

**Pilot Freight Carriers, Inc., and BBR of Florida, Inc. and Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America**

**Pilot Freight Carriers, Inc. and Truck Drivers, Warehousemen and Helpers Local Union No. 512, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 12-CA-6267, 12-CA-6288, and 12-CA-6384

September 26, 1978

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On May 9, 1978, Administrative Law Judge Josephine H. Klein issued the attached Supplemental Decision in this proceeding.<sup>1</sup> Thereafter, Respondent Pilot Freight filed a statement of exceptions in the nature of a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.<sup>2</sup>

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Pilot Freight Carriers, Inc., and BBR of Florida, Inc., Jacksonville, Florida, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> The Board's original Decision and Order in these cases was reported at 223 NLRB 286 (1976).

<sup>2</sup> Member Penello does not adopt the Administrative Law Judge's reliance upon *E. H. Limited, d/b/a Earringhouse Imports*, 227 NLRB 1107 (1977), in which he dissented. He finds the facts of the instant case clearly distinguish it from *Earringhouse*. Accordingly, he agrees with the conclusion of the Administrative Law Judge that Johnston was not guilty of willfully incurring a loss of earnings by assisting counsel in the preparation for, and by his presence at, the Sec. 10(j) and unfair labor practice hearings.

SUPPLEMENTAL DECISION

JOSEPHINE H. KLEIN, Administrative Law Judge: On March 26, 1976, the Board issued its Decision and Order

(223 NLRB 286) finding, *inter alia*, that (1) Pilot Freight Carriers, Inc. (Pilot) and BBR of Florida, Inc. (BBR) were joint employers (herein Respondents) (223 NLRB at 305); (2) Respondents discriminatorily discharged Melvynn Johnston on February 7, 1974 (223 NLRB at 300-303); and (3) a strike commencing on February 24, 1974, was an unfair labor practice strike because "it obviously resulted or was manifestly caused and prolonged by" Respondent's unfair labor practices, including Johnston's discharge (223 NLRB at 304). Respondents were ordered, *inter alia*, to reinstate Johnston and make him whole for loss of earnings caused by the discrimination against him (223 NLRB 286).

The Board applied to the Court of Appeals for the Fifth Circuit for enforcement of the Order (C.A. 5, No. 76-2425). Thereafter the Board moved to withdraw its application for enforcement on the basis of a stipulation of the parties which provided in part:

2. Respondent Pilot Freight Carriers, Inc. . . . having fully complied with the Board's Order . . . except for the payment of backpay owed to Melvynn Johnston, hereby waives its right to contest in any future proceeding in this Court any of the Board's findings and conclusions with respect to the unfair labor practices alleged and found . . . to have been committed against Melvynn Johnston.

3. Accordingly, if Pilot seeks judicial review of a subsequent decision awarding backpay to Melvynn Johnston . . . it is understood that Pilot will be precluded in such proceeding from challenging the propriety of the unfair labor practice findings or remedial provision in the Board's original decision and order.

On January 27, 1977, on the basis of that stipulation, the court granted the Board's motion to withdraw enforcement application without prejudice.

On May 11, 1977, the Regional Director issued a backpay specification, claiming a total of \$5,110.89, with interest, due to Johnston for the agreed backpay period of February 7, 1974, to September 9, 1976, when Johnston was reinstated.<sup>1</sup> BBR of Florida did not answer the backpay specification and failed to appear and participate in the hearing thereon. In its answer to the backpay specification, Pilot admitted "that the Board has ruled that Melvynn Johnston was unlawfully discharged by BBR of Florida, Inc., on February 7, 1974, and in effect that he is due backpay during the period from that date until September 9, 1976, when he was employed by Pilot." Respondent then generally denied the allegations of the backpay specification, and proceeded:

More specifically, it is alleged that throughout the period from February 7, 1974, until approximately September of that year, Johnston was on strike against Pilot . . . and therefore, was not in the labor market. Further, it is expressly denied that Johnston's weekly earnings prior to his discharge are an appropriate measure of backpay during his period of unemployment or that the backpay specification accounts for all earnings Johnston received during the backpay period.

