UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DEMING HOSPITAL CORPORATION d/b/a
MIMBRES MEMORIAL HOSPITAL

and **Cases 28-CA-016762**
28-CA-017278
28-CA-017390

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

BRIEF OF THE ACTING GENERAL COUNSEL IN RESPONSE TO THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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On December 20, 2011, the D.C. Circuit remanded the above-captioned case to the Board for further consideration of a backpay issue. *Deming Hosp. Corp. d/b/a Mimbres Memorial Hosp. v. NLRB*, 665 F.3d 196, 199-202 (D.C. Cir. 2011). Specifically, the Court requested that the Board "amplify its position" as to why interim earnings should not be deducted from the backpay of employees whose hours were unlawfully reduced. *Id*. at 199. The Board subsequently accepted the remand and invited the parties to file briefs on this interim-earnings issue. Pursuant to the Board's invitation, the Acting General Counsel submits his position that the Board should not, and appropriately did not in this case, deduct from backpay interim earnings that employees generated in this context, where there was no duty to search for interim employment or to mitigate losses.

[1] In its decisions, the Board has consistently referred to the Respondent as "Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home." However, on appeal to the D.C. Circuit, Respondent represented that it is not related to any entity named "Community Health Services, Inc.," that its sole corporate owner is Deming Hospital Corporation, and that its correct legal name is "Deming Hospital Corporation d/b/a Mimbres Memorial Hospital." The D.C. Circuit accepted these representations and modified its case caption accordingly.

I. BACKGROUND

The Respondent's backpay liability arises from a court-enforced Board Decision and Order, in which the Board found that Respondent ("the Hospital") violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the work hours of employees in its Respiratory Department, from 40 hours per week to between 32 and 36 hours per week. *Community Health Servs., Inc. d/b/a Mimbres Memorial Hosp. & Nursing Home*, 342 NLRB 398, 400-01 (2004), *enforced*, 483 F.3d 683 (10th Cir. 2007). The Board ordered the Hospital to remedy this violation by rescinding the unilateral change and "[m]ak[ing] employees whole for any loss of earnings and other benefits suffered as a result" of it. *Id*. at 404. The Board further specified that losses, for purposes of the make-whole remedy, should be "computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970)[, *enforced*, 444 F.2d 502 (6th Cir. 1971)]." *Id*.

In the compliance proceeding that ensued, the Hospital argued that its backpay liability must be reduced by the amount of any interim earnings that employees had during the backpay period. *Community Health Servs., Inc. d/b/a Mimbres Memorial Hosp. & Nursing Home*, 356 NLRB No. 103, 2011 WL 702298, at *16 (2011) ("*Mimbres II*"). The Board rejected this argument, adopting the administrative law judge's finding that, under "the clear language [of] *Ogle Protection*," interim earnings are not considered "in cases of this type." *Id*. at *1, *16. The relevant language from *Ogle*, which was quoted by the judge, distinguished between unlawful discharge cases—where employees have "an obligation to obtain interim employment" and resulting "interim earnings" that must be "offset against backpay"—and Section 8(a)(5) refusal-to-bargain cases that "do[] not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Id*.

(citing *Ogle Protection*, 183 NLRB at 683). Thus, the instant case fell into the category of cases that "do not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection*, 183 NLRB at 683. The judge further observed that to consider interim earnings as offsetting backpay in such a case would be to impose on the employees "a duty . . . to moonlight in order to minimize the impact of the unlawful conduct for the benefit of the wrongdoer." *Id*. at *16. The judge concluded that "[s]uch an absurd and grossly unjust result is not and should never be required in cases of this nature." *Id*.

Examining this interim-earnings issue on appeal, the D.C. Circuit found, contrary to the Board, that "[t]he 'clear language' of *Ogle* does not address the current situation." *Deming Hosp.*, 665 F.3d at 200. Under the Court's reading of *Ogle*, that case "simply states that if the employer's unlawful action 'does not involve . . . interim earnings,' then the Board should not calculate backpay" on a quarterly basis, as it would in a case involving such earnings. *Id*. *See F.W. Woolworth Co.*, 90 NLRB 289, 291-93 (1950). Although the Court allowed that *Ogle* "appear[s] to assume that an employee who had not been terminated would not seek another job (and thus would not generate interim earnings)," the Court held that *Ogle* does not squarely address the question whether interim earnings should be considered, and deducted from backpay, if a non-terminated employee happened to generate such earnings from a second job during the backpay period. *Deming Hosp.*, 665 F.3d at 200.

