

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNITY HEALTH SERVICES, INC.	:	Case Nos. 28-CA-16762
d/b/a MIMBRES MEMORIAL HOSPITAL	:	28-CA-17278
AND NURSING HOME	:	28-CA-17390
	:	
vs.	:	
	:	
UNITED STEELWORKERS OF AMERICA	:	
DISTRICT 12, SUBDISTRICT 2, AFL-CIO-CLC	:	

**MIMBRES MEMORIAL HOSPITAL AND NURSING HOME'S BRIEF IN
SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF
ADMINISTRATIVE LAW JUDGE WILLIAM L. SCHMIDT**

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PRELIMINARY STATEMENT

As the Respondent in the above-referenced cases, Mimbres Memorial Hospital and Nursing Home (hereafter, “Mimbres” or the “Hospital”) hereby files, by and through the Hospital’s Undersigned Counsel, this Brief in Support of Exceptions to the Supplemental Decision (hereafter, the “Supplemental Decision”) issued in the above-referenced cases by Administrative Law Judge William L. Schmidt (hereafter, “Judge Schmidt,” or at times, the “Judge”) on July 28, 2010.

STATEMENT OF THE CASE

1. The Underlying Unfair Labor Practice Proceedings

On April 23, 2001, Mimbres reduced the hours of the full-employees assigned to the Hospital’s respiratory department, which, at that time, consisted of only respiratory therapists. In response to Unfair Labor Practice Charges filed by the United Steelworkers of America, District 12, Subdistrict 2, AFL-CIO, CLC (hereafter, the “Union”), the General Counsel issued a Consolidated Complaint, and later, a Second Consolidated Complaint (hereafter, the “Complaint”), which alleged that, “[o]n or about April 23, 2001, the [Hospital] reduced the hours of work of its full-time employees” in violation of § 8(a)(1) and § 8(a)(5) of the National Labor Relations Act (hereafter, the “Act”). See Complaint ¶ 8(f).

On March 13, 2002, a hearing on the Complaint was held before Administrative Law Judge Lana H. Parke (hereafter, “Judge Parke”), who, by a

Decision dated May 13, 2002 (hereafter, at times, “Judge Parke’s Decision”), concluded that Mimbres had unlawfully reduced the work hours of the Hospital’s full-time respiratory therapists, and recommended that the Hospital be ordered to rescind the hours reduction and make whole any employee for any loss of earnings and other benefits suffered as a result of the Hospital’s violation. By a Decision and Order dated June 30, 2004 (hereafter, the “Board’s Decision”), the National Labor Relations Board (hereafter, the “Board”) affirmed Judge Parke’s rulings, findings and conclusions and adopted her recommended Order. See Community Health Systems d/b/a Mimbres Memorial Hospital and Nursing Home, 342 NLRB 368. The Decision was enforced by the United States Court of Appeals for the Tenth Circuit on April 16, 2007.

2. The Compliance Proceedings Now Before the Board

Well over a year later, on July 18, 2008, the Regional Director for Region 28 (hereafter, the “Regional Director”) issued a Compliance Specification (hereafter, the “Specification”) in which he alleged backpay amounts allegedly owed to sixteen individuals (hereafter, at times, the “employees”). In response to the Specification, on August 14, 2008, Mimbres filed an Answer that set forth several defenses, and on September 4, 2008, Mimbres filed an Amended Answer that set forth the same defenses. In relevant part, the Answers alleged that the General

Counsel had failed to investigate and pled the employees' interim earnings. See Answer ¶ 20; Amended Answer ¶ 20.

On September 8, 2008, the General Counsel filed with the Board a Motion to Strike Portions of the Amended Answer and a Motion for Summary Judgment. On March 25, 2009, the Board granted summary judgment as to the appropriateness of the General Counsel's backpay formula, but otherwise denied the Motion to Strike / Summary Judgment in its entirety, and remanded the case for a hearing before an Administrative Law Judge. In denying the General Counsel's Motions, the Board ruled that Mimbres' Amended Answer had properly placed the employees' interim earnings at issue.

On June 18, 2009, the Regional Director issued a First Amended Compliance Specification. In response, on July 9, 2009, Mimbres filed a Motion to Dismiss on the grounds the General Counsel had failed to investigate the employees' interim earnings. That same day, Mimbres also filed an Answer to the First Amended Compliance Specification, which carried forward the Hospital's previous defenses.

