Oil Capitol Sheet Metal, Inc. *and* Sheet Metal Workers Local 270, affiliated with Sheet Metal Workers International Union, AFL–CIO. Case 17–CA–19714

May 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

On January 3, 2000, Administrative Law Judge William N. Cates issued the attached bench decision.[1] The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. On June 14, 2000, the National Labor Relations Board issued an Order remanding the proceeding to the judge for further consideration in light of *FES,* 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).[2]

On July 31, 2000, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the bench decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

For the reasons set out below, we find that the Respondent violated Section 8(a)(3) of the Act by refusing to hire Union Organizer Michael Couch. The traditional remedy for a refusal-to-hire violation includes a backpay and instatement order. In a compliance proceeding, the General Counsel bears the burden of proving, by a preponderance of evidence on the record as a whole, the reasonableness of the gross backpay amount claimed under this order. This requires specification of the backpay period.[4] Over time, the Board has developed a rebuttable presumption that the backpay period should continue indefinitely from the date of the discrimination until a valid offer of reinstatement has been made. The primary issue to be determined in this case is whether the same presumption should apply where the discriminatee is a union organizer or "salt" like Couch.[5] Consistent with the concerns expressed in the dissenting opinion of former Member Hurtgen in *Ferguson Electric*, 330 NLRB 514, 519–520 (2000), we hold that the General Counsel cannot rely on this presumption to meet his burden of proving the reasonableness of a backpay period claimed for a salt/discriminatee.

Permitting the General Counsel to rely on a presumption of indefinite employment effectively requires the respondent employer to produce evidence that the discriminatee would not have worked for the entire backpay period claimed. This procedure is appropriate as a matter of fact and policy in a refusal-to-hire case that does not involve salts because job applicants normally seek employment for an indefinite duration, the respondent employer is in the best position to demonstrate that a given job would have ended or a given employee would have been terminated at some date certain for nondiscriminatory reasons, and any uncertainty as to how long an applicant, if hired, would have worked for a respondent employer is primarily a product of the respondent's unlawful conduct.

Unlike other applicants for employment, however, salts often do not seek employment for an indefinite duration; rather, experience demonstrates that many salts

[1] On January 5, 2000, the judge issued an "Erratum" in which he corrected the spelling of the Respondent's name in the case caption.

[2] The June 14, 2000 Order stated in pertinent part:

> The Board has decided to remand this case for further consideration in light of *FES*, including, but not limited to: (1) the determination of whether there were available openings at the time that the alleged discrimination occurred; and (2) whether the applicant had training and/or experience relevant to the announced or generally known requirements of the openings and whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] As explained in *Medline Industries,* 261 NLRB 1329, 1330 (1982), "gross backpay is not always simply a matter of mathematical calculation. Rather, the matter of gross backpay may encompass a variety of actual or potential matters in dispute, including the projected period of employment with the respondent-employer."

[5] "Salting" has been defined as "the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202, 1203 fn. 1 (9th Cir. 1996). A salting campaign's immediate objective may not always be organizational. See, e.g., *Hartman Bros. Heating & Air Conditioning v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002) (noting that true objective of union salting campaigns often is "to precipitate the commission of unfair labor practices by startled employers"), and *Starcon, Inc. v. NLRB*, 176 F.3d 948, 949 (7th Cir. 1999) (noting that salts' "proximate aim, in this case as commonly, is to precipitate an unfair labor practice proceeding that will result in heavy backpay costs to the employer and weaken his ability to fight future organizing efforts (since his freedom of action will be limited by the cease and desist order that the Board will enter)") (citation omitted). "Salts" are those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign.

remain or intend to remain with the targeted employer only until the union's defined objectives are achieved or abandoned. For this reason, much of the uncertainty as to the duration of the backpay period is attributable to the union and salt/discriminatee rather than to the wrongdoing respondent employer, and they are in the best position to prove the reasonableness of the claimed backpay period by presenting, through the General Counsel, evidence readily available to them.

In sum, the traditional presumption that the backpay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement loses force both as a matter of fact and as a matter of policy in the context of a salting campaign. Indeed, as discussed below, rote application of the presumption has resulted in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted nonunion employer. In this context, the presumption has no validity and creates undue tension with well-established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice, and that the Board's authority to command affirmative action is remedial, not punitive.

Given the different considerations applicable where the discriminatee is a union salt, we decline to apply a presumption of indefinite employment and instead shall now require the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification. Such evidence may include, but is not limited to, the salt/discriminatee's personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns. [6]

Our analysis also affects the Board's presumption that the salt/discriminatee, if hired at the site where he applied, would have been transferred to other sites after the project at the original site was completed. Indeed, even if it is undisputed that the targeted nonunion employer's practice is to transfer employees from site to site, the General Counsel must present affirmative evidence, as described above, that the salt/discriminatee would have accepted the transfer.

We shall apply this new evidentiary requirement in the present case and in all future cases where the issue arises. Although this case involves an unlawful refusal to hire a salt, the same analysis will also apply in cases where the salt has been unlawfully discharged or laid off. Application of our holding may impact the instatement order as well. If the General Counsel fails to prove by affirmative evidence the reasonableness of a claim that the backpay period should run indefinitely, then the salt/discriminatee is not entitled to instatement (or reinstatement in discharge and layoff cases).

II. ISSUES

A. The Unlawful Refusal to Consider for Hire and to Hire Discriminatee Michael Couch

The complaint alleged and the judge found that the Respondent violated Section 8(a)(3) by refusing to consider and/or to hire applicant Couch, a paid union organizer. However, in his recommended remedy and Order, the judge found only that the Respondent violated Section 8(a)(3) by refusing to consider Couch for hire, leaving to compliance the issue of whether the Respondent would have hired Couch but for its unlawful failure to consider him.

As noted above, after the judge issued his bench decision in this case, the Board issued its decision in *FES*, supra at 9. In *FES*, the Board held, inter alia, that "the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits." Id. at 12. The Board explained:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known re-

[6] It is clear that the discriminatees herein are salts.

We agree with our colleagues that the respondent bears the burden of showing that a discriminatee is a salt. Upon such a showing, however, the burden of proof is on the General Counsel to show that, absent discrimination, the discriminatee would have continued to work for the respondent for the period claimed by the General Counsel.

We would not distinguish between salts paid by the union and those who are not. Paid or unpaid, each salt is sent by the salting union to seek employment with a targeted employer in furtherance of the union's objectives, and each salt, as a union member, is subject to the union's disciplinary control. See *Scofield v. NLRB*, 394 U.S. 423 (1969).

> quirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

Id. (footnotes omitted).

Applying a *FES* analysis in his supplemental decision after remand, the judge found that the Respondent "was actively seeking to hire and hired sheet metal workers throughout all applicable times pertinent to this case[,]" that Couch applied for a position and "was an experienced sheet metal worker who had been an 'outstanding' apprentice for 4 years and was a journeyman at his trade[,]" that his "qualifications were not challenged[,]" and that "antiunion animus contributed to the [Respondent's] decision to terminate its interview with Couch and refuse to hire him."[7] We agree with the judge that the General Counsel therefore established, under the standard articulated in *FES,* a prima facie case that the Respondent unlawfully refused to hire Couch.

The burden then shifted to the Respondent to show that it would not have hired Couch even in the absence of his union activity or affiliation. We agree with the judge that the Respondent failed to meet this burden. In his bench decision, the judge explicitly rejected Respondent's contention that it declined to hire Couch because of his allegedly quarrelsome and disruptive behavior during the interview. Finding that the Respondent presented no new arguments on remand, the judge held that the Respondent violated Section 8(a)(3) by refusing to hire Couch. We agree with the judge and adopt his finding of this violation.

Having found the "refusal-to-hire" violation in his supplemental decision, the judge erred by simply affirming the conclusions of law, remedy, and order set out in his original bench decision, which left the refusal-to-hire issue to compliance. Because the supplemental decision resolved this issue, it was unnecessary to refer it to compliance. Accordingly, the judge should have amended his original conclusions of law, remedy, and order to reflect his supplemental finding. We shall therefore amend the judge's conclusions of law and issue a new Order. We shall also amend the judge's recommended remedy to include an instatement award and backpay for Couch for the period that he would have worked but for the unlawful discrimination against him.[8]

B. Duration of the Backpay Period

In *NLRB v. Town & Country Electric, Inc.*, the Supreme Court, noting the considerable deference accorded to the Board's interpretation of the Act, affirmed that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers. 516 U.S. 85, 94–95, 98 (1995) ("We hold only that the Board's construction of the word 'employee' is lawful; that term does not exclude paid union organizers."). In so doing, the Court explicitly stated that "[t]his is not to say that the law treats paid union organizers like other company employees in every labor law context." Id. at 97. The Court then cited, by way of example, the Board's position that salts, because of the temporary nature of their employment, may not share a sufficient community of interest with other employees to warrant inclusion in the same bargaining unit. Id.[9]

Since *Town & Country*, the Board, with circuit court approval, has continued to hold that salt/discriminatees, as employees protected under the statute, are eligible for backpay. See, e.g., *Ferguson Electric*, supra at 515. We leave that principle undisturbed.[10] However, as in the

[7] In finding that the Respondent exhibited antiunion animus, the judge found, and we agree, that the Respondent knew that Couch was a union organizer when he applied for a job on May 5, 1998, that the Respondent then disparately required Couch to take a written exam before he could be interviewed, and that it then seized upon Couch's attempt to clarify the exam to terminate his interview and thereafter refuse to hire him. Such evidence of anti-union animus supports a finding that the Respondent's refusal to consider Couch for hire or to hire him was unlawfully motivated.

[8] As discussed infra, the instatement award is subject to defeasance.

[9] We disagree with the dissent that the Court's single illustrative citation meant that it was referring primarily to different treatment of paid salts for community-of-interest issues but not for remedial issues. However, the Board "frequently" has excluded paid union organizers "from voting, either as 'temporary employees' or because their interests sufficiently differ from those of their coworkers." *Sunland Construction Co.*, 309 NLRB 1224, 1229 (1992) (footnotes omitted); see also *299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988) ("Where employment is solely for the purpose of union organizing *and temporary in nature*, the individual so employed should not be included in the bargaining unit even though [otherwise protected by the Act].") (emphasis in original); *Dee Knitting Mills, Inc.*, 214 NLRB 1041, 1041 (1974) (noting that while "an employee does not lose his status because he is also paid to organize," he may be ineligible to vote if "the employment itself was solely to organize, so that the employment is really only temporary, whether the employer knows it or not"). While the salts involved in the cited cases were paid union organizers, the Board's exclusionary rationale applies with equal force to unpaid salts whose tenure with a nonunion employer is similarly temporary.

[10] We note that the issue we address here concerns the amount of affirmative relief to which a salt/ discriminatee is entitled, not whether he or she is entitled to such relief at all. See *Starcon International, Inc. v. NLRB*, 450 F.3d 276, 278–279 (7th Cir. 2006) (expressing the court's view that the union, through the General Counsel, should bear the burden of proving in the initial unfair labor practice proceeding that salts

precedent cited by the Court, we find that the temporary nature of many salts' employment warrants different treatment in calculating the amount of backpay due in salting cases. In formulating an approach to address that scenario, we are guided by well-established remedial principles. "A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employee whole for losses suffered on account of an unfair labor practice." *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). The objective is to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The relief ordered must be "adapted to the [specific] situation which calls for redress." *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938). Each backpay remedy "must be sufficiently tailored to expunge only the *actual*, and not merely *speculative* consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 902–904 (1984) (emphasis in original) (rejecting a minimum backpay award imposed without regard to the discriminatees' actual economic losses and without evidence as to the period of time the undocumented employees might have continued working before their apprehension by federal immigration authorities). Though the Board's remedial authority under the Act is quite broad, it does not encompass punitive measures. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940); *Aneco, Inc. v. NLRB*, 285 F.3d 326, 329 (4th Cir. 2002) ("[A] backpay order may only serve as a compensatory, make-whole remedy, not a punitive sanction or deterrent.").

In every compliance proceeding, the General Counsel bears the burden of proving the gross amount of backpay due. *Ferguson Electric*, 330 NLRB 514, 515 (2000); *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). The Board applies a broad standard permitting the General Counsel to meet this burden by proving a "reasonable" method for calculating gross backpay.[11] Once the General Counsel has established the amount of gross backpay, the burden then shifts to the respondent to establish affirmative defenses that would negate or mitigate its liability, such as a willful loss of earnings. *Tubari, Ltd.,* 303 NLRB 529, 531 (1991); *NLRB v. Mooney Aircraft*, 366 F.2d 809, 812–813 (5th Cir. 1966). When there are uncertainties or ambiguities, doubt should generally be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.,* 204 NLRB 1068, 1068 (1973).

