Lederach Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 380. Case 04–CA–037725

March 4, 2013

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On September 10, 2012, Administrative Law Judge Earl E. Shamwell, Jr. issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed exceptions and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified[3] and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Lederach Electric, Inc., Lederach, Pennsylvania, its officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amounts set forth opposite their names, plus interest computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), minus tax withholdings required by Federal and State law.

We also order the Respondent to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each individual named below.

Jeffrey Wallace	$28,645.03
Christopher Rocus	36,844.14
Cameron Troxel	40,059.81
Christopher Breen	16,680.08
Total	$122,229.06

Dated, Washington, D.C. March 4, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Margarita Navarro-Rivera, Esq., for the Acting General Counsel.

Walter H. Flamm Jr., Esq. and *Robert J. Krandel, Esq. (Flamm Walton, PC),* of Blue Bell, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on May 22, 2012, based on a backpay specification and notice of hearing.

On the entire record,[1] including my observation of the demeanor of the witnesses and considering the briefs of the parties, I would find and conclude as follows:

I. BACKGROUND AND THE PARTIES' STIPULATION

This proceeding is based on a compliance (backpay) specification issued by the Regional Director for Region 9 of the National Labor Relations Board initially on January 19, 2012, and as amended on April 26, 2012.

By way of background on July 21, 2011, Administrative Law Judge Robert A. Giannasi issued a decision, inter alia, holding that the Respondent unlawfully laid off employees Jeffrey

[1] 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.

[2] In adopting the judge's finding that discriminatees Jeffrey Wallace, Christopher Rocus, and Cameron Troxel would have continued to work for the Respondent through April 12, 2011, the backpay period claimed in the compliance specification, we do not rely on the 2011 salting agreement signed by discriminatees Wallace and Rocus, as the time period covered by that agreement occurred after the claimed backpay periods. We therefore find it unnecessary to pass on the judge's analysis of the language contained in that agreement.

[3] We shall modify the judge's recommended Order to provide for daily compound interest in accordance with *Kentucky River Medical Center*, supra.

Consistent with our decision in *Latino Express*, 359 NLRB No. 44, slip op. at 3 (2012), we shall further modify the recommended Order to require the Respondent to provide the Social Security Administration (SSA) reporting remedy.

[1] Counsel for the Acting General Counsel filed her motion to correct transcript in the matter, copies of which were sent to the Respondent. I have perused the transcript record and would agree that the proposed corrections correspond to my recollection of and notes taken during the hearing. There has been no opposition to the motion, and I will grant the motion.

Wallace, Christopher Rocus, and Cameron Troxel because of their having engaged in protected activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Judge Giannasi also found that the Respondent unlawfully laid off another employee, Christopher Breen, because of his union activities and membership.

Notably, the Respondent did not file exceptions to the decision and, accordingly, the National Labor Relations Board (the Board) issued its Order adopting Judge Giannasi's decision.

As previously noted, on January 19, 2012, the Regional Director issued the initial compliance specification to which the Respondent filed its answer. The Regional Director filed an amended specification alleging, inter alia, that Wallace , Rocus, and Troxel were salts within the meaning of the Act as interpreted by and on the authority of *Oil Capital Sheet Metal*, 349 NLRB 1348 (2007). The Respondent thereupon filed its answer to the amended specification.

At the hearing the parties entered into a stipulation[2] which purported to narrow the outstanding issues on the amount of backpay, if any, that may be owed the four named persons pursuant to the make-whole remedies ordered by Judge Giannasi's decision. The stipulation provides as follows (in pertinent part):

> 3. (a) The Specification sets forth the amounts of backpay due to discriminates Chris Breen, Chris Rocus, Cameron Troxel and Jeff Wallace (discriminatees).
> (b) In the Amendment, the Regional Director alleged that the backpay periods for the discriminatees ended on April 12, 2011.
> 4. The sole issues to be litigated at the May 21, 2012,[3] compliance hearing are: (1) whether Rocus, Troxel, Wallace and Breen would have remained employed by Respondent during the backpay period and (2) whether Breen is a "salt" within the meaning of *Oil Capitol Sheet Metal, Inc.*, 351 NLRB 349 (2007); *Toering Electric Company*, 351 NLRB 225 (2007); and *Tradesmen International, Inc.*, 351 NLRB 399 (2007). The Acting Counsel for the Acting agrees that Rocus Troxel, and Wallace are "salts" under the above-cited case law.
> 5. (a) Respondent's only defense to the ending of the discriminatees' backpay period on April 12, 2011, is that the accomplishment of the Union's salting objectives prior to that date would have caused the discriminatees to end their employment with Respondent prior to April 12, 2011.
> (b) Based on the defense set forth in paragraph 5(a) above, Respondent contends that the discriminatees are not entitled to receive backpay.
> (c) The Acting General Counsel shall bear the burden of establishing that Rocus, Troxel, Wallace [and Breen if the Administrative Law Judge finds that he is a salt] would not have ended their employment prior to April 12, 2011, due to the accomplishment of the Union's salting objectives prior to that date.
> (d) Respondent bears the burden of proving that Breen is a salt. The Acting General Counsel contends that Breen is not a salt.
> 6. Respondent agrees that it does not have an alternative formula for calculating backpay, that the formula set forth in the Specification is reasonable and that if the Administrative Law Judge finds that Breen is not a salt and that Rocus, Troxel, Wallace and Breen would have remained employed during the backpay period alleged in the Specification, the amounts of backpay due to Breen, Rocus, Troxel and Wallace as set forth in Exhibits 2, 3, 4 and 5 of the Specification are accurate.
> 7. Respondent agrees that the formula set forth in the Specification shall be utilized by the Administrative Law Judge in deciding the amount of backpay due and owing to each discriminatee if he concludes that the discriminatees' backpay period ended before April 12, 2011
> 8. Respondent recognized the International Brotherhood of Electrical Workers Local 380 as the exclusive collective bargaining representative of its employees on January 26, 2012.

