

**No. 08-1462**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**  
**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**JACKSON HOSPITAL CORPORATION d/b/a  
KENTUCKY RIVER MEDICAL CENTER**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## TABLE OF CONTENTS

	<b>Page(s)</b>
Jurisdictional statement.....	1
Statement regarding oral argument.....	2
Statement of the issue .....	3
Statement of the case.....	3
I. The unfair labor practice proceeding.....	3
II. The compliance proceeding .....	5
III. The Board’s supplemental decision and order.....	6
Summary of argument.....	7
Argument.....	10
The Board acted within its broad remedial discretion in determining the amount of backpay owed to the four discriminatees for the loss of earnings they suffered as a result of being unlawfully discharged by the hospital for engaging in protected activities .....	10
A. Standard of review .....	10
B. A backpay award is a make-whole remedy designed to restore the economic status quo that a discriminatee would have obtained but for the employer’s unfair labor practice .....	12
C. The Board reasonably determined the amount of backpay that the hospital owes the discriminatees based on their interim earnings .....	14
1. The standard for determining whether there has been a willful loss of earnings.....	15

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
2. The Board reasonably determined that the hospital failed to prove that Eileene Jewell willfully incurred a loss of earnings .....	17
3. The Board reasonably determined that the hospital failed to prove that Debra Miller willfully incurred a loss of earnings and that she had no interim earnings from her trucking company .....	21
D. The Board reasonably found that Lois Noble was not given a valid, unconditional offer of reinstatement in 2002 .....	26
E. The Board reasonably determined that the hospital was precluded from litigating Maxine Ritchie’s supervisory status in the backpay hearing 6 years after she was unlawfully discharged .....	28
F. The judge did not abuse her discretion in ruling that the hospital was not entitled to financial information, unrelated to earnings, that it had subpoenaed.....	32
Conclusion .....	36

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<i>Adair Standish Corp. v. NLRB</i> , 912 F.2d 854 (6th Cir. 1990) .....	29
<i>Birch Run Welding &amp; Fabricating, Inc.</i> , 286 NLRB 1316 (1987), <i>enforced</i> , 860 F.2d 1080 (6th Cir. 1988) .....	24
<i>Consolidated Freightways v. NLRB</i> , 892 F.2d 1052 (D.C. Cir. 1989).....	29
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	10
<i>Golden State Bottling Co. v. NLRB</i> , 414 U.S. 168 (1973).....	13, 31
<i>Jackson Hospital Corp.</i> , 340 NLRB 536 (2003), <i>enforced</i> , No. 04-1019 (D.C. 2005).....	3, 4, 5
<i>Joseph T. Ryerson &amp; Son, Inc. v. NLRB</i> , 216 F.3d 1146 (D.C. Cir. 2000).....	33
<i>Kawasaki Motors Manufacturing Corp. v. NLRB</i> , 850 F.2d 524 (9th Cir. 1988) .....	15
<i>Kentucky General Inc. v. NLRB</i> , 177 F.3d 430 (6th Cir. 1999) .....	12, 28
<i>Kentucky River Community Care, Inc. v. NLRB</i> , 193 F.3d 444 (6th Cir. 1999) .....	33
<i>Lundy Packing Co. v. NLRB</i> , 856 F.2d 627 (4th Cir. 1988) .....	20

**TABLE OF AUTHORITIES**

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>Marlene Indus. Corp. v. NLRB</i> , 440 F.2d 673 (6th Cir. 1971) .....	11
<i>Mastro Plastics Corp.</i> , 136 NLRB 1342 (1962) .....	17
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983) .....	4
<i>Midwestern Personnel Services</i> , 346 NLRB 624 <i>enforced</i> , 508 F.3d 418 (7th Cir. 2007) .....	24, 27
<i>Morvay v. Maghielse Tool &amp; Die Co.</i> , 708 F.2d (6th Cir. 1983) .....	27
<i>NLRB v. Akron Paint &amp; Varnish Co.</i> , 985 F.2d 852 (6th Cir. 1992) .....	10, 14
<i>NLRB v. Brown &amp; Root</i> , 311 F.2d 447 (8th Cir. 1963) .....	14
<i>NLRB v. Gissel Packing Co., Inc.</i> , 395 U.S. 575 (1969) .....	10
<i>NLRB v. Health Care &amp; Retirement Corp.</i> , 511 U.S. 71 (1994) .....	32
<i>NLRB v. Interstate Builders, Inc.</i> , 351 F.3d 1020 (10th Cir. 2003) .....	33
<i>NLRB v. J.H. Rutter-Rex Manufacturing Co.</i> , 396 U.S. 258 (1969) .....	10, 12, 13

## TABLE OF AUTHORITIES

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>NLRB v. Joyce Western Corp.</i> , 873 F.2d 126 (6th Cir. 1989) .....	10, 11
<i>NLRB v. Kentucky River Community Care</i> , 532 U.S. 706 (2001).....	31, 32
<i>NLRB v. Mastro Plastics Corp.</i> , 354 F.2d 170 (2d Cir. 1965) .....	13
<i>NLRB v. Overseas Motors</i> , 818 F.2d 517 (6th Cir. 1987) .....	35
<i>NLRB v. Reynolds</i> , 399 F.2d 668 (6th Cir. 1968) .....	13, 14, 15
<i>NLRB v. Robert Haws Co.</i> , 403 F.2d 979 (6th Cir. 1968) .....	13
<i>NLRB v. Ryder System, Inc.</i> , 983 F.2d 705 (6th Cir. 1993) .....	10, 12, 13, 15, 23
<i>NLRB v. S.E. Nichols of Ohio, Inc.</i> , 704 F.2d 921 (6th Cir. 1983) .....	11
<i>NLRB v. Seligman &amp; Associate, Inc.</i> , 808 F.2d 1155 (6th Cir. 1986) .....	27
<i>NLRB v. Seven-Up Bottling Co.</i> , 344 U.S. 344 (1953).....	10, 11
<i>NLRB v. V&amp;S Schuler Engineering</i> , 309 F.3d 362 (6th Cir. 2002) .....	11
<i>NLRB v. Velocity Exp., Inc.</i> , 434 F.3d 1198 (D.C. Cir. 2006).....	16

