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Jackson Hospital Corporation d/b/a Kentucky River Medical Center *and* United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO–CLC. Cases 9–CA–42249, 9–CA–43128. 9–CA–43165, and 9–CA–43397

October 22, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

On August 27, 2010, the National Labor Relations Board issued a Decision and Order in this case finding, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by placing employee Frances Lynn Combs on an indefinite investigatory suspension. 355 NLRB No. 129. We ordered, inter alia, that Combs be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against her, with interest. We severed the issue of whether the Board should order that interest be compounded. Earlier, on May 14, 2010, we had invited all interested parties to file briefs in this and two other cases[1] regarding the question of whether the Board should routinely order compound interest on backpay and other monetary awards in backpay cases and if so, what the standard period for compounding should be.

For nearly 50 years, the Board has ordered interest to be paid on backpay awards under the Act.[2] For more than 20 years, a succession of NLRB General Counsels has urged the Board to order compound, rather than simple, interest.[3] The Board has consistently declined to do so—without ever addressing the merits of the issue, except for a preliminary endorsement of daily compounding in a notice of proposed rulemaking issued in 1992,[4] which was withdrawn in 1998.[5] Over the years, Board decisions have deferred a final ruling on the issue of compounding, denying the General Counsel's request for that remedy, but always leaving open the possibility of a change in policy.[6] Today, we make that change, after full briefing of the issue in response to our invitation.[7] We adopt a policy under which interest on backpay will be compounded on a daily basis, using the established methods for computing backpay[8] and for determining the applicable rate of interest.[9] As we will explain, the daily compounding of interest is used under other comparable legal regimes (including the Internal Revenue Code, which the Board has followed in other respects related to awards of interest), and it will better serve the remedial policies of the National Labor Relations Act.

A.

Our decision today continues the Board's judicially-approved, evolutionary approach to remedial issues involving interest on backpay awards.

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[1] *Bashas' Food City,* Case 28–CA–21435, and *Atlantic Scaffolding Co.,* Case 16–CA–26108.

[2] *Isis Plumbing Co.,* 138 NLRB 716 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963).

[3] See General Counsel Memorandum 00-05, *Compounding of Interest on Backpay and Other Monetary Awards,* 2000 WL 22958147 (July 20, 2000) (observing that "the General Counsel, beginning in 1989, sought the adoption . . . of a policy pursuant to which interest on backpay . . . would be compounded on a daily basis"). See also General Counsel Memorandum 07-07, *Seeking Compound Interest on Board Monetary Remedies,* 2007 WL 1308381 (May 2, 2007) (announcing intent to seek Board policy of adopting quarterly compound interest).

[4] NLRB, Notice of Proposed Rulemaking, *Codification of Standardized Remedial Decisions in Board Decisions Regarding Offers of Reinstatement, Make-Whole Remedies, Computation of Interest, and Posting of Notices,* 57 Fed.Reg. 7898, 7898–7899 (March 5, 1992).

[5] NLRB, Withdrawal of Proposed Rulemakings, *Rules Regarding Standardized Remedial Provisions in Board Unfair Labor Practice Decisions and the Appropriateness of Single Location Bargaining Units in Representation Cases,* 63 Fed.Reg. 8890 (Feb. 23, 1998). The Board explained that it was withdrawing the proposed rule so that it could "focus its time and resources on reducing the backlog of adjudicated cases pending before the Board." Id. at 8891.

[6] In 1990, for example, the Board stated that it was "not prepared at this time to deviate from [its] current practice," but was "taking the matter under advisement." *Alaska Pulp Corp.,* 300 NLRB 232, 232 fn. 4 (1990), enfd. mem. 944 F.2d 909 (9th Cir. 1991). The Board has continued to use the same language. See, e.g., *Rogers Corp.,* 344 NLRB 504, 504 (2005) (Board "not prepared at this time to deviate from [its] current practice"); *Accurate Wire Harness,* 335 NLRB 1096, 1096 fn. 1 (2001) (Board "not prepared at this time . . . to deviate from [its} current practice," with then Member Liebman and Member Walsh stating that they did "not foreclose future consideration of the request," and Member Truesdale stating that rulemaking on the issue "would be preferable"), enfd. 86 Fed. Appx. 815 (6th Cir. 2003).