Addressing the Board's concern that consideration of interim earnings would mean imposition of a duty to moonlight, the Court stated that this concern "conflate[d] and thus confuse[d] an employee's duty to mitigate with rules governing when backpay should be reduced by interim earnings." *Id*. The Court held that even though the employees here did

not lose their jobs and accordingly have no duty to mitigate, the Board might nevertheless consider their interim earnings "to ensure that employees who did choose to find other work do not receive windfalls." *Id*. The Court found that nothing in the Board's caselaw prohibits such a result and noted that the Board, indeed, has ordered the deduction of interim earnings from backpay in two cases *not* involving cessation of employment and the duty to mitigate.[2] *Id*. at 201. The Court acknowledged that Board counsel cited, in the Board's brief to the Court, one case—*88 Transit Lines, Inc.*, 314 NLRB 324, 325 (1994), *enforced*, 55 F.3d 823 (3d Cir. 1995)—in which the Board expressly indicated that it would not consider interim earnings in a case "involving a violation other than discharge from employment." *Deming Hosp.*, 665 F.3d at 201. However, the Court found that this case did not establish a general rule against considering interim earnings in nondischarge cases, given that, on appeal, the Third Circuit specifically stated that it did not "read the [Board's order] to mean that reduction for interim earnings is never appropriate in a nondischarge case." *Id.* (citing *88 Transit Lines, Inc. v. NLRB*, 55 F.3d 823, 827 n.2 (3d Cir. 1995).

Because the Court disagreed with the Board that its jurisprudence, and particularly *Ogle*, disposes of the interim-earnings issue here, it remanded the case to the Board "for a more thorough analysis of th[at] issue." *Deming Hosp.*, 665 F.3d at 200. The Court, however, did not prejudge the analysis to be undertaken by the Board and explicitly stated that it "d[id] not hold the Board must consider interim earnings in this case." *Id*. at 201.

[2] *Atlantis Health Care Grp. (P.R.), Inc.*, 356 NLRB No. 26, 2010 WL 4859824, at *1 (2010); *Amerigas Propane, L.P.*, 1997 WL 33315927 (1997).

II. ARGUMENT

A. The Board's Policy With Regard to Interim Earnings Is Closely and Appropriately Linked to Loss of Employment and the Duty to Mitigate

Unlike other statutes that regulate employer conduct and allow a backpay remedy for unlawful conduct, the Act does not mandate that interim earnings must be deducted from a backpay award. *Compare* Section 10(c) of the Act, 29 U.S.C. 160(c) (generally authorizing Board to order backpay as a remedy for unfair labor practices), *with* Section 706(g)(1) of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(g)(1) (authorizing EEOC to order backpay for violations of Title VII of the Civil Rights Act and specifying that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce back pay otherwise allowable"), *and* Section 107(a) of the Americans with Disabilities Act, 42 U.S.C. § 12117(a) (incorporating Title VII remedial provisions, including mandatory deduction of interim earnings). Nevertheless, early in the Act's administration, the Board determined that, in cases involving complete job loss, backpay awards should be reduced by employees' actual earnings from substitute employment during the backpay period—that is, their interim earnings. *See, e.g.*, *Nat'l Motor Bearing Co.*, 5 NLRB 409, 441 (1938); *Pusey, Maynes & Breish Co.*, 1 NLRB 482, 488 (1936). *See 88 Transit Lines*, 314 NLRB at 325 (describing interim earnings as earnings from "substitute" employment).

