Nos. 11-1064 & 11-1095

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEMING HOSPITAL CORPORATION
d/b/a MIMBRES MEMORIAL HOSPITAL

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Petitioner/Cross-Respondent	)	Nos. 11-1064 & 11-1095
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 28-CA-16762 28-CA-17278
Respondent/Cross-Petitioner	)	28-CA-17390

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home was the Respondent before the Board in the above-captioned case. Its corporate owner, Deming Hospital Corporation d/b/a Mimbres Memorial Hospital, is the Petitioner/Cross-Respondent in this court proceeding. The Board's General Counsel was a party before the Board. The United Steelworkers of America District 12, Subdistrict 2, AFL-CIO-CLC was the charging party before the Board.

B. Rulings Under Review

The case under review is a Supplemental Decision and Order of the Board, issued on February 28, 2011 and reported at 356 NLRB No. 103.

C. Related Cases

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 20th day of September, 2011

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Deming Hospital Corporation d/b/a Mimbres Memorial Hospital ("the Hospital") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Supplemental Decision and Order issued by the Board on February 28, 2011, and

reported at 356 NLRB No. 103. (A 595-610.)[1] In its Supplemental Decision and Order, the Board found that the Hospital owes backpay to 13 named employees, in the amounts specified plus interest, as a remedy for the Hospital's unilateral reduction of employee work hours, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act"). (*Id*.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows an aggrieved party to obtain review of a Board order in this Circuit, and allows the Board to cross-apply for enforcement.

The Hospital filed its petition for review on March 3, 2011. The Board filed its cross-application for enforcement on March 29, 2011. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

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[1] Record references in this brief are to the Joint Appendix ("A") filed by the Hospital. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Hospital's opening brief.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its broad remedial discretion in determining the amounts of backpay due 13 employees to make them whole for the loss of earnings they suffered as a result of the Hospital's unilateral change to their terms and conditions of employment.

STATEMENT OF THE CASE

The Board previously found (A 24, 29) that the Hospital violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by, *inter alia*, unilaterally reducing the work hours of its full-time respiratory department employees, establishing a fingerprint policy, and suspending employee Gary Kavanaugh pursuant to that policy. *Community Health Servs., Inc.*, 342 NLRB 398, 400-01 (2004) ("*Mimbres I*"). The Board ordered (A 25, 33-34) the Hospital to rescind these unlawful changes to its employees' terms and conditions of employment, and to make the employees whole for any loss of earnings and other benefits suffered as a result of the changes. *Id*. at 401, 404. The United States Court of Appeals for the Tenth Circuit enforced the Board's Order in full. *NLRB v. Community Health Servs., Inc.*, 483 F.3d 683, 688 (10th Cir. 2007).

Thereafter, the Regional Director for the Board's Region 28 issued a compliance specification and an amended compliance specification, setting forth the amounts of backpay due certain named employees under the terms of the

Board's court-enforced Order in *Mimbres I*. (A 596; A 281-374.) The Hospital filed answers to each of these compliance specifications, and the matter proceeded to a hearing before an administrative law judge. (A 596; A 375-453.)

At the close of testimony, the administrative law judge granted the Regional Director's request for leave to file a second amended compliance specification, if appropriate, naming additional backpay claimants based on updated records to be provided by the Hospital. (A 596-97; A 267-68.) The administrative law judge left the hearing open for purposes of receiving such an amended compliance specification and additional relevant evidence, if any. (*Id*.)

The Regional Director ultimately filed a second amended compliance specification on September 15, 2009. (A 597; A 454-92.) The Hospital filed an answer, and the administrative law judge went on to conduct two status conferences with the parties, addressing the Hospital's asserted need to adduce further evidence, before formally closing the hearing on January 20, 2010. (A 597; A 493-522, 571-79.)

The administrative law judge thereafter issued a decision and recommended order agreeing with the Regional Director's second amended compliance specification in some respects and awarding backpay to 13 named employees. (A 580-94.) The Regional Director and the Hospital filed exceptions. (A 595; A 274.) The Board considered the exceptions and issued a Supplemental Decision

and Order (A 595-96) adopting the judge's recommended order on February 28, 2011. *Community Health Servs., Inc.*, 356 NLRB No. 103 (2011) ("*Mimbres II*"). This case is before the Court on the Hospital's petition for review and the Board's cross-application for enforcement of the Board's Supplemental Decision and Order in *Mimbres II*.