II. THE ISSUES STATED

With the foregoing stipulations understood and agreed to by the parties and approved by me, the issues herein for resolution are as follows:

1. Has the Acting General Counsel satisfied met her burden to show that the individual discriminatees asserted as salts would have remained employed by the Respondent for the backpay period set out in the compliance specification, April 12, 2011, and thereby are entitled to the specification backpay amounts?

2. Has the Respondent meet its burden to show that one of the individual discriminatees is a salt in which case the burden shifts to the Acting General Counsel to show that the discriminatee would have continued to work for the Respondent consistent with the specification's backpay?

III. LEGAL PRINCIPLES APPLICABLE TO SALTING IN THE COMPLIANCE SETTING

In the instant case, there is no dispute regarding reasonableness or the propriety of the compliance specification, its methodology, and/or calculations. The essential issues for resolution redound to a factual determination of the status of the four individual discriminatees here, that is, whether they were "salts"—individuals paid or unpaid who apply for work with a nonunion employee in furtherance of a salting campaign. *Starcon, Inc. v. NLRB*, 176 F.3d 110, 112 (7th Cir. 2002); and whether those deemed salts would have remained employed with the Respondent for the period alleged in the specification. Salting is 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).

In *Oil Capitol Sheet Metal*,[4] the Board held consistent with prior holdings that 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

[2] See Jt. Exh. 1.

[3] The hearing was originally scheduled for May 21, but with the agreement of all parties the hearing was rescheduled for May 22.

[4] 349 NLRB 1348 (2007).

gross backpay amount claimed and the pertinent backpay period. However, in *Oil Capitol*, the Board determined that in the case of salts, these employees were not entitled to the presumption of indefinite employment until a valid offer of reinstatement is made by the offending employer. Rather, because of different considerations[5] applicable to salts, the Board held that in such cases the General Counsel has the burden not only of proving a reasonable gross backpay amount due but must present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the compliance specification at issue.

The Board noted that the affirmative evidence supportive of the claimed pay period for salts 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 (salting) assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns. Id. at 1349. Thus, in all cases irrespective of whether the salt/discriminatee is unlawfully refused employment or unlawfully laid off or discharged, the Board applies this evidentiary requirement.

Notably, if the discriminatee is not determined to be a salt, the General Counsel may rely on a presumption of indefinite employment, which in turn would require the employer to produce mitigating evidence that the discriminatee would not have worked for the entire backpay period as claimed.

IV. THE WITNESSES

A. The General Counsel Witnesses

Francis Clark[6] testified that he has been employed by the Union for about 32 years and for the last 9 he has been charged with membership development, which he described as an outreach position that calls for organizing nonunion or open shops. Clark stated that one of his main functions is to try to get nonunion shops to recognize Local 380 and become contract signatories.

Clark said that Local 380 currently has about 850 members and that discriminatees Wallace, Troxel, and Rocus were and are currently members, and that the three were solicited by him and agreed to apply for work at the Respondent. He explained the process by which the three members began their employment with Lederach Electric.

By way of background, Clark related that in early 2010, the Union had about 15 percent of its membership out of work, and by the spring the number increased to nearly 20 percent. Around this time, Clark said that he became aware the Respondent might be hiring and, as was his practice at the regular monthly membership meetings, he encouraged Local 380 members to apply for work there.

According to Clark, if a member indicates he wants to apply for work, at Lederach or any other nonunion shop, he has to come to the hall and is advised by him about the IBEW Comet Program which essentially encompasses the Union's salt training process and procedures.

Clark said that part of his job is to educate the prospective salt as to his obligations and responsibilities to minimize any liability to the Local or IBEW when he is working as a salt in an open shop setting. Clark also noted that when a member of one IBEW local works in the jurisdiction of another IBEW local, the member's home local can prefer charges against the offending member which may result in financial penalties.

Accordingly, after the prospective salt/member receives his salting training, Clark said that he is asked to sign a "Salting Agreement" (in 2010) and a similar agreement (in 2011) called "Conditional Waiver of IBEW Constitution Article 25(1)(f) And Agreement To Engage in Salting Activities."[7] Clark noted that these agreements did not (as he put it) "control the relationship," but they served as proof that the salts were educated in the IBEW salting process which reduces the Union's possible exposure to unfair labor practice charges. Clark said he believed the agreements obliged the salt not to go "rogue" and develop his own organizing strategy; rather, he should simply do a good job and let Clark and the owner converse about contracts. In short, according to Clark, the agreements make the salt understand what his responsibility is to the local, to follow the direction of a person like himself as the membership official.[8]

Clark said that these agreements, though worded differently, were intended to apprise the salt of his duties and responsibilities as a salt/employee but that the agreement is supplemented by his instruction to them not to create "headaches or heartaches" on the job, just to show their skills and be productive so that the employers start thinking about an IBEW contract. Clark stated that he considers his supplemental instructions to be a part of the salt's orientation process.

Clark stated that while unemployed members must get his permission to apply for work at nonunion employers, he does not in his view send them out to the employer.[9] Clark testified

[5] For instance, the Board reasoned, inter alia, that salts, unlike normal applicants for employment, often do not seek employment for an indefinite duration, that many salts remain or intend to remain with a targeted employer only until the union's defined objectives are achieved or abandoned. *Oil Capitol* at 1349.

[6] Clark was also called as a witness by the Respondent. His combined testimony is summarized herein.