<sup>1</sup> Backpay was actually claimed only through the last quarter of 1974, with the notation: "remaining quarters concededly eclipsed."

Pilot's answer concluded with the prayer that "the backpay proceeding be dismissed or, in the alternative, that Johnston's backpay claims be limited to what he actually would have earned had he been employed by Pilot . . . during the backpay period, less and reduced by what he . . . earned or in the exercise of reasonable diligence should have earned during that period." The General Counsel moved to strike Respondent's answer and motion for Summary Judgment. Upon the basis of Pilot's opposition, and a reply thereto filed by the Union, the Board denied the General Counsel's motion because "the pleadings and submissions of the parties raise factual issues which can best be resolved at [a] hearing."

The case was heard before me in Jacksonville, Florida, on September 13, 1977. All parties were represented by counsel and were afforded full opportunity to introduce evidence and argument and to examine and cross-examine witnesses. The General Counsel and the Charging Party presented short oral arguments. Respondent and the Charging Party stated their intention to submit briefs. However, no briefs have been filed.

#### I. ISSUES RAISED BY RESPONDENT

##### A. *Effect of the Strike*

As set forth above, Respondent's answer to the backpay specification alleges that Johnston was not entitled to any backpay for the duration of the strike, i.e., after February 25, 1974, when the strike began. However, Johnston had previously been discriminatorily discharged and thus was unconditionally entitled to reinstatement and backpay without the necessity of applying therefor. *Polynesian Cultural Center, Inc.*, 222 NLRB 1192, 1193-94 (1976). The Board, with court approval, has unequivocally decided the present issue against Respondent's position. See *Winn Dixie Stores, Inc.*, 206 NLRB 777 (1973), *enfd.* 502 F.2d 1151 (C.A. 4, 1974). The Board there said:

The Board has consistently held, in cases involving employees who have been unlawfully discharged before an economic strike is called, that the entire duration of the strike is includible in the backpay award period because the employer's own discrimination against the claimants makes it impossible to ascertain whether such claimant would have gone out on strike in the absence of the discrimination and the resulting uncertainty must be resolved against the employer.

The *Winn Dixie* rule is *a fortiori* appropriate in the present case, which involves an unfair labor practice strike caused at least in part by Johnston's discharge. It is at least possible that there would have been no strike at all absent the unlawful discharge. The burden was on Respondents to show that the strike would have occurred and continued without Johnston's discharge. *N.L.R.B. v. Valley Mold Co.*, 530 F.2d 693 (C.A. 6, 1976), *cert. denied* 429 U.S. 824. See *Philip Carey Mfg. Co. v. N.L.R.B.* 331 F.2d 720, 729 (C.A. 6, 1964), *cert. denied* 379 U.S. 888; *Teamsters Local No. 992 [Pennsylvania Glass Sand Corp.] v. N.L.R.B.*, 427 F.2d 582,

587 (C.A.D.C., 1970); *Amsterdam Wrecking & Salvage Co.*, 196 NLRB 113 (1972), *enfd.* 472 F.2d 153 (C.A. 2, 1973).<sup>2</sup>

##### B. *Gross Backpay*

In the backpay specification, gross backpay was computed on the basis of Johnston's average weekly earnings during 7 full weeks preceding his discharge. During that period, he had been on the payroll of BBR of Florida and Professional Driver Services, Inc. (PDS) but performing services for Pilot. In its opposition to the General Counsel's Motion for Summary Judgment, Pilot asserted that Johnston had never been an employee of Pilot and Pilot had never had an opportunity to examine the payroll records on which the gross backpay computation had been based. However, Robert R. Morley, compliance officer of the Board, testified to the computation. Check stubs covering the period were introduced into evidence. Respondent's counsel conceded that he had "nothing to refute or offset any of [Morley's] computations." Accordingly, so far as gross backpay is concerned, the only issue is whether projection of past earnings is a suitable method of computation.