As noted above, the Board has developed a rebuttable presumption in compliance proceedings that the backpay period should extend indefinitely from the date of the discriminatory discharge or refusal to hire until the respondent extends a valid job offer to the discriminatee. This rebuttable presumption effectively relieves the General Counsel of any affirmative evidentiary burden with respect to the duration of the backpay period. See *Diamond Walnut Growers, Inc.*, 340 NLRB 1129, 1132 (2003). Such a presumption is reasonable in an ordinary case because, in fact, most job applicants seek employment of an indefinite duration. Moreover, because the employer controls the job and is in the best position to establish how long it would have retained the discriminatee and whether it would have transferred him to subsequent jobs, it is appropriate, as an evidentiary matter, to place the burden on the employer to produce evidence showing whether or when the discriminatee's employment would have terminated for nondiscriminatory reasons. See, e.g., *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966) ("[T]he burden of going forward normally falls on the party having knowledge of the facts involved.") (citing *U.S. v. New York, N.H. & H.R.R. Co.*, 355 U.S. 253, 256 fn. 5 (1957), and 9 *Wigmore, Evidence* § 2486, at 275 (1940)).

The facts and policies supporting a presumption of continued employment do not apply with the same force where the applicant is a union salt. First, the Board's experience demonstrates that union salts, unlike other applicants, do not typically seek employment for an indefinite duration.[12] Rather, from the outset, the contemplated relationship is one of a limited engagement, and, if hired, the salt remains with the targeted employer only until the union's defined objectives have been achieved or abandoned.[13] Therefore, a presumption of indefinite

whose primary objective was to provoke the employer into committing unfair labor practices would have accepted a job if offered).

[11] See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 393 fn. 2 (1998) (citing NLRB Casehandling Manual (Part Three), Compliance Proceedings, Sec. 10532.1), enfd. mem. 215 F.3d 1327 (6th Cir. 2000); *Am-Del-Co*, 234 NLRB 1040, 1042 (1978).

[12] See, e.g., *Hartman Bros. Heating & Air Conditioning*, supra at 1111 (stating that "salts do not intend to remain in the company's employ after the plant or other facility is organized"); *American Residential Services of Indiana, Inc.*, 345 NLRB 995 (2005) (finding that union's "Youth-to-Youth" program required third-year apprentice electricians to take 6 months off from jobs with a union signatory employer to engage in union organizing activity with nonunion employers).

[13] In *Aneco, Inc.*, 333 NLRB 691 (2001), petition for review granted in part, denied in part, and remanded 285 F.3d 326 (4th Cir. 2002), the judge referred to evidence that training by the International Brotherhood of Electrical Workers on techniques for organizing employees in the construction industry "contemplated that at times, it would be advantageous for salts already employed by a non-unionized Company, to leave their employment with that company." Id. at 715. The judge then noted that one union training manual advised union officials that

employment, which can result in backpay awards spanning several years, strains common sense in the context of salts and is inconsistent with the Supreme Court's instruction that the validity of administrative agency presumptions turns on "the rationality between what is proved and what is inferred." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804–805 (1945).

Second, unlike with typical applicants, it is often the union's objectives in the salting campaign that dictate how long the salt remains. Consequently, evidence as to how long the salt would have worked for the salted employer in the absence of discrimination is not exclusively, or even primarily, related to matters within the control of that employer. Rather, much of the pertinent evidence about the likely duration of a salt's employment is in the possession of the union, as the campaign's progenitor and director, and of the salt participant in this campaign. Indeed, such evidence, which includes information relating to the union's organizing objectives, plans, anticipated deployment of personnel, and employment histories of its salts in similar salting campaigns, is not readily available to the respondent employer. It is therefore appropriate to place the burden on the union and salt/discriminatee to produce, through the General Counsel, evidence in their possession as to the reasonable duration of the backpay period. See *Mastro Plastics*, supra at 176.

Finally, application of the presumption of indefinite employment to backpay determinations involving salts has resulted in backpay awards that are more punitive than remedial.[14] The Board's decision in *Aneco,* supra, is illustrative. There, the Board reversed the administrative law judge's finding that the backpay period for a paid union organizer should extend for only 5 weeks. The judge found that the salt would have quit his job with the respondent once the union's interests were served; that the salt, after accepting the respondent's remedial offer of a job in 1998, worked for the respondent for only 5 weeks before leaving "during what he described as an 'unfair labor practice strike'"; and that the record contained no evidence of a salt ever having worked for a targeted employer for anything close to the 5 years for which backpay was sought. *Aneco*, supra at 695–697.

The Board reversed, finding merit in the General Counsel's contention that the judge's finding was "entirely speculative" and that the respondent had failed to prove that a backpay period of nearly 5 years was unreasonable. Id. at 691. Noting that "[i]n compliance matters, a wrongdoing employer bears the burden of proving that a discriminatee would not have remained at the same job which he was unlawfully denied," and observing that "[t]his principle is the same for paid union organizers as for other employee discriminatees," the Board stated that it had "no quarrel with the notion that, as a paid union organizer, Cox [the salt/discriminatee] *could* have left his job with the Respondent prior to April 1, 1998, if the Union's organizational objectives at Aneco were achieved or abandoned, or if his services were more urgently needed elsewhere." Id. (emphasis in original). The Board emphasized, however, that "[i]t is the Respondent's evidentiary burden to bridge the gulf from *could* to *would* when disputing the propriety of a backpay period, and it has failed to do so here." Id. at 691–692 (emphasis in original). The Board therefore ordered the respondent to reimburse Cox for lost earnings for the full 5-year backpay period.

On appeal, the Fourth Circuit refused to enforce the Board's backpay award because it contravened the principles that "a backpay order may only serve as a compensatory, make-whole remedy, not a punitive sanction or deterrent,"[15] and that "[a] backpay order is a means to restore the situation as nearly as possible, to that which would have obtained but for the illegal discrimination."[16] The court deemed "indefensible" the Board's assumption that Cox would have worked for Aneco for 5 years, citing, as did the judge below, Cox's status as a paid union salt, the absence of any evidence of other salts working for target employers for such prolonged periods, and the fact that Cox only worked for the respondent for 5 weeks after accepting a remedial job offer in 1998.[17]

For the reasons set forth above, we find that the Board's traditional presumption with respect to the duration of the backpay period is suspect in the case of a un-

when the time came to leave a non-union job, they should not "'drag up,'" an expression that meant to quit or resign, but should always go out on strike to preserve their right either to be placed on a preferential hiring list or to be reinstated. Id. This is precisely what happened in *Allied Mechanical Services*, 346 NLRB 326 (2006), involving a salting campaign by a Plumbers and Pipefitters local. Union salt Steve Titus was reinstated in 1997 and shortly thereafter went on strike again (as in 1992). Titus was reinstated and returned to work on June 14, 2001, but his work performance at that time was substandard and he was lawfully discharged on July 30, 2001. Id. at 326–327. Union salt Marty Preston went on strike in 1993. He was reinstated in 1997. After a few weeks' employment, Preston went on strike again. Preston returned to work on December 17, 2001, worked part of the day, and then left early and again went on strike. He returned to work for his previous employer the next day. Id. at 327. Union salt Jeff Weaver was reinstated on December 27, 2001, but went on strike after working 1 day. Id. at 328.

[14] Contrary to the dissent's assertions, we do not contend that the current presumption is inherently punitive. However, we believe cases such as *Aneco* demonstrate that there is a greater risk of a punitive backpay award based on an unreasonable backpay period with the presumption than there will be without it.

[15] *Aneco, Inc. v. NLRB*, 285 F.3d at 329.

[16] Id. (internal quotations and citations omitted).

[17] Id. at 332, 333.

ion salt, and we will no longer apply it. The same reasoning also applies to transfers of a salt/discriminatee to future jobsites. There is no reasonable basis for applying the *Dean General Contractors*[18] presumption that, absent a discriminatory discharge from a job, the discriminatee would have been transferred to a new job after the first job ended.[19] After seeking to organize one jobsite, it does not necessarily follow that the salt would have transferred to another. As former Member Hurtgen observed, even if the employer's practice was to do so, the issue of whether the employee would, in fact, have transferred may ultimately depend on whether the union wished to organize the new site, which is a matter peculiarly within the union's knowledge.[20] Consequently, the General Counsel should bear the burden of producing affirmative evidence as to whether the salt/discriminatee would have continued working for the employer and transferred to a new jobsite.[21]

The instant case, like *Aneco,* demonstrates the need for a more rational and balanced approach in fashioning remedies in cases involving union salts. Under the Board's traditional burden-shifting scheme, the backpay period for Couch would presumptively cover more than 8 years. This would be true despite the fact that Couch is employed by the Union and sought employment with Respondent for discrete organizational objectives. While there is no record evidence yet on point, we will not presume that individuals such as Couch would ever work for a targeted nonunion employer for anything close to 8 years. We see little reason to rest on an unfounded presumption of indefinite employment when the reasonableness of a backpay period can much more accurately be determined by requiring those with the best evidence of the union and salt/discriminatee's employment objectives to produce that evidence through the General Counsel.

In sum, where the evidence establishes a discriminatee's status as a union salt,[22] we will no longer apply a presumption of indefinite employment. In such cases, the General Counsel must present affirmative evidence to meet his burden of proving the reasonableness of the claimed backpay period. Accordingly, we overrule the Board decisions in *Ferguson Electric*, *Aneco*, and like cases to the extent they are inconsistent with our new rule. We shall apply this new evidentiary requirement in the present case and in all cases where the discriminatee is a union salt.

In formulating our new rules, we have considered arguments raised by our dissenting colleagues. For the following reasons, we find these arguments lacking in merit.

Our colleagues contend that the parties in this case have not requested reversal of the Board's existing backpay presumption as it applies to salts. However, it is the responsibility of the Board to fashion a specific remedy for unlawful conduct, even if the parties have not sought that remedy. This is certainly not the first time the Board has modified its remedial practices in the absence of exceptions or argument from parties in a case. See, e.g., *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996). Further, and more specifically, in exercising its remedial discretion, the Board is obligated to ensure that its remedies are compensatory and not punitive, and to guard against windfall awards that bear no reasonable relation to the injury sustained. That is all we do here.

Similarly, our colleagues say that we rely on the Board's "purported experience" rather than "empirical data" to support our views.[23] However, the presumption that the backpay period should run until an offer of instatement or reinstatement is not itself based on empirical data. Rather, it is based on what the dissent views as a universal policy-based evidentiary principle applicable to

[18] 285 NLRB 573. The *Dean General Contractors* presumption was summarized as follows by the Board in *Ferguson Electric*:

> An employer's backpay obligation can end at the completion date of the construction project in question, provided that the employer shows that, under its established policies, an employee hired into a position like the one unlawfully denied the discriminatee would not have been transferred or reassigned to another job after the project at issue ended. *Casey Electric*, 313 NLRB 774 (1994), citing *Dean General Contractors*, 285 NLRB 573 (1987). The Board resolves compliance-related uncertainties or ambiguities against the wrongdoer. *Kansas Refined Helium Co.*, 252 NLRB 1156–1157 (1980). [330 NLRB at 515–516.]

[19] We do not pass on the application of *Dean General Contractors* to nonsalting situations.

[20] *Ferguson Electric*, 330 NLRB at 519.

[21] In affirming the Board majority's determination in *Tualatin Electric*, 331 NLRB 36 (2000), over the dissent of then Member Hurtgen, that the *Dean General Contractors* presumption was applicable in cases even where the discriminatee was a union salt, the D.C. Circuit observed that the Board majority's policy choice was within the Board's statutory discretion. We do not disagree. However, for the reasons set out herein, we make a different policy choice from the one that the Board majority made in *Tualatin Electric*, supra.

[22] A discriminatee's status as a salt will often be established in the original unfair labor practice stage of litigation. If not litigated there, however, a respondent may introduce evidence on this point during the compliance proceeding. Contrary to the dissent, we do not foresee an explosion of litigation about this issue. In any case, the narrowly defined, easily proven factual issues will be whether a union was engaged in a salting campaign and whether a discriminatee joined or sought to join the targeted employer's work force in order to further that campaign.

