

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

SK USA CLEANERS, INC.

and

CASE 22-CA-26959

LOCAL 947, INTERNATIONAL
UNION OF JOURNEYMEN AND
ALLIED TRADES

Brian K. Monroe, Esq., for the General
Counsel.¹

Diane H. Lee, Esq., for the Respondent.²

SUPPLEMENTAL DECISION

WILLIAM N. CATES, Administrative Law Judge. This case involves a controversy over the amount of backpay due four (4) named individuals. As a result of the controversy, the Regional Director for Region 22 of the National Labor Relations Board (Board) issued a Compliance Specification and Notice of Hearing (Compliance Specification or Specification) on October 30, 2006, which stated SK USA Cleaners, Inc. (Company) owed backpay and other monetary relief totaling 79,330.90, plus interest, to the four (4) individuals in apportioned amounts.³

On March 22, 2006, in its Decision and Order in *SK USA Cleaners, Inc.*, 346 NLRB No. 63, the Board granted the Government's Motion for Default Judgment against the Company based on the absence of good cause being shown by the Company for its failure to file a timely Answer to the Government's Compliance Specification. Stated differently the Company failed to file an Answer to the Government's Specification and failed to respond to the Board's Notice to Show Cause why the Government's Motion should not be granted. In its Decision, the Board found the Company, by its President, Yi Jae Cho; about May 2005, interrogated and polled its employees about their union membership, activities and

¹ I shall refer to Counsel for General Counsel as Counsel for the Government and/or Government.

² I shall refer to Counsel for Respondent as Counsel for the Company and refer to the Respondent as the Company. I note that while Counsel for the Company filed an Answer to the Compliance Specification, she did not appear at either session of the trial nor did anyone appear for the Company.

³ The apportioned amounts are: Urbano Guzman, \$25,219; Margarita Hernandez, \$25,233; Emma Huesca, \$14,539; and, Guadalupe Vicky Huesca, \$14,279.

sympathies; about April, May, and June 2005, threatened its employees with termination if they spoke with anyone from Local 947, International Union of Journeymen and Allied Trades (Union); about June 2005, threatened its employees with a reduction in pay if the Union won the election; about June 15, 2005, threatened its employees with unspecified reprisals because of their support for the Union; and, about June 15, 2005, made deductions from the paychecks of employees Margarita Hernandez (Hernandez), Urbano Guzman (Guzman), Guadalupe Vicky Huesca (V. Huesca), and Emma Huesca (E. Huesca) because of their support for the Union. The Board found that on or about June 15, 2005, Hernandez, Guzman, V. Huesca, and E. Huesca engaged in a concerted refusal to work because the Company made the deductions, described above, from their paychecks. The Board found the Company, on about June 15, 2005, unlawfully terminated Hernandez, Guzman, V. Huesca, and E. Huesca because they engaged in the concerted refusal to work described above. The Board ordered the Company to offer Hernandez, Guzman, V. Huesca, and E. Huesca full reinstatement to their former jobs and to make them whole for any loss of earnings and other benefits that resulted from the Company's refusal to pay them their full wages and for their subsequent unlawful discharges, with interest. The Board's Order was enforced by the United States Court of Appeals for the Third Circuit on June 28, 2006, in an unpublished judgment in Case No. 06-2585.

The compliance trial was held in Newark, New Jersey, on January 10 and 18, 2007.

All parties⁴ were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. The Government timely filed a brief.

Upon the entire record, including my observation of the demeanor of the one witness called to testify and after considering Government Counsel's brief, I make the following findings of fact and conclusions of law:

I. Principles of Law and Rules and Regulations

In compliance proceedings, the Board attempts to place the discriminatees, as nearly as possible, in the same financial position they would have been in but for the illegal discrimination against them. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). A backpay award may involve some ambiguity and estimation and as such is only an approximation necessitated by the employer's wrong doing. *Cobb Mechanical Contractors*, 333 NLRB 1168 (2001). It is well-settled policy of the Board that a backpay formula which approximates what the discriminatees would have earned is acceptable if it is not unreasonable or arbitrary in the circumstances of the case. Any uncertainty in the evidence is to be resolved against a respondent as the wrongdoer. The Government bears the burden of establishing the amount of gross backpay. In meeting its burden, the Government need not find the exact amount due nor adopt a different and equally valid formula that may yield a somewhat different result. *McGuire Plumbing & Heating*, 341 NLRB 204, 205 (2004). The

⁴ The Company did not appear at either trial session. The second session was held in order to provide the Company an additional opportunity to call witnesses and present evidence.

respondent bears the burden of establishing any reductions in backpay such as interim earnings or willful loss of interim earnings. *Florida Tile Co.*, 310 NLRB 609 (1993).