STATEMENT OF FACTS

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

The Hospital is a corporation that operates a medical facility known as Mimbres Memorial Hospital ("MMH") in Deming, New Mexico. (A 26.) In the spring of 1996, the Hospital purchased MMH from Luna County, New Mexico. (A 27.) Following the purchase, the Hospital recognized and bargained with the then-existing collective-bargaining representative of the MMH employees—the United Steelworkers of America, District 12, Subdistrict 2, AFL-CIO ("the Union"). (*Id*.) However, in 1999, before the parties had achieved a collective-bargaining agreement, the Hospital withdrew recognition from the Union and began ignoring the Union's requests to bargain. (*Id*.)

In 2001, while the Union continued in vain to request bargaining, the Hospital made a series of unilateral changes to the employees' terms and conditions of employment. (*Id*.) Specifically, as relevant here, the Hospital

unilaterally reduced the hours of its full-time respiratory department employees from 40 hours per week to between 32 and 36 hours per week. (*Id*.)

The Board (Members Liebman, Schaumber, and Meisburg) found that the Hospital violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by making the above unilateral change and ordered, among other things, that the Hospital rescind that change and make employees whole for any loss of earnings and other benefits suffered because of it. (A 24-25, 29, 33-34.) The Tenth Circuit enforced the Board's Order in full. *NLRB v. Community Health Servs., Inc.*, 483 F.3d 683, 688 (10th Cir. 2007).

II. THE INSTANT COMPLIANCE PROCEEDING

Following the Tenth Circuit's enforcement of the Board's *Mimbres I* Order in 2007, a controversy arose concerning the amount of backpay due under its terms. As a result, the Regional Director for Region 28 issued a compliance specification ("Specification I"), and two amended compliance specifications ("Specification II" and "Specification III"), identifying the employees affected by the Hospital's unilateral changes and setting forth the amounts of backpay due

those employees, as well as the method used to calculate their backpay.[2] (A 596-97; A 281-374, 454-92.)

Specification III, the operative specification here, identified 19 employees as affected by the Hospital's unlawful reduction of full-time work hours in its respiratory department and therefore eligible for the make-whole remedy ordered by the Board in *Mimbres I*. (A 597; A 457.) The Regional Director identified the named employees as full-time employees, who were subject to the Hospital's unlawful reduction in full-time hours, based on an analysis of the hours they worked, according to the Hospital's payroll records. (A 602; A 262-65.)

The 19 employees named in Specification III included 3 who were employed full time in April 2001, when the Hospital implemented the reduction in full-time work hours. (A 606; A 462-64.) The Regional Director alleged that the backpay period for those employees continued to run after April 2001, as the Hospital never rescinded its unilateral change in work hours, and ended for each employee as of "the end of the last complete payroll period in which [the employee] worked in the Respiratory Department." (*Id*.)

The remainder of the 19 employees named in Specification III were hired into the respiratory department after April 2001, while the unilateral reduction of

[2] The Regional Director amended the compliance specification once before the hearing, and again after the close of testimony, to take into account updated personnel records provided by the Hospital.

hours remained in place. (A 605-06; A 459-68.) They were included in the specification because they were assigned the unilaterally reduced full-time schedule of 32 to 36 hours per week. (A 605-06; A 261-63.) The Regional Director assumed that these newer employees would have been assigned the regular full-time schedule of 40 hours per week, if not for the Hospital's unilateral elimination of that schedule beginning in April 2001. (A 605-06; A 261-65.) The Regional Director accordingly alleged that the backpay period for the employees hired after April 2001 began on the date of their hire and ended either at "the end of the last complete payroll period in which [the employee] worked in the Respiratory Department" or—for those who continued to be employed in the department—the end-date of the last payroll documents provided by the Hospital.[3] (A 459-68.)

In its answer to Specification III, the Hospital asserted that some of the employees named in the specification were not entitled to backpay "inasmuch as they are individuals . . . in a job classification not within the scope of the Board's

[3] Because the Hospital never rescinded its unlawful reduction of full-time work hours in the respiratory department, the Hospital's liability for backpay continues. (A 609; A 468 ¶19, 469 n.3, 571 n.1.) The Regional Director accordingly noted that, for the employees who continued to work in the respiratory department as of the proceedings below, the backpay period did not end, despite the use of an ending date to calculate their backpay. (*Id*.) The Regional Director also noted that employees hired to work in the respiratory department since the proceedings below may also be entitled to backpay as employees affected by the Hospital's as-yet-unrescinded unilateral change. (A 468 ¶19.)

Order." (A 601-02; A 511.) The Hospital also: 1) took issue with the Regional Director's failure to investigate and plead interim earnings for any of the 19 named employees (A 606-07; A 509); 2) argued that "no backpay period may extend beyond, or begin after, August 28, 2007," as the Hospital was "relieved of any further duty to bargain with the [Union]" as of that date (A 598-99; A 511); and 3) challenged the inclusion of employees hired after the unilateral change occurred in April 2001, stating that these employees were not within the scope of the Board's Order (A 605-06; A 510).