## TABLE OF AUTHORITIES

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>NLRB v. Westin Hotel</i> , 758 F.2d 1126 (6th Cir. 1985) .....	12, 13, 16, 17, 20
<i>Natter Manufacturing Corp. v. NLRB</i> , 580 F.2d 948 (9th Cir. 1978) .....	34
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB No. 37 (2006) .....	9, 28, 29, 31, 32
<i>Parts Depot, Inc.</i> , 348 NLRB No. 9 (2006), <i>enforced</i> , 260 Fed. Appx. 607 (4th Cir. 2008) .....	34
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	12, 13, 15, 16, 28
<i>SNE Enterprises, Inc.</i> , 344 NLRB 673 (2005) .....	29
<i>Saginaw Aggregates, Inc.</i> , 198 NLRB 598 (1972), <i>enforced</i> , 482 F.2d 946 (6th Cir. 1973) .....	17
<i>St. George Warehouse</i> , 351 NLRB No. 42 (2007) .....	23
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	12
<i>T. Steele Construction Inc.</i> , 348 NLRB No. 79 (2006) .....	31
<i>United Supermarkets, Inc.</i> , 287 NLRB 394 (1987), <i>enforced</i> , 862 F.2d 549 (5th Cir. 1989) .....	20

**TABLE OF AUTHORITIES**

<b>Cases --cont'd:</b>	<b>Page(s)</b>
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	11
<i>Van Dorn Plastic Machine Co. v. NLRB</i> , 881 F.2d 302 (6th Cir. 1989) .....	12
<i>Virginia Electric &amp; Power Co., v. NLRB</i> , 319 U.S. 533 (1943).....	11, 16
<i>Yesterday's Children, Inc.</i> , 321 NLRB 766 (1996), <i>enforced in relevant part</i> , 115 F.3d 36 (1st Cir. 1997) .....	32

<b>STATUTES</b>	<b>Page(s)</b>
-----------------	----------------

National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2(11) (29 U.S.C. § 152(11)).....	6, 28
Section 7 (29 U.S.C. § 157) .....	4
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 4
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3, 4
Section 10(a) (29 U.S.C. § 160(a)) .....	1
Section 10(c) (29 U.S.C. § 160(c)) .....	12
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 11

**Rules and Regulations**

29 C.F.R. § 102.53.....	14
29 C.F.R. § 102.56(e).....	31

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board order issued against Jackson Hospital Corporation d/b/a Kentucky River Medical Center (“the Hospital”). The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Supplemental Decision and Order, which it now

seeks to enforce, issued on February 29, 2008, and is reported at 352 NLRB No. 33. (D&O 1-17, A 53-77.)<sup>1</sup> The Order is final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices took place in Jackson, Kentucky. The Board's filing of its application for enforcement on April 8, 2008, was timely because the Act imposes no time limit on the institution of enforcement proceedings.

#### **STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

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<sup>1</sup> Record references in this proof brief are to the original record, as follows: "D&O" refers to the Board's Supplemental Decision and Order. "Tr" refers to the transcript of the backpay hearing. "GCX" and "RX" refer to hearing exhibits introduced by the General Counsel and the Hospital; "JX" refers to joint exhibits. "A" references are to the deferred joint Appendix, which will be filed by the Hospital on September 18, 2008. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## STATEMENT OF THE ISSUE

Whether the Board acted within its broad remedial discretion in determining the amount of backpay owed to four discriminatees for the loss of earnings they suffered as a result of being unlawfully discharged by the Hospital.

## STATEMENT OF THE CASE

The Board previously found that the Hospital discriminatorily discharged eight of its employees, on the basis of their union support and participation in a lawful strike, in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). *See Jackson Hosp. Corp.*, 340 NLRB 536 (2003), *enforced*, No. 04-1019 (D.C. Cir. 2005) (per curiam). In its Supplemental Decision and Order, which it now seeks to enforce, the Board ordered the Hospital to pay specific amounts of backpay to four of the eight discriminatees. The procedural history of the case is set forth below; facts relevant to the backpay awards are discussed in the Argument.

### I. THE UNFAIR LABOR PRACTICE PROCEEDING

In 1998, the United Steelworkers (“the Union”) was certified as the exclusive collective-bargaining representative of a unit of the Hospital’s employees, including registered nurses and technical employees. *Jackson Hosp.*, 340 NLRB at 539. Prior to a contract being reached between the

Union and the Hospital, a second election was held following the filing of a decertification petition. *Id.* The Union won the second election on March 30, 2000 and was recertified on August 2. *Id.* Prior to the recertification, the employees engaged in a strike from July 8 to August 15. *Id.*

Acting on charges filed by the Union and one employee, the Board's General Counsel issued a complaint alleging that the Hospital had engaged in a variety of unfair labor practices, both before and after the strike. *Id.* at 538. After holding a hearing, Administrative Law Judge David L. Evans issued a decision finding, among numerous other unfair labor practices, that the Hospital had discriminatorily discharged eight employees on the basis of their union support and participation in the strike in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).<sup>2</sup> *Id.* at 606.

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<sup>2</sup> Section 8(a)(3) makes it unlawful for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act].” Section 7 of the Act (29 U.S.C. § 157) grants employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” A Section 8(a)(1) violation is “derivative” of a violation of Section 8(a)(3). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

On September 30, 2003, the Board (Chairman Battista and Members Schaumber and Walsh) issued a decision affirming the judge's findings, and adopting his recommended order that, among other remedies, required the Hospital to offer reinstatement and pay backpay to the eight discriminatees whom it had unlawfully discharged. *Id.* at 536. On June 3, 2005, that order was enforced by the United States Court of Appeals for the District of Columbia Circuit. *See Jackson Hosp. Corp. v. NLRB*, No. 04-1019 (D.C. Cir. 2005).

## II. THE COMPLIANCE PROCEEDING

After enforcement of the Board's order requiring the Hospital to reinstate the discriminatees and to make them whole, a controversy arose concerning the amount of backpay that the Hospital must pay to the discriminatees. As a result, on August 18, 2006, the Board's Regional Director issued a notice of hearing before Administrative Law Judge Margaret G. Brakebusch and a compliance specification detailing the gross amounts of backpay owed to four of the discriminatees.<sup>3</sup> (D&O 2, A 55; GCX 1(c), A 7-14.)

