THE 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	Case 9-CA-42249
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC	

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF THE USE OF DAILY COMPOUND INTEREST ON BACK PAY AND OTHER MONETARY AWARDS IN UNFAIR LABOR PRACTICE CASES

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STATEMENT OF INTEREST

The Service Employees International Union ("SEIU") is a labor union representing more than 2.2 million members in the United States, Canada and Puerto Rico. SEIU is submitting this *amicus* brief in response to the May 14, 2010 invitation by the National Labor Relations Board for all interested parties to reply to the questions presented by the compound interest issue in the cases listed in the caption above. Founded in 1921, SEIU is recognized today as North America's fastest-growing union and predominantly represents workers in key service sectors including the health care, public services and property services industries. A major focus of SEIU is the organization of workers in industries that have traditionally not been organized and which are largely occupied by low-wage employees. A strong, equitable remedial regime that makes these workers whole and that disincentivizes the commission of unfair labor practices is therefore of vital importance to SEIU. The current back pay regime falls short of this objective and fails the workers who rely on it the most.

QUESTIONS PRESENTED

1. Section 10(c) of the National Labor Relations Act ("NLRA" or "the Act") grants broad discretionary power to the National Labor Relations Board ("NLRB" or "the Board") to make-whole discriminatees in unfair labor practice cases. Would assessing compound interest on back pay and other monetary awards in unfair labor practice cases be more in line with the purposes of the Act?

2. Daily compounding is also used by the Internal Revenue Service ("IRS") in carrying out the very provision on which the Board relies for determining the interest rate in back pay cases. Should the Board assess interest on a daily compounded basis as is consistent with IRS practice?

SUMMARY OF ARGUMENT

SEIU urges the Board to assess interest on monetary awards on a compounded daily basis in order to bring Board practices in line with current practice. Historically, the Board has exercised its discretion to fashion new methods for calculating interest that ensured that people whose rights were violated would be made whole. The Board's current policy, which requires the assessment of simple interest on a quarterly basis, is both woefully inadequate and is out of step with 1) the policies of the NLRA; 2) the provision of the tax code that the Board relies on in calculating interest rates on monetary awards; 3) the practices of other agencies that administer statutes with similarly worded remedial provisions; and 4) jurisprudence developed by several circuit courts of appeals. The Board should change its policy and assess compound interest on a daily basis in order to harmonize to harmonize current Board policy with the purposes of the Act and keep in step with well established legal principles regarding the assessment of interest.[1]

ARGUMENT

I. SO AS TO BRING ITS REMEDIAL PRACTICES INTO LINE WITH THE ACT AND FEDERAL LAW, THE BOARD SHOULD ROUTINELY ORDER COMPOUND INTEREST ON BACK PAY AND OTHER MONETARY AWARDS IN UNFAIR LABOR PRACTICE CASES.

A. Ordering compound interest is consistent with the National Labor Relations Act.

1. Section 10(c) of the Act authorizes the Board to order compound interest in unfair labor practice cases.

Section 10(c) of the NLRA empowers the Board to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] Act" that will restore and make-whole those who have been the victim of unfair labor

[1] The Board has considered requiring that compound interest be assessed on a daily basis; however, that rule was later withdrawn. See 57 FR 797-02. In that notice of proposed rulemaking, the Board considered changing the make-whole remedies it provides to require that an aggrieved party be reimbursed for the value of fringe benefit contributions. We believe that the Board should re-consider the appropriateness of such remedies including, but not limited to, compensatory and consequential damages.

practices. The use of back pay and other monetary awards is thus largely within the Board's discretion. In Phelps Dodge Corp. v. NLRB, the Supreme Court noted that "[t]he remedy of back pay . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." 313 U.S. 177, 198 (1941).

Ordering back pay and other monetary awards in unfair labor practice cases is one of the Board's a key remedial tools. Indeed, "[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." Id. at 197.

2. Routinely ordering compound interest would be a development in line with the evolution of Board precedent toward affording true make-whole remedies.

The Board has routinely exercised its power under 10(c) of the Act to expand the scope of back pay awards. In seeking to make workers whole for discriminatory action taken against them by employers, the Board has regularly used its powers under Section 10(c) to expand the scope of back pay awards beyond simplistic calculations. See, e.g., Phelps Dodge, 313 U.S. at 200 n. 7 (outlining various back pay rules formulated by the Board); Richard W. Kaase Co., 162 NLRB 1320, 1322 (1967) (finding that "vacation benefits are properly included in the back pay computation of a discriminatee"); Ryder Sys., Inc., 302 NLRB 608 (1991) (concluding that a "meal allowance was properly treated as an item of gross back pay").

