

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ONE**

ADF, INC. AND ITS ALTER EGO ADLA, LLC

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 251

CASE 1-CA-45068
JD-59-09

**GENERAL COUNSEL'S LIMITED CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46, subsection (e), of the Rules and Regulations of the National Labor Relations Board, the undersigned Counsel for the General Counsel respectfully files the following limited cross-exceptions to the Decision of Administrative Law Judge Arthur J. Amchan, dated November 4, 2009:

1. The Judge declined to rule on the issue of Anthony DelFarno's personal liability for Respondents' unfair labor practices, inappropriately deferring consideration of the issue to the compliance stage. (ALJD 6:20-24)
2. In his proposed remedy, the Judge improperly failed to order quarterly compound interest as pleaded in the Complaint. (ALJD 9:3-26)

Respectfully submitted,



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Dated at Boston, Massachusetts
this 18th day of December, 2009

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**GENERAL COUNSEL'S BRIEF IN SUPPORT OF THE LIMITED
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TABLE OF CONTENTS

I.	<u>STATEMENT OF THE CASE</u>	1
II.	<u>CROSS-EXCEPTION 1</u>	2
	<u>The Judge declined to rule on the issue of Anthony DeFarno’s personal liability for Respondents’ unfair labor practices, inappropriately deferring consideration of the issue to the compliance stage.</u>	
	A. <u>Procedural Background</u>	2
	B. <u>Facts supporting a finding of personal liability</u>	3
	C. <u>Board law supports a finding that Anthony DeFarno should be held personally responsible for the unfair labor practices of ADF and ADLA because he failed to maintain an arm’s-length relationship between himself and the companies under his control, blurring the corporations’ separate identities and misusing corporate assets for his personal gain.</u>	4
	D. <u>DeFarno would not be prejudiced by the amendments to the Complaint, and deferral to the compliance stage is not in the interest of justice.</u>	11
III.	<u>CROSS EXCEPTION 2</u>	12
	<u>Interest on the monetary award should be compounded on a quarterly basis.</u>	
	A. <u>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.</u>	12
	B. <u>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</u>	14
	1. <u>The Board should follow IRS policy and compound interest on monetary remedies</u>	14

2. <u>The Board should follow the practice of federal court applying employment discrimination law, of the U.S. Department of Labor, and of OPM and award compound interest on monetary remedies</u>	16
C. <u>The Arguments Made By Opponents of Compound Interest are Without Merit</u>	19
D. <u>The Board Should Compound Interest on a Quarterly Basis</u>	22
TABLE OF CASES	24

I. STATEMENT OF THE CASE

This case was heard before Administrative Law Judge Arthur J. Amchan in Pawtucket, Rhode Island on July 13, 2009, and in Providence, Rhode Island on August 24 and 25, 2009.¹ Anthony DelFarno, the owner of ADF and part-owner of ADLA, appeared *pro se* for the Respondents.

On November 4, Judge Amchan issued his Decision in the above-captioned case, in which he made certain findings of fact and conclusions of law and recommended that Respondent be ordered to take certain affirmative actions to effectuate the purposes of the Act.

Judge Amchan correctly found that Respondent ADLA is an alter ego of Respondent ADF, and that Respondents violated Section 8(a)(5) and (1) of the Act by repudiating and failing to comply with their collective-bargaining agreement with Teamsters Local Union No. 251 (“Union”).

On November 16, ADF and ADLA filed exceptions in which they launched a broad attack on the Administrative Law Judge’s Decision (“ALJD”), arguing that Judge Amchan showed bias and animus toward ADF and ADLA, and that the decision was generally flawed in its analysis of the facts and applicable law. The General Counsel has submitted an Answering Brief dealing with those exceptions.

General Counsel has now filed limited cross-exceptions to the ALJD. Specifically, the General Counsel respectfully submits that the Administrative Law Judge erred by (a) deferring to the compliance stage a ruling on Anthony DelFarno’s individual liability (ALJD 6:20-24),² and

¹ All dates are in 2009 unless otherwise noted.