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<sup>3</sup> The compliance specification included backpay for only four of the eight discriminatees because, at the time of the hearing, the Hospital had failed to reinstate three of the discriminatees and one discriminatee was not owed any backpay because her interim earnings exceeded her gross backpay. (D&O 2 n.2, A 55, 75.) The Regional Director has reserved the right to issue a

The Hospital submitted an Answer to the compliance specification. Subsequently, the Hospital made two motions to amend its answer. (D&O 4-5, A58-59.) The first motion to amend was made at the hearing, after one of the discriminatees had testified, to assert a “lack of knowledge” as to gross backpay owed to the four discriminatees. (D&O 4, A 58.) The second motion to amend the answer was made during a hiatus in the hearing and asserted that discriminatee Maxine Ritchie was a supervisor within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)). (D&O 4, A 58.) The judge denied both motions. (D&O 4-5, A 58-59.)

Following the hearing, the judge issued a supplemental decision in which she made findings of fact and credibility determinations on the issue of the discriminatees’ job searches, and ordered the Hospital to pay specific backpay awards to each of the four discriminatees. (D&O 7-17, A 62-75.)

### **III. THE BOARD’S SUPPLEMENTAL DECISION AND ORDER**

On February 28, 2008, the Board (Members Liebman and Schaumber) issued its Supplemental Decision and Order affirming the administrative law judge’s findings, and adopting her proposed order, with two modifications to correct for arithmetical errors and an inadvertent failure to consider the

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compliance specification to determine the amount owed to the remaining discriminatees once they have been offered reinstatement and the backpay is tolled. (D&O 2, A 55.)

closure of one of discriminatee Debra Miller's interim employers. (D&O 1, A 54.) The Board ordered the Hospital to pay the following amounts of backpay, plus interest, to the discriminatees:

Eileene Jewell	\$ 41,592
Debra Miller	39,854
Lois Noble	40,268
Maxine Ritchie	88,524
<hr/>	
Total Backpay:	\$ 210,238

(D&O 1, 17, A 53, 75.)

### **SUMMARY OF ARGUMENT**

The Hospital owes backpay to four discriminatees whom it unlawfully terminated for their union support during a lawful strike. The Hospital has failed to meet its burden of proof showing any reasons that it should be relieved of its obligation to make whole these discriminatees for its wrongdoing.

Eileene Jewell was a 60 year old surgical technician living in rural Kentucky, with no other hospital with a surgical unit within commuting distance from her home, when she was unlawfully discharged. She sought what work was available in her community and was employed as a pharmacy technician until faced with the choice of traveling 140 miles per

day to a different store to keep her \$7/hour part-time job. The Hospital did not prove that Jewell willfully lost any earnings during her backpay period.

Debra Miller was a phlebotomist when she was unlawfully discharged. During her backpay period, she found work as a phlebotomist with two different employers. At one point, Miller quit a job at a blood bank and cared for her sick daughter; because she left the job for personal reasons, her backpay was reduced by the earnings she would have received at that job, until a couple of years later when the blood bank shut down. The Hospital has not proven any reason why Miller's backpay should continue to be reduced by the amount she would have earned at the defunct facility where neither she, nor anyone, could have still been working. The Hospital also has failed to show why Miller's backpay should be reduced by earnings and loans from a trucking company that she owned, when she was receiving those earnings for the same amount of work prior to her unlawful termination. Miller's need to supplement her income from her company's assets should not be a windfall to the employer who unlawfully discharged her.

Lois Noble, a phlebotomist, was given a temporary offer of reinstatement to her position in 2002. The written offer made clear that, if the Hospital prevailed in litigation about her discharge, she would be fired

again. A temporary offer of reinstatement does not reduce backpay liability, only a specific, unequivocal, and unconditional offer will do so. The Hospital did not make a valid, unconditional offer to Noble in 2002.

Maxine Ritchie was an intensive care nurse before she was unlawfully discharged. The Hospital did not contend that Ritchie had supervisory duties until midway through the backpay hearing, when it filed a motion to amend its Answer and assert, as an affirmative defense, that Ritchie was a supervisor without the protection of the Act. The Board reasonably determined that retroactive application of its recent decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), upon which the Hospital relied, would work a manifest injustice. Furthermore, the Board followed its own precedent in rejecting the motion as untimely.

Finally, the judge did not abuse her discretion in limiting the Hospital's subpoena of personal financial records from the discriminatees. The Hospital, while allowed to subpoena all information related to job searches and earnings of the discriminatees, was not allowed information about bank accounts, mortgages, and other financial obligations that did not bear on earnings and served only as a "fishing expedition" into the discriminatees' and their families' financial positions.

## ARGUMENT

### **THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNT OF BACKPAY OWED TO THE FOUR DISCRIMINATEES FOR THE LOSS OF EARNINGS THEY SUFFERED AS A RESULT OF BEING UNLAWFULLY DISCHARGED BY THE HOSPITAL FOR ENGAGING IN PROTECTED ACTIVITIES**

#### **A. Standard of Review**

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord NLRB v. Joyce Western Corp.*, 873 F.2d 126, 128 (6th Cir. 1989). As the Supreme Court has explained, "In fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612 n.32 (1969). *Accord NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1993). The authority to fashion remedies under the Act "is for the Board to wield, not for the courts." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

Specifically, as this Court has recognized, the Board "has wide latitude in computing the amount of backpay to award to a discriminatee." *NLRB v. Akron Paint & Varnish Co.*, 985 F.2d 852, 854 (6th Cir. 1992).

“When the Board, ‘in the exercise of its informed discretion,’ makes an order of restoration by way of back pay, the order ‘should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’” *Seven-Up Bottling*, 344 U.S. at 346-47 (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). *Accord NLRB v. S.E. Nichols of Ohio, Inc.*, 704 F.2d 921, 923-24 (6th Cir. 1983). Accordingly, as this Circuit has long recognized, judicial review “‘is limited to a determination whether the Board has abused its discretion in fashioning its remedial order.’” *Joyce Western Corp.*, 873 F.2d at 128 (quoting *Marlene Indus. Corp. v. NLRB*, 440 F.2d 673, 674 (6th Cir. 1971)).