In a status conference that followed the pleadings described above, the Regional Director moved to amend Specification III to delete two individuals from the list of backpay claimants, based on evidence produced by the Hospital, showing that the two individuals in question were statutory supervisors excluded from the bargaining unit. (A 598; A 574.) The administrative law judge granted the motion, thereby reducing the total number of employees named in Specification III to 17. (*Id*.)

Thereafter, the administrative law judge issued a supplemental decision finding (A 602), in agreement with the Hospital's assertions in its answer, that employee job classifications should be taken into account in determining who was a full-time employee during the relevant time period, and therefore entitled to the make-whole remedy ordered in *Mimbres I*. Considering (*id*.) "all of the relevant

circumstances rather than merely the number of hours worked" by the named employees, the judge found that 3 of the employees named in Specification III were actually part-time or as-needed employees, and therefore not entitled to a remedy.[4] The judge also adjusted (A 602-04) the backpay figures for several of the remaining employees, based on changes in their job classifications that took them out of full-time status for portions of their respective backpay periods. After making these adjustments, the judge concluded (A 608-09) that a total of 13 employees were entitled to backpay in certain specified amounts, plus interest.

III. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On February 28, 2011, the Board (Chairman Liebman and Members Pearce and Hayes) issued its Supplemental Decision and Order affirming (A 595-96, 608-09) the administrative law judge's finding that the Hospital owes backpay to 13 named employees, in the amounts specified plus interest, as a remedy for the unilateral changes found in *Mimbres I*. The Board's Supplemental Order requires the Hospital to pay a total of $104,840.52, plus interest, to the named employees. (*Id*.)

[4] The number of employees entitled to backpay under Specification III was reduced by one more, as the net total backpay due one of the remaining named employees (Raymond Collier) was zero for the period covered by the Regional Director's calculations. (A 461.)

In agreement with the judge, the Board rejected several of the defenses raised in the Hospital's answer to Specification III, finding, as relevant here, that: 1) the Regional Director did not err in failing to investigate and plead interim earnings because interim earnings are irrelevant in this case (A 606-07); 2) the Hospital's liability for backpay was not tolled as of August 28, 2007, because the Hospital did not rescind the underlying unilateral change as required by the Board's Order in *Mimbres I* (A 598-99); and 3) the make-whole remedy ordered in *Mimbres I* properly extends to employees hired after the date of the unfair labor practice, as the unlawful reduction in full-time shift hours was never rescinded and the backpay period therefore continued to run (A 605-06).

SUMMARY OF ARGUMENT

The Board reasonably determined the amounts of backpay due 13 employees in the Hospital's respiratory department, as a remedy for the Hospital's unlawful reduction of full-time work hours in that department in April 2001. In this appeal, the Hospital does not challenge the Board's identification of any specific employee as entitled to backpay, or the formula used to determine the amount due each identified employee. Nor does the Hospital challenge the application of the formula, or the specific backpay figures, for any employee. Rather, the Hospital raises three defenses that, if successful, would have the effect of reducing the Hospital's total backpay liability.

The Board properly rejected (A 606-07) the Hospital's first defense (Br. 12-22), that the backpay due each employee must be reduced by any earnings the employee may have made from other employment during the backpay period. The Board reasonably found (A 606-07) that it would be inappropriate to consider and deduct such earnings where, as here, the employees had no duty to find interim employment and thereby mitigate their damages. The employees in this case suffered a slight reduction in their work hours, to which the duty to mitigate simply does not apply. *See 88 Transit Lines, Inc.*, 314 NLRB 324, 325 (1994), *enforced*, 55 F.3d 823 (3d Cir. 1995). The Hospital has failed to show any case in which employees who suffered a similar reduction in their work hours were held to a duty to find interim employment and produce interim earnings. Accordingly, the Hospital's interim-earnings defense should be rejected here, as it was by the Board.

The Hospital's second defense (Br. 27-30), that its liability should be tolled as of the date when it attempted to bargain with the Union, and when the Union assertedly waived bargaining by failing to respond, must also fail. The Hospital never first rescinded its unlawful reduction of full-time work hours in its respiratory department, as required under the Board's court-enforced Order in *Mimbres I*. In the absence of such rescission, as the Board found (A 598-99), the Union was not under any obligation to bargain with the Hospital over the already implemented reduction in hours. Moreover, under well-settled Board law, an offer

to bargain over a unilateral change, without prior rescission of that change, "is insufficient to 'undo the effects of [the violation] of the [A]ct' . . . and does not toll the [wrongdoer's] backpay liability." *Porta-King Bldg. Sys.*, 310 NLRB 539, 539-40 (1993), *enforced*, 14 F.3d 1258 (8th Cir. 1994); *accord Farina Corp.*, 311 NLRB 1186, 1186 (1993). Accordingly, the Board properly rejected the Hospital's tolling defense.

