



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
**Region 7 - Resident Office**  
**82 Ionia NW - Room 330**  
**Grand Rapids, MI 49503-3022**  
**Telephone (616) 456-2679      FAX (616) 456-2596**  
**Toll-Free Number: 1-866-667-NLRB (1-866-667-6572)**  
**Visit our Web site at [www.nlr.gov](http://www.nlr.gov)**

July 27, 2009

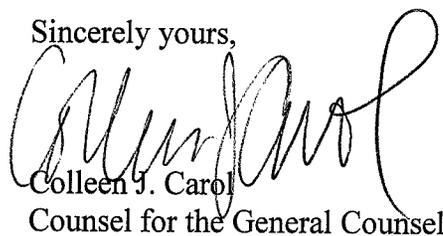
Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> St. NW  
Washington, DC 20570

RE: Knight Protective Services, Inc  
Cases GR-7-CA-51139  
GR-7-CA-51388

Dear Mr. Heltzer:

Please be advised that the Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions, with Certificate of Service has been filed with the Board and served on the parties electronically.

Sincerely yours,

  
Colleen J. Carol  
Counsel for the General Counsel

CJC:bk  
Enclosures

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

KNIGHT PROTECTIVE SERVICE, INC.  
Respondent

and

Cases: GR-7-CA-51139  
GR-7-CA-51388

LOCAL 206, UNITED GOVERNMENT  
SECURITY OFFICERS OF AMERICA (USGOA)  
Charging Union

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel excepts to the Administrative Law Judge's decision, conclusions of law and recommended dismissal as specified below:

1. The Administrative Law Judge (ALJ) erred in finding that Union Vice President Dennis O'Brien was the primary contact between the Union and the Respondent and that he had the lead role in discussions with management. (ALJD p. 4, lines 25-35, p. 12, line 30). The ALJ failed to consider or find that O'Brien had as much contact with management personnel as did the Union President Hopkins and many of the Union stewards. (Tr. 139-140)
2. The ALJ erred in finding that O'Brien and management representative Captain Ronald Umbarger spoke about the change on September 24, 2007 and that the conversation took place before Umbarger posted a notice to employees announcing the change. (ALJD p. 8, lines 16-17, p. 17, line 40) The findings are unsupported by the record evidence.
3. The ALJ erred in making a definitive finding that Umbarger posted the notice to employees announcing the elimination in lunch break pay on September 25 when the record evidence failed to support such a finding. (ALJD p.17, line 42)
4. The ALJ erred when he found that the Counsel for the General Counsel failed to prove that the Respondent made a "final, unalterable decision before it communicated the

change to the Union and because it never had any intention of bargaining with the Union about the change, it presented the Union with a *fait accompli* and thus violated Section 8(a)(5) of the Act”, inasmuch as the findings are contrary to the clear preponderance of the evidence. (ALJD p. 22, lines 47-51, fn. 35).

5. The ALJ erred in finding that the September 24, 2007 email between Umbarger and HR Director Donna Snowden was evidence of Umbarger’s intent to bargain with the Union. (ALJD p. 18, line 15, GC 16) That finding is contrary to the actual content of the email, which indicates not only that the Respondent intended on announcing the change to the Union, but also that it considered its duty to do so a “mere courtesy.” (GC 16)

6. The ALJ erred in finding that that the ten day lapse between the initial announcement of the change and the implementation date of the change was a crucial factor in finding that the Respondent acted in good faith (ALJD p. 14, lines 9-16, p. 15, lines 12-13) The ALJ failed to properly consider the objective evidence of the Respondent’s intent, regardless of the timing of the announcement.

7. The ALJ erred in finding that the fact that the Respondent notified the Union of the change before the unit employees was evidence of lawful behavior. (ALJD p. 15, lines 22-24) Board law looks to the intent of the Respondent when determining whether or not a decision was a *fait accompli*, not only the order in which notice is given. (ALJD p. 14, lines 18-40, p. 15, lines 21-24)

8. The ALJ erred by failing to consider the fact that the Respondent never contacted any union official about the change prior to announcing it to the employees. (T. 52, 162, 178)

9. The ALJ erred in finding that there was nothing improper in the Respondent informing the Union that the decision to eliminate lunch breaks had already been made. (ALJD p. 16, line 29-30) The ALJ also failed to consider, in conjunction with similar statements, that the Respondent had repeatedly told the Union that there was “nothing that it could do” about the decision. (ALJD p. 6, 15-18, p. 9, lines 12-13, GC 16)

10. The ALJ erred by not considering or finding that the Respondent misled the Union officials into thinking that the decision was mandated by the Federal Protective Service instead of being a decision made by Respondent. (ALJD p. 6, lines 16-17, T. 49, T. 233)

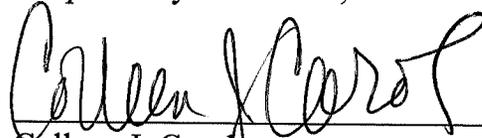
11. The ALJ erred by finding that the conversation between O’Brien and Umbarger constituted “meaningful bargaining.” (ALJD 21, lines 29-30)

12. The ALJ erred in finding that O’Brien clearly and unmistakably waived the Union’s right to bargain over the change. (ALJD p. 21, lines 3-5)

13. Because the ALJ erroneously failed to find a violation, he also failed to require the Respondent to pay the employees the amounts in the Compliance Specification, with any additional amounts that have accrued since the dates specified. (ALJD p. 22, line 30)

Dated this 27th day of July, 2009.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Colleen J. Carol". The signature is written in a cursive style and is positioned above a horizontal line.

Colleen J. Carol  
Counsel for the General Counsel  
National Labor Relations Board  
Region 7 – Resident Office  
82 Ionia NW, Suite 330  
Grand Rapids, MI 49503  
Ph: 616-456-2840  
Fx: 616-456-2596

Attachment

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

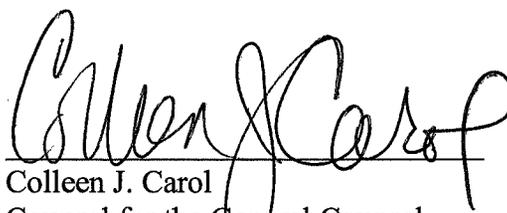
KNIGHT PROTECTIVE SERVICE, INC.  
Respondent

and

Cases: GR-7-CA-51139  
GR-7-CA-51388

LOCAL 206, UNITED GOVERNMENT  
SECURITY OFFICERS OF AMERICA (USGOA)  
Charging Union

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS



Colleen J. Carol  
Counsel for the General Counsel  
National Labor Relations Board  
Region 7 – Resident Office  
82 Ionia NW, Suite 330  
Grand Rapids, MI 49503  
Ph: 616-456-2840  
Fx: 616-456-2596  
Colleen.Carol@nlrb.gov

## TABLE OF CONTENTS

Table of Authorities .....	iv, v
I. Facts .....	1
II. ALJ Made Several Factual Findings That Are Not Supported by the Record Evidence (Exceptions 1,2,3) .....	5
A. O'Brien was not the Main Contact for the Union in Dealing with Respondent.....	5
B. Evidence Shows that Umbarger Posted the Notice of the Change to Employees on Either September 24 or September 25 (Exception 3).....	6
C. Evidence shows that the Conversation Between Umbarger and O'Brien Could Not Have Taken Place Before September 25 (Exception 2).....	6
III. The Respondent's Decision to Eliminate Unit Employees' Lunch Pay Was a <i>Fait Accompli</i> and the ALJ's Findings to the Contrary Are in Error....	8
A. ALJ Erred in Finding that the Respondent Did Not Announce a <i>Fait Accompli</i> to the Union Because it Announced the Change Ten Days Before Implementation (Exception 6).....	8
B. ALJ Erred in Finding that Respondent's Actions Were Presumed to Be Lawful Because the Union was Notified Before the Unit Employees. (Exception 7).....	9
C. ALJ Failed to Consider Objective Evidence that the Respondent Never Contacted the union for Bargaining Despite Its Timely Request (Exceptions 5, 8).....	10
D. The Use of Unequivocal Language is Objective Evidence in Determining the Respondent's Intent Regarding Bargaining. The ALJ Erred in Finding that the Respondent was Privileged to Announce a Final Decision to the Union After a Request to Bargain Had Been Made (Exception 9).....	12
E. ALJ Failed to Properly Consider Evidence that the Respondent Misled the Union Regarding Who Made the Decision to Eliminate the Lunch Break Wages (Exception 10).....	14
IV. Because the Conversation Between O'Brien and Umbarger Occurred After the Decision was Final, It Could not Constitute Meaningful Bargaining	

