Aluminum Casting & Engineering Co., Inc. *and* United Electrical, Radio and Machine Workers of America (UE). Cases 30–CA–12855, 30–CA–12902, 30–CA–12943, 30–CA–12944, and 30–CA–12949

January 31, 2007

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On November 14, 2003, Administrative Law Judge Bruce D. Rosenstein issued the attached Supplemental Decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a supporting brief. Each party filed an answering brief, and the General Counsel and the Charging Party filed reply briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The issue in this compliance proceeding is the appropriate amount of backpay due to employees who were not granted a wage increase as a result of the Respondent's unfair labor practices. In the underlying proceeding,[2] the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding annual across-the-board wage increases in 1995. The Board ordered the Respondent to make whole the employees who were employed in the bargaining unit in 1995 for the annual wage increases they would have received in "1995 *to date*."[3]

On appeal to the Seventh Circuit Court of Appeals, the Respondent argued, in relevant part, that the Board's Order was overbroad on the grounds that the "Board did not have before it the question of any wage increases for years following 1995," and that the Board's Order should have provided for backpay only for 1995, the year that the wage increases were unlawfully withheld.[4] The court agreed with the Board that the across-the-board increases had been unlawfully withheld. In enforcing the Board's order in relevant part, however, the court implicitly acknowledged that the Respondent's argument could have merit, if the Respondent were able to establish requisite facts in support of limiting the remedy in compliance. The court noted that "As long as [Respondent] has a fair opportunity to prove the proposition it has argued so strongly here—that general wage increases are *passé* . . . —the present order does no more than require payment of the 1995 increase . . . and any later ones supported by the company's normal practice at that later time."[5] Thus, the court found that the basis for finding a violation of Section 8(a)(3) was that the Respondent had "a normal practice of granting some kind of annual, across-the-board, wage increase to its employees . . . [and] wanted its employees to blame the union for the fact that the established practice was abandoned during the union campaign."[6]

With respect to the remedy, the court found that the Board's backpay order was "entitled to enforcement" based on two factors. First, the court read the Board's order as not binding the Respondent to "a perpetual practice of granting this particular kind of wage adjustment," noting further that:

> if, for example, in compliance proceedings relating to the year 1996, [the Company] introduced evidence that it had abjured across-the-board raises forever, and the General Counsel could not show that this was untrue or pretextual, not only would this suffice to excuse [the Company] from making any adjustments for 1996, but it would establish this new baseline for future years as well.[7]

Second, at oral argument, counsel for the Board explicitly assured the court that the Respondent would have the opportunity in compliance to show that "it had com-

[1] The Respondent filed a motion to strike as untimely the Charging Party's answering brief to the Respondent's cross-exceptions. The motion is denied. The Charging Party's brief was timely filed pursuant to *P & M Cedar Products*, 282 NLRB 772 (1987) (request for extension of time filed by one party is applicable to all parties). Specifically, the record shows that the General Counsel was granted an extension of time to February 20, 2004, to file his answering brief, and the Charging Party timely filed its answering brief on that date.

[2] 328 NLRB 8 (1999).

[3] Id. at 10 (emphasis added).

Throughout this discussion, those employees who were employed in the unit at the time of the unfair labor practices and thus are entitled to make-whole relief shall be referred to as "1995 employees." Employees working in the unit who are not entitled to a remedy because they were not employed in the unit in 1995 will be referred to as "later employed employees."

[4] *NLRB v. Aluminum Casting & Engineering Co.*, 230 F.3d 286, 295 (7th Cir. 2000).

[5] In its brief to the court, the Respondent further argued that while no definitive management decision had been reached in late 1994 concerning the future of across-the-board increases, the transition to an entirely different and more rational compensation system was well underway. See Respondent's Br. Opposing Enforcement of the Board's Order.

[6] Id. at 296.

[7] Id.

pletely abandoned across-the-board adjustments, in favor of targeted merit, incentive, training, and development raises."[8]

After a compliance investigation, the General Counsel found that the Respondent had abandoned across-the-board wage increases as a compensation tool in 1996, in favor of other formulae for wage increases, and that its liability was limited to making employees whole for its withholding of the across-the-board wage increase for 1995. After a hearing, the judge found, and we agree for the reasons stated by him, that the General Counsel properly relied on a 3-year representative period in calculating the across-the-board wage increase for 1995, that the Respondent could not rely on a wage survey conducted in 2003 to determine whether an increase would have been granted in 1995, and that the amount of the unlawfully withheld 1995 wage increase was 25-cent-per-hour.

Further, in ordering the Respondent to pay backpay and interest to the 1995 employees, the judge limited the period of backpay to calendar year 1995. The judge rejected the General Counsel's argument that the amount of the 1995 increase should be built into the 1995 employees' base wages for subsequent years, so that all 1995 employees (but no others) would receive 25 cents for every hour worked from the beginning of the backpay period until their employment ended or the backpay period was concluded. Instead, the judge limited the Respondent's backpay liability to making the employees whole for the wage increase withheld in 1995, without factoring that increase into the employees' subsequent base pay. Stated otherwise, the 25-cent increase unlawfully withheld from the 1995 employees would not have the "ripple effect" of raising base pay for these employees in every subsequent year.

The judge supported these findings with the following rationale. First he noted that, as contemplated by the court remand and the Board's subsequent decision, the Respondent demonstrated that as of January 1, 1996, the Respondent had abandoned the use of across-the–board increases as a compensation tool.[9] As of that date, the Respondent had put into place a system of wage determinations under which increases were based exclusively on merit, incentive, and training considerations. Thus, the Respondent had no obligation to provide 1995 employees, or any other employees, with across-the-board increases after 1995.[10]

The judge further found that after January 1, 1996, the Respondent treated all unit employees equally under the new compensation system, so that no 1995 employee lost previously awarded across-the-board increases or was denied appropriate merit or training increases under the new system. Further, under the new system, average wages for unit employees increased every year, and in every year the average increase exceeded the 25-cent increase in 1995. Finally, the judge found that the General Counsel had failed to show that 1995 employees received, on average, merit and training increases lower than 25-cent-per-hour. Thus, the judge concluded that the General Counsel's theory for the accrual of backpay was flawed, and that allowing the 1995 increase to "ripple" through the 1995 employees' compensation in perpetuity would constitute an abuse of process and unjust enrichment for the 1995 employees.