[7] Clark identified GC Exh. 2, a copy of the Salting Agreement in force and effect in 2010, and GC Exh. 3, a copy of the Conditional Waiver, etc. Agreement in force and effect in 2011. Notably, in the first agreement, the member is specifically described as a "salt"; in the second agreement the member is described as a "temporary organizer." The two agreements are certainly distinguishable in wording, but in my view essentially serve the same purpose. According to Clark, the agreements were changed by the IBEW lawyers and he could not explain why this was done.

[8] Clark's explanation of the purpose of the waiver agreements came as a response to my queries, since the agreement did not literally incorporate some of the purposes and understandings about which he was testifying.

[9] Clark explained that he does not in his view actually require members to apply for work at nonunion shops, but he informs them of hiring opportunities at nonunion shops and, if they need work, he asks them to participate in the salting progress. He viewed their participation as voluntary. (Tr. 25.)

that he notifies them of the work opportunity and the members can elect to pursue unemployment; and if they do, he provides them the salt training and they must execute the agreement he described generically as "waivers."

Turning to Wallace, Troxel, and Rocus, Clark stated that these three members worked for the Respondent and signed as appropriate a "waiver" agreement after having received the salting training, and each man received from him supplemental instructions about how they were to conduct themselves on the job, and that they would only be employed at Lederach for as long as the owner, James Lederach, needed them,[10] and that his plan was to have the Company become a signatory to a recognition agreement. Clark volunteered that neither of the three were employed by anyone at the time they were employed by the Respondent. Clark stated he would not send already employed members to seek employment at a contractor.

Clark acknowledged that he had his eye on organizing Lederach Electric as early as 2005, when he learned of the Company's involvement with an elementary school project, and then tried to introduce himself to James Lederach, the owner, for that purpose. Clark stated, however, that he did not pursue Lederach aggressively and certainly did not engage in a salting effort at the time.

Clark noted that pursuant to his attempt to organize Lederach, he filed a recognition petition with the Board on January 17, 2012.[11] However, Clark said that he withdrew the petition on January 31, 2012, because Lederach on January 26, 2012, had voluntarily agreed to recognize Local 380 as the collective-bargaining agent for its employees.[12]

Regarding Christopher Breen, Clark testified that he was not a member of Local 380, and he (Clark) had no involvement with Breen's obtaining employment with Lederach; more specifically Breen was not a Local 380 salt. Clark admitted that he became aware in May 2010 that Breen was employed by Lederach at a meeting where an organizer for (IBEW) Local 269, Steve Aldrich, informed him that Breen, a Local 269 member, was working for Lederach. Clark said that he asked Aldrich if he could speak with Breen about Lederach; for example, how he gained employment with Lederach, what projects the Company had, the Glenside Elementary School project in particular, and other details of Breen's employment.

Clark stated that he did not immediately speak with Breen but did so later and basically advised Breen to do a good job and if anything comes up on the job to contact him, specifically if there was any interest in the IBEW. Clark stated that while Breen was not working (as a salt) for Local 380, he was receptive to taking his (Clark's) calls and answering questions, but Breen was not following his organizing agenda or instructions pertinent thereto. According to Clark, Breen was merely doing his job at Lederach.

Jeffrey Wallace testified that he went to work at Lederach Electric in August 2010. He explained how this came about.

Wallace said that he discovered that the Company was hiring at one of the Local 380 monthly meetings given by Francis Clark, who said there were job opportunities at a couple of elementary school projects and the jobs paid prevailing wages. Wallace testified that he was unemployed at the time, having been laid off a previous job in April (2010) and since he had two children to support, he needed work. Accordingly, Wallace said that he applied for a job at Lederach in May 2010, and was hired in August 2010. Wallace stated that it was his intention to work for Lederach until he was no longer needed or until the job was completed.

Wallace noted that Clark showed him a salting video in the (IBEW) Comet class and discussed with him the (waiver) form, which he (Wallace) signed.[13] Wallace recalled that his conversations with Clark took place in his office and that Clark simply told him to go out to work and do a good job for them (Lederach); and talk (to the employees) about the IBEW after hours. Wallace said that Clark did not mention how long he (Wallace) would be working at Lederach.

Wallace also recalled his interview with the owner, Jim Lederach. According to Wallace, Lederach told him that he was first to report to a school project, Nash, and he later worked there; but Lederach said that he had other projects where he would work. According to Wallace, Lederach specifically mentioned a school project in Glenside.

Wallace also recalled a conversation with Jim Lederach while he was working at the Nash jobsite. According to Wallace, Lederach praised their (meaning the Local 380 employees) work and said as long as we did a good job, he had no intentions of laying them off and even had other jobs in store for them.

Wallace stated that he also signed a salting agreement with Local 380 in 2011,[14] and like the one he signed in August 2010, it was required when union members work for nonunion contractors so that the Union is aware of what company he was applying to work for and to keep things "above board."[15]

Wallace stated that had he not been laid off, he fully intended to work for the Respondent until the jobs were finished or his was completed. Wallace said that he never worked at the Glenside project, but heard about it from other coworkers, and

[10] Clark stated that he did not retain copies of the 2010 agreement (GC Exh. 2), but Wallace, Rocus, and Troxel each signed one in 2010. Clark said that Rocus signed the 2011 agreement in August 2011 (see GC Exh. 4), as did Wallace (see GC Exh. 5). Troxel did not sign a 2011 waiver because he was working at a union contractor at the time the Respondent called him back to work.

[11] Clark identified GC Exh. 6, a copy of the petition he filed with the Board.

[12] See G. C. Exh. 7, a copy of the letter dated January 26, 2012, from the Respondent's counsel acknowledging the parties' agreement; also, see GC Exh. 8, a copy of Clark's withdrawal letter to Region 4.

[13] Wallace identified GC Exh. 2, the "Salting Agreement" he signed on August 5, 2010.

