

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| DEMING HOSPITAL CORPORATION | : | |
| d/b/a MIMBRES MEMORIAL HOSPITAL | : | Case No. 28-CA-016762, |
| AND NURSING HOME | : | et al. |

and

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| UNITED STEELWORKERS OF | : |
| AMERICA, DISTRICT 12 | : |

**EMPLOYER’S STATEMENT OF POSITION CONCERNING
REMAND TO THE NATIONAL LABOR RELATIONS BOARD**

As the Employer in the above-captioned case, Deming Hospital Corporation, d/b/a Mimbres Memorial Hospital and Nursing Home (hereafter, “Mimbres” or the “Hospital”) hereby submits, in compliance with §102.46(j) of the Rules and Regulations of the National Labor Relations Board (hereafter, the “Board”), a statement of position in response to the Board’s invitation to file a statement of position, dated May 25, 2012.

BACKGROUND

1.) Underlying Unfair Labor Practice Proceedings

On April 23, 2001, the Hospital reduced the hours of full-time employees in the Hospital’s respiratory department, which at the time consisted of employees working as 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”) on October 16, 2001, the General Counsel issued a Second Consolidated Complaint which alleged that the Hospital had unlawfully reduced the hours of work for the employees in its respiratory department, in violation of §8(a)(1) and §8(a)(5) of the National Labor Relations Act, as amended (hereafter, the “Act”). Complaint, ¶ 8(f).

On March 13, 2002, a hearing on the Complaint was held before Administrative Law Judge Lana H. Parke, who by a Decision dated May 13, 2002, concluded that the Hospital had unlawfully reduced the hours of work 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 hours reduction. In re. Community Health Services, 2002 WL 1011731 (2002). By a Decision and Order dated June 30, 2004, the Board affirmed Judge Parke’s rulings, findings and conclusions, and adopted her recommended Order, directing the calculation of backpay as prescribed in Ogle Protection Service, 183 NLRB 682 (1970). Community Health Systems d/b/a Mimbres Memorial Hospital and Nursing Home, 342 NLRB 368 (2004). The Board’s Decision was enforced by the United States Court

of Appeals for the Tenth Circuit on April 16, 2007. N.L.R.B. v. Community Health Services, Inc. d/b/a Mimbres Memorial Hospital & Nursing Home, 483 F.2d 689 (10th Cir. 2007).

2.) Compliance Proceedings Before the Board

On July 18, 2008, the Regional Director for Region 28 (hereafter, the “Regional Director”) issued a Compliance Specification and Notice of Hearing in which he alleged backpay amounts owed to sixteen employees. In response to the Compliance Specification, on August 14, 2008, the Hospital filed an Answer that set forth the Hospital’s defenses, and on September 4, 2008, the Hospital filed an Amended Answer that set forth the same defenses. In relevant part, the Hospital’s Answers averred, inter alia, that the General Counsel had failed to investigate and plead the employees’ interim earnings. 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 the Motion for Summary Judgment as to the appropriateness of the backpay formula utilized by the General Counsel, but otherwise denied the Motion to Strike and Motion for Summary Judgment, and remanded the case for a hearing

before an Administrative Law Judge. In denying the General Counsel's Motions, the Board ruled that the Hospital's Amended Answer had properly placed the employees' interim earnings at issue in the case. Board's Supplemental Decision and Order, pp. 4-5.

On June 18, 2009, the Regional Director issued a First Amended Compliance Specification. In response, on July 9, 2009, the Hospital filed a Motion to Dismiss on the grounds that the General Counsel had failed to investigate and plead the employees' interim earnings. On the same day, the Hospital also filed an Answer to the First Amended Compliance Specification, which carried forth the Hospital's previous defenses. The Hospital's Motion to Dismiss was referred to Administrative Law Judge William 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, ruling that the General Counsel did not carry the burden to investigate and plead employees' interim earnings. Judge Schmidt also ruled that employees' interim earnings were irrelevant and that the Hospital would not be permitted to offer or develop any evidence regarding employees' interim earnings at the hearing before Judge Schmidt. Order, p. 6.

