

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 94-73

August 12, 1994

TO : All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM : William G. Stack, Associate General Counsel

SUBJECT: "Salting" Cases

This memorandum is to provide guidance to assist Regional Office staff in their investigation of "salting" cases. In a traditional "salting" case, labor organizations endeavor to infiltrate an unorganized employer's work force with union members or "salts" who thereafter attempt to convince other employees to support or join the union. In the past few years, employer refusals to accept applications from "salts" or to hire them has resulted in the filing of numerous unfair labor practice charges.¹ Most of these involve building contractors and building and construction trade unions. The Boilermakers call their effort in this area the "Fight back" campaign and the IBEW calls their "salting" program "COMET."

At first blush, these cases often do not appear to pose any special investigatory problems. Indeed, the basic evidence to be sought has been succinctly described by the Board in Big E's Foodland, Inc., 242 NLRB 963, 968 (1979):

Essentially, the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a Union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.²

¹ While there are many "salting" cases involving discharges, the suggestions herein are limited to cases asserting a refusal to accept applications and/or refusal to hire.

² Other refusal-to-hire cases note the importance of the qualifications of the applicant for the position sought. See also the November 19, 1993 Advice Memorandum in Powerplant Specialists, Inc., Case 21-CA-29305, for additional discussion of the elements of a prima facie case in these allegations.

Frequently, union activity and employer knowledge thereof is easily established, as the completed applications often contain information that the applicants are union members who will seek to organize the employer. Union members appearing at the jobsite en masse, accompanied by a union business agent and wearing union insignia are not uncommon occurrences. On occasion, the employer's reaction, in and of itself, may be clear evidence of animus. More usually, however, these cases evolve into lengthy and complex investigations, and animus may not be clearly evident. Often, the application, interview and hiring process are conducted by a third party, such as an employment service or a state or county agency. In these circumstances, the investigation may have to probe the utilization of facially neutral application rules and/or hiring priorities which have a disparate impact on union members or supporters. Our investigations are often rendered more difficult because many jobs are of short duration and it is not uncommon for employees to travel long distances to find other work in the trade. It may be difficult to locate discriminatees and witnesses.

The following suggestions are provided to assist you in completing a timely and thorough investigation of "salting" cases.

1. It is critical to commence the investigation early. Since many of the jobs are of short duration, a late start may impair the ability to locate witnesses who have already left the jobsite for employment elsewhere.

2. In many of these cases, the charging unions have recognized the time-consuming problem of tracking-down witnesses and discriminatees and have submitted affidavits or notarized statements when the charge is filed. Regions may find it helpful to treat these affidavits similar to those provided by charging party employers in priority cases. Although the entire affidavit should be subsequently reviewed (telephonically or in person) with the affiant to assure accuracy, the investigation will be expedited if subsequent affidavits are limited to those elements that are either not included in the original affidavit or need further development.

3. A thorough investigation into the application procedures is usually necessary. It is important to examine each step of the procedure, as well as to ascertain whether exceptions are permitted, and under what circumstances. For example, if applicants are required to appear in person, is that requirement published and have all employees been required to go through that procedure. If the contractor utilizes an employment service (state or privately run), the investigator should obtain a detailed explanation of the arrangements from both the contractor

and the service. It will also be of some assistance to be aware of agency as well as joint and single employer principles if leads dictate that these areas be reviewed with the charged employer or the service.³

The investigation should also encompass any rules that the employer follows in accepting or rejecting applications. The rules should be thoroughly reviewed and, if in writing, copies should be secured. For example, the investigation should cover (1) whether applications are accepted only when vacancies occur, (2) whether an applicant appears in person, (3) whether only original applications are accepted, (4) whether applications are active for only a prescribed period, (5) whether references are required, and (6) whether the applicant is required to provide a detailed employment history including the names of former employers and wage rates. Additionally, the business justification for the rules may be significant.

The investigator should request copies of or the opportunity to read all of the applications. As usual, the documents are the best evidence that reveal whether policies (rules on accepting applications) are followed, when they were initiated or how long they have been in effect and whether they are disparately applied. If the charging party has provided evidence that points toward a prima facie case and a review of the documents is needed to make a Regional determination, an investigative subpoena should be considered for this information. Frequently, charged employers will provide the applications of the discriminatees and/or other union applicants, but these are of limited value if the applications submitted by nonunion applicants and those from applicants who were subsequently hired are not also supplied.

