UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLAS REFINERY, INC.,

Respondent,

and

Case 22-CA-28403

LOCAL 4-406, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED, INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO,

Charging Party.

GENERAL COUNSEL'S EXCEPTIONS to the RECOMMENDED ADMINISTRATIVE LAW JUDGE DECISION

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INTRODUCTION

Counsel for the General Counsel files the following specific and limited exceptions to the decision since in large part, the Administrative Law Judge in this case found facts and conclusions of law consistent with the case presented by the General Counsel.

EXCEPTIONS

1. General Counsel Excepts to the Judge's Failure to Conclude as Law, as General Counsel Pleaded, That Respondent Violated the Act by Unlawfully Deviating from its Final Offer.

The Judge found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its revised final proposal on June 9, 2008 without affording the Union an opportunity to continue bargaining. ALJD p. 20, lines 28-30. However, he did not respond to General Counsel's properly pleaded allegation that Respondent further violated the Act by imposing unilateral terms that deviated from the final offer. However, since he correctly found the underlying facts, the Board should supply the additional conclusion that Respondent further and separately violated Section 8(a)(5), as pleaded by General Counsel.

Even after a bona fide bargaining impasse, which undisputedly did not occur here, an employer may not change its final proposal and thus can not unilaterally implement changes to its final proposal. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); *Loral Defense Systems-Akron*, 320 NLRB 155 (1996) enf'd, 200 F.3d 436 (6th Cir. 199); *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enf'd, 559 F.2d 1201 (1st Cir. 1977); *Falcon Tank Corp.,* 194 NLRB 33 (1971. In paragraph 15 of the Complaint, General Counsel specifically pleaded that Respondent

implemented a final offer that deviated from the final offer that Respondent had proposed in negotiations. Before trial, General Counsel filed and served a Notice of Motion to Amend the Complaint specifically pleading that the conduct described in paragraph 15 of the Complaint violated Section 8(a)(1) and (5) of the Act. General Counsel Exhibit 1(j) in evidence at trial. At the outset of the hearing, without objection from the Respondent, the Judge granted the Motion to Amend. Trial Transcript p. 10.[1]

The issue was properly pleaded and fully litigated. The Judge wrote in his factual narrative that Respondent deviated from its final offer in specific respects that he described. ALJD, p. 13, lines 4 -10. However, he failed to file the logical conclusion of law that such conduct violates the Act. The Board must thus, add this violation to the conclusions of law. In addition, the Notice to Employees must be modified to reflect the ordered relief. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 438-39 (1941).

2. General Counsel Excepts to the Judge's Failure to Find and Remedy Respondent's Unlawful Withdrawal of Recognition.

Similarly, Counsel for the General Counsel pleaded in the Complaint, in paragraph 20 that on June 13, 2008, Respondent unlawfully withdrew recognition from the Union. Respondent admitted the allegation. General Counsel's Exhibit No. 1(i). In the Notice to Amend Complaint, Counsel pleaded that such conduct violated Section 8(a)(1) and (5). General Counsel's Exhibit No. 1(j). As stated above, over no objection the Judge granted the General Counsel's Motion to Amend the Complaint made at trial. Trial Transcript (hereinafter "Tr") p.

[1] The ALJD does not mention this motion which should not be confused with General Counsel's post-hearing Motion to Amend Complaint which is discussed and is the subject of an exception *infra*.

10.

The Judge correctly found that Respondent withdrew recognition on June 13, 2008. ALJD p. 14, line 4 and n. 46 citing GC Ex 33. He found that the employees who submitted resignation letters, on which Respondent based its withdrawal, were unlawfully solicited to resign by the Respondent. ALJD, p. 21, line 41- p. 22, line 15. He included in his conclusions of law that Respondent violated Section 8(a)(1) by "soliciting employees to withdraw from the Union." ALJD, p. 23, line 34.

In *Levitz Furniture Co,* 333 NLRB 717 (2001), the Board held that an employer must show a union's actual loss of majority support in order to lawfully withdraw recognition. That decision, however, was limited to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions. The Board went on to note that it continues to adhere to its well-established policy that employers may not withdraw recognition in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union nor can it rely on any expression of disaffection by its employees which is attributable to its undermining support for the Union.