Mimbres' Motion to Dismiss was referred to Judge Schmidt, who, subsequent to the remand, had been appointed to preside over the case. By an Order issued on July 13, 2009, Judge Schmidt denied the Hospital's Motion, and in the process, also ruled that the employees' interim earnings were irrelevant and

Mimbres would not be permitted to offer or develop any evidence regarding that subject at the upcoming hearing.

On July 21, 2009, the parties appeared before Judge Schmidt for a one-day hearing in Deming, New Mexico. As part of the proceeding, the Judge ordered Mimbres to produce to the General Counsel timesheets and payroll documents for the employees making up the Hospital's respiratory department from May 2008 up to the date of the hearing. See Tr. 21.¹ As Judge Schmidt also indicated, upon review of the documents, the General Counsel would have an opportunity to amend the First Amended Compliance Specification to extend the backpay periods of the employees and / or add new backpay claimants, as applicable. Id. at 44, 192-93.

On September 15, 2009, the Regional Director issued a Second Amended Compliance Specification, which both extended the backpay period for some of the employees and added several new backpay claimants.² In response, on October 13, 2009, Mimbres filed an Answer, which again carried forward the Hospital's previous defenses, and added a defense that, by August 28, 2007, the Hospital was relieved of any duty to bargain with the Union, and therefore, no backpay period

¹ Mimbres had previously provided the General Counsel with timesheets and payroll documents for such employees for the period January 2000 to May 2008.

² The General Counsel later amended the Second Amended Specification to take out two of the new backpay claimants, namely Mr. Paul Linder and Karen Wasson, because they were statutory supervisors.

could extend beyond, or begin after, August 28, 2007. See Answer at ¶ 37. In response to the Judge's instructions, on October 30, 2009, Mimbres submitted to Judge Schmidt an offer of proof in support of the defense set forth in ¶ 37 of the Answer to the Second Amended Compliance Specification.

On November 30, 2009, Judge Schmidt issued an Order to Show Cause why the record should not be closed. On December 4, 2009, the General Counsel filed a Motion to Close the Record. On December 8, 2009, Mimbres filed a Response to the Judge's Order to Show Cause / Opposition to General Counsel's Motion to Close the Record, whereby the Hospital asked the Judge to keep the record open for receipt of the evidence outlined in the Hospital's offer of proof, along with some personnel documentation relating to the two employees added by the Second Amended Compliance Specification. By Order dated January 20, 2010, the Judge granted the General Counsel's Motion to Close the Record and set a date for the submission of post-hearing briefs.

3. The Supplemental Decision

As noted above, on July 28, 2010, Judge Schmidt issued the Supplemental Decision now before the Board. In relevant part, contrary to Mimbres' defense (see e.g. Answer to Second Amended Compliance Specification ¶ 36), the Judge ruled that the remedy awarded by the Board extended to employees hired after the date of the hours reduction. Though the Judge agreed with Mimbres that the

remedy only applied to the position of full-time respiratory therapist, the Judge elected to identify such individuals by looking at the entirety of the evidence, as opposed to relying only upon the Hospital's system of classifying employees. Additionally, the Judge once more ruled that the subject of the employees' interim earnings was not relevant and evidence of the Union's failure to respond to Mimbres' efforts to engender negotiations was not probative of the length or existence of certain backpay periods.

QUESTIONS PRESENTED

- 1.) Whether the backpay remedy awarded by the Board was intended to, or lawfully could, extend to employees hired after the date of the hours reduction (see Exception Nos. 2, 5, 6, 15, 16, 23-27, 29-33, 36);
- 2.) Whether the Hospital's lawful system of classifying employees should be used as the sole basis for identifying the Hospital's full-time respiratory therapists (see Exception Nos. 1, 15-20, 22-27, 31, 36);
- 3.) Whether Judge Schmidt erred by ruling that the General Counsel had no duty to investigate or plead the employees' interim earnings, and further ruling that Mimbres would be precluded from offering any evidence of the employees' interim earnings, where the Board ruled that Mimbres' Amended Answer properly placed the subject into issue (see Exception Nos. 1, 3, 5, 6, 11-14, 21, 23-28, 31, 35, 36);

- 4.) Whether the backpay period for any employees should extend beyond, or begin after, the date on which the Union failed to respond to Mimbres' invitation to bargain over the hours reduction (see Exception Nos. 4-10, 23-27, 31, 36); and
- 5.) Whether the award of interest, whether simple or compound, is a punitive remedy in circumstances where the General Counsel has failed to prove the employees for whom backpay was awarded would have saved the entirety of their backpay and / or took out a loan to pay for their typical living expenses due to their loss of income (see Exception No. 34).