	(Exception 11).....	15
V.	Contrary to the ALJ’s Finding, Record Evidence Showed that the Union Could Not and Did Not Waive Its Right to Bargain over the Change. (Exception 12).....	17
	A. Assuming No Fait Accompli, There was No Clear and Unmistakable Waiver.....	17
VI.	The ALJ Erred in Failing to Find that the Respondent Violated 8(a)(5) and that Respondent was Required to the Full Backpay Remedy. (Exception 13).....	18
	A. The Board Should Find the Amounts in the Specification to be Owed, Plus Any Amounts that Accrue After the Decision....	19
VII..	Interest on the Monetary Award Should Be Compounded on a Quarterly Basis....	20
	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....	20
	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.....	21
	1. The Board Should Follow IRS Policy and Compound Interest on Monetary Remedies.....	22
	2. The Board Should Follow the Practice of Federal Courts Applying Employment Discrimination Law, of the U.S. Department of Labor and OPM and Award Compound Interest on Monetary Remedies.....	23
	C. The Arguments Made by Opponents of Compound Interest are Without Merit.....	25
	D. The Board Should Compound Interest on a Quarterly Basis 27	
VIII.	Conclusion.....	29

## Table of Authorities

### Cases

26 U.S.C. § 6621(a) (2000) .....	22
26 U.S.C. § 6622(a).....	22, 27
42 U.S.C. §§ 2000e to 2000e-17 (2000) .....	22
5 C.F.R. § 550.806(a)(1), (e) (2006); 53 Fed. Reg. 45,885 (1988).....	24
5 U.S.C. § 5596(b)(1), (b)(2)(B)(iii) (2000) .....	24
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405, 419 (1975) .....	23
<i>Amtel Group of Florida, Inc. v. Yongmahapakorn</i> , 2006 WL 2821406, at *9 .....	24, 27
<i>AT&amp;T Corp.</i> 337 NLRB 689 (2002) .....	16
<i>Bergmann v. Department of Justice</i> , 2003 WL 1955193, at *3 (EEOC Federal Section Decision dated April 21, 2003) .....	24
<i>Beverly Health &amp; Rehabilitation Services</i> , 335 NLRB 635, 636 (2001).....	17
<i>Caltex Corp.</i> , 322 NLRB 977 (1997) enfd. 144 F.3d 904 (6 <sup>th</sup> Cir 1998).....	10
<i>Canterbury Gardens</i> 238 NLRB 864 (1978) .....	10
<i>Cherokee Marine Terminal</i> , 287 NLRB 1080, 1081 (1988).....	26
<i>Ciba-Geigy Pharmaceuticals</i> , 264 NLRB 1013 (1982).....	8, 16, 17
<i>Cobb Mechanical Contractors</i> 333 NLRB 1168, 1177 (2001).....	18
<i>Cook Dupage Transportation Company</i> 354 NLRB No. 31 (2009).....	9
<i>Cooper v. Paychex, Inc.</i> , 960 F. Supp. 966, 975 (E.D. Va. 1997) .....	23
<i>Davis v. Kansas City Housing Authority</i> , 822 F. Supp. 609, 616-617 (W.D. Mo. 1993). 23	
<i>Doyle v. Hydro Nuclear Services</i> , 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000).....	24, 27
<i>Doyle v. U.S. Secretary of Labor</i> , 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002) .....	24
<i>EEOC v. Guardian Pools, Inc.</i> , 828 F.2d 1507, 1512 (11th Cir. 1987).....	23
<i>EEOC v. Kentucky State Police Department</i> , 80 F.3d 1086, 1098 (6th Cir. 1996) .....	25
<i>Florida Steel Corp.</i> , 231 NLRB 651, 651 (1977) .....	20
<i>Freeman Decorating Co.</i> , 288 NLRB 1235, 1235 fn.2 (1988).....	20
<i>Gannett Co.</i> , 333 NLRB 355 (2001) .....	8
<i>Isis Plumbing &amp; Heating Co.</i> 138 NLRB 716, 720-721 (1962) .....	21, 24
<i>J.H. Rutter-Rex Mfg.</i> 86 NLRB 470 (1949) .....	10
<i>Luciano v. Olsten Corp.</i> , 912 F. Supp. 663, 676 (E.D.N.Y. 1996) .....	23
<i>Michigan Ladder</i> 286 NLRB 21 (1987).....	14, 15
<i>New Horizons for the Retarded, Inc.</i> 283 NLRB 1173, 1173 (1987) .....	21, 28
<i>NLRB v. Chrystal Springs Shirt Corp.</i> , 637 F.2d 399, 402 (5 <sup>th</sup> Cir. 1981) .....	16
<i>O'Quinn v. New York University Medical Center</i> , 933 F. Supp. at 345-346.....	23
<i>Paint American Services, Inc.</i> , 353 NLRB No. 100, fn. 8 (2009).....	18
<i>Patterson-Stevens, Inc.</i> , 325 NLRB 1072 (1998).....	18
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177, 194, 197-198 (1941) .....	20
<i>Pontiac Osteopathic Hospital</i> 336 NLRB 1081 (2001).....	8, 9, 11-13, 16
<i>Provena Hospitals d/b/a Provena St. Joseph Medical Center</i> , 350 NLRB 808 (2007) ...	17

<i>Republic Steel Corp. v. NLRB</i> , 311 U.S. 7, 10 (1940) .....	20, 25
<i>Rogers v. Fansteel, Inc.</i> , 533 F. Supp. 100, 102 (E.D. Mich. 1981).....	25
<i>Rush v. Scott Specialty Gases, Inc.</i> , 940 F. Supp. 814, 818 (E.D. Pa. 1996).....	23
<i>Russo v. Unger</i> , 845 F. Supp. 124, 127 (S.D.N.Y. 1994) .....	26, 27
<i>S&amp;I Transportation Inc.</i> 311 NLRB 1388, 1390 (1993):.....	9, 15
S. Rep. No. 97-494(I), at 305 (1982), <u>reprinted in</u> 1982 U.S.C.C.A.N. 781, 1047 ...	22, 27
<i>Sands v. Runyon</i> , 28 F.3d 1323, 1328 (2d Cir. 1994) .....	25
<i>Saulpaugh v. Monroe Community Hosp.</i> , 4 F.3d 134, 145 (2d Cir. 1993) .....	22, 25
<i>Shane Steel Processing, Inc.</i> , 353 NLRB No.59 (2008) .....	19
<i>UAW Daimler Chrysler National Training Center</i> 341 NLRB 431 (2004) 8, 10, 11, 12, 15	

I. Facts

Respondent is a Maryland corporation that provides security services for federal buildings throughout the United States<sup>1</sup>. (ALJD 2, line 31) At the relevant time period, it provided security services for several such buildings in the state of Michigan, including the Hart-Inouye-Dole Center in Battle Creek, Michigan. (ALJD 2, line 33) Respondent was contracted through Federal Protective Services, a subsidiary of the United States Department of Homeland Security<sup>2</sup>. (ALJD 2, line 36)

There are approximately 37 guards who work for Respondent at the Battle Creek facility, and those employees, as well as about 13 other guards at other locations, are all part of a bargaining unit represented by the Union. (ALJD 3, line 8) The Union has represented the employees in the unit since about 2004, and negotiated a contract with the Respondent in 2005 which was effective until 2008. (ALJD 3, lines 5-13) The contract contained language that codified the Respondent's responsibility to notify and bargain with the Union over any changes to working conditions, but limited that statement by another paragraph that obviated the Respondent's duty to engage in decisional bargaining over any decisions that were mandated by the FPS. (ALJD 3, lines 18-30)

