

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BASHAS', INC. d/b/a BASHAS'
FOOD CITY, and A.J.'S FINE FOODS

and

Cases 28-CA-21435
28-CA-21501

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

and

Cases 28-CA-21590
28-CA-21592
28-CA-21639
28-CA-21640
28-CA-21646
28-CA-21676
28-CA-21739
28-CA-21785
28-CA-21803

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

ATLANTIC SCAFFOLDING COMPANY

and

Case 16-CA-26108

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, LOCAL 502

JACKSON HOSPITAL CORPORATION
d/b/a KENTUCKY RIVER MEDICAL CENTER

and

Cases 9-CA-42249
9-CA-43128
9-CA-43165
9-CA-43397

UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY
ALLIED INDUSTRIAL & SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC

**ACTING GENERAL COUNSEL’S RESPONSIVE BRIEF
IN SUPPORT OF QUARTERLY COMPOUND INTEREST
ON ALL BACKPAY AND OTHER MONETARY AWARDS**

The Acting General Counsel files this brief in response to arguments raised by Respondents Atlantic Scaffolding Co. and Jackson Hosp. Corp. d/b/a Kentucky River Medical Center against a new remedial policy requiring quarterly compound interest on all backpay and other monetary awards. Notwithstanding Respondents’ contentions, (1) it is proper for the Board to adopt a new method for computing interest through adjudication rather than rulemaking, (2) a newly adopted method for computing interest should be applied retroactively because it will not produce a “manifest injustice,” and (3) the Respondents’ remaining arguments are without merit.

I. IT IS PROPER FOR THE BOARD TO ADOPT A NEW METHOD FOR COMPUTING INTEREST THROUGH ADJUDICATION RATHER THAN RULEMAKING

Respondents Atlantic Scaffolding and Jackson Hosp. err in their assertion that the Board may adopt a policy of compounding interest only through the rulemaking process set forth in the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2006). (See Atlantic Scaffolding’s Brief Recommending Continued Application of Simple Interest, pp. 4-5; Jackson Hosp.’s Brief in Response to the Board’s Request for Position on Issue of Compounding Interest, p. 7.)¹ To the contrary, it is well established that “the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). See also Sheet Metal Workers’ Local 355 v. NLRB, 716 F.2d 1249, 1256-57 (9th Cir. 1983) (affirming Board’s change to remedial policy through adjudication) (citing NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 351-52 (1953), which affirmed the Board’s

¹ These documents will be referred to hereafter as “Atlantic Scaffolding’s Brief” and “Jackson Hosp.’s Brief.”

change to backpay policy announced in F.W. Woolworth despite the lack of a rulemaking proceeding). In accord with these principles, the Board has always used adjudication, rather than rulemaking, to implement and modify its policy regarding the calculation of interest on backpay and monetary awards. (See General Counsel’s June 11, 2010 Brief in this matter, p. 5.) The courts have never questioned that practice when affirming the Board’s interest policy. See, e.g., NLRB v. G & T Terminal Packaging Co., 246 F.3d 103, 127 (2d Cir. 2001); NLRB v. Operating Engineers Local 138, 385 F.2d 874, 878 & n.22 (2d Cir. 1967), cert. denied 391 U.S. 904 (1968).²

Respondent Atlantic Scaffolding is misplaced in its reliance on cases, such as Pfaff v. HUD, 88 F.3d 739, 748-49 (9th Cir. 1996), and Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981), finding that federal agencies improperly utilized the adjudicatory process to promulgate new substantive rules that rendered previously lawful conduct unlawful. The proposed change to remedial policy here does not affect whether a respondent has or has not violated the Act. See Sheet Metal Workers’ Local 355 v. NLRB, 716 F.2d at 1257 & n.4 (affirming Board’s change to backpay policy where it only resulted in “imposition of different remedy for conduct that has long been deemed improper” and distinguishing Ford Motor Co. v. FTC on those grounds). In other words, adjudication in this matter is appropriate because “this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements.” NLRB v. Bell Aerospace Co., 416 U.S. at 295. Indeed, Respondents were always aware that they would be liable for

² Jackson Hosp. is simply wrong in its assertion that the General Counsel has failed to refer to any federal agency that assesses compound interest “without a properly enacted administrative regulation.” (See Jackson Hosp.’s Brief, p. 7.) See General Counsel’s June 11, 2010 Brief, pp. 8-9, 15-16, discussing decisions of the Administrative Review Board of the U.S. Department of Labor, which adopted a quarterly compound interest policy for backpay awards even in the absence of such a regulation.

some form of interest on a monetary award in the event unfair labor practices were found and the complaints in these cases, and all complaints since 2007, seek quarterly compound interest on backpay or other monetary awards. Therefore, switching from simple to compound interest can hardly be characterized as a “180 degree change.” (Atlantic Scaffolding’s Brief, p. 5.) In short, the Board would not act improperly or inequitably by proceeding through adjudication to slightly modify its current policy for computing interest.

