

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AEROTEK, INC.

Cases: 17-CA-071193
17-CA-075605
17-CA-078720

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 22, affiliated with the
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

ANSWERING BRIEF OF RESPONDENT AEROTEK, INC.

Respectfully submitted this 31st day of May, 2013.

BY: HARDING & SHULTZ, P.C., L.L.O.
WILLIAM A. HARDING #11709
KELLY M. EKELER #24141
800 Lincoln Square
121 S. 13th Street
Lincoln, NE 68501-2028
(402) 434-3000

and

FREEMAN & FREEMAN P.C.
MARK FREEMAN #013635
100 Park Ave. Suite 250
Rockville, MD 20850
(301) 315-0200

Attorneys for Respondent

TABLE OF CONTENTS

Page No.

I. FACTS 1

II. ARGUMENT 2

1. The ALJ Correctly Concluded that Aerotek Should Not be Required to Hire Johnson, but the Board Should Reject the ALJ's Conclusion that Aerotek Must Provide Backpay to Johnson. 2

A. The GC failed to satisfy his burden of proving Johnson was genuinely interested in establishing an employment relationship with Aerotek. 2

B. Aerotek would not have hired Johnson, and would have ultimately terminated him, regardless of whether he supported the Union. 11

C. The GC's theory impermissibly changes the theory alleged in the complaint. 13

D. Even if the Board upholds the ALJ's erroneous conclusion that Aerotek owes Johnson backpay, the specific period of backpay should be decided in the compliance stage of proceedings. 15

2. The Record Supports the ALJ's Finding that Johnson's Conduct was Inconsistent with the Duty of Loyalty Owed by an Employee. 16

III. CONCLUSION 20

CASES

<i>Alto-Shaam, Inc.</i> , 307 NLRB 1466, 1467 (1992).....	18
<i>Arlington Electric</i> , 332 NLRB 845 (2000)	17
<i>Associated Advertising Specialists, Inc.</i> , 232 NLRB 50, 54 (1977).....	5, 19
<i>ATC/Forsythe & Associates, Inc.</i> , 341 NLRB 501 (2004).....	5
<i>Beacon Elect. Co.</i> , 2012 US App. LEXIS 9188 (6 th Cir. 2012).....	17, 18
<i>Bill's Electric</i> , 350 NLRB 292, 295 (2007).....	3
<i>Casino Ready Mix Inc.</i> , 321 F.3d 1190, 1198 (D.C. Cir. 2003)	4
<i>C-Town</i> , 281 NLRB 458 (1986).....	18
<i>Contractors' Labor Pool, Inc. v. NLRB</i> , 323 F.3d 1051, 1058-60 (D.C. Cir. 2003)	12
<i>Dresser-Rand Company</i> , 358 NLRB No. 34, 193 LRRM 1077 (Feb. 18, 2011)	12
<i>Endicott Interconnect Techs., Inc. v. NLRB</i> , 453 F.3d 532, 535 (D.C. Cir. 2006).....	9
<i>Exterior Systems</i> , 338 NLRB 677 (2002)	4
<i>Five Star Transp.</i> , 349 NLRB 42, 46 (2007)	17, 19
<i>Fluor Daniel, Inc. v. NLRB</i> , 332 F.3d 961, 967 (6 th Cir. 2003).....	2
<i>Heiliger Electric Corp.</i> , 325 NLRB 966 (1998).....	4
<i>J. W. Microelectronics Corp.</i> , 259 NLRB 327 (1981).....	18
<i>Kenai Helicopters</i> , 235 NLRB 931, 936 (1978).....	5
<i>Lamar Advertising of Hartford</i> , 343 NLRB 261, 265 (2004)	14
<i>Marshal Durbin Poultry Company</i> , 310 NLRB 68 (1993)	16
<i>MeccaTech, Inc. v. Kiser</i> , 2008 U.S. Dist. LEXIS 32511 (D. Neb. April 21, 2008).....	11
<i>NLRB v. Interstate Builders, Inc.</i> , 351 F.3d 1020, 1032 (10 th Cir. 2003).....	3, 4
<i>NLRB v. Local Union No. 1229, IBEW</i> , 346 U.S. 464, 473 (1953)	10, 19
<i>NLRB v. Town & Country Electric, Inc.</i> , 516 U.S. 85, 98 (1995).....	4, 19
<i>North American Dismantling Corp.</i> , 341 NLRB 665, 667 (2004).....	5, 19
<i>Oil Capitol and Sheet Metal</i> , 349 NLRB 1348, 1352 (2007)	8, 10, 15, 16
<i>Precision Window Mfg., Inc. v. NLRB</i> , 963 F.2d 1105, 1110 (8 th Cir. 1992)	18
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9 th Cir. 1966).....	18
<i>Sierra Bullets, LLC</i> , 340 NLRB 242, 242-243 (2003).....	14
<i>Smucker Co.</i> , 341 NLRB 35, 36, <i>enfd</i> 130 Fed. Appx. 596 (3 ^d Cir. 2004)	12, 18
<i>Tann Electric</i> , 331 NLRB 1014, 1018-1019 (2000).....	4

Titus Elec. Contr., Inc., 2011 NLRB LEXIS 558 (Sept. 29, 2011)..... 6, 12

Toering Electric Co., 351 NLRB 225, 233 (2007), *reconsideration denied*, 352 NLRB 814
(2008)..... 2, 3, 4, 6, 8, 9, 10, 18

Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), *enf. sub. nom. Nev. Serv.
Emples. Union, Local 1107, SEIU*, 358 Fed. Appx. 783 (9th Cir. 2009) 10

OTHER AUTHORITIES

NLRB GC Advice Memorandum (Assoc. Gen. Counsel Barry J. Kearney, June 27, 2012) 9

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent Aerotek, Inc. ("Aerotek") files its answering brief to the cross-exceptions filed by the Acting General Counsel ("GC").