On July 21, 2009, the parties appeared before Judge Schmidt for a one-day hearing in Deming, New Mexico. At the hearing before Judge Schmidt, counsel for the Hospital made an Offer of Proof that the Hospital could produce evidence to prove the interim earnings of some of the affected employees. Transcript pp. 191-192. Specifically, the Offer of Proof illustrated that the Hospital could produce documents to prove that at least two of the employees included in the First Amended Compliance Specification issued by the Board had in fact taken on additional work at other local health care facilities during the backpay period to offset the effect of the Hospital's reduction of their hours.¹ Id. Nevertheless, Judge Schmidt rejected the Offer of Proof, and consistent with his previous rulings, did not allow the Hospital to produce any evidence of interim earnings at the hearing. Id.

On September 15, 2009, the Regional Director issued a Second Amended Compliance Specification, which both extended the backpay period for some employees and added new backpay claimants to the Specification. In response, on October 13, 2009, the Hospital filed an

¹ As explained below, the Offer of Proof did not, and could not, cover all of the employees at issue in the proceeding.

Answer which again carried forward the Hospital's previous defenses, including its defense concerning the consideration of interim earnings.

On November 30, 2009, Judge Schmidt issued an Order to Show Cause why the record in the case should not be closed. On December 4, 2009, the General Counsel filed a Motion to Close the Record. On December 8, 2009, the Hospital filed a Response to the Judge's Order to Show Cause and Opposition to the General Counsel's Motion to Close the Record, whereby the Hospital requested that the Judge keep the record open so that the Hospital could submit additional evidence, including evidence of employees' interim earnings. By Order dated January 20, 2010, Judge Schmidt rejected the Hospital's Offer of Proof and granted the General Counsel's Motion to Close the Record.

Judge Schmidt issued a Supplemental Decision on July 28, 2010, which reaffirmed that employees' interim earnings were not relevant to the computation of backpay. Community Health Systems, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home, 2010 WL 3285384. On September 3, 2010, both the Hospital and the General Counsel filed Exceptions to Judge Schmidt's Supplemental Decision with the Board. On February 28, 2011, the Board issued a Supplemental Decision and Order by which the Board affirmed, without explanation, Judge Schmidt's rulings, findings and

conclusions, and ordered the Hospital to pay backpay to employees as detailed in Judge Schmidt's Supplemental Decision. Community Health Services, Inc. d/b/a Mimbres Memorial Hospital and Nursing Home, 356 NLRB No. 103 (2011).

3.) Proceedings Before the Court of Appeals for the District of Columbia Circuit

On March 3, 2011, the Hospital filed a Petition for Review of the Board's Supplemental Decision and Order with the United States Court of Appeals for the District of Columbia Circuit (hereafter, the "D.C. Circuit"). On March 29, 2011, the Board filed a Cross-Application for Enforcement of the Board's Supplemental Decision and Order with the D.C. Circuit. In its Petition for Review, the Hospital argued that the Board had erred in three principal ways, including by failing to consider the interim earnings of the employees contained in the Second Amended Compliance Specification.

In a Decision dated December 20, 2011, the D.C. Circuit vacated the Board's backpay award on the grounds that the Board had failed to "adequately explain its failure to consider interim earnings when calculating the backpay award." Deming Hospital Corp. d/b/a Mimbres Memorial Hospital v. N.L.R.B., 665 F.3d 196, 199 (2011). Therefore, the D.C. Circuit

remanded the case “so that the Board may amplify its position on interim earnings.” Id.

On May 25, 2012, the Board, acting through the agency’s Executive Secretary’s Office, advised the parties of the Board’s decision to accept the remand and invited the parties to submit a position statement on the issues raised by the Court’s remand. At the request of the Acting General Counsel, the Board’s original deadline for the submission of the positions statements was extended from June 15, 2012 up to and including July 13, 2012.

ARGUMENT

1.) The Board Can Provide No Additional Basis for Excluding Interim Earnings Beyond Those Arguments Rejected by the D.C. Circuit

As explained below, the Board lacks any reasoned basis to refuse consideration of interim earnings, since the Court rejected the two reasons on which the Board relied in the 2011 Supplemental Decision and Order, and there is no other reason on which the Board could reasonably rely to refuse consideration of interim earnings.