The Battle Creek facility and most of the other facilities in Western and Northern Michigan are overseen in their daily operations by Captain Umbarger. Umbarger reports to his supervisor Sidney Bogan, a contract manager who works in the Detroit office. Finally, the company's human resource manager is Donna Snowden, who works in the corporate offices in Maryland. (ALJD 4, line 106)

During the relevant time period, the Union President was William Hopkins, who worked at the Battle Creek facility and the Union Vice President was Dennis O'Brien, who worked in the Lansing facility. The Chief Steward at the time was Jeff Miller, who also worked in the Battle Creek facility. (ALJD 4, line 8-14)

The CBA mandated that employees receive breaks, but neither specified how long the breaks are or whether those breaks are paid.<sup>3</sup> (GC 3) Before September 2007<sup>4</sup>, all bargaining

---

<sup>1</sup>References to the Administrative Law Judge will be "ALJ" and cites to the ALJ's decision will be "ALJD page, line". General Counsel and Respondent Exhibits will be references as "GC#" and "R#" respectively. All transcript citations will be "T. page number".

<sup>2</sup> Federal Protective Services will be referred to as "FPS".

<sup>3</sup> GC 2, Article XIII, GC3, Article XIV, "Subject to contractual requirements or rules or scheduling needs, employees will receive breaks, as available."

unit employees were paid for a 30 minute lunch break. (T. 43, 67, 194, ALJD 5, line 14) After that date, all employees except the employees working the day shift at the Battle Creek center have continued to receive pay for their lunch breaks. (T. 43, 61, 67, 194)

Before September, each of the three main entrances to the Battle Creek facility was manned by multiple guards: two were manned by two guards each and one was manned by three guards. (ALJD 2, 43, T. 135) Accordingly, each guard at the main entrances was able to relieve the other for a lunch break without the need to utilize a rove guard. (ALJD 5, lines 14-24, T. 153, 238) In the summer of 2007, there was some indication that the FPS was going to eliminate the redundant posts on the main entrances, but nothing official was decided or communicated to Respondent until September. (ALJD 5, lines 6-13, T. 138)

On September 18, the FPS, and the other tenants of the facility decided to request that Respondent eliminate the additional guards at those three posts - meaning essentially that they would no longer pay Respondent for those additional guards. (ALJD 5, line 14, R. 4, T. 49, 134, 135, 155) The request was communicated to Capt. Umbarger some time between on about September 20.<sup>5</sup> (ALJD 5, line 16 at fn. 9, T. 136) Nothing in the request from FPS made any mention of lunch breaks, pay or any issues other than the elimination of the posts. (R. 4)

After hearing about the decision, Respondent became aware that it would no longer be reimbursed for those additional guards, and as a result would have to utilize, *and pay* rove guards to relieve those posts for lunch. (ALJD 5, lines 25 -34, GC 16, T. 232, 233) Umbarger first contacted FPS to attempt to work out an assignment schedule that would both honor the FPS contract and allow the unit employees to remain receiving payment for lunches. (ALJD 5, line 34) Umbarger ultimately decided to confer with Bogan at the Detroit facility and determine how they handled a similar situation. (ALJD 6, line 1, GC 16, T. 152) The managers in Detroit informed Umbarger that they had simply eliminated the lunch pay for employees to make up for any costs that would otherwise be lost by utilizing a roving guard. (ALJD 6, line 7, T. 152) While Umbarger's testimony was not clear as to when the conversations with management officials in Detroit took place, he states they were within "probably a few days" of the initial

---

<sup>4</sup> All dates are 2007 unless otherwise indicated.

<sup>5</sup> Umbarger testified that he received word of the decision "couple of days...within a week" after the official decision was made on September 18. (T. 136) Given the paucity of his memory, the totality of the circumstances must be reviewed when determining an appropriate time line. Given that the uncontested testimony of Union President Bill Hopkins shows that Umbarger told Hopkins about the decision on September 20, Umbarger would have had to have received notice before that date. (T. 49, 136)

announcement<sup>6</sup>. (T. 136) Umbarger also consulted with deputy contract manager in Detroit Ky Mason and with HR Director Snowden about the change. It was decided at that time to eliminate the pay for the first shift guards at Battle Creek as they had done in Detroit. (ALJD 6, line 6)

On September 20, Umbarger communicated his decision to the Union President, Bill Hopkins. (ALJD 6, line 6, T. 49) Umbarger told Hopkins that FPS had decided to eliminate the three posts in question and that the day shift guards would no longer be paid for their lunch breaks. (ALJD 6, line 11, T. 49) Hopkins immediately protested, and stated that the Union had never been given an opportunity to bargain over the change. (T. 49) Umbarger then stated to Hopkins that it “was FPS’s decision and there’s nothing you could (sic) do about it.” (ALJD 6, lines 14-18, T. 49-50)

Despite Umbarger’s statement of futility, Hopkins submitted a written demand for bargaining to Umbarger the very next day, Friday, September 21. (ALJD 6, line 22, GC 5, T. 50, 138) Umbarger didn’t respond other than to say that it was “FPS’s decision”. (ALJD 6, line 37, T. 51) The demand for bargaining specifically quoted the contract, and asked if there were other options, whether the previously bid upon posts should be re-bid or if the company could absorb any of the costs. (ALJD 6, line 31) At the end of the request, Hopkins specifically stated that he awaited a reply from the company. (ALJD 6, line 34, GC 5)

Umbarger never contacted Hopkins for bargaining. (T. 52-53) In fact, he did not contact anyone from the Union before he contacted HR Director Snowden in the corporate office. (T. 53, 162, GC 16) On September 24, the Monday following Hopkins’ demand for bargaining, Umbarger outlined his new plan for eliminating lunch periods in an email to Snowden. (GC 16) Specifically, Umbarger stated “I have developed a new procedure for our guards working at the Fed. Building in Battle Creek which mirrors the Detroit procedures for lunch breaks”. (GC 16) He went on to say, “the attached procedure is the outcome that I *will* institute” (emphasis added). Umbarger did mention that he had been contacted by the Union President, and that he “had not been able to exchange any information with the Union as of yet, but will be *informing the Union President today of what this new procedure consists of.* (sic)” (emphasis added) (GC 16)

Snowden replied the same day in an email, indicating that “we notify the Union as a courtesy; however, they cannot dictate to the company how we run our business.” (GC 16) She

---

<sup>6</sup> The timing shows that Umbarger spoke with Detroit *before* he spoke with Hopkins, as he admits that he got the idea for the new policy that eliminated the pay for lunch breaks from Detroit management personnel. (T. 152-153)

went on to explain that the Union "...cannot impose a financial burden on the company by requesting we provide paid lunch breaks to the guards..." (GC 16)

Umbarger stated in his email to Snowden that he would inform the *Union President* of the new procedure but failed to do so apart from the Notice he posted in the break room for all employees on September 24. (GC 16, GC 6) The Notice stated that Respondent "will be instituting a change in procedure" and that day shift guards would have to sign in and out for lunch – meaning that they would no longer get paid for that time. (GC 6) Umbarger also posted the new schedule for the roving guards so that all employees would know who was being relieved by whom and when. (GC 6) The posting in the break room was the first time Hopkins was informed of the new procedure, when it would take effect and how it would be implemented. (T. 51, 52) No member of management consulted with, or spoke to him or any other union official before this date. (T. 52)

At some point, the date of which is disputed, Union Vice President O'Brien, who works at the Lansing facility, called Umbarger to find out more about the new policy. (ALJD 7, line 24, T. 178) Umbarger informed O'Brien that he had tried to come up with other ideas, but that the lunch breaks for the day shift employees at Battle Creek would no longer be paid. (ALJD 7, 28-31, T. 141-142, 164, 179) Umbarger informed O'Brien that the decision had already been made and that the plan he explained was "what Knight was going to do". (ALJD 8, line 13, T. 180) He explained further that Respondent did not want to pay extra money to have a roving guard relieve the eliminated posts, so the only solution was to cut the pay of those employees. (T. 191, 193)

O'Brien immediately followed up on the issue with Snowden.<sup>7</sup> (ALJD 8, line 23, T. 181, 207) O'Brien called Snowden shortly after he spoke with Umbarger and told her that he believed that the paid lunch breaks were a matter of past practice. (ALJD 8, line 24, T. 182, 193) Snowden, told him that when the company has to pay out of its own pocket to cover the costs of the lunch breaks, past practice no longer applied. (ALJD 8, line 25, T. 181) O'Brien indicated that he "understood that"(T. 182).