I. FACTS

Aerotek incorporates by reference the statement of the case and statement of facts from its brief in support of exceptions, pages 1 through 9. (*See* Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision pp. 1-9).

Aerotek agrees with the GC's statement that Brett Johnson testified he prepared a journal titled "Aerotek Staffing Timeline" which memorializes some of Johnson's communications concerning Aerotek. (*See* Counsel for the Acting General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge pp. 1-2)¹. Aerotek also agrees that two of Johnson's entries in his journal support the ALJ's conclusion that Johnson acted inconsistent with an interest in employment with Aerotek. (*See id.*). Aerotek disagrees with the GC's claim that the ALJ's conclusion was based solely on the two entries in Johnson's journal. (*See id.; compare id. with* Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision pp. 4-7 and Answering Brief of Respondent Aerotek, Inc., pp. 6-9, *infra*).

¹ Throughout this brief, reference to the following will be designated as follows:

- General Counsel's Cross-Exceptions to ALJD.....GCCE (followed by page number)
- Transcript..... Witness (followed by page and line number)
- General Counsel's Exhibit..... GCX (followed by exhibit number)
- Respondent's Exhibit..... RX (followed by exhibit number)
- Joint Exhibit..... JTX (followed by exhibit number)
- Administrative Law Judge's Decision..... ALJD (followed by page and line number)

II. ARGUMENT

The GC asserts two exceptions to the ALJ's decision, both of which concern the ALJ's finding that Johnson acted inconsistent with the duty of loyalty owed by an Aerotek employee when he attempted to exclude Aerotek from Interstates' work. (*See* GCCE at p. 1-2; ALJD p. 12:2-31.) The GC's exceptions should be rejected because the record supports the ALJ's conclusion that Johnson's conduct was so inconsistent with an interest in employment with Aerotek that Aerotek should not be required to offer him employment. *See e.g. Toering Electric Co.*, 351 NLRB 225, 233 (2007), *reconsideration denied*, 352 NLRB 814 (2008). Further, the Board should reverse the ALJD to the extent it requires Aerotek to provide backpay to Johnson. *See id.*

1. **The ALJ Correctly Concluded that Aerotek Should Not be Required to Hire Johnson, but the Board Should Reject the ALJ's Conclusion that Aerotek Must Provide Backpay to Johnson.**
 - A. **The GC failed to satisfy his burden of proving Johnson was genuinely interested in establishing an employment relationship with Aerotek.**

The burden of proof on the threshold issue of whether Johnson was a genuine applicant for employment with Aerotek rests with the GC. *See e.g. Toering Electric*, 351 NLRB 225; *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003) ("The General Counsel bears the burden of proof in unfair labor practice cases."). The decisions relied on by the GC in his cross-exceptions pre-date the *Toering Electric* Board's clarification of the GC's burden of proving an applicant is genuinely interested in establishing an economic relationship with the company as part of the GC's *prima facie* case. (*See generally* GCCE).

It is significant that this case falls under the point of law concerning salting campaigns clarified in *Toering Electric*. As explained by the Board, "when the Court stressed the breadth of Section 2(3) in *Town & Country Electric*, that breadth was bounded by the presence of some

form of economic relationship between the employer and the individual held to have statutory employee status." *Toering Electric*, 351 NLRB at 228 (internal citations omitted). The Board emphasized that "in each case where the Court found statutory employee status, there was at least a rudimentary economic relationship, actual *or anticipated*, between the employee and employer." *Id.* (emphasis in original; internal citations omitted).

The pre-*Toering Electric* line of decisions established that a disabling conflict could be shown by evidence the applicant "intended to engage in a sabotage campaign in order to run [the company] out of business." *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1032 (10th Cir. 2003). The Board in *Toering Electric* described the type of evidence showing an applicant lacked a genuine interest in employment, including, "but not limited to": evidence the applicant engaged in disruptive or antagonistic behavior during the application process or evidence the applicant "engaged in other conduct inconsistent with a genuine interest in employment." 351 NLRB at 233.

Certainly, an applicant's conduct undertaken in bad faith, designed to result in sabotage, or designed to drive the company out of the area or out of business, which is evidence of a disabling conflict, is also evidence the applicant engaged in conduct inconsistent with a genuine interest in employment. The GC skirts over the inconsistency in the ALJ's finding Johnson's conduct in trying to cut out Aerotek's business *malum in se*, but at the same time finding Johnson had the requisite economic expectancy with Aerotek. (*See* GCCE pp. 3-6).

