UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNITY HEALTH SYSTEMS, INC.
d/b/a MIMBRES MEMORIAL HOSPITAL
AND NURSING HOME

and **Cases 28-CA-16762**
28-CA-17278
28-CA-17390

UNITED STEELWORKERS OF AMERICA,
DISTRICT 12, SUBDISTRICT 2, AFL-CIO-CLC

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Limited Exceptions to the Supplemental Decision of Administrative Law Judge William L. Schmidt, [JD(SF)-29-10] (ALJD), issued on July 28, 2010, in the above-captioned cases. In all respects, other than what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.[1] These include findings that the two-part backpay formula devised by the Counsel for the Acting General Counsel was reasonable and that Respondent Community Health Systems, Inc, d/b/a Mimbres Memorial Hospital and Nursing Home (Respondent)[2] owed backpay amounts for many of the employees listed and specified

[1] References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the General Counsel and Respondent Exhibits will be referred to as (GC.) and (R.), respectively with the appropriate exhibit number.

[2] Throughout the proceedings in this matter Respondent has been referred to as "Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home." It has been discovered by the Acting General Counsel through a recent search of the hospital's website (http://www.chs.net/hospitals/map.html) that the correct legal name for Respondent is "Community Health Systems, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home". Counsel for the Acting General Counsel moves that any future references to this matter include the corrected name for Respondent.

in General Counsel's Second Amended Compliance Specification. However, the ALJ erred in reducing the backpay amounts calculated for certain discriminatees and finding certain other discriminatees not eligible for backpay remedies as calculated by the General Counsel on the basis that the General Counsel did not properly consider job status classifications in its backpay calculation. The ALJ also incorrectly concluded that ordering Respondent to post a Notice to Employees was not necessary for his decision. It is based on these conclusions that Acting Counsel for the General Counsel files these limited exceptions to the ALJ's decision.

I. STATEMENT OF FACTS

A. Background

In *Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home*, 342 NLRB 398 (2004), the Board concluded that since April 2001, Respondent unilaterally reduced the work hours of its full-time respiratory department employees from 40 hours per week to 32 to 36 hours per week without prior notice to the Union and without affording the Union an opportunity to bargain about the reductions in violation of Section 8(a)(5) of the Act. Accordingly, the Board ordered Respondent to make affected discriminatees whole for loss of earnings and other benefits suffered as a result of Respondent's unlawful action. Id. at 404.

In accordance with the Board's Order, the General Counsel submitted compliance specifications, the latest being a Second Amended Compliance Specification[3], which set forth the gross backpay calculations for discriminatees Anthony Acosta, Austin Amanambu, Myrna St. Jean Argant, Ruth Mary Boyer, Raymond Collier, Jamie Flores, Natalia Gordon, Cindy Hayes, Pedro Herrera, Charles Hustead, Gary Kavanaugh, Rudolph R. Lopez, Michael Scott

[3] The General Counsel issued a Compliance Specification in this matter on July 18, 2008. The General Counsel issued a First Amended Compliance Specification on June 18, 2009. The General Counsel issued a Second Amended Compliance Specification on September 15, 2009.

Loyd Jr., Judith Parra, Daniel Pattarozzi, and Nohail Syed. All of the named discriminatees were either current respiratory department employees of Respondent or employees who were working in that department during relevant times the unlawful hour reduction was taking place. (Tr. 27:14-20; 28:12-14; 29; 30:1-12; 32-33; 58:14-20; 59; 60:6-9; 61:6-8; 71:22-25; 72-73; 75; 76:1-5; 78:20-21, 24-25; 79; 81:5-11, 23-25; 87-88; 89:1-6; 91:17-22; 102:13-17, 22-25; 103-104; 187:14-25; 188, 189:1-13). On July 21, 2009, a compliance hearing was held to address, among other things, disputes raised by Respondent as to what backpay was owed the named discriminatees for this matter. The ALJ issued his decision on July 28, 2010.

