

**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 REPLY BRIEF

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel in the above-captioned cases, files the following Reply Brief to Respondent's Answering Brief to the Acting General Counsel's Limited Exceptions to the Supplemental Decision of Administrative Law Judge William L. Schmidt (ALJ Schmidt) dated July 28, 2010, in Community Health Systems, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home, Cases 28-CA-16762, et al. (JD(SF)-29-10).

1. Respondent has failed to Post a Notice to Employees as directed by the Board Order

In its Answering Brief, Respondent claims that the General Counsel never alleged Respondent was noncompliant with the obligation to post a Notice to Employees and that Counsel for the Acting General Counsel never raised the issue as part of the compliance proceedings before ALJ Schmidt. In the same Answering Brief, however, Respondent admits that every version of the Compliance Specifications issued by the General Counsel included a reference to Respondent's obligation to post a Notice to Employees as required by the Board's Order. Although Respondent claims it averred in its Answers that it had complied

with this remedy, it never offered any evidence at the compliance hearing demonstrating or showing that it had in fact done this. Likewise, Respondent neither offered nor presented any contention or evidence protesting its having to comply with this notice posting remedy.

More troubling is that in its Answering Brief, Respondent asserts that at one point in the compliance hearing, Respondent's counsel stated the non-compliance issues for the hearing were limited to Respondent's failure to pay backpay and failure to make whole one particular employee for a one-day suspension, but that Counsel for the Acting General Counsel never objected or raised issue asserted at that time that Respondent had failed to post a Notice to Employees. Respondent misstates and mischaracterizes this referenced testimony. Specifically, and more accurately, at the point in the hearing referenced by Respondent, ALJ Schmidt reminded Respondent's counsel that the Board Order required Respondent to send a notice to the Regional Director affirming that Respondent had complied with the Board Order. (TR. at 24:13-16) ALJ Schmidt asked Respondent's counsel if this had been done and Respondent's counsel only responded by saying "I believe so". (TR. at 24:17)

Respondent's counsel goes on to briefly define what Respondent believed to be the matters at issue for the hearing, but he did not finish his explanation after ALJ Schmidt cut him off and instead moved on to another issue in the hearing. (TR. at 24:17-22)

Respondent's counsel did not come back to complete his answer or clarify exactly what points he was trying to make regarding any discussion regarding the Notice to Employees. Counsel for the Acting General Counsel cannot be held to have failed to object to an incomplete statement when it did not include what Respondent represents it did. The Notice to Employee remedy was addressed by ALJ Schmidt and, at most, Respondent's counsel answered Respondent might have complied with the remedy. If the Notice to Employees was not an

issue, which is not the case here, Respondent's counsel was free to inform ALJ Schmidt of this or protest regarding it when the matter was being discussed on the record. Respondent failed to do this on both counts.

The unsure answer from Respondent's counsel regarding the posting of the Notice to Employees hardly serves as a sufficient basis to establish Respondent has complied with the posting requirement in the Board Order. When put to task on the issue, Respondent's counsel did not confirm or present evidence it met this posting remedy. Respondent argues that it is the General Counsel's burden to prove that Respondent had not complied with the Notice posting. The General Counsel did this by referencing this required remedy in applicable Compliance Specifications and arguing before ALJ Schmidt that Respondent had not complied with it. It is not the General Counsel's obligation, as argued by Respondent, to argue and prove that Respondent's uncertainty regarding its compliance with notice posting was not accurate.

More importantly, Respondent has made no contact with the Region to address the posting requirements articulated by the Board Order. The Board Order requires within 21 days after service by the Region, that Respondent file with the Region Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply. Again, if Respondent has in fact taken such steps, it has provided no such evidence to the Region or on the record during the compliance hearing. It is Respondent's responsibility to comply with the Board Order and the remedies encompassed in it. In this regard, this remedy needs to be addressed at the compliance stage of the proceedings and, in turn, Respondent needs to be directed as to what needs to be performed for compliance purposes. A blanket statement from Respondent that it may have posted the

Notice to Employees is not sufficient to establish compliance with this remedy. 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.

2. Respondent's System of Classifying Respiratory Department Employees is not Reasonable and Should not be Relied Upon in Identifying Which Employees were Subject to Backpay Remedies Provided by the Board Order

In its Answering Brief, Respondent claims the General Counsel acknowledges defects with its classification "solution" regarding which employees should be subject to General Counsel's backpay formula, based on the simple fact that General Counsel relies on a standard that the backpay formula and the amounts calculated from that formula need only be reasonable and free from arbitrary character. Contrary to Respondent's assertions, General Counsel has not admitted any such defects with its backpay formula or the backpay calculations that were derived from it. It is nonsensical to assert the mere citing and reliance of the standards associated with this compliance matter is somehow an admission that General Counsel's formula and calculated backpay amounts are deficient or defective.