Finally, the Board reasonably rejected (A 605-06) the Hospital's defense (Br. 22-27) that employees hired after April 2001 are not entitled to a remedy under the Board's Order in *Mimbres I*. As the Hospital never rescinded its unlawful reduction of full-time work hours in its respiratory department, employees have worked for years under an unlawfully reduced schedule of 32 to 36 hours per week. The Board reasonably determined (A 605-06) that all of the employees who have worked this unlawfully reduced schedule, since its implementation in April 2001, are entitled to a make-whole remedy. As the Board found (*id*.), the remedy that the Hospital requests (Br. 22-27) here—i.e., one that excludes employees hired after April 2001—is unacceptable because it would fail to make all affected employees in the respiratory department whole for the loss of earnings they suffered as a result of the Hospital's unlawful department-wide change.

As each of the Hospital's defenses thus fails, the Board respectfully requests full enforcement of its Supplemental Order.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THE AMOUNTS OF BACKPAY DUE 13 EMPLOYEES FOR THE LOSS OF EARNINGS THEY SUFFERED AS A RESULT OF THE HOSPITAL'S UNILATERAL CHANGE TO THEIR TERMS AND CONDITIONS OF EMPLOYMENT

A. Applicable Principles and Standard of Review

"Under [Section] 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), once the Board finds that an unfair labor practice has been committed, its choice of remedies includes the power to order an award of backpay." *Bufco Corp. v. NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998). Where the Board chooses this remedy, "it draws on a fund of knowledge and expertise all its own, and its choice . . . must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969); *accord Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 934 (D.C. Cir. 2005); *Power, Inc. v. NLRB*, 40 F.3d 409, 422 (D.C. Cir. 1994). *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *Shepard v. NLRB*, 459 U.S. 344, 349 (1983).

The Supreme Court has described the Board's power to order backpay, in particular, as a "broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *Accord Sure-*

Tan, Inc., 467 U.S. at 907. It is a power "for the Board to wield, not for the courts." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Thus, a Board order of backpay is entitled to enforcement unless it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC v. NLRB*, 604 F.2d 689, 697 (D.C. Cir. 1979) (internal quotation marks and citation omitted).

In a backpay proceeding such as this, the General Counsel's only burden is to establish the gross amount of backpay due; the burden then shifts to the wrongdoer to prove circumstances that would limit its liability. *See NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972). Any doubts about the alleged affirmative defenses are to be resolved against the employer who committed the unfair labor practice. *Id*. at 1321. *See NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 594 (7th Cir. 1976); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-73 (5th Cir. 1966).

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board's factual findings are conclusive so long as substantial evidence supports them. Substantial evidence exists when "a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Board's findings are therefore entitled to affirmance if they are reasonable,

and "[i]t is not necessary that [this Court] agree that the Board reached the best outcome in order to sustain its decision[]." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). Moreover, this Court has stated that it will defer to the Board's rules "if they are rational and consistent with the Act," and will uphold the Board's application of law to facts "unless arbitrary or otherwise erroneous." *Harter Tomato Prods. Co. v. NLRB*, 133 F.3d 934, 937 (D.C. Cir. 2009).

B. The Board Reasonably Determined the Backpay Due Under the Terms of the Board's Court-Enforced Order in *Mimbres I*

The Board acted well within the range of its discretion in determining the backpay due based on the Hospital's unlawful reduction of employee work hours in 2001. In this appeal, the Hospital's challenges to the Board's findings are quite limited. Indeed, the Hospital has waived its right to contest several of the Board's findings by failing to challenge those findings in its opening brief to this Court. *See Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1273 (D.C. Cir. 1998) (argument not made in opening brief waived); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) ("We require petitioners and appellants to raise all of their arguments in the opening brief to prevent 'sandbagging' of appellees and respondents and to provide opposing counsel the chance to respond.").

Specifically, in its opening brief, the Hospital has not challenged the Board's identification of the specific employees who were employed in the Hospital's respiratory department at the time of the April 2001 unilateral change. The Board arrived at this group of individuals after making explicitly reasoned judgments as to who worked full time in the respiratory department in April 2001, and who was therefore affected by the Hospital's unlawful reduction of full-time work hours in that department, beginning in April 2001. In reaching its conclusions with regard to full-time status, in particular, the Board considered not only employee work histories, but also the personnel classifications presented by the Hospital.