In exceptions, the General Counsel argues, inter alia, that the "ripple effect" of incorporating the 25-cent-per-hour increase into the 1995 unit employees' base pay in each subsequent year does not unjustly enrich the 1995 employees at the expense of later hires, best effectuates the remedial policies of the Act, and is consistent with Board law.

Under the circumstances of this case, we disagree. We find, in agreement with the judge, that "carrying forward" the 1995 increase into the base pay of the 1995 employees in subsequent years does more than compensate for the unlawful conduct of 1995. Further, it would provide the 1995 employees a windfall at the expense of later hired unit employees. Finally, it is inconsistent with Board law and the Act's remedial purposes.

The difference between our position and the position of the General Counsel and the dissent is as follows. Assume that employees were making $10 per hour at the start of 1995. They were unlawfully denied an across-the-board 25-cent bonus increase during 1995. Therefore, their pay after the denial should have been $10.25, and they are entitled, as a remedial matter, to the difference for the balance of 1995. Further, we would presume, absent rebuttal, that the $10.25 would have continued into 1996 and beyond. Phrased differently, the burden is on the Respondent to show that the pay would not have been $10.25 for 1996 and beyond. The Respondent has met that burden. In 1996, the Respondent lawfully changed from an across-the-board system to a merit pay system that is based upon individual performance. The new system was not based on a "baseline" for bargaining unit labor costs that incorporated a 25-cent increase for 1995. Thus, for example, assume that employee X was paid $11 per hour for 1996. The determination of the amount of his merit-based increase for 1996

[8] Id.

[9] The General Counsel has conceded that the Respondent has demonstrated this change in policy.

[10] There were no allegations of unlawful failure to implement across-the-board wage increases post-1995 in the complaint.

would be made without regard to whether employee X's hourly wage was $10 or $10.25 in the prior year. Our colleague would effectively raise employee X's pay to $11.25 for 1996, notwithstanding the Respondent's lawful determination that X merited only $11 per hour. Further, our colleague would pay employee X $11.25 per hour, even though an employee of comparable merit, hired in 1996, would be paid only $11. In short, our colleague's remedy does more than compensate for the unlawful conduct of 1995. It also provides a windfall for the 1995 employees, and it creates an improper disparity between them and the employees hired in 1996.[11]

To further illustrate the problems with the General Counsel's remedial formula, we need only compare the situation of the 1995 employees with that of later-hired employees under the General Counsel's scenario and our own.[12]

Under the formulation advanced by the General Counsel and our dissenting colleague, each 1995 employee would receive 25 cents per hour for every hour worked in the unit from the commencement of the backpay period until termination of employment. A 1995 employee still employed in the unit would benefit three times over from this remedy. First, the employee would receive 25 cents per hour for hours worked in 1995 plus interest. Let us assume that a 1995 employee worked 1500 hours in 1995. That employee would receive $375 plus interest to make him whole for his losses due to the Respondent's unlawful conduct. In our view, and in the view of the appeals court on remand, this remedy is well-tailored to the Respondent's unfair labor practice and its effects. Unit employees were denied across-the-board increases in 1995, and restoration to them of a comparable sum, based on the General Counsel's best calculations as to what would have occurred in the absence of wrongdoing, plus interest, makes up their losses and demonstrates that the Respondent is accountable for its discriminatory actions and cannot profit from its wrongdoing.

But the General Counsel and our dissenting colleague would not stop at this point. Assume that this same employee worked 1500 hours in the unit each year after 1995, and is still in the unit now. Under the formulation advanced by the General Counsel and the dissent, that employee would receive $375 plus interest for 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, and 2006 for a total of $4125 plus interest. What is more, as that employee is still employed in the unit, he will, at any given time through the rest of his employment in the unit, receive 25 cents more per hour than a similarly situated employee who had received exactly the same increases under the Respondent's post-1996 compensation plan, but who had started work after January 1, 1996.

We find that the latter two elements of the General Counsel's and the dissent's remedial plan detract from the remedial purposes of the Act. First, the 25 cents per hour, plus interest, for each hour worked between 1996 and termination of employment, provides a windfall to all 1995 employees. As the undisputed facts demonstrate, as of 1996, the Respondent abandoned its old method of providing across-the-board increases, and, in effect, wiped the slate clean. When the Respondent introduced its new compensation system, it used as its baseline for determining wage increases the overall labor costs of the unit at the end of 1995. Thus, the labor costs—the baseline—from which the 1996 increase and all further increases were calculated did not include that 25 cents per hour. As the court found, "if . . . [in] 1996, [the Company] introduced evidence that it had abjured across-the-board raises forever . . . not only would this suffice to excuse [the Company] from making any adjustments for 1996, *but it would establish this new baseline for future years as well.*"[13] (Emphasis added.) This is precisely what happened. If the baseline had included the 25 cents per hour, all subsequent raises would have been affected because the baseline would have been different, and based on the overall labor costs of the unit, the increases would likely have been smaller. The facts show that from 1996 forward, the 1995 employees were fairly and equitably compensated, along with newer members of the unit, according to their level of merit, training, and other lawful factors, based on a formula that did not incorporate a 25-cent increase for 1995. Thus, to require the Respondent to continue to pay the 1995 employees 25 cents per hour after 1995 is to give those employees a fictional baseline, and require the Respondent to provide them with compensation that they did not in fact lose.

For 1995 employees still working in the unit, the flow of unearned money would continue. The 1995 employee would always earn 25 cents per hour more than a similarly situated later-hired employee. This is a facial inequity that is utterly at odds with a responsible employer's commitment to linking wage increases to measurable

[11] Our colleague says that 12 employees were not earning at least 25 cents per hour more at the end of 1996, as compared to the end of 1995. Assuming that this is so, it is quite consistent with the Respondent's new (and lawful) system. If employee Y made $10 per hour in 1995, and $10.20 in 1996, that employee is entitled to a 25-cent-per-hour differential for 1995, but was lawfully determined to merit only $10.20 for 1996.

[12] For the sake of illustration, the following scenarios assume that all employees made the same wage.

[13] 230 F.3d 286, 296 (7th Cir. 2000).

achievements like training, merit, incentive, and development. Yet the Respondent would never be able to rectify the inequity between the two employees, either by holding the 1995 employee's wages until the later hired employee had caught up, or by raising the later hired employee's salary by 25 cents to catch him up to his colleague. Either action could be viewed as according unequal treatment to the discriminatee. Thus, the General Counsel's scheme would have the further damaging effect of creating, in essence, a two-tiered pay scheme for unit employees, differentiated only by whether the employee was in the unit in 1995, and thus eligible for the backpay remedy. This differential becomes even more anomalous in light of the judge's findings, as mentioned above, that after 1995, the Respondent treated the unit employees equally under the new system, and that no 1995 employee was denied appropriate merit or training increases under the new system.