The Board began assessing interest on back pay awards in Isis Plumbing & Heating Co., 138 NLRB 716 (1962) (establishing a simple, six percent annual interest rate on back pay awards). Before Isis Plumbing, the Board had refused to order interest payments. Id. at 717. Although the NLRA does not explicitly address the issue of interest, the decision observed that

"Congress deliberately left broad discretion to the Board in fashioning remedies." Id. at 719. The Board also noted that awarding interest would "bring its practice into conformity with general principles of law . . . achiev[e] a more equitable result, and . . . encourag[e] compliance with Board orders." Id. at 720.

The Board revisited its policy on interest in 1977 in Florida Steel Corp., 231 NLRB 651. Noting concerns about inflation at the time, the Board, in that decision, adopted a sliding interest scale used by the IRS in cases of overpayment and underpayment of federal taxes (and based on the adjusted prime rate as calculated by the Secretary of the Treasury). Id. at 651-52. The Board, in reviewing its prior decision in Isis Plumbing, observed that the basic "purpose of interest is to compensate the discriminatee for the loss of use of his or her money." Id. at 651. The Board noted that (1) various jurisdictions altered judgment interest rates in response to changes in private money market interest rates; (2) Congress itself was concerned with low interest rates "encourag[ing] taxpayers to 'borrow' tax funds rather than pay taxes promptly" when it enacted amendments to the tax law for underpayment and overpayment; and (3) failing to provide for flexibility in interest on back pay and other awards ordered by the Board would "make it profitable to violate the Act." Id. The Board therefore decided to alter its interest rate policy so as to "effectuate the policies of the Act" and noted that the new policy would encourage timely compliance with Board orders, discourage the commission of unfair labor practices, and compensate discriminatees for economic losses. Id. Taking administrative considerations into account, the Board further justified adopting the IRS sliding scale because it "is directly tied to interest rates in the private money market, . . . is subject to periodic semiautomatic adjustment, [and] . . . is relatively easy to administer . . ." Id. at 652.

The Board then set out its current policy regarding interest on back pay and other monetary remedies in unfair labor practice cases in New Horizons for the Retarded, 283 NLRB 1173 (1987). Under New Horizons, the Board applied the interest rate used by the IRS in cases of underpayment of federal taxes (the short-term Federal rate plus three percent, as specified in the Tax Reform Act of 1986, 26 U.S.C. §42 et seq.). Id.. The Board declared that the interest policy set out in Florida Steel was "no longer appropriate" in light of changes made by the Tax Reform Act of 1986 to the way that interest rates are calculated for underpayment and overpayment of taxes. Id. Moreover, the new method would reflect "private economic market forces" and would be "relatively easy to administer." Id.

In dealing with interest on back pay and other monetary awards in unfair labor practice cases, the Board has been keenly aware of modern practices regarding interest and has taken care to ensure that the make-whole relief it aims at affording under the Act is not undermined by the pernicious effect of insufficient interest calculations. At the time of its decision in Isis Plumbing, the Board had offered no rationale for failing to assess any interest at all on back pay awards. In revising that rule, the Board declared "it proper at [that] time to reexamine the interest question in the light of general legal principles and the policy of the Act." Id. at 717. Today, similar principles, as discussed below, should guide the Board toward once again bringing its policy on interest on back pay and other monetary awards in line with the standards required by the Act's make-whole remedial philosophy.

3. Ordering compound interest on back pay and other monetary awards owed to a wronged worker would further the purposes of the Act.

In analyzing the analogous topic of prejudgment interest in judicial proceedings, academics have argued that "compound interest is required because prejudgment interest is not paid to the plaintiff as it accrues, but is retained by the defendant until the judgment is enforced."