² The first number designates the page in the ALJD, the second number(s) designates the line.

(b) failing to order interest compounded on a quarterly basis. (ALJD 9:3-26) This brief is submitted in support of those cross-exceptions.

II. CROSS-EXCEPTION 1

The Judge declined to rule on the issue of Anthony DeFarno's personal liability for Respondents' unfair labor practices, inappropriately deferring consideration of the issue to the compliance stage.

There is ample evidence in the record to support a finding of individual liability, and the ALJ erred when he deferred the issue to the compliance stage. As detailed below, as well as in the General Counsel's Answering Brief, Anthony DeFarno routinely ignores corporate formalities, commingles his personal funds with those of ADLA, and undercapitalizes the companies he runs. Moreover, there is no inequity in declining to extend the protections of the corporate form to him. In fact, injustice would result from a failure to impose personal liability.

A. Procedural Background

On August 10, during the hiatus in the hearing, the General Counsel filed a Notice of Intent to Amend the Complaint to allege that DeFarno is personally liable for the unfair labor practices of ADF and ADLA. When the hearing resumed on August 24, the motion was formally made on the record, and DeFarno objected. Judge Amchan did not rule on the motion at that time, but indicated that he would base his ruling on whether the Respondent would be prejudiced by the proposed amendments to the Complaint. As stated in the Notice of Intent to Amend, the motion is based on evidence adduced during the hearing on July 13, when DeFarno gave testimony regarding commingled personal and corporate finances. Thereafter in his Decision, Judge Amchan declined to rule on the motion, deciding instead to defer the matter to the compliance stage. In particular, the Judge stated, "I have no sense of how DeFarno's use of

ADLA accounts to pay rent, support for his ex-wife, etc. impacts the ADLA to satisfy its obligations under the collective bargaining agreement.” (ALJD 6: 40-42)

In refusing to rule on the motion, or on DelFarno’s personal liability, the ALJ cited the following reasons: (a) DelFarno appeared *pro se*; (b) DelFarno received two weeks’ notice of the General Counsel’s intent to amend the Complaint; (c) DelFarno requested a continuance in light of the motion to amend, and his request was denied; and (d) enforcement of the General Counsel’s subpoena would give a clearer picture of the *White Oak Coal* criteria, particularly on the issue of whether DelFarno’s personal use of ADLA funds diminishes ADLA’s ability to satisfy its remedial obligations. (ALJD 6:26-42) These will be discussed below.

B. Facts Supporting a Finding of Personal Liability

Anthony DelFarno does not draw a pay check from ADLA, and has no other employment or source of income. (T 192)³ Instead, he draws “disbursements” from ADLA to pay his personal expenses, such as rent and utilities on his current residence at 75 Independence Way, Cranston, RI (T 112);⁴ car lease payments;⁵ maintenance of his estranged wife’s house (T 112),⁶ legal fees, and the like. (T 124) DelFarno acknowledged that he pays some of these expenses with ADLA checks, (T 193) explaining that he then charges it to himself as income from ADLA.⁷ However, DelFarno produced no documentary evidence to support this assertion, and

³ “T” will be used to designate the transcript; “GC” will designate General Counsel exhibits; “RE” will designate Respondents’ Exceptions to the ALJD.

⁴ Rent and utilities total about \$1500 per month, according to DelFarno. (T 197)

⁵ DelFarno has car lease payments of \$700 per month. (T 197)

⁶ According to DelFarno, the payments for the maintenance of the domicile total about \$7500-8000 per month, including a \$1000 a week payment for child support or alimony. (T 196)

⁷ DelFarno testified that, for income tax purposes, he assumes that the expenses on his primary residence are used 50 percent for business purposes, since he maintains an office there. (T 198) This loose method of accounting supports a conclusion that he does not maintain records of business expenses, but simply uses whatever funds are available to him and worries about accounting later.

the Judge correctly discredited it, finding that DelFarno does not distinguish personal expenses from business expenses when writing checks on the ADLA account.