[7] In addition to briefs filed by the parties in this case and the companion cases, amicus briefs were filed by the National Right to Work Legal Defense Foundation (NRWLDF), the Service Employees International Union, and the American Federation of Labor and Congress of Industrial Organizations. Only the employer respondents have opposed the adoption of a policy requiring compound interest.

In its brief, NRWLDF takes no position on the compound-interest issue, arguing only that any change in the Board's policy should apply to union respondents as well as to employer respondents when monetary make-whole remedies are awarded. As NRWLDF acknowledges, the Board has always applied its backpay and interest remedial policies equally to employers and unions. We will continue to do so.

[8] See *F. W. Woolworth Co.,* 90 NLRB 289 (1950) (backpay computed on quarterly basis).

[9] See *New Horizons for the Retarded,* 283 NLRB 1173 (1987) (adopting Internal Revenue Service rate for underpayment of Federal taxes).

In 1962, when the *Isis Plumbing* Board established our practice of awarding interest on backpay awards, it observed (citing the Supreme Court) that the "Board has the right to draw on 'enlightenment gained from experience' in fashioning remedies to undo the effects of violations of the Act."[10] Adding interest to backpay awards, the Board said, was a matter of "bringing [the Board's] practice into conformity with general principles of law, . . . achieving a more equitable result, and . . . encouraging compliance with Board orders."[11]

Fifteen years later, in the 1977 *Florida Steel* decision, the Board replaced the fixed interest rate originally adopted with the sliding interest rate scale then used by the Internal Revenue Service (IRS) (the "adjusted prime rate") in connection with the underpayment or overpayment of Federal taxes.[12] The *Florida Steel* Board cited an inflationary trend leading to higher interest rates charged by private lending institutions and resulting Congressional and State-legislative concerns "over the disparity between statutory interest rates and rates in the private money market."[13] "A rate of interest more accurately keyed to the private sector money market," the Board reasoned, "would have the effect of encouraging timely compliance with Board orders, discouraging the commission of unfair labor practices, and more fully compensating discriminatees for their economic losses."[14]

Finally, in a 1987 decision, *New Horizons for the Retarded*, the Board again altered its method of calculating the interest rate, responding to a statutory change in the method used by the IRS to calculate the rate applied to an underpayment of Federal taxes under 26 U.S.C. § 6621 (the "short-term Federal rate" plus 3 percent, as determined quarterly).[15] The Board observed that this rate was "influenced by private economic forces," was "subject to periodic adjustment," and was "relatively easy to administer."[16]

The Board's evolving approach in this area—the original decision to award interest on backpay awards, the decision to replace the fixed interest rate with the then-current IRS rate, and the decision to adopt the modified IRS rate—has been uniformly upheld by the Federal appellate courts.[17] As the Supreme Court has explained, Section 10(c) of the Act gives the Board "broad discretionary" power to "devis[e] remedies to effectuate the policies of the Act"; the Board is not "require[d] . . . to make a quantitative appraisal of the relevant factors," but rather may use "its judgment and its knowledge."[18]

In the present case, the Respondent[19] argues that the Board should address the compound-interest issue through rulemaking, not adjudication. The Supreme Court has held that the "choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[20] Here, we believe adjudication is appropriate. The General Counsel, in these cases among many others, has raised the compound-interest issue from the beginning of the unfair labor practice proceedings, pursuant to a publicly-announced decision to pursue a change in Board policy through adjudication.[21] The issue itself is neither novel, nor complex. It has been presented to the Board repeatedly over two decades, and it is familiar to the labor-law community. Furthermore, as earlier noted, the Board has three times previously determined remedial interest issues through adjudication. We see no persuasive reason for taking a different course in this instance.

We also reject the argument that rather than establishing a general rule with respect to compound interest, the Board should exercise its discretion on a case-by-case basis, as the Federal courts do with respect to both the award of prejudgment interest and how it is calculated in employment cases.[22] The reasons supporting our new policy apply categorically wherever a backpay award is appropriate; they do not depend on the specific circumstances of an individual employee in a given Board case. As an administrative agency establishing rules to govern a particular field of law (within the limits of the statute it

[10] *Isis Plumbing,* supra, 138 NLRB at 720, quoting *NLRB v. Seven-Up Bottling Co. of Miami, Inc.,* 344 U.S. 344, 346 (1953) (upholding Board's newly adopted *F. W. Woolworth* policy of calculating backpay on quarterly basis). In the years before *Isis Plumbing,* the Board had consistently declined to award interest, but had never offered a reasoned explanation for its policy. Id. at 717.