[14] Wallace identified GC Exh. 5, a copy of the Conditional Waiver, etc. Agreement he signed on August 1, 2011, before starting work once more with the Respondent. Wallace stated that he mistakenly signed his name in the space for the employer's name, which should have been Lederach Electric.

[15] Wallace said that unless he signed the agreement, he could lose his family health benefits due him as a union member, a very important matter for him since he had been a union member for 14 years and had never worked for nonunion employers, except Lederach, and none since being laid off by Lederach Electric. According to Wallace, with the agreement, the Union paid his health benefits.

that Jim Lederach never said to him (or the others) that he was going to lay him (them) off or ever had plans to do so.

Wallace stated that he never was threatened or promised anything by the Union to sign the agreements, but that he needed work so he signed them. According to Wallace, Clark merely told him to do a good job, and in reliance on Clark and his salting training he only spoke to Lederach's employees about joining Local 380 during off hours, during breaks, or at the end of the workday.

Cameron Troxel testified that he has been a member of Local 380 for about 10 years. Troxel said that he learned that Lederach, a nonunion contractor, was or may be hiring from Clark at the union hall on the last Friday in April 2010 as he was signing the local's out-of-work list. According to Troxel, Clark told him that there may be a need for manpower and provided him a waiver agreement.[16]

Troxel recalled that on the very day he signed the waiver he and Clark discussed his anticipated role at Lederach and Local 380's expectations while he was employed there. According toTroxel, Clark said that Local 380 had pursued Lederach for a contract for some time and he wanted to sign the Company. Clark said that he wanted him (and the other 380 members) to do a good job to show (Jim) Lederach what they were capable of and try to get him to sign an agreement. According to-Troxel, Clark said that we would work there as long as we were needed.

Troxel said that he worked at the General Nash Elementary School job, where Frank Slover (the foreman) one day (August 25, 2010) told him that when the General Nash job ended, he would be transferred to the Glenside School job. Troxel recalled that he had a second conversation with Slover who repeated the earlier conversation about his being transferred to Glenside, but also hinted that he should leave Local 380 and work for Lederach.

Troxel stated that it was his intention to work for Lederach as long as there was work. He related that while working for Lederach, he received a job offer from another nonunion employer but declined the offer.[17]

Troxel recalled that when he signed the waiver in 2010, he was on the Local 380 out-of-work list and was supporting his two children.

Christopher (Chris) Rocus testified that he has been a member of Local 380 for about 31 years, and is the father of a (dependent) child.

Rocus said that in 2010, he was out of work and looking for employment when he saw a listing for Lederach in the telephone book. Rocus explained that at the time he was going to apply for an extension of his unemployment benefits and was told by the State unemployment clerk that he needed to make job searches. Rocus said that he told the clerk that he could not apply to nonunion contractors because his local prohibited this. According to Rocus, the clerk said that he had to apply for work even at nonunion contractors.

Rocus said that having found out about Lederach Electric, that it was nonunion, he went to the hall and spoke to Clark about working for them. According to Rocus, Clark told him that if he wanted to work for Lederach, he would have to sign a waiver.

Rocus said that he had been out of work for 6 months and had been signed up on the Local 380 out-of-work list—he was around number 100—so he signed the waiver.[18] Rocus said that he signed the waiver because he was running out of money and needed more funds than that provided by the unemployment program.

In any case, Rocus said that when hired by Lederach, he had every intention of working there as long as there was work. Rocus could not recall Jim Lederach ever saying how long he was going to work while he was working at the Nash Elementary project.

Rocus did recall a couple of conversations with Lederach Foremen Lee (LNU), Frank Slover, and Darren (LNU) about the Glenside School project. In regard to the Slover conversation, Rocus said Slover said that the Company would need men for the Glenside project which had to be completed before the next school year and asked Rocus if he were interested. Rocus said that he responded in the affirmative.

In reference to the conversation with Lee, Rocus said that he happened to be working at the Nash School project for Lee on a Friday and Lee said that he (Rocus) might be transferred to Glenside the next Monday. However, by the end of the day, Rocus said that he was told he was not going to that job, that more work was needed at the Nash School project, and to return there on Monday. Rocus recalled that his conversation with Darren was similar to Lee's mainly, that Lederach had a job at Glenside that had to be completed by the next school year. Rocus said that his conversations with Darren, Lee, and Slover took place at various times during his time with Lederach; and they seemingly liked his work.

Rocus said that he also had a conversation with Jim Lederach about Glenside. According to Rocus, Lederach asked him if he (Rocus) would like to stay (employed) with him; he had work for him. Rocus noted that he was unsure whether Lederach specifically identified Glenside as the specific job, but the conversation took place roughly 3 weeks into his employment at Lederach in 2010, around the time he was conversing with the aforementioned foremen about Glenside.

Rocus related that after working for Lederach for a time, he spoke to Clark about organizing employees at Lederach, but Clark never said anything about how long he would be working

[16] Troxel said that he did not possess a copy of the agreement, but shown GC Exh. 2—the 2010 Salting Agreement—identified it as one identical to the one he signed. Troxel noted that he did not sign such an agreement in 2011 because when Lederach called him back to work, he was already employed with another company. Troxel said that he respectfully declined Lederach's offer.

[17] Troxel acknowledged having worked for nonunion contractors in 2001 or 2002 and even worked for one just prior to and just after working for Lederach. Troxel noted that except for Lederach Electric, he has never worked as a salt for the Union.

[18] Rocus said that he no longer possessed a copy of the waiver, but identified the Salting Agreement (GC Exh. 2) signed by Wallace as identical to the one he signed in 2010. Rocus also stated that he worked for Lederach in 2011 and signed a waiver agreement at the time. (See GC Exh. 4, a copy of the Conditional Waiver, etc Agreement Rocus signed on August 1, 2011.)

at the site and organizing the employees there. Rocus recalled that Clark instructed him that if anyone (at the jobsite) had questions to speak to them off the clock or refer them directly to him so that he could give better details.