On Friday of that same week, September 28, Umbarger approached Hopkins about the lunch break issue for the first time. (ALJD 9, line 8, T. 53) Umbarger announced to Hopkins that

---

<sup>7</sup> O'Brien's testimony directly contradicts Snowden's about the purpose of the call. Snowden indicates that O'Brien, despite not having any contact with her since February of that year, merely called to tell her how satisfied he was with his conversation with Umbarger. (T. 207, 209). However, O'Brien indicates that he followed up with Snowden to discuss past practice. (T.182).

the matter had been “negotiated” with O’Brien and that everything was “status quo” in that employees on day shift would not be paid for their lunches. (ALJD 9, line 11, T. 53) Hopkins protested that nobody had approached him or spoken to him about the issue. Umbarger reiterated that there was “nothing he could do about it.” (ALJD 9, line 13, T.53)

The following Monday, October 1, the new procedure was officially implemented, meaning that day shift guards no longer received pay for their lunch breaks. (ALJD 9, line 18, GC 6, T. 143) The Union waited until the change was reflected in the paychecks of the unit employees, and filed a grievance with Respondent on October 26. (GC 7) In it, the Union grieved the change and the fact that it was not negotiated with the union. (GC 7) In his 10/31 response, Umbarger indicates that the union was “notified” of the change before it became effective, but did not state that the matter had been negotiated fully or that any agreement had been reached. (GC 8) Umbarger denied it as untimely, and forwarded it to the next step. (GC 8)

Respondent continued to maintain its position that the grievance was untimely at the next two steps. (GC 9-15) Only on January 15 did the Respondent indicate that it considered the brief, informational conversations between O’Brien and Umbarger to have been “negotiations” that rendered the Union’s grievance moot. (ALJD 9, line 29, GC 14)

## II. The ALJ Made Several Factual Findings That are Not Supported by the Record Evidence (Exceptions 1, 2, 3)

### A. *O’Brien was Not the Main Contact for the Union in Dealing with the Respondent (Exception 1)*

While O’Brien testified that in early 2007 he informed HR Director Snowden that he would be the speaking on behalf of the Union, his statement to that effect and the ALJ’s reliance on it is not supported by the evidence. (ALJD 4, line 29) The record evidence shows that O’Brien had not, as Vice President of the Union, taken any part in contract negotiations, filed or handled any grievances or discussed any workplace issues with Snowden. (T 188, 189) In fact, there had been no contact between O’Brien and Snowden between early 2007 and the phone call during the week of September 25. (T. 207-209) Umbarger’s own testimony indicates that as the Captain in charge of day-to-day operations for the unit employees, that he had dealt with the former Union President Kukla, President Hopkins, various stewards as well as O’Brien when

dealing with Union issues. (T. 139-140) He also went on to say that he had spoken to O'Brien about union issues only "on a few occasions". (T. 140)

While the ALJ made much of the fact that Hopkins admitted that he was somewhat of a "figurehead", Umbarger's own testimony shows that he had dealt with Hopkins on Union issues on more than one occasion. (T. 138-140) Furthermore, Umbarger *went to Hopkins* when he informed the Union of the change to lunch procedures, not O'Brien. (ALJD 6, line 9) He accepted the demand for bargaining from Hopkins and further referenced Hopkins as the contact person in his September 24 email to Snowden. (ALJD 6, line 22, GC 16) At no time did Umbarger or Snowden indicate that it was unusual for Hopkins to be the "face of the Union" or that they should, instead, deal with O'Brien.

In short, the preponderance of the evidence establishes that while O'Brien was a union officer, he was in no way the spokesman for the Union or was somehow the main Union contact to negotiate this dispute. In fact, the evidence shows that it was Hopkins who was regarded as the go-to Union representative by Umbarger.

B. *The Evidence Shows that Umbarger Posted the Notice of the Change to Employees on Either September 24 or September 25 (Exception 3)*

The ALJ found decisively that Umbarger posted the notice to employees, indicating that the first shift employees would lose their lunch pay, on September 25. (ALJD 8, line 45) However, that finding is not supported by the evidence. The notice itself is dated September 24, which indicates that it was prepared on that date. (GC 6) Furthermore, Umbarger's testimony is not definitive. He indicates that he "may have" posted it on September 25. (T. 143) Given that he is not sure in his testimony and it is dated September 24, it was improper for the ALJ to make a definitive finding that the notice was posted on September 25.

C. *The Evidence Shows that the Conversation Between Umbarger and O'Brien Could Not Have Taken Place Before September 25 (Exception 2)*

Neither Umbarger nor O'Brien was able to pin-point when their conversation took place, but the circumstantial evidence is clear that it took place after September 24, when the

employees were given official notification of the change.<sup>8</sup> (T. 141, 181) The documentary evidence, coupled with Umbarger's testimony shows that Umbarger had made the decision and prepared the notice on September 24. (GC 6, T. 143) GC 16 also shows that he emailed HR Director Snowden about the policy that same day. The ALJ correctly found that as Umbarger did not mention the conversation with O'Brien (and instead referenced how he intended to tell *Hopkins* about the change) he had not yet spoken with him at the time of the drafting of the message. (ALJD 17, line 25) What the ALJ did not consider or find, was that at 4:29 p.m., ostensibly the end of the workday, Snowden replied that they only had to notify the union as a courtesy. (GC 16) She made no mention of any conversation with O'Brien. She did not state that the matter was negotiated or that the Union was fully on board. In fact, at the end of that work day, Snowden appeared to be mostly unaware of the situation at all. It strains credulity to think that she would email Umbarger about the issue and not mention that she spoke to O'Brien. And, given that O'Brien's credited testimony indicates that he called her *immediately* after he spoke to Umbarger, it is clear he had not spoken to either individual at that time that day.(ALJD 8, line 22)

What is even more telling is that O'Brien's credited testimony indicates that he also attended a Union Executive Board meeting that same day. (ALJD 8, line 33) Again, it is not logical to make the finding that, at some point *after* 4:29 p.m., O'Brien had an hour long conversation with Umbarger, spoke with Snowden and THEN made the hour long trip to the Battle Creek facility from Lansing. The earliest this conversation could have taken place is September 25, either the day after or the day of the posting to employees. What is clear is that the notice had already been prepared and finalized by Umbarger on September 24, before he spoke with any union official.

Lastly, Umbarger did not notify Hopkins of the conversation until September 28. (ALJD 9, line 8) If Umbarger knew Hopkins was the point person and instead bargained the issue with O'Brien, why would he wait four days to speak to Hopkins? Why would he not immediately inform Hopkins of the conversation and put the issue to bed once and for all? A finding that the conversation took place on September 24 is just not supported by the evidence. The evidence

---

<sup>8</sup> O'Brien thinks the conversation took place around September 15, which is not possible as the Union was not informed of the change until September 20. Umbarger puts the conversation "within a week or so of that[FPS notifying him of the change]...a few days a week." (T. 141, 181)

clearly shows that the conversation between O'Brien and Umbarger had to have taken place sometime between September 25 and 28.

