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

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

I. INTRODUCTION

By its exceptions, Community Health Systems, Inc., d/b/a Mimbres Memorial Hospital (Respondent) seeks to have the Board ignore the record evidence in this case and the well-reasoned determinations of Administrative Law Judge William L. Schmidt (ALJ Schmidt) concerning Respondent's remedial obligations to pay backpay it owes to named discriminatees as a result of Respondent's conduct in unilaterally and unlawfully reducing the hours of full-time employees in its respiratory department. Respondent's exceptions are without merit and should be denied.

II. RESPONDENT'S EXCEPTIONS LACK MERIT

A. The Extent of Backpay Remedy for Unilateral Reduction of Hours Violation was Properly Found by the ALJ.

In *Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home*, 342 NLRB 398 (2004), enforced 483 F.3d 683 (10th Cir. 2007), 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 its exceptions and brief in support, Respondent urges the Board to find that ALJ Schmidt incorrectly found the Board had authority to extend the backpay remedies prospectively or intended the remedy to continue up to the date on which Respondent rescinded the change in the employees' hours. Respondent argues that neither the Administrative Law Judge in the underlying proceeding, Lana H. Parke (ALJ Parke), nor the Board expressly or implicitly conveyed in their respective decisions that the remedy applied prospectively.

Unanswered in Respondent's exceptions is that to date, Respondent has failed to comply in any fashion with any remedy ordered by the Board and enforced by the 10th Circuit for its systematic and department-wide reduction of hours for the full-time employees in its respiratory department. Respondent presented no evidence at the hearing that it has taken any remedial steps to rescind the unilateral reductions of hours found unlawful by the Board. As a result of Respondent's failure and refusal to comply with the Board's enforced order, the unlawful working arrangements unilaterally made by the Respondent remain in effect. Until the unlawful working arrangements are rescinded by Respondent and status quo work arrangements are put back into effect as they were before the change, full-time employees hired after the unlawful systematic change was made are, and will be, subject to the same unlawful working conditions created by the change. Hence, full-time employees hired and working in the respiratory department after the change was made are eligible for the remedies that arise from that continuing unremedied violation.

Respondent argues in its exceptions and brief in support that its due process rights have been violated by this prospective application of the remedies and, in red herring fashion, contends there were no allegations involving its hiring practices and no evidence regarding the impropriety of those practices developed in the record before ALJ Parke. Respondent fails to understand, however, that it bears the burden and consequences of its unlawful actions and, in turn, its failure to remedy those unlawful actions. In this regard, any uncertainty in the evidence should be resolved against Respondent as the wrongdoer. *Cobb Mechanical*, 333 NLRB 1168 (2001), 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 1009 (1995).

It is not a matter of who Respondent has hired that warrants consideration. Rather, what is imperative to the analysis is whether Respondent hired any full-time employees who have been subject to the department-wide unlawful change. The unlawful unremedied systematic reduction of hours applies to all full-time employees, not conveniently to just a certain few on a one time basis as advocated by the Respondent. Employees, current or otherwise, who work under conditions created by the unlawful unilateral change, are entitled to the remedies that arise for that unlawful action. Respondent must comply with the Board Order for the period of time during which Respondent has unlawfully maintained the unlawful change. Accordingly, ALJ Schmidt's conclusion that the remedial order in this matter extended to employees employed at the time the change occurred and those employed thereafter, is reasonable and supported by the record and should be affirmed by the Board. (ALJD at 14:11-13)

Respondent cites *NLRB v. Dodson's Market, Inc.*, 553 NLRB F.2d 617 (9th Cir. 1977), and *Chauffeurs, Teamsters and Helpers Local Union No. 171*, 425 F.2d 1577 (4th Cir.

1970), as support for its argument the Board has no authority to apply the remedies of this matter prospectively. However, ALJ Schmidt aptly and correctly found those cases were not applicable to a unilateral change case like the one presented here because these cases involve the permanent department-wide reduction in hours of work each week, whereas Respondent's cited cases involved changes that only affected a certain specific group of employees.

