

**Diversified Enterprises, Inc. and Mid-Atlantic Regional Council of Carpenters West Virginia District, United Brotherhood of Carpenters and Joiners of America.** Case 09–CA–043110

June 11, 2012

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On August 13, 2010, the National Labor Relations Board issued a Decision and Order<sup>1</sup> that, among other things, ordered the Respondent, Diversified Enterprises, Inc., to make whole employee Robert Hornsby for the losses suffered by reason of the Respondent's discrimination against him. On July 13, 2011, the United States Court of Appeals for the Fourth Circuit entered its judgment enforcing the Board's Order.<sup>2</sup>

A controversy having arisen over the amount due Hornsby as reimbursement for the losses he suffered, the Regional Director for Region 9 issued a compliance specification and notice of hearing, setting forth the amount due under the terms of the Board's Order and notifying the Respondent that it was required to file an answer in conformity with the Board's Rules and Regulations.

On January 9, 2012,<sup>3</sup> the Respondent filed its answer to the compliance specification, denying the compliance specification's allegations and asserting as affirmative defenses that (a) Hornsby was not an eligible employee during the relevant period, and (b) the Respondent is no longer in business and has no assets to pay Hornsby.

On January 11, the Regional Office notified the Respondent that its answer was "not responsive to the Compliance Specification," as "the issues that you [raised] in the Answer were litigated in the underlying unfair labor practice case and were fully addressed before the Board." The letter further advised the Respondent that a Motion for Summary Judgment would be recommended, and that the Respondent had until January 18, 2012, to "clarify or submit a more adequate Answer in this case." The Respondent did not reply to the Region's letter.

On February 2, the Acting General Counsel filed with the Board a Motion for Summary Judgment and a Memorandum in Support, contending that the Respondent failed to file an adequate answer to the compliance specification. On February 3, 2012, 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 filed no response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulation specify, in relevant part, 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 to so 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.

Paragraphs 1 and 2 of the compliance specification allege that the amount owed to Hornsby, as reimbursement for the unlawful loss of use of a gas credit card and company-provided vehicle, is \$514.42, plus interest. The

<sup>1</sup> 355 NLRB 492 (2010), incorporating by reference 353 NLRB 1174 (2009).

<sup>2</sup> 438 Fed.Appx. 244.

<sup>3</sup> All dates are in 2012, unless otherwise noted.

Respondent's answer does not dispute the accuracy of the compliance specification's calculation, but rather asserts two affirmative defenses: (a) that Hornsby was a supervisor and not an employee, and (b) that the Respondent does not have any assets to pay Hornsby.

The Acting General Counsel contends that the Respondent's answer does not comply with the requirements of Section 102.56(b). First, the Acting General Counsel contends that the Respondent's supervisory assertion is *res judicata*, as that issue was resolved in the underlying proceeding. Next, the Acting General Counsel contends that the Respondent's ability to comply with the make-whole portion of the Order is immaterial at this stage of the proceeding. We agree with the Acting General Counsel's contentions.

The Respondent's first affirmative defense, that Hornsby was not an employee during the applicable period, is an attempt to relitigate a matter decided in the underlying unfair labor practice proceeding. Indeed, the administrative law judge specifically found that the Respondent failed to meet its burden of establishing that Hornsby was a supervisor within the meaning of Section 2(11) of the Act. The Board affirmed the judge's finding. *Diversified Enterprises*, 355 NLRB 492 (2010), incorporating by reference 353 NLRB 1174, 1180–1183 (2009). Therefore, as the matter was fully litigated and resolved in the underlying proceeding, the Respondent is barred from raising it again in the compliance stage of this proceeding. See, e.g., *Transport Service Co.*, 314 NLRB 458, 459 (1994); *Laborers Local 135 (Bechtel Corp.)*, 311 NLRB 617, 621 (1993), *enfd.* 148 LRRM 2640 (3d Cir. 1995); *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990), *enfd. mem.* 972 F.2d 1332 (3d Cir. 1992).

With regard to the Respondent's second affirmative defense, that it no longer is engaged in active business operations and does not own or maintain any assets, we agree with the Acting General Counsel that this contention is not a relevant consideration at the compliance

stage of the proceeding, "where the issue is the amount due and not whether [the Respondent is] able to pay." *Star Grocery Co.*, 245 NLRB 196, 197 (1979).<sup>4</sup>

Accordingly, as the Respondent's answer only raises issues that either were decided in the underlying unfair labor practice proceeding or were otherwise immaterial to the allegations in the compliance specification, we find the allegations in the compliance specification to be admitted as true and shall grant the Acting General Counsel's Motion for Summary Judgment. We conclude, therefore, that the amount due to Hornsby is as stated in the compliance specification, and we will order the Respondent to pay that amount to Hornsby.

#### ORDER

The National Labor Relations Board orders that the Respondent, Diversified Enterprises, Inc., Mount Hope, West Virginia, its officers, agents, successors, and assigns, shall make Robert Hornsby whole by paying him \$514.42, plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as set forth in *Kentucky River Medical Center*, 356 NLRB 6 (2010), *enfd. denied* on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), and minus tax withholdings required by Federal and State laws.

<sup>4</sup> As set forth above, the Region's January 11 letter to the Respondent stated that the Respondent's answer only raised issues that "were litigated in the underlying unfair labor practice case and were fully addressed before the Board." Although the Respondent's lack of assets defense was not an issue in the underlying proceeding, the Motion for Summary Judgment and accompanying memorandum clearly put the Respondent on notice of the Acting General Counsel's position concerning the lack of assets defense. Indeed, the Respondent had an opportunity to address this matter after the notice to show cause had issued. See, e.g., *MFP Fire Protection*, 337 NLRB 984, 985 (2002); *Mining Specialist, Inc.*, 330 NLRB 99, 101 fn. 12 (1999). It did not do so. Therefore, we find that, to the extent that the Region's letter inadvertently suggested the lack of assets defense had been previously litigated, the Respondent was not prejudiced by any such inadvertence.