**United States Government**

**NATIONAL LABOR RELATIONS BOARD**
**Region Four**
**615 Chestnut Street – Suite 710**
**Philadelphia, PA 19106-4413**

**Telephone:** (215) 597-7601
**Fax:** (215) 597-7658

Margarita Navarro-Rivera
Senior Field Attorney
(215) 597-7647
(215) 597-7658 (fax)
margarita.navarro-rivera@nlrb.gov

**VIA E-FILING**

October 22, 2012

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washingotn, D.C. 20570-0001

Re: Lederach Electric, Inc
Case 4-CA-037725

Dear Mr. Heltzer:

Attached please find Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter. Copies of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions have this day been served on the persons listed below by e-mail.

Very truly yours,

Margarita Navarro-Rivera

MARGARITA NAVARRO-RIVERA
Counsel for the Acting General Counsel
e-mail address: margarita.navarro-rivera@nlrb.gov

Robert J. Krandel, Esquire, Flamm Walton, PC, 794 Penllyn Pike, Blue Bell, PA 19422-1669; rjkrandel@flammlaw.com

Francis (Fran) Clark, Membership Development, International Brotherhood of Electrical Workers, Local 380, 3800 Ridge Pike, Collegeville, PA 19426, fran@ibewlu380.com

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

LEDERACH ELECTRIC, INC.

and Case 4-CA-37725

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 380

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

DATE: October 22, 2012

By: Margarita Navarro-Rivera
MARGARITA NAVARRO-RIVERA
Counsel for the Acting General Counsel
National Labor Relations Board, Region 4
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106
(215) 597-7647
(215) 597-7658 (Fax)
E-mail: margarita.navarro-rivera@nlrb.gov

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## I. STATEMENT OF THE CASE

On September 12, 2012, Administrative Law Judge Earl E. Shamwell, Jr. (ALJ herein) issued a Supplemental Decision based upon a Compliance Specification and Amended Compliance Specification issued by the Regional Director of the National Labor Relations Board, Region 4[1] on January 19, 2012 and April 26, 2012, respectively. The ALJ found (a) that the backpay period alleged in the Compliance and Amended Compliance Specification was reasonable (ALD p. 18, line 39)[2]; (b) that discrimnatees Jeffrey (Jeff) Wallace (Wallace herein), Christopher (Chris) Rocus (Rocus herein) and Cameron Troxel (Troxel herein) would have remained employed by Lederach Electric, Inc. (herein called Respondent) during the backpay period (ALJD p. 18 lines 34-35); and (c) that Breen was not a salt (ALJD p. 19 lines 14-15)[3]. The ALJ recommended that the amounts set forth in the specification plus interest be awarded to Wallace, Rocus, Troxel and Breen (ALJD p. 18, lines 39-40 and p. 19, lines 19-20).

On October 1, 2012, Counsel for the Acting General Counsel e-filed two Exceptions to the ALJ's Supplemental Decision. The Acting General Counsel's

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[1] The ALJ 's decision inadvertently identifies Region 9 as the Region that issued the Compliance and Amended Compliance Specifications.

[2] Throughout this Answering Brief, ALJD p____ line ____refers to ALJ's Supplemental Decision page and line numbers, GCX refers to General Counsel exhibits; JX refers to Joint Exhibit; RX refers to Respondent Exhibits; and, T. followed by a number refers to transcript page numbers.

[3] By way of background, on July 21, 2011, Administrative Law Judge Robert A. Giannasi issued a decision finding, inter alia, that Respondent unlawfully laid-off Wallace, Rocus and Troxel because of their protected concerted activities in violation of Section 8(a)(1) of the Act and because of their union activities in violation of Section 8(a)(1) and (3) of the Act. Judge Giannasi also found that Respondent unlawfully laid off Breen because of his union activity in violation of Section 8(a)(1) and (3) of the Act.

Exceptions sought to correct certain advertent errors contained in the ALJ's Supplemental Decision.

On October 9, 2012, Counsel for the Acting General Counsel received Respondent's Exceptions to the ALJ's Supplemental Decision[4].

This Answering Brief is being submitted in response and in opposition to Respondent's Exceptions.