The findings of fact underlying the Board’s decision are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court may not displace the Board’s choice between two fairly conflicting views, even if the court “would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *Accord NLRB v. V&S Schuler Eng’g*, 309 F.3d 362, 367 (6th Cir. 2002). “The Board’s conclusion as to whether an employer’s asserted defenses against liability have been successfully established will be overturned on appeal

only if the record, considered in its entirety, does not disclose substantial evidence to support the Board's findings." *NLRB v. Westin Hotel*, 758 F.2d 1126, 1130 (6th Cir. 1985). Moreover, the Board's finding that an employer has failed to carry its burden of establishing facts that would mitigate its backpay liability is also reviewed under the substantial evidence standard. *See Ryder Sys.*, 983 F.2d at 712; *Westin Hotel*, 758 F.2d at 1130.

**B. A Backpay Award Is a Make-Whole Remedy Designed To Restore the Economic Status Quo that a Discriminatee Would Have Obtained But For the Employer's Unfair Labor Practice**

Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that the Board, upon finding that an unfair labor practice has been committed, "shall order the violator 'to take such affirmative action including reinstatement with or without back pay, as will effectuate the policies' of the Act." *J.H. Rutter-Rex*, 396 U.S. at 262. Accordingly, Section 10(c) authorizes the Board to fashion appropriate orders to prevent and remedy the effects of unfair labor practices. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). *Accord Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 308 (6th Cir. 1989). Under the Act, an award of reinstatement with backpay is the "normal" remedy in cases of employer discrimination that results in an employee's loss of employment. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). *Accord Kentucky Gen. Inc. v. NLRB*, 177 F.3d 430, 439

(6th Cir. 1999). Indeed, a “finding of an unfair labor practice is presumptive proof that some back pay is owed.” *NLRB v. Reynolds*, 399 F.2d 668, 669 (6th Cir. 1968).

A backpay award is a make-whole remedy designed to restore “the economic status quo that [the discriminatee] would have obtained but for the [employer’s] wrongful [act].” *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *J.H. Rutter-Rex*, 396 U.S. at 263). *See also Phelps Dodge*, 313 U.S. at 198; *NLRB v. Robert Haws Co.*, 403 F.2d 979, 980 (6th Cir. 1968). A backpay award also serves to deter future unfair labor practices by preventing wrongdoers from gaining any advantage from their unlawful conduct. *See J.H. Rutter-Rex*, 396 U.S. at 265; *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965).

To restore the economic status quo, the discriminatee is ordinarily entitled to the difference between her gross backpay—the amount that she would have earned but for the wrongful conduct—and her actual interim earnings. *See Ryder*, 983 F.2d at 712 n.2. The backpay period normally runs from the date of the unlawful discharge to the date that the employer offers the discriminatee valid, unconditional reinstatement. *See, e.g., Westin Hotel*, 758 F.2d at 1128-29.

The burdens of proof in a backpay proceeding are matters of settled law. As this Court has explained, the General Counsel's sole burden is "to show the gross amounts of back pay due." *Reynolds*, 399 F.2d at 669; *see also Akron Paint*, 985 F.2d at 854.<sup>4</sup> Once that has been done, the burden is on the employer "to establish facts which would negat[e] the existence of liability . . . or which would mitigate that liability." *Reynolds*, 399 F.2d at 669; *see also Akron Paint*, 985 F.2d at 854.

**C. The Board Reasonably Determined the Amount of Backpay that the Hospital Owes the Discriminatees Based on Their Interim Earnings**

The Hospital does not challenge the starting dates for the backpay periods, or the dates that it made reinstatement offers to the discriminatees. Nor does the Hospital challenge the interim earnings of discriminatees Lois Noble and Maxine Ritchie.

The Hospital challenges only the interim earnings of discriminatees Eileene Jewell and Debra Miller. Specifically, the Hospital asserts that both Jewell and Miller had a willful loss of earnings during the backpay period.

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<sup>4</sup> The General Counsel ordinarily will also include in the backpay specification any mitigating amounts that he has discovered during his backpay investigation. *See* Section 102.53 of the Board's Rules and Regulations (29 C.F.R. § 102.53). By doing so, however, the General Counsel does not "assume[] the burden of establishing the truth of all of the information supplied or of negating matters of defense or mitigation." *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963).

Additionally, the Hospital contends that Miller had interim earnings from a trucking company that she owned. As the Board reasonably found, the Hospital failed to meet its burden of proof on these asserted defenses to its backpay liability.

**1. The standard for determining whether there has been a willful loss of earnings**

In making an employee whole for loss of pay suffered as a result of the employer's unfair labor practices, deductions are made from gross backpay "for actual [interim] earnings by the worker, [and] also for losses which he willfully incurred" by "a clearly unjustifiable refusal to take desirable new employment." *Phelps Dodge Corp.*, 313 U.S. at 198, 199-200. "The cases are unanimous that the defense of wilful [sic] loss of earnings is an affirmative defense, and that the burden is on the employer to prove the defense." *Reynolds*, 399 F.2d at 669. Accordingly, it is the duty of the employer "to carry the burden of proof and to point out what evidence in the record sustains [its] claim, as against the presumptive proof of the Board's findings that the employees did not sustain wilful [sic] losses." *Id.* at 670. Any "doubts [as to the employer's affirmative defenses] must be resolved against the employer" because it is the employer "who committed the unfair labor practice." *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988); *see also Ryder Sys.*, 983 F.2d at 716.

Moreover, it is important to note that the duty of employees to avoid such willful losses flows not so much from any duty to mitigate (though that term is often used), but rather from what the Supreme Court termed the “healthy policy of promoting production and employment.” *Phelps Dodge*, 313 U.S. at 200. While backpay awards “somewhat resemble compensation for private injury. . . [they are designed] to vindicate public, not private, rights” and it therefore is “wrong to fetter the Board’s discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order.” *Virginia Electric & Power*, 319 U.S. at 543. *Accord NLRB v. Velocity Exp., Inc.*, 434 F.3d 1198, 1203-04 (D.C. Cir. 2006).

