Ampersand Publishing, LLC d/b/a Santa Barbara News-Press *and* Graphic Communications Conference, International Brotherhood of Teamsters. Cases 31–CA–028589, 31–CA–028661, 31–CA–028667, 31–CA–028700, 31–CA–028733, 31–CA–028734, 31–CA–028738, 31–CA–028799, 31–CA–028889, 31–CA–028890, 31–CA–028944, 31–CA–029032, 31–CA–029076, 31–CA–029099, and 31–CA–029124

September 3, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On March 17, 2015, the National Labor Relations Board issued a Decision and Order[1] that, among other things, required Respondent Ampersand Publishing, LLC d/b/a Santa Barbara News-Press to make its unit employees whole for any losses suffered as a result of its discontinuation of merit increases for "performance years" 2006–2008, its change in the timing of employee-supervisor performance evaluation meetings, and its unilateral use of nonunit employees in violation of the National Labor Relations Act. The Board further ordered the Respondent to make employees Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of the unlawful employment actions taken against them. Finally, the Board ordered the Respondent to reimburse the Union for its costs and expenses incurred in collective bargaining from November 13, 2007, until the date on which the last negotiation session took place. On March 3, 2017, the United States Court of Appeals for the District of Columbia Circuit issued its judgment enforcing the Board's Order in full.[2]

A controversy having arisen over the amount of backpay due the unit employees and the amount of reimbursement due the Union, on July 13, 2018,[3] the Regional Director for Region 27[4] issued a compliance specification and notice of hearing setting forth the amounts of backpay and bargaining expenses due under the Board's Order, and notifying the Respondent of its obligation to file a timely answer complying with the Board's Rules and Regulations. On August 2, the Respondent filed an answer to the compliance specification with incorrect case numbers.[5] On August 6, the Respondent filed an errata correcting the case numbers.

By letter dated August 16, the General Counsel advised the Respondent that its answer was deficient under Section 102.56(b) of the Board's Rules and Regulations because significant portions of its answer lacked the requisite specificity. The letter further advised the Respondent that unless an answer that complied with the Board's rules was filed by August 23, a motion for summary judgment would be filed. At the Respondent's request, the deadline was extended to August 30. Respondent failed to file an amended answer by August 30. On November 9, the General Counsel filed with the Board a Motion for Partial Summary Judgment, arguing that the Respondent's answer failed to meet the specificity requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations. On January 31, 2019, 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 February 14, 2019, the Respondent filed an Opposition to the General Counsel's Motion for Partial Summary Judgment, and on February 21, 2019, the General Counsel filed a reply.[6]

On February 25, 2019, the Respondent filed an amended answer to the compliance specification.[7] In determining whether the Respondent's denial of the allegations in the compliance specification is sufficient to avoid partial summary judgment, we shall consider both the answer and the amended answer.

[1] 362 NLRB 252 (2015), enfd. 2017 WL 1314946 (D.C. Cir. Mar. 3, 2017).

[2] 2017 WL 1314946.

[3] All dates are 2018 unless otherwise indicated.

[4] The General Counsel transferred these cases from Region 31 to Region 27 on March 22, 2017.

[5] The Respondent styled its document "Respondent Ampersand Publishing, LLC dba Santa Barbara News-Press' Response to the Compliance Specification." We will refer to this document as the Respondent's answer, in keeping with the provisions of Sec. 102.56(b).

[6] The Charging Party Union also filed a statement in support of the General Counsel's motion on February 14, 2019.

[7] The Respondent styled its document "Respondent Ampersand Publishing, LLC dba Santa Barbara News-Press' Amended Response to the Compliance Specification." We will refer to this document as the Respondent's amended answer.

On February 27, 2019, the General Counsel filed a motion to strike the amended answer as untimely, and on February 28, 2019, the Respondent filed a response. The General Counsel's motion to strike the Respondent's amended answer is denied. No hearing has been held in this compliance proceeding, and "[i]t is well established . . . that a respondent in a compliance proceeding may properly cure defects in its answer before a hearing by an amended answer or a response to a Notice to Show Cause." *Daufuskie Island Club & Resort*, 341 NLRB 595, 596 (2004); see also *Consolidated Delivery & Logistics, Inc.*, 344 NLRB 544, 545 (2005). In the alternative, the General Counsel has requested leave to file a reply to the amended answer. We deny this request as moot in light of this decision.