## II. GUIDING PRINCIPLES

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 the Board that the administrative law judge's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 158 F.2d 362 (3d Cir. 1951);

The objective in determining gross backpay is to reconstruct as accurately as possible the employment and earnings a discriminate would have had during the backpay period, absent Respondent's unlawful action. The determination of gross backpay is not based on an unattainable standard of certainty but rather it must merely be based on a reasonable method and reasonable factual conclusions.

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[4] Although Respondent called the document it filed "Exceptions," the correct name should be Cross Exceptions as Counsel for the General Counsel had already filed Exceptions on October 1, 2012.

It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed, and that in a compliance proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due, that is the amounts employees would have received but for the Respondent's unlawful conduct. *NLRB v. Mastro Plastics Corp,* 354 F 2d 170, 178 (2d Cir 1975); *Basin Frozen Foods,* 320 NLRB 1072, 1074 (1996). In *Cobb Mechanical Contractors,* 333 NLRB 1168 (2001) the Board summarized the general purpose of compliance proceedings as follows: "In compliance proceedings, the Board attempts to reconstruct, "as nearly as possible," the economic life of each claimant and place him in the same financial position he would have enjoyed, "but for the discrimination." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (194) (1941). Determining what would have happened absent Respondent's unfair labor practices, however, is often problematic and inexact. Consequently a backpay award "is only an approximation, necessitated by the employer's wrongful conduct." *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977).

The Board has applied a broad standard of reasonableness in approving numerous methods of calculating gross backpay. The Board's well settled policy is that a backpay formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary *La Favorita, Inc.* 313 NLRB 902 (1994). The General Counsel need not find the exact amount due nor adopt a different and equally valid formula that may yield a different result. *Minnete Mills, Inc.* 316 NLRB 1009 (1994); *Coca Cola Bottling Company of Buffalo, Inc.*, 313 NLRB 1061. It is also well settled that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer. *Alaska Pulp Corp.* 326 NLRB 522, 523 (1998);

*Ryder P*I*E* Nationwide*, 297 NLRB 454, 457 (1989) enfd in relevant part 923 F2d 506 (7th Cir. 1991).

## III. THE BACKPAY FORMULA

Respondent did not except to the ALJ conclusion that the methodology, accuracy and conclusions of the Compliance Specification were not contested [ALJD p. 17, lines 23-25]. Moreover, Respondent stipulated that the backpay formula is reasonable [JX-1] and the ALJ concluded that it was reasonable and appropriate [ALJD p. 18, lines 38-39]. Accordingly, the ALJ's conclusion must be affirmed.

## IV. RESPONDENT'S EXCEPTIONS

Respondent's Exceptions aver that the ALJ committed reversible error: (1) by concluding that Wallace, Rocus and Troxel would have continued to work for Respondent after the conclusion of IBEW Local 380's salting campaign; (2) by concluding that the Acting General Counsel met his burden under *Oil Capitol Sheet Metal*, 349 NLRB 1348 (2007) of establishing that Wallace, Rocus and Troxel would have remained employed during the backpay period; (3) by concluding that Breen was not a salt; and (4) by concluding Respondent had not met its burden of establishing that Breen was a salt.

## V. ARGUMENT

### A. Respondent's contention that the ALJ committed reversible error by concluding that Wallace, Rocus and Troxel would have remained employed by Respondent during the Backpay period must be rejected by the Board

Respondent asserts that the ALJ erred by concluding that Wallace, Rocus and Troxel would have remained employed during the backpay period. In *Oil Capital*, the Board held that the *Dean General Contractors*[5] presumption that the backpay period should continue indefinitely from the date of the discrimination until a valid offer of reinstatement has been made should be changed in cases involving union organizers, or employees who are "salts" who obtained jobs for the purpose of organizing the employer. Although *Oil Capital* involved a refusal to hire employees, the Board stated that its principles should also apply to cases where employees were discharged or laid off. *Oil Capital* at 1349.

