

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BASHAS' FOOD CITY,

and

28-CA-21435

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 99.

ATLANTIC SCAFFOLDING CO.,

and

16-CA-26108

UNITED BROTHEROOD OF CARPENTERS
AND JOINERS, LOCAL 502.

KENTUCKY RIVER MEDICAL CENTER,

and

9-CA-42249

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations on behalf of its affiliated national and international labor organizations files this brief in response to the request of the National Labor Relations Board for *amicus* briefs addressing whether the interest charged on backpay and other monetary

awards should be compounded and, if so, whether the rate of compounding should be daily, quarterly or annually. We submit that the interest charged on such awards should be routinely compounded on a daily basis.

1. Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), gives the Board broad discretion to “devis[e] remedies to effectuate the policies of the Act.” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). In particular, “[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.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). Thus, “[t]he fixing of the back pay is one of the functions confided solely to the Board.” *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952).

From time to time, the Board has acted within its discretion to make changes to its method of calculating back pay in response to the “enlightenment gained from experience.” *Seven-Up*, 344 U.S. at 346. The NLRB General Counsel’s suggestion that the Board award compound interest instead of simple interest on back pay awards serves to effectuate the policy of the Act and is a logical development of the Board’s approach to making employees whole for the economic losses caused by unfair labor practices.

In 1950, the Board made its first major change regarding the calculation of back pay awards by adopting a quarterly system for calculating back pay, a change

from its prior approach of calculating back pay from the date of discharge. *F.W. Woolworth*, 90 NLRB 289, 291-93 (1950). The Board changed its policy because experience showed that under the previous system employers were able to avoid their back pay obligations by delaying reinstatement to employees who had a duty to mitigate their damages by seeking work elsewhere. *Id.* at 291-92. The move to a quarterly system allowed for greater back pay recoveries, more effectively compensating employees for the economic loss they incurred and more effectively deterring employers from profiting from their unlawful conduct. *Id.* at 292. The Supreme Court upheld the change. *Seven-Up*, 344 U.S. at 348.

The Board began awarding interest on back pay awards in 1962. *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), *enf. denied on other grounds*, 322 F.2d 913 (9th Cir. 1963). The Board reasoned that discriminatees should be compensated not only for their lost wages but also for the lost time value of their backpay award “because the statutory purpose was to create a debtor-creditor relationship and in equity interest is allowed as a means of compensating a creditor for loss of use of his money.” *Id.* at 718 (quoting *United States v. United Drill & Tool Corp.*, 183 F.2d 998, 999 (D.C. Cir. 1950)). The Board also noted that awarding interest on back pay would “bring[] its practice into conformity with general principles of law, . . . [and] achiev[e] a more equitable result.” *Id.* at 720. This outcome was upheld by the courts of appeals. *See, e.g., Philip Carey*

Manufacturing Co. v. NLRB, 331 F.2d 720, 729-31 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964) (upholding the award of interest as a legitimate exercise of the Board's remedial power).

Fifteen years later, the Board changed the way it calculated interest on back pay. *Florida Steel Corp.*, 231 NLRB 651 (1977), *enf. denied on other grounds*, 586 F.2d 436 (5th Cir. 1978). Instead of the flat six-percent rate applied in *Isis Plumbing*, the Board in *Florida Steel* adopted the rate used by the IRS for under and overpayment of taxes. *Id.* at 651. The Board explained that use of the rate prescribed by the IRS would better reflect the rates available in the private money market and remove incentives for delaying payment. *Ibid.* When the IRS rate for over and underpayment of taxes was changed by the Tax Reform Act of 1986, the Board responded by adopting the new IRS rate. *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In 1992, the Board issued a Notice of Proposed Rulemaking to change the computation of back pay to require that "interest on backpay and other monetary awards be compounded daily." 57 Fed. Reg. 7897, 7898 (1992). At that time, the Board recognized that "significant purposes are served" by compounding interest. *Ibid.* Among those purposes, the Board concluded that compounding interest would more fully "compensate discriminatees for the delay in their receipt of wages – in particular, to offset, at least partially, the reduction in value of delayed

payments to discriminatees resulting from inflation during the backpay period.”