[11] Id.

[12] *Florida Steel Corp.,* 231 NLRB 651 (1977), enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978).

[13] Id. at 651.

[14] Id.

[15] *New Horizons for the Retarded,* supra.

[16] Id. at 1173.

[17] See 1992 NLRB Notice of Proposed Rulemaking, supra, 57 Fed.Reg. at 7898 (collecting cases). See, e.g., *Philip Carey Mfg. Co. v. NLRB,* 331 F.2d 720, 731(6th Cir. 1964) (upholding Board's authority to award interest and collecting cases).

[18] *NLRB v. Seven-Up Bottling,* supra, 344 U.S. at 346, 348. Sec. 10(c) authorizes the Board, upon finding an unfair labor practice, to "take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act." 29 U.S.C. § 160(c).

[19] Atlantic Scaffolding also made the same argument.

[20] *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974).

[21] See General Counsel Memorandum 07-07, *Seeking Compound Interest on Board Monetary Remedies,* 2007 WL 1308381 (May 2, 2007) (announcing intent to seek Board policy of adopting quarterly compound interest).

[22] See cases cited infra. Notably, however, the Second Circuit has held that compound interest should ordinarily be awarded prejudgment. See, e.g., *Sands v. Runyon,* 28 F.3d 1323, 1328 (2d Cir. 1994) (Rehabilitation Act of 1973 case).

administers), the Board has a different role than the courts, operating "on a wider and fuller scale" that "differentiates . . . the administrative from the judicial process" in the Supreme Court's words.[23]

B.

After careful consideration, and based on the Board's experience in the decades following the initial decision to order interest on backpay awards, we have concluded that compound interest better effectuates the remedial policies of the Act than does the Board's traditional practice of ordering only simple interest and that, for the same reasons, interest should be compounded on a daily basis, rather than annually or quarterly.

In this context, our primary focus clearly must be on making employees whole. "A backpay order is a reparation order designed to vindicate the public policy of the statute by making employees whole for losses suffered on account of an unfair labor practice."[24] For instance, backpay is awarded for an unlawfully discharged employee only when the employee's interim earnings fall short of what he would have earned, had he not lost his job.[25] It remains the case, we think—as the *F. W. Woolworth* Board observed 60 years ago—that "[u]nemployment or employment at lesser wages may have resulted in the exhaustion of the employee's savings, his incurrence of debts, and even deprivation of the necessities of life."[26] "The purpose of interest is to compensate the [employee] for the loss of use of his or her money."[27] Money, of course, has a time value: it is more valuable today than it is tomorrow—or next year. "If justice were immediate, there would never be an award of . . . interest;" instead, because justice takes time—and sometimes, as students of the Board know, a long time—"interest is added to the original judgment to ensure that compensation is complete."[28] Since 1962, the Board has recognized that an award of interest is integral to achieving the make-whole purpose of a backpay award, consistent with the Supreme Court's characterization of backpay as "an indebtedness arising out of an obligation imposed by statute,"[29] and in the years that followed, the Board has sought to measure the time value of money more fairly and accurately by adjusting the interest rate paid on backpay awards.

Today, compound interest, not simple interest, is the norm in connection with private lending practices.[30] For example, interest on credit card debt is routinely compounded daily.[31] Compound interest has also become the norm for many monetary obligations imposed by Federal law. One statutory example of particular relevance here is the Internal Revenue Code, to which the Board looks in setting the interest rate on backpay awards. Under 26 U.S.C. § 6622(a), interest on tax underpayments (and overpayments) is compounded daily. The legislative history of the provision observes that compound interest was deemed necessary to "conform computation of interest . . . to commercial practice" and that without compound interest, "neither the United States nor taxpayers are adequately compensated for the value of the money owing to them."[32]

A second example also has persuasive weight here: In the Back Pay Act, applicable in certain circumstances to Federal employees who have suffered an "unjustified or unwarranted personnel action" resulting in a loss of pay, Congress required daily compound interest on backpay awards.[33] We see no reason why private-sector employees covered by the National Labor Relations Act should be treated less favorably than Federal employees, or, correspondingly, why violators of the National Labor Relations Act should not be subject to the same remedies as the United States in its capacity as an employer.[34]

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[23] *NLRB v. Seven-Up Bottling,* supra, 344 U.S. at 349–350

[24] *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263 (1969), quoting *Nathanson v. NLRB,* 344 U.S. 25, 27 (1952). As the *Isis Plumbing* Board explained, backpay is "not a fine or penalty imposed on the respondent by the Board." 138 NLRB at 719.