Obviously, the withdrawal of recognition was tainted here by the various and serious unfair labor practices found by the ALJ that preceded the withdrawal. Prior to the withdrawal, Respondent violated the Act by: threatening employees with discharge who would not return to work under terms and conditions of employment unlawfully implemented by the Respondent; unlawfully solicited employees to withdraw from the Union, unlawfully discharged employees because they supported the Union's efforts to continue bargaining, and unlawfully refused to bargain by attempting to dictate to the Union whether it could choose Jeff Gilliam as its representative, refused to bargain with the Union, unilaterally implemented new terms and

conditions of employment without affording the Union an opportunity to bargain, and locked out employees in order to evade its duty to bargain with the Union. ALJD, p. 23, lines 15-46. In addition, as asserted above, the Employer additionally violated the Act by deviating from its last offer. There can be no doubt that these violations were serious and unremedied on June 13 tending to cause employees to become disaffected from the union, a circumstance that *Levitz* considers to taint unlawfully a withdrawal of recognition. Nor can there be any question that the Respondent attempted to rely on expressions of disaffection by its employees which were directly attributable to its undermining support for the Union, as also prohibited by *Levitz.* Accordingly, the Board must add to the conclusions of law that Respondent unlawfully withdrew recognition on June 13, 2008 and remedy the unlawful withdrawal.

As the Judge has already ordered bargaining, the Board needs to make clear that such remedy is also in response to the unlawful withdrawal of recognition because a bargaining order is the traditional remedy for such an unlawful withdrawal. See *Caterair International*, 322 NLRB 64 (1996) cited in *The Fremont-Rideout Health Group*, 354 NLRB No. 68 (slip op., August 27, 2009) In addition, there must be an order to Respondent to cease and desist withdrawing recognition from the Union as the exclusive representative of its employees in the unit described in the recommended Order. *Id.* In addition, the Notice to Employees must be modified to reflect the ordered relief. *NLRB v. Express Publishing Co.*, supra.

3. General Counsel Excepts to the Judge's Failure to Order the Standard Remedies of Rescission and Restoration To Remedy Respondent's Unlawful Implementation of Contract Terms In Violation of Section 8(a)(5).

The Board's standard remedy where an employer has unilaterally changed terms and conditions of employment, including where the employer has made such changes by

implementing its final contract offer prior to reaching a good-faith impasse in bargaining, includes an order to a respondent to take the affirmative action of rescission and restoration on request by the union.[2] See e.g. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999) (relied on by the ALJ in the instant case).

The standard remedial language concerning rescission and restoration includes an order to the employer to take the following affirmative action to effectuate the policies of the Act. For example, in *Grinnell Fire Protection Systems Co.*, *supra*, 328 NLRB at 588, the order included the following affirmative action ordering the respondent there:

> On request by the Union, restore to unit employees the terms and conditions of employment that were applicable prior to [date of unlawful implementation] and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining and make them whole for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment on and after [date of unlawful implementation], plus interest.

In *Bentonite Performance Minerals*, 353 NLRB No. 75 (2008), the Board explained on rescission and restoration as remedies for unlawful unilateral changes:

> To the extent that the unlawful unilateral changes have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring or authorizing the Respondent to rescind such improvements unless requested to do so by the Union. We shall further order the Respondent to make unit employees and former unit employees whole for any losses suffered as a result of those unilateral changes in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), *enf'd* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).
>
> In addition, we shall require, to the extent applicable, the Respondent to remit all payments it owes to employee retirement, 401(k), and health care funds, with interest, as provided in *Merryweather Optical Co.,* 240 NLRB 1213 (1979), and to make employees

[2] The standard remedies for this violation also include an order to bargain in good faith and to cease and desist from bad faith bargaining, both of which the ALJ did include as remedies.

and former employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

See also *Oklahoma Installation Co*, 325 NLRB 741, 741-42 (1998).

The *Bentonite* Board also advised:

As the Board stated in *Larry Geweke Ford*, 344 NLRB 628 (2005), "[t]he standard remedy for unilaterally implemented changes in health insurance coverage is to order the restoration of the status quo ante." (Cites omitted.) The Respondent may litigate in compliance whether it would be unduly burdensome to restore the health insurance carrier in effect prior to July 13, 2007. Id. See also *Laurel Baye Healthcare of Lake Lanier, LLC*, 352 NLRB No. 30, slip op. at 1 fn. 3 (2008).