Knoll, *A Primer on Pre-Judgment Interest*, 75 Tex. L. Rev. 293, 307 (1996); see also Lokken, *The Time Value of Money Rules*, 42 Tax L. Rev. 9, 13 (1986) (explaining why compound interest is routinely employed and noting that its use "pervades the financial world"); McDivitt, Comment, *Pre-Judgment Interest as an Element of Damages: Proposed Solutions for a Colorado Problem*, 49 U. Colo. L. Rev. 335, 342-43 (1978) (explaining that "because the disparity between compound and simple interest increases as time passes, the disparity in the treatment of past and future losses will become greater as the time between filing and judgment increases"). Awarding compound interest is not only "consistent with commercial practices," Knoll, *Primer*, 75 Tex. L. Rev. at 307, but is also required by fairness and efficiency considerations. Id. at 308. In particular, simple interest "unfairly favors the defendant" for it does not require him to "fully pay for the harm caused." Id. Simple interest is also deficient because it fails to adequately deter the defendant from engaging in the harmful activity. Id. From an efficiency perspective, ordering simple rather than compound interest "encourages the defendant to drag on legal proceedings." Id.

Section 10(c) allows the Board to "effectuate the policies of th[e] Act" by requiring an employer "to restore and make-whole employees who have been discharged in violation of the Act." Republic Steel, 311 U.S. at 12. Discriminatees who merely receive simple interest on back pay, though, are not made whole for the loss of use of the money owed to them. As the Board articulated in Florida Steel Corp., when the Board adjusted the rate of interest to erosion of currency due to inflation, failure to award interest on back pay undercompensates wronged employees. Id. Having been deprived of the back pay at the time it originally should have been paid, a wronged employee has often lost numerous valuable opportunities to use that money

(including the opportunity to invest it and directly receive compound interest). Making the discriminatee whole therefore requires the Board to order compound interest.

The Board, in determining whether to order compound interest, should take proper notice of the interplay between the substance of the remedies it orders and the delay in providing those remedies. These points mirror the justifications for using compound rather than simple interest in the context of unfair labor practice cases overseen by the Board. They also show that the use of simple rather than compound interest undermines the Act in several key ways. To begin, the delay between the commission of unfair labor practices and the granting of relief to discriminatees by the Board is significant. The 2009 Annual Report published by the NLRB shows that in fiscal year 2009, the median number of days elapsed from the filing of an unfair labor practice charge to issuance of a Board decision was 483 days. In 2008, this figure was 559 days and in 2007, it was 1173 days. The cumulative delay prior to enforcement of an order for relief "provides employers with the opportunity to coerce employees in their choice about unionization" and "reduces the employee's bargaining power" in the settlement process. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769, 1796 (1983); see also Sachs, *Employment Law as Labor Law*, 29 Cardozo L. Rev. 2685 (2008) (attributing part of the NLRA's weakness to the delay in unfair labor practice cases and contrasting that to the more immediate remedies available under the Fair Labor Standards Act and Title VII).

The fact that the delay in issuing and enforcing orders in unfair labor practice cases is often substantial can be seen in the specific cases at issue here and should figure into the Board's decision. Moreover, the Board should keep in mind that ordering compound interest, like ordering interest in general, "would encourage more prompt compliance with Board orders

without placing a significant additional burden on the wrongdoer." Florida Steel, 231 NLRB at 651.

It is important to note, that simple interest fails to effectively deter the commission of unfair labor practices. One of the major considerations motivating the Board's revision of its interest policy in Florida Steel Corp. was "discouraging the commission of unfair labor practices." Id. The Court in NLRB v. J. H. Rutter-Rex Mfg. Co., in enforcing a Board order stated that "the Board could properly conclude that back pay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act." 396 U.S. 265. Given that compound interest is extensively employed and widely recognized as an appropriate measure of the true opportunity cost of money, its use is entirely justified on make-whole grounds alone. The added usefulness of compound interest in terms of deterrence, then, while fortunate, can be seen solely as "the serendipitous by-product of remedies designed to redress injuries inflicted on employees." See Paul Weiler, *Promises to Keep*, 96 Harv. L. Rev. at 1789. As the Court noted NLRB v. J. H. Rutter-Rex Mfg. Co.:

> Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer. In view of 'the economic hardship caused by many years of undeservedly substandard earnings,' lengthy delays 'must render the back pay award a wholly inadequate and unsatisfactory remedy' to the employees for the company's refusal to reinstate them. [Citation omitted]. This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. Id.

Given that back pay in general is often "far too small to be a significant deterrent" to employer commission of unfair labor practices, Id, the usefulness of compound interest on this count may be questioned. But compound interest, even if not "significant," is a deterrent

nonetheless and, more importantly, is mandated by fidelity to make-whole relief under the Act. The Board should thus not hesitate to require compound interest, as such orders should withstand even the most exacting scrutiny.