III. The Respondent's Decision to Eliminate Unit Employees' Lunch Pay was a *fait accompli*, and the ALJ's Findings to the Contrary Are in Error (Exception 4)

The ALJ erred in finding that "because the company provided adequate notice directly to the Union prior to implementation of the change, and engaged in discussions with the Union about that policy to the extent of soliciting suggestions from the union, I conclude...the circumstances...fail to establish the company violated Section 8(a)(5) of the Act. (ALJD 13, lines 11-16) The ALJ improperly relied on timing elements and failed to consider the only theory submitted by the Counsel for the General Counsel, which was that the notice to the Union was legally insufficient due to the fact that the Respondent had no intention of engaging in good faith bargaining with the Union on the subject. See, *Pontiac Osteopathic Hospital*, 336 NLRB 1081 (2001), *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013 (1982). Instead, the Respondent made a decision without the input of the Union and consistently displayed a fixed attitude when informing the Union of the change. There is no evidence that it ever intended to bargain with the Union in good faith and as such, the decision was presented to the Union as a *fait accompli* and a violation of Section 8(a)(5). *Pontiac Osteopathic Hospital*, supra.

A. *ALJ Erred in Finding that The Respondent Did Not Announce a Fait Accompli to the Union Because it Announced the Change Ten Days Before Implementation. (Exception 6)*

The ALJ placed much emphasis on the fact that the Respondent notified the Union of the elimination of the lunch wages ten days before the change was implemented. (ALJD 14, lines 9-16; ALJD 16, lines 12-13) What the ALJ failed to consider and failed to find is that despite the timing, the Respondent had already decided on a course of action and had no intent of altering that position regardless of the Union's attempts to bargain the issue.

The Counsel for the General Counsel conceded that the timing of the notice was adequate. The argument was not one of timing, but was one of intent. As stated in *Gannett Co.*, 333 NLRB 355 (2001) citing *Ciba-Geigy Pharmaceutical*, 264 NLRB 1013, 1017 (1982), "Where notice is given shortly prior to implementation of the change or *because of a lack of intent to alter its position*, then the notice is merely informational about a *fait accompli* and fails

to satisfy the requirements of the Act.” (emphasis added) The ALJ relied on the first portion of the test without an adequate assessment of the second.

Furthermore, the ALJ seems to suggest by his reasoning that if the notice is adequate from a timing perspective, it can never be a *fait accompli*. (ALJD 16, line 47 fn. 28) This is also contrary to Board precedent. In *UAW-Daimler Chrysler National Training Center*, 341 NLRB 431, 433 (2004), the Board found that, “announcement of a unilateral change may constitute a *fait accompli* that will not extinguish the union’s bargaining rights even when the change is to be effectuated several weeks in the future.” *Id.* at 433.

In the present case, the ten day lapse does not outweigh the other objective evidence that the Respondent lacked any intent to bargain in good faith. The record is rife with evidence that, *after the Union’s timely request to bargain*, Respondent made a final decision and announced it to the employees without so much as a telephone call to the Union. The preponderance of the evidence clearly shows that the ALJ erred in giving the timing aspect of the evidence paramount weight over the other, more persuasive evidence to the contrary.

B. *ALJ Erred in Finding that the Respondent’s Actions were Presumed to Be Lawful Because the Union was Notified Before the Unit Employees. (Exceptions 7)*

The ALJ also found that the fact that the Respondent notified the Union of the change before it announced it directly to the unit employees to be a “significant” factor in determining the Respondent’s state of mind. (ALJD 15, line 22) The ALJ fails to address, cite or consider the multitude of Board cases that have found violations, particularly in regard to the *fait accompli* theory, where the Union was notified first. See, *Pontiac Osteopathic Hospital*, supra *UAW Daimler Chrysler National Training Center*, supra, *S&I Transportation, Inc.* 311 NLRB 1388 (1993), *Michigan Ladder Company* 286 NLRB 21 (1987), *Cook Dupage Transportation Company* 354 NLRB No. 31 (2009)

It is not always the timing or the order in which the notice is given that determines whether a *fait accompli* has occurred, but instead the intent of the Employer when the announcement is made. *UAW Daimler Chrysler National Training Center* supra. The intent of the Respondent is shown by its actions in response to the demand for bargaining, the language it uses in communicating the decision to the union and to the employees, as well as any other

evidence that underlies its own perception of its duties to the union. *Id.* In the present case, the order of the notice is outweighed by the voluminous nature of the evidence that shows the Respondent's clear lack of intent to bargain in good faith with the Union on this matter.

C. *ALJ Failed to Consider Objective Evidence that the Respondent Never Contacted the Union for Bargaining Despite Its Timely Request (Exceptions 5, 8)*

The Board has consistently found that it is the Respondent's obligation to respond positively and engage with the Union when presented with a request for bargaining. *J.H. Rutter-Rex Mfg.* 86 NLRB 470 (1949), *Caltex Corp.*, 322 NLRB 977 (1997) enfd. 144 F.3d 904 (6<sup>th</sup> Cir 1998). In this case, the evidence showed that even after the Union's timely request for bargaining, no member of management ever contacted any Union official about the change until September 28, days after the decision had been made and announced to employees. (T. 52, 162, 178) Respondent's failure to respond to the Union at any time when it was formulating its plan, in the face of a request to bargain is clear evidence that it lacked any intent to bargain with the union and shows that the decision was nothing more than a *fait accompli*. See, *UAW Daimler Chrysler National Training Center* 341 NLRB at 433, *Canterbury Gardens* 238 NLRB 864 (1978).

In fact, after Hopkins made the request for bargaining, Umbarger contacted FPS, the Detroit office and the HR department in Maryland. (ALJD 5, line 37, GC 16) The evidence indicates that he took the issue seriously and intended to formulate a plan as quickly as possible. However, in his formulations, he failed to consult the Union. By September 24, Umbarger had already had the plan approved by the HR department, written a new policy and changed the first shift rove guard schedules without ever having consulted with the Union. (ALJD 5, line 37, T. 143)

The ALJ made much of the email between Snowden and Umbarger as evidence that Umbarger was aware of the Union's request and intended to bargain with the Union. (ALJD 18, 16) Contrary to that finding, the email exhibits absolutely no intention on the part of Umbarger or Snowden to ever bargain with the Union. (GC 16) The only reference made to the Union is when Umbarger acknowledges that the Union President (Hopkins) requested bargaining, that he had not given him any information on the change. The email then states that Umbarger intended

to inform Hopkins of what “the changes consist of.” (sic). It did not say that Umbarger intended on bargaining with Hopkins or any other Union official. (GC 16)

More starkly, the ALJ failed to consider or even acknowledge Snowden’s reply to Umbarger. Snowden clearly states the Respondent’s intention toward the Union when she informs Umbarger that “we only notify the Union as a courtesy.” (GC 16) She goes on to state that the Union cannot “request” that the Respondent continue to pay for the lunch breaks. Such an unambiguous statement demonstrates the Respondent’s intent. It did not believe it had to engage in any bargaining with the Union. It did not even give the Union any information or input on the change before it made the decision. Contrary to the ALJ’s finding, this email is clear evidence that the Respondent never contacted the Union and never had any intent of doing so before announcing or implementing the change.

D. *The Use of Unequivocal Language is Objective Evidence in Determining the Respondent's Intent Regarding Bargaining. The ALJ Erred in Finding that the Respondent was Privileged to Announce a Final Decision to the Union After a Request to Bargain Had Been Made (Exception 9)*

The ALJ found that “I have no doubt that he [Umbarger] presented the matter as having already been decided by the company. He did nothing improper by doing so.” (ALJD 16, line 30) This statement is in opposition to long standing Board precedent. The Board has held in several cases that the use of unequivocal expressions of futility or finality are evidence of the Respondent’s lack of intent to bargain and support the finding of a *fait accompli*. *Pontiac Osteopathic Hospital* 336 NLRB 1081 (2001), *UAW Daimler Chrysler National Training Center* 341 NLRB 431 (2004).

