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
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION		28-CA-21639 28-CA-21640 28-CA-21646 28-CA-21676 28-CA-21739 28-CA-21785 28-CA-21803
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
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC		9-CA-43165 9-CA-43397

BRIEF OF THE GENERAL COUNSEL RECOMMENDING QUARTERLY COMPOUND INTEREST ON ALL BACKPAY AND OTHER MONETARY AWARDS

The National Labor Relations Board has invited the parties to file briefs on the issues of whether the Board should routinely order compound interest on backpay and monetary awards, and, if so, what should be the standard period for compounding. The General Counsel's position is that quarterly compounding of interest on backpay and other monetary awards is necessary to satisfy the Act's make-whole remedial purpose. In support of that position, the General Counsel submits the following brief.

I. THE BOARD SHOULD ROUTINELY ORDER COMPOUND INTEREST ON BACKPAY AND OTHER MONETARY AWARDS.

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 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. 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 returned to the pre-unfair labor practice status quo because there is no consideration for either the 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 debt obligations,[1] the Board's current policy of assessing only simple interest fails to return discriminatees to the pre-unfair labor practice status quo. Thus, when an unfair labor practice deprives a discriminatee of wages or benefits, the discriminatee forgoes the opportunity costs associated with that compensation. Indeed, if the discriminatee has no savings cushion to rely on, he or she may fall behind on credit card or other compounded debt obligations while awaiting a backpay award. In that event, the discriminatee incurs not only compounded interest, but late penalties as well. A Board order awarding only simple interest will fail to fully compensate that employee for out-of-pocket expenses caused by the unfair labor practices.

[1] When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to assess compound interest on the overpayment or underpayment of taxes, it noted that it was conforming the IRS computation of interest to commercial practice. See S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047.

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.[2] First, the Internal Revenue Service (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.[3] The Board should update its policy so as to be in line with these practices.

[2] As a general matter, it is well-established that the Board has the remedial authority to charge interest on its monetary awards even though the NLRA does not expressly grant that authority. See Isis Plumbing & Heating Co., 138 NLRB 716, 717 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963). See also NLRB v. G & T Terminal Packaging Co., 246 F.3d 103, 127 (2d Cir. 2001) ("An award of interest is, of course, well within the Board's remedial authority."); NLRB v. Operating Engineers Local 138, 385 F.2d 874, 878 & n.22 (2d Cir. 1967) (listing circuit courts that had explicitly upheld Board's authority to charge interest on monetary awards), cert. denied 391 U.S. 904 (1968).

[3] Moreover, federal courts routinely compound interest in non-employment cases to make injured parties whole. See, e.g., American National Fire Ins. Co. v. Yellow Freight Sys., Inc., 325 F.3d 924, 937-938 (7th Cir. 2003) (Carmack Amendment case; court stated "compound prejudgment interest is the norm in federal litigation"); Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc., 633 F. Supp. 1047, 1057 (D. Del. 1986) (patent infringement case; compounding interest "will conform to commercial practices and provide the patent holder with adequate compensation for foregone royalty payments"); Brown v. Consolidated Rail Corp., 614 F. Supp. 289, 291 (N.D. Ohio 1985) (Vietnam Veterans Readjustment & Assistance Act case; compound interest awarded regardless of defendant's good faith or justification); United States v. 319.46 Acres of Land More or Less, 508 F. Supp. 288, 291 (W.D. Okla. 1981) (eminent domain case; Fifth Amendment "just compensation" standard would be satisfied only by compound interest award).

1. 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.[4] As part of the Tax Equity and Fiscal Responsibility Act of 1982,

[4] In those two cases, the parties did not argue, and the Board did not address, the issue of whether the interest should be compounded.

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.

Respondent-Jackson Hosp. asserts that IRS practice is irrelevant to the Board's method of computing interest on monetary awards because the Board for certain purposes has departed from IRS practice when computing backpay. (Jackson Hosp.'s Answering Brief to General Counsel's Cross-Exceptions, pp. 8-9). Specifically, it asserts that because the Board does not follow the IRS concept of "taxable income" to define "interim earnings" deducted from backpay, the Board should not follow IRS practice when it comes to computing interest on monetary awards. There is no merit to that argument. The Board already has explained why not all "taxable income" under the Internal Revenue Code should be considered "interim earnings" under the NLRA. See, e.g., Florence Printing Co., 158 NLRB 775, 781-82 (1966) (strike benefits are not interim earnings), enfd. 376 F.2d 216, 218-20 (4th Cir.), cert. denied 389 U.S. 840 (1967). However, the calculation of interest on an amount owed is the same under either statute. Thus, contrary to Jackson Hosp.'s position (Jackson Hosp.'s Answering Brief to General Counsel's Cross-Exceptions, p. 10), the Board would not be acting in an "arbitrary and capricious" manner by adhering to IRS practice for computing interest on monetary awards to discriminatees.

