

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and
KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a
PACIFIC BEACH HOTEL,

and

Cases 37-CA-7311
37-CA-7334
37-CA-7422
37-CA-7448
37-CA-7458
37-CA-7476
37-CA-7478
37-CA-7482
37-CA-7484
37-CA-7488
37-CA-7537
37-CA-7550
37-CA-7587

HTH CORPORATION d/b/a PACIFIC BEACH HOTEL

Case 37-CA-7470

and

KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL

Case 37-CA-7472

and

PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH
HOTEL

Case 37-CA-7473

Respondents

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,
LOCAL 142

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. PROCEDURAL HISTORY

A Consolidated Complaint and Notice of Hearing issued on August 29, 2008 against Respondents, which consolidated 15 separate charges filed by the Union.¹ (GC Exh. 1ffff) An Amended Consolidated Complaint and Notice of Hearing issued on September 30, 2008, which added one additional charge to the General Counsel's complaint. (GC Exh. 1iiii)

On October 21, 2008, the General Counsel issued an amendment to the Amended Consolidated Complaint, which added a prayer for compound interest on any monetary award, and for special remedies, including a make whole remedy for employee negotiators and for the Union for its preparation and conduct of negotiations between January 1, 2006 and November 30 2007, an extension of the certification year, the reading during work time of the Notice to Employees to assembled employees and the mailing of the notices to those employees who were terminated on November 30, 2007 and not rehired to work at the Pacific Beach Hotel ("Hotel") on December 1, 2007. (GC Exh. 1mmmm)

A hearing was held on November 4 through 12, 2008, and continued from February 19 through 27, 2009, in Honolulu, Hawaii, before Administrative Law Judge² James M. Kennedy on the allegations contained in the Amended Consolidated Complaint and Notice of Hearing. On the first day of the trial, the General Counsel made an oral motion to amend the Amended Consolidated Complaint and offered a Summary of Amendments to the Amended Consolidated

¹ All references to the transcript are noted by "Tr.", followed by the volume number and page number(s). References to the General Counsel's exhibits are noted as "GC Exh.", and references to the Respondents' exhibits are noted as "Resp. Exh." References to the Joint Exhibit are noted as "Jt. Exh."

² Hereinafter referred to as the "ALJ".

Complaint in an attempt to clarify all of the changes resulting from the proposed amendments. (GC Exh. 2) The ALJ granted the General Counsel's oral motion. (Tr. 1:8-16)

On December 15, 2008, the General Counsel filed a Motion to Amend the Amended Consolidated Complaint to include in paragraph 2.(m) an allegation that PBHM was an agent of the Respondents, in addition to the joint employer allegation already contained in that paragraph. (GC Exh. 1ssss) The motion was granted by the ALJ on December 22, 2008 via conference call, and memorialized in a letter to the parties dated December 29, 2008. (GC Exh. 1tttt) Attached to the motion was a document entitled "Complaint Conformed to Reflect All Amendments as of January 13, 2009" ("Conformed Complaint"), and marked as Attachment A. This conformed complaint reflected all of the amendments to the Consolidated Complaint as of January 13, 2009. The Conformed Complaint was also entered as GC Exhibit 1rrrr.³

On September 30, 2009, the ALJ issued his Decision⁴ ("ALJD") and, as discussed in detail in General Counsel's Answering Brief to Respondents' Exceptions to the ALJD filed on October 28, 2009, the ALJ properly found for the General Counsel on nearly every allegation contained in the complaint.⁵ However, the ALJ failed to directly address some of the allegations and remedies that the General Counsel believes should have been included in his Decision, and for these reasons, takes limited exception to portions of the ALJD.

³ GC Exh. 1rrrr is a duplicate of Attachment A of GC Exh. 1ssss, the December 15, 2008 Motion to Amend the Amended Consolidated Complaint. Page 31 of GC Exh. 1rrrr was inadvertently left out of the exhibit.

⁴ There are three possible versions of the ALJD that may be referenced by the parties. The first version was issued by the Executive Secretary, and contains large blank areas on pages 7 and 19 of the document. The second and third versions are the HTML and PDF versions of the document posted on the NLRB website. General Counsel will refer to the PDF version of the document contained on the NLRB website.

⁵ A thorough discussion of the ALJ's findings of fact and conclusions of law supported by the General Counsel appears in General Counsel's Answering Brief to Respondents' Exceptions to the Administrative Law Judge's Decision.

II. GENERAL COUNSEL'S EXCEPTIONS

- A. Exceptions 1 and 2: ALJ's failure to specifically conclude that the Respondents violated 8(a)(5) when they failed to rehire several individuals as of December 1, 2007 after discharging all of the Pacific Beach Hotel employees through PBH Management, LLC (ALJD pp 43-44) (Tr. 4:588-89; 5:813, 874-75; 6:942, 949; Resp. Exh. 18), and ALJ's failure to include in the Order a requirement that Respondents reinstate those individuals and/or make whole the individuals who were not rehired to begin work for the Pacific Beach Hotel on December 1, 2007. (ALJD pp 43-44) (Tr. 4:588-89; 5:813, 874-75; 6:942, 949; Resp. Exh. 18)**

The complaint alleges that Respondents violated Sections 8(a)(1) and (5) of the Act when, “[o]n or about November 30, 2007, [they] permanently terminated certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are known to the Respondents”. (GC 1rrrr, p 13, par 11(c), (e), (f); p 19, par 21) In his Findings of Fact, the ALJ found that “Respondents also discharged (through PBHM) all of the then current employees. Since it had also instituted the application process, it also offered employment to substantially fewer employees.” (ALJD p 23, LL 12-14) However, in his Conclusions of Law, the ALJ failed to specifically hold that the termination of the bargaining unit and failure to offer employment to some of the employees, all without bargaining with the Union, violated Sections 8(a)(1) and (5) of the Act,⁶ even though he ordered the Respondents to cease and desist from “[u]nilaterally changing the terms and conditions of employment of its unit employees without first bargaining with the Union, including discharging employees or imposing change in employees behavior rules.” (ALJD p 45, par 1(f))

⁶ In his Conclusions of Law, the ALJ identifies as unilateral all of the changes implemented by the Respondents that were related to the termination and hire of bargaining unit members. In paragraph 14 on page 44, the ALJ concluded, “[i]n October, 2007 as a predicate to resuming operations themselves, Respondents unilaterally and without bargaining with the Union, imposed as a condition of continued employment new conditions on its employees including requiring them to apply for their own job and treating them as new employees, requiring a drug test, and imposing a 90-day probationary period all in violation of Section 8(a)(5) and(1) of the Act.”

Clearly, the ALJ found that Respondents failed to negotiate with the Union over any change to the terms and conditions of employment of bargaining unit members it implemented.⁷ In fact, Respondents confirm that fact and argue that they had no obligation to bargain with the Union, since it was not the employer of the bargaining unit employees from January 1 through November 30, 2007. (Respondents' Brief in Support of Exceptions to the Administrative Law Judge's Decision ("Respondents' Brief"), p 28, par 3.c.)