The Hospital also has not challenged the Board's identification of the specific employees who were employed in the respiratory department after April 2001. To identify these employees, the Board analyzed work schedules and reasonably assumed that those who were hired at the unilaterally reduced schedule of 32 to 36 hours per week would have worked the pre-unilateral-change schedule of 40 hours per week, but for the Hospital's unilateral change. The Board accordingly included those employees in the class of employees affected by the Hospital's unilateral change.

With the identity of the affected employees established, the Hospital, finally, has not challenged the formula that the Board used to determine the backpay due each of the employees in the two groups above. Nor has the Hospital challenged

the Board's application of the formula, or the specific backpay figures, for any of the employees. As indicated above, by failing to challenge the Board's findings with regard to these matters, the Hospital has waived its right to contest those findings here. *See Nat'l Steel & Shipbuilding*, 156 F.3d at 1273; *Corson & Gruman Co.*, 899 F.2d at 50 n.4.[5]

Accordingly, the only issues properly before the Court are the three defenses addressed in the Hospital's opening brief, which would have the effect of reducing Hospital's total backpay liability. The Hospital argues that: 1) the employees' interim earnings should have been considered and deducted from the amounts due (Br. 12-22); 2) the Hospital's backpay liability should have been tolled as of August 28, 2007 (Br. 27-30); and 3) employees hired after April 2001 should have been excluded from the make-whole remedy (Br. 22-27). For the reasons explained below, these defenses were reasonably rejected by the Board, and they should be rejected here.

[5] The Hospital also has failed to challenge the Board's Supplemental Order insofar as it provides backpay for a separate unfair labor practice—the unlawful one-day suspension of Gary Kavanaugh in July 2001—and accordingly the Hospital has waived its right to contest that portion of the Supplemental Order. (A 596, 599, 609 n.5; A 455, 464.)

1. The Board reasonably rejected the Hospital's argument that any additional earnings that the full-time employees may have made by moonlighting at other jobs can be used to reduce the Hospital's backpay liability

The Hospital argues (Br. 12-22) that, in computing the backpay for employees whose hours were unlawfully reduced from 40 hours per week to between 32 and 36 hours per week, the Board should have deducted any income that the employees earned from other employment during the backpay period. As we now show, the Board acted consistent with well-established precedent when it declined to do so. (A 606-07.)

The Board inquires into and deducts an employee's earnings from other employment only where the employee has suffered a loss of employment for which there is a duty to mitigate damages. *88 Transit Lines, Inc.*, 314 NLRB 324, 325 (1994), *enforced*, 55 F.3d 823 (3d Cir. 1995). In turn, the kind of employment loss that triggers the duty to mitigate is denial of employment by virtue of an unfair labor practice, as in unlawful termination or refusal-to-hire cases. *Id.*[6] In such cases, the employee who was subjected to the unfair labor practice has a well-

[6] *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-99 (1941) (finding, in case involving unlawful discharges and refusals to hire, that backpay remedy must take into account discriminatees' duty to find "desirable new employment"); *Madison Courier, Inc.*, 472 F.2d at 1323 (finding, in case involving failure to timely reinstate strikers, that duty to mitigate applies "[w]hen a discriminatee has been improperly deprived of his employment position").

recognized duty to mitigate his damages by searching for "desirable new employment," and any "interim earnings" from that employment are then deducted from the backpay owed for the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-99 (1941); *88 Transit Lines*, 314 NLRB at 325.

Where, as in this case, the employees did not suffer a denial of employment, but a schedule change that reduced their work hours by 4 to 8 hours per week, there is no duty to mitigate damages by searching for additional employment. *See id*. at 324-25. Thus, in *88 Transit Lines*, the Board found that employees who suffered an even more dramatic schedule change, resulting in their loss of 13.75 work hours per week, were not under any duty to find replacement work to make up the shortfall in their work hours. *Id*. Tellingly, the Hospital cites no case establishing that employees have a duty to find substitute employment where they have suffered a reduction in work hours similar to that here.[7]

In the absence of any duty to mitigate damages, the question whether employees had earnings from other employment during the backpay period is

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[7] *Cf. Ironton Publ'ns, Inc.*, 313 NLRB 1208, 1208 n.4, 1213 (1994), *reviewed as to other matters*, 73 F.3d 362 (6th Cir. 1995) (table), where the Board specified that the backpay due for unfair labor practices that included a reduction of one part-time employee's hours by more than half (from 25 to 11 hours per week) would be calculated in accordance with in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), which allows for deduction of interim earnings.

irrelevant.[8] *88 Transit Lines*, 314 NLRB at 325. Indeed, as the Board stated (A 607) in this case, "holding otherwise . . . would have the effect of imposing a duty on employee victims of an unfair labor practice to moonlight in order to minimize the impact of the unlawful conduct for the benefit of the wrongdoer. Such an absurd and grossly unjust result is not and should never be required in cases of this nature."