Both DelFarno and ADLA part-owner Lisa Lavigne have loaned money to the two companies. DelFarno admitted that he has loaned money to ADF and ADLA to cover payroll and to pay for fuel.⁸ (T 101) Likewise, Lavigne confirmed that she has loaned money to ADF. (T 326) Neither DelFarno nor Lavigne produced any documents showing the terms of these loans, or demonstrating that they have been repaid. The ALJ correctly noted that DelFarno's and Lavigne's failure to produce subpoenaed documents prevented the General Counsel from adducing additional testimony and documentary evidence on the matter of individual liability. (ALJD 6:14-18)

At several points throughout the proceeding, DelFarno and Lavigne warned that ADLA is in financial straits and may not survive. Most recently, in his Exceptions, DelFarno asserted that ADLA's "work has not been consistent, and there were many days that none, or only one of the tractors has worked" (RE pg. 1, para. 4); that "ADLA [has not been] performing much work at all" (RE pg. 2, para. 1); and that ADLA's drivers "do not work regularly." (RE pg. 4, para. 6)

C. Board law supports a finding that Anthony DelFarno should be held personally responsible for the unfair labor practices of ADF and ADLA because he failed to maintain an arm's-length relationship between himself and the companies under his control, blurring the corporations' separate identities and misusing corporate assets for his personal gain.

The corporate form of a business organization serves the legal and policy purpose of promoting business investment by protecting corporate shareholders against personal liability. However, in order to benefit from the corporate legal fiction, the corporation must maintain a

⁸ ADF and ADLA frequently cannot meet their obligations to employees. Driver Javier Lopez testified that payroll checks often bounced, (T 249-50) and Union business agent Steve Labrie testified that ADF has long been in arrears on both health and welfare and pension fund payments.

distinct and separate identity from its shareholders. *Bolivar-Tees, Inc.*, 349 NLRB 720 (2007).

Should it fail to do so, the Board will pierce the corporate veil to hold an individual liable for the corporation's unfair labor practices. *SRC Painting, LLC*, 346 NLRB 707 (2006).

In *White Oak Coal Co.*, 318 NLRB 732 (1995), the Board adopted a two-pronged test for piercing the corporate veil:

Under Federal common law, the corporate veil may be pierced when: (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of same, or under capitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to non-corporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice, or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found.

Id. at 735 (citations omitted).

If an individual freely withdraws funds from a corporation, without supporting documentation or other indicia of an arm's-length relationship, then the corporation's separate

identity is blurred. *Id.* Moreover, the use of corporate funds to pay personal loans and other personal expenses constitutes a misuse of corporate identity and assets. *Id.* at 733-734.

In *White Oak Coal*, *supra*, the Board held corporate shareholders personally liable for the company's remedial and backpay obligations after it determined that they had misused the corporate structure. The Board found that the shareholders in *White Oak Coal* had continuously commingled and diverted corporate assets for personal, non-corporate uses, transferred corporate assets without arm's-length dealing for personal gain, misrepresented or interchanged corporate identity and obligation in legal documents, and failed to maintain adequate corporate records to justify their commingling of personal and corporate finances and affairs. *Id.* at 735.

Similarly, in *SRC Painting*, *supra*, the Board affirmed the Administrative Law Judge's finding of individual liability based in part on the respondents' liberal withdrawal of funds from one of the alter ego corporations, without supporting documentation or other indicia of an arm's-length relationship. *Id.* at 722. The respondents in *SRC Painting* withdrew corporate funds to pay for personal expenses such as telephone bills, student loans, home mortgage and utility payments, Direct TV and cable bills, the purchase of luxury items such as an expensive camera using corporate funds, and monthly car payments. *Id.*

As in *SRC Painting* and *White Oak Coal*, the record in this case is replete with examples of DeFarno's commingling of his personal assets and affairs with those of the Respondent companies.