Contrary to the GC's position, there is no right to engage in all activities that might be labeled "salting" and Board law is clear that many salting tactics are not protected. *See e.g. Toering Electric*, 351 NLRB at 230-231, 233; *Bill's Electric*, 350 NLRB 292, 295 (2007) (affirming ALJ's conclusion that company did not violate the Act when it refused to hire

applicants who appeared to videotape the application process); *Heiliger Electric Corp.*, 325 NLRB 966 (1998) (same); *Exterior Systems*, 338 NLRB 677 (2002) (mocking hiring official's accent while soliciting workers to quit their jobs and work for a union contractor); *Tann Electric*, 331 NLRB 1014, 1018-1019 (2000) (entering an employer's office *en masse* to apply while videotaping the proceedings); *see also generally Casino Ready Mix Inc.*, 321 F.3d 1190, 1198 (D.C. Cir. 2003) (noting that union campaign tactics are not irrelevant to a disabling defense and stating, "Given the somewhat imprecise boundaries of activities that constitute unprotected disabling conduct, an ALJ normally would be expected to allow evidence permitting an employer to make an argument on disabling conflict based on slightly different facts than have been previously recognized as making out the legal defense.").

The requirement of loyalty is not simply turned off when determining whether a union salt has the requisite economic expectancy in an employment relationship; rather, the Board should amplify its sensitivity to applicant loyalty in the context of a salting campaign. *See e.g. Toering Electric*, 351 NLRB 225. Although *Town & Country* established that union salts do not automatically lose protection under the Act, the *Toering Electric* Board distinguished *Town & Country* by pointing out that unlike "litigation-based salting campaigns," the evidence in *Town & Country* did not suggest that the organizers engaged in acts of disloyalty. *See Toering Electric*, 351 NLRB at 232 (distinguishing *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 98 (1995)).

Prior to the Board's decision in *Toering Electric*, the Board established that a company could rebut a *prima facie* case of failure to hire by showing the applicant had a disabling conflict with the company. *See generally Interstate Builders*, 351 F.3d 1020. Under these cases, it was well settled that the Act does not protect employee overtures to contractual interference. *See*

ATC/Forsythe & Associates, Inc., 341 NLRB 501 (2004); *North American Dismantling Corp.*, 341 NLRB 665, 666 (2004) (holding employee "was clearly engaged in unprotected conduct" when he sought to replace the company with a crew he would provide and thereby interfere with the company's business relationship with one of its clients); *Kenai Helicopters*, 235 NLRB 931, 936 (1978) (employees activities unprotected where they told the company's business partner that they were going on strike and while doing so would operate as a competitor of their employer); *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 54 (1977).

In *ATC/Forsythe*, an employee of a company that contracted to provide bus service to the city of Tempe, Arizona, met with city officials and offered his dissident union group "as an organized alternative to [his employer] either as [directly hired] city employees, or as an alternate service provider." 341 NLRB at 503. The employer accused the employee of interfering with its contractual relationship with the city and the employee was ultimately terminated. *Id.* The Board held that the employee's activities were unprotected because the object was the replacement of his employer as the Tempe bus contractor by his union group. *Id.* at 503-504.

In *Associated Advertising Specialists*, the employer produced advertising materials for its customers, the principal one of which was Rite-Aid. 232 NLRB 50. The alleged discriminatee was a union leader who used information he had acquired while working for the employer to underbid it for some of Rite-Aid's business, as a direct competitor. *Id.* at 53-54. The Board concluded that the GC failed to establish by a preponderance of the evidence that the union leader had been discriminated against for protected union activities. *See id.*

In *North American Dismantling*, an employee told one of his employer's clients that he could do the job for less than the client was paying his employer. 341 NLRB 665. More specifically, the alleged discriminatee told the client that he "could put some people together and

do this job for you for cash." *Id.* The Board concluded that the employee's "effort to steal work was an act of disloyalty," and entered an order denying reinstatement and limiting backpay. *Id.* at 666-667.

Here, the record establishes that Johnson engaged in a course of conduct aimed at getting rid of Aerotek as a competitor in the local market. (*See e.g.* Johnson 219:1-220:11 [testifying he targeted Aerotek for a salting campaign because his file for open electrician jobs keeps getting thinner], 228:7-229:16 [Johnson testifying about sending generic resumes en masse to Aerotek], 267:9-14; Erwin 377:4-20 [testifying Johnson sent him into an Aerotek employee event with a hidden recording device where he repeatedly pressed Aerotek staff to disclose Aerotek's trade secrets, including billing rates and commission structure]; Shank 607:16-608:6 [same]; Jeratowski 549:13-550:9 [same]; RX 23 [Johnson's journal showing he tried to persuade Aerotek's customer to stop doing business with Aerotek]; GCX 1-A to 1-LL [showing Johnson filed a series of meritless charges against Aerotek during a six-month period]; *see also Titus Elec. Contr., Inc.*, 2011 NLRB LEXIS 558, 14-15 (Sept. 29, 2011) (pursuant to *Toering Electric*, "the employer may contest the genuineness of the application through various kinds of evidence").