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-99 (1941), the Supreme Court approved the Board's practice of deducting interim earnings from the backpay due employees who were unlawfully denied total employment, but the Court added one caveat. *Id*. at 198-200. To be "fair," the Court held, "deductions should be made not only for actual earnings by

the worker but also for losses which he willfully incurred" by "unjustifiabl[y] refus[ing] to take desirable new employment" during the backpay period. *Id*. Without the latter deductions for willful loss, the Board's interim-earnings deductions would produce a strange and inequitable result: employees who exercised initiative and found substitute employment during the backpay period would have their backpay reduced, while those who took no such initiative and remained purposefully unemployed would receive their full backpay award. To prevent this situation, the Court recognized that the Board's practice of deducting interim earnings from backpay must be coupled with a duty, imposed equally on all employees, to mitigate losses suffered as a result of an unlawful denial of total employment. *See id*.

As the Court recognized, imposition of such a duty to mitigate is necessary to remove a perverse incentive otherwise created by the deduction of interim earnings from backpay. *See id.* Where employees know that their backpay will be reduced only in the event that they have interim earnings, they may well forego available employment in order to preserve their backpay awards. The Court sought to discourage such "unjustifiable refusal[s] to take desirable new employment" through appropriate deductions from backpay, expressly having in mind "not so much the minimization of damages as the healthy policy of promoting production and employment" among employees who are out of work due to an unfair labor practice. *Id*.

Following the Supreme Court's decision in *Phelps Dodge*, the Board understandably linked the concept of interim earnings with the concept of mitigation. *See 88 Transit Lines*, 314 NLRB at 325. Moreover, it began to define interim earnings in relation to the duty to mitigate: interim earnings were earnings from substitute employment "obtain[ed] . . . in accordance with the[] obligation to mitigate." *Id*. *See also* Robert S. Fuchs, Henry M.

Kelleher & Rosemary Pye, *Back Pay Revisited*, 15 B.C. Indus. & Com. L. Rev. 227, 243 (1973-1974) (describing interim earnings as "the products of a [backpay] claimant's fulfillment of his duty to mitigate"). The upshot was that, consistent with *Phelps Dodge*, there should be no deduction of interim earnings without a corresponding duty to mitigate losses.

B. The Board Should Not Deduct Interim Earnings from Backpay Where Employees Have Retained Their Jobs and Accordingly Have No Duty to Mitigate

The question raised by the D.C. Circuit's remand is whether it is appropriate for the Board to consider and deduct employees' interim earnings from backpay if the employees who are owed backpay have not been unlawfully deprived of total employment. Applying the policies developed under *Phelps Dodge*, the Acting General Counsel submits that interim earnings should not be deducted in these circumstances.

Preliminarily, as the D.C. Circuit acknowledged in the present case, "[v]ictims of unfair labor practices who have not lost their jobs have no . . . duty" to mitigate their losses by searching for substantially equivalent employment to replace the wages, hours, or benefits they lost by virtue of their employer's unlawful conduct. *Deming Hosp.*, 665 F.3d at 200. And with good reason. Employees who remain working notwithstanding an unfair labor practice are already participating in the labor market, and as a result, there is no need to impose a duty to mitigate on them in order to advance "the healthy policy of promoting production and employment." *Phelps Dodge*, 313 U.S. at 200. Moreover, such employees have limited time to devote to a search for substantially equivalent employment to replace the measure of wages, hours, or benefits they have lost. Considering the limitations on their time, as well as the limited opportunities available for part-time work that can mesh with their

current reduced employment, the duty to mitigate would amount to a burdensome exercise in futility for employees who have not been unlawfully denied total employment. Accordingly, the D.C. Circuit and the Board have appropriately found that such employees have no duty to mitigate. *See id.*; *88 Transit Lines*, 314 NLRB at 325 (holding that duty to mitigate "makes sense only with respect to employees who have been unlawfully discharged").

In the absence of a duty to mitigate, the deduction of interim earnings from backpay would be problematic for the reasons suggested by the Supreme Court in *Phelps Dodge*. *See* 313 U.S. at 198-200. Employees who exercised initiative and got second jobs during the backpay period would have their backpay reduced, while those who made no such effort would receive their full backpay award—raising serious questions of fairness among the employees to be made whole by the backpay remedy. Moreover, once employees came to understand that their backpay would be reduced as a result of a second job, they would most likely forego such jobs and check any inclination to be more productive, in order to preserve their full backpay award. The deduction of interim earnings without any concomitant duty to mitigate would, thus, undercut the "healthy policy of promoting production and employment" announced in *Phelps Dodge*.