Rocus said that he and Clark did not discuss how other Local 380 members might be interacting with the employees at Lederach; he only conversed with Clark about how he (Rocus) was doing. Rocus also said that Clark never discussed with him what would happen if Lederach recognized the Union or what his employment relationship with Lederach would be in such an event.

Gary Siter testified that he is currently employed by Local 380 as its business representative/referral agent, a position he has held for about 3 years although he has been an electrician/Local 380 member for 38 years.

Siter explained that in his capacity as referral agent, he is responsible for maintaining the local's out-of-work list. According to Siter, he assigns the out-of-work members a number, basically in the order they come in to sign up. When the member obtains work, his name comes off the list and the next member in line moves up.

Siter produced at the hearing a copy of his out-of-work list covering 2010 and explained that Jeff Wallace signed the out-of-work list on April 12 and was assigned initially number 156; Chris Rocus also signed on April 12 and was initially 157, and Cameron Troxel signed on May 3 and was initially assigned 202.[19]

According to Siter, when he assigns a number to a member it means that is where he is numerically in the out-of-work queue. So, for instance, where Wallace was assigned number 156, there were 155 members ahead of him; and Rocus had 156 members ahead of him, and so on for each member. Siter noted that because Wallace, Rocus, and Troxel were designated "salts," they would not lose their places on the out-of-work list and would move up as other members ahead of them got work.

Siter volunteered that in his estimate at the time—April 2010—Rocus at number 157 would have taken 7-1/2 to 8 months to be referred out for work, and the same could be said for Wallace at 156.

Siter stated that he used his out-of work list to compose a ""To Whom It May Concern Letter" dated May 21, 2012, in which he stated the following:

> Cameron Troxel was laid off May 3, 2010 and signed the out of work list. His position at that time was #202. He was then referred out to work on December 14, 2010.
>
> Jeff Wallace was laid off April 12, 2010 and signed the out of work list. His position at that time was #157. He was then referred out to work again on November 30, 2010.
>
> Chris Rocus was laid off April 12, 2010, signed the out of work list. His position at that time was #156. He was then referred out to work again on November 15, 2010.

B. The Respondent's Witness

Christopher Breen testified that he has been a member of IBEW Local 269 for about 17 years. Breen stated that around the end of 2009, about December 24, he was laid off from a large 2-year project that employed a good number of his fellow Local 269 members. Breen said that he is a father of five children who live with him.

Breen recalled that around the time of his layoff, a personal friend working at a local school district knew he was out of work and informed him that Lederach Electric was hiring. Breen said that he applied at Lederach in January 2010, and was interviewed by Jim Lederach the same day. According to Breen, Lederach told him that he was not hiring then but would keep him in mind. Breen related that Lederach called him in April 2010 at his home and asked if he were still interested in working for him. Breen said he told Lederach he was; Lederach called him in July 2010 and hired him on July 9, 2010.

Breen stated that he told his union representative, Steve Aldrich, that he was going to work for Lederach Electric, but only after he had been hired, and that the Company was paying a prevailing wage. Breen said that he informed Aldrich of his hiring so that he could be removed from Local 269's out-of-work list. Breen stated that Aldrich had not told him that Lederach Electric was hiring and, in fact, he (Breen) never told anyone at Local 269 that he was going to apply for work at Lederach.

Queried about salting, Breen testified that he has never received salt training from Local 269, or the IBEW. Breen acknowledged that prior to 2010, he worked for nonunion contractors but was never told by any IBEW officials that he had violated any constitutional provision. Breen said that he had informed his local that he was working for nonunion contractors, but had never been penalized. Breen went on to say that he was unaware of any Local 269 policy governing union members working for nonunion contractors but, in point of fact, he had never sought work with a nonunion contractor as a salt and that included his application for and time working at Lederach Electric. Breen stated that no one from Local 269 ever asked him to try to organize Lederach Electric and, in fact, he was not aware that Local 269 had ever tried to organize the Company. Breen stated that he has never signed a salting agreement. (Tr. 128.)

Breen recalled several conversations with Jim Lederach after the initial ones leading to his being hired, on which occasions Lederach told him that the Company would be swamped with work and mentioned a couple of jobs. Breen said after he was hired, Lederach again mentioned that he had "tons" of work coming up; he was hiring daily and even calling old employees back to work in order to man the projects. Breen recalled speaking with Frank Slover, the Glenside project manager, who also repeated what Jim Lederach had said about the availability of work.

Breen testified that it was his intention to work at Lederach "forever," by which he meant until the work ended or the job

[19] See GC Exh. 9, a copy of Siter's out-of-work list covering in part calendar 2010. The three members have "salt" written by their names. Siter noted that he does not include the year on the list because it believed that the members will be assigned work in less than a year. Siter acknowledged, however, that one employee on the list had "1/22/09" by his name; but he insisted that the year is not usually included because it is unnecessary in his view. [I will note that Breen's name appears nowhere on the list.]

was completed because the pay—prevailing wage—was good and he had to feed his family. However, Breen stated that one day in spite of the talk and appearance of needed work, he was told that he was to be laid off. According to Breen, Slover simply told him this was the way it is, but agreed that Breen had done outstanding work. Breen said another foreman, Chris Premaza, told him the same and said that this (the layoff) was not his idea. Breen recalled that at the time he was laid off, the Glenside job was only in its early stages.

Breen recalled that while he was employed at Lederach he met Francis Clark for the first time, and Clark told him that he was trying to organize the Company; but that Clark did not ask him for any specific aid in the effort. Breen recalled that Clark asked him when and how he happened to be hired, whom had he spoken to, and how many employees were on the job. Breen stated that he volunteered his responses to Clark, but did not offer any specific assistance to Clark's organizing effort.