The Board placed the burden on the General Counsel to prove the appropriateness of the backpay period. The Board required that the General Counsel present affirmative evidence that the employee would have worked for the employer for the backpay period claimed in the Compliance Specification. The Board stated that such evidence may include (1) the employee's personal circumstances, (2) contemporaneous union policies and practices regarding salting campaigns, (3) specific plans for the targeted employer, (4) instructions or agreements between the discriminate and the union concerning the duration of the assignment, and (5) the

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[5] 285 NLRB 573 (1987)

historical data regarding the duration of employment of the discriminatee and other salts in similar salting campaigns. *Oil Capital* at 1349 fn. 4.

In the instant case, the Compliance Specification and Amended Specification do not reflect the presumption of indefinite employment rejected by the Board in *Oil Capital*. Rather, the backpay period for discriminatees Wallace, Rocus and Troxel was limited to April 12, 2011, the date when the discriminatees would have been laid off from the Respondent's Glenside Elementary School job. The ALJ properly concluded that the Acting General Counsel had met his burden of showing that the backpay period for Wallace, Rocus and Troxel reasonably and properly ended on April 12, 2011, the date Wallace, Rocus and Troxel would have been laid off from Respondent's Glenside job, the job they were working at the time of their unlawful layoffs [ALJD p. 17; lines 28-29]. Respondent did not except to the ALJ's conclusion. Accordingly, the ALJ's conclusion that the backpay period ends on April 12, 2011, as alleged in the Amended Compliance Specification must be affirmed.

The ALJ properly concluded that discriminatees Wallace, Rocus and Troxel would have remained employed during the backpay period. In reaching his conclusion, the ALJ credited the unrebuted testimony of Wallace, Rocus and Troxel. Wallace's credited testimony established that he had been laid off for about one month and needed a job when he applied for work with Respondent [ALJD p. 7, lines 18-22; T.46, 50,]. Wallace found the job attractive because it was a prevailing rate job [ALJD p. 7, line 20-21;T. 46, 47]. Wallace's credited testimony also established that when he applied for work with Respondent he intended to remain working for Respondent until Respondent no longer needed him or until the job was

completed [ALJD p. 7, lines 23-24; T. 47,]. Additionally, Wallace's credited testimony established that around the time of his lay off, he had a conversation with Jim Lederach (Respondent's owner) where Lederach told Wallace that he liked the work Wallace was doing and that he had no intentions of laying Wallace off and that he had other jobs for Wallace [ALJD p. 7, lines 39-41; T. 49, 52]. Finally, Wallace's credited testimony established that if he had not been laid off by Respondent, he intended to remain working for Respondent until Respondent's jobs were finished or until Respondent was finished with him [ALJD p. 8, lines 8-9; T. 51].

Rocus' credited testimony established that he had been unemployed for at least six months at the time that he applied for work with Respondent, that he was running out of money and that he needed a job that paid more than unemployment [ALJD p. 9, lines 12-15; line 23 and lines 25-26; T. 57, 59 60,]. Rocus' credited testimony also established that when he went to work for Respondent, he intended to stay as long as Respondent had work for him and that he had no intentions of quitting [ALJD p. 9, lines 28-29; T.60,]. Rocus' credited testimony further established that during the time that he worked with Respondent, he had a conversation with Frank Slover (Respondent's General Manager). During that conversation, Slover told Rocus that Respondent was going to need men on the Glenside School job (one of Respondent's other job sites) and that the job had to be done before the next school year started. Slover asked Rocus if Rocus was interested in going to the Glenside job and Rocus responded that he was interested [ALJD p. 9, lines 33-36; T. 61]. Finally, Rocus' credited testimony established that about three weeks after he started working for Respondent he had a conversation with Jim Lederach. During this

conversation, Lederach told Rocus that he had work for Rocus if Rocus wanted to continue to work for Respondent [ALJD p. 10, lines 8-12; T.60].