Specifically, in *Pontiac Osteopathic Hospital*, supra, the Board found that the Employer’s change to working conditions was a *fait accompli* both because the decision was made before it notified the Union about the change, and because it used definitive language in its communications.<sup>9</sup> Key to that case was the fact that the Respondent told the Union and the employees that the change “will be implemented”. Supra at 1024.

Furthermore, the Board found a violation based on the *fait accompli* theory in *UAW Chrysler National Training Center*, supra. In that case, the Board found that the Respondent violated 8(a)(5) by laying off an individual and announcing the layoff to the Union as “a done deal”. In response to the Union’s inquiry on the layoff, the Respondent stated that he “could not help” the union and that there was “nothing to talk about”.<sup>10</sup> In that case, the Board found the statements to be “critical” in finding that the Respondent had no intention of bargaining with the Union. *UAW Daimler Chrysler Training Center* 341 NLRB at 433.

Both cases are analogous to the current case. Here, Umbarger told Hopkins, both on September 20 and on September 28, that there was nothing that could be done about the change in pay. (T. 49, 53) While the language Umbarger used needs no interpretation, it is important to note that he made both statements after Hopkins expressed his frustration with the fact that

---

<sup>9</sup> Facts in *Pontiac Osteopathic Hospital*, supra, are similar to the current case in regard to the language: “First, the Respondent desired a uniform PTO policy for all employees, and the decision to make the changes applicable to all employees occurred before Kaminski mailed his December 8, 1999 letter... This notice stated that the changes “will be implemented” (emphasis supplied), such language again showing the Respondent's intent to effect the change without bargaining.” Supra at 1024.

<sup>10</sup> It is interesting to note that in both *UAW Daimler Chrysler National Training Center*, supra and *Pontiac Osteopathic Hospital* supra, the Board found that the notice was given in a timely manner. It was the intent of the Respondent that was the basis for the violation.

management had never contacted the Union to bargain about the issue. (T. 48, 49, 53) Umbarger's statements were an expression of a fixed attitude and a signal to the union that there was nothing it could do about the change, much as in both *Pontiac Osteopathic Hospital*, supra and *UAW Daimler Chrysler Training Center*, supra.

This use of unequivocal statements of finality is also evident in Umbarger and Snowden's communications in the September 24 email regarding the new procedure. Umbarger informed Snowden that he "had developed a procedure" based on his conversations with the Detroit office and that it was the plan that he "*will institute.*" (GC 16) (emphasis added)

Snowden's response conveys Respondent's intentions even more starkly. She clearly states that the Respondent only notified the Union "as a courtesy". (GC 16) She did not reference the Union's bargaining demand at all, other than to state that the Union cannot dictate how the business is run or make them pay for lunch breaks. (GC 16) Neither individual discussed the need or intention to bargain with the Union over the change. (GC 16) The correspondence clearly shows that Umbarger's decision was final and there was nothing in Snowden's response to indicate any willingness to alter the course of events or to bargain with the Union.

This lack of good faith regarding bargaining with the Union is further reflected in the language and manner of the September 24 posting to employees.<sup>11</sup> (GC 6) The notice stated, "This Procedure *will* supersede all previous procedures regarding lunch breaks" and "We *will* be instituting a change in procedure for providing guard lunch breaks." (GC 6)(emphasis added) It also attached a new schedule for the rove guards, which means that schedules had already been altered based on Umbarger's decision. (GC 6) It was a clear and direct indication to employees that the lunch break procedure was changing and that it was a 'done deal'.

Umbarger also expressed futility directly in his conversation with O'Brien. Umbarger explained the new procedure to O'Brien and then said that the decision had already been made and it was "what Knight was going to do." (T. 180, 190). He then indicated, two separate times that the decision had already been made by the company. (T. 197) This language mirrors that used in *Pontiac Osteopathic Hospital*, supra, and has been clearly found by the Board to be an indication of a lack of intent to bargain.

---

<sup>11</sup> The language of this notice is particularly unequivocal given that the Respondent had, in the past posted notices to employees discussing possible changes, or information that had yet to be finalized. See, GC 4

Despite the above cases, the ALJ cited *Bell Atlantic Corp.* 336 NLRB 107 (2001) to stand for the proposition that using “positive language in presenting [a proposal] does not constitute an indication that a request for bargaining would be futile.” (ALJD 16, lines 42-45) He further states that it would be difficult for the Union to present a proposal if the Respondent’s proposals were not stated in a positive fashion. However, the case cited is clearly distinguishable. (ALJD 16, line 48 fn. 28)

In the present case, the Respondent did more than use positive language when formulating its proposal. It never made a proposal. It made an *announcement* that the plan was to eliminate the pay for the lunch hours. It was not informing the union of what it was considering of what it would like to have happen, it informed the Union that the pay was going to be eliminated and there was *nothing the Union could do about it*. Furthermore, in *Bell Atlantic Corp.*, supra, the Union failed to ever request bargaining. There, the Employer gave the Union six months notice to formulate a proposal and even indicated a willingness to bargain after the Union failed to request it. *Id.* In the present case, the Union made a prompt and unequivocal demand for bargaining that the Respondent blatantly ignored. The preponderance of the evidence shows that these multiple statements are not merely “positive language” but are clear evidence that the Respondent never intended to bargain with the union over this change.

E. *ALJ Failed to Properly Consider Evidence that the Respondent Misled the Union Regarding Who Made the Decision to Eliminate the Lunch Break Wages (Exception 10)*

The ALJ further failed to consider or find that Umbarger misled the Union as to who made the decision. (ALJD 6, line 16, T. 179) Misleading the Union on an issue that the Respondent is proposing to change is evidence of bad faith. *Michigan Ladder Company*, 286 NLRB at 23, fn. 4.

Hopkins’ uncontested testimony indicates that Umbarger informed him that FPS had made the decision both to eliminate the posts in question and to eliminate pay for the lunch breaks. ( T. 49) The record evidence clearly shows that the decision to eliminate the pay for lunch breaks was Respondent’s and was not mandated by FPS or any governmental agency. (R 4, T. 233) Umbarger’s statements regarding FPS conveyed something very important to the Union--Article XXIX of the collective bargaining agreement in effect at that time privileged the

Respondent to make changes, without any decisional bargaining with the Union, regarding anything that was *mandated* by the Government.<sup>12</sup> (GC 3) As such, had the elimination of the lunch break pay been government mandated, the Union would have been estopped from bargaining about anything but the effects of the change. But that was not the case. The misinformation that FPS had mandated the decision reinforced the Union’s mistaken belief, based on Umbarger’s representations, that its hands were mostly tied regarding bargaining. The ALJ failed to consider this evidence and ignored the objective evidence that the Respondent had no intention of bargaining with the Union in good faith over the elimination of pay for the employees.

IV. Because the Conversation Between O’Brien and Umbarger Occurred After the Decision was Final, It Could not Constitute Meaningful Bargaining (Exception 11)

The ALJ failed to find that the change was a *fait accompli*, not only because of the timing of the notice to the Union, but also because the Respondent “engaged in discussions with the Union about that policy to the extent of soliciting suggestions from the union”. (ALJD 13, line 13) The ALJ erred in finding this as a basis for dismissing the Complaint primarily because meaningful bargaining cannot take place after the decision has been made and particularly when the Respondent has misled the Union and exhibited a consistent lack of intent to bargain in good faith. *UAW Daimler Chrysler National Training Center* 341 NLRB at 344.

The ALJ found that the conversations between O’Brien, Umbarger and Snowden constituted meaningful bargaining, primarily because Umbarger explained his thought process and because Umbarger asked O’Brien for suggestions. (ALJD 18, line 30) But at that point, as discussed supra, the decision had already been made and finalized. There was nothing that O’Brien could have said to change course on the matter, as it had already been decided, approved by Snowden and posted to employees – complete with a change in employee schedules. The conversation was an announcement, not a negotiation.