B. Ordering compound interest would harmonize Board practice with the Internal Revenue Code provision to which the Board claims to adhere.

Currently, even though the Board assesses interest on monetary awards at the rate used by the IRS for under and over payment, for seemingly no reason it refuses to follow IRS practice when it comes to compounding interest. The Board's stated reason for the Board's policy shift regarding interest in New Horizons was that a change in the practice of the IRS in calculating interest on underpayment of taxes required it to follow suit. Id. Having adopted the interest rate calculation method set out in the Internal Revenue Code, 26 U.S.C. §6621, the Board should enhance the internal consistency of its policy by also adopting the practice set out in the very next section of that code, which requires that money owed under §6621 be compounded on a daily basis. The Board should do so for the same reason that the Joint Committee on Taxation observed: that the failure to provide for daily compounding of interest "significantly reduced the effective rate of interest provided for" under the law. 26 U.S.C. §6622; General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982, 256. The Board should also follow suite because "neither the United States nor taxpayers were adequately compensated for the value of money owing to them." Id.

By adopting compounding, the Board would not be blindly following the practice of another federal agency. Rather, it would be further rationalizing its interest rate policy, assuring that its remedies are fully compensatory, enhancing its administrative effectiveness, and effectuating the purposes of the Act.

C. Other Federal agencies administering employment statutes containing similarly broad remedial language to the Act assess compound interest as part of make-whole remedy scheme.

The Department of Labor ("DOL") assesses compound interest pursuant to a number of statutes with broadly worded make-whole remedies similar to the NLRA.

Like the NLRA, the statutes that the DOL administers contain provisions aimed at preventing discrimination against a protected class in the employment context. For example, the employee protection section of the Energy Reorganization Act of 1974 ("ERA") prohibits "discriminat[ion] against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" has engaged in a series of protected activities, including notifying the employer of a violation of the EPA 1974 or the Atomic Energy Act of 1954, 42 U.S.C. §2011 et seq., refusing to engage in illegal actions, or testifying about proceedings under those acts. See 42 U.S.C. §5851; 42 U.S.C.A. §5851. The Sarbanes-Oxley Act, which the DOL also enforces, likewise provides penalties for employers who "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee" relating to the reporting of, or testimony relating to, various securities laws. 18 U.S.C. § 1514A.

Like the NLRA, the statutory language pertaining to remedies under the ERA and Sarbanes-Oxley is no more instructive on the issue of compounding than is the NLRA. The ERA, for instance, simply states that the Secretary of Labor shall order a violator to "(i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant." 42 U.S.C. §5851(b)(2)(B)(emphasis added). Sarbanes-Oxley entitles a

discriminatee to "all relief necessary to make the employee whole" including "the amount of back pay, with interest." 18 U.S.C. §1514A(c)(1)-(2). This command is entrusted to the Secretary of Labor's broad remedial discretion to "take affirmative action to abate the violation [and] reinstate the complainant to his or her former position together with the compensation (including back pay). . . [and] compensatory damages. . . ." 18 U.S.C. §1514A(b)(2)(A); 49 U.S.C. §42121(b)(3)(B) (emphasis added). Like the NLRA, neither statute specifies a method of calculating interest, but leaves it to the agency's discretion. The Board should be similarly free to adopt compound interest in its administrative discretion.

Furthermore, the manner in which the DOL has awarded compound interest in the same manner that we are now urging the Board to do in these matters is instructive here. For example, in Doyle v. Hydro Nuclear Services, the Administrative Review Board ("ARB") of the DOL announced that "[a]bsent any unusual circumstance, [it] will award compound interest on back pay in cases arising under all [such] employee protection provisions" because the "remedial nature" of the employee protection provisions of federal statutes over which it has jurisdiction and the "make-whole" goal of back pay required it to do so. 2000 WL 694384 (DOL ARB, May 17, 2000) at *15. It then proceeded to award back pay with compounded interest to a complainant whom an employer had refused to hire and subsequently blacklisted for asserting his whistleblower rights under the ERA. Id. at *14. In arriving at that decision, the ARB reasoned that "if [the complainant] had received the pay over the years, [he] could have invested in instruments on which he would have earned compound interest." Id. at *14. The ARB similarly granted compounded interest on the complainant's back pay award in light of the "make-whole" nature of Sarbanes-Oxley in Welch v. Cardinal Bankshares Corp. 2005 WL 4889000 (DOL SAROX, Feb. 15, 2005) at *20. The interest rate charged by the IRS on the

underpayment of Federal income taxes was adopted in both Doyle, 2000 WL 694384 at *15, and Welch, 2005 WL 4889000 at *20.