Troxel's credited testimony established that he was out of work at the time that he applied for work with Respondent [ALJD p. 8, lines 19-22'; T. 69,]. Troxel's credited testimony also established that Union representative Clark told him that he would work for Respondent as long as Respondent needed him [ALJD p. 8, lines 30-31; T. 71]. Troxel's credited testimony also established that during the time that he worked at the Respondent's Nash job, he had two separate conversations with Frank Slover and that during those conversations, Slover told him that when the Nash job wound down, he would be transferring Troxel to the Glenside job [ALJD p. 8, lines 33-37; T. 71, 72]. Troxel's credited testimony further established that about three weeks after he started working for Respondent, he got a job offer from another contractor, but he did not accept the job offer because he was already working for Respondent [ALJD p. 8, lines 40-41; T 72]. Finally, Troxel's credited testimony established that when he went to work for Respondent, he intended to remain working for Respondent as long as there was work [ALJD p. 8, line 39; T.72, 75,].

Union Representative Fran Clark's credited testimony established that in early 2010, 15% of the Union's membership was out of work and by the spring that number had increase to almost 20% [ALJD p. 5, lines 10-11]. Clark's credited testimony also established that Clark told Wallace, Rocus and Troxel that they would be employed at Lederach as long as James Lederach, the owner, needed them and that his plan was to have the Company become a signatory to a recognition agreement [ALJD p. 6, lines 17-19]. Additionally, Union Referral Agent Gary

Siter's credited testimony established that Wallace was number 156, that Rocus was number 157 and that Troxel was number 202 on the Union's out of work list [ALJD p. 11, lines 8-16]. Siter's credited testimony also established that he estimated that it would have taken from 7½ to 8 months for Wallace and Rocus to be referred out to work by the Union [ALJD p. 11, lines 8-10].

Respondent's mere contention that the ALJ erred in concluding that Wallace, Rocus and Troxel would have not remained employed by Respondent during the backpay period while producing no evidence to rebut the credited testimony must be rejected.

Respondent asserts that the ALJ erred because the Acting General Counsel did not meet its burden of providing "objective" evidence showing that the salts would have remained employed during the backpay period "because paragraph 8 in the salt waiver agreement specified a limited employment purpose. Contrary to Respondent's assertion, *Oil Capitol* requires that the General Counsel present "affirmative information," not "objective evidence," that the salts would have remained employed during the backpay period. The uncontroverted testimony of Wallace, Rocus and Troxel, is precisely the "affirmative information" contemplated by *Oil Capitol* to be produced by the General Counsel. *Oil Capitol* at 1352. Thus, Respondent's assertion must be rejected.

Respondent's additional assertion that paragraph 8 of the "salt waiver" agreement specifies a limited employment purpose is baseless. First, the ALJ considered Respondent's argument and found it unpersuasive [ALJD p. 18, lines 7-11]. The "salt" (conditional waiver) agreement that the Respondent relies on is the 2011

conditional waiver [Rx-3] signed by Rocus [GCX-4] and Wallace [GCX-5] after they had already been fired by Respondent and after Respondent had made reinstatement offers[6]. This was not the waiver agreement that was signed by Wallace, Rocus and Troxel when they applied for work with Respondent and during their employment with Respondent. On the contrary, the conditional waiver agreements signed by Wallace [GCX-2], Rocus and Troxel in 2010, prior to commencing work for Respondent, clearly and unequivocally establish that Wallace, Rocus and Troxel would have remained working for the Respondent during the backpay period. More specifically, paragraph g of the 2010 salting agreement provides :

> g. The Salt agrees that, if hired by a nonsignatory contractor, it is intended that the Salt shall work for such nonsignatory contractor indefinitely until notified by the Union that the organizing effort has concluded, unless the organizing effort concludes with the contractor becoming a signatory contractor, in which case the Salt shall remain as a regular employee of such signatory contractor. The Salt further agrees that he/she will transfer from job to job, project-to-project, as such opportunities are afforded by any nonsignatory contractor with which the Salt has obtained employment."

Contrary to what Respondent's argument, the 2010 conditional waivers signed by Wallace, Rocus and Troxel do not support Respondent's assertion. Respondent's argument would be similarly incorrect, assuming arguendo, that the 2011 conditional waiver was the agreement signed by Wallace and Rocus during the time that they worked for Respondent, as Wallace and Rocus signed the 2011 conditional waivers after the unlawful discrimination against them. Thus, the 2011 conditional waivers would have no bearing on the length of time that Wallace and Rocus would have continued to work for

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[6] Troxel did not sign the 2011 salting agreement because he had obtained employment elsewhere when Respondent made its offer of reinstatement [ALJD p. 8, fn 16].

the Respondent absent the discrimination against them. As stated above, Troxel did not sign the 2011 conditional waiver. Accordingly, Respondent's assertion must be rejected.