Ibid. The Board also concluded that compounding interest would encourage the “prompt payment of legal obligations” and that daily compounding of interest “will serve these purposes even more effectively than the current simple interest rule.”

Ibid. However, the Board later withdrew the Notice for reasons having nothing to do with the merits of the proposal. 63 Fed. Reg. 8890 (1998).

2. When Congress amended the Internal Revenue Code in 1982 to provide for daily compound interest on amounts payable by either the United States or the taxpayer, the sponsors of this change advanced the same reasons as the Board had in support of its 1992 proposal. Thus, the Senate Finance Committee explained:

“Failure to compound interest owing under the Code significantly reduces the effective rate of interest provided for under the internal revenue laws. As a result, neither the United States nor taxpayers are adequately compensated for the value of money owing to them under the tax laws. This undercompensation is magnified the longer the debt is outstanding.” S. Rep. No. 97-494, at 305 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News at 1047.

The Committee also expressed its view that “the understatement of economic interest may induce some taxpayers to delay resolution of tax controversies.” *Ibid.*

As the NLRB’s 1992 Notice of Proposed Rulemaking demonstrates, each of

the reasons advanced for amending the Internal Revenue Code are pertinent to the remedial policies of the NLRA. Ensuring that victims of unfair labor practices “are adequately compensated for the value of money owing to them” is an important remedial goal under the Act. And, it is equally important under the NLRA that “the understatement of economic interest [not] induce some [employers or unions] to delay resolution of [labor] controversies.”

As we have noted, the NLRB has followed the Internal Revenue Code with respect to setting the rate of interest charged on amounts owed. *New Horizons*, 283 NLRB 1173 (1987) (following 26 U.S.C. § 6621). The Board chose the IRS rate because it was “keyed to the private sector money market in order to encourage timely compliance with Board orders, discourage the commission of unfair labor practices, and more fully compensate discriminatees for their economic losses.” *Id.* at 1173. The same reasons argue in favor of following the Internal Revenue Code in compounding the interest on amounts owed. *See* 26 U.S.C. § 6622.

3. The Internal Revenue Code is not the only law providing for compounding of interest on amounts owed. The federal government compounds interest on its own back pay obligations. Regulations from the Office of Personnel Management state that “[o]n each day for which interest accrues, the agency shall compound interest.” 5 C.F.R. § 550.806(e). OPM also uses the same federal short-term interest rate in 26 U.S.C. § 6621 that the Board adopted. 5 C.F.R. §

550.806(d).

In whistleblower cases administered under the Department of Labor's Administrative Review Board, the practice is also to compound interest on back pay awards. *See Doyle v. Hydro Nuclear Services*, ARB No. 99-041, 1989-ERA-22 (ARB May 17, 2000), *rev'd on other grounds sub nom. Doyle v. Secy' of Labor*, 285 F.3d 243 (3d Cir. 2002), *cert. denied* 537 U.S. 1066 (2002). In awarding compound interest on a back pay award for a whistleblower denied employment in violation of the Energy Reorganization Act, the ARB held that "[i]n light of the remedial nature of the ERA's employee protection provision and the 'make whole' goal of back pay, . . . the prejudgment interest on back pay ordinarily shall be compound interest." *Id.* at 18. The ARB also noted that it had recently ordered that interest on back pay awards under the Surface Transportation Assistance Act be compounded and stated that "[o]ur reasoning applies equally to back pay awards under analogous employee protection provisions of the other federal statutes under which we issue administratively final decisions." *Ibid.* The ARB has chosen to compound interest on a quarterly, rather than daily, basis in these cases, but the principle that "prejudgment interest on back pay ordinarily shall be compound interest" remains the same.

