Does The NLRB Need A Whip Or Bridle?
 Remedies That Go Too Far or Not Far Enough
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Under the National Labor Relations Act, 29 U.S.C. §160(c) (also called Section 10(c)) the Board is empowered to issue cease and desist orders and impose affirmative remedies if it finds a violation of the Act:

. . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. . .

See also NLRB v. G&T Terminal Packaging Co., Inc., 246 F.3d 103, 119 (2nd Cir. 2001). The Board’s power is a broad and discretionary, but it is not unlimited. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964); Coronet Foods, Inc. v. NLRB, 158 F.3d 782, 789 (4th Cir. 1998); National Cash Register Co. v. NLRB, 466 F.2d 945, 965-66 (6th Cir. 1972). Its discretion is “subject to limited judicial review . . . [which] will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” Fibreboard Paper, 379 U.S. at 216 (internal citations and quotations omitted).

However, the “Act does not confer upon the Board a punitive jurisdiction enabling the Board to inflict . . . any penalty it may choose because [the employer] is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be

The NLRB has faced pushback from both sides regarding the remedies implemented in response to unfair labor practices, challenging both the severity and weakness of remedies. Advocates for stronger remedies argue that the Board has failed to implement remedies adequate to stem the chilling effects of discriminatory discharge and other unfair labor practices. They argue that weak notice postings do little to inform employees and managers of important section 7 rights, and complain that often postings are placed in full view of managers and supervisors, making it difficult for employees to review postings without being under watch. Advocates for harsher remedies also contend that reinstatement is ineffective because reinstated employees often are terminated shortly after returning to work, or face hostile work environments that quell union involvement. Conversely, advocates for weaker remedies argue that the Board has no power under the Act to enforce remedies beyond requiring a notice posting and/or back pay to affected employees.

The Obama-era Board, citing the “broad, discretionary” authority conferred under Section 10(c) to implement remedies that “effectuate the policies” of the Act, implemented stronger remedies designed to make employees whole, and further, to deter employers from violating the Act. For instance, in *Don Chavas*, 361 NLRB slip op. No. 10 (August 8, 2014), the Board held that two employees were discharged for unlawful reasons and issued a make whole remedy that included calculating the value of prior social security payments and adverse tax consequences into the payment for back wages. The Board’s decision was applied retroactively.
Additionally, the current General Counsel has advocated that Section 10(c) permits the Board to award consequential damages for economic harm stemming from a respondent’s unlawful conduct. In a July 28, 2016 memorandum, the General Counsel’s office cited examples of consequential damages as being “expenses resulting from car repossession due to failure to make a car payment, penalties for early withdrawal from retirement accounts in order to cover living expenses, and loss of home equity in foreclosure action due to missed mortgage payments.” See OM 16-24, p. 1 (July 28, 2016).

Two relatively recent decisions, Pacific Beach Hotel, 361 NLRB No. 65 (2014), and King Soopers, Inc. and Wendy Geaslin, 364 NLRB No. 93 (2016) ordered unprecedented remedies. This paper discusses the Obama Board’s approach to remedies, as discussed in King Soopers, Inc., Pacific Beach Hotel, and Pressroom Cleaners Inc., Case No. 34-CA-071823 (Sept. 30, 2014).

**KING SOOPERS: SEARCH-FOR-WORK AND INTERIM EXPENSES**

In King Soopers, Inc., the Board set a new precedent of awarding employees lost wages in conjunction with search-for-work and interim expenses. Prior to King Soopers, Inc., the Board had consistently imposed a duty on the discharged employee to mitigate damages by making reasonable efforts to seek and hold interim employment. Midwestern Personnel Services, 346 NLRB 624, 625 (2006). Employees were not eligible for back pay for periods during which they failed to mitigate. Id. Thus, discharged employees were required to cover costs associated with their new job search. This duty to mitigate is not unique to traditional labor law. All other employment laws prohibiting discrimination or retaliation in the workplace require that plaintiffs mitigate damages by seeking interim sources of employment. See e.g., 42 USCA §2000e-5.
In King Soopers, Inc. the Board found the employer liable for 8(a)(1) violations after the employer twice suspended an employee and then discharged her for questioning whether performing certain tasks violated the collective bargaining agreement. King Soopers, Inc., at **1-4 (2016). The Board ultimately agreed with the General Counsel, holding that treating search-for-work and interim expenses as back pay was necessary to avoid unfairly reducing damages to the employee. Id.

While the search-for-work expenses remedy created in King Soopers was not unique to the Obama Board, King Soopers, Inc. is significant in that it changed the way that such expenses are calculated and reduces tax complications.1 Under the previous approach of Crossett Lumber Co., 8 NLRB 440, 497-498 (1938) and its progeny, search-for-work expenses, which are not wages, were taxed because they were combined with taxable back pay. Under King Soopers, Inc., not only are employee’s search-to-work and interim expenses not taxable, but expenses may exceed the value of any interim earnings.

Union advocates argue this approach is crucial to achieving the goal of Section 10(c) to make the wronged employee whole, because the cost of finding new employment can exceed the earnings employees secure, or employees may incur significant costs preparing resumes or traveling to secure jobs with lower wages. Thus, not only would the employee have endured wrongful discharge and discrimination, but they would also bear the out-of-pocket costs in offsetting the employer-induced discrimination.

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1 As the Board reminded us in King Soopers, Inc., search-for-work and interim expenses have been a Board approved remedy for almost 80 years. In Crossett Lumber Co., 8 NLRB 440 (1938), the Board permitted search-for-work expenses, but only as an offset to interim earnings in lieu of a separate element of back pay. In subsequent cases, the Board also refused to award search-for-work expenses where such expenses exceeded the interim earnings secured by the employee. See e.g. North Slope Mechanical, 286 NLRB 633, 638 fn. 19 (1987); West Texas Utilities Co., 109 NLRB 936, 937 fn. 3 (1954). The difficulty with these prior approaches to search-for-work expenses is that the Board provided little to no explanation for its rationale, making the traditional Crossett Lumber Co. approach a prime target for zealous advocates.
Then Board Member Miscimarra dissented in part from the majority’s decision disagreeing with the Board’s change in the methodology of awarding search-for-work expenses. Miscimarra reasoned that the Board’s authority is limited to providing remedial relief. As support for his dissent, Miscimarra pointed out that the change in the Board’s method of awarding search-for-work damages could result in a financial windfall in certain cases where the claimant’s interim earnings equal or exceed the sum of their lost earnings and their employment/search expenses. Miscimarra suggested, however, that the reasonable search-for-work expenses could be treated independently if the end result were not a windfall. Prior to *King Soopers, Inc.*, a claimant could only recover employment/search expenses as an offset against interim earnings. Therefore, if there were no interim earnings or the earnings exceeded the back pay, the claimant would not recover search-for-work expenses. The change to the Board’s methodology makes these expenses an addition to interim earnings, possibly resulting in recovery that would be greater than just making the claimant whole, and thus exceeding the Board’s statutory authority. Miscimarra also noted that this change could result in prolonging disputes as parties fight over the reasonableness of search expenses, delaying the availability of monetary remedies for adversely affected claimants.

A more conservative Board, as expected under the Trump administration, may reign in this remedy, by re-aligning it with similar remedies in other workplace discrimination and retaliation laws, which do not award search-for-work or interim expenses. Critics of search-for-work expenses argue that *King Soopers, Inc.* removes all incentives for an employee to mitigate damages and unfairly imposes speculative damages on employers. Employer advocates further argue it should not be responsible for these expenses, particularly since the employer has no authority over the choices a former employee makes in his or her job search. Employers can find
some reassurance in the fact that damages must be established with certainty and concrete evidence and that a recently discharged employee is unlikely to rely on the speculative promise of search-for-work expenses when he or she faces immediate lack of income, as noted in King Soopers, Inc.

