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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 computa-
tion 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 em-
ployer'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 find-
ing 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 em-
ployee.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 "punish-

1 103 N.L.R.B. 414 (1953).
3 206 F. (2d) 557.
4 224 F. (2d) 702.
5 110 N.L.R.B. 933 (1954) (one member dissenting).
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. In *NLRB v. Gullett Gin Co.*, 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. 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 for earning capacity lost through industrial injury. 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. 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. 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...
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. Once the employer is made liable for full back wages, the Board is without discretion to add punitive damages. 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. 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.