II. A NEWLY ADOPTED METHOD FOR COMPUTING INTEREST SHOULD BE APPLIED RETROACTIVELY BECAUSE IT WILL NOT PRODUCE A “MANIFEST INJUSTICE”

There is no merit to Respondents’ contentions that a policy of compounding interest should not be applied retroactively. (Atlantic Scaffolding’s Brief, p. 5; Jackson Hosp.’s Brief, pp. 8-10.) The Board customarily applies new policies and standards retroactively “to all pending cases in whatever stage.” See, e.g., SNE Enterprises, Inc., 344 NLRB 673, 673 (2005) (citations omitted). The Board will retroactively apply a new rule or standard to the case in which the new rule is announced, and all other pending cases, unless doing so would produce a “manifest injustice.” Id., 344 NLRB at 673 (citing cases). In evaluating whether retroactive application of a new rule will cause manifest injustice, the Board will consider: (1) the parties’ reliance on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application. Id. See also Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 931 (1993). None of these considerations warrant a departure from retroactive application here.

First, as noted above, the Respondents have been on notice since the complaints issued in these cases that the General Counsel was seeking compound interest as part of the remedy. Indeed, as all of the Respondents here acknowledge, the General Counsel has sought and the

Board has considered a switch to compound interest for the better part of the last two decades. (See *Bashas', Inc.'s Answering Brief to the General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions*, p. 42; *Atlantic Scaffolding's Brief*, p. 2; *Jackson Hosp.'s Answering Brief to General Counsel's Cross-Exceptions to the ALJD*, pp. 4-5.) Moreover, because the proposed change here would have no bearing on whether the Act has been violated, the Respondents' could not have relied on the preexisting simple interest rule in deciding whether to engage in the alleged unlawful conduct in these cases.

Second, as detailed in the General Counsel's June 11, 2010 Brief in this matter, quarterly compound interest is necessary to satisfy the Act's make-whole remedial purpose. Thus, the effect of applying such a rule retroactively will ensure that the Act's purposes are realized. See, e.g., *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 866 (6th Cir. 1990) (retroactive application of policy providing backpay in cases where employer refused to bargain over decision to layoff employees accomplished Act's purposes because it, among other things, "serves to make whole employees for losses suffered").

Finally, no particular injustice will arise from the retroactive application of compound interest on backpay and monetary awards. As stated above, this change does not impose liability for conduct that was lawful at the time it occurred.³ Nor, contrary to the suggestion of *Jackson Hosp.* (Brief, p. 8), can Respondents be said to have been prejudiced in any manner in preparing for litigation or assessing their potential liability: some form of interest has long been part of

³ On this basis, the current case is clearly distinguishable from those cited by *Atlantic Scaffolding* to argue against retroactive application. See *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 952 (9th Cir. 2007) (new rule that would have resulted in alien's deportation could not be applied retroactively to conduct that occurred before rule change); *Pfaff v. HUD*, 88 F.3d at 748-49 (setting aside agency enforcement action where alleged wrongdoers were prosecuted for conduct that was not unlawful when it occurred).

Board backpay and monetary awards and, the complaints in these cases specifically sought compound interest.