The Hospital nevertheless insists (Br. 19-21) that, under the Board's decision in *Ogle Protection Serv., Inc.*, 183 NLRB 682, 683 (1970), *enforced*, 444 F.2d 502 (6th Cir. 1971), *all* interim earnings must be "factor[ed] in" (Br. 21). However, that case provides no support for the Hospital's position. In *Ogle*, the Board held that its standard quarterly backpay computation,[9] which allows for deduction of interim earnings to prevent injustices to discriminatees "who exercised their

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[8] Contrary to the Hospital's suggestion (Br. 19 & n.5), the Board's use of the word "reimburse" (A 596) has no bearing on whether interim earnings are relevant in this case. The terms "reimbursement" and "backpay" are used interchangeably to refer to a Board make-whole remedy, and "reimbursement" does not preclude consideration of interim earnings as the Hospital implies. *See NLRB v. Gullett Gin Co.*, 340 U.S. 361, 363 (1951) (describing "back pay" remedy for unlawful discharge as requiring that employees be "reimbursed for earnings lost by reason of the unlawful discharge, from which should be deducted net earnings of employees from other employment during the back-pay period); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965) ("The back pay remedy has the . . . purpose of reimbursing employees for actual losses suffered as a result of a discriminatory discharge . . . .").

[9] *F.W. Woolworth Co.*, 90 NLRB 289, 291-93 (1950).

obligation to obtain interim employment," would be "unnecessary" in cases that did not involve an obligation to find interim employment. *Ogle Protection Serv.*, 183 NLRB at 683. The Board characterized the cases that impose an obligation to find interim employment as those involving "cessation of employment status or interim earnings *that would in the course of time reduce backpay*[.]" *Id*. (emphasis added). *Ogle* does not pretend to address what cases, other than cases involving cessation of employment, would involve interim earnings "that would in the course of time reduce backpay." For that, we must look to a case like *88 Transit Lines, Inc.*, 314 NLRB 324, 325 (1994), *enforced*, 55 F.3d 823 (3d Cir. 1995), which clearly establishes that interim earnings do not reduce backpay where the unlawful employer action is a slight reduction of hours for full-time employees.

The Hospital is no more successful in its efforts to show (Br. 15-18) that, "inside the four corners of [this] case," (Br. 17-18) the Board was obliged to consider and deduct interim earnings based on an earlier interlocutory decision. In the decision to which the Hospital refers, the Board addressed the Regional Director's motion to strike several paragraphs of the Hospital's amended answer to Specification I. (A 157-58.) The Board found, among other things, that the Hospital's answer's "general denial" that the Regional Director had properly investigated and pled interim earnings was "sufficient to place interim earnings and expenses into issue for all the employees," even though the Hospital did not make

specific interim earnings allegations as to any employee, "because that information is not generally within the knowledge of the [Hospital]." (A 158.) By these statements, the Board did not effectively find merit in the Hospital's interim earnings defense, as the Hospital suggests (Br. 15-18); nor did the Board make any affirmative finding that interim earnings are relevant. (*See* A 157-58.) The Board merely issued a routine procedural ruling that the issue of interim earnings was sufficiently raised by the Hospital's pleadings and therefore could be litigated before an administrative law judge.

In sum, the Hospital has failed to show that the Board acted unreasonably in refusing to consider and deduct interim earnings from the backpay due in this case. The Hospital has failed to provide any authority to establish that the employees here had a duty to seek substitute employment in order to make up the 4 to 8 hours of work they lost each week by virtue of the Hospital's unfair labor practice. In the absence of such a duty, the Board properly found (A 607) it inappropriate to inquire into and deduct any earnings that the employees may have had from other employment during the backpay period.

2. The Board reasonably rejected the Hospital's argument that the backpay period was tolled as of the date when the Union failed to respond to requests to bargain

The Board's Order in *Mimbres I*, which the Tenth Circuit enforced on April 16, 2007, required the Hospital to rescind the unilateral reduction in full-time

bargaining unit employees' shift hours. (A 33.) Notwithstanding this requirement, the Hospital admits (Br. 28) that it never rescinded its unilateral reduction of employee work hours. Therefore, all employees continue to work under unlawfully imposed conditions of employment.