Morley explained that this measure was chosen rather than actual earnings by other employees during the backpay period because the strike created an unstable situation not truly reflecting what Johnston would have earned absent the strike. Hobert Z. Miller, Pilot's regional manager for Florida, testified that during the strike Respondent experienced a 90-percent reduction in its small shipment business and a 60-percent reduction in its larger shipments. He further testified that Respondent had sufficient help available to handle the work during the strike. Pilot apparently contends that the gross pay computation reflected overtime worked by Johnston before his discharge, whereas during the strike the volume of business was so low that there was very little, if any, overtime work. Thus, according to Pilot, the gross backpay formula does not in fact reflect what Johnston would have earned if he had not been discharged.<sup>3</sup>

It has been definitively found that the strike here involved was an unfair labor practice strike. This finding is at least law of the case in the backpay proceeding.<sup>4</sup> Thus, the abnormal conditions which led to the alleged absence of overtime opportunities are Respondent's fault. To accept Pilot's present argument, therefore, would be in effect to reward it for its misconduct. Cf. *Bagel Bakers Council of Greater New York*, 226 NLRB 622 (1976), *enfd.* 555 F.2d

<sup>2</sup> Respondent sought to introduce evidence that, having executed a union authorization card, which includes an application for membership, Johnston was bound by a provision in the Union's constitution which prohibits members from working for a struck employer without the Union's permission. This evidence was rejected in view of the *Winn Dixie* rule, under which Johnston had the status of an unlawfully discharged employee. Pilot could have tested Johnston's attitude by offering him reinstatement.

<sup>3</sup> In his opening statement, Pilot's counsel said: "During the strike period the Board figured in overtime, as I understand it, at the rate of \$4.65 an hour . . . this strike knocked that out. There wasn't any; so, if he had been working there, there is no way he could have had overtime."

<sup>4</sup> Respondent's counsel said: "I'm not going to stipulate it was an unfair labor practice strike, even though it has been so found. I'll stipulate that the Board found it was an unfair labor practice strike." No review of that finding was sought and Respondent is committed not to dispute "the propriety of the unfair labor practice findings" if review of the backpay determination is sought.

304 (C.A. 2, 1977), involving an unlawful lockout. The Board there adopted Administrative Law Judge Rose's Decision, which considered a defense based on an asserted loss of work availability during the backpay period. The Decision said (627-628):

At the outset, it should be noted that this defense is available in mitigation of damages if the Respondents are in fact able to carry their burden of proof. . . . Of course the loss of work, and therefore loss of job availability, must be related to factors apart from the unfair labor practices which the Respondents were engaging in.

\* \* \* \* \*

The Respondents also contend that the basic assumption of the backpay specification—that absent the unfair labor practices the claimants would have earned the same in 1967 as they did in 1966—is erroneous. As indicated above, this assumption appears reasonable. The Respondents brought forth no evidence of probative value to suggest that the assumption is not reasonable. . . .

So much of the Respondents' defense that the assumption is generally erroneous is rejected as not having been sustained by competent probative evidence.

See also *N.L.R.B. v. Charley Toppino and Sons, Inc.*, 358 F.2d 94, 97 (C.A. 5, 1964), approving the use of "the projection of average earnings' formula."

In the present case Respondents have not alleged or attempted to establish by evidence that overtime work would have been unavailable during the backpay period if there had been no strike. Since it has already been definitively found that the strike was caused and prolonged by Respondents' unfair labor practices, it follows that the backpay specification was properly drawn on the assumption that, absent Respondents' unfair labor practices and the resultant strike, Johnston's earnings after February 7, 1974, would have been the same as they were before if he had not been discharged.

### C. Interim Earnings

As noted above, Respondent alleged that the backpay specification did not account for all of Johnston's earnings during the backpay period. The burden of proof as to this allegation is on Respondent. *Mastro Plastics Corporation*, 136 NLRB 1342 (1962), enfd., 354 F.2d 170 (C.A. 2, 1965), cert. denied 384 U.S. 972 (1966); *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 454 (C.A. 8, 1963). Pilot adduced no evidence to support this allegation. Indeed, Respondent's counsel volunteered that he had "nothing to refute or offset any of [Morley's] computations of actual interim earnings."