353 NLRB No. 75 p. 5, n.5.

As noted in Point 1, above, the Judge in the instant matter found that Respondent violated the Act by unilaterally implementing its "revised final" proposal on June 9, 2008, without affording the Union an opportunity to continue bargaining. ALJD p. 20, lines 28-30. As also described above, the Judge further found that Respondent deviated from unlawful terms. However, the Judge failed to include the standard remedies of rescission and restoration for the violation. The Board must supply these remedies to effectuate the purposes of the Act. In addition, the Notice to Employees must be modified to reflect the ordered relief. *NLRB v. Express Publishing Co.*, supra.

4. General Counsel Excepts to the Judge's Failure to Remedy Respondent's Unlawful Lock Out.

The Judge correctly concluded as a matter of law that Respondent locked out its employees in violation of Section 8(a) (5). ALJD p. 23 lines 39-42, Conclusion of Law No. 6 (By…locking out employees in order to evade its duty to bargain with the Union, the Company violated Section 8(a)(5) and (1) of the Act"); p. 21, lines 6-12. However, he omitted the standard

remedy consisting of an order to Respondent to make its employees whole for any loss of earnings and other benefits suffered as a result of the lockout with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See, e.g. *Eddy Potash*, 331 NLRB 552, 553 (2000). The Board must supply the requisite remedy in order to effectuate the purposes of the Act.

5. General Counsel Excepts to the Judge's Failure to Grant the General Counsel's Motion to Amend the Complaint.

The Judge correctly declared that the Board has established a two-part test with regard to whether an unpleaded matter may support an unfair labor practice finding. ALJD p. 15, lines36-40, citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf'd 920 F.2d 130 (2d Cir. 1990). The matter must be "closely connected to the subject matter of the complaint" and "fully litigated." *Pergament*, 296 NLRB at 334. See also *Earthgrains Co.*, 351 NLRB 733 slip op. at 21-22 (2007); *CAB Associates*, 340 NLRB 1391, 1397 (2003); *Niblock Excavating, Inc.*, 337 NLRB 53, 64 (2001); *Pan Am. Grain Co.*, 343 N.L.R.B. 318, 335 (2004), citing, *Seton Co.*, 332 NLRB 979, 981 fn.9 (2000); *Transpersonnel Inc.,* 336 NLRB 484, 485 (2001); *Baytown Sun*, 255 NLRB 154, 154 (1981); *Hi-Tech Cable Corporation*, 318 NLRB 280 (1995); *Meisner Electric, Inc.*, 316 NLRB 597 (1995).*Monroe Feed Store*, 112 NLRB 1336, 1337 (1955). General Counsel moved to amend the complaint post-trial to allege direct dealing by the Respondent based solely on the testimony of Respondent's Operations Manager, a high ranking employee called by the Respondent and who described direct dealing in his direct testimony. See Trial Tr. 658. Bauman is one of two supervisors whom the judge found to be involved in unlawful solicitation. See ALJD, p. 22, lines 5-15.

More specifically, General Counsel alleged that on June 9, 2008, immediately after Respondent locked out employees, and permitted to work only those employees who agreed to the unlawfully-imposed terms, Bauman communicated directly with Union-represented employees who had returned to work to establish wages and terms and conditions of employment declared by the Employer without the presence of the Union. ALJD, p. 15, lines 20-29.

The Judge correctly found that General Counsel met the first part of the *Pergament* test in that the direct dealing allegation was closely related ALJD p.16, lines16-17. However, he found that the allegation was not fully and fairly litigated, relying chiefly on *Medin Realty Corp.*, 307 NLRB 497, 503 (1992). ALJD p. 16, lines 12-14. *Medin Realty* is readily distinguished, as the evidence for the violation that General Counsel sought to add to the complaint *came from the General Counsel's own witness, apparently on direct testimony.*

Where as here, the evidence of the violation of the Act comes principally from the testimony of Respondent's witness, the decision to deny amendment is contrary to settled Board precedent. It is well settled that the rule that a closely connected allegation has been fully litigated and may be remedied even in the absence of a specific allegation in the complaint be "has been applied with particular force where the finding of a violation is established by the *testimonial admissions of the Respondent's own witnesses*." *Pergament,* supra at 334 (emphasis added).

The Judge here asserted that General Counsel, in seeking to amend the complaint post-hearing, overlooked the requirement that the Respondent have notice of an allegation sufficient to present a defense. ALJD, p. 15, line 40-43. But, where the evidence for post-hearing amendment comes from a r*espondent's witness*, the Board has found that the respondent has had sufficient notice to find that the issue has been fully litigated and that the proof of the violation

warrants imposition of a remedy. See *Earthgrains Co.*, 351 NLRB 733 slip op. at 21-22 (2007); *Meisner Electric, Inc.*, 316 NLRB 597 (1995).

