rules and has not adequately explained its failure to do so. We therefore grant the Acting General Counsel's Motion for Partial Summary Judgment on the gross backpay allegations in those paragraphs of the compliance specification.⁶

ORDER

IT IS ORDERED that the Acting General Counsel's Motion for Partial Summary Judgment is granted as to the gross backpay allegations in paragraphs 6 and 7 of the compliance specification, and that those allegations are deemed to be true.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 7 for the purpose of arranging a hearing before an administrative law judge limited to taking evidence concerning the amounts of interim earnings and net backpay involved in paragraphs 6 and 7 and to the remaining paragraphs of the compliance specification as to which summary judgment is not granted.

Dated, Washington, D.C. January 28, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

⁶ We note that the effect of our ruling is that the Respondent is precluded, at any subsequent compliance hearing, from disputing any of the factors entering into the gross backpay computations, including the duration of the backpay period from October 16, 2009 to June 23, 2012.

(SEAL) NATIONAL LABOR RELATIONS BOARD