[25] See *F. W. Woolworth,* supra, 90 NLRB at 291–293.

[26] Id. at 292.

[27] *Florida Steel,* supra, 231 NLRB at 651.

[28] Michael S. Knoll, *A Primer on Prejudgment Interest,* 75 Tex. L. Rev. 293, 294 (1996).

[29] *Nathanson v. NLRB,* supra, 344 U.S. at 27.

[30] See *Onti, Inc. v. Integra Bank, Inc.,* 751 A.2d 904, 929 (Del. Ch. 1999) ("even passbook savings accounts now compound their interest daily"); Frank J. Slagle, *Accounting for Interest: An Analysis of Original Issue Discount in the Sale of Property,* 32 S.D.L. Rev. 1, 35 fn. 186 (1987) ("banks commonly offer interest rates on various forms of savings accounts which are compounded daily").

[31] Laurie A. Burlingame, *Getting to the Truth of the Matter: Revisiting the TILA Credit Card Disclosure Scheme to Better Protect Consumers, 61 Consumer Finance Law Quarterly Report 308,* 315 (Summer 2007), citing Mark Furletti, *Credit Card Pricing Developments and Their Disclosure,* Federal Reserve Bank of Philadelphia Discussion Paper, p. 15 (Jan. 2003) (available at www.phil.frb.org).

[32] S. Rep. No. 97-494(I), 97th Cong., 2d Sess. (1982), 1982 U.S.C.C.A.N. 781, 1047. At the time of the Board's *New Horizons for the Retarded* decision, supra, this Internal Revenue Code provision was in effect, but there is no indication that the Board was aware of it; the issue of compound interest was not before the Board there.

[33] 5 U.S.C. § 5596(b)(1)(A) & (2).

[34] In cases under other statutes governing the private-sector workplace, the Federal courts regularly use their discretion to order compound interest on backpay awards, although not always computed on a daily basis. See, e.g., *EEOC v. Joe's Stone Crabs,* 296 F.3d 1265, 1276 (11th Cir. 2002), cert. denied 539 U.S. 941 (2003) (Title VII); *EEOC v. Kentucky State Police Dept.,* 80 F.3d 1086, 1098 (6th Cir. 1996) (Age Discrimination in Employment Act case), cert. denied 519 U.S. 963 (1996). *Saulpaugh v. Monroe Community Hospital,* 4 F.3d 134, 145 (2d Cir. 1993), cert. denied 510 U.S. 1164 (1994) (Title VII case, reversing district court's failure to grant compound interest: "Given that

There is no force to the argument, urged here, that compound interest wrongly penalizes respondents for the sometimes protracted nature of unfair labor practice proceedings. The Supreme Court has rejected a similar argument with respect to backpay awards generally, recognizing that delay injures backpay claimants and that the Board is "not required to place the consequences of its own delay . . . upon wronged employees to the benefit of wrongdoing employers."[35] Moreover, as the Federal courts have observed, during the period before a backpay award becomes effective, the respondent enjoys "an interest-free loan for as long as [it can] delay paying out back wages." *Clarke v. Frank*, 960 F.2d 1146, 1154 (2d Cir. 1992).[36]

We believe that daily compounding, which will lead to more fully compensatory awards of interest and thus come closest to achieving the make-whole purpose of the remedy, is superior to either annual or quarterly compounding. As we pointed out above, daily compounding conforms to commercial practice, i.e., individuals and institutions that lend money in the market are paid interest compounded daily. In addition, as we further pointed out above, daily compounding is used under both the Internal Revenue Code, which the Board has treated as a standard, and the Back Pay Act covering Federal employees. Finally, to the extent that enhanced monetary remedies also serve to deter the commission of unfair labor practices and to encourage compliance with Board orders—factors the Board has considered in the past in choosing to award interest and in choosing an interest rate[37]—daily compounding is also preferable. Annual compounding would be of very modest additional remedial value over simple interest, and would not comport with the predominant commercial practice. Similarly, in choosing daily compounding over quarterly, we choose the method that will more fully compensate victims of unfair labor practices.