In the 2011 Supplemental Decision and Order, the Board chose to exclude the subject of interim earnings altogether, due to what it referred to as the “clear language” of Ogle. The Board also concluded that accounting for interim earnings would impose upon employees a “duty to moonlight”

that is prohibited by the Act. See Community Health Services, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home, 356 NLRB No. 103, Slip Op., pp. 8-9. However, the D.C. Circuit rejected both of these arguments by the Board on their merits, stating that, “neither rationale withstands our scrutiny.” Deming Hospital Corp., supra, at 200.

First, the Board’s argument that the “clear language” of Ogle prohibits the Board from considering interim earnings in the case at bar was rejected by the D.C. Circuit as a “logical fallacy”. Id. The “clear language” of Ogle relied upon by the Board in its Supplemental Decision states only that if a case does not involve interim earnings, then the Board should not calculate backpay on a quarterly basis. The converse proposition – that if the Board decides not to calculate income on a quarterly basis, it is foreclosed from considering interim earnings, is at no point expressed by the Board in Ogle, a fact pointed out by the D.C. Circuit in its Decision. Id. Next, the D.C. Circuit rejected the Board’s “duty to moonlight” concern on the grounds that it conflated and confused “an employee’s duty to mitigate with rules governing when backpay should be reduced by interim earnings.” Id. As the D.C. Circuit explained in its Decision, the fact that an employee has no duty to mitigate in a reduction of hours case does not in any way preclude an employee from finding additional employment, and thus, accumulating

interim earnings. Finally, the Court also rejected the Board's reliance upon 88 Transit Lines, Inc., which was not mentioned by the 2011 Supplemental Decision, but raised by the Board's counsel in the proceedings before the Court of Appeals. As reflected by the Court's Decision, 88 Transit Lines was a narrow holding, inapplicable to the instant case, and "does not support the Board's ruling here." Id. at 201. In summary, the D.C. Circuit clearly and explicitly rejected all of the arguments on which the Board relied, both in the Supplemental Decision and otherwise, to exclude consideration of interim earnings in the case at bar.

Notably, the ill-fated reasons on which the Board relied to exclude interim earnings in the Supplemental Decision were the very same reasons relied upon by Judge Schmidt. Indeed, the Board's Supplemental Decision is nothing more than the wholesale adoption of Judge Schmidt's Decision. The fact that the Board did not articulate any reasons of its own in deciding that interim earnings should be excluded, but rather simply adopted the Judge's stated reasons, shows the Board's own recognition at the time that no additional reasons existed to support the exclusion of interim earnings. Stated another way, the Board did not modify Judge Schmidt's rationale by providing any additional / alternative explanation as to why exclusion of interim earnings was appropriate. As the Board now reviews on remand the

question of interim earnings, Mimbres would submit that no other reason exists today, nor did any other reason exist at the time the Supplemental Decision issued, to support exclusion of interim earnings. Indeed, as explained next, not only does the Board have the power to consider interim earnings, but both under the Board's existing precedent and Board policy, the Board is obligated to consider interim earnings.

2.) By Excluding Interim Earnings in the Case at Bar, the Board Acted Inconsistently with Board Precedent

The Board's precedent does not, as the Board argued before the D.C. Circuit, preclude the Board from considering interim earnings in the case at bar. In fact, the Board's precedent suggests that the Board has already determined that interim earnings should be considered in hours reduction cases; or at the very least, that consideration of interim earnings in this context should be the next logical step in the Board's progression concerning the subject.

The Board's current jurisprudence on interim earnings can be divided broadly into two categories. In 1950, the Board's Decision in F.W. Woolworth, 90 NLRB 289 (1950) introduced the modern approach, still used by the Board today, under which the Board calculates backpay on a quarterly basis in cases of employees who are terminated or laid off. In Ogle

Protection Service, the Board created an exception to the Woolworth approach for cases in which the violation of the Act committed by the employer did not involve a “cessation of employment status or interim earnings that would in the course of time reduce backpay.” Ogle Protection Service, supra, at 683. In cases where employment did not cease, quarterly computation as required by Woolworth was deemed “unnecessary and unwarranted” by the Board, apparently under the assumption that an employee who had not been terminated would not seek another job, and thus would not generate interim earnings.