ARGUMENT

As shown below, Judge Schmidt erred by applying the remedy awarded by the Board to employees hired after the date of the hours reduction. Though the Judge properly concluded that the Board's remedy was confined only to Mimbres' full-time respiratory therapists, the Judge erred by not relying exclusively upon the Hospital's classifications when identifying the full-time respiratory therapists.

In addition, contrary to a clear ruling by the Board, Judge Schmidt determined that the subject of the employees' interim earnings was irrelevant and the Hospital would be precluded from offering any evidence with respect to the subject.

Lastly, Judge Schmidt erroneously determined that the Union's failure to respond to Mimbres' invitation to bargain over the hours reduction had no effect on the end point of any employee's backpay period.

1.) The Remedy Awarded by the Board Did Not, and Legally, Could Not Apply Prospectively

In response to each version of the Compliance Specification, Mimbres maintained that the remedy awarded by the Board was not intended to, and in any event, could not lawfully extend to, respiratory therapists hired by the Hospital after the date on which the hours reduction took place. See e.g., Answer to Second Amended Compliance Specification ¶ 36. However, according to Judge Schmidt, the Board held the authority to extend the remedy prospectively and intended for the remedy to continue up to the date on which the Hospital rescinded the change in the employees' hours. See Supplemental Decision pages 12-13.

In support of the conclusion that the Board intended for the remedy to apply prospectively, the Judge did not refer to any language from Judge Parke's Decision or the Board's Decision, nor could the Judge refer to any supporting language. The simple fact of the matter is that neither Judge Parke nor the Board used any language that conveyed, whether expressly or implicitly, an intention for the remedy to apply prospectively. Compare Cascade Painting Co., Inc., 277 NLRB 926, 931 (1985) (Board expressly ruled that the make whole remedy awarded will apply to employees hired after the date of the unilateral changes). Insofar as the

language of Judge Parke's Decision and the Board's Decision lent no assistance, the Judge relied upon what he proclaimed as the "standard remedy in cases of this type," whereby employees continue to receive the benefit of the remedy(s) awarded by the Board up to the date on which the employer rescinds the unlawful change and bargains with the union. See Supplemental Decision page 13, Lines 1-10. Notably, though termed a "standard remedy," the Judge did not refer to a single case in which the Board prospectively applied a backpay remedy as part of the agency's conclusion that an employer had unlawfully changed employees' working conditions, much less authority for the proposition that such an approach is the "standard remedy." In the last analysis, the Board did not evince any intent, not by express language, not by any silent reliance upon a professed "standard remedy," to apply the backpay remedy prospectively. However, even if one presumes, solely for the sake of argument, the Board did carry such an intent, the agency lacked the authority to award the remedy to future hires.

To begin with, by seeking to extend the remedy to employees hired after the date of the hours reduction, the General Counsel violated Mimbres' due process rights. The Board's Decision concluded that Mimbres was guilty of an unlawful unilateral change by virtue of the Hospital's decision to reduce the work hours of the respiratory therapists actually employed by the Hospital from 40 hours / week to 36 to 32 hours / week. 342 NLRB 398, 401. The Board did not also conclude,

however, that Mimbres was guilty of an unlawful unilateral change (or for that matter, any other violation of the Act) by virtue of the Hospital's decision to hire respiratory therapists at fewer than 40 hours / week. In fact, the General Counsel never even set forth such an allegation as part of the underlying proceedings before Judge Parke. Notably, the General Counsel certainly had the factual predicate necessary for the allegation that Mimbres' hire of respiratory therapists at fewer than 40 hours / week violated the Act. In between the date of the hours reduction (April 23, 2001) and the date of the hearing before Judge Parke (March 13, 2002), Mimbres hired two respiratory therapists, namely Mr. Daniel Pattarozzi and Ms. Natalia Gordon, who, by the General Counsel's own theory, were hired at fewer than 40 hours / week. See Tr. 75, 78.