[23] While the dissent characterizes our experience as "purported," it is well recognized that "[i]n fashioning its remedies under the broad provisions of § 10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by a reviewing court." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 612 fn. 32 (1969). As set out above, our experience has guided us in formulating the new rules we announce here.

all backpay cases that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."[24] We reject the suggestion that our holding is inconsistent with this principle. As explained above, in a backpay case the General Counsel has the initial burden of establishing the gross amount of backpay owed. To satisfy this burden, the General Counsel must necessarily define the duration of the backpay period (see fn. 4 above). In nonsalting refusal-to-hire cases, the General Counsel may reasonably rely on a presumption of indefinite employment to meet this burden. In the case of salts, however, the presumption of indefinite employment must yield to common sense and experience. By definition, a salt seeks employment for the purpose of furthering a union's objectives, and the Board has long recognized that these objectives may impact on an employee's tenure. See, above, fns. 9 and 12 and accompanying text. We simply account for that purpose in determining the appropriate backpay period. Under our holding here, the General Counsel is still afforded a wide range of reasonableness in meeting this burden, but he will no longer be able to substitute a presumption for actual evidence with respect to proof of a matter that the wrongdoer's action has not obscured—i.e., how long the salt/discriminatee likely would have stayed on the job in light of the union's salting objectives.[25]

Since the General Counsel cannot rely upon a presumption in these cases, he has the burden of going forward with the evidence in regard to the length of the backpay period. In addition, as noted above, he also has the burden of persuasion that the evidence supports the backpay period set forth in the compliance specification. In this respect, the dissent mischaracterizes our holding in this case when it states, in effect, that we are presuming that the union should know *in advance* the duration of its salting assignments or how long a campaign would last. We make no such presumptions. Nor do we presume that salts will leave employment at some fixed point in time, known by the union in advance. On the contrary, and unlike our dissenting colleagues, we reject *any presumption* about the duration of a salt/discriminatee's backpay period and leave it to the General Counsel to adduce affirmative proof of the matter as part of his existing burden to prove a reasonable gross backpay claim.[26]

With respect to the issues of instatement and reinstatement, since the General Counsel has the burden of establishing the duration of the backpay period, it follows that the General Counsel also has the burden of going forward with the evidence that the discriminatee would still be employed by the Respondent if he had not been the victim of discrimination. The General Counsel also has the burden of persuasion in this regard. Accordingly, while our order herein provides for instatement, the order is subject to defeasance (as we stated above (see fn. 8)) if, at the compliance stage, the General Counsel fails to carry this burden of persuasion.

In reaching this conclusion, we find unpersuasive our dissenting colleagues' position that the Board may order instatement or reinstatement at a time when, in the absence of any unlawful discrimination, the discriminatee would have ceased working for the employer. As our colleagues note, the Act's remedial purpose with respect to employees who have been unlawfully discharged or denied employment is "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."[27] As a result, circumstances that terminate the running of the backpay period also extinguish the employer's obligation to instate or reinstate the discriminate."[28] For example, if a discriminatee is unlawfully refused hire on a construction project, and that project is subsequently completed and all employees are discharged (rather than transferred to a new project), the discriminatee's backpay period would cease as of the date on which the employees were discharged. The employee's right to instatement would terminate on the

[24] *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265 (1946).

[25] The dissent posits numerous situations in which salts/discriminatees might have stayed on the job for extended periods of time, or transferred to another jobsite, even after their union's objectives have been met or abandoned, or in spite of those objectives. Obviously, such situations may not be known in advance and we do not presume that they can be anticipated. However, affirmative proof that any such situation would have occurred in a specific case—based, for example, on the particular facts of that case or on what occurred in other similar salting efforts—would provide us with a basis for finding the claimed backpay period to be reasonable.

[26] We concede that the dissent's insistence on adherence to the same presumption of continuing employment for all discriminatees is a simpler approach. However, as the Supreme Court stated long ago in *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 198 (when rejecting the Board's argument against subjecting to litigation the issue of whether a discriminatee has incurred a willful loss of earnings during the backpay period):

> The advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.

[27] *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 194.

[28] For this reason, the Board's order of instatement is defeasible as of the date on which the backpay period ends.

same date. This outcome results because the discriminatee, if not unlawfully denied hire, nevertheless would have been discharged at the project's end along with the other employees, and his pay would have ceased at that point. Because the employer's obligation is simply to restore the discriminatee to the position he would have occupied but for the discrimination, no basis would exist to order instatement. Similarly, if a discriminatee would have terminated his employment with the employer when a salting campaign was completed (either successfully or not), there would be no basis on which to order instatement or reinstatement to the employer's employ at a later time. Consequently, the duration of the backpay period is inextricably linked factually with the remedies of instatement and reinstatement. See, e.g., *McKee Electric Co.,* 349 NLRB 463, 466 (2007) (Board "leaves to compliance the determination of whether the time-limited nature of the Bakersfield project would have resulted in the discriminatees being laid off for lack of work at some point in time, thereby rendering instatement inappropriate and tolling backpay."). To the extent that the dissent argues that instatement is appropriate even after backpay has been tolled, we find no warrant for this unprecedented remedy.

Finally, and contrary to the argument of the dissent, we have no hostility to the practice of salting. Salts are statutory employees and, as this case illustrates, may not be denied employment for discriminatory reasons. Further, like all discriminatees, they are entitled to backpay. Our only point is that the General Counsel has the burden of proving the length of the backpay period.

C. The Alleged Interrogation

The judge found that the Respondent violated Section 8(a)(1) by interrogating employee-applicant and paid union organizer Michael London about his union sympathies. For the following reasons, we reverse.

The Respondent, a sheet metal contractor, is located in Tulsa, Oklahoma. On May 28, 1998,[29] London, who was in Lawton, Oklahoma, some 220 miles from Tulsa, saw the Respondent's ad in the Oklahoma Daily Newspaper. Acting pursuant to the ad, London called Al DeRycke, the Respondent's estimator, about a job on June 2. According to London's uncontroverted testimony, when London described his qualifications and experience, DeRycke became very enthusiastic about his application. According to London's further uncontroverted testimony, "Al told me, he said, you know this is non-union. I said, that's no problem. And he said, you'll have to take a drug test. I said, that's no problem." (Tr. 127.)

[29] All dates hereafter refer to 1998.

The next day, London again called DeRycke, told him that he was having car trouble, and that he would not be able to get to Tulsa until June 5. DeRycke responded that London was losing money every day that he was not in Tulsa and that if London wanted to work, he would get to Tulsa. London further testified without contradiction that he was in Lawton and that he didn't "want to drive all the way to Tulsa for nothing." (Tr. 127.) DeRycke responded that if London passed a drug test, he would be hired.

London arrived at the Respondent's Tulsa facility on June 5. He then met with the Respondent's president, John Odom. During the course of the interview, Odom looked through London's application. According to London's credited testimony, Odom asked London about a contractor, Liberty Sheet Metal, and asked, "[A]ren't they union?" London responded, "[N]o, Liberty sold out to TRS Mechanical[.]" (Tr. 129.) Ultimately, Odom hired London effective June 8. London did not report for work on that date, however, because he "had no intention of going to work" for the Respondent. (Tr. 131.)

The judge found that Odom's June 5 question to London, as to whether Liberty Sheet Metal was union, constituted an unlawful interrogation. We disagree.

The determination of whether a question is coercive must take into account all of the surrounding circumstances.[30] The full circumstances are set forth above. In reviewing London's application, Odom noticed that one of London's former employers was Liberty Sheet Metal and simply asked whether that company was union. London truthfully responded that it was not, that it had been sold. That was the end of the matter. Odom's question conveyed no implied threat that if Liberty were union, London would not be hired. Accordingly, we find that this question was not a coercive interrogation, and that it does not evidence antiunion animus.[31]

[30] *Rossmore House Hotel*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

[31] Relying on *Facchina Construction Co.,* 343 NLRB 886, 886 (2004), enfd. 180 Fed. Appx. 178 (D.C. Cir. 2006), our dissenting colleagues would find that Odom's question constitutes an unlawful interrogation. We disagree. In *Facchina Construction Co.*, the respondent's job superintendent asked the applicant directly whether *he* (the applicant) was with the union. The Board found the interrogation unlawful because while the applicant's "chance of being hired was implicated[,]" the question was not relevant to his fitness for employment. Id. at 886. "Instead, it reasonably implied antiunion animus." Id. Similarly, in *Zarcon, Inc.,* 340 NLRB 1222 (2003), enfd. 118 Fed. Appx. 113 (8th Cir. 2005), a case cited by the Board in *Facchina Construction Co.,* the respondent's supervisor asked a job applicant (after the job applicant had stated that he was working for a particular company that was unionized and where the supervisor had formerly worked), "*You* ain't carrying a [union] card no more?" Id. at 1222 (emphasis added). In finding that the question constituted an unlawful

D. Statement that Respondent is Nonunion does not Evidence Antiunion Animus

We also find, again contrary to the judge, that DeRycke's May 28 statement to London—that the Respondent was nonunion—does not evidence anti-union animus. As explained above, London called the Respondent from Lawton, some 220 miles from Tulsa. During the course of their conversation, DeRycke truthfully stated that the Respondent was nonunion. By doing so, DeRycke did nothing more than inform London of the facts so that London could decide whether he should travel to Tulsa to seek employment with the Respondent. For, if London were unwilling to work for nonunion employers, it would obviously be a waste of London's time and resources to travel to Tulsa to apply for a job with the Respondent. As London himself said, he didn't "want to drive all the way to Tulsa for nothing." Further, in stating this fact, i.e., that the Respondent was nonunion, DeRycke did not impliedly question London about his own union sympathies or invite a response to what was, after all, a statement of fact. Finally, we find that DeRycke's statement conveyed no threat, overt or implied, that the Respondent would act adversely on London's application if he was a union member. In sum, DeRycke's statement, which conveyed neither an implied interrogation nor a threat, does not evidence antiunion animus.

AMENDED REMEDY

Having found that the Respondent discriminatorily refused to consider discriminatee Couch for hire and to hire him, Respondent must make Couch whole for its unlawful conduct against him. The duration of the backpay period shall be determined in accordance with the new evidentiary requirement that we have set out above. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

AMENDED CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers Local 270, affiliated with Sheet Metal Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.[32]

3. Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire and by refusing to hire applicant and paid union organizer Michael Couch.

4. Respondent has not otherwise violated the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Oil Capitol Sheet Metal, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disparately requiring employee-applicants to prepare written answers to essay questions as a condition of the application process.

(b) Refusing to consider for hire employee-applicants because of their union sympathies and/or to discourage employees in these activities.

(c) Refusing to hire employee-applicants because of their union sympathies and/or to discourage employees in these activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to Michael Couch employment in the job for which he applied or, if such job no longer exists, in a substantially equivalent position, without prejudice to Couch's seniority or any other rights or privileges to which he would have been entitled if he had not been discriminated against.

(b) Make Michael Couch whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the amended remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful refusal to consider Couch for hire or to hire him, and within 3 days thereafter notify him in writing that this has been done

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interrogation, the Board found, inter alia, that the supervisor already considered the applicant to be a good carpenter and that therefore "his question about a union card was clearly not relevant to [the applicant's] ability, skill, productivity, and reliability as an employee." Id. Rather, as the supervisor admitted, "he used the information gained in his questioning as the basis for the unlawful failure to hire [the applicant]." Id. In the present case, by contrast, Odom simply asked in passing if one of the *companies* listed on London's application was union. London truthfully answered the question about the *company*. Odom did not pursue the question, nor did he ever question London about *his own* union membership. In these circumstances, we find that the dissent overreaches when it asserts that Odom's question "had a clearly negative connotation" and "suggest[ed] that [London's] chances of being hired would be diminished if his former employer was 'union.'"

[32] Although the judge did not specifically set out this finding in his conclusions of law, he found that the Union was a labor organization within the meaning of Sec. 2(5) of the Act in appendix A to his bench decision (appendix A at 353).

and that the refusal to consider for hire or to hire Couch will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Tulsa, Oklahoma, copies of the attached notice marked "Appendix B."[33] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all employees employed by the Respondent on or at any time since May 5, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN and MEMBER WALSH, dissenting in part.