Moreover, contrary to the General Counsel's and Charging Party's arguments, carrying forward the 25-cent increase into the base pay of the discriminatees is not consistent with Board law. The cases on which they rely are distinguishable. In *Florida Steel*, 220 NLRB 260 (1975), the respondent stopped providing general increases to unit employees on the advent of the union, but maintained the practice of conducting a wage survey and providing general increases to similarly situated nonunion employees in other facilities. The Board adopted the judge's finding that the respondent discriminatorily singled out the unit employees in withholding the customarily granted general annual increase. There was no evidence that the respondent there changed its overall compensation practices, or that the increase would go to some, but not all, unit employees. Moreover, the remedy in that case was to make the unit employees whole for the withholding of the established general wage increases that continued as a normal practice by the respondent in subsequent years.

In *Achilles Construction Co.*, 290 NLRB 240 (1989), the respondent was ordered to pay backpay to strikers whom the respondent had unlawfully refused to reinstate in accordance with its expired collective-bargaining agreement with the union. In that case, there was no issue of a change in compensation methods affecting base pay or an award of backpay that provided a premium to certain employees. The respondent, in that case, did not establish any fact to negate or mitigate its liability.[14]

[14] In *Urban Laboratories*, 308 NLRB 816 (1992), there were no exceptions to the calculation of appropriate backpay. Therefore no issues relating to the amount or method of calculating backpay were before the Board.

We recognize that the Respondent gave merit increases in 1996 over and above the wages paid in 1995. That is, a hypothetical employee who was earning $10 per hour in 1995, and received a merit increase of 25 cents in 1996, earned $10.25 in 1996. Our colleague argues that, absent the unlawful denial of an increase in 1995, the employee would have earned $10.25 in 1995, and thus his merit increase in 1996 should bring him up to $10.50 for 1996. However, this reasoning assumes that the Respondent, if it had granted the 25-cent increase in 1995, would necessarily have granted a merit increase on top of that in 1996. Given the fact that the Respondent, in 1996, was paying wages based on merit, we cannot assume that the Respondent would have paid $10.50 to that employee. In these circumstances, it would be a windfall for the employee if we were to automatically award the employee the 25 cents for 1996 in addition to the 25-cent merit increase.

We do not believe that our approach is inconsistent with the principle that the burden of uncertainty is placed on the respondent wrongdoer. The Respondent unlawfully denied a 25-cent wage increase in 1995. Ordinarily, the remedy would be to restore the 25 cents for 1995 and subsequent years. However, in this case, the Respondent lawfully instituted a merit increase system in 1996. Because of that change, it cannot be said, with any degree of certainty, what would have happened in 1996 if the Respondent had not denied the 25-cent increase in 1995. That is, it is not at all clear that the employee would have received that 25 cents *plus* a merit increase. In short, the uncertainty is created by the lawful act of 1996, not the unlawful denial of a wage increase in 1995.

Our dissenting colleague contends that we are placing an unfair burden on the General Counsel, and that the Respondent must bear the weight of uncertainty about whether it would have granted a given employee a 25-cent increase in 1996 on top of a merit increase. We agree that the initial burden was on the Respondent. However, the Respondent met its burden by showing that it instituted a merit increase and training compensation system in 1996. There is no allegation or evidence that this action was unlawful. The uncertainty as to what an employee would have earned in 1996 is due to that lawful action. Phrased differently, but for that action, it would have been clear that the 25-cent increase of 1995 would have continued into 1996. In sum, the Respondent has shown an event (the switch to a merit increase and training compensation system) and that event caused the uncertainty. Accordingly, the burden was then on the General Counsel to show that a given employee would have received, in 1996, the 25-cent increase denied him

in 1995, *and* the merit increase that he received in 1996. The General Counsel has not established this fact.

The dissent further contends that the judge's remedy treats the wage increase as a one-time bonus. We disagree. The goal in determining backpay is to restore the situation to that which would have taken place had the violation not occurred. NLRB Casehandling Manual (Part Three) Compliance Section 10536.1. The judge's remedy requires the Respondent to pay the unit employees for the 1995 wage increase that would have been given but for the Respondent's unlawful act. That backpay liability period ended in 1996 when the Respondent changed to a merit and training compensation system and established a new baseline. As noted above, there is no dispute that after 1995, the across-the-board increases were permanently eliminated as a means of compensating Respondent's employees and that the new system changes the method in which future wage increases would be calculated.

The dissent also argues that any subsequent increases after 1996 failed to make up for the withheld 1995 increase and, in fact, 12 unit employees were not earning at least 25 cents per hour more at the end of 1996. The record shows that the Respondent treated all unit employees equally under the new compensation system and that all employees were given the same opportunity to increase their base wage rate through merit and training wage increases. Of course, there was no guarantee that an employee would get a specific wage increase under the new system, and there is no claim that these employees did not have the same opportunity as other employees to obtain larger increases. Thus, while not every employee was earning at least 25 cents more at the end of 1996, we find that this is a natural consequence of the lawfully implemented new compensation system.

Further, we disagree with our dissenting colleague's argument that the 25-cent increase should be incorporated into the employees' 1996 wage rate since the Respondent's past practice is to permanently incorporate the wage increases into the employees' basic wage rate. Past practice is not applicable here where the Respondent changed its method of calculating the base rate and future wage increases. In essence, the Respondent created a new system, and directing the Respondent to incorporate the wage increase would distort the base pay and all subsequent raises.

Finally, our colleague argues that we are foreclosed from fashioning this remedy exclusive to the 1995 wage increase because the Respondent failed to argue this to the court. Even assuming arguendo that the Respondent was not arguing for a remedy confined to 1995, we believe that our remedy is the appropriate one. The Board has broad discretionary power in fashioning remedies designed so far as possible to restore the status quo ante for "it is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct." *Westpac Electric*, 321 NLRB 1322, 1322 (1996). The Board approaches each case individually, tailoring a remedy appropriate to the particular circumstances presented. In this case, we find that the remedy, crafted by the judge and ordered herein, makes whole all discriminatees within the parameters of the allegations, factual findings, applicable law, and the court's remand.

Conclusion

We find that the judge correctly found that the backpay period in this case should be limited to 1995.