An employee has not willfully incurred a loss of earnings where she has made a good-faith effort to obtain interim employment. A “wrongfully-discharged employee is only required to make a reasonable effort to mitigate damages, and is not held to the highest standard of diligence. This burden is not onerous, and does not mandate that the [employee] be successful in mitigating the damage.” *Westin Hotel*, 758 F.2d at 1130. In evaluating the employee’s efforts, the Board does not undertake a “mechanical examination of the number or kind of applications,” but rather examines “the sincerity and reasonableness of the efforts made by an individual in his circumstances

to relieve his unemployment.” *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962). *Accord Westin Hotel*, 758 F.2d at 1130. Moreover, because the ultimate test of a claimant’s efforts is whether those efforts are consistent with “an inclination to work and to be self-supporting,” the Board has long held that those efforts must be viewed over the backpay period as a whole and not piecemeal, in isolated portions of that period. *Mastro Plastics Corp.*, 136 NLRB at 1359; *see also Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972), *enforced*, 482 F.2d 946 (6th Cir. 1973).

**2. The Board reasonably determined that the Hospital failed to prove that Eileene Jewell willfully incurred a loss of earnings**

On August 17, 2000, the Hospital unlawfully discharged surgical technician Eileene Jewell, then age 60. (D&O 7, A 63; Tr 159-61, A 98-100 (Jewell).) For 13 years, Jewell had worked for the Hospital, beginning as a hospital aide on the floor. (D&O 7, A 63; Tr 162-63, A 101-02 (Jewell).) In her surgical technician position, Jewell was responsible for sterilizing surgical instruments and cleaning the surgical areas. (D&O 7, A 63; Tr 162, A 101 (Jewell).)

After her discharge, Jewell looked for work at various businesses in the Beattyville and Lee County area near her home. (D&O 7, A 63; Tr 159, 174, A 98, 113 (Jewell).) The nearest hospital to Jewell’s residence was 30

miles away, and did not have a surgical unit. (D&O 7, A 63; Tr 182, A 121 (Jewell).) Because there was no work in her community comparable to the work she performed as a surgical technician for the Hospital, she visited and asked for work at a library, grocery store, and general store. (D&O 7, A 63; Tr 168-69, A 107-08 (Jewell).) She contacted individuals who worked as aides to the elderly and sick to explore possible job openings. (D&O 7, A 63; Tr 168-69, A 107-08 (Jewell).) With respect to doctor's offices in her community, Jewell knew all three doctors working in Beattyville and knew their staff had remained unchanged for a substantial period of time. (D&O 8, A 63; Tr 173, 197, A 112, 136 (Jewell).)

Jewell's job search proved fruitful in early 2001 when she was hired at Rite Aid as a pharmacy technician. (D&O 8, A 63; Tr 183, A 122 (Jewell).) Her employment there ended in November 2002 when two employees were transferred into the store and her only option for continued employment with Rite Aid was at the West Liberty store, requiring a 70 mile trip each way for a \$7/hour job. (D&O 8, A 63; Tr 183-85, A 122-24 (Jewell).) Jewell asked if she could be transferred out of the pharmacy to another position in the local store, but that request was denied. (D&O 8, A 63; Tr 186, A 125 (Jewell).) Jewell eventually retired on March 23, 2003, thereby closing her backpay period. (D&O 8, A 63.)

Based on those facts, which were established by Jewell's credited testimony,<sup>5</sup> records from the Social Security Administration, and Rite Aid, the Board found (D&O 8, A 64) that the Hospital had not shown that Jewell willfully incurred a loss of earnings. Indeed, the judge found "no evidence that [Jewell] neglected to make an honest good faith effort" to search for work. (D&O 8-9, A 64.) The judge took into account Jewell's age when she was fired, labor conditions in her area, and her skills and qualifications when assessing the reasonableness of her job search. (D&O 9, A 64.) For example, the Hospital's CEO identified on a map hospitals and health care providers within an eight county area, and acknowledged that only the hospitals, not the clinics, would have surgical technicians on staff. (D&O 9, A 64; Tr 635, RX 13, A 276, 673 (Bevins).) However, the map showed no other hospitals in the primary or secondary service areas for the Hospital's facility. (D&O 9, A 64; RX 13, A 673.) Thus, Jewell was stymied in her search for interim employment by "not only her age, but also the availability of comparable work as a surgical technician in her geographic area." (D&O 9, A 65.)

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<sup>5</sup> The judge "found Jewell to be a totally credible witness." (D&O 10 n.16, A 76.)

In arguing that Jewell was willfully idle, the Hospital claims (Br 24) that, once she was hired on a part-time basis at Rite Aid, she had no desire to work full time. There is no evidence to support the claim (Br 24-25) that Jewell was without desire for a full time job.<sup>6</sup> As the judge found (D&O 10, A 66), there is no indication in the record, including from the Hospital's witness, Rite Aid Regional Human Resources Manager Roy Terry, that Jewell was ever offered anything but part-time work by Rite Aid. She should not be penalized because she accepted part-time employment to attempt to make ends meet, rather than waiting only for a full-time offer. *See Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629-30 (4th Cir. 1988) (no willful loss of earnings where workers discontinued searching for full-time employment after accepting part-time or seasonal work); *see also United Supermarkets, Inc.*, 287 NLRB 394, 398 (1987), *enforced*, 862 F.2d 549 (5th Cir. 1989).

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<sup>6</sup> The Hospital quotes (Br 24-25) a portion of Jewell's testimony in support of its claim. However, Jewell was indicating in her excerpted answer, not that she "had no desire to work full time," (Br 24), but rather that she was not looking for a second part-time job while working at Rite Aid. (Tr 190, A 129 (Jewell).) Jewell had no obligation to do so, given that two part-time jobs would not be substantially equivalent to the one full-time job that she held at the Hospital. *See Westin Hotel*, 758 F.2d at 1310 (discriminatee must make "reasonable efforts" to find "substantially equivalent" employment that is "suitable to a person of [her] background and experience").

Nor should Jewell's backpay be reduced due to the loss of her part-time job at Rite Aid. She was forced out of her job at Rite Aid by the prospect of a 140 mile per day commute—a commute three times the distance of her commute to the Hospital—for a \$7/hour part-time job. (D&O 8, A 63; Tr 174, 185, A 113, 124 (Jewell).) The Hospital's assertion (Br 25) that Jewell did not request a transfer outside of the pharmacy department is an erroneous representation of the record. The judge credited Jewell's testimony that she made such a request and it was denied, also noting that the Hospital's witness, Rite Aid Manager Terry, did not refute that testimony. (D&O 10, A 66; Tr 186, A 125 (Jewell).)