As set forth above, it is abundantly clear that the record established that Wallace Rocus and Troxel would have remained employed until April 12, 2012, the date they would have been laid off from the Respondent's Glenside job as found by the ALJ. Respondent offered no evidence at the hearing to counter the unrefuted testimony of Wallace, Rocus and Troxel, cited no legal authority in support of its contention that Wallace, Rocus and Troxel would not have remained employed by Respondent during the backpay period. Accordingly, the ALJ did not commit reversible error by concluding that Wallace, Rocus and Troxel would have remained employed during the backpay period.

**B. Respondent's contention that paragraph 8 of the 2011 salting establishes the temporary nature of Wallace, Rocus and Troxel's employment was rejected by the ALJ and must be rejected by the Board**

As set forth above, the ALJ considered and rejected all the same arguments being raised by Respondent in its exceptions concerning paragraph 8, as unpersuasive [ALJD p. 18, lines 9-36]. Respondent offers nothing new in its exceptions to disturb the ALJ's conclusion. Respondent argues that "the objectives of the Union's salting campaign and the salt waiver agreement were to make the employees temporary organizers until the company recognized the Union. This would end the campaign. Once that occurred...the employees were to terminate their employment or face charges from the IBEW." First, it should be noted that the Respondent did not recognize the Union until January 26, 2012, after the end of the backpay period as found by the ALJ [ALJD p. 14, lines 10-12]. Second, the ALJ found that according

to Clark's testimony, it was the Union's intention that Wallace, Rocus and Troxel would work for Respondent as long as they were needed [ALJD p. 14, lines 8-10]. Third, the ALJ rejected the Respondent's contention and found that "paragraph 8 goes to the Union's right to cancel the agreement in its complete discretion, and that the salt agrees that the Union will determine whether the organizing campaign is effective an should continue, and upon notice to him of the cancellation of the campaign, the salt is required to sever the employment with the employer or face charges for violation of the of the IBEW constitution" [ALJD p. 18, lines 13-17]. Fourth, the ALJ also found that paragraph 8 did not speak "directly or indirectly to the *Oil Capitol* criteria [ALJD p. 18, lines 23]. Fifth, the ALJ further concluded that "Paragraph 8, as I read and interpret it...in the context of Clark's testimony, seems to be designed and intended to give the Union control over the salting campaign and the salts' involvement therein" [ALJD p. 18, lines 19-22]. Sixth, the ALJ further concluded "based on Clark's testimony, the 'agreement' salts sign onto includes not only the written agreements but also his instructions that he provides in the salt's orientation sessions. Therefore, as each salt testified, Clark placed no limits on how long they could work at Lederach except that occasioned by the lack of work, or job's ending or completion, and that Lederach would essentially make these decisions" [ALJD p. 18, lines 25-29]. Seventh, the ALJ explained "as I understood the credible testimony the salts were free to work at Lederach irrespective of the accomplishment of the Union's organizing goals, and irrespective of their being designated 'temporary organizers' under the 2011 Salting Agreement. The three salts each in their own way clearly indicated that they had no intention of leaving Lederach and would have

remained employed as long as possible. In this case, as long as possible was the Glenside job as alleged in the specification" [ALJD p. 18, lines 31-36].

In sum, the ALJ considered and rejected all Respondent's arguments concerning paragraph 8 of the 2011 salting agreement. Respondent proffered no evidence or legal authority to warrant reversal the ALJ's conclusion that Wallace, Rocus and Troxel would have remained employed during the backpay period. Similarly, Respondent has failed to show by a preponderance of the evidence that the ALJ's credibility resolutions were incorrect *Standard Dry Wall Products*, supra. Accordingly, the ALJ's credibility findings cannot be reversed and Respondent's assertions to the contrary must be rejected.