In reversing the burden of proof with respect to remedial issues involving salts, the majority overturns Board precedent endorsed by two appellate courts and rejected by none. Today's change in the law is made without any party having raised the issue, without the benefit of briefing, and without a sound legal or empirical basis. Indeed, the majority concedes that the Board's prior rule—which required the employer to show that the backpay period should be reduced for salts, as for other victims of unlawful discrimination—was "within the Board's discretion." The majority's new approach, in contrast, not only violates the well-established principle of resolving remedial uncertainties against the wrongdoer, but also treats salts as a uniquely disfavored class of discriminatees, notwithstanding the Supreme Court's ruling that salts are protected employees under the National Labor Relations Act. *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995). We therefore dissent.[1]

I

The Board's traditional approach to the issues presented here applies equally to *all* victims of unlawful discrimination under the Act. As we will explain, carving out special, less favorable rules for salts is unwarranted.

The purpose of the backpay remedy is "to vindicate the public policy of the [Act] by making the employees whole for losses suffered on account of an unfair labor practice."[2] To make "whole" in this sense is "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."[3]

Accordingly, the remedial backpay period for employees victimized by discrimination is presumed to run from the date of violation until the employer extends an offer of instatement or reinstatement. This rule was established, as noted with approval by the Supreme Court, in the Board's first reported case.[4] To ensure that the statutory priority of making discriminatees whole is met, the employer has the burden of showing that a backpay period should be truncated or that backpay should be otherwise reduced from the full amount accrued.[5] With respect to the construction industry, the Board has presumed, absent an employer's showing to the contrary, that a discriminatee would not only have worked through completion of the project from which he was unlawfully

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] We also disagree with the majority's finding that the Respondent did not violate Sec. 8(a)(1) when its president, during a job interview, asked about one of the applicant's former employers: "Aren't they union?" Although the applicant was a salt, he wore no union insignia at the time. In the context of a job interview, the Respondent's question was simply an indirect way of asking the applicant whether he was a union member, and an unsubtle suggestion that an affirmative answer would have negative consequences. See, e.g., *Facchina Construction Co.,* 343 NLRB 886, 886 (2004) (employer violated Sec. 8(a)(1) by asking job applicant, not wearing union insignia, whether he was with union; question was irrelevant to fitness for employment and reasonably implied antiunion animus), enfd. 180 Fed. Appx. 178 (D.C. Cir. 2006).

We agree with the majority that the Respondent violated Sec. 8(a)(3) by refusing to hire Michael Couch, a union salt.

[2] *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263 (1969).

[3] *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 900 (1984), quoting *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941).

[4] *NLRB v. Seven-Up Bottling Co. of Miami,* 344 U.S. 344, 347 (1953), citing *Pennsylvania Greyhound Lines*, 1 NLRB 1, 51 (1935); *Phelps Dodge*, supra, 313 U.S. at 197.

[5] See, e.g., *Millennium Maintenance,* 344 NLRB 516, 517 (2005); *McGuire Plumbing,* 341 NLRB 204 fn. 1 (2004); *Weldun International,* 340 NLRB 666, 675–676 (2003); *United Aircraft,* 204 NLRB 1068, 1068 (1973).

barred, but then would have transferred to the employer's succeeding worksites.[6]

In backpay cases, it is fundamental that the Board resolves factual uncertainties as to backpay against the wrongdoing employer.[7] This approach is hardly unique to the Board. As the Supreme Court has explained, in a decision often-quoted by the Board, the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).[8]

Until today, these judicially endorsed principles were applicable to backpay cases involving salts.[9] It could not be otherwise, given the Supreme Court's confirmation in *Town & Country Electric*, supra, that salts are protected employees within the meaning of the Act.[10] "Since paid union organizers have been held to be employees under the Act, it is appropriate that their rights as employees be meaningfully enforced and discrimination against them be meaningfully deterred through backpay awards when they are unlawfully kept from entering a workforce." *NLRB v. Ferguson Electric Co., Inc.*, 242 F.3d 426, 436 (2d Cir. 2001). As the United States Court of Appeals for the District of Columbia Circuit has explained:

> The principle that the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages has as much force in a case involving salts as in any other.

Tualatin Electric, Inc. v. NLRB, 253 F.3d 714, 718 (D.C. Cir. 2001). No appellate court has rejected this reasoning.[11]

II.

The majority necessarily concedes that the Board's current approach is a "policy choice within the Board's statutory discretion." No party has asked the Board to reconsider the law in this area, and no briefing on the question has been sought.[12] Nevertheless, according to the majority, this is "the primary issue to be decided in the case," and a "different policy choice" is in order. As we will explain, that choice is deeply flawed, and not surprisingly, given the process by which it is reached.

The majority rejects the traditional "presumption of indefinite employment," including the presumption that "the salt/discriminatee, if hired at the site where he applied, would have been transferred to other sites after the project at the original site was completed." Under the majority's new approach, the "General Counsel must present affirmative evidence to meet his burden of proving the reasonableness of the claimed backpay period," i.e., the General Counsel "has the burden of going forward with the evidence in regard to the length of the backpay period" and bears the "burden of persuasion that the evidence supports the backpay period set forth in the Compliance Specification." In short, to be eligible for backpay, the salt and his union (on whom the evidentiary burden falls as a practical matter) must be able to prove exactly how long the salt would have worked for the employer had the employer hired him or not fired him.

And this fundamental reallocation of evidentiary burdens applies not just to backpay, but also to the issue of instatement or reinstatement: whether the salt who was discriminated against must now be hired or rehired. Under the majority's new approach, the General Counsel

[6] *Dean General Contractors*, 285 NLRB 573 (1987). See *Cobb Mechanical Contractors, Inc. v. NLRB,* 295 F.3d 1370, 1379 (D.C. Cir. 2002). The majority today leaves the *Dean General* rule in place with respect to nonsalting situations, but rejects its application in salting cases.

[7] See, e.g., *Glenn's Trucking*, 344 NLRB 3 (2005); *Pan American Grain*, 343 NLRB 318, 344 (2004), remanded on other grounds 448 F.3d 465 (1st Cir. 2006); *Weldun International*, supra at 666 fn. 3; *United Aircraft*, supra, 204 NLRB at 1068. The majority acknowledges this bedrock principle only in passing.

[8] See, e.g., *Rainbow Coaches*, 280 NLRB 166, 168–169 (1986) (quoting *Bigelow*), enfd. 835 F.2d 1436 (9th Cir. 1987), cert. denied 487 U.S. 1235 (1988).

The Board applies this uncertainty rationale in a wide range of situations. See, e.g., *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 403 fn. 6 (1983) (burden of proof in mixed-motive discrimination case); *Planned Building Services*, 347 NLRB 670, 674 (2006) (number of discriminatees that successor employer would have hired and length of time successor would have bargained before agreement or impasse); *International Paper,* 319 NLRB 1253, 1277–1278 (1995) (duration of lockout), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997).

[9] See, e.g., *Tualatin Electric*, 331 NLRB 36 (2000), enfd. 253 F.3d 714 (D.C. Cir. 2001); *Ferguson Electric*, 330 NLRB 514, 515–516 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

[10] *Town & Country Electric*, supra at 88–92. Although the *Town & Country* Court noted (as the majority emphasizes) that paid salts might not be treated the same as other employees "in every labor law context," it is clear from the context that the Court was referring primarily to the issue of unit inclusion and not to remedial issues. 516 U.S. at 97.

[11] In *Aneco, Inc. v. NLRB*, 285 F.3d 326 (4th Cir. 2002), discussed further below, the court disagreed with the Board's application of the established approach in a particular situation. Contrary to the majority, however, the *Aneco* court neither questioned the presumption favoring discriminatees nor suggested that a more "rational" approach was required in cases involving salts. *Hartman Bros. Heating & Air Conditioning v. NLRB*, 280 F.3d 1110 (7th Cir. 2002), also cited by the majority, did not address the backpay period, and the court's brief comment that salts "do not intend to remain" after the targeted unit is organized was unsupported dictum.

[12] The majority cites *Indian Hills Care Center*, 321 NLRB 144 (1996), to justify acting unilaterally. In that case, however, the Board merely introduced time requirements for respondents to comply with Board orders. There is no comparison between that incremental change to preexisting remedial practice and today's policy-driven reversal of precedent, which erects new obstacles to remedies for an entire class of discriminatees.

bears the burdens of production and of persuasion to show that the salt "would still be employed by the Respondent if he had not been the victim of discrimination."[13]

These new rules apply to all "salts," whom the majority defines as "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign." The majority defines "salting" as the "act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees."

III.

The majority's approach is based on three propositions, which taken together wrongly place the burden of uncertainty on the victims of discrimination:

> (a) that salts do not typically seek employment for an indefinite duration, but rather remain with the targeted employer "only until the union's defined objectives have been achieved or abandoned";
>
> (b) that, consequently, "much of the pertinent evidence about the likely duration of a salt's employment is in the possession of the union . . . and of the salt"; and
>
> (c) that "application of the presumption of indefinite employment involving salts has resulted in backpay awards that are more punitive than remedial."

As we now show, each of those ostensible justifications for the majority's approach is dubious at best, even assuming that unions control the employment of salts (a debatable assumption, at least for unpaid salts).[14]

A.

The majority—citing the Board's purported experience, but not evidence in the record, scholarly studies, or other empirical data—asserts that salts do not seek employment for an indefinite duration, but only for a finite period, presumably known in advance by the union.[15]

However, the "experience" cited by the majority shows only that some salts, like many other employees, work for an employer for a relatively brief period of time.[16] And this experience is confined to four specific cases, which provide no evidence warranting a general shift in allocating the burden of proof. None of the four cases stands for the legal proposition that the Board's established approach is unsound. None cites any evidence that salts usually, let alone uniformly, quit at the end of every organizing campaign, or that unions typically know in advance how long a particular campaign will last.[17]

In fact, salting campaigns vary dramatically in duration. Some campaigns last for years,18 while others terminate more quickly.19 Moreover, in some instances, salts are simply assigned to work for an employer without any timeframe or campaign commitment, to make what individual progress they can in generating union support or in connection with area standards picketing. See, e.g., *Tuala-*

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[13] We assume that where the General Counsel carries those burdens, and demonstrates that the union would have permitted a salt to transfer to other sites, it would remain the employer's burden to show that the employer nevertheless maintained a policy against such transfers. See *Dean General*, supra at 574–575.

[14] Although a union may have the authority to reassign its paid staff to other salting campaigns, it does not follow that at the end of every campaign, a rank-and-file salt, who has no additional source of income, will be asked to leave or will leave, if asked.

[15] The majority's implicit premise would seem to be that the union's organizing campaign will fail, rather than succeed. A successful campaign, of course, would create a unionized workplace where salts who were rank-and-file union members might well work indefinitely.

In any event, the end of a salting campaign does not necessarily mean the termination of a salt's work for the union. It is possible that the union might want a salt to remain at the site after a campaign ends, either to remobilize union support after an unsuccessful campaign or to educate and strengthen the new bargaining unit after a successful one.

[16] As the Supreme Court observed in *Town & Country Electric*, although a salt might quit, "so too might . . . a worker who has found a better job, or one whose family wants to move elsewhere." 516 U.S. at 96. Such possibilities do not prevent requiring an employer to prove that a nonsalt's backpay period should be shortened.

[17] In *Aneco*, supra, the salt, after being unlawfully refused hire, was instated and "actually worked for Aneco," but joined a strike 5 weeks after that instatement, at the end of which he did not request to return to work. 285 F.3d at 332 (emphasis omitted). In the court's view, this "specific evidence" overcame the Board's initial presumption of a full backpay period for the unlawful refusal to hire, and justified reducing it. Id. The court did not hold that the Board's presumption itself was unsound or impermissible.

In *Allied Mechanical Services*, 346 NLRB 326 (2006), each of the three salts, as in *Aneco*, had quit or gone on strike within a few weeks after being hired by the respondent. Nothing in the Board's decision suggests whether this fact pattern is common. The decision itself did not determine any backpay issue.

American Residential Services of Indiana, Inc., 345 NLRB 995 (2005), concerned an apprentice program run by one local union that required participants to take a leave of absence to work as salts. The decision observed that "[t]ypically, an apprentice remains with the nonunion employer for about six months," before being directed to return. Slip op. at 1. The case itself did not involve the issue of backpay or reinstatement, nor did it address the union's other salting activities or the salting experience of its non-apprentice members or paid staff.