ORDER

IT IS ORDERED that the proceeding is remanded to the Regional Director for Region 30 to prepare an amended compliance specification, as follows:

The Regional Director will utilize the same calculations for the payment of the 1995 across-the-board increase as set forth in the compliance specification for the 381 employees listed therein. The period of backpay will be confined to calendar year 1995 with interest added thereon. The Regional Director will compute the appropriate interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws, until the Respondent ultimately remits the 1995 across-the-board increase to all employees who were eligible to receive it. This shall include employees who terminated their employment after the 1995 annual increase and should have been paid it, and any discriminatees still employed by the Respondent.

Dated, Washington, D.C. January 31, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I dissent from the majority's denial of full make-whole relief to unit employees for the unfair labor practice that was committed against them.[1]

In 1995, the Respondent violated Section 8(a)(3) and (1) by failing to grant an across-the-board wage increase

[1] In all other respects, I agree with the majority.

of 25 cents per hour because its employees had voted for the Union.[2] Beginning in 1996, the Respondent lawfully abandoned its practice of granting across-the-board wage increases and decided instead to award only merit and training wage increases. Under the terms of the Board's order, the Respondent must "[m]ake whole all employees who were not granted" the 1995 wage increase.[3] As the General Counsel and the Charging Party argue, to make the employees whole the Respondent must pay them 25 cents for each hour worked since the Respondent unlawfully withheld the wage increase.

The judge, however, limited the Respondent's backpay liability to the payment to employees of 25 cents for each hour worked in 1995 only. The majority erroneously affirms the judge. The rationales offered by the judge and the majority are premised on the conclusion that, in 1996, the Respondent implemented new merit-based *wage rates*, as opposed to merely implementing a new system of merit-based *wage increases*. As demonstrated below, this conclusion is erroneous; indeed, it is pure fiction.

I.

A review of the Board's well-established backpay principles is in order. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). As articulated in the NLRB Casehandling Manual (Part Three) Compliance Section 10536.1:

> The goal in determining backpay is the same in all cases. The Act is remedial; when it has been violated, its intent is to restore the situation to that which would have taken place had the violation not occurred.

Section 10536.2 of the Manual expressly defines the "Backpay Period" as "beginning when the unlawful action took place and ending . . . when conditions in effect prior to the unlawful action have been restored." Further, Section 10536.2 of the Manual defines "Gross Backpay" as "What the discriminatee would have earned from respondent had there been no unlawful action."

Here, the only way to achieve these remedial objectives, to "restore the situation to that which would have taken place had the violation not occurred," is to require the Respondent to pay the employees 25 cents for all the hours they worked after the Respondent's unlawful action. If the Respondent had not violated the Act, each employee's hourly wage would have been raised 25 cents in 1995 and, on January 1, 1996, would have been 25 cents per hour higher than it actually was. This indisputable fact is not altered in any way by the Respondent's *subsequent* decision not to grant *additional* across-the-board wage increases.[4]

The upshot is that each unit employee commenced working under the new wage-increase system at a permanent 25-cent-per-hour deficit. No matter how many merit-based or training-based wage increases an employee earned from 1996 to the present, he could never make up for the fact that his starting hourly wage under the new system was short 25 cents. Accordingly, to make sure each discriminatee is made "whole for losses suffered on account of [the] unfair labor practice," the Respondent must pay him that missing 25 cents for each hour worked since the Respondent's unlawful action in 1995. *Phelps Dodge*, supra at 197.

II.

The principle underlying this remedy is that a wage increase (as opposed to a bonus) is incorporated into an employee's basic wage rate, which may be raised still further by future wage increases. This principle is reflected *in the Respondent's own past practice*. As established by its own payroll records, the Respondent's past practice is to permanently incorporate wage increases into employees' basic wage rates. The Respondent's Exhibit 2 shows unit employees' wage rates from 1993 through 2000. In each year, the Respondent simply raised each employee's basic wage rate by the amount of any wage increase he earned that year. Thus, an employee's basic wage rate in 1995, for example, reflected the cumulative effect of the wage increases he received in 1993 and 1994. This demonstrates that, if the Respondent had given employees the 1995 across-the-board wage increase, it too would have become a permanent addition to each employee's individual wage rate.[5] Therefore, the employees are entitled to backpay for each

[2] See *Aluminum Casting & Engineering Co.*, 328 NLRB 8 (1999), enfd. 230 F.3d 286 (7th Cir. 2000), and as modified in *Aluminum Casting & Engineering Co.*, 334 NLRB 1 (2001).

[3] 334 NLRB at 2.

[4] Thus, contrary to the judge's rationale, it is completely irrelevant that the General Counsel agreed that the Respondent had no obligation to grant across-the-board wage increases in 1996 and later years. That is a completely separate question.

[5] At the hearing the regional compliance officer provided a useful analogy:

> It's very similar to our own across the board or cost of living increases that we get as federal employees. In January Congress or the powers that be determine we are entitled to a percentage increase. We get it in January. The following January the powers that be decide we are not going to give you an increase. They don't take away our permanent cost of living increase. It stays on our check. So the across the board is treated very much like that in my view. It's a permanent addition to the person's wage rate (Tr. 85).

hour worked since the Respondent's unlawful conduct in 1995.

III.

The majority's conclusion that the Respondent can make the employees whole by reimbursing them only for hours worked in 1995 is based on the erroneous conclusion that at the beginning of 1996, the Respondent implemented new merit-based wage rates as opposed to merit-based wage increases, which would be added to employees' then-existing wage rates. The majority's error is based on a mistaken reading of the record and a hodgepodge of irrelevant and misleading observations, but it begins with a misreading of the Seventh Circuit's decision enforcing the Board's original order.