**3. The Board reasonably determined that the Hospital failed to prove that Debra Miller willfully incurred a loss of earnings and that she had no interim earnings from her trucking company**

Debra Miller was a phlebotomist at the Hospital until she was unlawfully discharged on August 21, 2000. (D&O 12, A 68; Tr 324, A 194 (Miller).) Miller obtained interim employment at Central Kentucky Blood Center ("CKBC") in January 2001. (D&O 12, A 68; Tr 326, A 196 (Miller).) She left that position in early 2002 to enter nursing school. (D&O 12, A 68; Tr 326-27, A 196-97 (Miller).) However, her daughter had to undergo surgery at that time and Miller cared for her during her recovery until April 2002. (D&O 12, A 69; Tr 326, A 196 (Miller).) After her

daughter recovered, it was too late for Miller to enter the nursing program and thus she began searching for work. (D&O 12, A 69; Tr 326, A 196 (Miller).)

Miller found work again in 2003, for Appalachian Regional Healthcare. (D&O 12, A 69; Tr 329, A 199 (Miller).) She later left that position to return to CKBC, where she could earn more money, and worked there until that facility closed in July 2004. (D&O 12, A 69; Tr 332, 335, A 202, 205 (Miller).) Following the closure of CKBC, Miller resumed her search for work by doing newspaper and internet research, talking with friends about job openings, and applying at fast-food restaurants. (D&O 12, A 69; Tr 337, A 207 (Miller).) Miller also spoke to former colleagues at Appalachian Regional Healthcare and was told that there were no jobs open. (D&O 12, A 69; Tr 338, A 208 (Miller).)

The judge found (D&O 15, A 73) that Miller quit her job at CKBC in early 2002 for personal reasons. Accordingly, the judge deducted from Miller's future backpay the interim earnings that she would have had from CKBC if she had remained employed there from February 2002 to the end of the backpay period. (D&O 15, A 73.) The judge noted (D&O 12, A 69), and it is undisputed, that CKBC later closed its doors on July 31, 2004 and dismissed its entire staff. The Board, recognizing that Miller would have

had no interim earnings from CKBC after the closure, thus recalculated (D&O 1 n.3, A 54) Miller's backpay from July 2004 forward.

The Hospital posits (Br 33) that the Board erred by not reducing Miller's backpay by the amount of her interim earnings from CKBC in 2002 even after the facility closed, because Miller may have had "more than an academic possibility" of being transferred to another company facility or of receiving severance pay from CKBC, if she had not resigned in early 2002. In the first instance, the Hospital ignores the fact that Miller was working at CKBC when it shutdown in July 2004 and did not get transferred to another company facility. Secondly, the Hospital presented no evidence, consonant with its burden of proof, that Miller received severance pay as a CKBC employee at the time of the shutdown.

Finally, the Hospital fares no better in citing (Br 34) to language in the dissent in *St. George Warehouse*, 351 NLRB No. 42, slip op. at 10 (2007), for the proposition that Miller should have her backpay reduced because she is the "wrongdoer" for resigning from CKBC in 2002. As the employer who unlawfully discharged an employee, the Hospital is the wrongdoer with the burden to present specific facts to support its affirmative defenses. *See Ryder Sys.*, 983 F.2d at 712, 716. The Hospital's argument is also puzzling because, in any event, Miller already had her backpay reduced based on her

quitting the CKBC job in 2002 for personal reasons, and thus, the Hospital's liability had already been reduced.

The Hospital's remaining argument (Br 30) with respect to Miller's alleged interim earnings from her trucking company also fails because she had no change in her duties at her trucking company following her unlawful discharge. Miller owned a trucking company from 1997 through 2004. (D&O 12, A 69; Tr 340, 351, A 210, 221 (Miller).) The company employed three drivers for three trucks that hauled coal for a single customer. (D&O 12, A 69; Tr 352, 363, A 222, 233 (Miller).) Miller, who took over the company from her mother-in-law, had only one job in running it: to write payroll checks every 2 weeks. (D&O 12, A 69; Tr 340, 383-84, 674, A 210, 253-54, 282 (Miller).) Miller discontinued operations in 2004 because the company was no longer profitable. (D&O 12, A 69; Tr 351, 675-77, A 221, 283-85 (Miller).)

It is well settled that, during the backpay period, earnings or profits from a job or business that a discriminatee held during her employment are not deductible from gross backpay as interim earnings. *Midwestern Pers. Servs.*, 346 NLRB 624, 635 n.6, *enforced*, 508 F.3d 418 (7th Cir. 2007); *Birch Run Welding & Fabricating, Inc.*, 286 NLRB 1316, 1318 (1987), *enforced*, 860 F.2d 1080 (6th Cir. 1988). As the judge found, Miller had

supplemented her income with funds from the trucking company prior to her unlawful discharge as well. (D&O 14, A 71; Tr 415, 682, 685, A 255, 290, 293 (Miller).) In fact, the Hospital's own evidence establishes that Miller received supplemental earnings from the trucking company prior to her discharge. (D&O 14, A 72; RX 10 at 133-44, A 468-79 (Miller).) Miller testified, and the trucking records subpoenaed by the Hospital show, that she received a salary and took dividends from the company prior to her unlawful August 2000 discharge. (D&O 14, A 72; Tr 415, 682, 685, RX 10 at 133-44, A 255, 290, 293, 468-79 (Miller).)

The Hospital failed to show that Miller's duties at the trucking company increased, or changed in any manner, following her unlawful termination. As the judge found (D&O 14, A 72), the record evidence that Miller "performed the same duties for the trucking company before and after her unlawful discharge is un rebutted." Miller remained available to search for, and perform, other employment. (D&O 13, A 70.) In fact, she did just that throughout her backpay period by working at CKBC and Appalachian Regional Healthcare, as well as searching for jobs during periods of unemployment. At the end of the day, Miller's unlawful discharge "may have prompted her to deplete more of the trucking company's assets" (D&O

14, A 72), but that necessity clearly does not reduce the Hospital's backpay liability.