Thus, as part of the underlying proceedings before Judge Parke, the General Counsel clearly had the opportunity, nay the obligation, to allege that Mimbres also violated the Act by hiring respiratory therapists after the date of the hours reduction at fewer than 40 hours / week. See Jefferson Chemical, 200 NLRB 992 (1972). In point of fact, the General Counsel did not set forth any such allegations and the record developed before Judge Parke does not include a speck of evidence as to Mimbres' subsequent hiring practices as to respiratory therapists, let alone any evidence of unilateral departures from Mimbres' hiring practices.

Additionally, more than one U.S. Court of Appeals has held that the Board lacks the authority to extend a make whole remedy to employees hired after an unlawful reduction in hours. In NLRB v. Dodson's Market, Inc., the employer unlawfully reduced the hours of employees who signed authorization cards. 553 F.2d 617, 618 (9th Cir. 1977). The Board awarded a make whole remedy that extended to a person hired after the date of the unlawful change. The Court observed that the employee was not promised full-time employment, but rather accepted part-time employment on the terms offered. Id. at 619. The Board argued the employee suffered a “derivative injury,” insofar as she would have been hired full-time but for the unlawful change in hours. The Court rejected the argument and concluded the Board could not extend the remedy to the employee at issue, “because she did not suffer loss on account of [the employer’s] unfair labor practice.” Id. at 619-20.

In a case before another U.S. Court of Appeals, an employer had acquired a company and immediately reduced the work hours of the represented employees. Chauffeurs, Teamsters and Helpers Local Union No. 171 v. NLRB, 425 F.2d 157 (4th Cir. 1970). The Court observed that employees hired after the acquisition did not did not experience any sudden change in their employment relationship. 425 F.2d at 159. The Court also observed there was no evidence that the Board had intended for the make whole remedy to apply to employees hired after the

acquisition. Id. Accordingly, the Court limited the make whole remedy to persons employed at the time of the unlawful conduct. Id.

For all the reasons set forth above, by applying the remedy awarded by the Board to new hires, Judge Schmidt violated the Hospital's due process rights.

2.) The Judge Should Have Identified Mimbres' Full-Time Respiratory Therapists Based Upon the Hospital's Classifications Alone

In agreement with the Hospital, Judge Schmidt properly concluded that the remedy awarded by the Board only applied to the Hospital's full-time respiratory therapists. See Supplemental Decision p. 8-9. However, as far as identifying who among the employees was or was not a full-time respiratory therapist, the Judge did not rely upon the Hospital's classifications, but elected to consider all of the relevant circumstances. Id. at page 9.

Through the Hospital's Director of Human Resources, for the period of time at issue, Mimbres explained the system by which employees were classified as full-time *vs.* part-time *vs.* PRN (that is, as-needed). See Tr. 150. Mimbres' evidence as to the Hospital's classification system was not subject to any attack on cross-examination or challenged by any evidence offered by the General Counsel. Certainly, the General Counsel did not allege, much less offer any evidence to show, that Mimbres' classification system was unlawful.

Insofar as the General Counsel did not allege that Mimbres' policy of classifying employees was unlawful, Judge Schmidt was obligated to honor the

policy, and not identify the full-time respiratory therapists by reference to other evidence. See Loomis Armored Car Service, 227 NLRB 256, 258 (1976) (“the Act does not give the Board any control whatsoever over an employer’s policies”), Guidance & Control Systems Division, Litton Systems, Inc., 217 NLRB 208 (1978) (an administrative law judge must not “substitute [his] own ideas of business management for those of the Company”), C.P. & W Printing Ink Co., 238 NLRB No. 206 (1978) (“an employer’s business conduct is not to be judged by any standard other than that which it has set for itself”), Allbritton Communications, 271 NLRB 201, 204 (1984), citing Midwest Stock Exchange v. NLRB, 635 F.2d 1255, 1265 (7th Cir. 1980) (an administrative law judge must not “intrude more than slightly into an area of managerial authority reserved to the [employer] and not intended to be subject to second-guessing by the Board”), Country Epicure, Inc., 276 NLRB 436, 439 (1985) (administrative law judge declined “to intrude substantially on managerial authority”), Sam’s Club, 349 NLRB No. 94, fn. 10 (2007) (the administrative law judge could not properly “substitute [his] managerial judgment for that of [the employer]”).