Section 102.56 of the Board's Rules and Regulations addressing an answer to a compliance specification reads as follows:

(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.

The Company, in its answer to the Compliance Specification, admitted various allegations set forth therein. The Company admits the basic formulas set forth in the Specification and admits that gross backpay due the discriminatees is the amount of earnings they would have received but for the discrimination against them. The Company also admits that the backpay period for all discriminatees herein begins on June 15, 2005, the date the employees were discharged, and ends on September 15, 2006, the date the employees were offered reinstatement. The Company admits it has no payroll records showing hours worked or wages paid to the discriminatees prior to the backpay period. The Company, acknowledges in its Answer to the Compliance Specification that Company President Yi Jae Cho (Company President Cho) paid the discriminatees in cash for all but two of the work weeks prior to the backpay period and that its records related to payments for employment were destroyed in a sprinkler accident at the Company. In its Answer, the Company admits submitting to the Government wage documents for three of the discriminatees for pay periods ending June 15, and June 22, 2005.

Based on the Company's Answer to the Compliance Specification, it appears the Company disputes the total hours worked, as well as, the rates of pay and interim earnings for each of the discriminatees. Additionally, it appears the Company contests the interim expenses set forth in the Compliance Specification which expenses consist of unauthorized union dues deducted by the Company from the discriminatees' earnings.

Applying the above legal teachings along with the admissions and issues set forth in the Company's Answer, I shall examine the facts herein.

II. Findings of Facts, Analysis and Conclusions

The Board's Region 22 Compliance Officer Callette Sarro credibly testified, with supporting documentation, regarding the sources of the factual information she utilized in preparing the compliance specification and her rationale for the methods she utilized to compute the backpay amounts set forth in the specification. Compliance Officer Sarro's backpay formulation is the standard calendar quarterly computation provided for in *F.W. Woolworth*, 90 NLRB 289 (1950) with offsets for net interim earnings.

Compliance Officer Sarro testified that in producing backpay specifications, the Government requests that a respondent provide payroll records, time cards, W-2's and other documentation that would assist in preparing the backpay calculations. Sarro testified it was standard practice, as was done in the instant case, to also interview the discriminatees.

Sarro stated that, as Compliance Officer for Region 22 of the Board, she was specifically assigned the task of preparing the backpay specification herein. Sarro requested the Company provide her with payroll records, employee work logs and other documentation regarding the employees' hours of work and earnings. According to Sarro, no such records were ever produced. Compliance Officer Sarro testified that when she interviewed Company President Cho, he told her certain employment and payroll records were destroyed by a sprinkler accident at the Company. Compliance Officer Sarro testified the discriminatees were paid in cash for all times prior to the backpay period except for two weeks when three of them were paid by check. Sarro was provided and considered copies of the pay checks given to the three discriminatees for the pay periods ending June 15 and June 22, 2005. Compliance Officer Sarro credibly testified that when she interviewed Company President Cho he personally provided copies of three of the discriminatees applications for employment with the Company. The applications for employment reflected, as testified to by Sarro, the hourly rates of pay for those discriminatees as well as the days and hours per day that those three discriminatees were to work. Compliance Officer Sarro testified that in her interview with Company President Cho he told her he did not pay his employees overtime but rather paid them \$5.50 per hour instead of the minimum wage rate of \$5.15 per hour. Cho told Sarro the extra .35 cents per hour was paid in lieu of overtime pay. According to Sarro, Company President Cho told her he paid each of the discriminatees \$5.50 per hour. Additionally, Company President Cho's Board affidavit, received in evidence, reflects he paid the discriminatees at a \$5.50 hourly rate.