C. The Board's Refusal to Deduct Interim Earnings Where There Is No Duty to Mitigate Would Not Confer a Windfall on Those Employees Who Happened To Have Interim Earnings

In suggesting that it nevertheless may be appropriate for the Board to deduct interim earnings from the backpay due in this case, the D.C. Circuit relied heavily on the theory that such deductions might be necessary, "to ensure that employees who did choose to find other work [i.e., second jobs] do not receive windfalls." *Deming Hosp.*, 665 F.3d at 200. However, it is awkward at best to speak of a windfall to employees who are exerting their own efforts to

be productive in a second job, and to overcome a financial burden imposed by their employer's unfair labor practice. Moreover, if full backpay is seen as a windfall to those employees who take on supplemental employment during the backpay period, there is no reason that full backpay could not also be seen as a windfall to the employees who refuse to look for or take on such supplemental employment. Indeed, the only way to avoid having the backpay to either of these two groups characterized as a windfall is to impose a duty to mitigate on these employees, something that the Board and the D.C. Circuit are in agreement should not be done where less than loss of total employment has occurred.

In a real sense, the interjection of the concept of windfalls, where there is no duty to mitigate, misses the appropriate focus. Under Section 10(c) of the Act, the operative question is whether the Board's chosen remedy "effectuate[s] the purposes of th[e] Act." 29 U.S.C. § 160(c). "Making the workers whole for losses suffered on account of an unfair labor practice" is just "*part of* the vindication of the public policy" for which the Act stands. *Phelps Dodge*, 313 U.S. at 197 (emphasis added). A backpay remedy must also vindicate the policies of the Act by discouraging the unfair labor practice at issue, expunging its effects, and assuring employees that their rights under the Act mean something and that the violation of those rights has consequences. NLRB Casehandling Manual (Compliance Proceedings) § 10536.1. The remedy, accordingly, "must not be confined within narrow canons for equitable relief deemed suitable . . . in ordinary private controversies," and its sole focus cannot be the making of exact reparations to injured employees with precise adjustments made for an employee's interim earnings. *Phelps Dodge*, 313 U.S. at 188. *See also Transmarine Navigation Corp.*, 170 NLRB 389, 389-90 (1968) (establishing that minimum two-weeks backpay must be provided in cases involving effects-bargaining violations, to effectuate

purposes of the Act and recognizing that, in fashioning appropriate remedy, Board should be "guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of [the] unlawful conduct"); *F.W. Woolworth Co.*, 90 NLRB at 291-94 (ordering quarterly deduction of interim earnings from backpay to remove perverse incentives created by lump-sum calculations, even though the result is that employees may receive backpay while also retaining some of their interim earnings).

Applying these principles here, it would be offensive to the Act's underlying policies to reduce a backpay award by the relatively small amount of income that an employee gains from a second job that the employee was under no duty to either look for or take.[3] Although deduction of interim earnings in this context may seemingly conform to a model of a make-whole remedy, in the sense that it compensates only actual losses suffered during the backpay period, it penalizes employees for their mitigation efforts when they had no duty to mitigate in the first place. To avoid these consequences, which are at odds with the policies underlying the Act, the Board should exercise its broad remedial discretion and disallow the deduction of interim earnings from backpay awards owed to employees who have not been denied total employment.

[3] Cases that have suggested otherwise, by ordering the deduction of interim earnings where there was no total job loss or duty to mitigate, should be overruled.

III. CONCLUSION

Based on the foregoing, the Acting General Counsel respectfully submits that the Board should not, and appropriately did not in this case, deduct from backpay interim earnings that employees generated where there was no duty to search for interim employment or to mitigate losses.

Dated at Albuquerque, New Mexico, this 13th day of July 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF OF THE ACTING GENERAL COUNSEL IN RESPONSE TO THE BOARD'S NOTICE AND INVITATION TO FILE BRIEFS, in DEMING HOSPITAL CORPORATION d/b/a MIMBRES MEMORIAL HOSPITAL Cases 28-CA-016762 et al. was served by E-Gov, E-Filing, and E-Mail on this 13th day of July 2012, on the following:

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