The Board should follow the DOL's example because the important public policy interests underlying whistleblower protection laws are also served by the unfair labor practice provisions of the Act. Clearly, the provisions of the Sarbanes-Oxley Act and the ERA relating to the reporting of violations of those laws are mirrored by the protections under Section 8(a)(4) of the NLRA relating to action taken or testimony given in response to unfair labor practices.

But in a deeper sense, the policies served by whistleblower protection statutes are also promoted by the NLRA. As Richard Freeman and James Medoff explain, unions give employees a collective voice, which, in turn, enhances the flow of information from employees to employers by (1) helping to overcome the free-rider problem that often results in the underprovision of public goods (including "safety conditions, lighting, heating" and policies regarding grievance procedures, layoffs, etc.); and (2) protecting the individual voice of workers by insulating them from discharge for expressing their information and preferences. Freeman and Medoff, *What Do Unions Do?* 7-11 (1984). By protecting concerted activities and the collective bargaining process, the NLRA's unfair labor practice provisions serve an information-provision function similar to that of the whistleblower protection provisions of the ERA and Sarbanes-Oxley. The extent to which this function is effectuated depends, in part, upon whether the remedy for violation of the law (i.e., back pay) makes the discriminatee whole and prevents the discriminatory action from occurring in the first place.

The DOL's current practice of providing compound interest on back pay awards for violations of laws under its jurisdiction thus provides a useful and compelling roadmap and should guide the Board toward formulation of a similar policy.

D. Several courts of appeals also order compound interest on back pay as a matter of course when awarding make-whole remedies.

The use of prejudgment compound interest in judicial proceedings is broadly established among the various circuit courts of appeals, even when applying statutes with broadly worded remedy provisions that are silent on the issue of interest. Like the NLRA, neither Title VII nor the Age Discrimination in Employment Act ("ADEA") explicitly provides for compound interest. Title VII provides that a court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g)(1). The ADEA gives courts the jurisdiction "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]." 29 U.S.C. §626(b). The similarity of this broad remedial language to that in Section 10(c) of the NLRA is striking.

In applying similar language, courts have ruled that compound interest be assessed in favor of discriminatees. See, e.g., American Nat. Fire Ins. Co. ex rel. Tabacalera Contreras Cigar Co., 325 F.3d 924, 937-38 (7th cir. 2003)(noting that, while "[a]s a general rule, the decision whether to award compound or simple prejudgment interest is left to the discretion of the trial court . . . compound prejudgment interest is the norm in federal litigation" and reversing district court award of simple interest); Termine ex rel. Termine v. William S. Hart Union High School Dist., 288 Fed.Appx. 360, 363 (9th cir. 2008)(holding that district court's award of compound interest was not an abuse of discretion and citing Am. Nat. Fire Ins. Co.); Transorient Navigators Co., S.A. v. M/S Southwind, 788 F.2d 288, 293 (5th cir. 1986) (holding that the district court did not abuse discretion in ordering that the interest owed by defendant be compounded daily); Dynamics Corp. of America v. United States, 766 F.2d 518 (Fed. cir. 1985) (reversing district court's refusal to compound prejudgment interest as an abuse of discretion).

This norm is widely applied in back pay cases. See, e.g., Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 145 (2nd cir., 1993) (holding that failure of district court to compound award of back pay in Title VII suit failed to make plaintiff whole and therefore constituted abuse of discretion); Sands v. Runyon, 28 F.3d 1323, 1328 (2nd cir. 1994) (stating that "[b]ack pay should be calculated to the date of judgment, and should ordinarily include compound interest" and citing Saulpaugh); EEOC v. Kentucky State Police Dept., 80 F.3d 1086, 1098 (6th cir., 1996) (generally approving of the Second Circuit's standard and holding that the district court did not abuse its discretion by awarding compounded interest on back pay owed to plaintiffs under the ADEA).

Given that a major purpose of the Act in general, and of the Board's remedial power under Section 10(c) in particular, is to provide make-whole compensation to wronged employees, it appears particularly appropriate for the Board to order compound interest as well. By conforming to the principles underlying compounding of interest in Federal litigation, the Board would be comporting with widely accepted general principles of law.