Although his sole source of income is ADLA, DeFarno does not draw a pay check for his work. Instead, he draws "disbursements" from ADLA to pay his personal expenses, such as rent and utilities on his personal residence, car lease payments, maintenance of his estranged wife's house, and legal fees. DeFarno admittedly pays for these expenses either with ADLA

checks or from his own account, depending on which accounts have money in them. Although he claims to record these payments as income, there is no evidence that he has ever done so.⁹ As a result, it appears that DelFarno simply uses ADLA's accounts as his personal bank account, drawing funds as needed with no regard to the arm's-length requirement of the limited liability corporation. Moreover, neither DelFarno nor ADLA maintains records of these withdrawals.

Conversely, DelFarno frequently dips into his own pockets for corporate expenses, indicating that both companies are undercapitalized. At both ADF and ADLA, DelFarno has used his own money to cover payroll, to buy fuel for company vehicles, and to pay other business expenses. Although DelFarno claimed to have maintained a ledger of those transactions, there is no evidence in the record of either the loans or their repayment.

Similarly, DelFarno personally owns a Kenworth truck which he permitted ADF, and now ADLA, to use. Although he asserted that he will receive a percentage of the truck's revenue, there are no lease documents, invoices, or ledgers describing the truck's revenues, the terms of its use, or payments made.¹⁰ It is obvious that, like all his other personal and corporate assets, the Kenworth generates revenues that are deposited into one pool, from which DelFarno withdraws funds as needed for personal and business expenses.

In his decision, Judge Amchan appears to acknowledge that the General Counsel has satisfied the first prong of the *White Oak Coal* test. Even without financial records, DelFarno's testimony paints a picture of wanton disregard for corporate formalities and the legal obligations that underlie them. His routine and undocumented use of ADF and ADLA funds for such highly

⁹ DelFarno testified that he maintains a ledger in which these transactions are recorded, (T 295) but failed to produce any documentation. Thus, the ALJ properly inferred that either the ledger does not exist, or, if produced, it would not support DelFarno's testimony.

¹⁰ In his Exceptions, DelFarno asserted that the Kenworth is no longer on the road, in direct contradiction of his record testimony. (Compare T 71-72 with Respondents' Exceptions at page 5, para. 1)

personal expenses as the support of his former wife and the legal fees associated with the dissolution of their marriage clearly illustrates his total disregard for corporate formalities. Moreover, the undercapitalization of both companies supports a finding that the corporate form has been abused. There is no evidence that the purported loans adhered to accepted business standards regarding repayment terms or interest, or even that they were documented in any way. The Board has found undercapitalization to be one of the “most serious forms of abuse of the corporate entity.” *D.L. Baker, Inc.*¹¹

Because neither Respondent produced subpoenaed documents, the General Counsel was restricted in his ability to demonstrate the scope of DelFarno’s misuse of the corporate structure. The ALJ correctly noted that the General Counsel is entitled to an inference that, if produced, such financial documents would be unfavorable to the Respondent. (ALDJ 7:3-7 and ALJD 7:36-41) Nevertheless, the Judge declined to rule on the issue, deciding instead that the General Counsel should seek enforcement of the subpoenas in U.S. District Court so that a complete record could be made. The General Counsel should not be required to enforce his subpoenas in order obtain a ruling on individual liability. The evidence produced at trial, together with the adverse inferences to which the Government is entitled, is sufficient basis for a finding of individual liability.

The General Counsel has also met his burden of establishing that the second prong of the *White Oak Coal* test has been met. Because the imposition of individual liability is an equitable form of relief, it will be imposed only where “adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.”¹² Thus, the second prong

¹¹ 351 NLRB 515, 522 (2007)

¹² *White Oak Coal Co.*, 318 NLRB at 735.

hangs on the question of whether DelFarno's financial relationships with ADF and ADLA would lead to an unfair result if personal liability were not imposed.