Accordingly, the Board should rule that Mimbres’ system of classifying employees is the sole reference point for identifying the Hospital’s respiratory

therapists, and deny backpay to any employee who was not classified by the Hospital as a full-time respiratory therapist.³

3.) The Judge Erred in Ruling that the Employees' Interim Earnings Were Irrelevant

In response to the original Compliance Specification, Mimbres filed an Answer, and later, an Amended Answer, both of which averred that, inter alia, the General Counsel had failed to investigate and pled the employees' interim earnings. See Answer ¶ 20; Amended Answer ¶ 20. The General Counsel then filed with the Board a Motion to Strike Portions of the Amended Answer and a Motion for Summary Judgment (hereafter, the "General Counsel's Motions"), whereby the General Counsel asked the Board to strike Mimbres' defense that the General Counsel was obligated to investigate and pled the employees' interim earnings. In denying the General Counsel's Motions, the Board ruled that the Amended Answer had properly placed all of the employees' interim earnings into issue. See Board Supplemental Decision and Order dated March 25, 2009 at pages 4-5.

Subsequent to the Board's rulings that the employees' interim earnings were placed into issue by virtue of the Hospital's Amended Answer, the General

³ At a bare minimum, the Board should deny any backpay to Mr. Nohail Syed, who was employed initially as a respiratory therapist assistant, a position that did not even exist at the time of the hours reduction (see Tr. 105), and later was transferred to an entirely different department. See Tr. 94-96, 182-86.

Counsel issued the First Amended Compliance Specification, which like the original Compliance Specification, failed to plead the employees' interim earnings. Accordingly, Mimbres filed a Motion to Dismiss the First Amended Compliance Specification, which was denied by Judge Schmidt.⁴

In denying the Hospital's Motion to Dismiss, Judge Schmidt not only ruled that the General Counsel did not carry the burden of pleading the employees' interim earnings, but went on to determine that the subject of the employees' interim earnings was irrelevant. Accordingly, the Judge ruled that Mimbres, even for its own part, would not be permitted to offer any evidence on the subject of the employees' interim earnings. See Judge Schmidt's Order Denying Mimbres' Motion to Dismiss page 6, fn. 1. In the process, Judge Schmidt simply ignored the fact that, by virtue of the Board's rulings on the General Counsel's Motions, the Board had plainly determined that the Amended Answer had properly placed the employees' interim earnings at issue. The Judge's determination to exclude the question of the employees' interim earnings from the case was erroneous, not to mention somewhat premature given the fact the General Counsel had not moved to preclude the Hospital from offering evidence of the employees' interim earnings.

⁴ In the context of the Hospital's post-hearing brief, Mimbres again asserted the relevance of the employees' interim earnings, but the Judge reaffirmed his previous rulings. See Supplemental Decision p. 14.

In the Judge's view, the remedy awarded by the Board as part of the underlying proceedings was a remedy in the nature of "reimbursement." As defined by Webster's, "reimbursement" means: "to pay back to someone: repay," as *reimburse* travel expenses."⁵ In the present context, therefore, "reimbursement" would involve Mimbres' repayment of money to the employees. Obviously, the employees never paid any money to Mimbres, and the General Counsel certainly is not seeking the repayment of any money on behalf of the employees. Instead, the General Counsel is seeking payment for the employees' lost earnings. Thus, looking simply at the typical meaning and usage of the word, the Board's remedy clearly does not call for any type of reimbursement.

Not surprisingly, as part of the underlying proceedings, neither Judge Parke nor the Board used the word "reimbursement," or any comparable word, to identify or describe the remedy. Instead, Judge Parke's Decision and the Board's Decision directed Mimbres to make employees whole for "any loss of **earnings** or other benefits suffered as a result of its unlawful actions." 342 NLRB at 404 (emphasis added). Such language is, of course, the standard language for garden variety awards of backpay. See e.g., Provena Hospitals d/b/a Provena St. Joseph Medical Center, 350 NLRB 808, 824 (2007). Thus, every version of the Compliance Specification issued in the above-referenced cases alleges a controversy in

⁵ www.merriam-webster.com/dictionary/reimbursement.