B. Respondent's System of Classifying Respiratory Department Employees is not Controlling.

In its exceptions and brief in support, Respondent incorrectly states which employees were subject to the remedy awarded by the Board for this matter by asserting the remedy only applied to Respondent's "full-time respiratory therapists". Respondent creates unnecessary confusion with this inaccurate wording. Specifically, the Board Order is not limited to any specific job classification. Instead, the Order is clear that Respondent reduced the hours of all full-time respiratory department employees, not just the limited classification expressed by Respondent. Throughout the litigation of this matter, ALJ Parke, the Board, the 10th Circuit, and subsequently ALJ Schmidt have consistently stated the Board-awarded remedy applied to all full-time employees in the respiratory department. There is no limitation articulated in any of the decisions that the remedy was limited to full-time respiratory therapists.

In determining who was eligible for a backpay remedy, the General Counsel relied on the parameters of hours specifically laid out by the Board in its Order. The Board expressly states full-time employees had their hours reduced from 40 hours to 32 to 36 hours. *Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home,* 342 NLRB at 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)

In his decision, ALJ Schmidt, in ascertaining who was eligible for backpay, did not rely solely on the Respondent's classification system for identifying the full-time employees who were eligible for backpay remedies in this unlawful reduction of hours case. (ALJD at 7:26-27) Respondent takes exception to this and argues in its brief in support that ALJ Schmidt cannot substitute his own business management ideas for Respondent, but did so even though the Respondent's classification system was not attacked at the hearing.

Respondent mischaracterizes the standard for this compliance matter. The standard is not whether ALJ Schmidt should have relied solely on the Respondent's classification system but whether the General Counsel's backpay formula and its application of that formula under presented circumstances were reasonable. *Virginia Electric v. NLRB*, 319 U.S. 533, 544 (1943); *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Atlantic Limousine*, 328 NLRB 257, 258 (1986). Here, with some limited exceptions filed with the Board by the Acting General Counsel, ALJ Schmidt's conclusions that the General Counsel's formula and general application of that formula were reasonable and well-founded are supported by the record.

Respondent is mistaken that the General Counsel did not raise issue with the classification system. The record reflects numerous objections by Counsel for the Acting General Counsel that classifications were not relevant and that the issue was centered on determining which employees in the respiratory department worked full-time hours, not what title Respondent may have given them. As an example, discriminatee Nohail Syed was an employee in the respiratory department who worked as a respiratory therapist assistant for

relevant times during his defined backpay period. Respondent argues Syed was not a respiratory therapist and thus not subject to the Board Order. What is controlling is not what title or classification Syed had during his time in the respiratory department, but whether he worked as a full-time employee in that department during a time the unilateral change was unremedied. ALJ Schmidt correctly found, with some exception as to the extent of the backpay period, that Syed was eligible for backpay remedy because he worked full-time hours in the respiratory department during a time an unlawful unilateral change was in place. (ALJD at 7:39-43)

Equally importantly, Respondent's classification system as to who is full time and who was part time cannot and should not be relied upon. The General Counsel did not rely on Respondent's employee job status classifications and definitions when applying the backpay formula to potential discriminatees, because Respondent applied an unreasonably narrow definition for defining full-time status. Respondent considers anyone who works 39 hours or less in a week to be part-time or a PRN (as needed employee). (ALJD at 8:12-16) Respondent's system ignores the underlying nature of the unlawful reduction of hours being remedied by the Board Order and does not take into consideration that it had not taken any action to rescind the unlawful unilateral action. Respondent's classification system is not reasonable or rationale under the circumstances created by Respondent with its unlawful conduct.