Corporate whistleblowers who experience retaliation are also entitled to compounded interest on a back pay award under the Sarbanes-Oxley law. *Welch v. Cardinal Bankshares Corp.*, 2005 WL 4889000, at *20 (Dept. of Labor ALJ

decision, Feb. 15, 2005); *see also* 29 C.F.R. § 1980.109(b). Following the result in *Doyle*, interest is compounded quarterly. *Welch* at *20.

4. Compounding interest owed on an obligation reflects “[t]he usual assumption in economics as in life . . . that a dollar today is worth more than a dollar tomorrow.” *Heiar v. Crawford County*, 746 F.2d 1190, 1203 (7th Cir. 1984). For just this reason, the awarding of compound interest is an important component of any make-whole remedy. And, by the same token, awarding compound interest on back pay prevents unjust enrichment by employers because “[a]n injurer allowed to keep the return on this money has profited by the wrong.” *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir. 1992). Compounding interest also encourages prompt compliance with the Board’s remedial orders.

Both the NLRA’s statutory purpose and the equities between the parties weigh in favor of awarding compound interest. The NLRA puts the Board in the position of a creditor “as agent for the injured employees,” *Nathanson*, 344 U.S. at 27, and the “long-accepted practice of awarding interest in debtor-creditor cases is [based on] the principle that to do so fully compensates the creditor for the loss of the use of his money,” *Philip Carey*, 331 F.2d at 730. Compound interest, then, is a part of a proper make-whole remedy and “is in no sense punitive as against the employer.” *NLRB v. Globe Products Corp.*, 322 F.2d 694, 697 (4th Cir. 1963).

The equities also weigh in favor of awarding compound interest because of the reality that “wage-earners are heavily dependent upon wages, which more often than not constitute the sole resource to purchase the necessities of life from day to day.” *Philip Carey*, 331 F.2d at 730. As a result, workers who are unlawfully discharged must often resort to borrowing money in the private market to support themselves and their families, for which interest is charged and typically compounded. *Ibid.* This reality is reflected in other areas of the law, such as state laws requiring prompt payment of wages and the priority given wage claims in the Bankruptcy code, *ibid.*, and the Board is certainly permitted to take these equities into consideration when exercising its discretion to fashion appropriate remedies.

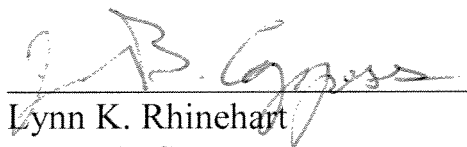
5. When Congress amended the Internal Revenue Code to provide for compound interest, it provided that “all interest payable . . . will be compounded daily,” because this would “conform computation of interest under the internal revenue laws to commercial practice” and because “a rule of daily compounding . . . appears simplest to administer.” S. Rep. No. 97-494, at 305, reprinted in 1982 U.S. Code Cong. & Admin. News at 1047. The same reasons should lead the Board to compound interest on a daily basis.

If the point of compounding interest is compensate for the withholding of money owed, there is no reason that the compounding should not be on a daily basis. Daily compounding ensures that the person owed the money in question will

be fully compensated for its withholding. And, if Congress is correct about daily compounding being the simplest method to administer, that is an additional reason to take this approach.

We understand that the Department of Labor Administrative Review Board has taken the approach of compounding interest quarterly. But the ARB has not explained that choice. And, we submit that the Board should not follow the ARB's example except for reasons sufficient to outweigh the adverse effect of not fully compensating the victims of unfair labor practices.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "L. K. Rhinehart", is written over a horizontal line.

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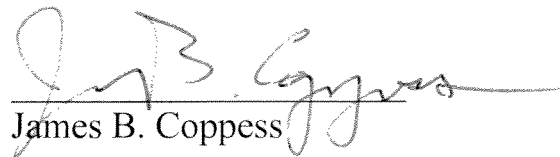
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