It is undisputed that Respondents did not bargain over the application process, drug testing, implementation of a probationary period, decision to determine which employees would be effectively terminated after November 30, 2007, and which employees would receive lesser wages after December 1, 2007. Respondents' Regional Vice President of Operations Robert "Mick" Minicola ("Minicola"), who served as Respondents' chief witness, admitted that Respondents did not engage in any bargaining with the Union after December 2006. (Tr. 1:135-36) The Union also asked for information about the application process, and never received a response. (Tr. 2:289-90; GC Exhs. 36 & 37)

An employer must bargain in good faith with respect to mandatory subjects of bargaining – wages, hours, and other terms and conditions of employment. NLRB v. Borg-Warner Corp., Wooster Div., 356 U.S. 342, 349 (1958). An employer violates Sections 8(a)(5) and (1) by unilaterally imposing new and different wages, hours, or other terms and conditions of employment upon bargaining unit employees without first providing their collective-bargaining representative with notice and an opportunity to bargain regarding the change. NLRB v. Katz, 369 U.S. 736 (1962). Subjects over which the parties must bargain are mandatory subjects of bargaining, which are matters "plainly germane to the 'working environment'" but not

⁷ E.g., ALJD p 44, par 14

managerial decisions which lie at the core of entrepreneurial control. Ford Motor Co. v. NLRB, 441 U.S. 488 (1979). A unilateral change to a mandatory subject of bargaining must be material and have a real impact upon employees or their working conditions. Outboard Marine Corp., 307 NLRB 1333, 1339 (1992).

As the ALJ properly found, Respondents were a continuous employer of the employees employed by the Pacific Beach Hotel. (ALJD p 16, LL 19-20; FN 13) As such, the ALJ concluded that “[a]lthough between January 1, 2007 and December 1, 2007 Respondents contractually delegated PBHM to run the Hotel and to bargain collectively with the Union on Respondents’ behalf, at no time were Respondents relieved of the obligation to bargain collectively in good faith with the Union.” (ALJD p 43, par 8) (Emphasis added) By virtue of their continuous Employer status, Respondents had an obligation to provide notice to, and bargain with, the Union before implementing any change to terms and conditions of employment of bargaining unit employees.

After causing PBHM to terminate all of the bargaining unit employees, Respondents determined that certain employees would not be hired as of December 1, 2007. (Resp. Exh. 18) The reduction in the Respondents’ workforce was purported to be necessitated by reduced occupancy forecasts and forecasted reduction of customer traffic, although Minicola also claimed that the reductions were based on the closure of the Shogun Restaurant as well.⁸ (Tr. 13:2138-42, 2160-62) In these circumstances the decision not to rehire some employees is akin to a layoff because it resulted directly from economic considerations rather than a change in the scope and

⁸ Minicola asserts that the closure of the Shogun Restaurant affected the other departments but failed to provide detailed evidence of how he determined the number of positions that would be affected in other departments. Given the lack of specificity in Minicola’s assertions concerning the closure of the Shogun Restaurant and how it affected the number of positions in other departments, the assertion was simply his ad hoc attempt to justify the Respondents’ actions.

direction of the enterprise itself. See First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Thus, selecting which employees would not be rehired due to economic considerations in the circumstances of this case becomes akin to selecting which employees should be terminated/laid off for economic reasons. The decisions concerning which employees to terminate/lay off in this instance are mandatory subjects of bargaining. Kajima Engineering & Construction, Inc., 331 NLRB 1604, 1618-20 (2000). Respondents did not bargain with the Union over which employees it would hire, effective December 1, 2007. Respondents' made an economic decision to reduce the workforce thereby resulting in the termination/layoff of certain employees. Accordingly, Respondents violated Sections 8(a)(5) and (1) of the Act by failing to bargain over the economic decision to terminate/layoff certain employees, effective December 1, 2007.

Employees who are laid off as a result of an employer's unilateral actions in violation of Sections 8(a)(5) and (1) Act are entitled to full back pay and offers of reinstatement.⁹ Consequently, an order to remove references to the layoff of the affected individuals from the Respondents' files, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make the affected individuals whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest,¹⁰ is necessary to remedy Respondents' violation of the Act.

⁹ See, e.g., Pan American Grain Co., 351 NLRB 1412, 1414-15, fn 11 (2007); Toma Metals, Inc., 342 NLRB 787, 791 (2004)

¹⁰ General Counsel has excepted to the ALJ's failure to order quarterly compound interest be added to all monetary awards. This exception is addressed *infra* in Section II G of this Brief.

B. Exception 3: ALJ's failure to make a finding of fact regarding General Counsel's allegation that Respondents unilaterally lowered certain employees' wages as of December 1, 2007 and make a conclusion of law that Respondents actions violated 8(a)(5) of the Act. (ALJD pp 20-21; pp 43-44) (GC 1rrrr, pp 13-14, par 11(g), (e) & (f); Tr. 1:113-15; 1:135-36)

The complaint alleges that Respondents violated Sections 8(a)(1) and (5) of the Act when, "[o]n or about December 1, 2007, [they] hired certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are known to the Resopndents [sic] HTH , at an hourly wage lower than the hourly wage they received from PBHM". (GC 1rrrr, pp 13-14, par 11(g), (e), (f)) The ALJ failed to make any findings of fact or conclusions of law on this allegation.

Minicola admitted that Respondent hired some bargaining unit employees into positions as of December 1, 2007 that were different from the positions they held prior to December 1, 2007 and were paid less as a result in that position change. (Tr. 1:113, L 11 to p 115, L 9) As noted in Section A above, Minicola admitted that Respondents did not engage in any bargaining with the Union after December 2006, (Tr. 1:135-36) and therefore failed to bargain with the Union over the change in positions or change in pay of certain bargaining unit employees effective December 1, 2007.

As previously discussed, Respondents had a duty to bargain with the Union over the change to the terms and conditions of employment of these bargaining unit employees and Respondents' failure to do so violated Section 8(a)(1) and (5) of the Act.

As a remedy to this unilateral change, an order to reinstate the affected individuals to the jobs they occupied prior to December 1, 2007, or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make the affected individuals whole for any loss of earnings and other

benefits resulting from Respondents' unilateral change to their positions and/or pay, plus interest, is appropriate.

C. Exception 4: ALJ's failure to order a remedy which includes the reinstatement of any individuals terminated during the Respondents' unilaterally imposed 90 day probationary period. (ALJD pp 45-46) (Tr. 13:2320; GC Exhs. 51 & 79)

The complaint alleges that Respondents violated Sections 8(a)(1) and (5) of the Act when, "[o]n or about December 1, 2007, [they] implemented a 90-day 'Introductory Period' for its employees." (GC 1rrrr, p 13, par 11(d), (e), (f)) The ALJ concluded that Respondents violated Sections 8(a)(1) and (5) of the Act when they unilaterally imposed the 90-day probationary period on bargaining unit employees without bargaining with the Union. (ALJD p 44, par 14) However, in his Order, the ALJ failed to specifically include an order to reinstate all individuals who were terminated during the Respondent's unilaterally imposed 90-day probationary period.¹¹

In Windstream Corp., 352 NLRB 44 (2008), the Board held that the employer violated Sections 8(a)(1) and (5) of the Act when it unilaterally implemented a zero-tolerance ethics policy, which altered the just cause provision in its collective bargaining agreement with the union, without first bargaining with the union. The administrative law judge observed that no

¹¹ In paragraph 2(b) on page 46 of the ALJD, the ALJ included a broadly worded remedy which appears to have been intended to address all of the Respondents' 8(a)(5) violations. The ALJ ordered as follows: "On the Union's request, rescind the unilateral changes, whether found in the employee handbook or some other location, and restore the previously existing wages and other terms and conditions of employment as they existed prior to December 1, 2007, and make unit employees and former unit employees whole for any losses suffered as a result of those unilateral changes. However, nothing in this Order shall be construed as requiring the Respondent to rescind any benefit previously granted unless the Union requests such action." Although this paragraph could be construed as encompassing the remedy being requested under Exception 4, the General Counsel respectfully urges that the Board to specifically enumerate in the Order a remedy for Respondents' unlawful imposition of a 90-day probationary period.

unit employees had been terminated under the zero-tolerance ethics policy as of the date of the hearing. However, the administrative law judge included in his decision the following order:

2.(b) In the event any unit employee has been terminated as a result of the unilaterally adopted zero tolerance policy, rescind the termination and offer the employee reinstatement to his prior position, without loss of seniority or other benefits, make him whole for any wages and benefits lost as a result of the termination and expunge from its files any reference to the termination.