Breen said that while he does promote the Union—he has worn IBEW T-shirts on projects—he is respectful of his coworkers and will only answer questions about the Union after hours. However, Breen testified that he did not discuss the Union on the Lederach job.

Breen said that there were Local 380 members working at Lederach in 2010, but he (did not speak with them and, in fact, only came to know them when the matter was in court (the NLRB unfair labor practice hearing).

Breen recalled that Clark told him to do the best he could on the Lederach job to show the Company what he could do. Breen noted that he once wore an IBEW shirt to work at Lederach, but that this was because it was a "bad laundry day";[20] and that having never been trained in salting, he did not know that this was or could be a part of a salting effort on a nonunion job.

Queried about his practice of keeping a daily log, Breen said that he keeps a "green book" for every job on which he works. The journal tracks his time, those with whom he worked, and what he did on the job. Breen identified a similar book that he kept for his time at Lederach.[21] Breen stated his keeping of these books have nothing to do with salting, although he does make note—sometimes extensively recorded—of conversations he had on the job. Breen said he keeps these journals for union and nonunion jobs.

V. CONTENTIONS OF THE PARTIES

It is clear that as of January 26 or 31, 2012, Local 380's efforts to organize Lederach Electric had paid off with the Company's agreement to recognize the Union. In that sense then the salting campaign could be said to be terminated as its objective had been attained. That there is no collective-bargaining agreement in place in my view is not really relevant to the inquiry here. The question is whether the three salts—and there is no dispute that Wallace, Rocus, and Troxel were such—would, as claimed in the specification, be working at Lederach until April 12, 2011—but for the unlawful actions of the Respondent.

The Acting General Counsel first contends that the testimony of its witnesses, namely Clark, Siter, Wallace, Troxel, and Rocus was uncontroverted and should be credited, and that their individual testimony established that the three salts would have remained employed during the backpay period as alleged in the specification. She notes that the specification does not reflect the presumption of indefinite employment the Board rejects for salts. Rather, the backpay period as contained in the specification is limited to April 12, 2011, a reasonable and supportable date the three would have been laid off from the Glenside Elementary School project.

The Acting General Counsel contends further that the individual personal circumstances of the three salt discriminatees indicate, as they testified, that they would have continued to work for the Respondent until the April 12 layoff at Glenside. She submits that each man was unemployed at the time of his application and hiring and had been so for a substantial period, and had additional compelling reasons—family support or medical insurance—to continue their employment with the Respondent for (as they collectively intended) as long as there was work or the job completed. Each man testified he had no intentions of quitting and essentially all would even be still working for the good prevailing wages they received, had they not been unlawfully laid off.

The Acting General Counsel also notes that the unrebutted testimony of the three discriminatees about the various conversations they had with not only the Respondent's job foremen but also the owner, James "Jim" Lederach, further informs the record here that they would have continued working with the Respondent and that the Glenside job was a realistic project in the offing for them.

Moreover, based on the again unrebutted testimony of the Union's referral official, Siter, it is clear from the three salts' standing on the out-of-work list they would not have been referred out for about a half of a year or more. Also, when one considers the economy at the time, the outlook for work for out-of-work Local 380 members was rather bleak. These things taken together clearly support the proposition that the three would have stayed with the Respondent until at least April 12, 2011, the end of the backpay period as alleged in the specification.

The Acting General Counsel also points to paragraph g of the 2010 Salting Agreement signed by the three which she maintains clearly indicates that the salt, even where the organizing effort has concluded, may remain a regular employee of the contractor. Moreover, according to the unrebutted testimony of Clark, it was the Union's intention that the three salts would work for the Respondent as long as they were needed. The Acting General Counsel notes that here the Union did not achieve its goal of securing a recognition agreement until January 2012, months after the ending of the backpay period in the specification.

The Acting General Counsel asserts that she has more than adequately met her burden, and notes that the Respondent offered no evidence to the contrary. Accordingly, the three salts

[20] I took this to mean Breen's humorous way of saying he did not have his laundry chores up to date and wore the shirt because it was the only apparel available that day.

[21] Breen identified R. Exh. 4, a copy of his Lederach journal that was subpoenaed by the Respondent. The journal was not received in evidence.

are entitled to the backpay amounts set forth for each in the specification.

Turning to Breen, the Acting General Counsel essentially asserts that he was not a salt, but specifically was there no credible evidence adduced by the Respondent that he was engaging in a salting effort under the auspices of Local 380, the only local on this record that had a salting campaign ongoing with the Respondent.

The Acting General Counsel notes further that Breen found out about hiring at Lederach Electric through a friend—not Clark or any union official—and applied on his own with the Company, not even informing his local (IBEW 269) of his intentions.

The Acting General Counsel contends that Breen testified credibly about his involvement with Clark after he was hired, and specifically when he said that he rendered no intentional assistance to Local 380's organizing effort. Most notably, she submits that in Breen's case there is no signed salting agreement between him and either Local 380 or 269. According to Clark, such an agreement was obligatory for any of his members applying for work at a nonunion contractor. Moreover, the Local 380 records do not list Breen as a salt as was the situation with Wallace, Troxel, and Rocus.

The Acting General Counsel contends that Breen did not seek or obtain employment at the behest of his union—here IBEW Local 269—so as to advance the union's interest at Lederach Electric; and further, clearly he was not sent to the Company by Local 380 to obtain employment to organize the Company's employees. The Acting General Counsel asserts that the Respondent, who called Breen as its witness, did not meet its burden to show that Breen was a salt within the meaning of the pertinent Board authorities. Accordingly, she contends that Breen is entitled to the backpay amounts as set out in the pertinent section of the specification.