Partially quoting and partially paraphrasing the court's decision, the majority observes that "the Respondent argued, in relevant part, that the Board's order was overbroad on the grounds that the 'Board did not have before it the question of any wage increases for years following 1995,' *and that the Board's order should have provided for backpay only for 1995*, the year that the wage increases were unlawfully withheld." (Emphasis added.) The italicized portion—the paraphrased portion—is misleading. The Respondent's actual argument was that "the order should *address* only the contested 1995 annual increase." *NLRB v. Aluminum Casting & Engineering Co.*, supra at 295. (Emphasis added.) This is a crucial difference. The majority's version of the Respondent's argument suggests that the Respondent argued to the court that it need only provide backpay for each hour worked in 1995. In fact, the Respondent never made such an argument. The Respondent's argument that the Board's order should address only the 1995 wage increase was, as the court recognized, directed to language in the Board's order seeming to require the Respondent to make whole employees for *additional* annual wage increases that might have been given in years after 1995. The Respondent never argued how the Board's order should address the contested 1995 annual increase.[6]

A careful reading of the court's decision further demonstrates that, contrary to the majority, the court did not endorse the Respondent's post-hoc argument that to address the 1995 annual wage increases it only needed to pay backpay for hours worked in 1995. The court said:

> [I]f, for example, in compliance proceedings relating to the year 1996, [the Company] introduced evidence that it had abjured across-the-board raises forever, and the General Counsel could not show that this was untrue or pretextual, not only would this suffice to excuse [the Company] from making any adjustments for 1996, but it would establish this new baseline for future years as well.

NLRB v. Aluminum Casting & Engineering Co., supra at 296. Seizing on the phrase, "new baseline," the majority concludes that the Respondent's showing that it abandoned across-the-board wage increases in 1996 also means that it was excused from implementing the wage increase it withheld in 1995. On the contrary, the quoted passage, read in its entirety, makes clear that the "new baseline" must *include* the 1995 across-the-board wage increase. Plainly, the court was merely recognizing that, if the Respondent established that it had forever abandoned across-the-board increases in 1996 (or 1997 or 1998), then it would be relieved from giving *additional* across-the-board adjustments from that point forward; it could simply add any future merit and training increases earned by an employee to his 1996 wage rate. This reading is consistent with the Respondent's brief to the court,[7] and is confirmed by the court's own summation of the Board's Order: "the present order does no more than require payment of the 1995 increase (which the record as it stands shows would have been given but for the anti-union actions) and any later ones supported by the company's normal practice at that later time." *Aluminum Casting*, supra at 296–297.

Inexplicably, the majority contends that adding the 1995 wage increase to the basic wage rate would "distort" the baseline for wage increases given in 1996 and later years. In fact, the majority's approach results in a distortion. As demonstrated, the majority artificially lowers the employees' wages 25 cents by effectively converting the 1995 wage increase into a one-time bonus that the Respondent could take away at the end of that year. This is directly contrary to the Board's established backpay principles, to the Respondent's own past practice, and to the court's decision, discussed above.

The majority tries to rationalize this distortion by claiming that the Respondent introduced a "new compensation system" and "wiped the slate clean" when it stopped awarding across-the-board increases; that the Respondent nullified its past practice regarding across-the-board wage increases by establishing new merit-

[6] All of this is confirmed by the Respondent's brief filed with the court. See Respondent's Br. Opposing Enforcement of an Order by the National Labor Relations Board, *NLRB v. Aluminum Casting & Engineering Co.*, 230 F.3d 286 (7th Cir. 2000). It was not until the compliance hearing in this case that the Respondent asserted, for the first time, that its backpay liability should be limited to hours worked in 1995.

[7] See Respondent's Br. Opposing Enforcement of an Order by the National Labor Relations Board at 27, *Aluminum Casting*, supra at 286 ("There was *no* evidence presented that could even arguably support any violation for any year other than 1995").

based wage rates going forward. The simple answer to the majority's claim is that there is no testimonial or documentary evidence to support it. There is no evidence that the Respondent reassessed, recomputed, or revised base wage rates in any manner. Indeed, the Respondent acknowledged in its brief to the Seventh Circuit that the minimum level of pay established for each job classification "remained constant through the years." Respondent's Brief Opposing Enforcement of an Order by the National Labor Relations Board at 5, *Aluminum Casting*, supra at 286.[8]

The Respondent's "new compensation system" consisted only of taking each employee's existing hourly wage rate at the end of 1995 (without the unlawfully withheld 25 cents per hour) as the "new baseline" for 1996, and then awarding future increases based solely on merit and training. This is confirmed by Respondent's Exhibit 2, discussed above, which shows that the merit or training increases employees earned in 1996, and later years were simply added to the base wage they were earning at the end of 1995. Again, the only thing "new" for 1996 was the Respondent's method of awarding wage increases.[9]

The majority grasps at yet another straw when it points out that the "average" annual wage increase in 1996 was more than the 25 cents per hour the Respondent denied each employee in 1995. Whether one looks at averages or the raw data, the size of any wage increase given after 1995 is completely beside the point. The Respondent has not produced any evidence, or even claimed, that it included an extra 25 cents in the merit and training wage increases it gave in 1996 to make up for the unlawfully withheld 1995 wage increase. And, in fact, the record conclusively establishes that it did not do so. The Respondent's own payroll records show that 12 unit employees[10] were not earning at least 25 cents per hour more at the end of 1996 than they were earning at the end of 1994. The majority attributes this circumstance to the natural consequences of the lawfully implemented new compensation system. In fact, it is attributable to the Respondent's unfair labor practice, and now to the majority's failure to properly remedy it.

Finally, the majority asserts that carrying forward the 1995 wage increase into the base pay of the employees who were employed at that time will provide them with a windfall at the expense of later-hired employees, and that this scheme will create a two-tiered pay scheme for unit employees based on whether they were in the unit in 1995. The first part of this argument is fallacious; both parts are attributable to the Respondent's own wrongdoing.

First, the 1995 employees will not receive a windfall. Carrying forward the 1995 wage increase into the base pay of the 1995 employees merely gives them the 25-cent wage raise they *earned* in 1995, but never received as a result of the Respondent's unlawful action. The majority points out that it cannot be said with certainty that the employees would have received merit increases in 1996 if they had received the 25-cent increase in 1995. Faced with this uncertainty, the majority professes adherence to the principle that the burden of any uncertainty is placed on the wrongdoer respondent, but then turns right around and says that it was the General Counsel's burden to show that an employee would have received a merit increase in 1996 in addition to the across-the-board increase unlawfully withheld in 1995. The General Counsel had no such burden. The Respondent alone must bear the full weight of any uncertainty about whether it would have granted a given employee a merit increase in 1996 on top of the 1995 25-cent raise. This is particularly appropriate here because, contrary to the majority's view, any uncertainty about what would have happened in 1996, in fact is solely attributable to the Respondent's unlawful conduct in 1995, not its lawful implementation of merit increases in 1996. Indeed, had the Respondent not violated the Act in 1995, it would then have known exactly what each employee was properly earning, and it would then have been in a position to decide whether to grant an employee a merit increase.