In its answer to the backpay specification, Pilot prayed that gross backpay should be "reduced by what he earned or in the exercise of reasonable diligence should have earned" during the backpay period (emphasis supplied). The backpay specification included within the interim earnings to be deducted from the gross, money which Johnston received from the Union for picketing. The Union had paid pickets \$5 per hour. At the hearing, Pilot sought to establish that

Johnston could have picketed more than he did, thus increasing his interim earnings.<sup>5</sup>

So far as appears, Respondents have been given credit for all sums paid to Johnston for picketing.<sup>6</sup> Pilot was unsuccessful in its attempt to establish that Johnston could have obtained more work as a paid picket. James H. Wheeler, union secretary-treasurer and business manager, testified that "picketing was not available to every one of the people that we had out on strike at any time they chose."<sup>7</sup> Johnston testified, without contradiction, that there were occasions when he sought paid picketing but none was available. He had never refused an offer of paid picketing. The burden, of course, was on Respondent to establish that picketing or other suitable work was available for Johnston.<sup>8</sup> This burden Respondent failed to meet.

Although Respondent's answer to the backpay specification does not expressly allege that Johnston was guilty of willful loss of earnings, its prayer for relief requests deduction of amounts which "in the exercise of reasonable diligence should have been earned." To support this prayer for relief, Respondent's major argument appears to be that during the backpay period Johnston removed himself from the labor market by devoting his efforts and time to litigation concerning the dispute between Respondent and the Union, including his own discharge.

In May Johnston spent 4 days in Tampa, under subpoena by the Board in the Board's injunction action against Respondent under Section 10(j) of the Act. (See 223 NLRB at 290.) Then, the hearing of the unfair labor practice case underlying the present backpay hearing consumed the major part of July and August 1975.<sup>9</sup> Johnston's discharge was one of the major issues litigated in that proceeding.<sup>10</sup> Additionally, as a leader of the union campaign (223 NLRB at 289), Johnston was vitally interested in the outcome of the entire case and was manifestly an appropriate person to assist counsel in the preparation and conduct of the litigation. He thus reasonably spent those 2 months attending the hearing and assisting and consulting with, or being readily available to assist and consult with, counsel for the General Counsel and for the two lawyers representing the International and Local Unions.

Johnston testified that because of his discharge and the

<sup>5</sup> Unlike strike benefits, payments for picketing are deemed to constitute earnings, and the General Counsel, with the apparent acquiescence of the Union, has so treated such picket pay. *My Store, Inc.*, 181 NLRB 321, 330 (1970), enfd. in pertinent part 468 F.2d 1146, 1149 (C.A. 7, 1972), cert. denied 410 U.S. 910 (1973). Cf. *N.L.R.B. v. Rice Lake Creamery Company*, 365 F.2d 888, 893 (C.A.D.C., 1966), cert. denied 371 U.S. 827; *Florence Printing Co. v. N.L.R.B.*, 376 F.2d 216, 219-220 (C.A. 4, 1967), cert. denied 389 U.S. 840; *Golay & Company v. N.L.R.B.*, 447 F.2d 290 (C.A. 7, 1971), cert. denied 404 U.S. 1058, 1972.

<sup>6</sup> At the outset of his cross-examination of the Union's business manager, Pilot's counsel attempted to show that the Union had "available to [it], to supply pickets for this strike, some \$2,400,000." Certainly Respondents had no right to require that the Union expend available money to pay pickets.

<sup>7</sup> In my opinion, it would not have been unreasonable for the Union to prefer strikers over Johnston for available paid picket duty, since Johnston stood to obtain full compensation from Respondent.

<sup>8</sup> It is questionable whether paid picketing qualifies as "suitable work" which a dischargee must accept in order to "mitigate" damages.

<sup>9</sup> Pilot's counsel placed the total time involved as "a day short of nine weeks."

<sup>10</sup> Counsel for the General Counsel stated that Johnston was under subpoena at the complaint trial but, as a discriminatee, he was not paid witness fees. He received some \$80 in connection with the 10(j) proceeding in Tampa.

need for his testimony and assistance, he felt he "couldn't do anything but be in the courtroom and available to the lawyers." Pilot adduced no evidence indicating that Johnston had devoted an excessive amount of time to the preparation for and attendance at the 10(j) and unfair labor practice hearings. Pilot's contention and Johnston's response are summed up in the following colloquy in Respondent's cross-examination of Johnston:

Q. But, what I'm trying to—once again, like you said on your direct examination, there was picketing available if you had had the time to do it?