“backpay” (see e.g., Second Amended Compliance Specification page 4), a term which, ironically, also appears sporadically in the Supplemental Decision authored by Judge Schmidt. See Supplemental Decision page 6, Lines 1-5, page 7, Lines 1-5, 20-25.

Insofar as the remedy awarded by the Board was not in the nature of any type of “reimbursement,” but rather, clearly in the nature of traditional backpay, the relevance of the employees’ interim earnings is axiomatic. Indeed, by virtue of the Board’s rulings on the General Counsel’s Motions, the Board has removed any doubt as to the relevance of the employees’ interim earnings. In that way, the Board took a step towards preventing the employees from receiving economic windfalls, which are clearly prohibited by the Act. See Oil Capitol Sheet Metal, Inc. 349 NLRB No. 118, slip op. at *8 (May 31, 2007) (the “Board is obligated to ensure that its remedies are compensatory and not punitive, and to guard against windfall awards that bear no reasonable relation to the injury sustained”).

Based upon Judge Schmidt’s rulings, however, the employees are poised to receive a windfall remedy. In fact, as shown by Mimbres’ offer of proof, at least two of the employees had earned interim earnings during their respective backpay periods. See Tr. 191-92.

In summary, Judge Schmidt’s determinations that the employees’ interim earnings are not relevant ignore the clear rulings of the Board which confirmed the

relevance of the subject, and create the risk (and for at least two employees, confirm the eventuality) of prohibited windfall remedies.

4.) The Union's Failure to Bargain with Mimbres Tolled Backpay

In Mimbres' Answer to the Second Amended Specification, the Hospital alleged that, as of August 28, 2007, the Hospital complied with its duty to bargain with the Union, and therefore, no backpay period could extend beyond, or begin after, August 28, 2007. See Answer to Second Amended Compliance Specification, ¶ 37. In response to Judge Schmidt's Order to Show Cause issued on November 30, 2009, Mimbres extended an offer of proof in support of ¶ 37 of the Answer, explained the legal relevance of the defense, and asked the Judge to reconvene the proceedings in order for the Hospital to adduce the necessary evidence. However, by Order dated January 20, 2010, Judge Schmidt ruled that, while Mimbres' offer of proof would be admitted into the record, the Hospital's evidence was not relevant, as the record did not include any evidence that the hours reduction had been rescinded by the Hospital. The Judge's rulings were reaffirmed by the Supplemental Decision. See pages 4-5.

The fact the record does not include evidence of Mimbres' rescission of the hours reduction should not have compelled the Judge to reject the Hospital's defense. At the outset, Mimbres should note that the Hospital's decision not to rescind the hours reduction was tied to the Hospital's good faith position that the

remedy awarded by the Board only applied to the respiratory therapists employed by the Hospital at the time of the hours reduction. Because the Hospital did not employ anyone in that capacity at the time the Court of Appeals enforced the Board's Decision, there was simply no rescission to make. Thus, contrary to the Judge's impression, Mimbres hardly chose to deliberately ignore the Court of Appeals' Order. See Supplemental Decision page 5.

In addition, the Judge's focus upon Mimbres' so-called failure to rescind the hours reduction overlooks the fact that the purpose of rescinding a unilateral change, or put another way, returning the parties to the status quo ante, is to set the stage for negotiations with respect to the change(s) previously implemented by the employer.⁶ As shown by Mimbres' offer of proof, and the Union's continued lack of any involvement in the compliance proceedings now before the Board (see Tr. 6, 16), the Union has not shown any desire to negotiate with Mimbres over the hours reduction, or for that matter, any other subject. The Union's choice to withdraw from the collective bargaining process has taken away any opportunity for the parties to agree to the reduction in hours (which, incidentally, was a means to avoid a layoff of bargaining unit employees), or as the case may have been, to