Second, if there is a risk of creating a two-tiered wage scale, the Respondent has only itself to blame. Our concern must be with restoring the 1995 employees to the situation they would have been in had the Respondent not violated the Act. As indicated earlier, each 1995 employee commenced working under the new wage-increase system at a permanent 25-cent-per-hour deficit. Unless this amount is carried forward into the backpay they are owed, they will never be made whole.

IV.

The basic remedial purpose of the Act is "to restor[e] the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In this case, the majority fails to restore the situation to that

[8] As a result, the majority's demonstrative hypotheticals are all fatally flawed, in that they presume that the Respondent instituted new merit-based *wage rates*.

[9] The majority claims that *Florida Steel*, 220 NLRB 260 (1975), and *Achilles Construction Co*., 290 NLRB 240 (1989), are distinguishable on the ground that the respondents in those cases did not change their overall compensation practices. Neither did the Respondent.

[10] These employees are Jose Estrada, Arthur Gee, Jesus Gonzales, Jerome Kastenholz, James Kennedy, Alvis Moorer, Flex Ramirez, Regulo Ruiz, Poblo Soto, Charles Tardy, Charles Tripp, and Felipe Valdez.

which would have obtained but for the Respondent's unlawful conduct.

Dated, Washington, D.C. January 31, 2007

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Eryn M. Doherty, Esq. and *Benjamin Mandelman, Esq.,* for the General Counsel.

Kevin J. Kinney, Esq. and *Timothy C. Kamin, Esq.,* of Milwaukee, Wisconsin, for the Respondent-Employer.

Polly J. Halfkenny, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This matter was heard in Milwaukee, Wisconsin, on August 25 and 26, 2003.

On May 28, 1998, Administrative Law Judge William G. Kocol (ALJ) issued a decision finding that the Respondent violated Section 8(a)(1) and (3) of the Act. The Respondent took exceptions to the ALJ's decision, in particular, his finding that it failed to continue its practice of conducting annual wage surveys and granting an annual wage increase in 1995, because the employees selected the Union as their exclusive collective-bargaining representative. The National Labor Relations Board (the Board) found no merit to Respondent's exception concerning its failure to implement the wage increase and ordered Respondent to make whole all employees who were not granted annual wage increases in 1995 to date. See 328 NLRB 8 (1999).

The United States Court of Appeals for the Seventh Circuit enforced in relevant part the Board's Order that found Respondent violated Section 8(a)(1) and (3) of the Act by not giving the annual across-the-board wage adjustment. *NLRB v. Aluminum Casting & Engineering Co.,* 230 F.3d 286 (7th Cir. 2000). The Respondent challenged the scope of the Board's remedial backpay Order requiring it to make whole employees for across-the-board increases for the years 1995 to the present. However, for 1996 and subsequent years, based upon the assurances of the General Counsel, that Respondent "would have an opportunity during compliance proceedings to show that it had completely abandoned across-the-board adjustments as a tool of company policy, in favor of the targeted merit, incentive, training, and development raises it has touted in its brief," the Seventh Circuit enforced the Board's Order. Id. at 298. Thereafter, the Board issued its Supplemental Decision and Order on May 16, 2001, modifying its Order consistent with the Seventh Circuit's remand. See 334 NLRB 1 (2001).

After a substantial compliance investigation, the General Counsel determined, in agreement with Respondent, that its liability is limited to the across-the-board increases for 1995 only and not subsequent years.

A controversy having arisen over the amount of payments due under the Court's Order, on April 30, 2003, Region 30 of the Board issued a compliance specification and notice of hearing. The Respondent filed an Answer to the Compliance Specification dated May 27, 2003 and on August 14, 2003, filed an Amended Answer.[1]

This Supplemental Decision is based on the entire record including the briefs filed by the General Counsel, Charging Party, and the Respondent and my observation of the demeanor of the witnesses.

Issues

The General Counsel determined that Respondent's practice since at least 1989, with the exception of 1991, when no raise was conferred, had been to give employees two across-the-board wage increases for the years 1989 through 1994. Since the amount of the across-the-board increases were consistent in the 3 years immediately prior to 1995, a representative period, the same wage increases were applied for 1995, i.e., 20 cents per hour in February 1995, and 5 cents per hour in August 1995. The Respondent disputes the selection of this representative period and asserts the full 6-year period should be utilized for an accurate picture of any wage increase that may be due and owing in 1995. Second, whether a wage survey that was conducted by Respondent in 2003 using 1994 wage criteria should be relied upon to establish that no across-the-board wage increase would have been given to employees for the year 1995. Lastly, as disputed by Respondent, whether the backpay continues to accrue for the discriminatees who remain employed until such time as Respondent permanently applies the appropriate across-the-board wage increase to their hourly wages for the years 1996 through 2003.

The Respondent does not dispute that the backpay period commences with the date on which the first 1995 across-the-board increase would have been given in February 1995, nor does it contest that an appropriate measure of the gross backpay for each of the eligible discriminatees is the product of the actual straight time and overtime hours worked during their employment with Respondent multiplied by the across-the-board wage increase and/or increases each discriminatee would have received in the appropriate quarters of the backpay period. Likewise, the Respondent does not dispute the General Counsel's calculations of backpay as set forth in the compliance specification (GC Exh. 1) but does contest the total amount of backpay as calculated by the General Counsel and set forth in paragraph 11 of the compliance specification.

A. The Appropriate Representative Period

The General Counsel asserts that it was reasonable to rely upon the Respondent's practice in the preceding 3 years prior to 1995 when determining the appropriate across-the-board wage increase especially in light of Respondent's refusal to offer any alternative formula prior to the issuance of the Compliance Specification on April 30, 2003. Respondent argues, as raised for the first time in its August 14, 2003 amended answer, that

[1] Respondent retained three separate attorneys to represent it during the course of these proceedings. The second attorney filed the original answer while the third and current attorney filed the amended answer.

the most accurate formula is to take a 6-year average of the across-the-board increases given to employees over that period.[2] Thus, the figure should be 14.16-cents-per-hour in February 1995 instead of 20 cents, and 4.16 cents instead of 5 cents in August 1995.