B. Application of General Counsel's Backpay Formula to Named Discriminatees

In his decision, the ALJ found the two-part backpay formula devised by the General Counsel to be reasonable. (ALJD at 7:26-27) Miguel Rodriguez, the Compliance Officer for Region 28, prepared all of the compliance specifications associated with this matter and testified at the compliance hearing about the gross backpay formula used in this case. (Tr. 118-124) Rodriguez attested that he calculated backpay amounts utilizing hour and pay rate information he obtained from paycheck and timesheet records provided by Respondent for employees in the respiratory department[4]. (Tr. 113:12-16)

From payroll and timesheet records, Rodriguez identified which respiratory department employees to include in the specification. (Tr. 115: 1-12, 17-25) Specifically, Rodriquez explained that he included employees from the department in the specification who consistently worked above or around 64 hours in a two-week period and, in the alternative, he

[4] At the hearing Compliance Officer Rodriguez testified he relied on documents Region 28 received from Respondent for the time period of April 2001 to May 2008. Subsequent to the hearing date, Respondent provided payroll and timesheet records for discriminatees for the time period subsequent to May 2008 and up to the date of the hearing, July 21, 2009. The Region issued a Second Amended Compliance Specification on September 15, 2009, incorporating this newly obtained information.

did not include department employees who did not work consistently beyond 60 hours in a two-week period. (Tr. 115; 1-12; 116: 4-16) Rodriguez attested that he based these parameters on the Board Order defining affected employees as being full-time respiratory department employees whose work hours had been reduced from 40 hours per week to 32 to 36 hours per week. (Tr. 116:4-9).

C. Respondent's Job Status Classifications

During the compliance hearing, Respondent provided testimony through Human Resources Director Johanna Grant regarding how Respondent defined its job status classifications. (Tr. 150) Grant attested that Respondent defined its full-time employees as being employees who worked 40 or more hours per week, defined its part-time employees as being those employees who worked 39 hours or less per week, and defined its PRN employees as being employees who worked on an "as needed" basis. (Tr. 150; ALJD at 8:11-16)

Respondent introduced personnel action forms (PAFs) at the hearing for discriminatees Natalia Gordon, Cindy Hayes, Judith Parra, Dan Pattarozzi, and Nohail Syed. (R. 2-17) Some of the PAFs noted the employment status for the respective discriminatee at their time of hire as being full-time, part-time or PRN. (R. 5, 10, 12, 14, 24) Some of the PAFs presented by Respondent reflected job status changes for a respective discriminatee. (R. 4, 6, 8, 11, 13, 15, 16) Such changes included when a respective discriminatee changed from being considered full-time by Respondent to part-time or from PRN to full-time and vice versa. Respondent argued at the compliance hearing only employees designated full-time by these forms were eligible for any potential remedies provided by the Board Order and, in turn,

contends those employees considered at any time to be part-time or PRN would not be so eligible. (Tr. 163)

In his decision, the ALJ relied on Respondent's PAFs and the resulting job status classifications Respondent assessed on the forms for discriminatees Natalia Gordon, Cindy Hayes, Judith Parra, Dan Pattarozzi, and Nohail Syed. (ALJD at 10-11) In relying on Respondent's PAF status forms and the times periods they were designated by Respondent to be part time or PRN employees, the ALJ reduced the backpay calculated by the General Counsel for the named discriminatees for those portions of their backpay periods. Specifically, the ALJ found that discriminatee Natalia Gordon's backpay amount should be reduced from $7,665.99 to $1,670.16, that discriminate Cindy Hayes' backpay amount should be reduced from $7,324.31 to $2,920.36, that discriminatee Judith Parra's backpay amount should be reduced from $1,093.89 to $170.74, that discriminate Dan Pattarozzi's backpay amount should be reduced from $6,091.25 to $4,359.37, and Nohail Syed's backpay amount should be reduced from $9,423.60 to $4,684.52. (ALJD 10-11) Likewise, the ALJ relied on Respondent's PAFs to determine that discriminatee Jamie Flores was not entitled to a calculated backpay amount of $10,134.75 because the PAF prepared by Respondent showed he was hired as a part time employees to only work 24 hours a week and that discriminate Pedro Hererra was not entitled to calculated backpay amount of $21,328.48 because the PAF prepared by Respondent showed he was hired as a PRN employee.

The General Counsel relied on the parameters of hours specifically laid out by the Board in the Order. The Board expressly states full time employees had their hours reduced from 40 hours to 32 to 36 hours. *Id.* 404. Using these hour parameters, the General Counsel evaluated Respondent's payroll and timesheet records to identify employees who were

consistently working 60 to 64 hours in two-week payroll periods and then used its backpay formula to ascertain who suffered backpay loss in not being scheduled to work 40 hours a week or 80 hours in a two-week pay period as had been the case for full-time employees prior to the unilateral change. (Tr. 115; 1-12; 116: 4-16)

II. ARGUMENT

A. The ALJ Erred in Reducing Backpay Sought by the General Counsel for Discriminatees Natalia Gordon, Cindy Hayes, Judith Parra, Daniel Pattarozzi, and Nohail Syed and not finding discriminatees Jamie Flores and Pedro Hererra were Eligible to Receive Backpay Remedy [Exceptions No. 1 and No. 2]