In his Decision, Judge Amchan wondered whether DelFarno's misuse of ADLA funds "has diminished ADLA's ability to satisfy its remedial obligations" under the Act. (ALJD at 6:38-40) This reading of *White Oak's Coal's* second prong is unnecessarily narrow. Although this is one of the considerations raised in *White Oak Coal*, it is not the whole inquiry relevant to the second prong of the test for individual liability. Rather, the Board requires that "inequity must flow from the misuse of the corporate form, and the individuals charged personally must be found to have participated in the fraud, injustice, or inequity."¹³

Here, it is clear that DelFarno divested ADF of its assets and transferred the trucking operation, complete with all its customers, managers, and employees, to ADLA. As Judge Amchan correctly noted, DelFarno did so as part of a course of conduct intended, among other aims, to relieve himself of his legal obligations to his employees under his collective-bargaining agreement with the Union. (ALJD 4:20-25)¹⁴ Having freely used ADLA accounts without documentation to pay for his personal expenses, including countless items that would have undoubtedly shown up in the subpoenaed documents, he has left ADLA with little working capital. This is evidenced by his repeated need to "loan" money to ADLA for basic operating expenses, and by his inability to meet his most basic obligations as an employer. As discussed fully in the General Counsel's Answering Brief, DelFarno frequently cannot cover payroll, has not made Health and Welfare payments since July 2008, and has not contributed to the pension

¹³ *A.J. Mechanical, Inc.*, 352 NLRB 874, 876 (2008)

¹⁴ In addition, it is probable that DelFarno divested himself of all assets in view of his ongoing divorce proceedings and the related division of property. His ex-wife could make no claim to vehicles, equipment, and other assets in ADLA's name.

fund for at least two years. As a result, unless DelFarno is held personally liable, the employees of ADF/ADLA and the Union stand little chance of reaping the benefits of the remedy recommended by the ALJ. It is only fair that DelFarno, who has benefited from his free access to ADLA accounts, be personally held liable for the unfair labor practices committed by ADLA as an alter ego of ADF.

Based on the foregoing, as well as on appropriate adverse inferences made by the ALJ, the General Counsel has produced sufficient evidence to support a finding of personal liability. Although, as Judge Amchan noted, the ALJ has discretion to defer such a finding to the compliance stage, this is neither necessary nor appropriate where, as here, there is ample evidence that Respondent has consistently ignored corporate formalities by commingling funds, treating corporate assets as his own, and undercapitalizing the two companies. Thus, the General Counsel's motion to amend the Complaint should be granted.¹⁵

¹⁵ As detailed in the General Counsel's Brief to the ALJ, the amendment would add Anthony DelFarno as an individual Respondent, and add the following paragraphs to the Complaint:

2. Since about October 2008, a more precise date being presently unknown to the General Counsel, Respondent DelFarno:

- a. has failed to operate Respondents ADF and ADLA as separate corporate entities;
- b. has commingled Respondents' corporate funds and assets with his personal funds and assets;
- c. has failed to maintain adequate corporate records for Respondents;
- d. has disregarded corporate legal formalities with Respondents and has failed to maintain arms'-length relationships between Respondent companies and between Respondent companies and himself;
- e. has diverted Respondents' assets for non-corporate uses; and
- f. has transferred Respondents' assets without fair consideration.

3. At all material times, Respondent DelFarno, in his capacity as an owner, officer, shareholder, and/or primary source of capitalization for Respondent, has demonstrated such a unity of interest with Respondents, and lack of respect for its separate identity, that Respondents' personality and assets and his own are indistinct, and adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

D. DelFarno would not be prejudiced by the amendments to the Complaint, and deferral to the compliance stage is not in the interest of justice.