There is no dispute Johnson tried to convince Interstates to stop doing business with Aerotek. (*See* GCCE pp. 1-2). The parties agree Aerotek had an existing contractual relationship with Interstates as of February 2012, under which Aerotek agreed to supply labor to Interstates for a project at a Tyson Foods plant located in Council Bluffs, Iowa. (*See e.g.* JTX 5).

Despite his knowledge of the Aerotek-Interstates relationship, Johnson described how he appeared in person at the Interstates office late in the afternoon on February 29, 2012, and addressed Lee Heitmann, Interstates Division Manager, by offering to "cut out the middleman,"

the "middleman" being Aerotek, and instead have the Union refer electricians to Interstates. (RX 23 p. 2). After Heitmann responded to Johnson by stating that Aerotek was doing a "great job," Johnson filed another charge against Aerotek, and then a few days later, Johnson contacted Larry Den Herder, owner of Interstates. (RX 23 p. 2). In his message to Den Herder, Johnson again proposed that he could cut out Aerotek and offer "direct assistance in the way of manpower to the Tyson Foods Project they currently have as there are already IBEW members working for them at that job." (RX 23 p. 2).

The necessary implication of Johnson's message to Aerotek's client, Interstates, was that all of Aerotek's employees on the job were willing to quit Aerotek, and instead be employed through the Union. (*See* RX 23 p. 2). Johnson did not propose that Aerotek's employees would continue on with Aerotek and simply be organized and represented by the Union, by contrast, Johnson was explicit that he wanted to completely "cut out" Aerotek. (RX 23 p. 2). Moreover, Johnson's proposal to Interstates meant that at the same time Aerotek's employees quit their jobs with Aerotek, Interstates should terminate its contract with Aerotek and replace it with a new contract between Interstates and the Union. (*See* RX 23 p. 2).

Although Johnson's journal entries alone sufficiently demonstrate that his conduct was inconsistent with an interest in employment with Aerotek, contrary to the GC's characterization, the ALJ did not rely solely on Johnson's two journal entries. (*See* GCCE pp. 1-2; ALJD pp. 1, 2:17-25, 4:29-36, 8:10-13, 12:27-29). Johnson testified at the hearing that he blamed Aerotek for the decrease in the Union's business in the local market. (*See* Johnson 219:3-19.) When asked why he targeted Aerotek for a salting campaign, Johnson described the Union's struggle in the local market:

[E]ach time there is an electrical contractor that posts something in the newspaper, we photocopy it and put it into a file and if you go back ten years, that file was about an inch

and a half thick, and you can see the progression in the file cabinet of each year of those files getting smaller and smaller and smaller.

(Johnson 219:9-19). As Johnson explained, over the course of the last ten years, the number of contractors who used the union for their labor needs has continued to dwindle because of, in Johnson's opinion, the existence of staffing companies such as Aerotek. (*See id.*). Johnson's testimony shows his purpose from the beginning was to drive Aerotek out of the local market. (*See id.*).

Additional facts showing Johnson lacked a genuine interest in employment with Aerotek, include Johnson's testimony that if hired by Aerotek, he would have quit if it was no longer deemed a "viable" target. (*See* Johnson 231:13-25, 268:17-270:7, 275:5-278:15, 290:24-294:12; RX 24; *see also* Jankowski 321:23-323:13 [testifying he received Construction Organizing Membership Education Training "COMET" training from the Union]); *compare id. with Toering Electric*, 351 NLRB at 225 (noting the IBEW's COMET manual provides guidance to local unions for conducting salting campaigns and emphasizes a "strategy of imposing such costs on a nonunion employer as will cause it to scale back its business, leave the salting union's jurisdiction entirely, or go out of business altogether."). Johnson testified in detail how, if hired, he would have quit Aerotek if Aerotek were "deemed a non-viable organizing target," by the local executive board. (Johnson 231:13-25, 290:24-294:12; *see also* Johnson 268:17-270:7, 275:5-278:15); *Oil Capitol and Sheet Metal*, 349 NLRB 1348, 1352 (2007) (recognizing that "unlike typical applicants, it is often the union's objectives in the salting campaign that dictate how long the salt remains").

Johnson's submitting "generic" resumes *en masse* to Aerotek as part of his salting campaign, especially when he lacked the permission of at least one applicant to submit the resumes to Aerotek, supports that Johnson's campaign was in bad faith. (Johnson 229:1-24;

Winge 329:16-18, 336:10-17); *see also e.g. Toering Electric*, 351 NLRB 225. To the extent the GC claims Johnson had authority to submit the resume of Alan Winge to Aerotek because Johnson was "generally authorized" to use Winge's resume in the salting campaign, the Board in *Toering Electric* rejected the same argument. *See Toering Electric*, 351 NLRB at 234 ("Although Jendrasiak testified that these five alleged discriminatees authorized the use of their resumes for salting and organizational purposes, he did not testify whether he was authorized to use their resumes for the purpose of obtaining work for them with Toering Electric. . . . Thus, there is no evidence that these alleged discriminatees were genuinely interested in seeking an employment relationship with Toering Electric.").