(352 NLRB at 52)

Upon considering exceptions and briefs filed by the parties, the Board affirmed the judge's rulings, and modified the recommended Order. The Board ordered that the following paragraph be substituted for the recommended paragraph 2.(b):

(b) In the event any unit employee has been terminated as a result of the unilaterally adopted zero tolerance policy, and that employee would not have been terminated under the preexisting lawful policy, take the following actions: offer the employee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; make him whole for any loss of earnings and other benefits suffered as a result of his discharge; and remove from its files any reference to the unlawful discharge and notify the affected employee in writing that this has been done and that the discharge will not be used against him in any way.

(352 NLRB at 44)

The application of the unilaterally implemented 90-day probationary period in the instant case, and the unilaterally implemented zero-tolerance ethics policy in Windstream Corp., both violated 8(a)(1) and (5) of the Act, and both have the potential to have resulted in the termination of bargaining unit employees. Recognizing, however, that the employer may have legitimately terminated some employees under lawfully promulgated and maintained rules, the Board's revised order in Windstream Corp. allows the employer to avoid the remedy obligation if it can

so demonstrate. (352 NLRB at 44, fn 3) The Board is respectfully urged to order a similar reinstatement and make whole remedy in this matter.

D. Exception 5: ALJ's failure to make a conclusion of law that PBH Management, LLC was an agent of the Respondents. (ALJD pp 43-44) (GC Exh. 38 *passim*; Tr. *passim*)

In the Complaint, the General Counsel set forth alternate theories to define Respondents' relationship to the bargaining unit employees at the Pacific Beach Hotel and to PBHM, as well as to determine Respondents' liability for various acts. The complaint alleges:

2.(l) At all material times, from about January 1, 2007, until about November 30, 2007, Respondents HTH possessed and exercised control over the labor relations policy of PBHM and administered a common labor policy for employees employed at the Pacific Beach Hotel.

2.(m)(i) At all material times, from about January 1, 2007, until about November 30, 2007, PBHM and Respondents HTH were joint employers of the employees employed at the Pacific Beach Hotel.

2.(m) (ii) In the alternative, at all material times, from about January 1, 2007, until about November 30, 2007, PBHM acted as the agent of Respondents HTH within the meaning of Section 2(13) of the Act for purposes of operating the Pacific Beach Hotel.

2.(o) At all material times since about August 15, 2005, Respondents HTH has been an employer of the employees employed at the Pacific Beach Hotel.

(GC Exh. 1rrrr, p 7)

Although the ALJ found it unnecessary to make any finding regarding General Counsel's joint employer and/or agency theories, he did correctly find that Respondents were "in fact the true employer of the entire Hotel staff." (ALJD p 16, L 20) The ALJ also noted the following as additional evidence that Respondents retained control over the Hotel, even while PBHM was under contract with Respondents to operate the Hotel:

Additional evidence that Respondents retained control of the Hotel was its decision to replace hallway carpeting without consulting PBHM and Minicola's

pendant for speaking directly to department managers without going through PBHM's general manager. And curiously, PBHM simply adopted the HTH/PBC personnel forms and procedures, in some cases not even bothering to change the logo heading the document. There is also evidence, from Barry Wallace, an Outrigger Hotels Hawaii vice president, to the effect that Minicola insisted upon inserting himself into nearly every management decision which PBHM wished to make. Wallace's testimony is not, in my opinion, as significant as the other matters showing Respondents' continued meddling since it is not a [sic] as specific. Nonetheless, it is consistent with those other matters.

(ALJD p 16, fn 13)

The ALJ also correctly found that Respondents were attempting to construct the facade of successorship in order to hide their true relationship to the bargaining unit employees. He wrote:

It seems self-evident from this fact pattern that Minicola and Ms. Watanabe [nee Hayashi]¹² were taking this step¹³ in order to create the appearance of successorship. Under successorship rules as established by decisions under the Act, a successor corporation may set the initial terms and conditions under which the employees of a continuing operation would be obligated to work. And, of course, where supported by proof that the incumbent Union has lost its majority status, it could lawfully refuse to recognize the Union. Frankly, this has all the ingredients of a sham.

(ALJD p 18, LL 25-31)

Finally, the ALJ correctly found that Respondents were the continuous employer of the Hotel's bargaining unit employees and described in the following manner the elaborate scheme

¹² Ms Corine Watanabe is the daughter of the deceased founder of HTH Corporation, Herbert T. Hayashi, and is the President and Chief Executive Officer of HTH and all of the HTH entities. (Tr. 1:76)

¹³ The step referred to by the ALJ is described in the paragraph preceding the quoted paragraph, in which the ALJ described what had happened after Respondents terminated their Management Agreement with PBHM, and designated the Pacific Beach Corporation to be the managers of the Pacific Beach Hotel. The ALJ found:

Eventually, the transition was memorialized in a hotel management and service agreement between Koa Management and Pacific Beach Corporation. It is dated December 1, 2007, and is signed by Corine L. Watanabe on behalf of both entities. Unlike the PBHM Management Agreement, which microscopically detailed all matters, this document consists of only four pages. In large part it is Watanabe speaking to Watanabe, authorizing or limiting Watanabe's operation of the Hotel.

(ALJD p 18, LL 18-23)

devised by the Respondents to avoid their collective bargaining obligations by utilizing PBHM to cover their tracks:

Indeed, in reviewing the management agreement and Respondents' general behavior toward the Union, it seems clear that the entire concept of inserting an 'independent' manager such as PBHM was nothing more than a long-term scheme to wash the Union from the Hotel. It was designed to make it appear that Respondents were a bona fide successor to PBHM where it could also claim that the Union's one-vote majority of two years before had become dissipated. If so, it reasoned, it could simply treat all of the employees as if they were new hires and set the new terms and conditions. Even if it could not rid itself of the Union entirely, at the very least it could ignore all of the collective bargaining that had gone before and set initial terms and conditions of employment under cover of the holding in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

(ALJD p 39, LL 7-16) (Emphasis added) The ALJ also concluded that as a continuous employer, Respondents had a continuing duty to bargain collectively with the Union between January 1, 2007 and December 1, 2007, even though they had contractually delegated PBHM to operate the Hotel and collectively bargain with the Union during that period. (ALJD p 43, par 8) The ALJ further concluded that:

Respondents "utilized PBHM as a middleman as part of a scheme to disguise its decision to deprive the employees of Union representation and to escape its obligation to collective bargain in good faith and when PBHM was about to reach a contract with the Union, Respondents canceled its operating agreement with PBHM to defeat any collective bargaining contract which PBHM might have achieved.

(ALJD p 43, par 9) (Emphasis added) Thus, the ALJ made multiple findings of fact and conclusions of law that support the conclusion that PBHM was Respondents' agent for the purposes of collective bargaining.

Respondents clearly made PBHM their agent for the purposes of collective bargaining, when they included in the Management Agreement entered into on or about September 7, 2006,¹⁴ provision 3.3.e, which states:

Operator agrees to offer employment to all of the bargaining unit employees employed by Owner at the Hotel as of the Effective Date (the 'BU Employees') and further agrees to recognize the Union as the sole bargaining representative of the BU Employees. Owner represents and warrants that (1) all of the BU Employees to be offered employment are listed on the Schedule attached hereto as **Exhibit G** and (2) there is no existing collective bargaining agreement with the Union as of the Effective Date. From and after the Commencement Date, Operator will recognize the Union at the Hotel, shall assume Owner's obligation to negotiate with the Union and shall be responsible for completing negotiations with the Union, all at and as an Owner's Expense. Operator shall have the right, in its sole discretion, to select its representatives to conduct the negotiations with the Union. Substantially concurrently with the Plant Closing Notices, Owner and Operator shall notify the Union, in writing and pursuant to a form agreed to by Owner and Operator, that Operator shall be the designated employer of the Hotel Employees (which, by definition, excludes employees of the Retail Spaces and Parking Garage) from and after the Commencement Date.