The Respondent contends that the Acting General Counsel failed to meet her burden of providing affirmative evidence establishing that the three admitted salts would have remained employed with it for the duration of the backpay period alleged in the specification.

The Respondent rests its argument on essentially two grounds, (1) paragraph 8 of the 2011 Salt Agreement and (2) the insufficiency of the proof of the salt's personal circumstances.

With regard to its first ground, the Respondent notes that the 2011 Salting Agreement, in contradistinction to the 2010 version, eliminates the term "salt" and substitutes the term "temporary organizer." The Respondent contends this terminology in and of itself affirmatively evinces the specific and limited duration of employment by the salt with a designated employer.

The Respondent further notes that paragraph 8 (in pertinent part) provides the following instruction to the salt:

> . . . Failure to immediately sever employment with Employer after receiving such notice shall result in charges being brought against Temporary Organizer for violation of IBEW Constitution Article 25, Section 1(f) and any other applicable article.

The Respondent contends that the objective of the Union's salting campaign and the (2011) Salting Agreement was for employees to be temporary organizers until the Company recognized the Union, and this would end the salting campaign. More importantly to the point, the Respondent argues that per their agreement, the salts were to terminate their employment with the Employer or face charges from the IBEW. Thus, the Respondent contends this provision in the salt agreement provides affirmative evidence that Wallace, Rocus, and Troxel would not have remained employed through the entire backpay period. More specifically, once Lederach recognized Local 380, the salt campaign objective was achieved.

The Respondent also contends that the Union's unemployment system—its out-of-work list—also indicates that the salts were considered temporary workers, but ones with certain privileges. The Respondent notes that the salts never lose their place on the out-of work queue, even when they were working. The Respondent asserts what it describes as a "hold my place in line" system demonstrates that the Union and the salts believed that the nature of salting work was highly temporary. For these reasons, the Respondent argues that the salts did not intend to stay employed with Lederach after Lederach recognized the Union and, more specifically, through the backpay period alleged in the specification.

As to the Acting General Counsel's attempt to meet its *Oil Capitol* burden by showing the salts' personal circumstances, the Respondent contends that this burden was not met. The Respondent notes that the salts stated that essentially they needed to work either because of family obligations or they were running out of money. The Respondent asserts that this kind of testimony by itself cannot affirmatively show that the salt/discriminatee would have continued working at Lederach.

The Respondent further notes that at least one discriminatee, Troxel, was aware of other ongoing salting campaigns by Local 380, but he was not aware of any Local 380 members actually going to work at some of the nonunion contractors in question. The Respondent argues that if the salts were solely interested in keeping their jobs because of their personal needs (circumstances), more unemployed members of Local 380 would have been sent to these other campaigns. The Respondent contends that since the Lederach campaign was a concerted salt campaign for organization of the employees there, Wallace, Troxel, and Rocus' employment at Lederach was intended for the specific purpose of organizing, and not just for "need based employment." Thus, on balance, the Respondent asserts that the Acting General Counsel cannot meet her *Oil Capitol* burden just by showing the subjective testimony of the three salts that they would have remained employed by Lederach.

As to Breen, the Respondent contends that he meets the definition of a salt as set out in *Oil Capitol*—that is an individual paid or unpaid who applies for work with a nonunion employer in furtherance of a salting campaign.

The Respondent asserts that just as Clark spoke with Wallace, Rocus, and Troxel about the local's organizing campaign and to go out and do a good job at Lederach, Clark spoke in similar fashion with Breen once he learned of his employment at the Company. Essentially, the Respondent contends that their communications and the general relationship Clark formed with Breen was identical to that of the formal salting arrange-

ment Clark had with the Local 380 salts; and further, the objective was the same—the organization of Lederach through the salting methodology and process.

The Respondent submits that although Breen claimed that he had no formal organizing training, especially in salt training, his behavior on the job, that included keeping a journal for every job he worked on and communicating with union organizers like Clark, made him for all intents and purposes a salt. Breen, the Respondent asserts, acted in furtherance of and participated in the Local 380 salting campaign and therefore was a salt. Since the Acting General Counsel failed to show otherwise, Breen is not entitled to the amount allegedly due him in the specification.[22]

Discussion and Conclusions

We start with certain inarguable tenets of Board law regarding an offending employer's obligation to remedy its unlawful treatment of affected employees—here discriminates Wallace, Troxel, Rocus, and Breen.

Generally, where an unfair labor practice has been found, some backpay is presumptively owed by the offending employer in a backpay proceeding. *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1231 (10th Cir. 1005).

The General Counsel's burden is to demonstrate the gross amount of backpay due, that is, what amount the employee would have received but for the employer's illegal conduct. The General Counsel, in demonstrating gross amounts owed, need not show an exact amount, an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35 (1991). Thus, it is well established that any formula which approximates what the discriminatee would have earned absent the discrimination is acceptable if it is not unreasonable or arbitrary under the circumstances. *Am-Del-Co., Inc.*, 234 NLRB 1040 (1978); *Frank Mascali Construction*, 289 NLRB 1155 (1988). The courts and the Board have held that any doubts and uncertainties regarding the resolution of the backpay issue must be resolved in the favor of the discriminatee and against the wrongdoing employer. *United Aircraft Corp.*, 204 NLRB 1068 (1973). Once this has been established, the employer must then demonstrate facts that would mitigate the claimed backpay liability. The employer must, by a preponderance of the evidence, establish and clarify any such uncertainties. *Metcalf Excavating*, 282 NLRB 92 (1986).

The backpay period terminates or is tolled by a valid offer of reinstatement to a substantially equivalent position by the employer to the discriminatee. *Thalbo Corp.*, 323 NLRB 630 (1997). "The offer of employment must be specific, unequivocal and unconditioned in order to toll backpay and satisfy the employer's remedial obligation." *Holo-Krome Co.*, 302 NLRB 452, 559 (1991).