---

<sup>12</sup> GC2, Article XXVII (A): The Union agrees to cooperate with the company in all matters required by the United States Government and the Union recognizes that the term and conditions of the agreement are subject to certain sovereign priorities which the United States Government may exercise. The Union agrees that any actions *taken by the company pursuant to a requirement of the United States Government shall not constitute a breach of this Agreement. Nothing in this agreement shall be construed to prevent institution of any change prior to discussion with the union where immediate change is required by the US Government.* (emphasis added) The company will however upon request, bargain with the union concerning the effects of such change.

The facts are similar to those in *Michigan Ladder* 286 NLRB 21 (1987). In that case, the Respondent decided to subcontract unit work and finalized the decision before it spoke with the Union on the matter. When it did meet with the Union, it informed them that it was considering a subcontracting proposal and that it was affording the Union an opportunity “to give us their ideas before it entered into the agreement” *Id.* at 29. The Board found that due to the fact that the Respondent misled the union during the meeting and because it had already made the decision, its offer to discuss the issue was merely a ruse. *Id.* See also, *S&I Transportation Inc.* 311 NLRB 1388, 1390 (1993). (Respondent's actions merely a “ruse to give the appearance of bargaining while not doing so.”).

The present circumstances are similar. Because the conversation took place after the decision had been made O'Brien could not have effected any change, regardless of what he suggested. The fact that Umbarger asked if O'Brien had suggestions is meaningless. Umbarger admitted to O'Brien that the company had made a final decision. Those statements were buttressed by the fact that Umbarger had already announced the change to the affected unit employees. Furthermore, while Umbarger asked if there were suggestions, he had already told O'Brien that eliminating lunch pay was “what Knight was going to do.” (ALJD 8, line 14)

While O'Brien did not request *further* bargaining in that conversation, it is reasonable to assume, based on the evidence, that he would have believed that any such request would be futile. *UAW Daimler Chrysler National Training Center*, *supra* at 433. Furthermore, Umbarger's subsequent actions indicate that he understood the matter had not been concluded to the satisfaction of the Union. First, Umbarger followed up with Hopkins to let him know that the matter was taken care of by O'Brien. Hopkins indicated that he was unaware of any negotiations and that he was unhappy that he was not contacted. However, any possibility of a follow up request by Hopkins was swiftly foreclosed by Umbarger's statement to Hopkins that there was nothing else he could do. (ALJD 9, lines 8-15) Clearly the Union cannot be held to be responsible for further bargaining requests when it has been repeatedly informed that there would be no point in making one.

Because the decision was made and finalized, and because neither side offered nor discussed proposals with the intent of reaching an agreement, there was no meaningful bargaining about the elimination in lunch pay. The ALJ failed to consider the evidence and by doing so, erred in his findings.

V. Contrary to the ALJ's Finding, Record Evidence Showed that the Union Could Not and Did Not Waive Its Right to Bargain over the Change. (Exception 12)

The ALJ erred in finding that O'Brien waived the Union's right to bargaining in his conversation with Umbarger. (ALJD 20, line 27) This finding is in error primarily because a Union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*. *Pontiac Osteopathic Hospital*, supra at 1023, citing *NLRB v. Chrystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5<sup>th</sup> Cir. 1981). Notice of a *fait accompli* is not the sort of timely notice upon which the waiver defense is predicated. *Ciba-Geigy Pharmaceutical Division*, supra at 3.

The ALJ, in finding that there was a waiver, cited *AT&T Corp.* 337 NLRB 689 (2002). That case is distinguishable, primarily because in that case the Union completely failed to request bargaining, and thus waived its right to do so. In this case, the Union promptly requested bargaining and was ignored by the Respondent. By the time O'Brien contacted Umbarger, the decision had been finalized and announced to the employees. The decision was made, the die was cast, and there was nothing O'Brien could have said to change that. Because the Union cannot waive its right to bargain when presented with a *fait accompli*, the Union could not, and did not, waive its right to bargain about the change in the employees pay for lunch. *Id.*, *Ciba-Geigy Pharmaceuticals, Inc.*, supra.

A. *Assuming no Fait Accompli, There Was No Clear and Unmistakable Waiver*

Even assuming that there was no *fait accompli*, the ALJ erred in finding the conversation between O'Brien and Umbarger to be a "clear and unmistakable waiver." The clear and unmistakable waiver standard requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena Hospitals d/b/a Provena St. Joseph Medical Center*, 350 NLRB 808 (2007); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001)(A waiver of bargaining rights by a union is not to be lightly inferred, but rather must be demonstrated by the union's clear and explicit expression.)

In the present case, the Respondent did not sustain its burden that there was a clear expression of waiver made by O'Brien. The evidence, as vague as it was, showed that Umbarger explained to O'Brien what the company was going to do and asked if he had any suggestions. O'Brien had no suggestions. (ALJD 7, lines 37-40). O'Brien testified to the effect that he said he was satisfied, but never elaborated on the exact intent underlying those words. Did it mean that he was authorizing unilateral action? Did it mean that he was satisfied that Umbarger had attempted to look to other alternatives? Was he satisfied that Umbarger had explained it well? Or, as the evidence suggests, was he satisfied that the action assertedly mandated by FPS did not violate the collective bargaining agreement? The fact is, without knowing what he meant, it cannot be found that his statements were "clear and unmistakable". Quite the opposite, they were vague and subject to interpretation.

Furthermore, even looking at the extrinsic evidence, it is not clear. If O'Brien had waived his right to bargain, why did he immediately call Snowden and argue that the matter was one of past practice? (ALJD 8, line 22) While he erroneously stated that he understood her argument that past practice did not apply, he certainly said nothing that would clearly and unmistakably waive the Union's rights, particularly since past practice is a contractual argument. Furthermore, GC 14 clearly shows that, at least to the Respondent, O'Brien's statement of satisfaction applied to the collective bargaining agreement. O'Brien's direct testimony indicates that he told Snowden that he was satisfied that the action did not violate the *collective bargaining agreement*. (T. 182, 184) (emphasis added). There was not a scintilla of evidence to show that he was waiving the Union's rights under 8(a)(5). If the parties understood O'Brien's statements to apply only to the collective bargaining agreement, then obviously the parties did not both understand the nature of the waiver and agree to it on unequivocal terms. The evidence instead shows that both parties seemed to be of the understanding that it was the collective bargaining agreement that was the subject of discussion and NOT the duties and obligations under the Act. Without that understanding, there can be no waiver, and the ALJ erred in finding one.

VI. The ALJ Erred in Failing to Find that the Respondent Violated Section 8(a)(5) and that Respondent was Required to the Full Backpay Remedy. (Exception 13)

As the ALJ erred in not finding that the Respondent violated Section 8(a)(5) by unilaterally deciding to eliminate unit employees lunch pay without legally sufficient notice, he

also failed to find that the Respondent owed those employees backpay as set forth in the Compliance Specification.

A. *The Board Should Find the Amounts in the Specification to be Owed, Plus Any Amounts that Accrue After the Decision*

In a compliance hearing, the ALJ's duty is to find whether the formula used by the General Counsel in calculating the backpay owed to the discriminatees produced a reasonable approximation of the amount due. *Patterson-Stevens, Inc.*, 325 NLRB 1072 (1998). In the present circumstance, the exact amount of backpay due to each unit member, through March 31, 2009 is listed in GC 1(ff). However, as stated in the compliance specification, "back pay continues to run." (GC1(y)(II)(2)) While the ALJ can find that the amounts specifically listed are owed, he is also empowered to find that Respondent owes additional amounts that accrue between the decision and the final disposition of the remedy. See, *Paint American Services, Inc.*, 353 NLRB No. 100, fn. 8 (2009).

The issue was specifically addressed in *Cobb Mechanical Contractors* 333 NLRB 1168, 1177 (2001)<sup>13</sup>, where the ALJD, adopted by the Board found,

"Respondent owes certain net backpay...accrued during the periods computed in the compliance specification. However, payment of such net backpay amounts does not fully satisfy Respondent's obligation to make the discriminatees whole for losses they have suffered because of the unlawful discrimination. When backpay continues beyond the period computed in the specification, Respondent must pay it, as well as interest computed in accordance with the standard formula used by the Board."