(GC Exh. 38, p 9, par 3.3.e.) (Emphasis in original) Thus, Respondents clearly assigned their obligation to negotiate a contract with the Union to PBHM including the obligation to honor all tentative agreements. However, notwithstanding the provisions of 3.3.e of the Management Agreement, PBHM could not actually complete negotiations with the Union without also complying with paragraph 3.2.c of the Management Agreement, which required Respondents' approval of agreements or contracts of a certain duration or with a value exceeding \$350,000.

(GC Exh. 38, p 8, par 3.2.c.) Under the provisions of paragraph 3.2.c., Respondents retained ultimate control over the achievement of a collective bargaining agreement.¹⁵

¹⁴ GC Exh. 38. Although the document does not contain the month of the effective date, the parties stipulated that the Agreement's effective date was September 7, 2006. (Tr. Vol VII, pp 1090-91)

¹⁵ The ALJ correctly concluded that ultimately, Respondents canceled the Management Agreement that is had with PBHM in order to avoid a collective bargaining agreement with the Union. (ALJD p 43, par 9) It was a scheme.

In the Restatement (Third) of Agency, agency is defined as, “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”¹⁶ All of the required elements of common law agency exist in this case. The Respondents, through the Management Agreement, gave PBHM the authority to negotiate a collective bargaining agreement with the Union, and any such collective bargaining agreement would ultimately be subject to the Respondents’ control, by virtue of the approval requirements of paragraph 3.2.c. PBHM consented to act as Respondents agent when it executed the Management Agreement.

In the instant case, Respondents repeatedly held PBHM out to the Union as the employer of the Hotel’s employees. On April 17, 2007, the Union sent letters requesting information to both PBHM and Respondents. (GC Exhs. 28 & 29) The request to Respondents went to Minicola. (Tr. 2:257-58; GC Exh. 28) The letters requested 24 separate items of information to “substantiate the correct corporate entity which has the control ‘over contract negotiations as well as terms **and** conditions of employment for the bargaining unit members represented by the ILWU, Local 142.’” (GC Exhs. 28 & 29) (Emphases in the original) Specifically, the Union requested documents identifying the managing entity of the Hotel. Although Outrigger Executive Vice President and Chief Financial Officer, and PBHM Executive Vice President Melvyn Wilinsky (“Wilinsky”) was conducting negotiations with the Union at this time on behalf of PBHM, the Union also requested the information from Respondents in its attempt to prove as true its belief that Respondents continued to exercise control over terms and conditions of employment at the Hotel. (Tr. 2:258-59)

¹⁶ Restatement (Third) of Agency § 1.01 (2006).

When PBHM began managing the Hotel, the Union attempted to determine whether HTH Corporation or Pacific Beach Corporation or both had any continuing control over terms and conditions of employment. (Tr. 2:259) The April 17 letter also requested information pertaining to the Outrigger Enterprise Group because the Union was also trying to determine if PBHM was the proper employer entity, given its relationship to Outrigger Enterprise Group. (Tr. 2:259-60)

Shortly after sending the April 17 letter to Respondents, Minicola called the Union's Chief Negotiator Dave Mori ("Mori"). (Tr. 2:260) Minicola said that he was calling Mori as a courtesy to let him know that legal counsel had advised Minicola that he did not need to respond to the Union's information request because Respondents were not involved in the negotiations. (Tr. 2:260) There was no written response from Respondents to the Union's April 17 letter. (Tr. 2:260)

The Union did receive some information from PBHM, but the nature of the information served to confuse the Union even further with respect to which entities controlled the terms and conditions of employment for the Hotel's workers. (Tr. 2:264; GC Exh. 30) Due to the Union's further confusion, it submitted a follow-up request for information to Respondents and to PBHM, dated May 30, 2007 ("May 30 letter"). (Tr. 2:265-66; GC Exhs. 31 & 33) Mori added further detail to his request for information but maintained that the information regarding the relationship between various entities remained relevant to negotiations because the Union needed to know which entities had ultimate control over contract negotiations and Hotel employees' terms and conditions of employment. (Tr. 2:267; GC Exh. 31) Presumably, it was to ensure that the appropriate entities were made parties to any final agreement. The May 30 letter requested several items of information that would generally reflect the right of any entities to affect terms and conditions of employment for Hotel workers. (GC Exhs. 31 & 33)

Respondents responded by letter, dated June 7, 2007, in which Minicola provided no information and instead informed Mori that he would be forwarding Mori's request to PBHM, the employer of the Pacific Beach Hotel employees, for response. (Tr. 2:265-66; GC Exh. 32) Although Mori had sent a similar letter to Wilinsky, Mori never received any written or oral response to the request. (Tr. 2:266-67)

By pointing the Union to PBHM each time the Union requested information necessary for negotiations, Respondents clearly communicated to the Union that PBHM was the employer of the bargaining unit members and PBHM had the apparent authority to negotiate a collective bargaining agreement on behalf of Respondents. The granting of actual authority by Respondents to PBHM, via the Management Agreement, to negotiate a collective bargaining agreement with the Union and its persistence in pointing to PBHM whenever the Union requested information during negotiations compels the conclusion that PBHM was Respondents' agent and that PBHM possessed actual authority to act on Respondents' behalf for the purposes of collective bargaining.¹⁷ Further, based on Respondents actions, the Union had every reason to believe that PBHM had the apparent authority to act on behalf of Respondents.¹⁸

¹⁷ Restatement (Third) of Agency §§ 2.01, 3.01 (2006), which states as follows:

2.01 Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

3.01 Creation of Actual Authority

Actual authority, as defined in § 2.01, is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.

¹⁸ Restatement (Third) of Agency §§ 2.03, 3.02, 3.03 (2006), which state as follows:

2.03 Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and the belief is traceable to the principal's manifestations.

The Board has applied common law principals of agency when determining whether a person is clothed with actual or apparent authority to act as another's agent. In Alliance Rubber Company,¹⁹ for example, the employer hired Robert Blankenship, d/b/a W.C.S. Polygraph Division to administer polygraph examinations to the employer's employees as part of its investigation into allegations of sabotage and drug usage.²⁰ The Board found that the employer and respondent Blankenship violated 8(a)(1) of the Act when Blankenship interrogated employees about their union activities while he administered the polygraph examinations, since Blankenship committed the unfair labor practices while he acted under the general scope of authority granted to him by the employer.²¹

In addition, the Board held that the doctrine of apparent authority supported its findings that Blankenship was an agent of the employer.²² Under that doctrine, the employer should have known that its employees would perceive Blankenship as having authority to act on the employer's behalf, since the offending questions were asked in the course of the polygraph

3.02 Formal Requirements

If the law requires a writing or record signed by the principal to evidence an agent's authority to bind a principal to a contract or other transaction, the principal is not bound in the absence of such a writing or record. A principal may be estopped to assert the lack of such a writing or record when a third party has been induced to make a detrimental change in position by the reasonable belief that an agent has authority to bind the principal that is traceable to a manifestation made by the principal.

3.03 Creation of Apparent Authority

Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

¹⁹ 286 NLRB 645 (1987)

²⁰ 286 NLRB at 645.

²¹ 286 NLRB at 645-646.