The existence of Johnson's litigation based salting campaign targeting Aerotek, combined with Johnson's efforts in having a group of employee salts armed with a concealed recording device attempt to obtain information on Aerotek's trade secrets, billing rates, and commission structure further evidences that Johnson's conduct was inconsistent with an employee relationship. (*See* Answering Brief of Respondent Aerotek, Inc., II. Argument § 1.A. p. 6, *supra*). As described by the ALJ, Johnson's conduct in trying to cut out Aerotek from its Interstates contract was "obviously inconsistent with the duties of an employee." (See ALJD 12:27-30); *see also generally e.g. Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 535 (D.C. Cir. 2006) (reversing board's finding unfair labor practice in termination of employee for statements that lay-offs left "gaping holes in the business"); NLRB GC Advice Memorandum (Assoc. Gen. Counsel Barry J. Kearney, June 27, 2012) (under *Jefferson Standard*, where an argument could be made that a flyer was so disparaging that the employees who distributed it lost Section 7 protection, the Region should dismiss allegations the employer unlawfully interrogated and threatened to discipline employees for distributing the flyer).

The GC asks that the Board do away with the requirement that Johnson have an actual or anticipated economic relationship with Aerotek. (*See* GCCE pp. 5-7). Instead, the GC argues the Board should award Johnson punitive relief in the form of backpay notwithstanding his lack of interest in establishing an economic relationship with Aerotek and his admitted competitive targeting of Aerotek and attempts to harm Aerotek economically. (*See id.*; *see also e.g.* RX 23 p. 2; Johnson 219:9-19).

The ALJ's decision to limit Johnson's back pay and deny him reinstatement as a result of his disloyal conduct is consistent with the policies and purposes of the Act. *See e.g. NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953); *Toering Electric*, 351 NLRB 225; *Oil Capitol*, 349 NLRB 1348. Weighing in on the issue of employee loyalty, the Supreme Court has said that the Act is not intended to "weaken the underlying bonds and loyalties of employer and employee." *Local Union No. 1229, IBEW*, 346 U.S. at 473; *see also Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enf. sub. nom. Nev. Serv. Emples. Union, Local 1107, SEIU*, 358 Fed. Appx. 783 (9th Cir. 2009) (applying the Supreme Court's assessment of the Act's purpose and explaining, "finding that employees' communications are related to a labor dispute or terms and conditions of employment does not end the inquiry. Otherwise-protected communications with third parties may be so disloyal, reckless, or maliciously untrue as to lose the Act's protection.").

Denying Johnson Section 2(3) protection because he lacked the requisite anticipation of an economic relationship with Aerotek is consistent with the remedial provisions of the Act because there is "no provision in the Act for punitive remedies." *Toering Electric*, 351 NLRB 225. The Act is not a penal statute and awarding Johnson a windfall remedy of back pay or

instatement, benefits he would not have obtained absent the claimed discrimination, would be penal and contrary to the intent of the Act. *See id.*

B. Aerotek would not have hired Johnson, and would have ultimately terminated him, regardless of whether he supported the Union.

Even if the GC had met his burden of proving Johnson anticipated an economic relationship with Aerotek, which he did not, awarding Johnson backpay for any period or ordering Aerotek to hire Johnson would be penal because the record unequivocally establishes Aerotek would not have hired Johnson regardless of union support and would have terminated him because of his disloyal conduct. (*See e.g.* RX 28 pp. 7-8; RX 29 pp. 7-8; Hinze 461:9-469:9; Shank 117:2-118:23; RX 23; JTX 4-6; RX 17; Hinze 450:17-21; RX 2 p. 88).

Contrary to the GC's claim, the ALJ did not "assume" Johnson was trying to supplant Aerotek's work with Interstates, Johnson's admitted own words explicitly tell about two specific attempts Johnson made to cut out Aerotek from the Interstates project. (*See* GCCE pp. 5-6; Johnson 267:9-14; RX 23 p. 2).

Johnson's conduct was at odds with the loyalty Aerotek required of its employees. (*See* RX 28 pp. 7-8 [Contract Employee Handbook prohibiting disclosing business secrets and conducting self in unsatisfactory manner] and RX 29 pp. 7-8 [same]; RX 1 [listing of Aerotek competitors]; Shank 115:24-118:21 [testifying about the competitive market and how Aerotek's revenues depend upon contracts with business customers]; *see also generally* JTX 5 [stipulation that Aerotek had contract with Interstates]); *MeccaTech, Inc. v. Kiser*, 2008 U.S. Dist. LEXIS 32511, *18-19 (D. Neb. April 21, 2008) (under Nebraska law, an employee breaches his duty of loyalty to his employer when he assists another firm to engage in competition with the employer and a duty exists "irrespective of the existence of a covenant not to compete or non-solicitation clause"). The Director of Business Operations at Aerotek's Omaha office, Travis Hinze, testified

how an employee could be terminated for disclosing business secrets, and how it was impossible to specifically list all unacceptable forms of behavior but any questionable behavior should be brought to an account manager or Hinze. (Hinze 461:9-464:9). Jacob Shank testified about the competitive nature of Aerotek's business, particularly, the need for Aerotek to beat competitors in providing labor to business customers. (*See e.g.* Shank 117:2-118:23).