### C. Respondent's contention that the fact that Wallace, Rocus and Troxel have children does not satisfy the Acting General Counsel's burden was rejected by the ALJ and must be rejected by the Board

Respondent argues that the ALJ erred when he concluded that the Acting General Counsel met its burden under *Oil Capitol* of establishing that Wallace, Rocus and Troxel would have remained employed during the backpay period by taking into account that Wallace, Rocus and Troxel had children in arriving at his conclusion. Respondent argues that the ALJ erroneously credited the testimony of the Wallace, Rocus and Troxel that they needed work because they had families and children to support and that the ALJ relied on their "subjective testimony that the salts believed that Lederach had more work assignments." Respondent repeats its argument concerning paragraph 8 of the 2011 salting agreement and asserts that it is "objective evidence that the language of paragraph

8 undermines the testimony of Wallace, Rocus and Troxel." As noted above, the ALJ rejected all of these arguments being raised by Respondent concerning paragraph 8 of the 2011 conditional waiver and properly credited the uncontroverted testimony of Wallace, Rocus and Troxel in its entirety. Respondent produced absolutely nothing at the hearing to rebut or contradict the discriminatees' testimony. Contrary to Respondent's assertion, personal circumstances are a part of the General Counsel's affirmative information dictated by *Oil Capitol* in satisfying his burden under. The ALJ rightly considered Wallace, Rocus and Troxel's personal circumstances (including that they each had children and families to support) in arriving at his conclusion that they would have remained employed during the backpay period. Respondent produced nothing that warrants reversal of the ALJ's conclusion. Respondent's assertion that the ALJ relied on the "subjective testimony that the salts believed that Lederach had more work assignments," could not be further from the truth, The record is crystal clear that the ALJ relied on the unrebuted testimony of Wallace, Rocus and Troxel's concerning statements made to them by Respondent's managers, including Lederach himself. In this regard, Wallace's credited testimony established that Lederach told Wallace that he liked Wallace's work, that he had no intentions of laying him off as long as he continued to do a good job and that he had other jobs for Wallace [ALJD p. 7, lines 39-41, T. 49] Rocus' credited testimony established that Slover told Rocus that Respondent needed men on the Glenside job. Slover asked Rocus if he was interested in going to the Glenside job and Rocus responded that he was interested in going to the Glenside job [ALJD p. 9, lines 33-36, T. 61]. Rocus' testimony also established that about three weeks after he started working for Respondent, Lederach told him that Respondent had work for Rocus if

Rocus was interested in continuing to work for Respondent [ALJD p. 10, lines 8-12, t. 60]. Troxel's credited testimony established that Slover told him in two separate conversations that when Respondent's Nash job wound down, Slover would be transferring Troxel to the Glenside job [ALJD p. 8, lines 33-37]. Respondent offered no testimony or any evidence to counter the testimony of Wallace, Rocus, and Troxel concerning these statements made to them by Respondent's owner and managers. Thus, Respondent's arguments must be rejected

**D. Respondent's contention that the ALJ committed reversible error by concluding that Christopher Breen was not a salt must be rejected**

The ALJ concluded that Respondent had failed to meet its burden of establishing that Breen was a salt under *Oil Capitol* [ALJD p.19, lines 9-15]. Respondent argues that the ALJ erroneously concluded that Breen was not a salt; however, the evidence of record belies Respondent's argument.

The evidence of record established that Breen, a father of five children, was a member of IBEW Local 269 for seventeen years and was not a member of IBEW Local 380[7]. Breen had been laid off after working on a two year project knew that he would be out of work for a while because a lot of his local brothers had also been laid off [ALJD p. 11, lines 26-29; T. 116]. He found out from a friend that Respondent was hiring and applied for work in January 2010 [ALJD p. 11, lines 31-33; T. 117, 130]. Breen notified his business agent Steve Aldrich, that he had obtained work with Respondent so that he could be taken off Local 269's out of work list [ALJD p. 11,

[7] Clark's credited testimony corroborated Breen's testimony that he was not a member of Local 380 [ALJD p. 6, line 34; T.30,]. Additionally, the ALJ found that Clark did not have anything to do with the hiring of Breen by Respondent [ALJD p. 6, line 35; T. 30].

lines 41-42]. Aldrich did not tell Breen to apply for work with Respondent, Breen did not have to tell anyone from Local 269 that he was applying for work with Respondent and no one from Local 269 asked him to apply for work for Respondent or to organize Respondent's employees [ALJD p. 11, lines 42-44, T. 118, 130].