²² 286 NLRB at 646.

examinations, and since the employer's vice-president instructed the employees to submit to the examination, unless they objected.²³

In Service Employees Local 87 (West Bay Maintenance),²⁴ the Board explained the concept of apparent authority as it applied to cases before the Board, and stated:

Section 2(13) of the Act provides that:

In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Under this standard for establishing agency, we are satisfied that the General Counsel was warranted in relying both on the doctrine of apparent authority and on ratification.

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. (Citations omitted)²⁵

In the present case, Respondents, the principals, by their communications and actions, caused the Union to believe that PBHM had the authority to bargain collectively with the Union on Respondents' behalf, and relied on that manifestation when it entered into various tentative agreements with PBHM.

The ALJ clearly went to great lengths to cite in his findings of facts and conclusions of law evidence upon which he relied to show that PBHM was being used by Respondents in its

²³ 286 NLRB at 646.

²⁴ 291 NLRB 82 (1988).

²⁵ 291 NLRB at 82-83

elaborate “scheme to wash the Union from the Hotel”²⁶ and to “evade the Act.”²⁷ He described the actual authority given by Respondents to PBHM via the Management Agreement to complete negotiations with the Union and Minicola’s deferral of the Union’s information requests to PBHM. He did everything to describe the agency relationship that PBHM had with Respondents but stopped short of calling it that.

The ALJ correctly found and concluded that Respondents were a continuous employer and that, although Respondents delegated PBHM to run the Hotel and bargain collectively with the Union on Respondent’s behalf, at no time were Respondents relieved of the obligation to bargain in good faith with the Union. Therefore, Respondent must immediately recognize the Union and resume bargaining with the Union in good faith, including honoring all of the tentative agreements entered into by the Union and PBHM. Clearly, based on the ALJ’s findings and conclusions, Respondents are responsible for the actions of PBHM. However, even though the ALJ’s findings and conclusions clearly support the conclusion that PBHM was an agent of Respondents, the Board is urged to expressly find that PBHM was an agent of Respondents and that Respondents are bound by the commitments made in bargaining by PBHM. Such an express finding could avoid a remand in the event of any appellate court review.

E. Exception 6: ALJ’s failure to order the reinstatement of all tentative agreements reached between Respondents and the Union and PBH Management, LLC and the Union. (ALJD p 45, par 2(a)) (GC Exhs. 17, 26, 27, 38; Tr. 2:237-38, 4:493, *passim*)

The Union’s Chief Negotiator Mori testified that during a meeting among Minicola, Mori and Union President Fred Galdones which occurred approximately 60 days prior to PBHM’s take

²⁶ ALJD p 39, LL 9-10.

²⁷ ALJD p 40, L 48.

over of the Hotel's management, Minicola stated that the new managing entity would be honoring all tentative agreements reached between Respondents and the Union, and that the entity would resume bargaining with the Union. (Tr. 2:237-38) Wilinsky, who served as PBHM's lead negotiator, also testified that PBHM accepted all of the tentative agreements reached between Respondents and the Union. Wilinsky explained:

Q. (By Counsel for the General Counsel) And did PBH Management LLC begin negotiating with the Union from scratch, in other words, with no --

A. From a blank piece of paper?

Q. Yes, from a blank piece of paper.

A. No, we didn't. There were prior negotiations before PBH Management took over responsibility for running the hotel. And we accepted all the previously negotiated points that predecessor owner and manager had agreed to with the Union.

Q. And why did you do that?

A. It was a condition of our agreement with PBH -- with HTH rather, I'm sorry.

(Tr. 4:493) Copies of the tentative agreements reached between Respondents and the Union are all contained in GC Exh. 17.

Indeed, the Union and PBHM began their negotiations exactly at the point where Respondents left off. When asked whether PBHM began negotiations using their own drafted proposals, Mori testified:

A. Well, let me answer it this way.

Going back to that initial meeting where there were two bargaining committees -- Mr. Minicola's committee and Mr. Wilinsky -- Mr. Minicola's previous Last and Final was presented at that meeting. It was the same Last and Final.

So you know, it was interpreted that PBH Management LLC was starting off from there, following HTH Corporation's Last and Final proposal. That's where we left off with Mr. Minicola and resumed with Mr. Wilinsky.

Q. (By Counsel for the General Counsel) And did you in fact start off from the Last and Final proposals of Mr. Minicola during negotiations with Mr. Wilinsky?

A. Yes.

(Tr. 2:243) PBHM and the Union were subsequently able to enter into 13 additional tentative agreements (GC Exhs. 26 & 27), 11 of which were entered into prior to Respondents' August 3, 2007 announcement to PBHM that Respondents were cancelling the Management Agreement. (ALJD p 18, LL 5-6) The notice of cancellation of the Management Agreement came on the heels of PBHM's July 30, 2007 request for Respondent's authorization to offer the Union proposals which PBHM was sure the Union would accept. (Tr. 4:501-02; GC Exh. 44) PBHM submitted to Respondents the request for authorization pursuant to paragraph 3.2.c of the Management Agreement. (Tr. 4:503-04)

The Board has found in certain cases where an employer has refused to bargain in good faith by withdrawing proposals or has unlawfully withdrawn recognition of a union during negotiations, that the standard bargaining order is inadequate to remedy the unfair labor practices. In those cases, the Board has ordered the reinstatement of the withdrawn contract provisions or entire contract proposals.²⁸

²⁸ See, Suffield Academy, 336 NLRB 659 (2001) (ordering the employer to reinstate the revised collective bargaining agreement proposal, including illegally withdrawn tentative agreements regarding a health insurance plan); Sunol Valley Golf Club, 310 NLRB 357 (1993) (ordering the employer to execute an agreement with the union, since the contract offer had been properly accepted by the union); Transit Service Corporation, 312 NLRB 477 (1993) (ordering the reinstatement of employer's proposed 3-year contract including all of the terms reflected in its August 28, 1991 draft, and ordering the employer to bargain over the remaining open item, which was the effective dates of the agreement); Star Dental Products, 303 NLRB 968 (1991) (ordering the employer to reinstate the unlawfully withdrawn contract offer for a reasonable period of time); The Mead Corporation, 256 NLRB 686 (1981) (ordering the respondent to reinstate a withdrawn contract proposal and to restore the *status quo ante*,

In The Mead Corporation, the Board reasoned that, absent an order to reinstate withdrawn proposals, not only will the policies of the Act not be effectuated, but further, “Respondent [will be allowed] to profit from its unlawful conduct.” The Mead Corp., 256 NLRB at 686.

The law demands that the Respondents be ordered to honor all tentative agreements reached between Respondents and the Union, as well as between Respondents’ agent, PBHM, and the Union. Not only has the ALJ concluded that Respondents have engaged in bad faith bargaining over the course of an entire year, but that the bad faith bargaining was topped off with Respondents’ utilization of PBHM as Respondents’ “middleman as part of a scheme to disguise its decision to deprive the employees of Union representation and to escape its obligation to collectively bargain in good faith” with the Union.²⁹ Finally, after what the ALJ termed the “bait and switch”³⁰ where Respondents claimed to be the Employer of the bargaining unit members until December 2006, then claimed not to be (pointing to PBHM) from January to November 30, 2007, and then claimed to be the Employer once again beginning December 1, 2007, Respondents unlawfully withdrew recognition of the Union as the exclusive bargaining representatives of the bargaining unit employees, rendering futile almost two years of first contract bargaining.

The ALJ’s findings clearly establish that the Respondents were the true employer of the Hotel’s employees, that Respondents were the continuous employer of the Hotel’s employees, and that PBHM was Respondents’ agents. In light of the Board’s stated policy considerations in

holding, “It is clear that merely ordering Respondent to resume bargaining in good faith, without more, will permit Respondent to continue to withhold from the bargaining table the proposal that it illegally retracted.”).

²⁹ ALJD p 43, par 9.

²⁹ ALJD p 14, L 31.