Finally, the employer in a backpay proceeding may not relitigate matters decided in the underlying unfair labor practice case. *Schorr Stern Food Corp.*, 248 NLRB 292 (1980).

As previously noted herein, the Board has enunciated certain somewhat altered requirements in the form of burdens of proof on the General Counsel in the case of discriminatees who also were salts in a union organizing campaign. I have carefully considered the testimony of the witnesses herein and, in my view in agreement with the Acting General Counsel, all testified credibly; in fact, the individual testimony was in the main unrebutted.

Also previously noted, the instant compliance specification is not in question, that is to say that its methodology, accuracy, or conclusions have not been contested and, in fact, have been stipulated and agreed to by the parties with my approval. The only remaining issues were those previously stated herein regarding the Acting General Counsel's having met her burden to show that the backpay period for the three salts reasonably and properly ended on April 12, 2011, when they would have been laid off the Glenside job. In that regard, I would find and conclude that the Acting General Counsel has met her burden and that the Respondent did not demonstrate any factors (or legal authority) that would mitigate or in this case negate the claimed backpay liability to the three salts.

Contrary to the Respondent and in complete agreement with the Acting General Counsel, considering the circumstances both personal and existentially of the three salts, it is hard to imagine the three intending not to work for Lederach for as long as they could. First, it is clear that at the relevant time, jobs were hard to come by in the area, and all three salts were fairly far down on the out-of-work list and faced possibly months of continued unemployment unless they applied for and were hired by Lederach, a nonunion contractor. Rocus had one child and Troxel and Wallace had two children to support; and each man was unemployed at the time. Then, too, the Lederach jobs promised prevailing wages and, according to each salt, Jim Lederach or his foremen, or both, said there was plenty of work for each and that the Company liked their work. I found each of the salts eminently credible and, as pointed out by the Acting General Counsel, their testimony was unrebutted. Furthermore, as again pointed out by the Acting General Counsel, the Respondent did not call any witnesses to counter the three members' testimony.[23]

I note also that the three salts testified that there was work in the offing for them at the Glenside project. So the Glenside layoff time frame seems reasonable as the end of the backpay period.

I have carefully considered the Respondent's argument that the 2011 Salting Agreement, especially in paragraph 8, established the purely temporary nature of the salt's employment at Lederach and found it unpersuasive.

First, I note 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

[22] If Breen were deemed a salt, the Acting General Counsel would have to show that he intended to stay employed with the Respondent for the backpay period alleged in the specification. The Acting General Counsel did not call him as her witness. However, I note that Breen testified without contradiction that he would have stayed with the Respondent "forever" because of the wages it paid and that he had to provide for the support of five children.

[23] I will note that James Lederach was in the hearing room, and I observed counsel for the Respondent consulting with him during the course of the hearing. Mr. Lederach was not called as a witness by the Respondent.

is effective and should continue, and that upon notice to him of the cancellation of the campaign, the salt is required to sever his employment with the employer or face certain charges for violation of the IBEW constitution.

Paragraph 8, as I read and interpret it, does not speak to the issue at hand, that is whether under the criteria of *Oil Capitol*, the backpay period for salts is reasonable and supportable. This provision, as I read 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. It does not speak directly or indirectly to the *Oil Capitol* criteria.

Second, it should be noted that 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 salts' 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 the jobs' ending or completion, and that Lederach would essentially make these decisions.

Therefore, 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 and in their own way clearly indicated that they had no intention of leaving Lederach and would have remained employed there as long as possible. In this case, as long as possible was the Glenside job as alleged in the specification.

On balance, on this record, I would find and conclude that the backpay period alleged in the specification for Wallace, Troxel, and Rocus is reasonable and appropriate. I would recommend that the amounts contained in the specification be awarded to them.

Turning to Breen, I would note that as I heard the credible testimony from the only witness who could speak with some authority about the IBEW salting program in general and Local 380's in particular—Clark—all IBEW members who desire to apply for work at nonunion employers must first and foremost sign a salting agreement and participate in the salting orientation process which includes a video presentation and some supplemental instructions from the responsible union official.

Breen credibly testified about his hearing about possibly available work at Lederach and that Local 380's Clark had nothing to do with that. Breen said that he applied on his own and did not inform his own local until he had been employed, but not for purposes of organizing the Company, but to remove his name from the out-of-work list. Clearly, Breen did not sign a salting agreement with Local 380 or his own local. As I have previously noted, Breen's name does not appear at all on the Local 380 out-of-work list, least of all as a salt.

It seems at least on this record that an IBEW member cannot simply make himself a salt as the Respondent contends was the case with Breen. I am not persuaded that simply because Breen kept a journal of the jobs on which he worked, clearly was a union supporter, and spoke to Clark about Local 380's organizing effort at Lederach, that he was a salt within the meaning of *Oil Capitol* and other pertinent Board authorities. In my view, the complete absence of any agreement between Breen and Local 380 regarding organizing the employees at Lederach militates against any finding that he was a salt.

Accordingly, I would find and conclude that the specification amounts allegedly owed to Breen are reasonable, and that since the Respondent has not offered persuasive evidence to mitigate the amount in question, I would recommend that Breen be awarded the specification amount.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Lederach Electric, Inc., Lederach, Pennsylvania, its officers, agents, successors and assigns, shall make Jeffrey Wallace, Christopher Rocus, Cameron Troxel, and Christopher Breen whole by paying them the amounts listed below, plus interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State law:

Jeffrey Wallace	$28,645.03
Christopher Rocus	$36,844.14
Cameron Troxel	$40,059.81
Christopher Breen	$16,680.08

Dated, Washington, D.C. September 10, 2012

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.