The Board reasonably concluded (A 596, 605) that the earlier court-enforced obligation—that all employees be made whole for any loss of earnings or benefits "suffered as a result of the unilateral changes made"—required the Hospital to make employees whole until such time as the Hospital rescinded the change. Accordingly, the Board's Supplemental Order imposes upon the Hospital the obligation to make-whole all full-time employees in the respiratory department until such time as the Hospital rescinds the unlawful reduction in their schedule. *See Bedford Farmers Coop.*, 259 NLRB 1226, 1239 (1982) (ordering that employees who suffered unilateral reduction of work hours be made whole "by the payment to each of a sum of money equal to that which he or she normally would have earned . . . from the date, in each instance, when the particular hours or overtime were reduced until the restoration of the *status quo ante* of these conditions of employment").

To escape this result, the Hospital argues (Br. 30) that it should be spared of any backpay liability from August 28, 2007, forward, because by that date the Hospital had offered to bargain with the Union and the Union had not responded.

However, as the Board found (A 598), because the Hospital failed to rescind the unlawful reduction in hours, the Union had no duty to bargain. Indeed, rescission is a necessary and independent first step that the court has imposed upon the Hospital.

This conclusion is consistent with well-settled law. As the Board correctly stated (A 599), "a bargaining representative does not waive its right to bargain over a mandatory subject [here, the employees' work hours] where it refuses to meet and negotiate about that subject with an employer who has already implemented the change and ignores a court's order to restore the status quo as the [Hospital] has done here." *See Five Star Mfg., Inc.*, 348 NLRB 1301, 1339 (2006) (noting that wrongdoing employer can implement desired changes "after returning to the status quo, giv[ing] the [u]nion notice of a proposed change and bargain[ing] with the [u]nion"), *enforced*, 278 F. App'x 697 (8th Cir. 2008); *Stone Boat Yard*, 276 NLRB 1185, 1188 (1985) (noting acknowledgment by parties in case that "no amount of post violation good faith bargaining can stop the liability from continuing to accrue until the Company has first restored the *status quo ante*"). *Cf. Farina Corp.*, 311 NLRB 1186, 1186 (1993) (finding that wrongdoing employer's backpay liability could be tolled based on an offer to bargain, if employer can also show that "it was impossible to restore the status quo ante . . . prior to bargaining").

In these circumstances, the Board reasonably found (A 598) that the Hospital's offer of proof regarding its efforts to bargain with the Union in 2007 "would not be probative of any issue . . . in this compliance proceeding." Such an offer to bargain, without prior rescission of the unilateral change that is to be the subject of bargaining, "is insufficient to 'undo the effects of [the violation] of the [A]ct' . . . and does not toll the [wrongdoer's] backpay liability." *Porta-King Bldg. Sys.*, 310 NLRB 539, 539-40 (1993), *enforced*, 14 F.3d 1258 (8th Cir. 1994); *accord Farina Corp.*, 311 NLRB at 1186. *See also Stone Boat Yard*, 276 NLRB at 1188 (finding backpay period not tolled where wrongdoing employer did not restore the status quo as required by court-enforced Board order, but instead engaged in bargaining and conditioned agreement on union's waiver of the status quo).

3. The Board's make-whole relief reasonably includes all full-time respiratory department employees who continue to work under the reduced full-time hours even if they joined the department after the reduction began

As shown above, until the Hospital rescinds the unilateral reduction of the hours of its full-time respiratory department employees, all of those employees continue to work under unlawfully imposed conditions of employment. Accordingly, the Board, in implementing the court-enforced order that employees be made whole for any loss of earnings and other benefits "suffered as a result of

the unilateral changes made" (A 33) included in the remedy all department employees who continue to work under the unlawfully imposed reduction of hours, even if they joined the department after the unlawful reduction began. (A 605-06.)

The Hospital's argument (Br. 22-27), that any make-whole relief should be confined to those unit employees who were in the respiratory department at the time the reduction was announced, was reasonably rejected by the Board. The Board's application of its make-whole remedy "to all affected employees, both those employed at the time when [the unilateral change] occurred and those employed thereafter" (A 606) is supported by the Act and relevant case law.

Section 10(c) of the Act, 29 U.S.C. § 160(c), authorizes the Board to issue an order requiring "such affirmative action[,] including . . . backpay, as will effectuate the policies of this Act." As the Board found (*id*.), the Hospital's unilateral change "involved a permanent, department-wide reduction in the hours of work each week," a change which, "by its very nature[,] would affect both present and future employees until rescinded." In these circumstances, the Board reasonably awarded the remedy prospectively, to new employees who were assigned the reduced full-time schedule of 32 to 36 hours per week.