II. IN ORDER TO PROVIDE A FULL MAKE-WHOLE REMEDY AND CONFORM ITS PRACTICE TO THAT OF THE IRS, THE BOARD SHOULD ORDER INTEREST TO BE COMPOUNDED ON A DAILY BASIS.

A. The Act authorizes interest to be compounded on a daily basis.

As previously noted (see I.A.1, supra), Section 10(c) of the NLRA provides the Board with broad discretionary authority in fashioning orders designed to effectuate the make-whole remedial purpose of the Act. This discretion, which would permit the adoption of compounded interest, equally enables the Board to select a daily basis as the standard period over which to carry out that compounding.

B. There is no compelling justification for compounding on a quarterly (or any other) basis, rather than on a daily basis.

1. Ordering daily compounded interest would harmonize Board practice with the Internal Revenue Code provision that has guided recent Board policy on interest.

As noted and explained above (see I.B, supra), the IRS uses daily compounding in cases of underpayment of taxes. 26 U.S.C. §6622. As the Joint Committee on Taxation has observed, it is vital to realize that compounding yields different effective interest rates if a different basis (e.g., quarterly versus daily) is used, even if the nominal stated interest rate is the same. See Joint Committee on Taxation, Study of Present-Law Penalty and Interest Provisions as Required by §3801 of the IRS Restructuring and Reform Act of 1998 (including provisions relating to corporate tax shelters), Vol. 1, 41(1999) (noting that "a lower interest rate can be the equivalent of a higher rate if the compounding is more frequent"). Adopting daily compounding would promote further consistency with IRS practices and would remove a potential discrepancy between effective interest rates that would arise were the Board to order interest to be compounded on a non-daily basis. Daily compounding would also allow Board remedies to more fully enjoy the benefits cited in support of the Internal Revenue Code provisions, particularly those relating to superior compensation and enhanced administrative effectiveness.

2. Board precedent is consistent with daily compounding, as both reflect a concern with the time-sensitive nature of back pay awards.

The quarterly adjustment of interest rates adopted by the Board in New Horizons mirrors, to some extent, the Board's decision in F.W. Woolworth Co., 90 NLRB 289 (1950), which established the practice of computing back pay on a quarterly basis from the time of the respondent's "discriminatory action to the date of a proper offer of reinstatement." Id. at 293.

Far from representing a rigid adherence to a quarterly-based calculus, though, the rationale in Woolworth strengthens the case for compounding on a daily basis. Prior to the

Board's decision in Woolworth, back pay calculations were performed over the entire period for which the back pay was owed. The Board recognized that this method of calculation "f[ell] short of effectuating the basic purposes and policies of the Act" because "employees, after having been unemployed for a lengthy period following their discriminatory discharges [often] succeeded in obtaining employment at higher wages than they would have earned in their original employments. This . . . resulted in the progressive reduction or complete liquidation of back pay due." Id. at 291-92. As a result, employers often refused to offer reinstatement to discharged employees, "knowing that the greater the delay, the greater would be the reduction in back pay liability," and employees often "waiv[ed] their right to reinstatement in order to toll the running of back pay and preserve the amount then owing." Id. at 292. Moreover, the economic burden upon wrongfully discharged employees owing to "unemployment or employment at lesser wages may have resulted in the exhaustion of the employee's savings, his incurrence of debts, and even in deprivation of the necessities of life." Id. Thus, in order to effectuate the Act by restoring the situation to that which would have existed had there been no discrimination, the Board established the quarterly method of calculating back pay. Id.

The very same considerations that motivated the Board in Woolworth to revise its method of calculating back pay should move the Board to adopt daily compounding today. The Board takes over a year to resolve a matter under the Board's administrative process. That time is often substantially delayed when there has been a discriminatory discharge and actual receipt of back pay. After an ALJ makes findings, a rash of further litigation ensues that includes the filing of exceptions and brief related to those exceptions, those exceptions must be considered by the Board, the Board's order must be enforced by a court, and then this is all followed later by a mitigation proceeding. This all occurs while an aggrieved party remains without money needed

to make ends meet. This process further prolongs the amount of time that typically elapses between an unfair labor practice charge and a Board decision (see I.A.3, supra).