A. Yes, but you're forgetting the most important thing, Mr. Alexander . . . I was fired from Pilot Freight Carriers or BBR, or whoever, any my sole intent was to get that turned around. And, when it came to a choice between going out and picketing for five dollars an hour or counselling with attorneys, that might be some end to this situation, I chose to be with the attorneys.

Pilot thus would give Johnston two alternatives: to picket or litigate to a Pyrrhic victory. Pilot could suffer no monetary loss under either alternative: under the first, the Union would bear the cost of Johnston's wages; under the second, the burden would be Johnston's.

The fact is that Johnston's presence at the hearing and assistance to counsel were necessitated by Respondents' violation of the statutory rights of their employees, including Johnston. As the General Counsel said in his closing argument in the backpay hearing:

The employer's position almost borders on an 8(a)(4) violation itself. . . . Obviously a citizen has the right to file a charge, and implicit in the filing of the charge is the right to have counsel and to meet with the NLRB and to appear at the hearing where the evidence is presented with respect to the charge.

An employee's right to attend a Board hearing affecting him is protected by the Act. *E.H., Limited d/b/a Earring-house Imports*, 227 NLRB 1107, 1008-10 (1977). Johnston's attendance at the hearing was not voluntary in any true sense. First, he had been subpoenaed. Second, protection of his statutory rights against Respondents' deprivations required his presence and assistance to counsel.

Perhaps most important is the fact that Johnston's efforts were addressed to regaining the job he had been unlawfully denied. In other words, the litigation itself was a search for employment. It ill behooves Pilot to maintain that Johnston was required to seek other employment rather than the employment by Pilot, of which he had been unlawfully deprived. He manifestly was very actively in the labor market when taking steps necessary to obtain reinstatement by Pilot.

Accordingly, I reject Pilot's apparent contention that Johnston was guilty of a willful loss of earnings when he devoted his time to litigation against Respondents during the backpay period.<sup>11</sup>

<sup>11</sup> This holding is not inconsistent with the Board's apparent view that an employer need not pay wages to a current employee for time spent at a Board hearing, whether the employee is a discriminatee or merely an interested witness. Cf. *Western Clinical Laboratory, Inc.*, 225 NLRB 725 (1976), enf'd. in pertinent part 571 F.2d 457 (C.A. 9, 1978); *General Electric Com-*

## II. THE CHARGING PARTY'S CONTENTIONS

The Union attempted to establish that the backpay specification was inadequate because it failed to claim overtime compensation which, according to the Union, Johnston would have received if he had not been discharged and because it did not call for pension and health and welfare fund payments during the backpay period. Although no direct authority has been cited and none has been found, it is here assumed that the Charging Party is not bound by the terms of the backpay specification and may seek to increase the amount of the claim. However, due-process considerations would necessarily dictate that Respondents be seasonably informed of any such enlarged claim they might be called upon to litigate. Cf. *The Carter-Jones Lumber Company*, 198 NLRB 1036, 1037 (1972). So far as appears, no such advance notice was given to Respondents.<sup>12</sup> However, although it may be that the issues have not been properly raised, the Union's claims will be discussed.

### A. Overtime During the Backpay Period

The Union maintains that if Johnston had not been unlawfully discharged and had worked during the strike, he would have worked overtime, and thus the amount of gross pay claimed should be increased by the amount of such overtime compensation.

First, it must be noted that the addition of any such item would be inconsistent with the method of computing gross backpay adopted in the backpay specification. As indicated above, gross backpay was computed on the basis of Johnston's average weekly earnings before his discharge. Such average obviously included whatever overtime compensation he had then received.<sup>13</sup> As a concomitant of measuring gross backpay by reference to Johnston's predischarge earnings, it is necessary to assume that, but for Respondents' unfair labor practices, his earnings would have been the same during the postdischarge period. Robert P. Morley, the Board's compliance officer, testified that because the strike period was abnormal and unstable, he made his computations as if there had been no strike. On this reasonable method of computing gross backpay, it would be improper to add overtime compensation, since it is already included in the weekly average earnings.