ALJ Schmidt correctly noted in his decision that Respondent asserts conveniently rigid definitions for employees considered to be in full-time and part-time status. (ALJD at 8:46-49). Specifically, ALJ Schmidt properly found Respondent's definitions to be largely self-serving, adding that accepting Respondent's assertions that the remedial action only applied to

full-time employees and then strictly applying Respondent'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 Respondent's classification system was "problematic" and 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 8:11-12, 25-26)

Relying solely on Respondent's classifications post unilateral change under these conditions is not warranted. More particularly, Respondent's 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 appropriately 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).

With the definitions purported by Respondent being unreasonable, 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 should not be allowed to profit from any uncertainty caused by its unlawful conduct. ALJ Schmidt correctly determined that the remedy applied to full-time employees but did not err in failing to rely solely on Respondent's classification systems for determining who was or was not a full-time employee. ALJ Schmidt's reliance on other factors to make this determination and his effectuation of that determination, save for the Acting General Counsel's limited exceptions, is reasonable and is supported by the record and should be affirmed by the Board. (ALJD at 9:46-47)

C. Interim Earnings were not Relevant to the Remedy Mandated for Respondent's Unilateral Changes.

ALJ Schmidt's conclusion that the General Counsel did not carry the burden of pleading employee interim earnings for this compliance matter is correct and supported by the record and should be affirmed by the Board. Respondent's attempts in its exceptions and brief in support to make interim earnings an issue in this unilateral change matter in not supported by case law. Both ALJ Parke and ALJ Schmidt correctly cited *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), for the remedial formula to follow for calculating backpay. In *Ogle*, the Board held that the backpay owing from the repudiation and failure to apply the terms of a collective-bargaining agreement would not be computed using the formula articulated in *F.W. Woolworth Company*, 90 NLRB 289 (1950), because cessation of the employment status and interim earnings were not involved with that unilateral change charge. 183 NLRB at 683.

This compliance matter does not involve a case where interim earnings are an issue. Indeed, the Acting General Counsel asserts that the inclusion of interim earnings is particularly unwarranted in this matter because employee backpay calculations are based on an hour differential determined on a week-to-week basis during their time of employment with Respondent and not any cessation of employment that would require them to seek new employment. To this end, this unlawful unilateral reduction of hours case is analogous to a denial of a bonus or a pay shortage or a failure to apply a term of a collective bargaining agreement as presented in *Ogle*. Accordingly, this matter does not, and should not, raise any interim earnings issues as presented by Respondent in its exceptions and brief in support.

Respondent is not prejudiced by any information in the possession of, or available to, the Acting General Counsel that should be accounted for in the backpay computations. To the

contrary, the hour reduction information associated with the case is best in the hands of the entity that records these hours, namely Respondent. See, e.g., *Gateway Service Co.*, 209 NLRB 1166 (1974); *Jerome Fink & Sons, Inc.*, 258 NLRB 1113 (1981). Again, there are no discharges or allegations involving the cessation of employment associated with this matter. Discriminatees arguably did not have to seek interim employment because they were still working full time for Respondent during the material times they were subject to Respondent's unlawful unilateral actions. ALJ Schmidt was correct in rejecting Respondent's claim that interim earnings needed to be investigated and pled for this matter. (ALJD at 15:7-8)

Respondent argues its interim earnings defense is relevant because it is supported by the Board's Supplemental Decision on March 25, 2009, regarding General Counsel's Motion for Summary Judgment and Motion to Strike Portions of Respondent's Amended Answer. It is not disputed the Board ruled in that supplemental decision that Respondent's Amended Answer had properly placed employee interim earnings into issue. Respondent recitation of that ruling in its exceptions and brief in support, however, does not give the proper context in which this finding was made. The question before the Board was whether the defense posed by Respondent in its answer had enough specificity as required by Section 102.56 of the Board's Rules and Regulations, not whether Respondent had presented a valid defense for the matter. Regarding this issue, the Board ruled that the interim earnings defense was pled specifically and sufficiently enough to warrant not being struck pursuant to Section 102.56(b). There was nothing in the ruling that determined Respondent's interim earnings defense was legitimate or well-founded for the compliance proceedings. That was a matter left to ALJ Schmidt, and he correctly determined that issue was not relevant to this unilateral change compliance matter. (ALJD at 15:1-7)

