

Ace Masonry, d/b/a Ace Unlimited and Bella Masonry, LLC, alter egos and Bella Furniture Solutions, Inc., and Henry Bellavigna, Lisa Bellavigna, Robert P. Bellavigna and Domenick Bellavigna and International Union of Bricklayers and Allied Craftworkers, Local No. 3

Ace Masonry, d/b/a Ace Unlimited and Bella Masonry, LLC, alter egos and Bella Furniture Solutions, Inc., and Henry Bellavigna, Lisa Bellavigna, Robert P. Bellavigna and Domenick Bellavigna and Laborers International Union, Local No. 785

Ace Masonry, d/b/a Ace Unlimited and Bella Masonry, LLC, alter egos and Bella Furniture Solutions, Inc., and Henry Bellavigna, Lisa Bellavigna, Robert P. Bellavigna and Domenick Bellavigna, and Northeast Regional Council of Carpenters Cases 03–CA–073540, 03–CA–074523, 03–CA–073549, 03–CA–074531, and 03–CA–079606

January 31, 2014

DECISION AND SUPPLEMENTAL ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

The Acting General Counsel seeks partial summary judgment in this compliance proceeding on the basis that the Respondents' answers to certain allegations in the compliance specification are inadequate under the Board's Rules and Regulations. For the reasons that follow, we grant the motion.

On January 23, 2013, the National Labor Relations Board issued an unpublished Order, adopting the administrative law judge's finding that Ace Masonry, d/b/a Ace Unlimited and its alter ego Bella Masonry, LLC (Respondents Ace and Bella) violated Section 8(a)(1) and (5) of the Act by failing and refusing, since September 21, 2011, to apply the terms of its collective-bargaining agreements with the International Union of Bricklayers and Allied Craftworkers, Local No. 3 (Bricklayers), Laborers International Union, Local No. 785 (Laborers), and Northeast Regional Council of Carpenters (Carpenters).¹ Among other things, the Order required the Respondents Ace and Bella to make whole all bargaining unit members of the Bricklayers, Laborers, and Carpenters for any loss of earnings and other benefits resulting from the Respondents' unfair labor practices. On March

¹ All dates are in 2013, unless otherwise specified.

26, the United States Court of Appeals for the Second Circuit entered a judgment enforcing the Board's Order.²

A controversy having arisen over, among other things, the amount of backpay and benefit fund contributions due under the Board's Order, the Acting Regional Director for Region 3 issued a compliance specification and notice of hearing on July 18. The specification sets forth the amount of backpay due the bargaining unit members of the Bricklayers, Laborers, and Carpenters, based on the hourly wage rate they should have earned under the terms of the respective collective-bargaining agreements. The specification further sets forth the amount of contributions due the funds of the respective labor organizations on behalf of those bargaining unit employees who performed, or would have performed, bargaining unit work during the backpay period. The specification also alleges the liability of the following additional Respondents to comply with the Board's Order: Henry Bellavigna, Lisa Bellavigna, Robert P. Bellavigna, Domenick Bellavigna, and Bella Furniture Solutions, Inc.³ On August 7, the Respondents filed an answer to the specification (August 7 answer), generally denying the compliance specification allegations of the specification.⁴ On August 12, the Regional Director issued an amendment to the specification and on September 3 the Respondents filed a second answer (September 3 answer), generally denying certain allegations set forth in the amendment.⁵

By letter dated September 5, counsel for the Acting General Counsel advised the Respondents that their answers failed to meet the requirements of Section 102.56(b) of the Board's Rules and Regulations. Specifically, the letter stated that the answers contained only general denials and failed to set forth the basis for the Respondents' disagreement with the calculations contained in the specification and failed to provide the Respondents' positions as to the amount of backpay due. The letter stated that the Acting General Counsel would seek summary judgment if the Respondents failed to file an amended answer correcting the deficiencies by September 12. The Respondents did not file an amended answer.

