BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTERS OF:	)	
	)	
BASHAS' FOOD CITY	)	Case No. 28-CA-21435
	)	
and	)	
	)	
ATLANTIC SCAFFOLDING CO.	)	Case No. 16-CA-26108
	)	
and	)	
	)	
KENTUCKY RIVER MEDICAL	)	
CENTER	)	Case No. 09-CA-42249
	)	

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION IN SUPPORT OF EQUAL APPLICATION OF ANY CHANGE IN THE BOARD'S INTEREST POLICY

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INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense and Education Foundation is a nonprofit, charitable organization that provides free legal assistance to workers who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

Foundation attorneys have represented numerous individual workers before the National Labor Relations Board and in the courts in cases under the National Labor Relations Act, including such landmark cases as *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997), *granting review & rev'g* 322 N.L.R.B. 1 (1996); *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995); and *Dana Corp.*, 351 N.L.R.B. 434 (2007). In scores of cases throughout the country the Foundation is currently aiding individual employees who seek through Board proceedings to vindicate their rights to refrain from forced association with, and/or subsidization of, unions.

Particularly relevant here, Foundation attorneys have sought and won monetary awards with interest against unions for employees in at least three circumstances:

(1) back pay where an employee has been discharged from employment because of a union's unlawful demand for discharge, *e.g.*, *United Auto Workers*, 337 N.L.R.B. 237, 242 (2001); *Production Workers Union of Chicago & Vicinity*, 322 N.L.R.B. 35, 36 (1996), *enforced*, 161 F.3d 1047 (7th Cir. 1998);

(2) refund of forced fees where a union has collected such fees from nonmembers absent the procedural protections required by the Act or including costs of activities not lawfully

chargeable under *Beck*, *e.g.*, *Rochester Mfg. Co.*, 323 N.L.R.B. 260, 262-63 (1997); *California Saw*, 320 N.L.R.B. at 254, 256; and,

(3) back pay and benefits where a worker has lost employment opportunities due to a union's unlawful failure to refer from a hiring hall, *e.g., Theatrical Stage Employees, Local 720*, 352 N.L.R.B. 29, 29 (2008).

Amicus Foundation believes that any change in Board policy as to the method of computation of interest should apply equally to employers and labor organizations. It is not clear from the Board's invitation of amicus briefs in these cases that the Board is considering changing interest computation in Section 8(b) cases as well as Section 8(a) cases. Therefore, the Foundation submits this brief to urge the Board to continue to compute interest in awards against unions in the same manner as it computes interest against employers.

ARGUMENT

I. INTRODUCTION

"The remedial provision of the [NLRA, as amended,] is silent about the question of interest on backpay awards." *Isis Plumbing & Heating Co.*, 138 N.L.R.B. 716, 717 (1962) (3-2 decision).[1] The Board originally "refrained from adding interest to such awards." *Id.* Nevertheless, in 1962 the Board, with two Members dissenting, decided that it had the implicit authority to award 6% per annum interest on net back pay calculations from the date of an unlawful discharge until compliance is achieved. *Id.* at 720-21. In 1977, the Board abandoned the

[1] Section 10(c) of the Act merely provides that, if the Board finds a respondent guilty of an unfair labor practice, the Board shall issue an order requiring that respondent "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c).

6% interest rate and adopted the Internal Revenue Services's sliding "adjusted prime interest rate." *Florida Steel Corp.*, 231 N.L.R.B. 651, 651-52 (1977). Most recently, the Board decided to compute interest "at the 'short-term Federal rate' for the underpayment of taxes." *New Horizons for the Retarded, Inc.*, 283 N.L.R.B. 1173, 1173 (1987). In none of these cases, did the Board distinguish between the monetary awards against employers, on the one hand, and labor organizations, on the other.

