

**UNITED STATE OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

<b>TEXAS DENTAL ASSOCIATION</b>	§	
	§	
<b>and</b>	§	
	§	
<b>NATHAN CLARK, an Individual</b>	§	<b>Cases Nos. 16-CA-25349</b>
	§	<b>16-CA-25445</b>
<b>and</b>	§	<b>16-CA-25383; and</b>
	§	<b>16-CA-25840.</b>
<b>BARBARA JEAN LOCKERMAN,</b>	§	
<b>an Individual</b>	§	
	§	
<b>and</b>	§	
	§	
<b>PATRICIA ST. GERMAIN, an Individual</b>	§	

**RESPONDENT'S ANSWERING BRIEF TO  
GENERAL COUNSEL'S CROSS-EXCEPTIONS**

Respondent Texas Dental Association (“TDA”) files this, its Answering Brief to General Counsel’s Cross-Exceptions to the Administrative Law Judge’s Decision and Order in this case. At the hearing in this matter, General Counsel twice requested that the Administrative Law Judge (the “ALJ”) deviate from the Board’s standard practices by requiring TDA to electronically post the required remedial notice and awarding the charging parties compound interest on their monetary award. Both requests would have required the ALJ to depart substantially from long-standing Board precedent, and, based on that precedent, the ALJ correctly denied these requests.

General Counsel now requests that the Board reverse course on electronic posting and compound interest. General Counsel has failed, however, to show why reversal of the Board’s position is warranted in this case wherein General Counsel presented no evidence of any conduct

by TDA warranting special remedies. Therefore, General Counsel's cross-exceptions should be denied.

**1. The ALJ Correctly Denied the Request For Electronic Posting.**

General Counsel requests that TDA be required to electronically post the remedial notice to its employees required by the ALJ's decision. The ALJ correctly denied the request and General Counsel's cross-exception should also be denied for the following reasons:

**a. The facts of this case do not warrant a special remedy.**

The National Labor Relations Board (the "Board") has consistently held that its standard notice-posting provision, which the ALJ issued in this case and which requires the posting of a remedial notice "in conspicuous places including all places where notices to employees are customarily posted," does not encompass electronic distribution. *See Int'l Business Machines Corp.*, 339 NLRB 966 (2003) (observing that the Board's standard order language has never been interpreted and applied to require electronic posting). Electronic posting is a special remedy reserved only for cases in which General Counsel shows that the Respondent's unfair labor practices "are so numerous, pervasive, and outrageous that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) *enf'd in relevant part* 97 F.3d 65 (4th Cir. 1996).

This is clearly not an appropriate case for electronic posting. General Counsel failed to show that TDA's unfair labor practices, if any, were anything more than isolated incidents involving two TDA employees and no anti-union activity, and General Counsel failed to present any evidence of outrageous conduct by TDA. In short, General Counsel failed to carry his burden to show that TDA's conduct required electronic posting.

**b. The only case cited by General Counsel where electronic posting was required is clearly distinguishable.**

General Counsel cites only one case where the Board required electronic posting. In *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001) *enf'd* 318 F.3d 1173 (10th Cir.) (“*POC*”), the Board required electronic posting after finding that, during the course of collective bargaining with a union, the respondent had “sent an electronic mail communication to all unit employees, soliciting them to notify the Respondent that they no longer wished to be represented by the Union. The aim was to enable the Respondent to obtain a decertification election to remove the Union as collective bargaining representative.” *Id.* at 490. The administrative law judge found, and the Board agreed, that the respondent used e-mail to commit an unfair labor practice. *Id.* The respondent was ordered to distribute a copy of the required notice “in electronic fashion on the same basis and to the same group or class of employees as were sent” the offending e-mail. *Id.* at 490-91. In requiring electronic posting to remedy the respondent’s conduct, the administrative law judge and the Board were clearly concerned that the “punishment fit the crime” and that the same employees whose rights had been violated with regard to the earlier e-mail be provided the notice.

This case is clearly distinguishable and the concerns present in *POC* are not relevant to this case. Despite General Counsel’s suggestion to the contrary, the ALJ did not find that TDA committed an unfair labor practice by sending an e-mail to its employees. Rather, the ALJ found only that TDA’s discharges of Nathan Clark and Barbara Lockerman were violations of the Act. Thus, *POC*, the only case cited by General Counsel where electronic posting was required, is plainly distinguishable, General Counsel’s request was correctly denied, and General Counsel’s cross-exception should also be denied.

**c. TDA does not regularly post notices to its employees electronically.**

General Counsel argues that TDA regularly communicates with its employees via e-mail and therefore should be required to electronically post the required notice. This argument is misplaced. Surely, virtually every employer that provides its employees with an e-mail account regularly communicates with its employees via e-mail. General Counsel's burden must be higher than merely proving that an employer regularly communicates with its employees via e-mail

In a recent case, the Board suggested that in order to show that electronic posting is necessary, General Counsel must show that the respondent **customarily posted its policies electronically**. See *Valley Hospital*, 351 NLRB No 88, fn. 1 (2007) (denying request for electronic posting even where General Counsel had presented "some limited evidence that the Respondent has begun posting some of its policies on its internet, [because] this evidence is insufficient to find that the Respondent customarily communicates with employees electronically.").

Pursuant to *Valley Hospital*, General Counsel failed to carry its burden by failing to show that TDA regularly posts its policies electronically. TDA provides its employees with permanent paper copies of its policies, including the personnel policies submitted into evidence in this case so as to provide a permanent copy for review. The permanency of the posting was the primary concern of the ALJ in denying General Counsel's request for electronic posting—in response to General Counsel's request, the ALJ stated that "electronic communications are subject to immediate deletion." JD slip op. at 15:21-22. Because General Counsel failed to show that TDA

regularly posts its policies electronically, General Counsel's cross-exception requesting electronic posting of the remedial notice should be denied.