⁶ See Massey Energy Co., 354 NLRB No. 83, slip op. at *75 (September 30, 2009), citing U.S. Marine Corp. v. NLRB, 944 F.2d 1305, 1322-23 (7th Cir. 1991); New Concept Solutions LLC, 349 NLRB 1136, 1161 (2007); Waterbury Hotel Management LLC, 333 NLRB 482, 555 (2001); Eldorado, Inc., 335 NLRB No. 76, slip op. at * 13 (2001).

reach impasse on the subject so that Mimbres would have held the lawful right to (re)implement the hours reduction. Five Star Manufacturing Inc., 348 NLRB 1301, 1339 (2006); Laidlaw Transit, Inc., 1999 WL 33454732. Regardless, Mimbres should not be made to suffer for what was the Union's choice to eschew any negotiations with the Hospital. To the contrary, Judge Schmidt should have provided Mimbres with an opportunity to establish that the Hospital met any duty to bargain, and therefore, enjoyed the right to define the employees' hours, so that the Hospital is not resigned to defend, and the General Counsel is not permitted to prosecute, an alleged backpay liability that persists from now until the end of time.

5.) Any Award of Interest Would be Punitive, and Therefore, Unlawful

In response to the General Counsel's request, Judge Schmidt awarded interest on the backpay awards set forth by the Supplemental Decision. The design of the Act is to make employees whole for economic losses that arise from any unfair labor practice. Here, the General Counsel necessarily presumes that the employees would not have spent one penny of their additional pay, but rather deposited and saved the entirety of the pay in an account with interest. Such a presumption has, of course, no place in reality. Nor should the presumption have any place in the Board's jurisprudence, which prohibits the award of any windfall remedy. See Oil Capitol Sheet Metal, Inc., supra.

In reality, the only instance in which the Board could properly consider an award of interest would be an employee who, due to the reduction in her hours, took out a loan which charged interest. Needless to say, Mimbres should not be subject to an award of interest based upon the exceedingly unlikely presumption that every employee to whom the Judge awarded backpay inevitably took out a loan in order to satisfy his / her daily living expenses. To the contrary, the General Counsel should bear the burden to show that the employee actually took out a loan and made payments of interest.

In the case now before the Board, the record does not establish that Mimbres' actions required any employee to take out a loan to pay for their typical expenses. For that reason, any award of interest would be punitive, not compensatory, and therefore violate the Act.

CONCLUSION

For the reasons set forth above, Mimbres respectfully requests that the Board rule that the backpay remedy awarded by the Board does not extend to employees hired after the date of the reduction in hours, or to employees, whether working at the time of the hours reduction or hired later, who were not classified by the Hospital as a full-time respiratory therapist. Additionally, Mimbres requests that the Board remand the case and instruct the General Counsel to investigate and plead the employees' interim earnings, or alternatively, afford the Hospital an

opportunity on remand to offer evidence of the employees' interim earnings.
Mimbres also requests that the Board rule that no backpay period may extend beyond or begin after August 28, 2007, and no interest be awarded on any backpay that the Board deems owed to any employee.

Dated: September 3, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan T. Carmody", is written over a horizontal line. The signature is stylized and includes a large, sweeping flourish at the end.

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	:	
UNITED STEEL WORKERS OF AMERICA	:	
DISTRICT 12, SUBDISTRICT 2, AFL-CIO-CLC	:	

**STATEMENT OF SERVICE OF RESPONDENT’S BRIEF IN SUPORT OF
EXCEPTIONS**

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, certifies, pursuant to 28 U.S.C. § 1746, that the original of the Respondent’s Brief in Support of Exceptions to the Supplemental Decision of Administrative Law Judge William L. Schmidt (hereafter, the “Brief”) is being filed this date by Mimbres Memorial Hospital and Nursing Home in the above-captioned matter via E-Filing at www.nlr.gov, being the website maintained by the National Labor Relations Board.

The Undersigned further certifies that a copy of the Brief is being provided this date to the following by way of E-mail and Federal Express:

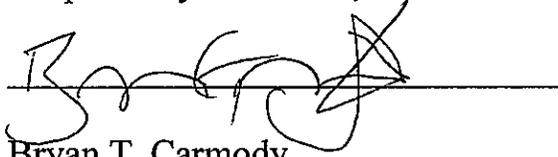
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Dated: September 3, 2010

Respectfully submitted,



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