The two cases together establish on their face a clear, but somewhat incomplete, framework: In cases where an employee is laid off or terminated, the Board must apply the framework established by Woolworth, which explicitly requires the computation of interim earnings as a part of the backpay award. In cases where a complete cessation of employment has not occurred, the Board applies Ogle. The case now before the Board requires the Board to determine how to handle a slightly different case – a case in which a complete cessation of work has not occurred, but interim earnings were earned.

Consideration of interim earnings is not prohibited by either of the two existing legal frameworks created by the Board to calculate backpay.

To the contrary, the formula derived by the Board in Woolworth explicitly requires the consideration of interim earnings. Additionally, the Board's decision in Ogle states that Ogle should be applied in any case "which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay". Ogle, supra, at 683 (emphasis added). As reflected by the Hospital's Offer or Proof, the case at bar did involve interim earnings, and therefore, Ogle did not apply. Alternatively, to the extent Ogle was applied by the Board, it should not have been for purposes of excluding interim earnings, but rather, only for the purpose of setting forth how interim earnings ought to be calculated. Indeed, in cases involving a reduction of hours where Ogle has been applied, the Board still considered and deducted interim earnings. See, e.g. Pratt Industries, Inc., 358 NLRB No. 52 (2012); Pepsi America, Inc., 399 NLRB No. 125 (2011) (Amending the ALJ's Order to calculate backpay under Ogle without eliminating the ALJ's requirement that interim earnings be subtracted from the backpay owed to employees.) As explained by various Courts of Appeals, the Board's Decision in Ogle did not set aside the role of interim earnings in backpay calculations – rather, it just changed the way any interim earnings would be calculated as a part of the backpay remedy in the

case. See Bufco Corp. v. N.L.R.B., 147 F.3d 964 (D.C. Cir. 1978); Raven Services Corp. v. N.L.R.B., 315 F.3d 499 (5th Cir. 2002).

In summary, the Board clearly has the authority to reduce a backpay award on account of employees' interim earnings and has exercised that authority routinely, both under F.W. Woolworth and consistently, as the subject has come up, in cases under Ogle. The Board's precedent shows that, as a general matter, interim earnings are considered in an hours reduction case. See Atlantis Health Care Group, 356 NLRB No. 26 (2010); Amerigas Propane, L.P., 1997 WL 33315927 (1997). The Board's consideration of interim earnings in hours reduction cases is consistent with the Board's statutory duty to issue only "make whole" relief and avoid making any windfall awards to employees. The award of compensation that can or could exceed an employee's out of pocket loss is explicitly prohibited by the National Labor Relations Act. See Grondof, Field, Black & Co. v. N.L.R.B., 107 F.3d 882 (D.C. Cir. 1997) (Court remanded case to Board in order for employer to demonstrate how their contributions to a union benefit fund constituted an improper windfall to employees.); Oil Capitol Sheet Metal, Inc., 349 NLRB No. 118 (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.").

Finally, it should be noted that, in the very case at bar, the Board itself expressed an acknowledgment of the proper role of interim earnings in the instant case. As noted above, in ruling upon the General Counsel's Motion to Strike and Motion for Summary Judgment, the Board ruled that the Hospital's Answer was sufficient to place the subject of interim earnings at issue. Thus far at least, the Board is yet to even address, let alone explain, why the agency departed from this prior ruling, so clearly and so abruptly, in the context of the Supplemental Decision. The Hospital submits that, particularly in these circumstances, the Board should not have declined consideration of interim earnings, for such a subject was an established part of the law of the case. Continuing disregard of the subject of interim earnings in this particular case would constitute arbitrary action by the Board.

Therefore, based on the Board's long-standing precedent and the specific underlying facts of the case at bar, it is clear that the Board has, already, the necessary authority, and furthermore, a legal obligation, to consider evidence of employees' interim earnings.

3.) The Only Appropriate Course of Action is for the Board to Reopen the Case at Bar

The Hospital has established that, contrary to the Board's previous assertions, the case now before the Board requires the Board to consider the Hospital's evidence of interim earnings. Not only has the D.C. Circuit ruled that none of the Board's explanations for its actions were sufficient to uphold its decision to ignore evidence of interim earnings in this case, the Board's own precedent illustrates the Board's authority to consider interim earnings and practice of doing so in hours reduction cases. Therefore, the Board's only option going forward is to re-open the case at bar to allow investigation, and if necessary, litigation of employees' interim earnings.