Hartman Bros. Heating & Air Conditioning, supra, as previously noted, did not address the backpay period issue, and the court's brief comment on the duration of salts' employment was unsupported dictum.

[18] See *Tambe Electric*, 346 NLRB 380 (2006) (5 years); *Aztech Electric*, 335 NLRB 260 (2001), enfd. in part 323 F.3d 1051 (D.C. Cir. 2003) (3 years).

[19] See *WestPac Electric*, 321 NLRB 1322 (1991) (8 months).

tin Electric, supra, 331 NLRB at fn. 1.[20] It is therefore unreasonable to presume that salts will leave employment at some fixed point in time, known by the union in advance.

There is correspondingly no basis for the majority's departure from *Dean General*, supra, and for assuming that a salt, upon completion of the employer's current construction project, would not have transferred to one of the employer's other projects. Rather, it seems considerably more likely that in many, if not most, salting campaigns in the construction industry, the union's organizing target is the employer, not merely one of the employer's worksites. Absent specific evidence to the contrary, then, it seems more likely than not that the union would have wanted the salt to follow the employer to a new worksite. A rank-and-file salt who needs continued employment would be even more likely to accept a transfer, given the option, than a paid staff organizer.

B.

The majority asserts that, for remedial purposes, unions and salts have superior access to the evidence relevant to the duration of a salt's employment. That proposition, too, is factually unsupported, as well as legally irrelevant.

The essential point here is that the employer's unlawful conduct has created an uncertainty that can be only imperfectly resolved, if at all. It should be obvious that an employer's refusal to hire a salt, or the decision to fire or lay off a salt, means that we likely will never know how the union's salting campaign would have proceeded had the employer obeyed the law. Perhaps if salts had been hired or retained, the union's campaign would have quickly succeeded and the union-staff salts, at least, moved on. Perhaps the campaign would have failed sooner rather than later. Or perhaps a definitive outcome would have taken a long time to become clear.[21]

Presumably, the union does not, and cannot, make all of its tactical decisions, including the duration of its salting assignments, in advance. The union therefore cannot know, let alone prove, how long a campaign *would* have lasted, or how long the salt *would* have stayed to participate in it, if the employer had not acted unlawfully.[22]

Equally important, the union itself has not created any of the uncertainty. The uncertainty of a salt's backpay period is the result of the employer's misconduct, not the union's lawful activity. Thus, the majority's assertion that "much of [that] uncertainty" is "attributable to the union" is simply wrong as both a factual and legal matter. Under the Board's traditional approach to remedies, in this area and in others, uncertainty is attributed to the wrongdoer.[23]

This case, then, does not involve a situation where evidentiary rules are based, or should be based, primarily on factors unrelated to one party's legal culpability. In upholding the rule of *Dean General Contractors* as applied to salts, the District of Columbia Circuit not only acknowledged the Board's view that the *employer* had superior access to evidence as to the issue of transfer to later worksites, but also approved the Board's adherence to its traditional uncertainty rationale. *Tualatin Electric*, supra, 253 F.3d at 718.[24]

C.

Finally, the majority is mistaken in characterizing the Board's established approach as "punitive." That view has no foundation, either in the cases the majority cites or elsewhere. Indeed, the majority's own admission that the established approach is "within the Board's statutory discretion"—as the District of Columbia Circuit and the Second Circuit have held—negates any contention that that approach is impermissibly punitive.

Every employer found to have violated the Act could argue that being required to show that the remedial backpay period should be shortened places it at a disadvantage and is consequently "punitive." But that argument was rejected by the Board and the courts long ago, and for the reason common to all culpable respondents: the

[20] For this reason, the majority's suggestion that a determination can be made of how long a discriminatee would have stayed employed, based on what occurred in "other similar" salting efforts, is dubious.

[21] The impact that an unlawful refusal to hire a salt may itself have on the length of a campaign is difficult to assess and impossible to state as a generalization, particularly considering that some campaigns (as here) involve only one or two salts, while others involve a larger number.

[22] The majority disavows reliance on a presumption that the union will know the exact duration of salting assignments "in advance." But such advance knowledge is seemingly just what the union will need in order to make the required showing with objective evidence. The fact of discrimination makes it impossible to know how long a salting campaign would have progressed, absent the discrimination, unless there was a predetermined ending date.

[23] Consider, for example, cases involving employees who were unlawfully discharged prior to an economic strike and who were not offered reinstatement until after the strike ended. The Board permits the employer to show that backpay should be tolled during the strike, because the discharged employees would have joined the strike. However, because the employer created the underlying uncertainty, it is the employer's burden to make that showing, not the employee's burden to demonstrate that he would have crossed the picket line to work during the strike. See, e.g., *Inland Empire Meat*, 255 NLRB 1306, 1307–1308 (1981).

[24] As the *Tualatin* court explained:

> [T]he employer's superior access to evidence . . . is but one of several reasons underpinning Dean. At least as important, per the Board, is the judgment that the policies of the Act make it undesirable "to apply a presumption in favor of an adjudicated wrongdoer while seeking to remedy the underlying unfair labor practice committed against the aggrieved employee."

253 F.3d at 717 (quoting *Dean General Contractors*, supra, 285 NLRB at 574).

uncertainty was created by the employer's own unlawful misconduct.

That an employer has chosen to violate the rights of salts, rather than of other discriminatees, should make no difference so long as salting is properly regarded as protected activity under the Act. The majority cites the undisputed rule that a remedial Board order cannot be "merely speculative." By the same token, however, the Board and the courts have recognized that all backpay awards are necessarily "approximations."[25] And backpay itself—specifically authorized by Section 10(c) of the Act—is not a penalty, but a make-whole remedy. See *NLRB v. Strong*, 393 U.S. 357, 359 (1969).[26]

There is nothing punitive about the Board's established approach with respect to remedies in salting cases. As in other cases of unlawful discrimination, the respondent employer has the right to present evidence to reduce its backpay liability to salts. Such evidence can pertain to interim earnings, whether a salt would have transferred to another site, or to whether the salt would have quit at any point in time. Allocating the burden of proof to the employer on those matters is not a penalty, but [simply] a matter of equity.[27] Nor, insofar as this evidentiary rule ultimately has a deterrent effect on unlawful discrimination by ensuring that discriminatees are made whole, is that a reason to reject it. Contrary to the majority's implication, seeking deterrence is a proper use of the Act's remedial authority.[28]

IV.

The majority's new approach, then, is based on shaky factual and legal foundations. But even if this were not the case, the new approach would still be flawed in several important respects: (a) failing to provide clear guidance with respect to determining a discriminatee's status as a salt; (b) failing to recognize the difference between paid and unpaid salts; and (c) reaching beyond the issue of backpay for salts to the question of whether they must be instated or reinstated to the workplace. We address each problem in turn.

A.

To begin, by creating more restrictive evidentiary rules applicable only to salts, the majority invites litigation about the status of discriminatees in every case: Are they salts or not? (The Act, of course, makes no such categorical distinction, as the Supreme Court's *Town & Country Electric* decision established.) The attractive prospect of truncating the backpay period and precluding instatement or reinstatement of salts will give every employer respondent in a Board proceeding a powerful incentive to characterize discriminatees as "salts."[29] The majority's definition of "salt," in turn, suggests that determining a discriminatee's status will not always be simple.[30]

B.

Next, the majority errs in treating paid salts and unpaid salts the same. For the reasons already suggested, this failure to distinguish between the two groups is arbitrary. A union might well treat paid staff organizers and unpaid rank-and-file members differently with respect to their participation in salting campaigns. More important, a rank-and-file member, who cannot rely on the union for continuing income, is presumably much less likely to be

[25] E.g., *Ferguson Electric Co.*, 242 F.3d at 431; *Glenn's Trucking Co.*, 344 NLRB 377, 380 (2005).

[26] Compare *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (Board lacked authority to require employer to reimburse public agencies for work-relief payments made to employees who had been unlawfully discharged or denied reinstatement). See also *NLRB v. Virginia Electric & Power Co.*, 319 U.S. 533, 540 (1943) (Board's remedial order is proper unless it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act").

[27] In *Planned Building Service*. 347 NLRB 670 (2006), supra, for example, the Board unanimously modified prior law to permit a successor employer to introduce evidence that it would not have agreed to its predecessor's terms and conditions of employment. We noted that the prior rule (which conclusively presumed such agreement) was arguably punitive, but explained that the new rule equitably placed the burden of proof on the wrongdoer. Id. at 675–676.

[28] See, e.g., *Ferguson Electric*, supra, 242 F.3d at 431 (backpay award "serves to deter employers from engaging in unfair labor practices"). See also *Hartman Bros.Heating & Air Conditioning*, supra, 280 F.3d at 1114 (noting principle that "purpose of awarding backpay to employees victimized by an employer's hostility to unionization is deterrent as well as compensatory"); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 317 (3d Cir. 1980) (en banc) ("[I]t is settled that the purpose of a back pay order is to vindicate the public policy embodied in the Act and to deter further encroachments on the labor laws by making employees whole for losses suffered on account of an unfair labor practice").

The majority quotes the Fourth Circuit's admonition in *Aneco*, supra, that a Board backpay remedy cannot be a "*punitive* sanction or deterrent." 285 F.3d at 329 (emphasis added). We do not read the decision to hold that any deterrent is necessarily "punitive." Such a reading would place the Fourth Circuit in conflict with other appellate courts, as the cited decisions suggest.

[29] The majority places the burden on the respondent employer to show that a discriminatee is a salt.

[30] Presumably, employees who are hired independent of a salting campaign, but who support a union's subsequent organizing efforts are *not* salts under the majority's definition. Nor would the definition seem to include employees who seek work in order to engage in organizing activity but who do not apply at the direction of a union.

Not all persons who have union affiliations and who apply to nonunion employers are salts. For example, some union members might have temporary permission from their union to work nonunion simply due to local economic circumstances. Alternatively, an applicant might be ignoring a union prohibition to work nonunion, or might have only a former affiliation with a union. When such employees are unlawfully discriminated against, their status will surely become an issue.

under the control of the union with respect to the duration of his employment with a nonunion employer.[31]

C.

Finally, and most remarkably, the majority applies its new approach not only to the issue of backpay, where it predictably will reduce monetary relief, but also to the separate question of instatement and reinstatement, where it may foreclose a remedy altogether.

Instatement and reinstatement are basic statutory remedies, essential to fully redress discrimination in hiring and firing, as the Supreme Court made clear more than 65 years ago. *Phelps Dodge*, supra at 187–188. These remedies serve statutory goals distinct from backpay, which makes the individual discriminatee whole. In the Supreme Court's words, "to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization." 313 U.S. at 193. It is instatement or reinstatement that restores the right of employees—both the discriminatee and the employer's other workers—to exercise their Section 7 rights.

This obvious point is, if anything, *more* important, not less, in the case of salts, who seek employment precisely in order to organize their fellow workers. Under the majority's approach, a salt might never be granted access to the workplace, even in the absence of any lawful reason for excluding him from employment. As the *Phelps Dodge Court* observed, "[d]iscrimination against union labor in the hiring of men is a dam to self organization at the source of supply." 313 U.S. at 185. The majority's approach positively encourages employers to maintain such a dam, given the risk of only modest backpay liability.

Notably, the majority extends that approach not only to refusal-to-hire cases like this one, but also to cases involving salts who are unlawfully terminated. Terminating a salt will likely be even more coercive than refusing to hire him, because more employees will learn of a coworker's termination than would learn of an unknown applicant's rejection. And, in cases involving a discriminatory discharge or layoff, the majority threatens to frustrate even restoring the status quo.

IV.

The majority's decision abruptly reverses decades of judicially approved precedent. Disregarding the facts of this case and relying on legally incorrect pronouncements regarding our remedial authority, the majority replaces sound law with arbitrary rules that run contrary to the fundamental policies of the National Labor Relations Act.

We have little doubt that the majority's decision is grounded in hostility to the practice of salting and to unions' increasingly successful use of salting as an organizing tool in the wake of the Supreme Court's decision in *Town & Country Electric*. But that practice is—at least for now—protected by the statute. That employers who discriminate against salts are exposed to liability is no reason for the Board to retreat from enforcing the law. We cannot join that step backwards and so endorse what amounts to the Board's own discrimination against salts.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT disparately require employee-applicants to prepare written answers to essay questions as a condition of the application process.

WE WILL NOT refuse to consider for hire employee-applicants because of their union sympathies and/or to discourage employees in these activities.

