

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

**EMBARQ CORPORATION, a wholly-owned
Subsidiary of CENTURYTEL, INC. d/b/a
CENTURYLINK**

and

**Cases 28-CA-22804
28-CA-22849
28-CA-23021**

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL
UNION #396, AFL-CIO**

**ACTING GENERAL COUNSEL'S BRIEF
IN SUPPORT OF CROSS-EXCEPTIONS**

Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Brief in Support of Cross-Exception to the Decision of the Administrative Law Judge.¹

I. Respondent Videotaped Employees Engaged in Picketing in Violation of Section 8(a)(1).

The ALJ correctly found that Respondent videotaped employees engaged in picketing (ALJD p. 2, lines 40-42); however, the ALJ failed to state a conclusion of law that Respondent's videotaping of the picketing employees violated Section 8(a)(1). The ALJ also failed to order a remedy to the violation. The ALJ's error appears to be inadvertent since he correctly concluded the photographing of employees by Respondent during the same picket violated Section 8(a)(1) and ordered an appropriate remedy for the photographing. (ALJD p. 13, lines 39-41; ALJD p. 14, lines 32-34)

¹ "ALJ" refers to Administrative Law Judge George Carson, II. "ALJD" refers to the ALJ's decision. "Tr." refers to the transcript of the administrative hearing; "JX," "GCX," and "RX" refer to joint exhibits, the General Counsel's exhibits, and Respondent's exhibits, respectively.

The Board has held that, while an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance, photographing and videotaping constitute more than mere observation. *Washington Fruit and Produce Co.*, 343 NLRB 1215, 1215 (2004); *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997). As the Board reasoned in *National Steel*, supra, "[p]hotographing and videotaping such activity clearly constitute more than mere observation...because such pictorial record keeping tends to create fear among employees of future reprisals." *Id.* at 499. Thus, the Board requires an employer engaging in photographing or videotaping employees engaged in union activities to demonstrate it had a reasonable basis to have anticipated misconduct by the employees. *Id.*

Respondent stipulated, and the ALJ found (ALJD p. 2, lines 40-42) that security guard and Respondent agent Shauna Slayback videotaped employees engaged in picketing. (Tr. 10, 222, 304) The record contains no evidence regarding Respondent's reasons for videotaping the employees on the picket line. Thus, the record clearly establishes that Respondent engaged in unlawful surveillance in violation of Section 8(a)(1) by videotaping the employees, requiring a cease and desist remedy.

II. Respondent Failed and Refused to Bargain over the Effects of the Elimination of the Retail Cashiers' Position

The ALJ erred in finding that the Union did not ask to bargain over the effects of the elimination of the retail cashiers, and that Respondent did not refuse to bargain regarding the effects. The record shows that the Union repeatedly asked to bargain over the effects, as early as the first suggestion on August 26, 2009, that Respondent was moving in the direction of a layoff, (Tr. 72; GCX 5, GCX 7, GCX 11, GCX 13) and continuing up until the parties met on about December 16, ostensibly to bargain over the effects. At the meeting, Labor Relations Manager Joseph Basile stated that Respondent's position was that they were not going to offer

anything other than what was in the collective-bargaining agreement [for reduction in force for lack of work].² (ALJD p. 9, lines 29-33; Tr. 83) Thus, although Respondent appeared at a meeting to bargain over effects, its unwillingness to offer anything other than what was in the collective-bargaining agreement shows it had no intention to actually bargain.

The ALJ found that (ALJD p. 12, lines 29-32), although the elimination of the retail cashiers produced effects upon the job duties of the retail sales consultants, the Union never asked to bargain over those specific effects. For this reason, the ALJ recommends dismissal of the general complaint allegation that Respondent failed to bargain over [all] effects. The ALJ's characterization of the Union's obligation with regard to asking for effects bargaining is unsupported by Board law. There is no requirement for a union to delineate which specific effects it desires to bargain over with an employer before the parties sit down at the table to bargain. Moreover, there is no factual or legal basis to support the ALJ's attempt to limit the scope of the Union's request to bargain over effects to only the effects on retail sales consultants.

Further, much of the information the Union sought from Respondent related to the retail sales consultants and who would be performing the work previously performed by the retail cashiers, so it was apparent from the Union's information requests that this was an area on which it sought to bargain.

² Respondent conceded at trial that there were effects resulting from the layoffs not covered by reduction in force contract provision. (Tr. 379)

III. The ALJ Erred in Failing to Order Compound Interest.

The ALJ correctly ordered backpay to the laid off retail cashiers, however, failed to order compound interest on the backpay. Counsel for the Acting General Counsel argues that compound interest is appropriate.

Interest on monetary remedies can be compounded annually, quarterly, or daily and each different method has some legal support. The chart below shows the different amounts of interest due under each method of computing interest mentioned above, assuming a 10% interest rate on a \$10,000 backpay award.

Type of Interest	Year 1	Year 5	6 th Year Alone	Total for 6 Years
Simple	\$1,000.00	\$5,000.00	\$1,000.00	\$6,000.00
Annual Comp.	\$1,000.00	\$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

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. 124, 128-129 (1994) (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.814, 818 (1996) (quarterly); *O'Quinn v. New York University Medical Center*, 933 F. Supp. 341, 345-346 (1996) (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 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.

CAGC requests that the Administrative Law Judge recommend 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 1173 (1987). 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.

The Board has recently issued several decisions denying a request for compound interest. See e.g., *National Fabco Mfg.*, 352 NLRB No. 37, slip op. at fn. 4 (March 17, 2008) (“Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.”) The General Counsel does not consider these decisions to be an authoritative resolution of this issue. Rather, these decisions are simply a

rejection of the relief sought in these specific cases and an acknowledgement that the issue will be considered in other cases once a full Board is constituted.

IV. Conclusion

Counsel for the Acting General Counsel respectfully requests that the Board grant the above Cross-Exceptions and modify the Administrative Law Judge's Decision accordingly.

Respectfully submitted this 19th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS in EMBARQ CORPORATION, a wholly-owned Subsidiary of CENTURYTEL, INC. d/b/a CENTURLINK, Cases 28-CA-22804, was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 19th day of October 2010, on the following:

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