II. THE BOARD MUST APPLY INTEREST ON MONETARY AWARDS EQUALLY TO UNIONS AND EMPLOYERS

The Foundation takes no position as to whether the Board should once again change its method of computing interest on monetary awards to compound such interest. However, as evidenced by the cases cited at pages 1-2 in the Foundation's statement of interest, the Board's practice has been to compute interest against unions guilty of unfair labor practices in the same way that it computes interest against guilty employers. Therefore, should the Board decide to change its policy in the computation of interest, as a matter of fundamental fairness any changes should apply to unions.

The Act itself indicates that the remedies awarded for unfair labor practices must be applied equally against guilty employers and unions. Section 8(b), added to the NLRA by the 1947 Taft-Hartley Act, defines "[u]nfair labor practices by labor organization[s]." 29 U.S.C. § 158(b). A proviso to section 10(c) specifies that "back pay may be required of the employer *or labor organization*, as the case may be, responsible for the discrimination suffered by" a discharged employee. 29 U.S.C. § 160(c), 1st *proviso* (emphasis added). In *Radio Officers' Union v. NLRB*, the United States Supreme Court found that Congress enacted this proviso "to

give the Board power to remedy union unfair labor practices comparable to the power it possessed to remedy unfair labor practices by employers." 347 U.S. 17, 54 (1954).

And, section 10(c) requires that when the Board finds "that *any person* named in the complaint has engaged in or is engaging in any . . . unfair labor practice, then the Board shall . . . issue and cause to be served on such *person* an order requiring such *person* to cease and desist . . . and to take such affirmative action . . . as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c) (emphasis added). In the Act, "[t]he term 'person' includes . . . labor organizations . . . ," not just employers. 29 U.S.C. § 152(1).

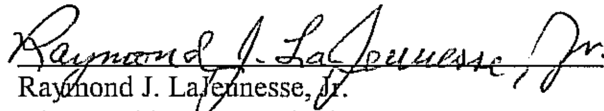
In *Isis Plumbing* the Board decided to add interest to monetary awards because it believed it was "achieving a more equitable result, and . . . encouraging compliance with Board orders." 138 N.L.R.B. at 720. In *Florida Steel*, the Board changed to a sliding interest scale because it believed that a sliding scale "would have the effect of . . . more fully compensating discriminatees for their economic losses." 231 N.L.R.B. at 652. However, those principles apply equally to employer and union respondents. In particular, making whole an employee who has lost wages or paid excess forced union fees because of a union's unfair labor practices, regardless of whether the union acted unlawfully alone or in concert with an employer, is no less important than making whole an employee who has had monetary losses due to employer misconduct.

In short, union wrongdoers should be required to assume the increased financial burden of compound interest to the same extent as employers. That would continue the Board's practice of awarding "make whole" relief against both employer and union violators of the Act.

CONCLUSION

For the above-stated reasons, if the NLRB changes its method of computing interest, it should apply that change in policy equally to unions and employers.

Respectfully submitted,



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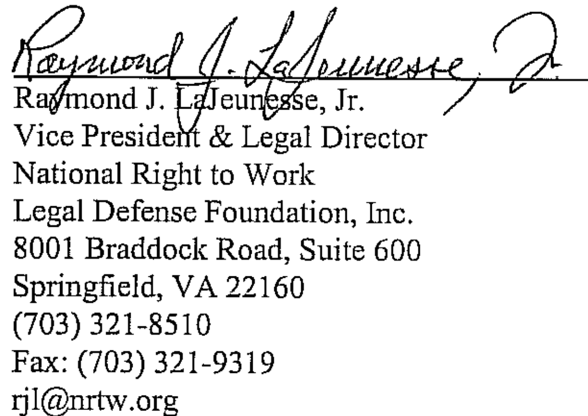

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CERTIFICATE OF SERVICE

I, Raymond J. LaJeunesse, Jr., hereby certify that on June 11, 2010, a true and correct copy of Brief *Amicus Curiae* of the National Right to Work Legal Defense Foundation in Support of Equal Application of Any Change in the Board's Interest Policy was served as listed below:

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