DelFarno would not be unduly prejudiced by such amendments to the Complaint. First, he received notice of the Intent to Amend on August 10, two full weeks before the hearing resumed. DelFarno acknowledged that he had consulted an attorney regarding the motion and its ramifications, but apparently decided not to retain counsel, as he continued to appear *pro se*. His decision not to hire a lawyer does not equate to prejudice, however, and DelFarno could have taken any of several actions if he truly believed he was prejudiced by the purportedly late notice of the amendment. As noted above, he could have retained counsel, but did not.¹⁶ He could have asked the ALJ to keep the record open in order to prepare his defense on the issue of individual liability, but he did not.¹⁷ He could have made a statement on the record regarding the ways in which he would be prejudiced, but he did not even do that. Instead, DelFarno made a blanket claim that he would be prejudiced by the requested amendment:

Even in [Counsel for the General Counsel's] amendment to put me personally in the complaint and not allow me to defend myself. It's a prejudice. It's prejudice. It's showing individual prejudice and discrimination completely. (T 350: 18-21)

Without more, DelFarno's bald claim of prejudice does not preclude amendment of the Complaint, or a finding of individual liability. This is especially true where it was DelFarno's own testimony, during the first day of hearing, that precipitated the Motion to Amend. Until then, DelFarno alone had knowledge of his companies' complete failure to observe legal formalities. The General Counsel should be permitted to react to the disclosures by amending

¹⁶ On August 19, DelFarno requested a postponement of the hearing resumption date in order to retain counsel. It is noteworthy that he waited nine days after the General Counsel's motion was filed before making this request, which was denied by the ALJ.

¹⁷ Judge Amchan gave DelFarno ample opportunity to make such a request.

the Complaint and naming DelFarno as an individual respondent, with personal liability for the unfair labor practices of the companies he runs.

In view of DelFarno's direct role in depleting ADLA's coffers by repeatedly and blatantly treating company funds as his own, adherence to the corporate form and failure to disregard the corporate entity would unfairly reward his attempts to avoid his legal obligations and would promote injustice. *SRC Painting, LLC*, 346 NLRB at 708 (holding that, to be held individually liable for a corporation's unfair labor practices, an individual must have participated in the fraud, injustice, or inequity). Under these circumstances, it is both entirely appropriate and just to disregard the corporate entity and hold DelFarno personally liable for the unfair labor practices of ADF and ADLA.

III. CROSS-EXCEPTION 2

Interest on the monetary award should be compounded on a quarterly basis.

Counsel for 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 fn.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 loans,¹⁸ the Board's current policy of assessing only simple interest fails to return discriminatees to the pre-unfair labor practice status quo. Thus, if an employer violates Section 8(a)(5), for example, by failing to pay unit employees their contractual benefits, a unit employee may need to borrow money from a bank in order to pay bills or maintain private health insurance while awaiting the Board order or the enforcement of that order. The employee will have to repay that loan with compounded interest, and a Board order awarding only simple interest will fail to fully compensate that employee for out-of-pocket expenses caused by the unfair labor practice.

¹⁸ 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.¹⁹ 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.²⁰ The Board should update its policy so as to be in line with these practices.

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

¹⁹ 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 & fn.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).

²⁰ Moreover, federal courts routinely compound interest in non-employment cases to make injured parties whole. See, e.g., *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).

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.²¹ As part of the Tax Equity and Fiscal Responsibility Act of 1982, 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.

²¹ In those two cases, the parties did not argue, and the Board did not address, the issue of whether the interest should be compounded.

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.

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.*”²² *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) (emphasis supplied), cert. denied 510 U.S. 1164 (1994). See also *Cooper v. Paychex, Inc.*, 960 F. Supp. 966, 975 (E.D. Va. 1997) (Title VII and 42 U.S.C. § 1981 race discrimination case stating “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). When discussing the presumption of a backpay remedy for a Title VII violation, the Supreme Court has made clear that Title VII remedies were modeled after those provided under the NLRA, the

²² 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 post-judgment interest, which must be compounded pursuant to the federal post-judgment 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).

purpose of which is to put discriminatees in the position they would have been in absent the respondent's unlawful conduct:

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 has also 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.²³ 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

²³ 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.