As the Board's own Casehandling Manual explains, in cases where interim earnings play a role, such as in the case at bar, the burden falls to the General Counsel to investigate and plead employees' interim earnings. See Casehandling Manual §§ 10536.2, 10536.2. The position that the General Counsel is required to investigate and plead interim earnings is further borne out by precedent from the Circuit Courts. See N.L.R.B. v. Izzii, 395 F.2d 241 (1st Cir. 1968) (The Board has the burden of going forward with testimony from discrimination employees regarding their interim earnings); Florence Printing Co. v. N.L.R.B., 376 F.2d 216 (4th Cir. 1967) (An employer is to be allowed to produce employee testimony on interim earnings whenever necessary to dispute the Board's backpay figures.)

Therefore, the Board should re-open the case at bar and direct the General Counsel to investigate and plead the employees' interim earnings.

Furthermore, in the event a disagreement arises from the General Counsel's investigation and / or calculation of interim earnings, and a new Compliance Specification is issued, the Hospital must have use of standard subpoena power in accord with standard Board procedure. Before the record opened before Judge Schmidt, he had ruled that the subject of interim earnings was not relevant. Accordingly, the Hospital was not able to use subpoenas to obtain from the discriminatees evidence of their interim earnings. The evidence underlying the Hospital's Offer of Proof was gathered upon the fortuity of Mimbres' relationship to another health care facility in New Mexico. Accordingly, the evidence outlined by the Hospital's Offer of Proof does not, and given the rulings up to that point in time, could not, represent a complete picture of the employees' interim earnings. Therefore, it is necessary that this case be re-opened, and in the event of a disagreement regarding the General Counsel's calculation of interim earnings, the Hospital be afforded the appropriate subpoena power.

CONCLUSION

For the reasons explained above, the Hospital respectfully submits that the Board has no legitimate reason to exclude consideration of the

employees' interim earnings in this case. Each of the reasons offered by the Board were squarely addressed and rejected by the Court. No legitimate reason exists for the Board to decline consideration of interim earnings. To the contrary, the Board has both the authority and the practice of considering interim earnings, including in cases similar to the one now before the Board. The Board, therefore, should reopen the case and remand the case to the General Counsel with instructions for the General Counsel to investigate and plead the employees' interim earnings. In addition, the Board should make clear that the Hospital has the same type of subpoena power as exists in any other case that involves interim earnings.

Dated: July 13, 2012
Glastonbury, Connecticut

Respectfully Submitted,

Kaito Bundege for BTC

Bryan Carmody, Esq.
Attorney for Deming Hospital Corporation
d/b/a Mimbres Memorial Hospital and
Nursing Home
134 Evergreen Lane
Glastonbury, Connecticut 06033
bryancarmody@bellsouth.net

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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify that, pursuant to 28 U.S.C. §1746, that the Employer’s Statement of Position Concerning Remand to the National Labor Relations Board was e-filed on Friday, July 13, 2012 with the National Labor Relations Board through the website of the National Labor Relations Board (www.nlr.gov).

The Undersigned does hereby certify that, on July 13, 2012, a copy of the Employer’s Statement of Position Concerning Remand to the National Labor Relations Board was served by email upon the following:

David T. Garza

Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, SW, Suite 310
Albuquerque, NM 87103-0567
David.Garza@nlrb.gov

Manny Armenta
United Steelworkers of America, District 12,
Subdistrict 2, AFL-CIO-CLC
3150 Carlisle Blvd. NW, Suite 110
Albuquerque, NM 87110
marmenta@usw.org

Dated: July 13, 2012
Glastonbury, Connecticut

Respectfully Submitted,

Kate Bundege for BTC

Bryan Carmody, Esq.
Attorney for Deming Hospital Corporation
d/b/a Mimbres Memorial Hospital and
Nursing Home
134 Evergreen Lane
Glastonbury, Connecticut 06033
bryancarmody@bellsouth.net