2. 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*."[5] Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 145 (2d Cir. 1993) (emphasis supplied), cert. denied 510 U.S. 1164 (1994). See also Walia v. Vivek Purmasir & Assocs., Inc., 160 F. Supp. 2d 380, 388-89 (E.D.N.Y. 2000) (applying Saulpaugh rationale); Cooper v. Paychex, Inc., 960 F. Supp. 966, 975 (E.D. Va. 1997) (Title VII and 42 U.S.C. § 1981 race discrimination case: "common sense and the equities dictate an award of compound interest"), affd. 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), affd. 110 F.3d 210 (2d Cir. 1997); Davis v. Kansas City Housing Authority, 822 F. Supp. 609, 616-617 (W.D. Mo. 1993). The Supreme Court has made clear that Title VII remedies, including backpay, 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:

[5] The analysis in this subsection focuses only on how federal courts routinely compound prejudgment interest in employment discrimination cases so as to make adjudged discriminatees whole. Unlike with postjudgment interest, which must be compounded pursuant to the federal postjudgment interest statute, 28 U.S.C. § 1961(b), federal courts have discretion on whether and how to assess prejudgment interest. See, e.g., O'Quinn v. New York University Medical Center, 933 F. Supp. 341, 344-345 (S.D.N.Y. 1996) (Title VII case).

> 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 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 also has 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.[6] 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, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066

[6] The ARB's policy of compounding interest pre-dates the passage of the Sarbanes-Oxley Act and the Department of Labor's responsibility for administering that statute. However, the increase in whistleblower claims as a result of Sarbanes-Oxley has created even greater use of the compound interest methodology by DOL, and makes it even more apparent that the Board's simple interest methodology is out of sync with other agencies' practice.

(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 Administrator of the Wage and Hour Div., U.S. Dept. of Labor v. Help Foundation of Omaha, Inc., 2008 WL 5454136, at *6 & n.66 (DOL Admin. Rev. Bd. December 31, 2008) (ordering compound indecent on backpay award under Immigration and Nationality Act); Amtel Group of Florida, Inc. v. Yongmahapakorn, 2006 WL 2821406, at *9 (DOL Admin. Rev. Bd. September 29, 2006) (same).

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) (the Back Pay Act); 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 Sector Decision dated April 21, 2003) (where federal agency had discriminated based on sex, interest on backpay owed to discriminatee must be compounded daily as required by 5 C.F.R. § 550.806(e)), supplemented by 2006 WL 3052475 (EEOC Federal Sector Decision dated October 19, 2006).

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.[7] 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

[7] Under a system of compounding interest, the amount of a monetary award grows at an increasing rate the longer it remains unpaid. For example, at a 10% interest rate the satisfaction of a $10,000 backpay obligation after one year would require $1,038.13 in quarterly compounded interest versus $1,000 in simple interest. However, after five years, there would be $6,386.16 in quarterly compounded interest versus $5,000 in simple interest. If the backpay award is not paid for an additional sixth year, it would accumulate $1,701.10 in quarterly compounded interest versus $1,000 in simple interest for that year alone.

discrimination have routinely awarded compound interest for this make-whole purpose.[8] 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, 28 F.3d 1323, 1328 (2d Cir. 1994) (under Rehabilitation Act of 1973, backpay for Postal Service refusal to hire applicant because of physical disability, "should ordinarily include compound interest"); Serricchio v. Wachovia Securities, LLC, 606 F. Supp. 2d 256, 267 (D. Conn. 2009) (applying Saulpaugh rationale and awarding compound interest for violation of Uniformed Services Employment and Reemployment Rights Act), supplemented by __ F. Supp. 2d __, 2010 WL 1330629, at *6-*7 & n.5 (D. Conn. March 31, 2010); 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

[8] Contrary to Respondent-Jackson Hosp.'s assertion, Title VII's authorization of punitive damages does not grant federal courts greater authority to award compound interest in Title VII cases than the Board has in NLRA cases. (Jackson Hosp.'s Answering Brief to General Counsel's Cross-Exceptions, p. 10.) In the Title VII context, it is recognized 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. 676.