If the overtime issue had been properly raised, the burden of proof as to the increase in gross backpay would be on the Union. The present record establishes that the Union is unable to meet that burden. When Union's counsel was prevented from litigating the overtime issue, because he had not given the parties advance notice thereof, he proceeded to make an offer of proof. He offered to prove that during the backpay period other local employees had

*pany*, 230 NLRB 683 (1977); *Electronic Research Co.*, 187 NLRB 733 (1971). Respondent could have secured the advantage of this rule at any time by offering Johnston reinstatement.

<sup>12</sup> The backpay specification and all other pleadings were served on the Union and on its Florida counsel. It filed a reply to Respondent's opposition to the General Counsel's Motion for Summary Judgment. The Union thus recognized, before the hearing that it had status as a party and should reasonably have disclosed its claims in a pre-hearing pleading.

<sup>13</sup> While working for BBR Johnston was paid \$4 per hour plus time-and-a-half for overtime. PDS paid him \$4.25 per hour, with no premium rate for overtime hours.

been permitted to make weekend over-the-road trips and that Johnston was denied similar work after his reinstatement. When counsel was asked what proof of the facts he proposed to present, he replied, "In candor, I would have to prove it by hearsay through Mr. Johnston. I don't have a witness available who has direct knowledge of it." Uncorroborated hearsay by Johnston as to events occurring at the plant after he was discharged would not be sufficient to support a finding.

#### B. Pension, Health, and Welfare Benefits

Union's counsel maintains that Johnston should be compensated for payments which should have been made for pension and health and welfare benefits during the backpay period. Counsel conceded that during the backpay period there was no collective-bargaining agreement in effect calling for pension and health and welfare benefits. In support of his present claim for compensation for such benefits, he said:

We do say that the Board ought to look at this situation in the context of the prior Pilot cases, which are referred to in Judge Saunders' decision and the Board's decision here and prior decision by the Board. And, we say that in those special circumstances, absent unfair labor practices, Mr. Johnston would have been the beneficiary of pension and health and welfare benefits which he did not benefit from solely by reason of the Respondent's unfair labor practices. . . . In effect, we are saying that he would have been covered contractually with respect to clearly ascertainable specific amounts of health and welfare benefits. . . . This company has, systemwide except in Florida, been under Teamster contract for almost a generation.

The Union's position on this matter is virtually identical to the union's contention rejected by the Board in *Ex-Cell-O Corporation*, 185 NLRB 107, 110 (1970).<sup>14</sup> On the basis of that decision, I reject the Union's claim for compensation for pension and health and welfare benefits.

There is no contention that the figures and calculations in the backpay specification are incorrect in any respect. Thus, since I have found that the method of computation of backpay used in the backpay specification is reasonable, and I have rejected the conflicting claims of the Union and Respondent, I shall recommend that an order be issued in accordance with the backpay specification.

#### RECOMMENDED ORDER

Upon the foregoing findings and conclusions, and the entire record in this case, it is ordered that Respondents Pilot Freight Carriers, Inc., and BBR of Florida, Inc., shall, jointly and severally, pay Melvynn E. Johnston the sum of \$5,110.89, with "interest in the amount and manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)," less any lawful tax withholdings.<sup>15</sup>

<sup>14</sup>When union counsel stated his position at the hearing, he was asked how the present case differed from *Ex-Cell-O*. His reply was: "It differs in that we are focussing on a specific. I had best reread *Excello* before I answer that, if I may." At the close of the hearing, counsel said: "[T]he union's position with respect to claims outside the Regional Director's specification will be presented . . . in a brief." As previously noted, no post-hearing briefs were filed.

<sup>15</sup>The quoted language is from the Board's Decision in this case (223 NLRB 286). Whatever may be the Board's power or policy with respect to applying a different measure of interest retroactively (cf. *Florida Steel Corporation*, 234 NLRB 1089 (1978)), I have no authority to depart from the terms of the Board's prior Order in this case. Cf. *Northern States Beef, Inc.*, 234 NLRB 921, 922, fn. 7.