WE WILL NOT refuse to hire employee-applicants because of their union sympathies and/or to discourage them in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to Michael Couch employment in the job for which he applied or, if such job no longer exists, in a substantially equivalent position, without prejudice to Couch's seniority or any other rights or privileges to which he would have been entitled if we had not discriminated against him.

[31] The majority observes that as a union member, an unpaid salt is "subject to the union's disciplinary control." But union members are free to resign from the union, and to avoid discipline, at any time. *Pattern Makers League of North America v. NLRB*, 473 U.S. 95, 100 (1985).

WE WILL make Michael Couch whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to consider Couch for hire or to hire him, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to consider him for hire or to hire him will not be used against him in any way.

OIL CAPITOL SHEET METAL, INC.

Francis A. Molenda, Esq. and *David Nixon, Esq.,* for the General Counsel.
Frank B.Wolfe III, Esq. and *John E. Harper Jr., Esq.,* for the Company.
Loren Gibson, Esq., for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a failure to consider for and/or hire an employee-applicant case. At the close of a 2-day trial in Tulsa, Oklahoma, on December 3, 1999, I rendered a Bench Decision in favor of the General Counsel (Government) thereby finding a violation of 29 U.S.C., 158(a)(1) and (3). This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (exceptions) to the National Labor Relations Board. I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Oil Capital Steel Metal, Inc. (the Company), I found the Company violated Section 8(a)(1) of the National Labor Relations Act the (Act), when on June 5, 1998, it interrogated an employee-applicant regarding his union sympathies and desires. Additionally, I found the Company also violated Section 8(a)(3) and (1) of the Act when on May 5, 1998 it disparately required employee-applicant and paid Union Organizer Michael Couch (Couch) to prepare written answers to essay questions as a condition of the application process; and, since that date has refused to consider for and/or to hire Couch. I rejected the Company's contention it gave Couch the written interview requirements for valid business reasons or that it terminated the interview with Couch and declined thereafter to hire him because of his quarrelsome, belligerent, confrontational and disruptive behavior during the interview. I also rejected the Company's contention it was not unlawfully motivated in rejecting Couch in that it always sought to hire union members because of their superior training as not having been validly established with credible evidence. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 351 to 377, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as Appendix A.

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company discriminatorily failed to consider Couch for hire, it must consider his resume and provide backpay for him if it would have hired him but for its unlawful conduct. If, at the compliance stage, it is established the Company would have assigned Couch to any current job the Company shall hire Couch and place him in that position or any substantially equivalent position for which he applied. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate Notice to Employees, copies of which are attached hereto as "Appendix B"[2] for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

[Recommended Order omitted from publication.]

APPENDIX A

DECISION

JUDGE CATES: Decision. Oil Capitol Sheet Metal, Inc. and Sheet Metal Workers' Local 270, affiliated with Sheet Metal Workers' International Union, AFL–CIO, Case 17–CA–19714. William N. Cates, the Administrative Law Judge.

This is an unfair labor practice case prosecuted by the National Labor Relations Board's Counsel, acting through the Regional Director for Region 17 of the Board, following an investigation by Region 17's staff. The Regional Director for Region 17 of the Board issued a Complaint and Notice of Hear-

[1] [Errors in the transcript have been noted and corrected. Appendix C, containing a list of the corrections, has been omitted from publication.]

[2] If this Order is enforced by a Judgement of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read: "Posted Pursuant To a Judgement of te United States Court Of Appeals Enforcing a Order Of te National Labor Relations Board."

ing on May 26, 1999 against Oil Capitol Sheet Metal, Inc., hereinafter, "The Company," based on an unfair labor practice charge filed on May 27, 1998 and amended on May 19, 1999, by Sheet Metal Workers' Local 270, affiliated with Sheet Metal Workers' International Union, AFL-CIO, hereinafter, "Union."

Specifically, the Complaint alleges the Company, on or about June 5, 1998, interrogated employee applicants regarding their union sympathies and activities, and on or about May 5, 1998, disparately required employee applicant, Michael Couch, hereinafter, "Couch," to prepare written answers to essay questions as a condition of the application process. And since on or about May 5, 1998, has refused to consider for or to hire employee applicant Couch, which conduct of the Company is alleged to violate Section 8(a)(1) and (3) of the Act.

In it's Answer to the Complaint, as well as admissions made at trial, the Company admits the Board's jurisdiction is properly invoked and the Union is a labor organization within the meaning of the Act. The Company denies violating the Act in any manner set forth in the Complaint.

The Parties were afforded opportunity to file pre-trial briefs and Counsel for the General Counsel, hereinafter, "Government Counsel," and Counsel for the Company, filed such briefs which have been considered.

The Company is an Oklahoma Corporation with an office and place of business located in Tulsa, Oklahoma, where it is engaged in the business of sheet metal contracting. The Company in conducting it's business, annually purchases and receives at it's facility, goods and materials valued in excess of $50,000.00 directly from points outside the state of Oklahoma.

The evidence establishes the Parties admit and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The evidence establishes the Parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

The evidence establishes the Parties admit and I find that Company President, John C. Odom, is a supervisor and agent of the Company within the meaning of Section 2(11) and 2(13) of the Act. Company President Odom testified, for example, that he interviews and hires all employees for the Company. He also testified he has fired employees.

This is a case that is fact driven and as such, I shall outline what I consider to be the essential and crucial facts.

For example, Couch testified he had been a union organizer for approximately 4½ years. Couch said his duties included organizing the non-union work force and attempting to persuade non-signatory companies to execute union collective bargaining agreements. Couch testified that in February 1998, he went to the Company dressed in jeans with a union shirt and union ball cap and spoke with Company Chairman of the Board, Lee Odom. Couch testified he attempted to persuade Chairman Odom to sign a union agreement and covered with Chairman Odom past problems that had existed between the Company and the Union. Couch testified Chairman Odom told him the union did not have anything to offer the Company. Couch testified that Company President, John Odom; walked into Chairman Odom's office and the Chairman introduced his son to him. Couch mentioned he had been trying to get Chairman of the Board Odom to sign an agreement. Couch testified he visited Company work sites, including the one at Southcrest Hospital in Tulsa, Oklahoma, wearing his union shirt and hat.

Couch testified he had stripped away employees from the Company. Couch explained that stripping employees away meant he persuaded employees to join the union and work for a union contractor instead of the Company.

Couch testified he responded to a Tulsa, Oklahoma newspaper advertisement by the Company for employees on May 5, 1998. Couch said he was dressed in jeans, boots, and a union insignia shirt and sought to and filled out an application for employment with the Company.

Couch testified that after he completed the application that Company estimator, DeRycke, came out of an office. Couch testified he knew DeRycke because DeRycke had been an estimator for a union company sometime earlier.

According to Couch, DeRycke directed that Couch provide a copy of his driver's license, a copy of his City of Tulsa, Oklahoma mechanic license, and his state of Oklahoma mechanic license, and told Couch he would be with him in a minute.

Couch testified that approximately five minutes later Company estimator DeRycke returned and asked him to write down on paper how to perform a leak test and about a VAV box. Couch asked what type VAV box he wanted to know about and what type of leak test he wanted performed.

Couch testified he feared that if he gave the wrong answer, the Company would use that against him and not hire him. So, he wanted to know specifically what the Company wanted in it's written inquiry.

Couch asked DeRycke if anyone else had been asked to respond to written questions and was told, "No." Couch asked to see anyone else's answers, but was told, "No, he could not, it was none of his business."

Couch testified DeRycke asked him if he wanted to see Company President Odom. Couch said yes and was escorted to Odom's office. According to Couch, President Odom introduced himself. Couch said he responded by saying, "It was nice meeting you. I'm Michael Couch. We have met." According to Couch, Company President Odom did not remember any such meeting. Company President Odom asked why Couch had not answered the questions.

Company President Odom informed Couch he needed the answers to the questions. Couch testified he told Odom he would do so, but he needed to know which VAV boxes he was talking about and what leak test he was referring to.

According to Couch, Company President Odom asked him why he was there and Couch responded that he wanted to go to work for the Company and that he was open to anything. A duct installer or any other job. According to Couch, they talked about welding and he was asked about a welding test. Couch testified he indicated that if he had time to change clothing, he would be happy to take a welding test.

Couch testified they talked about a position in the shop fabrication area as a layout job. Couch testified Company President Odom accused him of trying to harass him. Couch testified he told Odom he was not, that he was there pursuant to the advertisement for help that had appeared in the newspaper.

Couch testified he asked Odom how long his application was good for and was told it would be good for six months. Couch denied he shouted at or was loud with Company President Odom.

Michael London, hereinafter, "London," testified that he was a union organizer attempting to organize the unorganized. London testified that he observed a newspaper advertisement in the Oklahoma Daily Newspaper on May 28, 1998 and that he thereafter spoke with estimator DeRycke whether the Company was still accepting applications.

According to London, he was told that the Company still needed workers and that he sounded excited about the potential of London coming to work for the Company. London testified he thereafter spoke again with Company estimator DeRycke and indicated that he was having some difficulty, automobile-wise, and it would be a little while before he could arrive in Tulsa, Oklahoma for an interview.

According to London, Company estimator DeRycke told him that he was losing money everyday that he was not there and that with his experience, that if he showed up, he would have a job.

London finally arrived at the Company's offices on June 5, 1998. According to London, he met with Company President Odom, they shook hands, and Odom looked through his application. According to the testimony of London, Company President Odom asked him about a contractor, Liberty Sheet Metal, and asked, "Aren't they union?" London told him that, "No, they had sold to someone else."

According to London, Company President Odom told him that they needed workers very badly because they had a group of employees that did not know anything. Company President Odom introduced him to DeRycke and he was hired effective June 8, 1998.

London testified he was wearing no union insignia, nor did he identify himself as being with the union, and that he was not asked to respond to any essay type questions. More specifically, he was not asked to respond to any leak test or to describe, explain, or speak to any VAV boxes.

On the other side of the picture, Company President Odom testified that he had entered the sheet metal business at a very early age inasmuch as his father had been in the business before him. Specifically, Company President Odom testified that he became a summer apprentice at the age of 16 and thereafter, joined the union as a first-year apprentice and had the opportunity to and prevailed in first place, in various annual contests for apprentices, both at the local/state level.

Company President Odom acknowledged that he did not prevail in the tests at the national level. Company President Odom testified he had a long relationship with the union and contracts with the union, perhaps going back as far as 1954. Company President Odom testified that the Company did not renew a contract with the union in approximately 1985. Company President Odom explained that at or around that time, the Company purchased approximately a half a million dollars worth of mill equipment that was placed into their fabrication shop and that the sophisticated equipment did not require the highly skilled employees that had previously been required to be in the fabrication shop and that as a result, he sought from the union, the ability to have a dual rate-type contract. That is a contract that employees working in the fabrication shop could be paid at a lesser scale than was offered to those employees of the Company, journeyman, who would be working on site in the field.

According to the testimony of Company President Odom, the local union would have been agreeable to such an arrangement, but that the International Union would not allow the local union to do so because they did not want the impact that such a contract in the Midwest might have on northeastern companies.

Company President Odom testified that he has always sought for and hoped to hire union members because of the vastly more superior quality such individuals were. Company President Odom testified that he did not know of any union members that the Company had not hired other than Couch.

Odom testified that he held no animosity toward anyone's affiliation with the union because he needed the union as a source of obtaining qualified and trained sheet metal workers. Company President Odom testified that such training cannot be obtained at Technical schools.

Company President Odom testified that he not only does all of the hiring for his Company, but that he also personally does all of the interviewing. Company President Odom testified that on May 5, 1998, he received a telephone call on that morning from one of his site foreman, a Mr. Meyers, who was working at the hospital for which they had a large contract to perform, that certain leak tests would need to be run that very day.

Company President Odom testified that he had a lot of other work to do that day, but that he had no one else that was qualified to perform a leak test other than himself. Company President Odom testified that at approximately 10:30 a.m. on that same morning, he was reviewing some bids that he needed to get out because of time constraints, and that Company estimator DeRycke told him that there was an applicant out front that he might need to see.

Company President Odom testified that he instructed estimator DeRycke to give the applicant a piece of paper and on it was leak tests and VAV, that he was fearful that if he did not give the applicant something to do physically, such as responding to these two questions in writing, that the applicant would leave and that he was hoping, based on the answers that the applicant might give to these questions, that he would be able to use the applicant to send out to perform the leak test as opposed to his, Company President Odom, having to go perform the test himself.