In arguing for compound interest, the General Counsel advocates use of a quarterly period, primarily for administrative reasons. He correctly observes that the interest rate used by the Board is updated quarterly[38] and that the Board computes backpay on the basis of separate quarterly periods.[39] In this remedial context, the Board certainly has considered ease of administration, among other factors.[40] And, given his role in administering the backpay remedy in practice, we take the General Counsel's view seriously. But we remain unpersuaded. First, prior occupants of the General Counsel's office have sought daily compounding,[41] which suggests that any administrative difficulties associated with daily compounding may be relatively minor. Second, in an era of sophisticated computer software for financial calculations, we believe that daily compounding can easily be integrated into the computation of backpay. We see no necessary connections between the compounding period, the interest-rate adjustment period, and the backpay period.[42] Each period serves its own purpose. Finally, even if daily compounding did impose a not insignificant administrative burden on the Board and the General Counsel, it would be outweighed by the policy benefits we have examined here.

C.

For all of these reasons, we adopt a new policy under which interest on backpay will be compounded on a daily basis. Consistent with the Board's long-established practice—followed in *Isis Plumbing*, *Florida Steel*, and *New Horizons*, among many other decisions—we will apply this policy retroactively in this case and in all pending cases in whatever stage, given the absence of any "manifest injustice" in doing so.[43]

In determining whether retroactivity would be unjust, we consider "the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive ap-

the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded."); *EEOC v. Gurnee Inn Corp.,* 914 F.2d 815, 817, 819–820 (7th Cir. 1990) (Title VII); *Parson v. Kaiser Aluminum & Chemical Corp.,* 727 F.2d 473, 478 fn. 3 (5th Cir. 1984), cert. denied 467 U.S. 1243 (1984) (Title VII).

[35] *NLRB v. J. H. Rutter-Rex Mfg. Co.,* supra, 396 U.S. at 265.

[36] Arguably, a respondent could even invest the retained funds and earn interest on them at the prevailing market rate, i.e., interest compounded daily. Even if the employer chooses to replace an unlawfully discharged employee, that decision presumably reflects a determination that the wages paid to the replacement worker represent a better financial return to the employer than lending the money out at market rates. Cf. *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978,* 954 F.2d 1279, 1331 (7th Cir. 1992) ("Tortfeasors who choose to reinvest their money in their business . . . must believe that the returns in their enterprise exceed the market rate. Having earned this higher rate of return for the duration of the litigation, they are in no position to complain when called on to pay prejudgment interest.").

[37] See, e.g., *Florida Steel,* supra, 231 NLRB at 651.

[38] *New Horizons for the Retarded,* supra.

[39] *F. W. Woolworth,* supra.

[40] See, e.g., *New Horizons for the Retarded,* supra, 283 NLRB at 1171 (discussing use of IRS interest rate).

[41] See General Counsel Memorandum 00-05, *Compounding of Interest on Backpay and Other Monetary Awards,* 2000 WL 22958147(July 20, 2000).

[42] Cf. *New Horizons for the Retarded,* supra, 283 NLRB at 1174 fn. 12 (holding that Board will apply quarterly method for computing interest even in cases where backpay is not determined quarterly, because "the determination of the rate of interest to be applied in any given backpay period is not affected by the methods used to compute backpay").

[43] E.g., *SNE Enterprises,* 344 NLRB 673, 673 (2005) (collecting cases).

plication."[44] There is no basis here for departing from the Board's usual practice. We are deciding a remedial issue, not adopting a new standard concerning whether certain conduct is unlawful. No respondent, then, can fairly be said to have relied on the Board's prior rule of awarding only simple interest on backpay awards in deciding to take the unlawful action on which their liability is based. Nor were the respondents entitled to rely on preexisting law in deciding to contest the case: the General Counsel's complaints put the respondents on notice that compound interest was sought as a remedy. We see no "particular injustice" to the respondents from retroactivity either; this is not a case, for example, where a party has belatedly invoked a new Board rule in order to raise a new issue in the proceedings. Finally, retroactive application of our new approach significantly promotes the purposes of the Act, by improving a basic statutory remedy.

For all these reasons, we shall order that any backpay owed to Frances Lynn Combs shall be paid with interest compounded on a daily basis.

[44] Id.

ORDER

The National Labor Relations Board reaffirms its Order set forth in 355 NLRB No. 129 (2010), except that any backpay owed to Frances Lynn Combs shall be paid with interest compounded on a daily basis.

Dated, Washington, D.C. October 22, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD