



NORTHEAST REGIONAL FIELD MEETING

October 10, 2024

**1199 SEIU
498 7th Avenue
New York, NY**

Remedies

October 10, 2024

3:00 – 3:50 PM

Session Presenters:

Lisa Charles, Arbitrator

**Kate Swearengen, Cohen, Weiss and Simon LLP, New York
Olga Torres, Regional Attorney at NLRB Region 2, Manhattan, NY**

Remedies

**ULA Northeast Regional Field Meeting
October 10, 2024**

Panelists:

Lisa Charles, Arbitrator

Olga Torres, Regional Attorney, NLRB Region 2

Kate Swearingen, Cohen, Weiss and Simon LLP

GC Memos

NLRB General Counsel Memos on Remedies

- GC 21-06 Seeking Full Remedies
- GC 21-07 Full Remedies in Settlement Agreements
- GC 22-01 Ensuring Rights and Remedies for Immigrant Workers Under the NLRA
- GC 22-06 Updates on Efforts to Secure Full Remedies in Settlements
- GC 24-04 Securing Full Remedies for All Victims of Unlawful Conduct

GC's Views on Full Remedies

GC 21-06

- Consequential damages
- Front pay
- Liquidated backpay
- Union access
- Reimbursement of organizational costs
- Notice reading
- Notice publication
- Visitorial and discovery clauses
- Extended posting periods
- Notice distribution to supervisors and managers
- Training of supervisors and managers
- Instatement of a qualified applicant of the union's choice
- Broad cease-and-desist orders ("in any other manner")

GC's Views on Full Remedies

GC 21-06 (Cont.)

- Bargaining orders
- Compensation for losses as a result of failure to bargain
- Bargaining schedules
- Submission of period progress reports on bargaining
- 12-month insulation periods
- Reinstatement of bargaining proposals
- Reimbursement of collective bargaining expenses
- Engagement of FMCS mediator

GC's Views on Full Remedies

GC 24-04

- Regions should seek full make-whole remedies for all employees harmed as a result of an unlawful work rule or contract term, irrespective of whether those employees are identified during the course of the ULP investigation
- Accordingly, Regions should seek settlements that include make-whole relief for employees who were disciplined or subjected to legal enforcement as a result of an unlawful work rule or contract term, since the start of the 10(b) period, where “the discipline or legal enforcement action targets employee conduct that touches the concerns animating Section 7,” unless the employer can show that the conduct actually interfered with its operations and it was that interference that led to the employer’s action

Direct or Foreseeable Pecuniary Harms

Thryv, Inc., 372 NLRB No. 22 (Dec. 13, 2022)

- Section 10(c) of the NLRA gives the NLRB its remedial authority.
- According to the Board in *Thryv*, employees terminated in violation of the Act may be entitled to compensation for “direct or foreseeable pecuniary harms.”
- Examples include: credit card debt (and interest and late fees), medical debt, penalties for early withdrawals from retirement accounts, loss of a vehicle or home, increased transportation costs, and childcare.
- The Board declined ruling on whether damages for pain and suffering or emotional distress and payment of legal fees are authorized under Section 10(c).
- The Fifth Circuit subsequently vacated portions of the Board’s order, finding the employer had not committed a ULP and consequently vacating the remedies imposed by the Board. The proposition that remedies levied as a result of a ULP can include all losses incurred as a direct or foreseeable result of the ULP still stands.

Make Whole Remedies for Failures to Bargain

***Ex-Cell-O Corp.*, 185 NLRB 107 (1970)**

- In *Ex-Cell-O Corp.*, the Board declined to provide a make whole compensatory remedy for failures to bargain. In GC 21-04, *Mandatory Submissions to Advice*, and GC 21-06, *Seeking Full Remedies*, the General Counsel indicated that she is considering urging the Board to overrule its decision in *Ex-Cell-O Corp.*
- Recent complaints in several cases alleging technical violations of Section 8(a)(5) (test-of-certification cases) seek orders requiring respondents to make the bargaining-unit employees “whole for the lost opportunity to engage in collective bargaining at the time and in the manner they were entitled to under the Act.”

Make Whole Remedies for Failures to Bargain

Ex-Cell-O Corp. (Cont.)

- In motions for summary judgment, the General Counsel has urged the Board to overrule *Ex-Cell-O Corp.* and include as part of its remedial order a requirement that the respondent make the bargaining-unit employees whole for the lost opportunity to engage in collective bargaining at the time and in the manner contemplated by the Act. The General Counsel further argued that the actual calculation of such make-whole remedy should be deferred to a compliance proceeding.
- The Board has not yet decided the issue, but in several cases has severed the issue and retained it for further consideration.
- A recent case: *Nexstar Media Inc.*, 373 NLRB No. 88 (Aug. 29, 2024)

What remedies are appropriate to this hypothetical fact pattern?

Employer Nimmo employs 500 employees represented by **Union Lindor**. The CBA is set to expire in three months' time. **Nimmo** has recently undergone a change in leadership. Its new president, **Alonso**, is reputed to hate unions.

Lindor is eager to bargain a new contract with **Nimmo**. But **Nimmo** ignores **Lindor's** requests for dates and then, when bargaining is ultimately scheduled, cancels at the last minute, with the bargaining committee and **Lindor's** lawyer already seated at the table. In the meantime, **Nimmo** imposes new productivity rules and begins to strictly enforce its longstanding, but never previously enforced, rules around lateness and absenteeism. **Lindor** files a ULP charge alleging that **Nimmo** is bargaining in bad faith and challenging the productivity/lateness/absenteeism rules. It also files a grievance over the new productivity/lateness/absenteeism rules.

Six employees, frustrated by the delay in bargaining, ambush **Alonso** during one of his plant visits. They insist that **Nimmo** bargain with them over wage increases.

A week later, **Nimmo** fires four of the employees who confronted **Alonso**, claiming that they fell short of productivity metrics and/or were consistently late or absent without leave. **Lindor** files a new ULP charge challenging the terminations.

The Board agent contacts **Nimmo's** attorney to schedule affidavits. All of a sudden, **Nimmo** offers dates. During the first bargaining session, **Lindor** proposes wage increases of 8%/6%/4%. **Nimmo** counters with 1%/0%/0%. Two weeks later, **Nimmo's** attorney calls **Lindor's** attorney and advises without explanation that **Nimmo** is withdrawing its 1% proposal and advises that it does not know when, or if, **Lindor** will be in a position to make another offer.

Questions & Answers