Breen did not sign a conditional waiver and/or a salting agreement for Local 380 and was not aware if Local 269 required the signing of a conditional waiver and/or a salting agreement [ALJD p. 12, line 8, T. 128]. His credited testimony established that Breen received no salting training from his Local or from the International [ALJD p. 11, lines 46-47; T. 119, 127]. No one from Local 269 asked Breen to try to organize Respondent's employees [ALJD p. 12, line 6-7]. Prior to working for Respondent, Breen worked for other nonunion contractors and nobody from Local 269 told him that he was in violation of any IBEW constitutional provision despite the fact that he told Local 269 that he was working for nonunion contractors [ALJD p. 11, lines 47-49, T 119, 120]. Local 269 never told Breen that he could be penalized or fined for working for nonunion contractors [ALJD p. 11, line 50, T. 120].

The record also established that while Breen generally talks to nonunion employees about the benefits of unionization after hours if he is asked. Contrary to Respondent's assertion, Breen never at any time during his employment with Respondent, spoke to any of Respondent's employees about the benefits of unionization [ALJD p. 12, lines 34-35, T.121, 124,].

The record established that after he began his employment with Respondent, Clark contacted Breen and talked to Breen about Local 380's organizing effort at Lederach [ALJD p. 12, lines 26-28; T. 121, 122]. More specifically, Clark told Breen

that some of his members were working on another job. However, Breen did not talk to those members, and in fact did not meet them, until the litigation of the underlying unfair labor practice case [ALJD p. 12, lines 37-39, T. 121,]. Clark asked Breen when he had been hired, how he was hired, who he spoke with when he was hired and how many employees were working for Respondent, but he did not ask for Breen's help with the campaign [ALJD p. 12, lines 28-29, T. 122,]. Breen answered Clark's questions, but did not offer his help with the organizing campaign [ALJD p. 12, lines 30-31, T. 123][8].

Clark did not give Breen any instructions or training on how to promote the Union, he merely told Breen to do the best job he could do [ALJD p. 12, lines 41-42, T. 121].

Breen wore an IBEW t-shirt on one occasion while working for Respondent because "it was a bad laundry day" [ALJD p. 12, lines 42-43, T.122][9].

Breen keeps a daily log/journal for every job that he works whether for a union or for a nonunion contractor, as his way of keeping track of his jobs. The log Breen kept while employed at Lederach was no different than any of his other logs/journals. No one told Breen to keep a journal [ALJD p. 13, lines 5-6; T. 124, 125, 127].

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[8] Clark's credited testimony corroborated Breen. Clark's testimony established that he became aware that Breen was working for Respondent when he attended an IBEW membership development meeting and Steve Aldrich, a Local 269 organizer, mentioned that Breen was working for Respondent [ALJD p. 6, lines 37-38; T. 30, 34].

[9] The ALJ concluded that Breen's statement, that he wore an IBEW t-shirt to work on one occasion because "it was a bad laundry day," was Breen's humorous way of saying that he did not have his laundry chores up to date and wore the shirt because it was the only apparel available that day [ALJD p. 12, fn 20].

Breen's credited testimony established that he intended to work forever for Respondent because Respondent was paying him he good wages [ALJD p. 12, line 18; T. 131]. Breen's credited testimony also established that Lederach and Slover made statements to him about his continued employment with Respondent. Thus during Breen's initial interview with Lederach, Lederach told him that Respondent was swamped with work and Lederach mentioned Respondent's prevailing rate jobs at water treatment plants and schools [ALJD p.12, lines 11-12; T.131]. Throughout the course of his employment, Glenside job Project Manager, Frank Slover told Breen that Respondent had tons of work coming up, that they were hiring daily and that they were calling back former employees [ALJD p. 12, lines 13-16]. Breen's unrebuted testimony further established that on the day he was laid off, he questioned Slover about why he was being laid off when there was a lot of work that Slover agreed that there was a lot of work, but responded "that's just the way it is" [ALJD p. 12, lines 21-22; T. 131, 132].