The Mead Corporation and its progeny, these circumstances compel an order requiring Respondents to reinstate all of the tentative agreements reached between Respondents and the Union, as well as between PBHM and the Union to restore the *status quo ante* and to prevent Respondents from being unjustly enriched by their unlawful conduct.

F. Exception 7: ALJ's description of the bargaining unit in footnote 6 excluded some included positions. (ALJD pp 5-6) (GC Exh. 3, pp 4-5)

The ALJ included in his Decision a description of the certified bargaining unit. (ALJD pp 5-6, fn 6) The parties stipulated to the certified unit description in GC Exhibit 3, on pages 4 to 5, paragraph 7D. The following positions are not included in footnote 6, but are part of the bargaining unit as certified on August 15, 2005: bell sergeant, housekeeper IB (instead of housekeeper I) and hosthelp. Footnote 6 of the ALJD also contains additional words and letters not included in the certified unit description. The certified unit description contained in the Stipulation is copied below, and we respectfully request that the Board adopt this description in its decision.

All full-time, regular part-time and regular on-call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, hosthelp, wait help, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st,

mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

G. Exception 8: ALJ's failure to order quarterly compound interest to be paid on all monetary awards made. (ALJD p 41, LL 42-43) (GC 1ssss, Attachment A, p 31)

The complaint prays for a remedial order requiring Respondents to pay quarterly compound interest on any monetary award ordered as a result of Respondents' unlawful unilateral changes and their unlawful termination of bargaining unit employees who were members of the Union's bargaining committee. (GC 1ssss, Attachment A, p 31) The ALJ failed to order Respondents to pay quarterly compound interest on the monetary amounts he awarded.

1. INTEREST ON THE MONETARY AWARD SHOULD BE COMPOUNDED ON A QUARTERLY BASIS

Counsel for the General Counsel urges that the current practice of awarding only simple interest on back pay and other monetary awards be replaced with the practice of compounding interest. Only the compounding of interest can make adjudged discriminatees fully whole for their losses, and IRS practice and precedent from other areas of labor and employment law provide ample legal authority for assessing compound interest to remedy unfair labor practices.

Indeed, the trend in recent years has been increasingly toward remedies that include compound interest, and the NLRA will soon be an anomaly if the Board continues with its current practice.

a. Computing Compound Interest, Rather than Simple Interest, Is the Only Manner by Which to Make Adjudged Discriminatees Whole and Carry Out the Purposes of the Act

The Act has been interpreted as “essentially remedial,” Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940), meaning that Board orders are to restore the situation to that existing before any unfair labor practices occurred so as to assure employees that they are free to exercise their Section 7 rights, see Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 197-198 (1941); Freeman Decorating Co., 288 NLRB 1235, 1235 fn.2 (1988) (Board does not award tort remedies but only makes discriminatees whole for losses incurred because of unlawful conduct). Thus, an employee that was unlawfully discharged is entitled to back pay representing his or her lost wages. Absent an award of interest on that back pay, the discriminatee will not have been returned to the pre-unfair labor practice status quo because there is no consideration for either the discriminatee’s lost investment opportunities or need to borrow interest-bearing funds during the period of the unlawful discharge. See Florida Steel Corp., 231 NLRB 651, 651 (1977) (“The purpose of interest is to compensate the discriminatee for the loss of use of his or her money.”), enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978).

The issue then becomes what method of computing interest best returns the employee to the pre-unfair labor practice status quo. Because the established practice among banks and other financial institutions is to charge compound interest on loans,³¹ the Board’s current policy of

³¹ When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to assess compound interest on the overpayment or underpayment of taxes, it noted that it was conforming the IRS computation of interest to commercial practice. See S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047.

assessing only simple interest fails to return discriminatees to the pre-unfair labor practice status quo. Thus, if an employer violates Section 8(a)(5), for example, by failing to pay unit employees their contractual benefits, a unit employee may need to borrow money from a bank in order to pay bills or maintain private health insurance while awaiting the Board order or the enforcement of that order. The employee will have to repay that loan with compounded interest, and a Board order awarding only simple interest will fail to fully compensate that employee for out-of-pocket expenses caused by the unfair labor practice.

b. IRS Practice and Precedent from Other Areas of Labor and Employment Law Provide Ample Legal Authority for Assessing Compound Interest to Remedy Unfair Labor Practices

A significant amount of legal authority supports a change in remedial policy from simple to compound interest.³² First, the Internal Revenue Service (IRS) requires the compounding of interest on the overpayment or underpayment of taxes and the Board has a history of linking its interest policy with that followed by the IRS. Second, federal courts routinely exercise their discretion to award compound interest for employment discrimination, a policy also adopted by the Administrative Review Board of the U.S. Department of Labor, and the U.S. Office of Personnel Management (OPM) charges compound interest on monetary remedies owed to federal employees.³³ The Board should update its policy so as to be in line with these practices.

³² As a general matter, it is well-established that the Board has the remedial authority to charge interest on its monetary awards even though the NLRA does not expressly grant that authority. See Isis Plumbing & Heating Co., 138 NLRB 716, 717 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963). See also NLRB v. G & T Terminal Packaging Co., 246 F.3d 103, 127 (2d Cir. 2001) (“An award of interest is, of course, well within the Board’s remedial authority.”); NLRB v. Operating Engineers Local 138, 385 F.2d 874, 878 & fn.22 (2d Cir. 1967) (listing circuit courts that had explicitly upheld Board’s authority to charge interest on monetary awards), cert. denied 391 U.S. 904 (1968).

³³ Moreover, federal courts routinely compound interest in non-employment cases to make injured parties whole. See, e.g., Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc., 633 F. Supp. 1047, 1057 (D. Del. 1986) (patent infringement case; compounding interest “will conform to commercial practices and provide the patent holder with adequate compensation for foregone royalty payments”); Brown v. Consolidated Rail Corp., 614 F. Supp. 289, 291 (N.D. Ohio 1985) (Vietnam Veterans Readjustment & Assistance Act case; compound interest awarded regardless of

- (1) The Board should follow IRS policy and compound interest on monetary remedies.

Since the Board first adopted a policy of assessing interest on monetary remedies in Isis Plumbing & Heating Co., it has linked that policy to the practices followed by the IRS. 138 NLRB at 720-721. Thus, in Isis Plumbing, the Board adopted a flat interest rate of six percent on monetary remedies, which at the time was the rate used by the IRS with regard to a taxpayer's overpayment or underpayment of federal taxes. See Florida Steel Corp., 231 NLRB at 651 (six percent interest rate was used by "the [IRS], in suits by the Government, and was the legal rate of interest in most States"). The IRS later changed to a sliding interest scale and, in Florida Steel Corp., the Board concluded that its flat interest rate "no longer effectuate[d] the policies of the Act" and it adopted that sliding interest scale. Id. at 651. Finally, in New Horizons for the Retarded, Inc., the Board, in accord with another change in IRS policy that was mandated by the Tax Reform Act of 1986, again changed the method of determining its official interest rate. 283 NLRB 1173, 1173 (1987). The Tax Reform Act required the IRS to use the short-term Federal rate to calculate interest on tax overpayments and underpayments. See 26 U.S.C. § 6621(a) (2000). The Board adopted the rate applicable to the underpayment of federal taxes, i.e., the short-term Federal rate plus three percent, and reasoned that its official interest rate should reflect, at least indirectly, the forces of the private economic market. See New Horizons for the Retarded, Inc., 283 NLRB at 1173.