The Board's authority to take this remedial action—and, in particular, to apply a make-whole remedy to those hired after a unilateral change—is well settled. *See, e.g., 88 Transit Lines, Inc.*, 314 NLRB at 325 (finding that

"replacement drivers" hired after unilateral schedule change were to be made whole for losses related to schedule change, just like drivers employed at time of schedule change), *enforced*, 55 F.3d at 826. As explained in *88 Transit Lines*, this approach is reasonable because the employer's unlawful change resulted in a loss of full-time work opportunities for all employees in the respiratory department, and "[a]s [new employees] became part of the [department], they suffered the same disadvantage . . . as did the other unit employees." *88 Transit Lines*, 314 NLRB at 325. As the unlawful action was directed against the department, the remedy must "inure to the benefit of the entire [department]," including affected new employees in the department. *88 Transit Lines, Inc. v. NLRB*, 55 F.3d 823, 826 (3d Cir. 1995); *88 Transit Lines*, 314 NLRB at 325. "Any other course would mean that the bargaining unit would not be made whole for the [employer's] unlawful actions." *88 Transit Lines*, 314 NLRB at 325.

Moreover, as *88 Transit Lines* shows, it is not a novel procedure or a violation of due process, as the Hospital contends (Br. 25-26), for the Board to award a remedy, in compliance proceedings, to employees who were not employed when the unfair labor practice occurred. *See Bufco Corp.*, 147 F.3d 964, 968 (D.C. Cir. 1998) (interpreting make-whole remedy, in compliance proceedings, to include "would-be employees" who were denied employment following employer's unlawful repudiation of collective-bargaining agreement);

Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114 (D.C. Cir. 1986) (same).

The Hospital, in its brief (Br. 23-24), cites two cases in which prospective remedies have been found inappropriate: *NLRB v. Dodson's Market, Inc.*, 553 F.2d 617 (9th Cir. 1977), and *Teamsters Local Union No. 171 v. NLRB*, 425 F.2d 157 (4th Cir. 1970). However, as the Board found (A 605-06), these cases are readily distinguishable. In *Dodson's Market*, the court rejected the Board's award of a make-whole remedy to an employee newly hired into a department that had earlier become overcrowded by reason of the employer's unlawful discriminatory conduct. The court found that the underlying discrimination that the Board was seeking to remedy was not inflicted on the newly hired employee. By contrast, in the present case, the unlawful conduct to be remedied was a unilateral change inflicted on an entire department, affecting both present and future employees until the change's rescission. The remedy for the unilateral change, thus, necessarily includes employees hired after the unfair labor practice. Moreover, in *Teamsters Local Union No. 171*, the court upheld the Board's order of a make-whole remedy limited to employees whose wages were unlawfully reduced by a successor employer, where the language of the underlying Board decision made clear that the remedy was to be directed "solely to these men." *Teamsters Local Union No. 171*,

425 F.2d at 158. There is no such limiting language in the Board Decision and Order in *Mimbres I*.

As shown above, the Hospital's failure to rescind its unilateral reduction of full-time work hours in its respiratory department has created a situation where employees have worked, over many years, under an unlawfully reduced schedule. The Board ordered (A 605-06) the Hospital to remedy this situation by making whole all of the employees who have worked the reduced schedule since its unlawful implementation in April 2001. As the Board found (*id*.), excluding employees hired after April 2001 is unacceptable because it would fail to make all affected employees in the respiratory department whole for the loss of earnings they suffered as a result of the Hospital's unlawful department-wide change.

In sum, all three of the Hospital's defenses to its backpay liability were reasonably rejected by the Board. Accordingly, this Court should uphold the Board's Supplemental Order requiring (A 595-96) that the Hospital provide backpay to the 13 named employees who were affected by the Hospital's unlawful change.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Hospital's petition for review and enforcing the Board's Order in full.

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September 2011

H:/FINAL/Deming Hospital-final brief-remr

STATUTORY ADDENDUM

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69 (2000):**

Sec. 7. [§ 157.] Employees shall have 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> ***
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate

temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court

shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DEMING HOSPITAL CORPORATION d/b/a MIMBRES MEMORIAL HOSPTIAL	)	
Petitioner/Cross-Respondent	)	Nos. 11-1064 & 11-1095
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 28-CA-16762 28-CA-17278
Respondent/Cross-Petitioner	)	28-CA-17390

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,044 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, D.C.
this 20th day of September 2011

UNITED STATES COURT OF APPEALS
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Petitioner/Cross-Respondent	)	Nos. 11-1064 & 11-1095
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 28-CA-16762 28-CA-17278
Respondent/Cross-Petitioner	)	28-CA-17390

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on counsel of record for Deming Hospital Corporation, named below, through the CM/ECF system, as he is a registered CM/ECF user:

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Dated at Washington, D.C.
this 20th day of September 2011