4. The Region should also seek to obtain evidence from the employer concerning the failure to interview or hire an applicant. Usually, union members or affiliated applicants just never hear from the contractor after the application is filed. One defense for not interviewing or hiring some alleged discriminatees is that they are not serious or bona fide applicants. The contention is often put forth that discriminatees who are already employed when they apply or those who are also paid union organizers have no intention to accept employment if offered or that they are attempting to entrap the Employer. These issues have already been decided by the Board. See Fluor Daniel, Inc., 304 NLRB 970 (1991), Wilmar Electric

³ If the contractor utilizes a state employment agency and there is evidence that the agency, either on their own or on instructions from the contractor, screens-out union applicants or commits Section 8(a)(1) or 8(a)(3) violations, notify the Division of Operations-Management coordinator.

Service, Inc., 303 NLRB 245 (1991), H.B. Zachary Co., 289 NLRB 838 (1988) and Sunland Construction Co., Inc.

5. A statistical analysis may be beneficial in certain cases to determine whether an employer discriminated against union applicants. In Fluor Daniel, Inc., 311 NLRB 498 (1993), a violation was established, in part, by the showing that despite the fact that union applicants comprised a significant number in the applicant pool, none was hired.

6. We have seen several cases where the Employer defended on the basis of alleged neutral hiring priorities. One formula that may appear gives top priority to current employees of the contractor. When this list is exhausted, employees are selected from a list of former employees. Next hired are those who have been recommended by current supervisors of the contractor. Following them are applicants who have the recommendation of current employees. Last hired are unknown applicants or off-the-street applicants. If this or any hiring priority is used as a defense, a copy, if it is in writing, should be sought. It may also be important to review the names of those hired (ask the contractor for a list or print-out of these) to determine if the priority formula is uniformly applied. An investigative subpoena should be considered if this information is critical to a Regional determination. Of course, the investigation should inquire into any discrepancies or hiring that falls outside the priority formula. Word-of-mouth hiring or giving priority to those applicants recommended by supervisors or current employees is extensively discussed in D.S.E. Concrete Forms, Inc., 303 NLRB 890 (1991). Also, suggested lines of inquiry appropriate when this defense is raised can be found in the Advice Memoranda in Zurn/N.E.P.C.O., Case 12-CA-15833, April 26, 1994 and Willamette, Inc., et al., Cases 3-CA-24434, et al., February 24, 1993.

7. Contractors may have a policy to disqualify for employment applicants based on their prior work history. Skill, experience and prior discipline, of course, are usually valid criteria used to disqualify. Screening out applicants based on an applicant's work record with some or exclusively union contractors, however, is unlawful. KRI Constructors, 290 NLRB 802, 813 (1988). Some allegations contend that the contractor discriminates against union applicants by disqualifying those with work records revealing much higher wage rates than the contractor is willing to pay on the current job. The business justification frequently is that the applicant is over qualified or, if hired, will quickly leave when a job paying the higher rate comes along. For discussions of the effect of high wage rates in the hiring process see SAM 94-3, July 1, 1994, Aneco, Inc., Case 12-CA-15738. In such cases, it is beneficial to include in the investigation whether the applicant stated a

willingness to work for the wage rate the contractor is willing to pay.

As in many cases overt or direct evidence of animus is not always present in "salting" cases. However, where an employer fails to hire qualified applicants whom the employer knows to be union adherents, and instead hires nonunion applicants without explanation, an unlawful motive may be inferred. Fluor Daniel, Inc., 304 NLRB 970 (1991).

Extraordinary remedies may be sought in "salting" cases. Frequently, employers found to have violated the Act work at sites throughout the country and may even have outstanding Board orders against them or be a party to numerous settlement agreements in other Regions. Consulting the Operations-Management coordinator or your AGC will assist you in resolving remedial issues. Additionally, unions may seek extraordinary remedies, such as organizational expenses. In such cases current guidance on extraordinary remedies should apply.

Settlement attempts involving "salting" cases may involve backpay for paid union organizers who are discharged after successfully obtaining employment with the respondent. Like any discriminatee, they have an obligation to search for work to mitigate the contractor's backpay obligation. However, if such alleged discriminatees claim double wages, i.e., they received a salary from the union before and during their employment with respondent, that salary does not offset the backpay owed by respondent.

As the potential exists for merit cases involving the same employer in different Regions, there is a need to coordinate the "salting" cases. In order to ensure that we are aware of all cases, when you receive a "salting" case, please send a copy of the charge to the Operations-Management coordinator, Richard Hardick. Also send a copy of the FIR or agenda minute to the coordinator for all "salting" cases in which the Region has decided have no merit, as well. The Region should not dismiss the case until the coordinator has reviewed the decision.

As always, your cooperation is much appreciated.


W. G. S.

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