The ALJ was not persuaded that Respondent met its burden under *Oil Capital* of establishing that Breen was a salt simply because he kept a journal, was a union supporter and spoke to Clark about Local 380's organizing effort [ALJD p. 19, lines 10-12].

Respondent argues that the Acting General Counsel did not meet its burden of establishing that Breen would have remained employed during the backpay period because the Acting General Counsel did not produce any "objective" evidence concerning how Local 269 treated its salts and whether it required its salts to sign a salting agreement containing a paragraph similar to paragraph 8 of the 2011 salting agreement.. However, Local 269 was not involved in the salting campaign at Lederach

and the ALJ concluded that Breen was not a salt. Consequently, the Acting General Counsel was not obligated to put on evidence concerning Local 269's non-existing campaign or speculate as to how Local 269 would treat its members if it had conducted such a campaign. Contrary to Respondent's assertion, the Acting General Counsel produced evidence to establish that Breen would have remained employed during the backpay period, in the event that the ALJ concluded that Breen was not a salt. Thus, Breen's uncontroverted credited testimony established that he sought employment with Respondent because he was laid off at the time, had five children to support and he would have worked for the Respondent forever. Lederach told Breen that Respondent was swamped with work. Slover told Breen that Respondent had tons of work coming up, that they were hiring daily and calling back employees who used to work for Respondent. Additionally, on the day of his lay off, Slover told Breen that there was a lot of work. The ALJ did not have to rule on the issue of whether Breen would have remained employed during the backpay period because he found that Respondent had not met its burden of establishing that Breen was a salt. Thus the ALJ properly concluded that Breen was not a salt. Accordingly, Respondent's arguments must be rejected.

### E. Respondent's argument that it cannot be faulted for not calling any company witnesses to rebut the Acting General Counsel's witnesses because at all times, the Acting General Counsel held the burden of proof must be rejected

Respondent failed to produce any testimony to rebut the testimony of Wallace, Rocus, Troxel and Breen. Respondent falsely asserts that it did not produce any company witnesses because the Acting General Counsel had the burden at all times. Contrary to Respondent's assertion, it bore the burden of proving that Breen was a salt. The Acting

General Counsel's burden in a backpay proceeding is to demonstrate the gross amount of backpay due but for the Respondent's illegal conduct *Laborers Local 158 (Worthy Brothers)*, 301 NLRB 35 (1991). Respondent must then demonstrate facts that mitigate the claimed backpay liability. Respondent must establish and clarify any such uncertainties by a preponderance of the evidence *Metcalf Excavating*, 282 NLRB 92 (1986). Respondent cannot fault the Acting General Counsel or the ALJ for its failure to meet its burden of establishing that Breen was a salt or for its failure to rebut the uncontroverted testimony of Wallace, Rocus, Troxel and Breen. Respondent and Respondent alone, was responsible for countering the testimony of Wallace, Rocus, Troxel and Breen. It failed to do that so. In light of Respondent's failure to meet its burden, the ALJ properly credited the testimony of Wallace, Rocus, Troxel and Breen and correctly concluded that Breen was not a salt and that Wallace, Rocus and Troxel would have remained employed during the backpay period.

## VII. CONCLUSION AND REMEDY

For all the reasons stated above, Counsel for the Acting General Counsel urges the Board to reject Respondent's exceptions and to affirm the ALJ's conclusions that Wallace, Rocus and Troxel would have remained employed during the backpay period and that Breen was not a salt. Additionally, Counsel for the Acting General Counsel urges the Board to adopt the ALJ's recommended Order that Respondent make whole Jeffry Wallace in the amount of $28,645.03 plus interest, Christopher Rocus in the amount of $36,844.14 plus interest, Cameron Troxel in the amount of $40,059.81 plus

interest and Christopher Breen in the amount of $16,680.08 plus interest. Interest should be calculated in accordance with *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010).

Respectfully submitted

MARGARITA NAVARRO-RIVERA
Counsel for the Acting General Counsel