Ruling on Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations state in relevant part as follows:

> (b) *Form and contents of answer*. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the respondent must so state, such statement operating as a denial. Denials must 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 must specify so much of it as is true and 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 will 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 must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.
>
> (c) *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 to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

The compliance specification at issue here sets forth a formula for calculating the gross backpay due to unit employees as a result of the Respondent's unlawful cessation of merit pay increases and the use of nonunit employees to perform bargaining-unit work. The compliance specification also sets forth a formula for calculating the gross backpay due to discriminatees Dennis Moran and Richard Mineards. Finally, the compliance specification sets forth the costs and bargaining expenses owed to the Union.

In its amended answer to the compliance specification, the Respondent admits the allegations contained in paragraphs I, II(a), III(k), V(d), V(l), V(m), V(q), and VII. Except for paragraph V(q), the General Counsel moves for summary judgment on these paragraphs based on the Respondent's unqualified admissions. We grant the General Counsel's motion as to each of these paragraphs, including paragraph V(q).[8]

In contesting the remainder of the specification, the Respondent attempts to relitigate its unfair labor practice liability. It asserts that it owes no backpay, interest, or payment to compensate for the adverse tax consequences of a lump-sum backpay award because the underlying acts previously found unlawful were, in fact, lawful. "It is well settled that a respondent may not relitigate matters in the compliance stage that were decided in an underlying unfair labor practice proceeding." *M. D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49, slip op. at 2 (2015) (citing *Convergence Communications*, *Inc.*, 342 NLRB 918, 919 (2004)), enfd. 728 Fed. Appx. 2 (D.C. Cir. 2017). In addition to its general denials that it acted unlawfully, the Respondent contends that the General Counsel's calculations are incorrect because merit increases were discretionary, and pay for most employees has decreased in the intervening time period. The failure to continue merit increases was found by the Board to be unlawful, and the D.C. Circuit enforced the Board's Order. *Santa Barbara News-Press*, 362 NLRB at 253. To the extent the Respondent's contention that merit increases were discretionary constitutes an attempt to relitigate the merits of that finding, it is impermissible. See *M. D. Miller Trucking & Topsoil*, supra; *New York Party Shuttle, LLC d/b/a Onboard Tours, Washington D.C. Party Shuttle LLC*, 365 NLRB No. 147, slip op. at 3 (2017). To the extent the Respondent challenges the accuracy of alleged merit-increase backpay amounts because some employees may have qualified for merit increases and others may not have, its amended answer fails to meet the requirements of Section 102.56(b), as follows.

Section 102.56(b) expressly states that "a general denial will not suffice" for "all matters within the knowledge of the Respondent," specifically including "the computation of gross backpay." Instead, "if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures." The Respondent fails to set forth its position in detail or to furnish supporting figures to counter those in the compliance specification. See *Flaum Appetizing*

[8] Par. V(q) alleges that the "Respondent provided four (4) weeks of paid vacation each year." Although the General Counsel failed to seek summary judgment on this paragraph of the compliance specification, the Respondent in its amended answer admits the allegation. We grant summary judgment on par. V(q) based on this unqualified admission.

Corp., 357 NLRB 2006, 2007 (2011) (stating that a general denial is insufficient if it "fails to offer any alternative formula for computing backpay, fails to furnish appropriate supporting figures for amounts owed, or fails adequately to explain any failure to do so"). The Respondent's generalized disagreement with the General Counsel's backpay calculations is therefore insufficient under Section 102.56(b).[9] Similarly, we reject the Respondent's argument that the compliance specification lacks evidence demonstrating that certain employees were eligible for merit pay increases and that nonunit employees performed bargaining unit work. As to the former, records such as performance evaluations that would be relevant to the merit raises to which bargaining-unit employees were entitled are within the control of the Respondent. Records demonstrating the amount of work performed by nonunit employees are also within the control of the Respondent. Thus, its assertions that the General Counsel's backpay calculations are speculative and therefore deficient do not meet the standards required by Section 102.56(b) ("As to all matters within the knowledge of the Respondent, . . . a general denial will not suffice.").[10] Finally, and for the same reason, we grant summary judgment on paragraph VI of the compliance specification, in which the General Counsel alleges that the Respondent has not made payments to satisfy its obligations under the terms of the Board Order. Although the Respondent denies this paragraph, it does not provide evidence of payments that it has made, a matter clearly within the Respondent's knowledge.