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 (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 *Amtel Group of Florida, Inc. v. Yongmahapakorn*, 2006 WL 2821406, at *9 (DOL Admin. Rev. Bd. September 29, 2006) (involving Immigration and Nationality Act).

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); 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 Section Decision dated April 21, 2003) (where federal agency had discriminated based on sex, EEOC stated that interest on backpay owed to discriminatee had to be compounded daily as required by 5 C.F.R. § 550.806(e)).

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.²⁴ 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 discrimination have routinely awarded compound interest for this make-whole purpose. 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

²⁴ Compound interest grows at an increasing rate the longer a monetary award 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.

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) (where Postal Service violated Rehabilitation Act of 1973 by refusing to hire applicant because of physical disability, court stated backpay “should ordinarily include compound interest”); *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 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. This argument is sometimes 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 & fn.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.

D. 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.²⁵ 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). In 2000, the DOL’s Administrative Review Board also adopted a policy of compounding interest quarterly on monetary awards owed to discriminatees in employee

²⁵ 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.

<u>Type of Interest</u>	<u>Year 1</u>	<u>Year 5</u>	<u>6th Year Alone</u>	<u>Total for 6 Years</u>
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

protection cases. See, e.g., *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. 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 a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

Respectfully submitted,



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Dated at Boston, Massachusetts
this 18th day of December, 2009.

TABLE OF CASES

	<u>PAGE NO.</u>
<i>A.J. Mechanical, Inc.</i> , 352 NLRB 874, 876 (2008).....	9
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405, 419 (1975).....	17
<i>Amtel Group of Florida, Inc. v. Yongmahapakorn</i> , 2006 WL 2821406, at *9 (DOL Admin. Rev. Bd. September 29, 2006)	18, 23
<i>Bergmann v. Department of Justice</i> , 2003 WL 1955193, at *3 (EEOC Federal Section Decision dated April 21, 2003)	18
<i>Bolivar-Tees, Inc.</i> , 349 NLRB 720 (2007)	5
<i>Brown v. Consolidated Rail Corp.</i> , 614 F. Supp. 289, 291 (N.D. Ohio 1985).....	14
<i>Cherokee Marine Terminal</i> , 287 NLRB 1080, 1081 (1988)	21
<i>Cooper v. Paychex, Inc.</i> , 960 F. Supp. 966, 975 (E.D. Va. 1997), affd. 163 F.3d 598 (4th Cir. 1998)	16
<i>D.L. Baker, Inc.</i> , 351 NLRB 515, 522 (2007)	8
<i>Davis v. Kansas City Housing Authority</i> , 822 F. Supp. 609, 616-617 (W.D. Mo. 1993).....	16
<i>Doyle v. Hydro Nuclear Services</i> , 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000)	17, 18, 23
<i>Doyle v. U.S. Secretary of Labor</i> , 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002).....	18
<i>EEOC v. Guardian Pools, Inc.</i> , 828 F.2d 1507, 1512 (11th Cir. 1987)	17
<i>EEOC v. Gurnee Inn Corp.</i> , 914 F.2d 815, 817, 819-820 (7th Cir. 1990)	22
<i>EEOC v. Kentucky State Police Department</i> , 80 F.3d 1086, 1098 (6th Cir. 1996), cert. denied 519 U.S. 963 (1996)	20
<i>EEOC v. Sage Realty Corp.</i> , 507 F. Supp. 599, 613 (S.D.N.Y. 1981).....	22
<i>Florida Steel Corp.</i> , 231 NLRB 651, 651 (1977) enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978).....	13, 15
<i>Freeman Decorating Co.</i> , 288 NLRB 1235, 1235 fn.2 (1988).....	13
<i>Isis Plumbing & Heating Co.</i> , 138 NLRB 716, 717 (1962) enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963)	14, 19
<i>Luciano v. Olsten Corp.</i> , 912 F. Supp. 663, 676 (E.D.N.Y. 1996), affd. 110 F.3d 210 (2d Cir. 1997).....	16
<i>New Horizons for the Retarded, Inc.</i> , 283 NLRB 1173, 1173 (1987).....	15, 23
<i>NLRB v. G & T Terminal Packaging Co.</i> , 246 F.3d 103, 127 (2d Cir. 2001)	14
<i>NLRB v. Operating Engineers Local 138</i> , 385 F.2d 874, 878 & fn.22 (2d Cir. 1967), cert. denied 391 U.S. 904 (1968)	14
<i>O'Quinn v. New York University Medical Center</i> , 933 F. Supp. 341, 344-345 (S.D.N.Y. 1996).....	16, 22
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177, 194, 197-198 (1941).....	13
<i>Republic Steel Corp. v. NLRB</i> , 311 U.S. 7, 10 (1940).....	12, 19
<i>Rogers v. Fansteel, Inc.</i> , 533 F. Supp. 100, 102 (E.D. Mich. 1981).....	20
<i>Rush v. Scott Specialty Gases, Inc.</i> , 940 F. Supp. 814, 818 (E.D. Pa. 1996).....	16, 22
<i>Russo v. Unger</i> , 845 F. Supp. 124, 127 (S.D.N.Y. 1994).....	20, 22
<i>SRC Painting, LLC</i> , 346 NLRB 707 (2006)	5, 6, 12