² *NLRB v. Ace Unlimited & Bella Masonry, LLC*, Docket No. 13-585 (2d Cir. 2013) (unreported).

³ Any references to "the Respondents" collectively include Ace Masonry, d/b/a Ace Unlimited and its alter ego Bella Masonry, LLC, Bella Furniture Solutions, Inc., Henry Bellavigna, Lisa Bellavigna, Robert P. Bellavigna, and Domenick Bellavigna.

⁴ In their answer, the Respondents admitted to pars. V(d), VI(b), VI(c), VI(d), and VI(g), which set forth allegations unrelated to the amounts of backpay and fund contributions due.

⁵ In their second answer the Respondents admitted, in part, to par. V(h) of the amendment.

On September 19, the Acting General Counsel moved for partial summary judgment, contending that the Respondents' general denials in their answers failed to satisfy the specificity requirements of the Board's Rules and Regulations. The Acting General Counsel seeks summary judgment with respect to certain specified paragraphs in the compliance specification concerning the elements of backpay and fund contributions due, and as to the matters that the Respondents admitted in their August 7 answer. On September 27, 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 Respondents filed an Opposition brief to the Acting General Counsel's motion on October 23.

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

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

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

(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 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 found so by the Board without the taking of evidence supporting such allegation, and the respondent shall be

precluded from introducing any evidence controverting the allegation.

We examine whether the Respondents' answers, as supplemented by their opposition brief, satisfy the requirements of Section 102.56(b).

1. Backpay period

(Par. I of specification)

Paragraph I of the specification alleges that the "backpay period begins on September 21, 2011, and ends when the Respondent Bella ceased doing business." In denying paragraph I, the Respondents argue that the specification lacks specificity because it does not define when Respondent Bella was considered to have "ceased doing business" and fails to identify a specific ending date.

The Respondents' denial of paragraph I is insufficient to comply with the requirements of Section 102.56(b) and (c) of the Board's Rules. If a respondent disagrees with the alleged backpay period, the respondent must "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." *Id.* The Board has found that this requirement is not satisfied when a respondent fails to support its backpay contentions with specific dates. See *Paolicelli*, 335 NLRB 881, 883 (2001) (partial summary judgment granted where the respondent argued that it was no longer in existence on the ending date of the backpay period but did not "support its denial with any specific alternative date of employment on which the backpay period should end").

Although the Respondents argue that there are several potential events that could be considered as the point at which Respondent Bella ceased doing business, including the last day that any work was performed by Bella, they have not proposed any of these dates as an alternative. Moreover, the Respondents do not assert that the periods during which work was still being performed by bargaining unit members, upon which the Acting General Counsel relied, occurred after Respondent Bella ceased doing business. Accordingly, we find unavailing the Respondents' contention that the allegation in paragraph I is "flawed" and, inasmuch as the relevant dates relating to Respondent Bella's business are within the Respondents' knowledge, their failure to provide a specific date as to when the backpay period ended is contrary to the specificity requirements of Section 102.56(b) and (c). Thus, we grant the General Counsel's Motion for Partial Summary Judgment as to the backpay period. See *United States Service Industries*, 325 NLRB 485, 486 (1998).

2. Backpay and benefit fund contributions (Pars. II and III of specification)

Paragraph II of the specification addresses the method in which backpay was calculated and the amount of backpay owed. It sets forth the following formula: “An appropriate measure of the gross backpay amount owing to Bricklayers, Laborers and Carpenters’ bargaining unit members is the hourly wage rate they should have earned under the terms of the respective collective-bargaining agreements in effect during the backpay period multiplied by the number of hours worked.” In addition, it sets forth the formula for calculating net backpay as “the gross backpay amount owed, less the amount employees were actually paid.” It provides, together with the worksheets appended to the specification, specific amounts for gross backpay, interim earnings, and net backpay for affected employees and broken down by calendar quarters.

