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Labor Law - LMRA - Deduction of Workmen's Compensation from Employer's Back Pay Liability

John A. Beach
University of Michigan Law School

LABOR LAW—LMRA—DEDUCTION OF WORKMEN'S COMPENSATION FROM EMPLOYER'S BACK PAY LIABILITY—The National Labor Relations Board found that the Moss Planing Mill Company had committed an unfair labor practice in discharging an employee for his union activities.[1] The company's secretary-treasurer also had battered the employee, inflicting injury, at the time of the discharge. Pursuant to section 10 (c) of the amended National Labor Relations Act,[2] the Board ordered the company to reinstate the employee and make him whole for back pay lost due to the unfair discharge. The order was enforced by the court of appeals.[3] In a supplemental order specifying the amount of back pay to be awarded,[4] the Board refused to deduct the sum of $432 which the employee had received for incapacity from the injury under North Carolina's workmen's compensation law.[5] On a motion to amend the enforcement decree, *held*, the Board's supplemental order set aside and remanded for new computation with deduction of the $432. Workmen's compensation benefits paid by the employer's insurance carrier are in discharge of the employer's statutory obligation to compensate the employee for injuries arising out of employment and, as such, are direct benefits to be deducted from the employer's gross back pay liability. Failure to deduct them would make the employee more than whole at the expense of the employer. *NLRB v. Moss Planing Mill Co.*, (4th Cir. 1955) 224 F. (2d) 702.

Section 10 (c) of the Taft-Hartley Act authorizes the Board, upon finding an unfair labor practice, to order "such affirmative action, including reinstatement with or without back pay, as will effectuate the policies of this Act. . . ."[6] This provision was intended to vest no private right in the employee.[7] The Supreme Court has said that a back pay order is designed to vindicate the public policy against unfair labor practices and operates as a command to pay the amount owed to the Board as agent for the employee.[8] The Court has held that liability for back pay may not exceed compensation for the employee's loss from the unfair discharge, the Board's power to order affirmative action being purely "remedial" and not "puni-

1 103 N.L.R.B. 414 (1953).
2 61 Stat. L. 147 (1947), 29 U.S.C. (1952) §160 (c).
3 (4th Cir. 1953) 206 F. (2d) 557.
4 110 N.L.R.B. 933 (1954) (one member dissenting).
5 N.C. Gen. Stat. (1950) §§97-1 to 97-122.
6 61 Stat. L. 147 (1947), 29 U.S.C. (1952) §160 (c).
7 See H. Rep. No. 1147, 74th Cong., 1st sess., p. 24 (1935).
8 Nathanson v. NLRB, 344 U.S. 25, 73 S.Ct. 80 (1952).

tive."[9] It has been established that the Board must deduct from a back pay award any amount actually earned elsewhere by the employee during the interim between unfair discharge and reinstatement, and also any amount which he might reasonably have earned in mitigation but inexcusably failed to earn.[10] In *NLRB v. Gullett Gin Co.*,[11] state unemployment insurance benefits were held not to be earnings in mitigation of the loss so that it was no abuse of the Board's discretion for it to refuse to deduct such payments from back pay awards. The Court reasoned that (1) since no consideration is given to collateral losses in computing awards, no consideration should be given to collateral benefits and (2) unemployment insurance benefits are collateral because they are not made in discharge of any obligation of the employer, but, rather, are designed to effectuate a policy of social betterment for the entire state.[12] In the principal case, the court distinguished workmen's compensation benefits from "collateral benefits" on the basis that the former are paid directly by the employer or his insurance carrier to make partial compensation[13] for earning capacity lost through industrial injury.[14] Thus, the court views such benefits as essentially back pay, and compels the Board to deduct them. To the possible objection that this allows the employer two wrongs (discriminatory discharge and infliction of injury) for the price of one, it may be replied that workmen's compensation is intended to provide benefits from the employer in place of wages lost through injury, without regard to the fault or negligence of the employer. Nothing punitive is involved.[15] Workmen's compensation guarantees the employee positive benefits in lieu of wages lost due to industrial injury, while precluding additional recovery from the employer based on fault.[16] It would seem to be a clear abuse of the Board's remedial discretion to order the employer to pay full back wages plus a workmen's compensation award

9 Consolidated Edison Co. v. NLRB, 305 U.S. 197, 59 S.Ct. 206 (1938); Republic Steel Corp. v. NLRB, 311 U.S. 7, 61 S.Ct. 77 (1940).

10 Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S.Ct. 845 (1941); 133 A.L.R. 1217 (1941). This is, of course, an extension of the contract law principle of mitigation of damages. See 5 WILLISTON, CONTRACTS, rev. ed., §1358 (1937). Failure to take reasonable steps in mitigation of damages was a separate ground of setting aside the Board's computations in the principal case.

11 340 U.S. 361, 71 S.Ct. 337 (1951).

12 Groceries donated to an employee by a union are collateral benefits and need not be deducted. NLRB v. Brashear Freight Lines Inc., (8th Cir. 1942) 127 F. (2d) 198.

13 The North Carolina statute provides benefits of 60% of the incapacitated worker's average weekly wage. N.C. Gen. Stat. (1950) §97-29.

14 North Carolina, like many other states, allows the employer to be self-insurer by proving ability to pay. N.C. Gen. Stat. (1950) §97-93. The insurance pool system may tend to shift the burden of compensation onto the ultimate consuming public, but does not negate an individual employer's liability for specific claims. See Larson, "The Nature and Origins of Workmen's Compensation," 37 CORN. L. Q. 206 at 215 (1952).

15 Ibid.

16 Payment of a workmen's compensation award by an employer bars further recovery by the employee against the employer for the same injury, but a tort action against the individual inflicting the injury may be maintained. H. J. McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E. (2d) 219 (1940).

for the same period in the case where the employee's injury results from no fault of the employer. To reach a different result when the employer has been guilty of tortious conduct would be to invoke a punitive power which the Supreme Court has denied the Board.[17] Once the employer is made liable for full back wages, the Board is without discretion to add punitive damages.[18] It may be that the courts have gone too far in limiting the discretion of the Board in its administration of the reinstatement-with-back-pay provision.[19] The act contains no express requirement of mitigation of damages, let alone deduction of compensation benefits. Nevertheless, such a deduction appears to be required under the current judicial view that the Board's power is purely remedial in nature.

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[17] In the principal case the Board refused to follow its usual practice of excluding from back pay coverage any time during which the employee was incapable of working on the ground that the employer caused the incapacity. Note 1 supra, at 419.

[18] Retention by the employee of full back wages plus unemployment insurance for the same period was justified in NLRB v. Gullett Gin Co., note 11 supra, on the ground that the two payments were from different sources. In the principal case the employer was liable for both Board and workmen's compensation awards. See also Matter of Skutnik, 268 App. Div. 357, 51 N.Y.S. (2d) 711 (1944), where state unemployment benefits were ordered refunded upon recovery of a back pay award.

[19] See Farber, "Reversion to Individualism: The Back Pay Doctrines of the N.L.R.B.," 7 IND. & LAB. REL. REV. 262 (1954).