Respondent throws in with its exceptions and brief in support that the Acting General Counsel did not move to preclude Respondent from offering evidence of employees' interim earnings. Such action by the Acting General Counsel was not necessary. ALJ Schmidt already ruled in his July 9, 2010 Order Denying Respondent's Motion to Dismiss Amended Compliance Specification and Notice of Hearing that Respondent would not be allowed to present evidence regarding interim earnings issues at the compliance hearing which was held on July 21, 2009. Respondent did not attempt to present such evidence related to the interim earnings issue in the record for that hearing and did not make any arguments on the record objecting to ALJ Schmidt's ruling for that purpose. Respondent should not be allowed to advocate for doing so now, post ALJ decision.

D. Respondent's Backpay Obligation has not Tolled.

ALJ Schmidt correctly determined in his supplemental decision that Respondent's duty to bargain defense has no merit. As previously noted, Respondent presented no evidence at the hearing that it has taken any remedial steps with the Region to rescind the unilateral reductions of hours found unlawful by the Board. In these circumstances, Respondent cannot claim the Charging Party Union has failed to bargain with Respondent when Respondent itself has engaged in prior bad faith bargaining conduct which to date it has failed to remedy. ALJ Schmidt properly noted the Charging Party Union did not have a duty to bargaining under those conditions. To allow Respondent's defense to take hold under these conditions would allow it to inure a benefit from its original unlawful refusal to bargain conduct. This cannot and should not be allowed to take place.

Any make whole remedy associated with the unilateral change in this compliance matter only ends when the Charging Party Union no longer holds the status of exclusive

collective bargaining representative of the represented employees. See *Coastal Derby Refining Co.*, 312 NLRB 495, fn.1 (1993). Here, there is no evidence the Charging Party Union has lost its status as exclusive collective-bargaining representative. There is no evidence whatsoever in the record showing any disclaimer of interest has been made, that employees have voted to decertify the Charging Party Union as their bargaining representative, or that employees have expressed a desire to no longer be represented.

Likewise, there is no evidence Respondent has lawfully withdrawn recognition pursuant to objective considerations associated with loss of majority status. *Levitz Furniture Co., of the Pacific*, 333 NLRB 717 (2001) (Board held that an employer must show a union's actual loss of majority support in order to lawfully withdraw recognition). Without such evidence, the make-whole remedy associated with this matter is not tolled. Even if such events warranted consideration of the defense, the defense would arguably fail on the basis there are unremedied unfair labor practices (unilateral change) that would have arguably tainted any such decertification or withdrawal of recognition. *See, e.g., Flex Plastics, Inc.*, 262 NLRB 651, 656 (1982); *Terrell Machine Company*, 173 NLRB 1480, 1480-1481 (1969); *Pioneer Inn Associates d/b/a Pioneer Inn and Pioneer Inn Casino*, 228 NLRB 1263, 1265 (1977).

In passing, Respondent notes in its exceptions and brief in support that the General Counsel should not be allowed to prosecute an alleged backpay liability until the end of time. If Respondent would rescind the unlawful unilateral change found by ALJ Parke, affirmed by the Board, and enforced by the 10th Circuit Court of Appeals, it would not have to worry about having any indefinite liability.

III. CONCLUSION

Respondent's exceptions are without merit and should be denied b the Board. The Board should affirm the ALJ Schmidt's decision, save for the Acting Counsel for the General Counsel's limited exceptions which the Board should grant.

Dated at Albuquerque, New Mexico, this 16th day of September 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF 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 16th day of September 2010, on the following:

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