Company President Odom testified he specifically did not know who was out in the reception area to be interviewed. Company President Odom testified that the individual came to his office with estimator DeRycke and that the applicant said to him, "Hi, John," and that he responded, "Do I know you? Have I seen you before?"

According to Company President Odom, the applicant wanted to know why he was being asked to take a written test. What kind of VAV's he was talking about and what kind of leak tests he was referring to. Company President Odom testified that he tried to get the applicant to go forward with the interview but that the applicant grew more insistent that he explained to him precisely what he wanted in the tests.

According to Company President Odom, the atmosphere at the end of the meeting was of a high stress level with all three of them, namely, Company President Odom, Company estimator DeRycke, and the applicant, whom he learned was Michael Couch, all stood up when he informed the applicant that the interview was over.

Company President Odom testified that he was fearful during the interview, that the whole thing scared him, specifically the fact that Couch refused to answer questions, Couch's facial expressions, his loud voice, and that he had never encountered any such interviewees before. Company President Odom testified that he was even fearful that Couch might be carrying a gun under his jacket and that halfway through the interview, he concluded that he would not hire this individual, namely, Couch.

Company President Odom indicated that halfway through the interview he decided not to hire him because, among other factors, Couch had carried on an unnatural conversation, that each time he stopped speaking that Couch smiled in a manner that he did not consider a warm or friendly smile, and that his, Company President Odom's leg started twitching. Odom indicated that his leg started twitching only when he became frightened.

He could recall one other occasion when he was leading the choir in his church that such happened.

Company President Odom testified, with respect to the interview with applicant London, that they had a pleasant conversation, that London was a perfect gentleman, and had been a sheet metal worker all of his life and the approximate same amount of time that he, Odom, had sheet metal work experience. So, he hired London.

Chief estimator DeRycke testified that his duties as chief estimator simply was to view the work that needed to be done either by the drawings or otherwise, workup figures on what it would cost to do the job, consult with Company President Odem and then go forward with the bid.

Specifically referring to the morning of May 5, 1998, Company estimator DeRycke testified that he went to Company President Odom's office to speak about estimates that he was working on, bids that he was preparing. He advised Company President Odom that he had an applicant down near the reception area that he might want to interview or need to interview.

DeRycke testified that Company President Odom wrote on a piece of paper the subject matters of leak tests and VAV boxes, instructed him to give the paper to the applicant and ask him to write what he knew about those subject matters and that they would be with him in 30 minutes.

According to DeRycke, applicant Couch wanted to know why he was being asked to do this, which leak tests he speaking about and what type VAV boxes he was making reference to. VAV, as I understand it, means variable air volume boxes. DeRycke testified he told Couch he didn't know, that he was only told to have him write on those subject matters and that Couch continued to wish to find out why he needed to answer the questions and what specifically it was that they wanted answered.

DeRycke then asked Couch if he would like to go down to Company President Odom's office and speak with Company President Odom about it. He indicated he would. Company estimator DeRycke's recollection of the events was that when they entered the office with Mr. DeRycke going in first, that Couch said, "Hi, John," to Company President Odom and that Company President Odom had a puzzled look on his face and said, "Do I know you?" Company estimator DeRycke testified that at the end of the interview, Company President Odom said, "I believe this interview is over," and the interview ended at that time.

Company estimator DeRycke testified he could not recall what took place in-between the opening comment and the termination of the interview. He said he felt uncomfortable and frightened and it had been a long time since the meeting took place.

When pressed further on what may have taken place, again, Company estimator DeRycke said that he couldn't recall anything further.

On cross-examination, DeRycke estimated that the meeting took place approximately 8 to 10 minutes, but to him it felt like an eternity.

DeRycke acknowledged that there were discussions about a welding test, that Couch indicated he wanted a job, that he would be willing to work for as little as $6.00 plus an hour. DeRycke testified he did not know which type of VAV box Company President Odom was referring to, nor did he know which type leak test was sought to be performed.

Before we get down to the applicable law, credibility resolutions and final conclusions, for the benefit of the decision, I shall describe briefly the positions of the Parties.

The Government contends the Company advertised for experienced duct installers, fabricators, and lead men on or about May 5, 1998 and that in response thereto, Couch sought employment with the Company.

The Government asserts Couch appeared at the Company wearing clothing that identified himself as a union supporter. The Government asserts Couch filled out an application noting his activities as a union organizer, along with his sheet metal work experience. Counsel for the Government asserts Couch was asked to provide essay-type answers to two questions regarding the operations of an air valve box and the performance of a leak test before the Company would or could or did interview Couch.

Counsel for the Government asserts the essay questions were not part of the Company's regular application process. The Government asserts Couch asked to see other applicants' responses to such questions and was denied any opportunity to do so.

The Government asserts Couch would have answered the questions, but needed clarification, which clarification, the Government asserts, the Company refused to provide. The Government asserts Couch was accused of harassing the Company and Couch accused the Company of changing it's hiring practices to discourage him from applying.

Counsel for the Government asserts the Company terminated the interview process without hiring or further considering Couch for hire. The Government contends that notwithstanding the fact the Company refused to further consider for hire or to

hire Couch, that the Company, on June 5, 1998, hired undisclosed union organizer, Michael London.

Counsel for Government asserts London was hired after Company estimator DeRycke had, on June 2, 1998, asked London in a telephone conversation if he knew the Company was non-union. The Government asserts union organizer London told DeRycke it was not a problem. The Government further asserts CompanyPresident Odom asked a non-disclosed union organizer, on June 5, 1998, while reviewing 1his application for employment, if one of the employers he had listed as having worked for was a union employer. The Government asserts London told Odom no and without any tests of his work skills, was hired for the next day following the interview.

The Government asserts the Company required Couch to respond to essay questions and thereafter refused to hire him because he was a union organizer. The Government asserts the Company knew Couch was a union organizer and expressed anti-union animus in questioning London for employment in June 1998. The Government contends Couch was treated in a disparate manner and that he was the only applicant required to answer written questions before an interview.

The Government argues a union organizer presents an entirely different concern for a union adverse employer than those who merely list union experience on their application. The Government argues the giving of the written test to Couch, a union organizer, without giving such to any other applicants constitutes evidence of animus. Counsel for the Government asserts the totality of the circumstances including the insistence that Couch take a written test as part of the application process, coupled with the interrogation of London, demonstrates the Company violated Section 8(a)(3) and (1) of the Act when it refused to fully consider and/or to hire Couch for employment.

The Union essentially adopts the position of the Government.

The Company's position is that it has a history of hiring union applicants on a regular basis. That the Company, in fact, prefers to hire union applicants, as they tend to be better trained and are thus more qualified to perform sheet metal work than applicants lacking a union background.

The Company argues the evidence shows it has hired union applicants in vastly greater percentages than it has hired non-union applicants.

The Company argues the Government failed to demonstrate any anti-union animus on the part of the Company. The Company asserts it was Couch's combative and confrontational behavior during the May 5, 1998 interview, to the extent that an interview was conducted, that disqualified Couch from consideration for employment with the Company.

The Company argues the evidence establishes that Company President Odom did not know Couch was a union organizer until after the interview when Odom first had an opportunity to review Couch's application. The Company argues Couch was not treated in a disparate manner when Company President Odom instructed, through Company estimator DeRycke, that Couch write out his knowledge of VAV systems and leak testing before he was interviewed, even though the Company never asked any other applicant to do so.

The Company asserts Company President Odom directed the writing by the applicant on the VAV systems and leak testing to occupy Couch's time so Company President Odom could complete other pressing matters before Couch was interviewed. The Company in it's pretrial brief asserts Couch was actually given preferential treatment in the interviewing process because it allowed Couch time to prepare for subjects to be discussed in the interview in advance.

The Company asserts it needed to know of Couch's experience level because the Company not only needed duct installers, but fabricators and lead men. The Company argues it may lawfully refuse, as it did, to hire Couch because of his confrontational and disruptive attitude and the Act does not require the sanctioning of such belligerent conduct.

It would be helpful at this time to review some of the law that will govern this type case.

It is well established that a failure to hire a job applicant because of his or her union sympathies or activities violates Section 8(a)(1) and (3) of the Act.

The same principle applies when an employer for the same reason fails to even consider an applicant for employment. See for example, *DSE Concrete Forms*, 303 NLRB 890 at 896 (1991) and *VOS Electric, Inc.*, 309 NLRB 745 at 759 (1992). In *Wright Line*, 251 NLRB 1083 (1980), enforced 662 Fd2d 899 (1st Cir 1981), cert denied 455 US 989 (1982), approved in *NLRB Transportation Management Corp,* 462 US 393 (1983).

The Board set forth it's causation test for cases alleging violations of the Act that turn as does the case herein on employer motivation.

First, the Government must persuade the Board that anti-union sentiment was a substantial or motivating factor in the challenged employer conduct or decision. Once this is established, the burden shifts to the employer to prove it's affirmative defense that it would have taken the same action even if it's employees or applicants for employment had not engaged in protected conduct. See *Manno Electric, Inc.*, 321 NLRB 278, footnote 12 (1996).

Applicants for hire are employees within the meaning of the Act entitled to the Act's protections. *NLRB v. Town & Country Electric,* 116 U.S. 450 (1995), *Phelps Dodge Corporation v. NLRB*, 313 U.S.C. 177 at 182–187 (1941), *The 3E Co.*, 322 NLRB 1058 (1997).

As stated, discrimination in refusing to consider applicants for hire is discrimination in regard to hire within the ambit of Section 8(a)(3). Such discrimination is proved by showing; (1) The employer is covered by the Act; (2) The employer at the time of the purported illegal conduct was hiring or had concrete plans to hire employees; (3) Anti-union animus contributed to the decision not to consider, interview, or hire an applicant; and (4) The applicant was a bonafide applicant. Again see, *The 3E Co.*, 322 NLRB 1058 at 1061–1062 (1997), *NLRB v. The Ultra Systems Western Contractors*, 18 Fd3d 251 at 256 (4th Cir, 1994), enforced in part–denying enforcement in part and remanding *Ultra Systems Western Contractors [I],* 310 NLRB 545 (1993), quoted in *Ultra Systems Western Contractors [II]*, 316 NLRB 1243 (1993).

The fact that a non-union employer fails to hire a union

member does not establish a case of anti-union sentiment. *Shell Electric*, 325 NLRB 156 (1998). There must be some proof of animus and causal connection. The Government must establish union animus or unlawful motivation as part of his case-in-chief. If an unlawful purpose is not present or implied, the employer's conduct will not violate the Act even if it is otherwise unjustified or unfair. Motive may be inferred from the totality of the circumstances proved. *Floral Daniel, Inc.*, 311 NLRB 4989 (1993). Simply stated, the issue is employer's motive and the burden is on the Government.

In the recent case of *NLRB v. Town & Country Electric*, 316 U.S. 450 (1995), the United States Supreme Court upheld the Board's position that paid union organizers are employees or applicants for employment within the meaning of 2(3) of the Act. The Court held that the language of the Act "is broad enough to include those company workers whom a union also pays for organizing" and "the Board's broad, literal interpretation of the word 'employee' is consistent with several of the Acts purposes, such as protecting the right of employees to organize for mutual aid and protection without employer interference" citing *Republican Aviation Corp. v. NLRB*, 324 U.S. 793 at 798, (1945) and "encouraging and protecting the collective process" citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 at 892 (1984).

Credibility resolutions. It is necessary to make some credibility resolutions in this case. And in doing so, I have had an opportunity to observe the witnesses as they testified and I based my credibility determinations on their demeanor as they testified. I have also taken into consideration whether their testimony is supported by other witnesses, whether it is supported by documentation, and how it is viewed in the overall context of the totality of the facts.

The essential credibility determination that must be made in this case involves, for the greater part, the meeting of May 5, 1998. I have decided and am persuaded that the testimony given by applicant Couch may be relied upon and credited and that at any place where it conflicts with the testimony of Company President Odom or Company estimator DeRycke, I will credit the testimony of Couch and discredit the testimony of Odom.

I found trouble with Company President Odom's testimony that he did not know of any union members that he had not hired except Couch. And he bases that, among other things, on the evidence that is submitted in Respondent's Exhibit 1.