**2. The ALJ Correctly Denied the Request For Compound Interest.**

General Counsel argues that interest on the ALJ's monetary award to the charging parties should be compounded quarterly. The ALJ correctly denied this argument, citing to the Board's recent decision in *National Fabco Mfg.*, 352 NLRB No. 37 (March 17, 2008). Now, General Counsel asks the Board to reverse *National Fabco* and its long-standing position against ordering compound interest. General Counsel has failed to raise any new arguments before the Board on this point and any arguments particular to this case. Therefore, General Counsel's cross-exception should be denied.

**a. The Board has repeatedly denied identical requests for compound interest.**

Only weeks ago, on May 23, 2008, the Board maintained its long-standing and consistent practice of denying compound interest requested by General Counsel. *Al & John, Inc.*, 352 NLRB No. 69 n. 1 (2008) (stating that "we are not prepared at this time to deviate from our current practice of assessing simple interest."). The Board denied General Counsel's request for compound interest computed on a quarterly basis—the identical request made by General Counsel in this case. *Id.* The *Al & John* holding is consistent with a long line of Board cases, including the *National Fabco Mfg.* case referenced by the ALJ in his opinion in this case. 352 NLRB No. 37 at n. 4 (same); see also *Rogers Corp. and Jeremy Lamothe*, 344 NLRB No. 60 (2005) (same); *Commercial Erectors, Inc.*, 342 NLRB 640, n. 1 (2004) (same); *Accurate Tool & Mfg.*, 355 NLRB 1096 n. 1 (2001) (same).

Based on this line of cases, other administrative law judges have rejected the same arguments made by General Counsel in this case, and have found that Board precedent mandates

an award of simple interest. *See, e.g., Narcot Industries*, 2008 WL 2019362 (May 6, 2008) (rejecting request for compound interest despite “the practice of the Internal Revenue Service in assessing daily compounded interest with regard to the overpayment or underpayment of federal income taxes.”).

Nevertheless, without providing reasons specific to this case as to why the Board should overturn its long-standing position, General Counsel requests that the Board require Respondent to pay compound interest on the ALJ’s monetary award. As with his request for electronic posting, General Counsel has failed to demonstrate how the facts of this case warrant the special remedy of compound interest. Therefore, General Counsel’s cross-exception on this point should be denied.

**b. Policy justifications in this case support the Board’s precedent.**

General Counsel references several policy arguments made by other employers in support of the Board’s refusal to award compound interest. Employers have successfully argued that 1) compound interest is punitive and inconsistent with the Act’s remedial purposes of making the discriminator whole; 2) compound interest based on compounding the short-term Federal rate plus a surcharge of three percent amounts to a penalty on a penalty because the three percent surcharge is already a penalty; 3) the Board’s own processes cause delay in a charging party receiving backpay; 4) compound interest will dissuade respondents from fully litigating their positions before the Board and the reviewing Federal Courts; and 5) the Board should proceed on a case-by-case basis and award compound interest in only the most egregious cases. These arguments are persuasive in this case.

First, compound interest is punitive and should only be applied, if at all, in the most egregious cases. General Counsel's attempt to analogize this case to employment discrimination cases where compound interest is awarded fails because the animus present in those cases, for example when an employer discriminates based on race, is simply not present in this case. Second, the Board's current vacancies, which have resulted in the rejection and backlog of unfair labor practice appeals, means that now more than ever, respondents will be punished for attempting to fully exercise their rights if they are forced to pay compound interest. *See, e.g.* Mo Morrissey, *NLRB Suffering Due to Political Wrangling Over Appointments*, ASSOCIATED CONTENT, April 3, 2008 (available at <http://www.associatedcontent.com/article/693013>) (stating that Board Chair Peter Shaumber revealed that about 15% of the NLRB's cases are being turned away because of vacancies on the board). Finally, awarding compound interest would discourage employees bringing cases under the Act from securing new employment and mitigating their damages. Based on these policy justifications, General Counsel's cross-exception requesting compound interest should be denied.

Respectfully submitted,

McGINNIS, LOCHRIDGE & KILGORE, L.L.P.

William H. Bingham

State Bar No. 02324000

Lin Hughes

State Bar No. 10211100

Brian T. Thompson

State Bar No. 24051425

600 Congress Avenue

Suite 2100

Austin, Texas 78701

(512) 495-6000

(512) 495-6093 FAX

By:   
Lin Hughes

*ATTORNEYS FOR TEXAS DENTAL  
ASSOCIATION*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2008 a true and correct copy of the above was filed electronically through the Board's e-filing system. In addition, the original and four paper copies were sent regular mail to:

Roberto Perez, Esq.  
Counsel for the General Counsel  
National Labor Relations Board  
Region 16, San Antonio Resident Office  
H.F. Garcia Federal Building & US Courthouse  
615 East Houston Street, Suite 401  
San Antonio, TX 78205-2039

Eight paper copies were sent overnight mail to:

Office of the Executive Secretary  
National Labor Relations Board  
1099 14th Street NW  
Washington D.C. 20570

Copies were also sent via regular mail to:

Barbara Jean Lockerman  
209 Byrne Street  
Smithville, Texas 78957

Nathan Clark  
8801 La Cresada Drive, Apt 1536  
Austin, Texas 78749

Patricia St. Germain  
601 Davis Ranch Road  
San Marcos TX 78666



---

Lin Hughes