Stallone Electric, 337 NLRB 1139, 147 n. 14 (2002), where Board observed tersely that a respondent had "no notice" of a proposed amendment is also distinguishable because there is no discussion of where the evidence supporting the amendment attempted by the Board attorney was derived. It is unlikely to have come from the mouth of a high-ranking manager on direct testimony in a respondent's case if the Board was aware of *Pergament* and its progeny.

The judge's complaint that the motion to amend the complaint was submitted "extremely late – after the record closed and incorporated into the General Counsel's post-trial brief" and that no justifiable excuse was offered for the General Counsel's failure to move before the record closed to add an allegation consisting of facts with which it was well aware long before trial" are unnecessary and unsupported. There is no time limit that made General Counsel's post-hearing amendment "extremely" tardy. No law requires her to offer any excuse for a post-hearing amendment which is permitted under all of the circumstances here. As to whether she was "well aware," not just aware, of the underlying facts "long before trial," not just before trial, these are deprecating conclusions without basis. Such chastising should be disavowed by the Board. See *Meisner Electric, Inc.,* supra, 316 NLRB at 597, n.4; *Williams Pipeline Co.*, 315 NLRB 630 n. 3 (1994). Contrary to the remarks of the Judge, Counsel for the General Counsel had no affirmative obligation to move immediately, or even quickly thereafter to amend the complaint upon hearing the admissions of Respondent's Operations Manager, if she wanted to challenge the legality of Baumann's statement. See *Meisner Electric, Inc.*, 316 NLRB at 597. *Pergament* permitted her post-trial motion to amend. The judge's comments, if left to stand, would support time limits and the necessity for sufficient excuse and lack of fault for post-hearing motions to

amend, which depend instead on connection to the rest of the case and whether the matter was fully litigated.

Of course fairness must be considered in the consideration of the requested amendment. *Facet Enterprises v. NLRB*, 907 F.2d 963, 972 (10th Cir. 1990); *Maintenance Service Corp.*, 275 NLRB 1422, 1425-26 (1985). But here, the ALJ gave Respondent the opportunity to file a brief in response to the motion to amend. ALJD, p. 2, lines 7-10. Respondent has never requested that the hearing be reopened to present evidence rebutting the direct dealing allegation or asserted that such evidence exists. Thus, the spurned amendment is fair. The issue of direct dealing was fully litigated, and the Judge's conclusion to the contrary should be overturned.

6. General Counsel Excepts to the Judge's Failure Find Direct Dealing in Violation of Section 8(a)(5) of the Act.

Operations Manager Bill Baumann, one of Respondent's two main witnesses, testified that he met one-on-one with each employee who went to work on June 9 and 10, and that he discussed wages and other terms and conditions of employment without any union official being present. After these meetings, each respective employee signed an individualized agreement as to his wages and other terms and conditions of employment. GC Ex 32; Tr 658, lines13- Tr 660, line10; Tr 107, lines 20-21.

Respondent cross-examined employee witnesses called by the General Counsel about this matter. Respondent's counsel adduced testimony from Employee Manuel Goncalves that after returning to work on or about June 9, he met with Operations Manager Bill Baumann to discuss "wages and what you would be paid." Tr 189, lines 20-22. The Employer identified and introduced as his own exhibit R-41, the letter that Baumann presented to Goncalves during that conversation. Tr 194, lines 4-9. Similarly, on cross-examination of Employee Edmondo

Maisonet, another witness called by the General Counsel, Respondent's counsel adduced testimony that Baumann presented a letter to him establishing "your terms of employment, your pay rate and benefits." Tr 239, lines 11-24. Respondent had Maisonet identify Respondent's Exhibit 41, the letter presented to him by Baumann stating his individual terms and conditions of employment. Tr 240, lines 5-16; Tr 251, lines 9-14; Tr 255, lines 22-23. Again, on cross-examination, Respondent elicited testimony that Maisonet and Bauman discussed Maisonet's pay and benefits without the Union. Tr 256, lines 5-8. Respondent brought out the same facts on re-cross examination of Maisonet, as well as the fact that Baumann presented him with his letter setting forth his directly and unilaterally-imposed terms and conditions. Tr 259, line 18- Tr 260, line 8. Respondent's Exhibit 41 makes clear that the Respondent had similar meetings in June 2008, and extracted similar signed agreements from employees John Carrasca, Manuel Goncalves, Edward Olander and Les Porzio, as well as on or about February 6, 2009, when it met with and directly dealt with Gilberto Alers regarding his unilaterally-imposed terms and conditions of employment.