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. Respondent-Jackson Hosp. emphasizes that in Title VII cases, whether to award simple or compound interest in each case is vested in the court's the discretion. (Jackson Hosp.'s Answering Brief to General Counsel's Cross-

Exceptions, p. 10.) Nevertheless, federal circuit courts have recognized that only compound interest on a backpay award can make whole victims of employment discrimination.[9] See Saulpaugh v. Monroe Community Hosp., 4 F.3d at 145 (Tile VII case); EEOC v. Kentucky State Police Department, 80 F.3d at 1098 (ADEA case; approving of Saulpaugh rationale). Indeed, a district court abused its discretion by failing to award compound interest to a Title VII discriminatee because simple interest could not have made the discriminatee whole. See Saulpaugh v. Monroe Community Hosp., 4 F.3d at 145. The Board, which has never proceeded on a case-by-case basis for computing interest on backpay and other monetary awards, should follow these principles and adopt a compound interest rule.

The cases that Jackson Hosp. relies on fail to support its argument for a case-by-case approach. (See Jackson Hosp.'s Answering Brief to General Counsel's Cross-Exceptions, p. 10.) In Buonanno v. AT & T Broadband, LLC, 313 F. Supp. 2d 1069, 1083-84 (D. Colo. 2004), the parties agreed on a prejudgment interest rate of 8% and there is no indication that the plaintiff contested the computation of simple interest. Although the Buonanno court stated that the general rule is that simple interest will be used absent statutory language mandating compound interest, id. at 1084, n.7, the court was apparently applying the traditional, common law rule to a federal cause of action (i.e., Title VII).[10] The Seventh Circuit has explained that the traditional, common law rule should not apply to federal causes of action, for which compound prejudgment interest is the "norm." See American National Fire Ins. Co. v. Yellow Freight Sys., Inc., 325

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[9] Moreover, the Seventh Circuit has stated, albeit outside of the Title VII context, that "compound prejudgment interest is the norm in federal litigation." American National Fire Ins. Co. v. Yellow Freight Sys., Inc., 325 F.3d at 937-938.

[10] Indeed, the Buonanno court cited Quinlan v. Koch Oil Co., a Div. of Koch Indus., Inc., 25 F.3d 936, 941 (10th Cir. 1994), for the "general rule." However, Quinlan involved an oil lease interest holder's state law-breach of fiduciary duty claim and the computation of interest pursuant to Oklahoma law. Id. at 941-43.

F.3d at 937-938. Moreover, Marfia v. T.C. Ziraat Bankasi, 147 F.3d 83, 90 (2d Cir. 1998), also cited by Jackson Hosp., is completely irrelevant because it does not involve a federal employment discrimination claim. Rather, Marfia involved a state law-breach of implied contract claim and the application of New York state law to the issue of how interest was to be calculated. In that context, the court stated that Saulpaugh did not apply to the calculation of prejudgment interest. Id.

The argument for a case-by-case approach also has been 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.

II. 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.[11] 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 (S.D.N.Y. 1981) (quarterly). Cf. Kraemer v. Franklin and Marshall College, 941 F. Supp. 479, 487 (E.D. Pa. 1996) (ordering quarterly compound interest in ADEA case). In 2000, the DOL's

[11] The chart below shows the different amounts of interest due under each method of computing interest mentioned above, assuming a 10% interest rate on a $10,000 backpay award.

Type of Interest	Year 1	Year 5	6th Year Alone	Total for 6 Years
Simple	$1,000	$5,000	$1,000	$6,000
Annual Comp.	$1,000	$6,105.10	$1,610.51	$7,715.61
Quarterly Comp.	$1,038.13	$6,386.16	$1,701.10	$8,087.26
Daily Comp.	$1,051.56	$6,486.08	$1,733.61	$8,219.69

Administrative Review Board also adopted a policy of compounding interest quarterly on monetary awards owed to discriminatees in employee protection cases. See, e.g., Administrator of the Wage and Hour Div., U.S. Dept. of Labor v. Help Foundation of Omaha, Inc., 2008 WL 5454136, at *6 & n.66; 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. This approach is further supported by the fact that the Board routinely computes backpay on the basis of separate quarterly periods. See F.W. Woolworth Co., 90 NLRB 289, 292-93 (1950); NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 348 (1953) (approving of Woolworth methodology). 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 significantly lower interest than that paid by private financial institutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of BRIEF OF THE GENERAL COUNSEL RECOMMENDING 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 11th day of June, 2010.

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