The General Counsel has discretion in selecting a formula that will closely approximate backpay and has the burden of establishing only that the gross backpay amounts contained in a compliance specification are reasonable and not an arbitrary approximation. *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Mastell Trailer Corp.*, 273 NLRB 1190 (1984). Any formula which approximates what the discriminatees would have earned had they not been discriminated against is acceptable if not unreasonable or arbitrary under the circumstances. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Any uncertainty about how much backpay should be awarded to a discriminatee is resolved in his or her favor and against the respondent whose violation caused the

uncertainty. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), *enfd. in part* 231 F.3d 1156 (9th Cir. 2000); *Intermountain Rural Electric Assn.*, 317 NLRB 588, 590-591 (1995), *enfd. mem.* 83 F.3d 432 (10th Cir. 1996). Under the circumstances presented by the evidence, General Counsel has met this standard.

In its Answering Brief, Respondent characterizes General Counsel's approach as being haphazard. This is far from the truth. In determining who was eligible for 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)

Notwithstanding Respondent's claims to the contrary, Respondent's classification system as to who is full-time and who was not is not reliable. The General Counsel did not rely on Respondent's system when applying the backpay formula to potential discriminatees because Respondent applied an unreasonably narrow definition for defining full-time status, a pinnacle question to answer for determining who was eligible for backpay remedy in this compliance matter. 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 has not taken any action to rescind the unlawful unilateral action. In fact, ALJ Schmidt 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)

The General Counsel has systematically applied a reasonable formula in a reasonable manner to address which employees were subject to Respondent's unlawful, unrescinded systematic departmental change to full time employee hours. Respondent's having employees work within the range of hours (32 to 36) defined in the Board Order, but noting in employee paperwork the employees were part time or PRN employees is not reasonable and does nothing but create confusion as to real status of those employees. 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 8:11-12, 25-26) Relying solely on Respondent's classifications post unilateral change under these conditions is not warranted and not reasonable.

Respondent cites concerns in its Answering Brief that the General Counsel's approach will lead to windfalls for unrepresented employees (part-time and PRN employees). Here, Respondent turns the coin on its head. With the definitions purported by Respondent being unreasonable and in effect eliminating anyone from potential backpay remedy because of its rigid, self-serving classification definitions, the effectuation of those definitions cannot in turn be relied upon subsequent to Respondent's commission of unlawful and unremedied unilateral reduction of full time hours. It is Respondent who should not be allowed to profit from

windfalls or uncertainty created by its unlawful conduct. Respondent bears the burdens that arise from its unlawful actions and, in turn, the consequences for its failure to remedy those unlawful actions. 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).

3. Conclusion

Respondent's attempts to reverse standards and avoid obligations arising in this compliance matter should be rejected by the Board. Respondent is the party who has failed to comply in any fashion with any remedy ordered by the Board 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, that it has posted a Notice to Employees, or that it has notified the Region as to what steps it has undertaken. Until the unlawful working arrangements are rescinded by Respondent and status quo work arrangements put back into place, full-time employees hired and working for Respondent under the unlawful working conditions are entitled to the backpay remedies found by ALJ Schmidt, with some limited exceptions raised by the Acting General Counsel.

In sum, the Board should affirm the ALJ Schmidt's decision, save for Counsel for the Acting General Counsel's limited exceptions that the Board should grant.

Dated at Albuquerque, New Mexico, this 28th day of September 2010.

Respectfully submitted,

/s/ David T. Garza

David T. Garza

Counsel for the Acting General Counsel

National Labor Relations Board, Region 28

421 Gold Avenue, SW, Suite 310

Albuquerque, NM 87103-0567

Telephone: (505) 248-5130

Facsimile: (505) 248-5134

David.Garza@nrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY 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 28th day of September 2010, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Bryan T. Carmody, Attorney at Law
512 Roxbury Road
Stamford, CT 06902
E-Mail: bryancarmody@bellsouth.net

Don T. Carmody, Attorney at Law
P.O. Box 3310
Brentwood, TN 37024
E-Mail: doncarmody@bellsouth.net

United Steelworkers of America,
District 12, Subdistrict 2, AFL-CIO-CLC
3150 Carlisle Boulevard NE, Suite 110
Albuquerque, NM 87110
E-Mail: marmonta@usw.org

United Steelworkers of America,
District 13, Subdistrict 1, AFL-CIO-CLC
1300 Rollingbrook Drive, Suite 504
Baytown, TX 77521
E-Mail: fsanchez@usw.org

Via Overnight Delivery:

Community Health Services, Inc.
d/b/a Mimbres Memorial Hospital
and Nursing Home
900 West Ash Street
Deming, NM 88030

/s/David T. Garza

David T. Garza
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, SW, Suite 310
Albuquerque, NM 87103-0567
Telephone: (505) 248-5130
Facsimile: (505) 248-5134
E-Mail: David.Garza@nlrb.gov