In prior Board decisions addressing *malum in se* conduct similar to Johnson's conduct, the Board had no difficulty inferring a violation of company policy in the absence of evidence of "an express policy or past practice" dealing with the misconduct. *Smucker Co.*, 341 NLRB 35, 36, *enfd* 130 Fed. Appx. 596 (3d Cir. 2004); *see also Dresser-Rand Company*, 358 NLRB No. 34, *114, 193 LRRM 1077 (Feb. 18, 2011) (adopting ALJ's finding that applicant's conduct in trying to economically harm company "reveals a depraved state of mind consistent with actual malice. It does not merit protection under the Act."). In *Smucker*, the Board specifically held that even in the absence of any evidence the company had an express policy or practice prescribing the alleged discriminatee's conduct in cheating on a preemployment exam, it was inherent that the employer's purpose in giving the exam would imply a policy prohibiting cheating on the exam. 341 NLRB at 36.

Before addressing the fact that Aerotek would have terminated Johnson for his disloyal conduct, the GC first has the burden to prove that antiunion animus contributed to Aerotek's decision not to hire Johnson. "Specifically, there must be a showing that the employer maintained animus against such union membership or sympathy, and the employer refused to hire the applicant because of such animus." *Titus Elec. Contr., Inc.*, 2011 NLRB LEXIS 558, *12-14 (Sept. 29, 2011); *see also Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1058-1060 (D.C. Cir. 2003) (an unlawful motive must be proved to establish a violation of § 8(a)(3),

and disparate impact cannot be relied upon alone to establish such a violation, at least where the Board had separately found that the respondent was not motivated by unlawful animus).

The ALJ and GC cannot identify a single instance in which Aerotek harbored union animus, instead their position is that because Aerotek's legitimate nondiscriminatory system did not result in Johnson's hiring, Aerotek is strictly liable. This is so notwithstanding the admitted facts that Aerotek had more than 500 candidates for only 37 electrician positions and Aerotek filled the 37 open positions by hiring union members at a rate of about 49%. (*See e.g.* JTX 4 through 6; RX 17; Shank 105:19-112:20, 160:2-165:14, 198:10-199:4; Johnson 241:17-245:14; GCX 3 pp. 7, 9-13, 6-71, 81, 90, 105-106, 129-130, 137-144). There is also no dispute that at the same time the GC alleges Aerotek discriminated against Johnson, Aerotek knowingly rehired union supporters who were openly supporting the Union. (*See e.g.* ALJD p. 7 n. 10; JTX 4 and 6; Shank 111:18-112:18; 168:13-22; Stock 385-388; Coats 410:6-22).

Additionally, Aerotek established that Johnson's wage history sent a red flag in Aerotek's hiring system for placement in any of the electrician jobs Aerotek had available during the period, and thus Johnson was not the best candidate. (*See* RX 2 p. 88; RX 18; JTX 4 and 6; GCX 3; Shank 102:3-21, 139:11-142:24, 209:8-210:12; Mehmen 576:6-577:21).

Thus, because Aerotek would not have hired Johnson in the first instance, and because Aerotek would have terminated him for his disloyal conduct, Johnson is not entitled to back pay or reinstatement.

C. The GC's theory impermissibly changes the theory alleged in the complaint.

The Board has indicated that "[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in

midstream without giving respondents reasonable notice of the change." *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (internal citations omitted). In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the theory ultimately applied. *See generally Sierra Bullets, LLC*, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when the General Counsel expressly litigated case on narrow theory).

In his cross-exceptions, the GC tries to distinguish cases cited in the ALJD on the basis that in some of those cases, the GC failed to meet its burden of proving a *prima facie* case of discrimination. (*See* GCCE p. 4-5). However, the cases are not distinguishable on that basis and the ALJ in this action erroneously concluded that the GC met his burden of proving a *prima facie* case of discrimination. Aerotek agrees with the GC that the ALJD is inconsistent, and Aerotek submits that the inconsistency is a result of the ALJ's failure to require the GC to meet his burden of proving Johnson was a genuine applicant for employment with Aerotek.

The GC's theory assumes the ALJ was correct in concluding the GC satisfied his burden of proving a *prima facie* case of discrimination. The GC's assumption is incorrect for all of the reasons previously stated in this brief, *supra*. In addition, the GC's theory is not based upon the theory of discrimination stated in the Consolidated Complaint and litigated by the parties, specifically that Aerotek discriminated against Johnson because he assisted the Union and engaged in concerted activities. Instead, the GC's theory depends upon the precise theory that Aerotek discriminated against Johnson because he is a "union organizer." (*Compare* ALJD p. 7 n. 10, 10:27-30 [acknowledging Aerotek knowingly rehired active Union supporters but inferring

discriminatory motive for failing to hire a "voluntary organizer"] *with* ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING ¶¶ 5(b) and (c) [alleging Aerotek refused to consider for hire or hire Johnson because Johnson "assisted the Union and engage in concerted activities, and to discourage employees from engaging in these activities."]).