I am unwilling to give a great deal of weight to Respondent's 1 and I think that can be best exemplified by the criteria that was used to arrive at Employer's 1, in that he testified he would determine who was union or who wasn't union by, among other factors, whether they traveled or not. Whether they came from another location or not. I find that I am unable to give a great deal of weight to that, that the mere fact someone would come from another state or area to work would automatically make them a union member, also that he would conclude that an individual was a union member simply because of timein the trade. I find that a criteria that I cannot give a great deal of weight to.

And so, with the previous employer. Even a union reference does not equate to the fact that the individual is a union member or a union supporter. The mere fact that they would give an employer who was a union company or reference an individual that was a union official does not establish union membership.

I had difficulty with Company President Odom's testimony that you could not get training at any other place when his own Company estimator was not trained through the union program and the testimony of Mr. Harris, I believe it was, that training is offered at other locations.

Simply stated, I am suspect of Company President Odom's testimony that you can't get the training at technical schools. Also, the testimony of Company President Odom that the arrival of Mr. Couch and the call from the contractor, his own foreman down at the General Contractor, and his being busy and could not go out and perform the leak test himself, just all seemed to come together at the same time. I have some problem with Company President Odom's testimony that he wanted to give this test to–or these questions, at least, to Mr. Couch so he could; (A) Keep him there, or (B) he could ascertain if he was fully prepared to send out to perform leak tests when Company President Odom testified he was the one that has always performed the tests and he thereafter performed at least 50 of these tests himself, perhaps with the assistance of one of his foreman on the site.

I found suspect Company President Odom's testimony that he had no prior knowledge of Couch when he entered the room for the interview. I am persuaded that Couch had a meeting with Chairman of the Board Lee Odom in February, as he testified he did. I am persuaded that Company President Odom entered duringthat meeting.

I am convinced that it did take place and that Company President Odom is either unable or unwilling to remember that it took place.

I found suspect Company President Odom's testimony that the encounter with Couch was so scary and so disrupting that even his secretary wanted to–or thought about–or spoke about calling 911. The secretary was not called to support such a contention. For that matter, Company Chairman of the Board Lee Odom was not called, nor was any explanation given for any failure to call him, as to the meeting that took place between Couch, Chairman of the Board Odom and Company President Odom.

I also found troubling and question Company President Odom's testimony that he was scared of Couch because he was wearing a jacket that; (A) He wasn't wearing one, or (B) that he engaged in an unnatural conversation, and that he smiled each time each time he concluded a sentence.

I also found unpersuasive Odom's testimony that he decided halfway through the conversation or the interview not to hire Couch because his [Odom's] leg started to twitch, among other things. I am likewise unimpressed by Company President Odom's testimony that on this occasion only, he asked an applicant to reply to two questions because he wanted to see if Couch could do a leak test. It is just too convenient, in my opinion, that all of these matters fell into place at the same time. And his testimony that he wanted to be able to find if this individual was sufficiently capable to send out to perform the leak tests when it had never been done by anyone before and

he, Company President Odom, had to do it the next 50 or so times.

Simply stated, any place where Company President Odom's testimony conflicts with that of Couch, as I have earlier outlined, I credit Couch's testimony. Now, based on those facts, has the Government proved a case and has the Company rebutted same?

The first item that must be proved: is the Employer covered by the Act? There is no question that the Employer is covered by the Act. It is admitted. The evidence establishes this.

Was the Employer hiring or did the Employer have plans to hire at the time Couch was interviewed and sought employment? Yes. The Company's own documents indicated they hired before and they certainly hired afterwards. We had one of those candidates testify here.

Is there anti-union animus? The answer to that is yes, in my opinion. I am persuaded that the Company knew from the earlier meeting in Chairman of the Board Lee Odom's office in February of 1998, that Couch was a union organizer.

I am persuaded that animus evidence is further demonstrated by the fact that the Company required Couch, unlike any other applicant, to respond to written questions before he could be interviewed and that the Company seized upon the opportunity of Couch's attempting to clarify the questions, to terminate the interview, and thereafter, refuse to hire Couch.

The Company's anti-union stance is further demonstrated by the fact that Company President Odom asked applicant London on June 5, 1998, if a particular employer listed on his application was union. The fact that Company estimator DeRycke told applicant London, in their comments about whether they were seeking employees or not, that this was a non-union company and he was assured by London that would make no difference.

Further animus is shown by the fact that a union organizer was hired when he did not disclose that he had any union affiliation. Whereas, union organizer Couch was not hired because it was known that he was.

Was Couch a bonafide applicant? Yes. The mere fact he was a paid union organizer does not remove him from the protection of the Act.

Did the Company present any credible, persuasive evidence that it would not have hired Couch even in the absence of any protected conduct on his part? I'm persuaded not. Quite the contrary. When there was no concerted protected activity on the part of a union organizer, unknown to them as a union organizer, they hired him.

In conclusion, I find that the Company violated the Act as alleged in the Complaint and I shall order an appropriate remedy thereto.

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

The Company having discriminatorily failed to consider Michael Couch for hire, it must consider his resume and provide back pay for him if it would have hired him but for it's unlawful conduct.

If, at the compliance stage, it is established that the Company would have assigned Couch to any current job, the Company shall hire Couch and place him in that position or any substantially equivalent position for which he applied. Back pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950) and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In my certification of the bench decision, I shall set forth an appropriate notice for the Employer to post and I shall also set forth a specific order and remedy that will outline the various matters that the Company must take to comply with this order.

The time for taking exceptions to this decision, if any Party cares to do so is, I will, upon service of a copy of the transcript by the court reporter, thereafter certify those pages of the transcript that constitute my decision. I will attach a Notice of Correction to any part of the transcript containing the decision that needs to be corrected. I shall attach a Notice that will be for the Company to post and I shall set forth a specific order of other action that the Company will be required to take.

I thank you for your attention and this trial is closed.

(Whereupon, at 2:06 p.m., the hearing in the above-entitled matter was closed.)

SUPPLEMENTAL DECISION

WILLIAM N. CATES, Administrative Law Judge. On January 3, 2000, I issued my bnch decision in this case finding Oil Capitol Sheet Metal, Inc. (the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by interrogating an employee-applicant regarding his union sympathies and by disparately requiring employee-applicant and paid Union Organizer Michael Couch (Couch) to prepare written answers to essay questions as a condition of the application process and refusing to consider for and/or hire Couch. By its unpublished Order dated June 14, 2000, the National Labor Relations Board (the Board) remanded the decision to me for further consideration in light of its decision of May 11, 2000, in *FES*, 331 NLRB 9. The Board's June 14, 2000 unpublished Order reads in part:

> The Board has decided to remand this case for further consideration in light of *FES*, including, but not limited to: (1) the determination of whether there were available openings at the time that the alleged discrimination occurred; and (2) whether the applicant had training and/or experience relevant to the announced or generally known requirements of the openings and whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied.

On June 22, 2000, I issued an Invitation to File Briefs[1] to the parties prior to my preparation of this supplemental decision and such briefs were filed by counsel for General Counsel (Government) and the Company. Upon due consideration of the Board's decision in *FES* the existing record in this case along with the supplemental briefs submitted by the Government and the Company, I find, in agreement with the parties, that it is unnecessary to reopen the record as the existing record provides sufficient evidence to decide this case pursuant to the *FES* analytical framework. I find my Bench Decision issued

[1] The Government and Company both requested the record not be reopened.

on January 3, 2000, clearly meets the criteria set forth by the Board in *FES* for the elements of a discriminatory refusal to hire *prima facie* case.

In *FES*, at 12, the Board stated:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire,[7] at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination and (3) that antiunion animus contributed to the decision not to hire the applicants.[8] Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

I found the Company was actively seeking to hire and hired sheet metal workers throughout all applicable times pertinent to this case. In that regard Company President John Odom testified he placed advertisements in the Tulsa World Newspaper Tulsa, Oklahoma, on, among other dates, May 5, 1998, which was the date Couch sought employment with the Company. The May 5, 1998, newspaper advertisement follows:

> Sheet Metal
>
> Immediate positions for experienced duct installers, fabricators and lead men. Large established shop offers top wages, medical, holidays, 401K/profit sharing and guaranteed raise evaluations twice a year. If you are looking for a sheet metal position with a future apply in person or mail a resume to Oil Capitol Sheet Metal, 1807 N. 105E. Ave., Tulsa, OK 74116. We are an Equal Opportunity Employer. Se Habla Espanol.

When asked if he had an urgent need at that time [May 5, 1998] for Sheet Metal Workers Company President Odom testified, "Yes, we had a fairly large job going at Columbia Crest Hospital at the time." Company President Odom acknowledged hiring some 57 employees from May 5, 1998, throughout applicable times herein only adding, "[t]hey weren't all sheet metal workers . . . [b]ut we hired a lot of people. . . ." Company President Odom further testified regarding the May 5, 1998 interview with Couch. "I was hoping to find somebody . . . I'd advertised for experienced people . . . . I didn't want him [Couch] to run off until I got a chance to talk to him." Company President Odom testified he urgently needed someone to perform certain leak tests that specific day. Furthermore the Company conceded its needs when company counsel, at the beginning of the trial, stated: "This Company freely concedes that it needed sheet metal workers and it was running ads and . . . it wanted Mr. Couch for reasons he didn't even know." Company counsel further stated at trial, "Mr. Odom will tell you he wanted to hire this man [Couch]." Company counsel added at trial that the Company even needed journeyman to hang ventilation duct work. Thus, the first requirement of the *FES* criteria was met as the Company urgently needed workers and was hiring at the time of the alleged unlawful conduct. It is noted that in my Bench Decision I concluded the Company was hiring at and after the time Couch was interviewed and sought employment.

The evidence remains unrefutable that Couch was an experienced sheet metal worker who had been an "outstanding" apprentice for 4 years and was a journeyman at his trade. Couch was asked at the job interview for and provided to the Company his current State of Oklahoma and City of Tulsa, Oklahoma, mechanical journeyman licenses which are required to perform sheet metal work in the state and city herein. Couch listed his work experience with sheet metal contractors on his application with the Company. Couch's qualifications were not challenged. The second requirement of *FES* was met just as concluded in my bench decision.

I concluded in my bench decision that antiunion animus contributed to the Company's decision to terminate its interview

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[7] The General Counsel may establish a discriminatory refusal to hire even when no hiring takes place if he can show that the employer had concrete plans to hire and then decided not to hire because applicants for the job were known union members or supporters. See, e.g., *V.R.D. Decorating*, 322 NLRB 546, 551–552 (1996) (employer held to have discriminatorily refused to hire applicants where employer advertised for experienced commercial/industrial painters, received applications from known union members or supporters with experience in commercial and industrial painting, and delayed filling the advertised jobs in order to avoid making job offers to the union applicants).

[8] We do not address the nature of proof necessary to show antiunion motivation, because that was not an issue in this case. Rather, we adhere to existing law on that issue. Our concurring colleague, member Brame, insists upon "direct evidence" of discriminatory motivation. In most cases where 8(a)(3) violations are found, the conclusion is inferred from all of the circumstances. We know of no case which eschews this approach, we would not abandon it.

with Couch and to refuse to hire him. The Company, specifically Company Chairman Lee Odom and Company President John Odom, knew Couch was a union organizer from Couch's February 1998 meeting with the two of them at which he attempted to have the company sign a labor agreement with the Union. Further evidence of the Company's antiunion animus was, as noted in my bench decision, demonstrated by the Company's requirement that Couch, unlike any other applicant, respond to written questions before he could be interviewed, and that the Company seized upon the opportunity of Couch's attempting to clarify the questions, to terminate the interview and refuse to hire Couch. As noted in my bench decision the Company hired some 57 others after the Couch interview, among the others was Union Organizer London who did not disclose his union affiliation to the Company at the time he was interviewed and hired. Union Organizer London was told the Company was nonunion and he responded that would make no difference to him. Company President Odom even asked London during his employment interview if a particular employer listed on his application was union. London explained there had been a change in ownership of the listed employer and it was at that time a non-union company. Company President Odom continued with the interview and London was hired.

The Company presented no persuasive credible evidence at trial that it would not have hired Couch even in the absence of any protected conduct on his part. The Company advanced no new arguments in its remand brief.

Accordingly, I find my prior bench decision in this case meets the criteria of *FES* and the conclusions of law, remedy and Order are reaffirmed by me. I note the Board has used the term "instatement" in *FES* rather than "reinstatement."

In as much as this case is a refusal-to-hire case I adopt the Board's called for terminology as applicable herein.

I reaffirm my prior bench decision except as specifically noted immediately above.