<i>Sands v. Runyon</i> , 28 F.3d 1323, 1328 (2d Cir. 1994).....	20
<i>Saulpaugh v. Monroe Community Hosp.</i> , 4 F.3d 134, 145 (2d Cir. 1993), cert. denied 510 U.S. 1164 (1994)	16, 19
<i>Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.</i> , 633 F. Supp. 1047, 1057 (D. Del. 1986)	14
<i>United States v. 319.46 Acres of Land More or Less</i> , 508 F. Supp. 288, 291 (W.D. Okla. 1981)	14
<i>White Oak Coal Co.</i> , 318 NLRB 732 (1995).....	5, 6, 8

Statutes

1982 U.S.C.C.A.N. 781	16, 22
26 U.S.C. § 6621(a) (2000).....	15
26 U.S.C. § 6622(a)	15, 22
28 U.S.C. § 1961(b)	16
42 U.S.C. §§ 2000e to 2000e-17 (2000).....	16
5 U.S.C. § 5596(b)(1), (b)(2)(B)(iii) (2000)	18

Regulations

5 C.F.R. § 550.801(a).....	18
5 C.F.R. § 550.806(a)(1), (e) (2006).....	18
53 Fed. Reg. 45	18
C.F.R. § 550.806(e).....	18

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

In the Matter of

ADF, INC. AND ITS ALTER EGO ADLA

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 251

CASE 1-CA-45068
JD-59-09

DATE OF MAILING December 18, 2009

AFFIDAVIT OF SERVICE OF copy of General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge, General Counsel's Brief in Support of the Limited Cross-Exceptions to the Decision of the Administrative Law Judge, AND General Counsel's Answer Brief to Respondents' Exceptions to the Administrative Law Judge's Decision

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

Anthony Delfarno, President ADF, Inc. and its alter ego ADLA, LLC 99 Jefferson Boulevard Warwick, RI 02888	Ryan C. Hurley, Esq. Gursky Law Associates 420 Scrabbletown Road, Suite C North Kingstown, RI 02852
Ms. Lisa Lavigne ADLA, LLC 99 Jefferson Boulevard Warwick, RI 02888 Ms. Lisa Lavigne 75 Independence Way Building 40, Apt. 114 Cranston, RI 02021	

/s/ Mary H. Harrington

Subscribed and sworn to before me this 18th day of December,
2009

DESIGNATED AGENT

Michelle Cassata
NATIONAL LABOR RELATIONS BOARD