**D. The Board reasonably found that Lois Noble was not given a valid, unconditional offer of reinstatement in 2002**

Lois Noble was unlawfully terminated from her position as a phlebotomist on August 28, 2000. (D&O 10, A 66; Tr 240, A 148 (Noble).) On February 19, 2002, Hospital CEO Okey David Bevins sent Noble a letter, indicating that the Hospital was offering her interim reinstatement during the time that the Hospital litigated the legality of Noble's termination. (D&O 11, A 68; JX 1, A 294.) Bevins further explained that, if Noble returned to work and the Hospital prevailed in the administrative proceedings, she would again be terminated. (D&O 11, A 68; JX 1, A 294.) Bevins also pointed out that, by declining the offer of temporary reinstatement, Noble would not forfeit her "right to fight" her termination. (D&O 11, A 68; JX 1, A 294.) Noble rejected the Hospital's offer because she needed work that was not temporary and "was going to be more stable." (D&O 11, A 68; Tr 255, A 163 (Noble).)

Despite the Hospital's protestations (Br 26) that it should not be liable for backpay after it made the 2002 temporary reinstatement offer, its offer was not a valid offer of reinstatement and its backpay liability to Noble was not cut off upon her rejection of it. It is well-settled that an offer of

employment must be specific, unequivocal, and unconditional to toll backpay and satisfy an employer's obligation to comply with a Board order of reinstatement. See *NLRB v. Seligman & Assoc., Inc.*, 808 F.2d 1155, 1163 (6th Cir. 1986); *Midwestern Pers. Servs.*, 346 NLRB at 624. "The purpose of an offer of reinstatement is to undo the employer's wrong by restoring the employees to the position they would have occupied before the wrong occurred. Therefore, an offer is insufficient to terminate back pay liability if . . . the job which [s]he is offered is temporary . . ." *Seligman & Assoc.*, 808 F.2d at 1159 (quoting *Morvay v. Maghielse Tool & Die Co.*, 708 F.2d 229, 232 (6th Cir. 1983)). The Hospital admits (Br 27) that this is the standard for judging the validity of a reinstatement offer, and provides no justification for how its letter meets this standard. The letter itself is clear on its face that the offer to Noble is for "temporary" employment. (D&O 11, A 68; JX 1, A 294.)

Additionally, the Hospital sought to reassure Noble in the letter that rejection of the temporary offer would not prejudice her later reinstatement pursuant to enforcement of the Board's Order. (D&O 11, A 68; JX 1, A 294.) That the Hospital has since argued, to the judge, the Board, and now the Court (Br 27-28), that Noble should be denied backpay based on her declining the offer is duplicitous. The Hospital's attempt (Br 27-28) to

argue that it only offered reassurance as to reinstatement, but not backpay, is unavailing. An award of reinstatement with backpay is the “normal” remedy under the Act for an unlawful termination. *See Phelps Dodge*, 313 U.S. at 194; *Kentucky Gen.*, 177 F.3d at 439.

**E. The Board reasonably determined that the Hospital was precluded from litigating Maxine Ritchie’s supervisory status in the backpay hearing 6 years after she was unlawfully discharged**

Maxine Ritchie provided patient care as a registered nurse in the Intensive Care Unit until she was unlawfully terminated on August 28, 2000. (D&O 15-16, A 74; Tr 460, A 263 (Ritchie).) Throughout the unfair labor practice proceedings in this case, including the trial, exceptions to the Board, and enforcement proceedings before the D.C. Circuit, as well as in its Answer to the compliance specification and the first 2 days of the backpay hearing, the Hospital did not allege that Ritchie engaged in any supervisory duties. During a hiatus in the backpay hearing in November 2006, however, the Hospital sought to file a Second Amended Answer asserting that Ritchie was a supervisor within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)) and thus without the protections of the Act. (D&O 4, A 58; RX 14, A 674-75.)

The Hospital based this claim on the Board’s definition of the terms “assign,” “responsibly to direct,” and “independent judgment” in Section

2(11) set forth in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006). The Hospital argues (Br 20-21) that it could not have litigated Ritchie's supervisory status prior to the Board's *Oakwood Healthcare* decision, because prior to that decision, her non-supervisory status was "obvious, and not contestable" (Br 21). However, the Hospital now asserts that it should be allowed to litigate that status 6 years after her discharge through retroactive application of *Oakwood Healthcare*.

The Board's usual practice is to apply new policies and standards retroactively, so long as it will not work a "manifest injustice." *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 866 (6th Cir. 1990); *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005). In determining whether retroactive application will produce manifest injustice, the Board considers: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice to the losing party arising from retroactive application of the change of law. *Adair Standish*, 912 F.2d at 866; *SNE Enterprises*, 344 NLRB at 673. When assessing retroactive application of a new standard, a court will "generally balance the interests of the parties, taking into account such factors as the degree of hardship they will experience, their justifiable reliance on past practices, and the statutory interest in a retroactive

application of the new rule.” *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989).

In weighing these factors, the judge found (D&O 5, A 59) that considerable reliance had been placed on Ritchie’s status as a non-supervisory employee, in the charge that was filed, the complaint that was issued, and the evidence that was produced before the judge at the unfair labor practice hearing. Contrary to the Hospital’s claim (Br 20), the judge properly examined the reliance of the parties on the preexisting law, and found most especially that the party against whom the new rule would be applied relied on the former rule. Based on the weight of this reliance and considering all the factors in the Board’s test, the judge determined (D&O 5, A 59) that “the inequity of applying the Board’s new analysis for determining supervisory status far outweighs the interests of its application in this case.” The judge could find “no equitable basis” for entertaining the Hospital’s motion to amend its answer. (D&O 5, A 59.)

The Hospital’s attempt (Br 20-21) to re-weigh the factors of the Board’s test in its own favor, and its invitation to the Court to do likewise, should be rejected. The Hospital’s claims about Ritchie’s supervisory status are speculative at best. Six years after her discharge from a nursing job, the Hospital seeks (Br 23) “an opportunity to explore whether Ms. Ritchie was a

statutory supervisor,” without a hint of the bona fides of this exploration. Furthermore, the Hospital’s assertion (Br 21) that, if it could show Ritchie was a supervisor within the meaning of the Act and thus disqualified from the Board’s remedy of reinstatement and backpay, no “injustice” would result because Ritchie was gainfully employed at the time of the backpay hearing, represents a fundamental misunderstanding of the role of backpay in the Board’s remedial scheme. *See Golden State Bottling*, 414 U.S. at 188 (backpay is a make-whole remedy designed to restore “the economic status quo that [the discriminatee] would have obtained but for the [employer’s] wrongful [act]”). As the Board properly found, allowing the Hospital to delve into some unidentified particulars of Ritchie’s job duties six years later, based on retroactive application of *Oakwood Healthcare*, would work a manifest injustice.