Limiting backpay to the amount owed at the time of the hearing would undercut the remedial powers outlined in the Act. The Board would never be able to issue a compliance specification, even with a Board or Court order, until a discriminatee had been offered reinstatement or a change rescinded. That logic is circular – in order to issue a remedial document (the compliance specification), Respondent would have already had to have at least partially complied with its remedial requirements. Because of this inherent problem, the Board is empowered to issue a specification requesting that the ALJ find that Respondent owes a

---

<sup>13</sup>See also, *Paint America Services, Inc.*, 353 NLRB No. 100 (2009). fn. 8 reads: "The amounts specified in this Order represent the Respondents' backpay obligation as of the Board's most recent compliance specification, which covers the period from Lancaster's 2004 discharge through the first quarter of 2007. As noted in the judge's supplemental decision, the Respondents' backpay obligation continues, because none of the Respondents have offered Lancaster reinstatement."

certain amount of money up to a certain date. Any additional monies that accrue before full compliance is achieved, if not garnered voluntarily after the Board decision, can be subject to a supplemental compliance specification, if necessary. See, *Shane Steel Processing, Inc.*, 353 NLRB No.59 (2008).

VII. 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 backpay 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 backpay representing his or her lost wages. Absent an award of interest on that backpay, the discriminatee will not have been returned to the pre-unfair labor practice status quo because there is no consideration for either the discriminatees' 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,<sup>14</sup> the Board's current policy of 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.<sup>15</sup> 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.<sup>16</sup> The Board should update its policy so as to be in line with these practices.

---

<sup>14</sup> 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.

<sup>15</sup> 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).

<sup>16</sup> 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

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.* 138 NLRB 716, 720-721 (1962), it has linked that policy to the practices followed by the IRS. . 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 Co.*, 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.* 283 NLRB 1173, 1173 (1987), 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. . 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 interest on amounts owed.<sup>17</sup> 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.

---

of 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).

<sup>17</sup> In those two cases, the parties did not argue, and the Board did not address, the issue of whether the interest should be compounded.

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 backpay 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.*”<sup>18</sup> *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 (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 backpay 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 backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, “[m]aking the workers whole for

---

<sup>18</sup> 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 post judgment interest, which must be compounded pursuant to the federal post judgment 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).

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 backpay 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.<sup>19</sup> 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).

---

<sup>19</sup> 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.

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 backpay 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 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 backpay 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 backpay 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 backpay awards is necessary to make employees whole for economic losses they have suffered because of unlawful personnel actions taken against them. Backpay 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.<sup>20</sup> Rather, compound interest accounts for the true value of monies lost to a

---

<sup>20</sup> 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 backpay 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 backpay award is not paid for an additional

wronged employee during the time the backpay 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 backpay “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 (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 backpay. 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.

---

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

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 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.<sup>21</sup> 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.

<sup>21</sup> 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 backpay 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

§ 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 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.<sup>22</sup>

---

<sup>22</sup> The Board has recently issued several decisions denying a request for compound interest. See e.g., *National Fabco Mfg.*, 352 NLRB No. 37, slip op. at fn. 4 (March 17, 2008) (“Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.”) The General Counsel does not consider these decisions to be an authoritative resolution of this issue. Rather, these decisions are simply a rejection of the relief sought in these specific cases and an acknowledgement that the issue will be considered in other cases once a full Board is constituted.

VII. Conclusion and Recommended Order

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board grant the Counsel for the General Counsel's Exceptions to the Decision of the ALJ and find, based on the record evidence that the Respondent failed to bargain in good faith with the Union by presenting it with a *fait accompli* regarding the elimination of lunch break pay. The Respondent never intended to bargain in good faith, and unilaterally made the decision to cut the pay of many of the represented employees. As such the Respondent should be ordered to cease and desist and to make all affected employees whole for their lost wages as outlined in the Compliance Specification and in the attached Proposed Order.

Respectfully submitted on this 27<sup>th</sup> Day of July 2009,

---

Colleen Carol  
Counsel for the General Counsel  
National Labor Relations Board  
Region 7 – Resident Office  
82 Ionia NW, Room 330  
Grand Rapids, MI 49453  
Tx: 616-456-2840  
Fax: 616-456-2596  
[Colleen.Carol@nrlrb.gov](mailto:Colleen.Carol@nrlrb.gov)

Attachment



# NOTICE TO EMPLOYEES

**POSTED PURSUANT TO A SETTLEMENT AGREEMENT  
APPROVED BY A REGIONAL DIRECTOR OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT**

We are posting this Notice to inform you of your rights guaranteed by the National Labor Relations Act, and we give you these assurances:

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** refuse to bargain collectively and in good faith with Local 206, United Government Security Officers of America (UGSOA), (the Union) as the exclusive collective-bargaining representative of the employees in the following bargaining unit (the Unit), by unilaterally implementing changes in terms and conditions of employment for our employees in the Unit without giving the Union prior notice and a meaningful opportunity to bargain about such changes.

All full-time and regular part-time guards as defined in Section 9(b)(3) of the Act, including security officers, guards, security police officers, and part-time supervisors, employed by Knight Protective Service, Inc., at its jobsites at the US Social Security Administration offices in Benton Harbor, Kalamazoo, Lansing, Jackson, and Battle Creek, Michigan and the Battle Creek Federal Center; but excluding office clerical employees, secretaries, captains, lieutenants, managerial employees, supervisors as defined in the Act, and all other employees.

**WE WILL NOT** fail or refuse to bargain collectively and in good faith with the Union as the exclusive representative of our employees in the Unit.

**WE WILL**, upon request by the Union, rescind the elimination of paid lunch breaks for Unit employees at the Hart-Doyle-Inouye Federal Center, and **WE WILL** make whole Unit employees for any loss of earnings or benefits suffered by them as a result of such changes by payment to them of back pay, plus interest calculated on a quarterly compound basis.

**WE WILL** bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the Unit with respect to wages, hours, and other terms and conditions of employment.

**Knight Protective Service, Inc.**  
(Respondent)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Representative) (Title)

82 Ionia Avenue, NW, Room 330, Grand Rapids, Michigan 49503  
(616) 456-2679 Hours: 8:15 a.m. to 4:45 p.m.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

Patrick V. McNamara Federal Building, 477 Michigan Avenue,  
Room 300, Detroit, Michigan 48226, or telephone  
Supervisory Compliance Officer, Mark Baines at 313-226-3244

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON D.C.**

KNIGHT PROTECTIVE SERVICES, INC.

Respondent

and

Cases GR-7-CA-51139  
GR-7-CA-51388

LOCAL 206, UNITED GOVERNEMENT  
SECURITY OFFICERS OF AMERICA (USGOA)

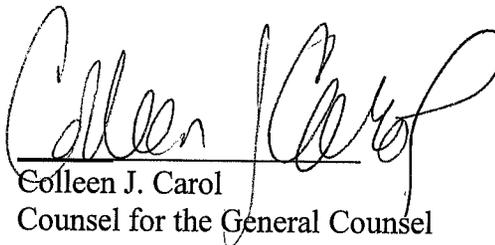
Charging Union

**CERTIFICATE OF SERVICE**

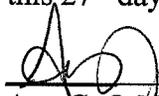
The undersigned hereby certified that **Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions** was filed electronically with the Board on July 27, 2009 and a true and correct copy of the document was served upon the parties by electronically.

Meredith S. Campbell, Attorney  
Shulman, Rogers, Gandal, Pordy & Ecker, P.A.  
11921 Rockville Pike, Third Floor  
Rockville, MD 20852  
mcampbell@srgpe.com

Jeffrey C. Miller, President  
Local 206, UGSOA  
5182 East Lacey Rd.  
Dowling, MI 49050  
Jcmiller1968@msn.com

  
Colleen J. Carol  
Counsel for the General Counsel

Subscribe and Sworn to Before Me  
this 27<sup>th</sup> day of July 2009.

  
Ann C. O-Neal-Jones  
Notary Public, Kent County, Michigan  
My commission expires September 30, 2011