**PACIFIC BEACH HOTEL: REMEDIES WITH DEPTH AND BREADTH**

In Pacific Beach Hotel, the Board required the employer to adhere to significantly more burdensome and harsh notice requirements that any past decision as a warning for repeatedly committing unfair labor practices. In that case the Board found that the employer had engaged in a 10-year period of pervasive unfair labor practice violations, including overbroad solicitation policies; unlawful promotions and wage increases immediately before elections; bargaining in bad faith; threatening employees with termination; and unilaterally changing the terms and conditions of employment. Pacific Beach Hotel, 361 NLRB No. 65 (2014).

Despite having previously being found liable for multiple unfair labor practices, it was the Board’s position that the employer had refused to comply with the Board’s ordered remedies. The Board held that the employer’s repeated acts of bad faith perpetuated unnecessary litigation and bargaining. Accordingly, the Board imposed harsh remedies against the employer. Among other remedies, the majority ordered the employer to pay the litigation expenses of the General Counsel and the union and pay the union's bargaining and other expenses. Beyond a notice posting, the employer was required to publish a decision and explanation of rights, which was included as an Appendix to the decision, and which “sets out the employees’ core rights under the Act, coupled with clear general examples that are specifically relevant to the unfair labor practices found in this case.” In addition, the Board extended the standard 60-day notice posting period to 3 years, in an effort to reduce the chill of unfair labor practices. The employer was also
required to publish these documents in local publications, selected by the Regional Director, for an 8-week period.

In addition, the Board expanded the target audience and method of distribution. The Board ordered copies of the notice, Explanation of Rights, and a letter written by the Regional Director, be mailed to incoming, current, and former employees, managers, and supervisors over the 3-year period. Housekeeping Managers and Supervisors were also required to attend a special meeting where the notice was read because the Board found that these individuals were directly involved in unfair labor practices that affected the workforce. The Board also granted the union certain rights of access to the employer’s workplace to ensure compliance with its Order.

Union advocates will likely argue that such remedies are warranted given the employer’s continuous disregard of court orders and Board decisions, coupled with continued engagement in unfair labor practices. To employers, these ordered remedies overstep the Board’s authority and are punitive, rather than remedial. Although Section 10(c) gives the Board broad discretion to implement remedies that will effectuate the Act’s policies, the Board’s powers are limited to remedial measures rather than punitive ones. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940) (“We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures” or “to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.”). *See also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 fn. 6 (2002).

Miscimarra dissented to the award of attorneys’ fees to the General Counsel and Union, and the majority’s discussion of its authority to award front pay as a remedy, as both are clearly outside the Board’s remedial authority under the Act. Being that it is well established that the Board cannot award punitive remedies, Miscimarra wrote:
The Supreme Court has held that the circumstances under which attorney’s fees are to be awarded are matters for Congress to determine, and a court may award attorney’s fees only when expressly so authorized by the legislature. It would be incongruous to suggest that the Board as an agency, not a court, has greater authority to require fee-shifting without congressional authorization than suggested by the Supreme Court. (internal citations and quotations omitted).

In fact, the D.C. Circuit held in Unbelievable, Inc. v. NLRB, 118 F.3d 795, 806 (D.C. Cir. 1997) that the Board could not impose fee-shifting as a remedy. Miscimarra goes on to argue that the lack of any such language in the Act is clear evidence Congress did not authorize the Board to use fee shifting as a remedy. Miscimarra also discussed his view that the Act did not authorize the Board to award an attorney future pay in lieu of reinstatement largely because it exceeds make-whole relief and calculating such an award was outside the Board’s expertise and statutorily authorized duties.