Paragraph III of the specification alleges the appropriate measure of the amounts owing to the Bricklayers’, Laborers’, and Carpenters’ funds on behalf of the respective bargaining unit members, based on the number of hours they worked, or should have worked, multiplied by the applicable hourly contribution rate for each fund, plus liquidated damages and interest. In addition, it alleges, together with the worksheets appended to the specification, specific amounts owing to each fund.

In their August 7 answer, the Respondents offer general denials to paragraphs II and III, but do not provide a position as to the Acting General Counsel’s premises or computations, or furnish alternative figures. The Acting General Counsel contends that these denials do not comply with the requirements of Section 102.56(b) and (c), which expressly states that such general denials are insufficient. We agree.

Turning to the Respondents’ opposition to the Acting General Counsel’s motion, the Respondents specifically dispute the Acting General Counsel’s calculation of backpay owed Charles Morrow, an individual employed under the terms of the Carpenters’ collective-bargaining agreement. Unlike the other individuals named in the specification, whose backpay was calculated according to actual hours worked, the gross backpay calculations for Morrow are based on the “additional hours” that Morrow “would have worked” for Respondent Bella performing work covered by the Carpenters’ collective-bargaining agreement.⁶ Appendix 3 of the specification contains a list of Respondent Bella’s contracting projects and alleg-

⁶ There are no interim earnings offsetting the gross backpay calculation for Morrow and, accordingly, the Acting General Counsel seeks summary judgment on Morrow’s gross backpay.

es the number of hours that Morrow would have worked, based on a minimum standard equal to an 8-hour day at the beginning of a project and an 8-hour day at the end of a project. The Respondents argue that because the Acting General Counsel has not provided a basis for determining how many hours Morrow would have worked, the calculations are speculative.⁷

The Respondents have not provided a sufficient basis for their disagreement with the General Counsel’s computation of Morrow’s backpay. For instance, the Respondents do not specifically refute the premise that Respondent Bella performed work that was covered by the Carpenters’ collective-bargaining agreement during the backpay period. The Respondents have not provided alternative figures showing how many hours, if any, Morrow was eligible to perform such bargaining unit work. Similarly, the Respondents fail to offer any alternative formula or hourly wage rate for computing Morrow’s backpay.

In sum, the Respondents have failed to specifically deny or set forth the basis of their disagreement with the backpay period, or the amounts of backpay and fund contributions included in the compliance specification, and have failed to offer any alternative formula or figures for computing these amounts.

Because the Respondents’ assertions fail to satisfy Section 102.56(b), the corresponding allegations in the compliance specification are deemed admitted to be true under Section 102.56(c). Summary judgment is therefore warranted as to those paragraphs and appendices. For the foregoing reasons, the Acting General Counsel’s Motion for Partial Summary Judgment is granted.

ORDER

IT IS ORDERED that the Acting General Counsel’s Motion for Partial Summary Judgment is granted as to the following paragraphs and appendices of the compliance specification: paragraphs I, II(a)-(f), III(a), in part, III(b)-(c), V(d), VI(b)-(d) and (g); appendices 1(a)-(j), 2(a)-(d), 3, 4(a)-(j), 5, 6.⁸

⁷ The Respondents deny the Acting General Counsel’s computation of the contributions due the Carpenters’ fund on Morrow’s behalf on the same basis. The Acting General Counsel has not requested summary judgment as to the amounts alleged due the Carpenters’ fund on Morrow’s behalf.

⁸ Two paragraphs in the specification were inadvertently numbered II(d). We grant summary judgment as to both. The second par. II(d) and pars. II(e)-(f) each contain both gross and net backpay calculations for Charles Morrow. We grant summary judgment as to Charles Morrow’s gross backpay only. With regard to par. III(a), on which the General Counsel seeks summary judgment in part, we clarify that we are granting his motion as to the appropriate measure of the amount owing the respective funds of the Bricklayers and Laborers.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 3 for the purpose of arranging a hearing before an administrative law judge on the remaining allegations contained in the compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a decision

containing findings, conclusions, and recommendations based on all the record evidence. Following the service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall apply.