Compliance Officer Sarro testified she determined the gross back pay for Guzman to be \$25,219 plus interest. She determined Guzman's backpay based on the number of weeks in each of the backpay quarters he would have worked times the number of hours (60) he worked per week times his \$5.50 hourly wage rate. Guzman verified his weekly hours worked and his wage rate when interviewed by Sarro. Guzman's job application reflects he was hired to work 60 hours per week at \$5.50 per hour. Compliance Officer Sarro credibly testified she asked Company President Cho to provide information, if any existed, to suggest there was insufficient work for Guzman to perform during the backpay period. She said no such information was provided. Sarro learned in her interview with Guzman that he had no interim earnings during the backpay period but did have interim expenses of \$40 based on

Company President Cho's withholding that amount in unauthorized union dues deductions from Guzman's pay.

The Company presented no evidence to dispute the Government's computations related to Guzman. Accordingly, I conclude and find Guzman is entitled to \$25,219 in backpay plus interest.

Compliance Officer Sarro determined the gross back pay for Hernandez to be \$25,233 plus interest. Sarro arrived at Hernandez's gross back pay by utilizing the number of weeks Hernandez would have worked in each quarter during the back pay period times the number of hours (60) she would have worked per week times Hernandez's \$5.50 hourly wage rate. Sarro interviewed Hernandez and Company President Cho in preparing the calculations. Sarro testified Hernandez had no interim earnings but did have interim expenses of \$54 based on Company President Cho's withholding unauthorized union dues from Hernandez's wages. Compliance Officer Sarro sought, but the Company did not provide, any information regarding insufficient work for Hernandez during the backpay period and no information was provided that Hernandez was not available for work.

The Company presented no evidence disputing the Government's computations related to Hernandez. Accordingly, I conclude and find Hernandez is entitled to \$25,233 in backpay plus interest.

Compliance Officer Sarro testified she determined gross back pay for E. Huesca to be \$14,539 plus interest. Sarro arrived at E. Huesca's gross backpay by utilizing the number of work weeks for her in each quarter during the backpay period times the number of hours (50) she would have worked per work week times E. Huesca's \$5.50 hourly wage rate. Sarro testified Company President Cho provided the hourly rate for E. Huesca and she said she took the 50-hour work week from E. Huesca's work application that she filed with the Company. Compliance Officer Sarro testified that while interviewing E. Huesca, she learned E. Huesca had \$5,313.60 interim earnings. The interim earnings were offset against E. Huesca's gross backpay. E. Huesca had \$70 in interim expenses resulting from Company President Cho's withholding unauthorized union dues from E. Huesca's wages. Sarro requested, but the Company did not supply, any information to indicate E. Huesca was unavailable for work during the backpay period or that there was insufficient work for E. Huesca to perform during the backpay period.

The Company presented no evidence disputing the Government's computations related to E. Huesca. Accordingly, I conclude and find E. Huesca is entitled to \$14,539 in backpay plus interest.

Compliance Officer Sarro testified she determined gross backpay for V. Huesca to be \$14,279 plus interest. Sarro arrived at V. Huesca's backpay based on the number of weeks V. Huesca would have worked in each quarter during the back pay period times the hours (60) she would have worked each week times V. Huesca's hourly pay rate of \$5.50. Sarro determined V. Huesca's hourly rate from her interview with Company President Cho and determined the hours per week V. Huesca would have worked from her interview with V.

Huesca and as well as from notations on her employment application filed with the Company. It was determined in the interview with V. Huesca that she had interim earning of \$120 which amount was offset against her gross backpay. Sarro also learned V. Huesca had \$60 interim expenses that resulted from Company President Cho’s withholding unauthorized union dues from V. Huesca’s wages. Compliance Officer Sarro requested, but the Company did not provide, any information regarding V. Huesca being unavailable for work during the backpay period or that there was insufficient work for her to perform during the backpay period.

The Company presented no evidence to dispute the Government’s computations related to V. Huesca. Accordingly, I conclude and find V. Huesca is entitled to \$14,279 in backpay plus interest.

III. Conclusions

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁵

ORDER

The Company, SK USA Cleaners, Inc., its officers, agents, successors, and assigns, shall make payments to the individuals named below in the amounts set forth below, plus interest, calculated in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings as required by Federal and State laws.

Urbano Guzman	\$25,219.00
Margarita Hernandez	\$25,233.00
Emma Huesca	\$14,539.00
Guadalupe Vicky Huesca	\$14,279.00
Total	\$79,270.00 ⁶

Dated, Washington, D.C., February 26, 2007.

William N. Cates
Associate Chief Judge

⁵ 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.

⁶ The addition of the above amounts appears to equal \$79,270 instead of the \$79,330 set forth in the Specification total.