On appeal, the D.C. Circuit held that it lacked jurisdiction to consider most of the company’s objections because they were never raised before the Board. Specifically, the Court held that the “company’s failure to file a motion for reconsideration bars all its challenges except . . . its objections to the Board’s award of litigation expenses and aspects of its challenge to the notice-reading remedy.” Addressing the mandatory notice reading, the D.C. Circuit struck down the Board’s order requiring that a company official read the order with strong language, holding that the order is akin to punishment “devised by Stalin and adopted by Mao . . . in the hopes that full confession might avert dispatch to the gulag, torture or execution.” The Court asked:

What is the subtext communicated by the sort of scene the Board would mandate? What is communicated to the assembled workers and the perpetrator himself? “You see before you one of your managers, who normally has a responsibility to make important choices as to your work. But who is he? Not merely is he a lawbreaker, but he is a pathetic creature who can be forced to spout lines some government officials have put in his mouth. He is not
even a parrot, who can choose when to speak; he is a puppet who speaks on command words that he may well abominate.

The Court upheld the Board’s exercise of discretion in ordering notice reading in the modified form, i.e., with the company having the option of punting the task to a Board employee.

The Court also struck down the Board’s orders requiring that the company pay litigation expenses to the General Counsel and union. The D.C. Circuit held that “the authoritative ban on punitive remedies by the Board is triggered here: the Supreme Court has consistently classified application of the bad-faith exception to the American rule as punitive. *Hall v. Cole*, 412 U.S. 1, 5 (1973). Such fee shifting is akin to a fine for civil contempt: both serve the purpose of vindicating the tribunal’s authority over a recalcitrant litigant.”

**PRESSROOM CLEANERS: SUCCESSORSHIP REMEDIES**

On September 30, 2014, the National Labor Relations Board overruled established precedent once again. In *Pressroom Cleaners Inc.*, Decision and Order, Case No. 34-CA-071823 (Sept. 30, 2014), the Board held that a successor found guilty of such a scheme, in addition to being required to recognize and bargain with the union, had to: (1) restore the “status quo” by putting in place the employment terms of its predecessor, i.e., those spelled out in their old labor agreement, until it bargained to an agreement or impasse with the union; and (2) pay the employees it unlawfully failed to hire back pay and benefits under the monetary terms under which they worked for the predecessor. Saying it was simply returning to the Board’s “traditional approach” to remedying unfair labor practices of this kind, the majority overruled the Board’s 2006 decision in *Planned Building Services*, 347 NLRB 670 (2006), a case giving a successor found to have unlawfully avoided successorship status a way to reduce its liability.

The way *Planned Building Services* held a successor could reduce its liability was by proving in
a compliance proceeding that, had it not unlawfully avoided becoming a successor, it would have bargained to an agreement or impasse with the union on less generous monetary terms.

The Board in *Pressroom Cleaners* concluded the rule was “based upon a misunderstanding of the Board’s traditional remedy in successorship-avoidance cases, inconsistent with other Board precedent, and flawed as a matter of policy.” Relying upon *State Distributing*, 282 NLRB 1048 (1987), the majority noted that, in fashioning a make-whole remedy in successorship-based failure to hire cases, allowing the successor to prove it would not have accepted the predecessor’s monetary terms and would have reached impasse ignores the possibility the parties may have reached a compromise. As such, according to the majority, the rule in *Planned Building Services* was flawed because a determination whether impasse or a compromise would have been reached would amount to conjecture. The majority also found the *Planned Building Services* rule to be unfair because it gave a wrongdoing employer an opportunity to prove bargaining would have resulted in less favorable terms than the predecessor had in place but did not give the union an equal opportunity to prove bargaining would have resulted in more favorable terms. In expressing that conclusion, however, the majority did not explain how, as a practical matter, that distinction made the rule unfair. Lastly, the majority justified throwing out the *Planned Building Services* rule because, in its view, the rule “prolongs litigation by greatly complicating the compliance phase and discouraging meaningful bargaining.” The majority, however, offered no empirical data to support its conclusion.

The case was not appealed to Circuit Court, although previously, in *Capital Cleaning Contractors v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998), a case on which the Board relied in *Planned Building Services*, that court rejected the Board’s so-called traditional approach, finding it to be both punitive and to unlawfully impose a predecessor’s contract terms on a successor.