In both Florida Steel and New Horizons, the Board followed the lead of the IRS with regard to the appropriate interest rate, but failed to adopt the IRS's practice of compounding

defendant's good faith or justification); United States v. 319.46 Acres of Land More or Less, 508 F. Supp. 288, 291 (W.D. Okla. 1981) (eminent domain case; Fifth Amendment "just compensation" standard would be satisfied only by compound interest award).

interest on amounts owed.³⁴ As part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had mandated that the IRS compound interest on the overpayment and underpayment of taxes. See 26 U.S.C. § 6622(a). The rationale was that calculating simple interest on amounts owed did not conform to commercial practice and that, without compounding interest, “neither the United States nor taxpayers are *adequately compensated* for the value of money owing to them under the tax laws.” S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047 (emphasis supplied). This same rationale mandates that the Board adopt a policy of compounding interest on its monetary remedies because adjudged discriminatees in NLRA cases are not “adequately compensated,” i.e., made whole for their economic losses, with simple interest alone. Thus, the Board should continue to adhere to IRS practices and should assess compound interest on all monetary remedies.

- (2) The Board should follow the practice of federal courts applying employment discrimination law, of the U.S. Department of Labor, and of OPM and award compound interest on monetary remedies

Federal courts routinely award compound interest on back pay awards in Title VII cases, 42 U.S.C. §§ 2000e to 2000e-17 (2000), with one court insisting that “[g]iven that the purpose of back pay is to make the plaintiff whole, *it can only be achieved if interest is compounded.*”³⁵ Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 145 (2d Cir. 1993) (emphasis supplied), cert. denied 510 U.S. 1164 (1994). See also Cooper v. Paychex, Inc., 960 F. Supp. 966, 975

³⁴ In those two cases, the parties did not argue, and the Board did not address, the issue of whether the interest should be compounded.

³⁵ The analysis in this subsection focuses only on how federal courts routinely compound prejudgment interest in employment discrimination cases so as to make adjudged discriminatees whole. Unlike with postjudgment interest, which must be compounded pursuant to the federal postjudgment interest statute, 28 U.S.C. § 1961(b), federal courts have discretion on whether and how to assess prejudgment interest. See, e.g., O’Quinn v. New York University Medical Center, 933 F. Supp. 341, 344-345 (S.D.N.Y. 1996) (Title VII case).

(E.D. Va. 1997) (Title VII and 42 U.S.C. § 1981 race discrimination case stating “common sense and the equities dictate an award of compound interest”), affd. 163 F.3d 598 (4th Cir. 1998) (unpublished table decision); Rush v. Scott Specialty Gases, Inc., 940 F. Supp. 814, 818 (E.D. Pa. 1996); O’Quinn v. New York University Medical Center, 933 F. Supp. at 345-346; Luciano v. Olsten Corp., 912 F. Supp. 663, 676 (E.D.N.Y. 1996), affd. 110 F.3d 210 (2d Cir. 1997); Davis v. Kansas City Housing Authority, 822 F. Supp. 609, 616-617 (W.D. Mo. 1993). When discussing the presumption of a back pay remedy for a Title VII violation, the Supreme Court has made clear that Title VII remedies were modeled after those provided under the NLRA, the purpose of which is to put discriminatees in the position they would have been in absent the respondent’s unlawful conduct:

The “make whole” purpose of Title VII is made evident by the legislative history. The back pay provision was expressly modeled on the back pay provision of the National Labor Relations Act. Under that Act, “[m]aking 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.”

Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) (citations omitted); see also EEOC v. Guardian Pools, Inc., 828 F.2d 1507, 1512 (11th Cir. 1987) (Congress modeled Title VII remedies on those afforded by NLRA). Because Title VII remedies were modeled after those provided by the NLRA and it has been determined that compound interest is needed to make a Title VII discriminatee whole, it follows logically that compound interest is needed to make whole a NLRA discriminatee who was discriminated against because of his or her exercise of Section 7 rights.

Based on circuit court precedent in employment discrimination cases, the Administrative Review Board (ARB) of the U.S. Department of Labor has also adopted a policy of compounding

interest on back pay awards. The ARB issues final agency decisions for the Secretary of Labor in cases arising under a wide range of labor laws, including whistleblower protection, employment discrimination, and immigration.³⁶ It has stated that a “back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest.” Doyle v. Hydro Nuclear Services, 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000) (involving whistleblower protection under Energy Reorganization Act of 1974), revd. on other grounds sub nom. Doyle v. U.S. Secretary of Labor, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002). Thus, in Doyle the ARB agreed with the rationale of Saulpaugh and similar circuit court decisions and concluded that in light of the remedial nature of the whistleblower provisions involved and the make whole goal of back pay, “prejudgment interest on back pay ordinarily shall be compound interest.” Id., 2000 WL 694384, at *15. It then stated that, absent unusual circumstances, it would award compound interest in all cases involving analogous employee protection provisions. Id. See also Amtel Group of Florida, Inc. v. Yongmahapakorn, 2006 WL 2821406, at *9 (DOL Admin. Rev. Bd. September 29, 2006) (involving Immigration and Nationality Act).

Further support for adopting a policy of compounding interest comes from the public sector. Since the end of 1987, pursuant to Congressional directive, OPM has required all federal agencies to award compound interest on any back pay due to federal employees for “unjustified or unwarranted personnel action[s].” 5 U.S.C. § 5596(b)(1), (b)(2)(B)(iii) (2000); see also 5 C.F.R. § 550.806(a)(1), (e) (2006); 53 Fed. Reg. 45,885 (1988). By that legislation, Congress

³⁶ The ARB’s policy of compounding interest pre-dates the passage of the Sarbanes-Oxley Act and the Department of Labor’s responsibility for administering that statute. However, the increase in whistleblower claims as a result of Sarbanes-Oxley has created even greater use of the compound interest methodology by DOL, and makes it even more apparent that the Board’s simple interest methodology is out of sync with other agencies’ practice.

sought to “mak[e] an employee financially whole (to the extent possible). . . .” 5 C.F.R. § 550.801(a). Thus, in cases where a federal employee is subjected to unlawful discrimination, he or she will receive compound interest on the back pay award. See, e.g., Bergmann v. Department of Justice, 2003 WL 1955193, at *3 (EEOC Federal Section Decision dated April 21, 2003) (where federal agency had discriminated based on sex, EEOC stated that interest on back pay owed to discriminatee had to be compounded daily as required by 5 C.F.R. § 550.806(e)).

The policy underlying the practice followed by federal courts, the ARB, and OPM is the same: compound interest on back pay awards is necessary to make employees whole for economic losses they have suffered because of unlawful personnel actions taken against them. Back pay awards issued under the NLRA serve the same purpose. See, e.g., Isis Plumbing & Heating Co., 138 NLRB at 719 (“‘Backpay’ granted to an employee under the Act is considered as wages lost by the employee as the result of the respondent’s wrong.”). Accordingly, the Board should update its interest policy so as to be consistent with the common practice used to remedy unlawful employment actions in other contexts.

c. The Arguments Made By Opponents of Compound Interest are Without Merit

First, compound interest is neither punitive nor inconsistent with the Act’s remedial purpose of making discriminatees whole. Cf. Republic Steel Corp. v. NLRB, 311 U.S. at 11 (Board not vested with “discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act”). The purpose of compound interest is to make individuals whole for losses wrongfully inflicted upon them, and its assessment does not constitute a penalty merely because its calculation results in a larger

remedial award.³⁷ Rather, compound interest accounts for the true value of monies lost to a wronged employee during the time the back pay amount was unlawfully withheld, and therefore more accurately measures that value. Indeed, federal courts dealing with claims of employment discrimination have routinely awarded compound interest for this make-whole purpose. See Saulpaugh v. Monroe Community Hosp., 4 F.3d at 145 (Title VII case; court stated “[g]iven that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded”); EEOC v. Kentucky State Police Department, 80 F.3d 1086, 1098 (6th Cir. 1996) (Age Discrimination in Employment (ADEA) case; approving of Saulpaugh rationale), cert. denied 519 U.S. 963 (1996); Sands v. Runyon, 28 F.3d 1323, 1328 (2d Cir. 1994) (where Postal Service violated Rehabilitation Act of 1973 by refusing to hire applicant because of physical disability, court stated back pay “should ordinarily include compound interest”); Rogers v. Fansteel, Inc., 533 F. Supp. 100, 102 (E.D. Mich. 1981) (ADEA case).