Although the distinction may be slight, it is significant that the GC does not now rely on the theory that Aerotek discriminated against Johnson because he assisted the Union and engaged in concerted activities, since Aerotek unquestionably refuted such claim by establishing it knowingly rehired or offered to rehire Andrew Stock, Joseph Stock, and David Erwin *after* they identified to Aerotek that they were assisting the Union and engaging in concerted activities. (*See* Shank 111:18-112:18, 168:13-22; Stock 385-388:11; Coats 410:6-22; RX 23 [4/12/12 entry]; JTX 6 ¶ C.1; RX 31 [8/01/12 and 8/02/12 entries]; ALJD 3:29-30; ALJD p. 7 fn. 10). Unable to account for Aerotek's indifference to hiring union supporters, the GC now relies on the theory that Aerotek discriminated against Johnson because he is a union *organizer*.

The GC tramples Aerotek's due process rights by pursuing a theory of discrimination neither claimed nor litigated. The GC's cross-exceptions should be rejected because they require the assumption that the GC proved a *prima facie* case, not because Johnson assisted the union or engaged in concerted activity, but because Johnson is a union organizer, which impermissibly changes the theory alleged.

D. Even if the Board upholds the ALJ's erroneous conclusion that Aerotek owes Johnson backpay, the specific period of backpay should be decided in the compliance stage of proceedings.

In cases such as this, where it is established that Johnson was a salt, it is improper to presume Johnson would have continued employment with Aerotek for any period of time. *Oil Capitol*, 349 NLRB 1348. Instead, the GC must present affirmative evidence to meet his burden

of proving the reasonableness of the claimed backpay period. *Id.* at 1353. Only after the GC satisfies his burden of proving the amount of gross backpay does the burden then shift to Aerotek "to establish affirmative defenses that would negate or mitigate its liability, such as a willful loss of earnings." *Id.* at 1351; *see also id.* at n. 22 (stating that if the discriminatee's status as a salt is not litigated in the unfair labor practice stage of litigation, the company may introduce evidence on this point in the compliance proceeding).

Oil Capital makes it clear that the burden of proof in salting cases rests with the GC to prove the alleged discriminatee/salt would have worked during the claimed backpay period. *Id.*, 349 NLRB 1348. Only upon the GC's satisfying this burden does the burden shift to Aerotek to prove an affirmative defense that it would have terminated Johnson prior to the end of the claimed period. *See id.*; *see also e.g. Marshal Durbin Poultry Co.*, 310 NLRB 68, n.7 (1993) (when the proper remedy was a make-whole order from the time of the discriminatee's discharge to the time the company learned of the discriminatee's misconduct, the specific period was left to be determined in the compliance stage of proceedings), *affirmed in part and reversed in non-relevant part by Marshal Durbin Poultry Co. v. NLRB*, 39 F.3d 1312 (5th Cir. 1994).

Consistent with *Oil Capital*, if the Board upholds the ALJ's erroneous conclusion that Aerotek owes Johnson backpay through the date Aerotek learned of Johnson's misconduct, the exact date on which Aerotek learned of Johnson's misconduct should be determined in the compliance stage after the GC satisfies his burden of proving Johnson would have worked during the claimed period. *See id.*, 349 NLRB 1348.

2. **The Record Supports the ALJ's Finding that Johnson's Conduct was Inconsistent with the Duty of Loyalty Owed by an Employee.**

Johnson should not be treated as an employee solely for the purpose of penalizing Aerotek. It is arbitrary for the GC to argue Johnson was a genuine applicant for employment

with Aerotek and Aerotek owes him back pay for the period of August 1, 2011, through October 30, 2012, but then to also argue Johnson was excused from the duty of loyalty owed by an employee to Aerotek during the same period. (*See* GCCE pp. 5-7). The GC admits that on February 29, 2012, Johnson attempted to steal Aerotek's business and interfere with its Interstates contract. (GCCE pp. 1-2; *see also* RX 23 p. 2). If Johnson was a prospective employee of Aerotek at the time he interfered with Aerotek's business, then the duty of loyalty must apply. If Johnson was not even a prospective employee, then there can be no § 8(a)(1) and (3) violation.

Here, Johnson did not attempt to simply lawfully represent Aerotek's employees who were working at the Interstates job, rather, Johnson was attempting to cut Aerotek completely out of the equation while simultaneously claiming to be a genuine applicant for employment and deserving of back pay from Aerotek. *See e.g. Five Star Transp.*, 349 NLRB 42, 46 (2007) (noting, "The Court in *Town & Country* did not suggest that the salts had no duty of loyalty to the prospective employer.").

Johnson's misconduct consisted of ruthless disloyalty to his supposed prospective employer. *See generally e.g. Arlington Electric*, 332 NLRB 845 (2000) (a union and/or its members may communicate with third parties to advance such legitimate interests when the communication is not so disloyal, reckless or maliciously untrue to lose the Act's protection). This case is unique because Johnson's application to Aerotek was part of a salting campaign aimed at economically harming the Union's competitor. The unfortunate reality is that some salting campaigns, such as the campaign spearheaded by Johnson, are aimed at cutting out the nonunion competition by involving companies in costly litigation prosecuted by the Board. *NLRB v. Beacon Elect. Co.*, 2012 US App. LEXIS 9188, *45 (6th Cir. 2012) (not recommended

for full text publication). The IBEW's tactic as used by Johnson in his salting campaign targeting Aerotek is precisely the problem that prompted the Board's clarification in *Toering Electric*. See *Beacon Elect.*, 2012 US App. LEXIS 9188.