In his decision, the ALJ found that the remedial action ordered by the Board applied only to full-time employees. (ALJD at 8:11) At the compliance hearing and as a defense to the compliance specification, Respondent asserted the Board's remedial order did not apply to part-time or PRN (as needed) employees. (Tr. 163, ALJD at 9:44-45) The ALJ relied upon this defense in his decision and found that the General Counsel erred in failing to accord at least some weight to the job status classification of the backpay claimants during their work history with Respondent. (ALJD at 9: 47-48) The ALJ did not agree with the General Counsel's theory that the backpay remedy applied to employees solely by the number of hours they worked. The ALJ surmised that the General Counsel's approach ignored the complaint in the underlying case that Respondent had unlawfully reduced the hours of only "full time employees" in April 2001, and that the General Counsel's formula application resulted in some unrepresented PRN employee receiving an unwarranted windfall. (ALJD at 9:4-8)

The ALJ admits in his decision, however, that Respondent asserted conveniently rigid definitions of what was considered full-time and part-time status. (ALJD at 8:46-49)

Specifically, the ALJ found Respondent‘s definitions to be largely self-serving and added that accepting Respondent’s assertions that the remedial action only applied to full-time employees and then strictly applying Grant’s definitions would lead to the absurd result that almost no one was entitled to backpay under the Board’s remedial order. (ALJD at 8:22-25) In fact, the ALJ acknowledged that “using Grant’s definitions Respondent’s own unlawful conduct blurred the line that divided a full-time employee from a part-time employee.” (ALJD at 8:25-26)

The General Counsel did not rely on Respondent’s employee job status classifications and definitions when applying the backpay formula to potential discriminatees. Respondent’s narrow definition for defining full-time status ignored the underlying nature of the unlawful reduction of hours being remedied by the Board Order and did not take into consideration that it had not taken any action to rescind the unlawful unilateral action. The ALJ even notes in his decision that employees working pursuant to the unlawful change would never meet Respondent’s definition because the change itself involved employees having their hours reduced from 40 hours a week in the first place. (ALJD at 8:15-19)

This is precisely why the General Counsel did not rely on Respondent’s definitions when assessing which discriminatees were subject to Board Order remedies. Respondent’s job status classification system cannot be relied upon based on its unreasonable definitions for who is considered full-time and who is not. The Acting General Counsel submits that relying on Respondent’s classifications post unilateral change under these conditions is not warranted. More specifically, having an employee work within the range of hours (32 to 36) as defined in the Board Order but noting in that employee’s paperwork the employee was a part time or PRN employee is not reasonable and does nothing but create confusion as to

status of that employee. As the ALJ notes in his decision, Respondent is the party who blurred the line that divided a full-time from a part-time employee with its unlawful conduct. (ALJD at 8:25-26) The ALJ goes as far as to cite an example where one PAF in evidence showed discriminatee Anthony Acosta being hired to work three 12-hour shifts per week, hours that would put him at the high end range of being a full-time employee, but Respondent's classifying him on the form as being a part-time employee. (ALJD at 8:29-36) In one turn, this example raises doubt with both Respondent's self-serving definitions and the effectuation of those definitions on its job status forms.

The Acting General Counsel submits that when pressed with determining which employees were subject to Respondent's unlawful conduct, the Acting General Counsel's application of his backpay formula to those employees whose hours worked fell within the parameter of hours defined by the Board Order was reasonable. The Acting General Counsel's reliance on the parameters defined by the Board Order is a reasonable means for ascertaining the backpay losses suffered by discriminatees who were subject to a unilateral reduction of hours not remedied by Respondent. It is well settled that a backpay formula that approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary under the circumstances. *Velocity Express, Inc.*, 342 NLRB 888 (2004). The Acting General Counsel has discretion in selecting a backpay formula and "need not find the exact amount due nor adopt a different and equally valid formula which may yield a somewhat different result." *Minette Mills*, 316 NLRB 1009, 1010 (1995). Thus, the Acting General Counsel has the burden of showing only that the gross backpay amounts contained in a backpay specification are reasonable and not arbitrary. *Virginia Electric v. NLRB*, 319 U.S. 533, 544 (1943); *Performance Friction Corp.*, 335

NLRB 1117 (2001); *Atlantic Limousine*, 328 NLRB 257, 258 (1986). Under the facts and evidence presented for this matter, the Acting General Counsel has met his burden of showing that the backpay formula and its application were reasonable for establishing the gross backpay amounts.