Additionally, the judge found (D&O 5, A 59) that the Hospital’s motion to amend its answer was untimely. The Board’s rules do not provide for an amendment to insert an additional affirmative defense. *See* 29 C.F.R. 102.56(e). Specifically, the Board has held that an employer may not, in an untimely fashion, amend its answer as to an employee’s supervisory status based on a subsequent change in the law. *See T. Steele Construction Inc.*, 348 NLRB No. 79, slip op. at 1, n.1 (2006) (denying motion to amend

answer regarding supervisory status filed by an employer in light of the Supreme Court's decision in *NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706 (2001), and the Board's decision in *Oakwood Healthcare*; *Yesterday's Children, Inc.*, 321 NLRB 766, 766 n.1 (1996) (denying motion to amend answer and to supplement record to allege that a charge nurse was a supervisor in light of the Supreme Court's decision, issued 5 weeks prior to the motion, in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 71 (1994)), *enforced in relevant part*, 115 F.3d 36, 46-47 (1st Cir. 1997)).

The Hospital's response (Br 22) to the finding of untimeliness is an assertion that it would have been "futile, if not frivolous" to litigate Ritchie's supervisory status at any previous point in the litigation. The Hospital does not explain why it did not argue that Ritchie's duties *should* have conferred supervisory status on her and that the Board's then-current standard was wrong. Such arguments were made successfully, with respect to nurses' duties, by the employer in *Oakwood Healthcare*, and by other employers in previous litigation. *See, e.g., NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706, 721 (2001).

**F. The judge did not abuse her discretion in ruling that the Hospital was not entitled to financial information, unrelated to earnings, that it had subpoenaed**

The Hospital alleges (Br 15) that the administrative law judge improperly restricted its ability to lessen its backpay liability by partially quashing its subpoenas requesting personal financial information, unrelated to earnings, from the discriminatees. The Board found (D&O 1 n.2, A 54) that the judge had acted within her discretion in making the evidentiary ruling. Contrary to the Hospital's assertion (Br 14), that the Board's decision should be reviewed *de novo*, this Court has clearly stated that evidentiary rulings by an administrative law judge are to be reviewed under an abuse of discretion standard. *See Kentucky River Cmty. Care, Inc. v. NLRB*, 193 F.3d 444, 452 (6th Cir. 1999); *see also NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1028 (10th Cir. 2003); *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153 (D.C. Cir. 2000).

Prior to the October 19, 2006 hearing, the Hospital served subpoenas duces tecum on all four discriminatees. (D&O 5, A 60; RX 1-4, A 296-334.) Miller was served on Friday, October 13 at 4:29 p.m. and Jewell, Noble, and Ritchie were all served on Saturday, October 14. (D&O 5, A 60; RX 1-4, A 296-334.) The information sought from the discriminatees included income tax records, documents showing their job qualifications, documents relating

to self-employment, retirement, termination from interim employment, disability, and education, as well as the production of bank and financial records including mortgage and lease commitments and any other financial obligations including with respect to any dependents. (D&O 5, A 60; RX 1-4, A 296-334.) The record shows (D&O 6, A 60) that the judge enforced the subpoenas against the discriminatees for any documents relating to interim earnings, search for work, supplemental education, and correspondence with the Union, and the claimants complied with those subpoenas to the extent possible.

However, the judge quashed the Hospital's demand for bank records, mortgage and lease commitments, and information pertaining to other financial obligations. (D&O 6, A 60.) The purpose of those demands was, as the Hospital's brief demonstrates (Br 15-16), solely speculative; it hoped to uncover some inconsistency that might undercut the claimants' documented testimony regarding interim earnings. The judge concluded that the Hospital's "mere hope of possibly finding a 'smoking gun' is nothing more than a fishing expedition, rather than a request for the valid production of reasonably anticipated probative evidence." (D&O 6, A 61.) *See Parts Depot, Inc.*, 348 NLRB No. 9 at n.6 (2006), *enforced*, 260 Fed. Appx. 607 (4th Cir. 2008); *see also Natter Mfg. Corp. v. NLRB*, 580 F.2d 948, 952 n.4

(9th Cir. 1978) (affirming Board’s denial of a subpoena that amounted to a “fishing expedition in order to prove [the employer’s] wholly unsubstantiated assertions”). Despite the Hospital’s reliance (Br 17) on *Parts Depot*, the case clearly supports the notion that an employer may not burden the record with superfluous requests for personal financial records that are crafted out of the mere hope of finding something that has not been revealed in the relevant documentation provided. 348 NLRB No. 9 at n.6 (finding that a judge acted within his broad discretion by restricting enforcement of subpoena for bank records and mortgage loan applications from backpay claimants).

Furthermore, the Hospital’s reliance (Br 16) on this Court’s decision in *NLRB v. Overseas Motors*, 818 F.2d 517 (6th Cir. 1987) is equally misplaced. In that case, a judge precluded the employer from cross-examining a discriminatee, who had kept no records of his self-employment income from doing auto repair work, as to the source of almost \$100,000 spent on living expenses and overseas travel. *Id.* at 521. The court concluded that, given the entirety of the circumstances surrounding the discriminatee’s expenditures and income, the judge erred in precluding cross-examination regarding the living expenses. *Id.* at 521-22. The situation in *Overseas Motors*, as the judge here concluded, is fully

distinguishable. The Hospital was not limited in the scope of its cross-examination of each of the four discriminatees. Moreover, the Hospital has not, and cannot, point to any evidence that “any of the discriminatees had unreported income or had fraudulently concealed interim earnings during the relevant backpay period.” (D&O 6, A 61.)

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

October 2008

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	No. 08-1462
v.	)	
	)	Board Case No.
JACKSON HOSPITAL CORPORATION	)	09-CA-37734
	)	
Respondent	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,083 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC  
this 7th day of October, 2008