By letter dated February 28, 2003, the compliance officer for Region 30 apprised the second-retained attorney for Respondent that beginning on October 24, 2000, it was afforded an opportunity to provide the Region with information and the basis on which the two 1995 wage increases would have been calculated. In a meeting with that attorney on January 17, 2001, the compliance officer informed him that in the absence of any proposed wage increase calculations from Respondent, she would use the historical data contained in the ALJ Decision to determine the amount of the 1995 wage increases. Accordingly, since the amount of the wage increases for 1992 through 1994 remained the same, and the consumer price index for 1995 appeared to be unchanged from the previous year, the same increase amounts for 1995 as were applied from 1992 through 1994 were used. Thus, the compliance officer determined the February 1995 wage increase was 20-cents-per-hour and for August 1995 it was 5-cents-per-hour (GC Exhs. 12, 19, and 20).

As noted above, the Compliance Specification issued on April 30, 2003, and prior to that date the Respondent had not provided the compliance officer with any alternative information or figures on how to calculate the 1995 wage increase. Indeed, the second-retained attorney informed the compliance officer that no historical data was available to recreate wage survey information for 1995. Under these circumstances, I do not find it unreasonable for the General Counsel to have relied upon the 3-year representative period in calculating the across-the-board increase for 1995. See *Cable Car Charters,* 336 NLRB 927, 932 (2001). Thus, I find the current attorney's proposed 6-year average representative period raised for the first time in his August 14, 2003, amended answer, a period of less than 2 weeks prior to the opening of the subject hearing, to be untimely for the purposes of submitting alternative calculations. In any event, I find the determination by the compliance officer in relying on a 3-year representative period to be within her discretion and not prejudicial to the Respondent especially in view of the Board's practice of not relying on backpay records that are 5 or 6 years old and the Respondent's repeated inability prior to the issuance of the compliance specification to offer any alternative calculations.[3]

Based on the forgoing, I find the General Counsel's reliance on a 3-year representative period to be entirely reasonable and appropriate in calculating the across-the-board wage increase for 1995.

B. The 2003 Wage Survey

The Respondent, in accordance with the Board's Order in the Supplemental Decision dated May 16, 2001, conducted a wage survey in 2003, shortly before the commencement of the subject hearing using 1994 wage criteria.[4]

The Seventh Circuit found that during the years 1989 through 1994, Respondent followed a similar procedure for deciding whether to offer increased wages and how much to offer. It relied principally on three sources of information: the increase in the cost of living, if any, over the preceding 12 months; conversations with other foundries in the area to see if they were granting wage increases; and reports in general business publications such as the Management Resources Association. Its goal was to keep its wages at a competitive level.

The Respondent's Director of Operations William Gempler commenced employment in 1998. Thus, he was not present during the earlier period when Respondent followed its practice for deciding whether to offer increased wages and how much to offer. Indeed, he testified that he could not find any backup information or copies of wage surveys that had previously been used during the period between 1989 and 1994. Gempler principally relied on information contained in a portion of the spring 1994 Milwaukee/Waukesha Area Management Resources Association (MRA) Wage Survey for manufacturing firms (R Exh. 5).[5] Gempler stated that while a number of the companies listed in the new group manufacturing list performed light manufacturing work similar to the Respondent, a number of the job classifications and duties set forth in the MRA were not the same as those of Respondent. Gempler concluded that since wages had fallen an average of 38 cents in the Milwaukee area according to the 1994 MRA survey, that the Respondent would not have given an across-the-board wage increase to its employees in 1995. Similarly, Robert Horvat, a compensation expert retained by the Respondent several weeks before the hearing, concluded that after reviewing the Board's 2001 Supplemental Decision (R Exh. 3), carefully studying the 1994 MRA data and noting that only seven companies reported giving a COLA under the survey, no across-the-board increase would have been given to Respondent's employees in 1995.

I am highly suspect in relying on this 2003 wage survey to sustain the Respondent's position that no across-the-board increase would have been given to employees in 1995 for the following reasons. First, noticeably absent from Respondent's survey, is any attempt to have engaged in discussions with similarly situated foundries in the local area to see whether they gave across-the-board increases in 1995. Indeed, Gempler admitted, that the Respondent's 2003 wage survey did not in-

[2] I note that the second attorney, who filed the original answer on May 27, 2003, did not propose any alternative calculations on which to base the 1995 across-the-board wage increase.

[3] The extensive computations for 381 employees fill numerous bound volumes and are found as appendices to the compliance specification (GC Exh. 1(f)).

[4] In its decision at 334 NLRB 1 (2001), the Board stated that it:

> did not bind [the Company] to a perpetual practice of granting this particular kind of wage adjustment. To the contrary, it provided that "[t]he exact amounts of the wage increases due employees shall be determined in compliance proceedings and shall be computed to the extent appropriate. . . . At the compliance stage, [the Company] shall be given the opportunity to establish that even if had followed its normal practice concerning annual age increases, no increase would have been given in a particular year."

[5] The General Counsel introduced into evidence the complete MRA Survey (GC Exh. 22).

clude any contact with foundries in the local area to inquire whether they had given across-the-board increases in 1995. Second, while the Respondent relied on the fact that wages had fallen an average of 38 cents in the Milwaukee area, it did not identify or consider what the cost of living was in the preceding 12 months in the local area. Third, reliance on the MRA as it related to a comparison of job duties was problematic at best, as Gempler conceded that job classifications and duties listed in the MRA were not exact comparisons with those at Respondent.[6]

Additional support for not relying on Respondent's 2003 wage survey is found in Judge Kocol's decision that the Respondent did not assert during the proceedings before him that the failure to give a wage increase in 1995 was because the normal process used by Respondent in determining annual wage increases resulted in the conclusion that no increase was justified, nor does it assert that the failure was based on an ability to afford any increase. Likewise, Respondent's second-retained attorney informed the compliance officer in 2001, that no historical data existed that could be used to recreate wage survey information for 1995. Thus, I am hard pressed to rely on a belated survey conducted in 2003, that asserts that no across-the-board increase would have been given to employees in 1995, when the Respondent did not make that finding after completing the wage survey in late 1994.[7] Moreover, the Seventh Circuit determined that in mid-October 1994, company representatives met with new employees, in part to discuss the Union's organizing effort. At that time, they assured the group that each year the Respondent reviews what is happening in the Milwaukee market place with wages and benefits. It looks at the year's performance for the Company, and then decides what type of wage and benefit adjustment can be made. During a meeting in November 1994, company officials again told the employees that annual wage and benefit reviews occurred each year in November and December, that the Company was then in the process of conducting that review, that it would decide what changes to recommend, that the announcement of the change would be made in January, and that the change would take effect in February.

Since the Respondent continuously reaffirmed its normal practice to employees throughout the election campaign, and did not inform them that the results of its process in conducting the wage survey review would preclude an across-the-board increase in 1995, it was a natural expectation for the employees to anticipate a wage increase.