Second, there is no merit to the argument that charging compound interest based on the interest rate adopted in New Horizons, i.e., the short-term Federal rate plus three percent, would amount to a penalty on a penalty because the three percent surcharge already acts as a penalty. One federal district court that was presented with a similar argument in an ERISA case noted that Congress wanted the interest rate applicable to the overpayment and underpayment of taxes to reflect market rates and that the addition of three percent to the short-term Federal rate, which is a low-risk rate that may be below market rates, more appropriately measured the value of money than the short-term rate alone and was not a penalty. See Russo v. Unger, 845 F. Supp. 124, 127

³⁷ Compound interest grows at an increasing rate the longer a monetary award remains unpaid. For example, at a 10% interest rate the satisfaction of a \$10,000 back pay obligation after one year would require \$1,038.13 in quarterly compounded interest versus \$1,000 in simple interest. However, after five years, there would be \$6,386.16 in quarterly compounded interest versus \$5,000 in simple interest. If the back pay award is not paid for an additional

(S.D.N.Y. 1994). Thus, compounding interest using the interest rate set forth in New Horizons cannot be considered a penalty on a penalty.

Third, there is no merit to the argument that compounding interest is inappropriate in cases where the Board's own processes, rather than anything within a respondent's control, arguably cause the delay in an adjudged discriminatee receiving back pay. Delay is inherent in any administrative process. Since the purpose of compounding interest is to make adjudged discriminatees whole for losses incurred as a result of unfair labor practices directed at them, it would be inappropriate not to make discriminatees whole for the entire period in which they incurred losses.

Fourth, compound interest will not dissuade respondents from fully litigating their positions before the Board and the reviewing federal courts, as is appropriate under the legal process established by the Act. As stated above, compound interest serves the same make-whole purpose, just on a more appropriate basis, as simple interest. Simple interest has not had the effect of inhibiting respondents from fully litigating their positions, and neither will compound interest. Respondents can also address this concern by creating a litigation reserve account in which to deposit funds to be used in satisfying a monetary remedy. Pursuant to commercial practice, that account will accrue compound interest.

Finally, opponents have argued that the Board should proceed on a case-by-case basis rather than adopt a blanket rule of compounding interest. This argument is sometimes based on Cherokee Marine Terminal, 287 NLRB 1080, 1081 (1988), where the Board refused to adopt a blanket rule requiring visitatorial clauses in all cases because "hardship could result from the

sixth year, it would accumulate \$1,701.10 in quarterly compounded interest versus \$1,000 in simple interest for that year alone.

routine inclusion of a standard provision.” Any reliance on Cherokee Marine Terminal is misplaced. The Board there concluded that the routine grant of the proposed visitatorial clause could create “hardship” because of “practical concerns regarding the administration of the model clause . . . and by the potential for abuse inherent in its lack of limits, specificity, and procedural safeguards.” 287 NLRB at 1081. For example, the proposed clause did not specify time limits on Board access to respondents’ statements and records, failed to specify the third parties who would be included in the order, and failed to specify that respondents could have counsel present or had reciprocal discovery rights. Id. at 1081-82 & fn.12. No similar concerns are present here because there is no potential for the General Counsel to manipulate a method for computing interest, which is a standard mathematical formula.

d. The Board Should Compound Interest on a Quarterly Basis

Interest on monetary remedies can be compounded annually, quarterly, or daily and each different method has some legal support.³⁸ The IRS’s practice is to assess daily compounded interest with regard to the overpayment or underpayment of federal income taxes. See 26 U.S.C. § 6622(a) (“In computing the amount of any interest required to be paid under this title . . . such interest . . . shall be compounded daily.”); accord Russo v. Unger, 845 F. Supp. at 128-129 (awarding daily compound interest in ERISA breach of fiduciary duty case because defendants had engaged in self-dealing and, as trustees, had duty to reinvest interest earned on funds). Indeed, Congress explicitly recognized that daily compounding would bring the IRS’s practices

³⁸ The chart below shows the different amounts of interest due under each method of computing interest mentioned above, assuming a 10% interest rate on a \$10,000 back pay award.

<u>Type of Interest</u>	<u>Year 1</u>	<u>Year 5</u>	<u>6th Year Alone</u>	<u>Total for 6 Years</u>
Simple	\$1,000	\$5,000	\$1,000	\$6,000
Annual Comp.	\$1,000	\$6,105.10	\$1,610.51	\$7,715.61
Quarterly Comp.	\$1,038.13	\$6,386.16	\$1,701.10	\$8,087.26
Daily Comp.	\$1,051.56	\$6,486.08	\$1,733.61	\$8,219.69

in line with commercial practice. See S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047 (compounding interest on a daily basis “will conform computation of interest under the internal revenue laws to commercial practice”).

However, in the Title VII context, which is more closely analogous to that of the NLRA, interest on monetary remedies is compounded annually or quarterly. See, e.g., EEOC v. Gurnee Inn Corp., 914 F.2d 815, 817, 819-820 (7th Cir. 1990) (annually); Rush v. Scott Specialty Gases, Inc., 940 F. Supp. at 818 (quarterly); O’Quinn v. New York University Medical Center, 933 F. Supp. at 345-346 (annually); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 613 (S.D.N.Y. 1981) (quarterly). In 2000, the DOL’s Administrative Review Board also adopted a policy of compounding interest quarterly on monetary awards owed to discriminatees in employee protection cases. See, e.g., Amtel Group of Florida, Inc. v. Yongmahapakorn, 2006 WL 2821406, at *9; Doyle v. Hydro Nuclear Services, 2000 WL 694384, at *15.

Counsel for the General Counsel requests that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent. See New Horizons for the Retarded, Inc., 283 NLRB at 1173. Because the short-term Federal rate is updated on a quarterly basis, id. at 1173, 1174, it would make administrative sense to also compound interest on the same basis. In addition, compounding interest on a quarterly basis is more moderate than daily compounding, which has not been applied in the analogous Title VII context, but is more reflective of market realities than annual compounding, which is inadequate because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

The General Counsel respectfully requests that the Board reconsider its practice of awarding simple interest on monetary awards and award compound interest because it is the fairer and more equitable remedy for the victims of the Respondents' pervasive unfair labor practices.

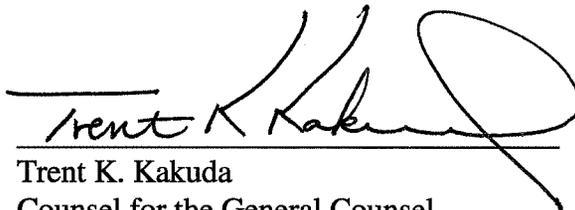
III. CONCLUSION

For all of the foregoing reasons, the General Counsel respectfully requests that the Board find for the General Counsel in all of the exceptions taken herein.

Dated: Honolulu, Hawaii, this 9th day of December, 2009.



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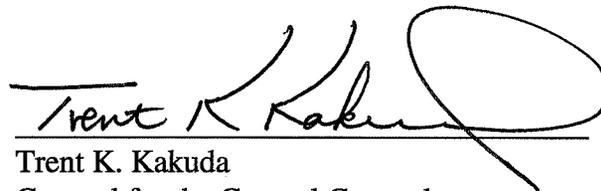
CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Counsel for the General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision has this day been served by hand-delivery, upon the following persons at their last-known addresses:

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