The amount of time that has elapsed since the unfair labor practices were committed in the cases currently before the Board illustrate the importance of providing for daily compounded interest. The discriminatory action taken by the employers in Bashas' Food City and Atlantic Scaffolding Company occurred more than two years ago; in Kentucky River Medical Center, the delay has been almost five years.

Given the importance of timely payments to workers seeking to earn a livelihood, true make-whole back pay awards should reflect the daily opportunity cost of delayed payments to workers. Daily compounding, a finer and more exact measure of the cost of pay wrongfully delayed to a worker, would thus more fully compensate discriminatees than would quarterly compounding. Daily compounding would also enhance incentives for reinstatement of wrongfully discharged employees, and would encourage settlements and reduce delays in unfair labor practice cases. Even more, it would end the effective subsidization of unfair labor practices committed by employers and would serve to deter unfair labor practices from being committed in the first place.

3. Daily compounding is administratively practical, as evidenced by its use by other Federal agencies.

The Supreme Court, while recognizing the Board's broad discretion in fashioning back pay awards, has also counseled the Board against "overestimat[ing] administrative difficulties and underestimat[ing] its administrative resourcefulness." Phelps Dodge, 313 U.S. at 198. While administrative ease is not an impermissible consideration, "the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." Id.

Daily compounding is used by the IRS in calculating the amount to be paid due to overpayment or underpayment of taxes (see I.B and II.B, supra). Moreover, daily compounding is used by the Office of Personnel Management in calculating back pay owed to Federal civil service employees. 5 C.F.R. §550.806; 5 U.S.C. §5596 (requiring, in cases of an "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee," that the employee receive back pay with interest which "shall be compounded daily."). In fact, this practice is based on 26 U.S.C.A. §6621, the same section of the Internal Revenue Code that the Board relied on in New Horizons. 283 NLRB at 1173.[2]

That daily compounding is used by another Federal agency in calculating back pay owed to employees strongly suggests that there are no great administrative obstacles to the Board's implementation of a similar policy. In fact, because daily compounding is a finer measure of the lost value of money over time (due both to inflation and lost opportunity costs), it is superior to quarterly compounding in terms of furthering the "make-whole" policy of the Act and back pay in general. This is particularly true where the back pay or monetary award has been delayed for a long period of time, as is often the case in unfair labor practice cases.

Although the Secretary of the Treasury determines the short-term Federal rate each month, the IRS applies the rate on a quarterly basis. New Horizons, 283 NLRB at 1174. It might be contended that because the rate of interest currently used by the Board is only updated on a quarterly basis, compounding should be done on a quarterly basis. This reasoning should be rejected. The rate of interest promulgated by the IRS for underpayment of taxes, used by the

[2] The only difference is that, while the Board in New Horizons specified the IRS underpayment rate, the Office of Personnel Management uses the IRS overpayment rate. Both measures, however, are calculated in the same way—by adding three percentage points to the Federal short-term rate (determined by the Secretary of the Treasury)—except that the overpayment rate is modified slightly for corporations. 26 U.S.C.A. §6621.

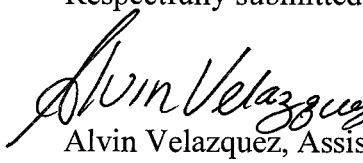
Board, is itself a modification of the official rate: it consists of the short-term Federal rate plus three percentage points. Thus, there is no necessary link, either from a practical or theoretical perspective, between the interest rate used by the Board and the compounding period which it may employ. In fact, as noted above, consistency with the effective interest rates used by the IRS would require daily compounding (see II.B.1, supra). But cf., Hughes Aircraft Co. v. United States, 31 Fed. Cl. 481, 493 (1994) (selecting an annual compounding period due to link between compounding and the effective rate of interest).

Keeping in mind its remedial advantages, then, the Board should adopt daily compounding of back pay and monetary awards.[3]

CONCLUSION

For all of the foregoing reasons, SEIU respectfully urges the Board to routinely order that daily compounded interest be assessed on awards of back pay and other monetary awards in unfair labor practice cases.

Respectfully submitted,



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[3] The Board could do this, for instance, by continuing to use the quarterly IRS rates for underpayment of taxes. Daily compounding would thus be based on the rates as revised every three months.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, I caused a true and accurate copy of the foregoing **Brief of Service Employees International Union as *Amicus Curiae*** to be sent via U.S. mail to the following:

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