Based on the forgoing, and particularly noting the Board and Court's conclusion that no across-the-board increase was given to employees in 1995, because they selected the Union as their collective-bargaining representative, I reject the Respondent's belated attempt in 2003 to now argue that it would not have given any1995 annual wage increase.[8]

C. Accrual of Backpay

The Respondent argues that the Seventh Circuit agreed with its position that no backpay was due and owing for 1996 and later years, as it abandoned its practice of annual across-the-board increases and introduced its revised merit and training compensation system in late 1994. Accordingly, assuming arguendo the Board finds that it has a duty to pay the 1995 across-the-board increase, the Respondent contends that it should only be responsible for that payment and any applicable interest until it remits the wage increase to employees.

The General Counsel asserts in the compliance specification that the backpay should continue to accrue for those discriminatees still employed until such time as the Respondent permanently applies the across-the-board increase to their hourly wages. Indeed, it argues, that the standard methodology for calculating backpay when an across-the-board wage increase has been denied is to build the amount of the wage increase into an employee's base wages. Stated otherwise, employees who were denied the 25-cent increase in 1995 were underpaid 25-cents-per-hour for every hour worked from 1995 to their termination or to the present time. Thus, to remedy the Respondent's wrongdoing, these employees must be paid the 25 cents per hour they are owed for all hours worked from 1995 to the present. To support this proposition, the General Counsel opines that such a remedy is necessary to foreclose the contingency that the Respondent might remove employee previously awarded across-the-board increases from their base wages, that the discriminatees will not receive across-the-board increases in years 1996 through 2003, and that the discriminatees might receive wage increases under the new merit and training compensation system less then the 25-cent across-the-board increase that they otherwise would have received.

For the following reasons, I find that the General Counsel's theory for the accrual of backpay in this manner is flawed.[9] First, the General Counsel after an exhaustive compliance investigation agreed with the Respondent's contention that for 1996 and subsequent years, it had completely abandoned the concept of across-the-board increases in favor of a merit and training compensation system. Thus, the General Counsel con-

[6] Gempler testified that he had no knowledge whether the information that he relied upon from the MRA Survey was the same type of information that the Respondent previously relied upon as part of its practice in determining the across-the-board increase.

[7] Judge Kocol found that "VanderMale admitted that Respondent had engaged in the process it does each year to determine whether an increase should be given and, if so, what amount." See also Respondent's prior posthearing submissions in the underlying proceedings attached to the General Counsel's posthearing brief as items L, M, N, and O.

[8] A further example of Respondent's shifting explanations for not giving the 1995 across-the-board increase can be found in their second-retained attorney's assertion in March 2003, that even if the wage survey was conducted, it would have resulted in no wage increase because of the introduction of the merit and training compensation system in late 1994 (GC Exh. 20 and 21). It is noted that Respondent did not assert that the wage survey undertaken in 1994 resulted in a finding that no across-the-board increase would be given in 1995.

[9] Contrary to the Charging Party, I do not find that the case of *Florida Steel Corp.,* 220 NLRB 260 (1975), enfd. 543 F.2d 1389 (D.C. Cir. 1976), is factually similar to this matter. In this regard, the remedy in that case was undertaken to address the withholding of its general wage increase that continued in subsequent years. In the subject case, there is no dispute that after 1995, across-the-board wage increases were permanently eliminated as a means of compensating Respondent's employees.

cluded that the Respondent had no obligation to provide employees an across-the-board increase for years 1996 and later. Second, the General Counsel conceded that effective in 1996, all employees were treated equally with respect to the new compensation system. That is, they were all given the same opportunity to increase their base wage rate through merit and training wage increases. Third, the General Counsel acknowledged that no employee including still employed discriminatees had any prior across-the-board increases removed from their base wages after the implementation of the new merit and training compensation system. Indeed, the General Counsel grudgingly admits that those merit and training wage increases earned by employees including the still-employed discriminatees were added each year to their base hourly wage rate. Fourth, the Respondent conclusively established that the average employee wage rate increased under the new compensation system for 1996 and each year thereafter, and exceeded the 25-cent across-the-board increase that the General Counsel asserts should be permanently applied to the discriminatees hourly wage rate (R Exh. 2). Fifth, the General Counsel did not conclusively establish its position that still employed discriminatees in 1996 through 2003, received an average lower merit and training wage increase in comparison to the 25-cent across-the-board wage increase that they insist should have been permanently applied to their base wages.

Based on the forgoing, I reject the General Counsel's argument that the backpay continues to accrue (the ripple effect theory) for discriminatees in the years 1996 through 2003.[10] Accepting such a proposition would be an abuse of process and lead to unjust enrichment by the still-employed discriminatees who have earned an average merit and training wage increase in 1996 through 2003, greater than the 25-cent across-the-board increase asserted by the General Counsel that should also be permanently applied to their base wage rate for each of those years.

On these findings of fact and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Aluminum Casting & Engineering Co., Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall make whole each of the discriminatees by payment to each of them as follows:

Region 30 will utilize the same calculations for the payment of the 1995 across-the-board increase as presently set forth in the compliance specification for the 381 employees listed therein.[12] The period of backpay will be confined to calendar year 1995 with interest added thereon. Instead of continuing to accrue the backpay for still-employed discriminatees until such time as the Respondent permanently applies the across-the-board increase to their hourly wages, the Region will compute the appropriate interest in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus required tax withholdings for the years 1995 through 2003 or until the Respondent ultimately remits the 1995 across-the-board increase to all employees who were eligible to receive it. This will include employees who have since terminated their employment after the 1995 annual increase should have been paid and any discriminatees still employed at Respondent.

Dated, Washington, D.C. November 14, 2003

[10] If an individual received an across-the-board increase in 1995, it became a permanent addition to their wage rate and was an ongoing obligation that continued to accrue while that individual remained employed.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] The compliance officer should refer to the summarized quarterly reimbursement report for each employee set forth in the compliance specification (GC Exh. 1(f)). For example, the first employee listed is Dorothy Adams. Adams computations show for the first quarter in 1995, total net backpay was $66.30, for the second quarter it was $120.27, in the third quarter it was $118, and for the fourth quarter of 1995, it was $115.88. The four quarters should be totaled and then multiplied by the appropriate yearly interest rate. These calculations, with appropriate interest added thereon, should be performed for all 381 employees up to their date of termination or to the present date for employees that are still currently employed at the Respondent.