The law is well-established that reinstatement is not a proper remedy in instances of serious misconduct. See *Smucker*, 341 NLRB at 36 (awarding backpay until the date of the hearing when the company learned the alleged discriminatees cheated on a preemployment test but refusing to order reinstatement). In determining whether backpay and reinstatement are appropriate where an employee engaged in misconduct, the Board "looks to the nature of the misconduct and denies reinstatement in those flagrant cases 'in which the misconduct is violent or of such character as to render the employees unfit for further services.'" *C-Town*, 281 NLRB 458 (1986), quoting *J. W. Microelectronics Corp.*, 259 NLRB 327 (1981).

Where an alleged discriminatee's conduct is so flagrant so as to render the discriminatee unfit for further service with the company, the company is not required to instate the discriminatee and the discriminatee's backpay is cut off as of the date of the misconduct. See *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992) (discriminatee forfeited right to reinstatement and backpay as of date discriminatee threatened coworker); *Precision Window Mfg., Inc. v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992) (discriminatee forfeited right to reinstatement by threatening his supervisor and by lying at the administrative hearing).

Any argument by the GC that Johnson's conduct was not of such severe nature that he was not unfit for employment with Aerotek is contrary to the reasonable inferences drawn by the ALJ in observing the evidence and witnesses, the undisputed record evidence, and Board precedent. See generally *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)

(ALJ's inferences are entitled to deference where they are supported by substantial evidence on the record as a whole).

Johnson's conduct is not vindicated by the fact that Aerotek had not previously confronted such conduct on the part of an employee. The fact that no employee has previously engaged in such quintessentially disloyal conduct cannot be used to force Aerotek to hire such a disloyal applicant. *See e.g. North American Dismantling*, 341 NLRB at 667 (holding employer not violate act where refused to hire union supporter who had attempted to cut employer out of relation with employer's client). To hold otherwise is contrary to the purpose and intent of the Act. *See Local Union No. 1229, IBEW*, 346 U.S. 464.

The GC's argument that Johnson was somehow excused from the duty of loyalty owed to Aerotek because he was unable to obtain employment with Aerotek is contrary to the purposes of the Act and established Board precedent. *See e.g. Associated Advertising Specialists*, 232 NLRB at 54 (1977) (alleged discriminatee's "union activities did not accord him any immunity from the rules which applied to all other employees"); *Five Star Transp.*, 349 NLRB at 46 ("We also disagree with the dissent's suggestion that there is no duty of loyalty owed to a prospective employer by [the] applicants. Just as an employer legitimately wants extant employees to be loyal, so a prospective employer legitimately wants prospective employees to be loyal. In both cases, the goal is the same--not to have disloyal employees on the payroll. Indeed, *Town & Country*, supra, supports this view."). The record here supports the ALJ's conclusion that Johnson's conduct was inconsistent with the duty of loyalty owed by an employee.

III. CONCLUSION

Respondent Aerotek respectfully submits that for the reasons set forth above, the GC's cross exceptions must be rejected and the Board should affirm the ALJ's conclusion that Aerotek is not required to offer employment to Johnson. Furthermore, the Board should reject the ALJ's proposed order requiring Aerotek to provide Johnson backpay through February 29, 2012, and instead enter an order that Aerotek is not required to provide backpay to Johnson.

Respectfully submitted this 31st day of May, 2013.

AEROTEK, INC.

BY: HARDING & SHULTZ, P.C., L.L.O.
WILLIAM A. HARDING #11709
KELLY M. EKELER, #24141
800 Lincoln Square
121 S. 13th Street
Lincoln, NE 68501-2028
(402) 434-3000

and

FREEMAN & FREEMAN P.C.
MARK FREEMAN #013635
100 Park Ave. Suite 250
Rockville, MD 20850
(301) 315-0200

BY: s/Kelly M. Ekeler
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2013, I electronically filed Respondent's Answering Brief to the Acting General Counsel's Cross-Exceptions and sent copies via *e-file* and *e-mail* to:

Gary Shinnors
Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Rm. 5300
Washington, DC 20570-0001
Via e-file at: <http://www.nlr.gov>

Mike Werner, Esq.
Counsel for the Acting General Counsel
National Labor Relations Board
Region 14, Subregion 17
8600 Farley Street, Suite 100
Overland Park, KS 66212-4677
Via e-mail to: Michael.werner@nlrb.gov

Lori Elrod, Esq.
Blake & Uhlig, P.A.
753 State Ave., Suite 475
Kansas City, KS 66101
Attorneys for International Brotherhood of Electrical Workers
Via e-mail to: LDE@blake-uhlig.com

BY: s/Kelly M. Ekeler
One of Said Attorneys