

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL UNION NO. 91  
(COUNCIL OF UTILITY CONTRACTORS, INC.  
AND VARIOUS OTHER EMPLOYERS)**

**and**

**Case 03-CB-163940**

**FRANK S. MANTELL, an Individual**

**GENERAL COUNSEL'S BRIEF AND CROSS-EXCEPTION  
TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, Counsel for the General Counsel hereby cross-excepts to the Decision of the Administrative Law Judge (ALJ) Arthur J. Amchan, dated September 7, 2016, in the above-captioned case, submitting that the ALJ erred by failing to order Respondent to compensate Frank S. Mantell for any consequential damages stemming from its unlawful actions. Specifically, in lines 22-26 on page 5 of the ALJD, the ALJ did not award Mantell compensation for any consequential damages he suffered.

The facts of the case are fully set forth on the ALJ's Decision at pages 1-3. Based on these facts, the ALJ found that Respondent violated Section 8(b)(1)(A) of the Act by removing Frank S. Mantell from the out-of-work referral list. However, the ALJ failed to compensate Mantell for any consequential damages he may have suffered due to Respondent's unlawful conduct.

Failing to award compensation for consequential damages, under the Board's present remedial approach, allows some economic harm that flows from a respondent's unfair labor

practices to go unremedied. See Catherine H. Helm, The Practicality of Increasing the Use of Section 10(j) Injunctions, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board’s standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. E.g., Graves Trucking, 246 NLRB 344, 345 n.8 (1979), enforced as modified, 692 F.2d 470 (7th Cir. 1982); Operating Engineers Local 513 (Long Const. Co.), 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent’s unfair labor practices.

Furthermore, reimbursement for consequential economic harm, in addition to backpay, is well within the Board’s remedial power. The Board has “‘broad discretionary’ authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act.” Tortillas Don Chavas, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board’s remedial structure is to “make whole” employees who are the victims of discrimination for exercising their Section 7 rights. See e.g., Radio Officers’ Union of Commercial Telegraphers Union v. NLRB, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); see

also, J.H. Rutter-Rex Mfg., 396 U.S. at 263 (recognizing the Act’s “general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company’s” unlawful act).

Moreover, the Supreme Court has emphasized that the Board’s remedial power is not limited to backpay and reinstatement. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 539 (1943); Phelps Dodge Corp., 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” NLRB v. Seven-Up Bottling of Miami, Inc., 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. See e.g., Tortillas Don Chavas, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); Kentucky River Medical Center, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); Isis Plumbing & Heating Co., 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), enforcement denied on other grounds, 322 F.2d 913 (9th Cir. 1963); F.W. Woolworth Co., 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); see also, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of

particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. Carpenters Local 60 v. NLRB, 365 U.S. 651, 655 (1961) (quoting Phelps Dodge, 313 U.S. at 194); see Pacific Beach Hotel, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act’s remedial purpose of restoring the economic status quo that would have obtained but for a respondent’s unlawful act. J.H. Rutter-Rex Mfg., 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated or otherwise loses employment, such as being removed from the out-of-work list, and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.<sup>1</sup> Similarly, employees who lose health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. See Roman Iron Works, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket

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<sup>1</sup> However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).<sup>2</sup>

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. See Greater Oklahoma Packing Co. v. NLRB, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in Tortillas Don Chavas as part of Board's "broad discretion"); Deena Artware, Inc., 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), enforced, 228 F.2d 871 (6th Cir. 1955); BRC Injected Rubber Products, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); Nortech Waste, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); Pacific Beach Hotel, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy,

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<sup>2</sup> Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. See Phelps Dodge Corp. v. NLRB, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.<sup>3</sup> In Nortech Waste, *supra*, the Board distinguished its previous reluctance to award medical expenses in Service Employees Local 87 (Pacific Telephone), 279 NLRB 168 (1986) and Operating Engineers Local 513 (Long Construction), 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific."

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<sup>3</sup> This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

Nortech Waste, 336 NLRB at 554 n.2.<sup>4</sup> The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. Id. However, where—as in Nortech Waste—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. Id. (citing Pilliod of Mississippi, Inc., 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee’s consequential medical expenses)); Lee Brass Co., 316 NLRB 1122, 1122 n.4 (1995) (same), enforced mem., 105 F.3d 671 (11th Cir. 1996)).

## CONCLUSION

For all the reasons set forth above, General Counsel respectfully requests that the Board grant the General Counsel’s Cross-Exception to the Decision of the Administrative Law Judge and issue an appropriate order that Respondent compensate Frank S. Mantell for any consequential damages he suffered. General Counsel further requests that the Board issue an order otherwise affirming and adopting the Decision and Recommendations of the ALJ.

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<sup>4</sup> The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. See Landgraf v. USI Film Products, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized “damages for ‘future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.’” Id. (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. See Pappas v. Watson Wyatt & Co., 2007 WL 4178507, at \*3 (D. Conn. Nov. 20, 2007) (“[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages” for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); see also, Proulx v. Citibank, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), affirmed mem., 862 F.2d 304 (2d Cir. 1988).

**DATED** at Buffalo, New York this 19<sup>th</sup> day of October, 2016.

Respectfully, submitted,

/s/ Linda M. Leslie

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT on October 19, 2016, the following document was electronically filed with the National Labor Relations Board and copies were served on the following parties by electronic mail:

General Counsel's Brief And Cross-Exception to the Administrative Law Judge's Decision.

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Dated: October 19, 2016

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