III. THE RESPONDENTS' REMAINING ARGUMENTS ARE WITHOUT MERIT

First, Jackson Hosp. errs in its efforts to undermine the Board's reliance on IRS practice with respect to interest awards. Although, as it points out (Jackson Hosp.'s Brief, pp. 5-6), the NLRA does not explicitly reference the tax code provisions regarding interest, whereas some other regulatory statutes do, that does not undermine the validity of the Board's reliance on IRS practice. Courts have enforced the Board's interest policy, which currently follows IRS practice as to rate, despite the lack of any express authorization for interest in the NLRA. See, e.g., NLRB v. G & T Terminal Packaging Co., 246 F.3d at 127; NLRB v. Thill, Inc., 980 F.2d 1137, 1141 (7th Cir. 1992), enforcing in relevant part 298 NLRB 669, 670-71, 673 (1990); International Brotherhood of Operative Potters v. NLRB, 320 F.2d 757, 760 (D.C. Cir. 1963) ("the absence of express statutory authorization does not necessarily operate as a limitation of power"). This is consistent with the Board's broad authority to adopt and apply remedies that ensure make-whole relief. See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). In short, the lack of reference to IRS interest provisions in the Act does not mean that Congress does not want the Board to follow IRS policies in structuring its remedies. Jackson Hosp. is equally without merit in its further suggestion that the Board should not rely on IRS practice because the IRS is "dealing with the public's money whereas the Board is dealing with individuals and bargaining units" and not the "citizenry as a whole." (Jackson Hosp.'s Brief, pp. 4-5.) This argument ignores that the Board operates in the public interest to enforce federal statutory rights and that its remedial orders vindicate public, not private, rights. See, e.g.,

Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 543 (1943); International Brotherhood of Operative Potters v. NLRB, 320 F.2d at 761.

Second, Jackson Hosp. misapprehends the relevance of Title VII law to this issue. It misreads the significance of the 1991 amendments to Title VII adding compensatory and punitive damages for certain types of violations. (See Jackson Hosp.’s Brief, pp. 6-7.) Its argument that this amendment invalidates any reliance on federal court practice in assessing compound interest on Title VII backpay awards ignores the language that Jackson Hosp. itself quotes from Landgraf v. USI Film Products, 511 U.S. 244, 252-53 (1994). There the court makes it plain that these new remedies are “‘in addition to,’ and [do] not replace or duplicate” the original make-whole remedy of backpay. As indicated in the General Counsel’s June 11, 2010 Brief (at p. 11, n.8), the federal courts recognize that compound prejudgment interest on a backpay award is needed to serve a remedial, make-whole purpose that is separate from the deterrent and punishment purposes of Title VII’s punitive damages provision. See Luciano v. Olsten Corp., 912 F. Supp. 663, 676 (E.D.N.Y. 1996), affd. 110 F.3d 210 (2d Cir. 1997). Thus, current practice under Title VII remains a valid example for the Board to follow. Further, Jackson Hosp.’s observation that postjudgment interest in Title VII cases is mandated by statute is completely irrelevant. (See Jackson Hosp.’s Brief, pp. 6-7.) All of the federal court cases cited in the General Counsel’s June 11, 2010 Brief (see also p. 7, n.5) deal with compound prejudgment interest that was not awarded pursuant to the federal postjudgment interest statute.⁴

⁴ Respondent-Atlantic Scaffolding also advances arguments against compound interest, including that it would be a penalty and that a blanket rule would conflict with federal court practice under Title VII. (See Atlantic Scaffolding’s Brief, pp. 3-4). The General Counsel rebutted those arguments in his opening brief. (See General Counsel’s June 11, 2010 Brief, pp. 10-14.) Moreover, the courts have rejected the argument that interest on monetary awards is either a penalty or windfall because of the passage of time associated with Board proceedings. See, e.g., Bufco Corp. v. NLRB, 147 F.3d 964, 967 (D.C. Cir. 1998); NLRB v. Thill, Inc., 980 F.2d at

IV. CONCLUSION

For the foregoing reasons and those reasons detailed in the General Counsel's June 11, 2010 Brief in this matter, the Acting General Counsel takes the position that the Board should routinely order quarterly compound interest on backpay and other monetary awards.

Respectfully submitted,

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Dated: July 8, 2010

1141; NLRB v. International Measurement & Control Co., Inc., 978 F.2d 334, 336-37 (7th Cir. 1992) (“[T]he passage of time . . . is a reason to award interest, not deny it.”); Bagel Bakers Council of Greater New York v. NLRB, 555 F.2d 304, 306 (2d Cir. 1977).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of ACTING GENERAL COUNSEL'S RESPONSIVE BRIEF IN SUPPORT OF QUARTERLY COMPOUND INTEREST ON ALL BACKPAY AND OTHER MONETARY AWARDS in Cases 28-CA-21435, et al., Case 16-CA-26108, and Cases 9-CA-42249, et al., was served by electronic mail to the parties listed below on this 8th day of July, 2010.

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