> It is well settled that three elements be established to make out unlawful direct dealing: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *Majestic Towers, Inc.*, 353 NLRB No. 29 (2008); *Permanente Medical Group*, 332 NLRB 1143 (2000); *James Heavy Equipment Specialists, Inc.*, 327 NLRB 910 (1999): *Southern California Gas Co.*, 316 NLRB 979 (1995). Each of these elements is plainly present here.

330 NLRB at 1416-1417. The Board has frequently held that when an employer presents an employee with an individual employment contract and requires the employee to sign such an agreement without union representation, the employer has engaged in direct dealing. See *National Association of Government Employees*, 327 NLRB 676, 684 (1999) citing *Silverado*

Mining Company, Inc., 313 NLRB827, 827 (1994). Respondent here has patently engaged in direct dealing in violation of Section 8(a) (1) of the Act.

7. General Counsel Excepts to the Judge's Failure to Require Respondent to Pay Compounded Interest.

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 Internal Revenue Service 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 n.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

discriminatee's lost investment opportunities or need to borrow interest-bearing funds during the period of the unlawful discharge. See *Florida Steel Corp.*, 231 NLRB 651, 651 (1977) ("The purpose of interest is to compensate the discriminatee for the loss of use of his or her money."), enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978).

The issue then becomes what method of computing interest best returns the employee to the pre-unfair labor practice status quo. Because the established practice among banks and other financial institutions is to charge compound interest on loans, 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. First, the 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.20 The Board should update its policy so as to be in line with these practices. 4

i. The Board should follow IRS policy and compound interest on monetary remedies.

Since the Board first adopted a policy of assessing interest on monetary remedies in *Isis Plumbing & Heating Co.*, it has linked that policy to the practices followed by the IRS. 138 NLRB at 720-721. Thus, in *Isis Plumbing*, the Board adopted a flat interest rate of six percent on monetary remedies, which at the time was the rate used by the IRS with regard to a taxpayer's overpayment or underpayment of federal taxes. See *Florida Steel 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.,* the Board, in accord with another change in IRS policy that was mandated by the Tax Reform Act of 1986, again changed the method of determining its official interest rate. 283 NLRB 1173, 1173 (1987). The Tax Reform Act required the IRS to use the short-term Federal rate to calculate interest on tax overpayments and underpayments. See 26 U.S.C. § 6621(a) (2000). The Board adopted the rate applicable to the underpayment of federal taxes, i.e., the short-term Federal rate plus three percent, and reasoned that its official interest rate should reflect, at least indirectly, the forces of the private economic market. See *New Horizons for the Retarded, Inc.*, 283 NLRB at 1173.

In both *Florida Steel* and *New Horizons*, the Board followed the lead of the IRS with regard to the appropriate interest rate, but failed to adopt the IRS's practice of compounding interest on amounts owed. As part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had mandated that the IRS compound interest on the overpayment and underpayment

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

ii. 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.*" *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"), aff'd 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), aff'd 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 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 c. *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.23 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*, 2006 WL 2821406, at *9 (DOL Admin. Rev. Bd. September 29, 2006) (involving Immigration and Nationality Act). 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*

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. Rather, compound interest accounts for the true value of monies lost to a 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 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.

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 & n.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. The IRS's practice is to assess daily compounded interest with regard to the overpayment or underpayment of federal income taxes. See 26 U.S.C. § 6622(a) ("In computing the amount of any interest required to be paid under this title . . . such interest . . . shall be compounded daily."); accord *Russo v. Unger*, 845 F. Supp. at 128-129

(awarding daily compound interest in ERISA breach of fiduciary duty case because defendants had engaged in self-dealing and, as trustees, had duty to reinvest interest earned on funds). Indeed, Congress explicitly recognized that daily compounding would bring the IRS's practices 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 14 (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

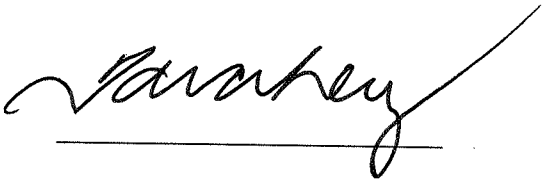
because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

CONCLUSION

Based on the foregoing, General Counsel asks the Board to modify the ALJ decision as urged.

Respectfully submitted,

September 18, 2009



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