Respondent's reliance on its internal designation of job status is not and should not be controlling on whether an individual is subject to the scope of the Board Order. It is the language of the Board Order that is and should be controlling, and it is the language of that Order that the Acting General Counsel has relied on in determining which employees to include in the specification. The Board found that since April 2001, Respondent had unilaterally reduced the work hours of its full time respiratory department employees from 40 hours per week to 32 to 36 hours per week. Clearly the Board states that full-time respiratory department employees are subject to the remedies provided by the Order. The seminal question becomes what is considered full time. Respondent would have us believe that status is dictated by how it defines it, namely only those who worked a full 40 hours a week. Respondent considers anyone who works 39 hours or less in a week to be part- time or a PRN. Again, this is not reasonable or rationale under the circumstances created by Respondent with its unlawful conduct.

Counsel for the Acting General Counsel does not disagree with the ALJ that the Board Order was only applicable to full-time employees. A backpay award perforce involves some ambiguity and estimation, and therefore it is only an approximation, necessitated by the employer's wrongful conduct. *Cobb Mechanical Contractors*, 323 NLRB 1168 (2001), quoting *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977). Any uncertainty in the evidence is to be resolved against Respondent as the

wrongdoer. *Cobb Mechanical*, 333 NLRB at 1168, enfd. in relevant part 295 F.3d 1370 (D.C. 2002), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *Minette Mills*, 316 NLRB at 1011. If the definitions purported by Respondent are absurd, as noted by the ALJ, the effectuation of those definitions cannot be relied upon subsequent to Respondent's commission of unlawful and unremedied unilateral reduction of full time hours. Respondent's self-serving designations for which employees are full time or part time or PRN are distorted by its rigid and unreasonable definitions for those classifications. Respondent should not be allowed to profit from any uncertainty caused by its unlawful conduct.

Accordingly, Counsel for the Acting General Counsel asks that the Board find that the ALJ erred in relying on Respondent's job status classification definitions and reducing the backpay sought by the General Counsel for discriminatees Natalia Gordon, Cindy Hayes, Judith Parra, Daniel Pattarozzi, and Nohail Syed for the time periods Respondent asserts they were working as part-time or PRN employees and further find that the backpay amounts calculated by the General Counsel in its Second Amended Compliance Specification for these discriminatees was correct. Likewise, Counsel for the Acting General Counsel asks the Board to find that the ALJ also erred in relying on Respondent's job classification definitions in finding that discriminatees Jamie Flores and Pedro Hererra were not entitled to receive backpay remedies pursuant to the Board Order and further find that Flores and Hererra are entitled to backpay amounts calculated by the General Counsel in its Second Amended Compliance Specification.

B. ALJ's Failure to Order Respondent to Post a Notice to Employees in Accordance with Remedies Subject to Compliance with the Board Order. [Exception No. 3]

Commensurate with the Board Order that issued in this matter, Respondent is obligated to post a Notice to Employees as a remedy found by the Board. *Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home*, 342 NLRB at 405. Respondent has never posted the Notice to Employees as required by the Board order. Respondent offered no evidence at the compliance hearing showing it posted a Notice to Employees. Likewise, Respondent did not offer any explanation why it had failed to do so. Arguably, with its conduct, or lack thereof, Respondent is disputing the appropriateness of the Notice to Employees associated with this matter. It has been held that the appropriateness of posting provisions can best be addressed in the compliance stage. *Ebasco Services, Inc. (Boilermakers District 57)*, 107 NLRB 617, 621 (1953). In this regard, this remedy still needs to be addressed at the compliance stage of the proceedings and Respondent needs to be directed as to what still needs to be performed for compliance purposes. Accordingly, Counsel for the Acting General Counsel asks the Board to reaffirm its order that Respondent post a Notice to Employees that remedies the violations previously found by the Board.

III. CONCLUSION

Based on the foregoing, it is respectfully requested that the Board reverse the conclusions of the ALJ as set forth above, and find that Respondent owes backpay amounts to discriminatees Natalia Gordon, Cindy Hayes, Judith Parra, Daniel Pattarozzi, Nohail Syed, Jamie Flores and Pedro Hererra as calculated by the General Counsel in its Second Amended

Compliance Specification, and to reaffirm the order that Respondent post the Notice to Employees commensurate with the remedies associated with this matter.

Dated at Albuquerque, New Mexico, this 3rd day of September 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in COMMUNITY HEALTH SYSTEMS, INC. d/b/a MIMBRES MEMORIAL HOSPITAL AND NURSING HOME, Cases 28-CA-16762 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 3rd day of September 2010, on the following:

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