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to the following paragraphs of the compliance specification: Sections I, II(a), III(a)-(p), IV(a)-(r), V(a)-(i), (l)-(m), (q), VI, VII, and VIII and the portions of the appendices incorporated therein.[11]

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 27 for the purpose of arranging a hearing before an administrative law judge limited to taking evidence concerning the paragraphs of the compliance specification as to which summary judgment was not granted.

Dated, Washington, D.C. September 3, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

[9] The Respondent argues that it cannot adequately contest the interest calculation because it does not yet know what the interest will be. The Board has long ordered interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent does not take issue with this precedent. Furthermore, the General Counsel does not seek summary judgment regarding the specific amounts of interest due, but requests only that the Respondent be precluded from litigating the appropriate formula for calculating interest. We grant the General Counsel's motion for summary judgment regarding the interest formula, but the Respondent may dispute the accuracy of the General Counsel's interest calculations using that formula.

[10] We deny the General Counsel's request to strike pars. 17 and 18 of the Respondent's amended answer, but we reject the arguments presented in those paragraphs on the merits. In these paragraphs, the Respondent argues first that employees may not have been eligible to receive merit increases. We have rejected that argument as an impermissible attempt to relitigate an issue previously decided in the unfair labor practice proceeding and as insufficient under Sec. 102.56(b). Second, the Respondent argues that the Board's Order limits the remedy for the Respondent's failure to pay merit increases to the years specifically identified in the Order. This is correct, but the compliance specification does not transgress this limit. As relevant here, the Board ordered the Respondent to "[m]ake unit employees whole for any losses they may have suffered as a result of the discontinuation of the program of merit pay raises for the performance years 2006–2008." *Santa Barbara News-Press*, 362 NLRB at 254. Based on this language, the Respondent argues that that no backpay is owed after 2009, the year in which the 2008 merit increases would have been awarded. This argument conflates two distinct issues: the years for which the Board found merit increases due, and the backpay period. In accordance with the Board's Order, the compliance specification properly reflects merit increases for eligible employees for 2007–2009 (corresponding to "performance years" 2006–2008). In calculating backpay, however, the compliance specification *incorporates* these increases in the backpay amounts it calculates for the years after 2009. Contrary to the Respondent, the compliance specification does not award merit increases for years after 2009, and we reject the Respondent's arguments in pars. 17 and 18 of its amended answer.

[11] Specifically, summary judgment is warranted as to Appendices B, C, D, and E of the compliance specification subject to the limitations described below.

The General Counsel does not move for summary judgment as to matters outside the Respondent's knowledge, specifically (i) the Union's bargaining costs and expenses, alleged in pars. II(b)-(d), (ii) the net amount of backpay owed to discriminatees Moran and Mineards, alleged in pars. V(j)-(k), (n)-(p), and (r)-(w), and (iii) the portions of Appendices D-1 and D-2 that affect net backpay, including interim earnings and interim medical expenses. The Respondent will have the opportunity to litigate the Union's bargaining costs and expenses and matters affecting the net backpay of Moran and Mineards on remand.

As noted above, the Respondent did not specifically contest the formula for interest and will be precluded from doing so on remand. Similarly, while the General Counsel does not seek summary judgment for a specific amount owed for the adverse tax consequences for Moran and Mineards of receiving a lump sum backpay award, the Board's Order clearly requires that such adverse tax consequences must be defrayed. *Santa Barbara Press-News*, 362 NLRB at 254. On remand, the Respondent is precluded from arguing to the contrary.

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD