

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Richfield Hospitality as Managing Agent for Kahler
Hotels, LLC

Respondent

and

UNITE HERE Local 21

Charging Party

Cases 18-CA-151245

EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS ON BEHALF OF THE
GENERAL COUNSEL

Submitted by:

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In response to the exceptions being filed by Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC (Respondent) in the above-referenced case, Counsel for the General Counsel (General Counsel) files the following limited exceptions. These exceptions are generally restricted to what appear to be inadvertent errors in Administrative Law Judge (ALJ) Steckler's proposed Conclusions of Law and the underlying decision. The final exception addresses a relatively minor remedial issue involving an employee who was found by ALJ Steckler to have been denied hours in response to her union activity. In all other respects, ALJ Steckler's well-reasoned and exhaustive decision should be summarily affirmed by the National Labor Relations Board (Board).

Exception 1: Administrative Law Judge (ALJ) Steckler Erred by Failing to Include the Information Request Violations in Her Conclusions of Law

Argument: ALJ Steckler correctly found that Respondent committed two violations of Section 8(a)(5) by failing to timely respond to UNITE HERE Local 21's (Union) requests for vacation and health care information. (ALJD at 36–42.)¹ Her reasoning regarding these violations is sound and should be summarily affirmed by the Board. However, while ALJ Steckler included these violations in her recommend Order (ALJD at 62) and in her proposed Notice to Employees regarding these violations (ALJD Appendix at 2), she neglected to include this violation in her conclusions of law. (See ALJD at 61.) Accordingly, the General Counsel requests that ALJ Steckler's proposed

¹ References to ALJ Steckler's underlying decision will be marked as "ALJD." References to the underlying transcript from the administrative hearing will be marked as "Tr."

Conclusions of Law be amended to include the information request violations, consistent with her analysis, recommend order, and proposed notice to employees.

Exception 2: ALJ Steckler Erred by Failing to Include the Unit Description in Her Conclusions of Law

Argument: As with the General Counsel’s First Exception, this exception appears to be based on an inadvertent error in the ALJ’s proposed Conclusions of Law. Conclusion of Law 3. does not include the unit description. The General Counsel requests that the unit description from ALJ Steckler’s recommended Order on pages 62 and 63 of her decision be included in the final Conclusions of Law issued by the Board.

Exception 3: ALJ Steckler Mistakenly Listed Employee Kelli Johnston as the Employee who Overheard Threats Made by Respondent’s Supervisors to an Employee

Argument: In her analysis, ALJ Steckler mistakenly lists employee Kelli Johnston as the employee who overheard HR Managers Michael Henry and May Kay Costello threatening an employee in the human resources office. (ALJD at 29:17–29.) However, it is clear from ALJ Steckler’s earlier discussion (ALJD at 29:3–14) and the record evidence (Tr. 352–55) that the support for this allegation comes from employee Kelly Schroeder, not Kelli Johnston. Accordingly, the General Counsel requests that this portion of the underlying decision be corrected.²

Exception 4: ALJ Steckler Erred by Ordering an Oil Capitol Remedy for Union Vice-President Kelli Johnston; the Board Instead Should Utilize Its Standard Backpay and Instatement Remedy

Argument: ALJ Steckler properly found that Respondent denied hours to Union Vice-President Kelli Johnston in the bartending and housekeeping departments at its various properties in retaliation for her union activities. (ALJD at 53–60.) As with the

² The identity of this listener is not relevant to any of the other violations, other than the one at issue here.

information request violations discussed above, the Board should summarily affirm ALJ Steckler's finding as to the merit of this allegation.

ALJ Steckler committed reversible error, however, by ordering that Ms. Johnston's remedy be limited, as outlined in the Board's decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007). (ALJD at 61.) In that case, the Board addressed the question of whether union "salts" were entitled to the rebuttable presumption of indefinite employment. The Board held that they were not, noting that salts are uniquely employed to accomplish union objectives (typically, organizing a workplace) and thereafter often leave employment. Given the unique circumstances of salts, the Board adopted a modified remedy, whereby the General Counsel is required "to present affirmative evidence that the *salt/discriminatee*, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification." *Id.* at 1349 (emphasis added). Since the Board issued this decision, it has strictly limited its application to situations involving "salts," and has held that a finding of "salting" is a necessary prerequisite to an *Oil Capitol* limitation. *See, e.g., Tradesman International, Inc.*, 351 NLRB 579, 585–86 (2007) (limiting *Oil Capitol* to proven salts and allowing employer to argue in compliance that additional employees may be salts); *McBurney Corporation*, 351 NLRB 799, 801–02 (2007) (same), *enforced sub nom., Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO v. NLRB*, 377 F. App'x 125 (2d Cir. 2010). Indeed, the General Counsel has been unable to find a single decision, other than the instant decision, where an *Oil Capitol* remedial limitation has been found to be appropriate in the absence of a salting campaign.

ALJ Steckler did not find that Ms. Johnston was a salt before applying the limited *Oil Capitol* remedy. Respondent has not argued to date that Ms. Johnston is, was, or has ever been a salt. And the evidence is crystal clear that she is not a salt, as defined by the Board. She has worked for Respondent for sixteen years, and while she has held various union roles during this time, the evidence adduced at hearing clearly shows that she was not hired to achieve a specific union objective during an organizing campaign. (Tr. 313–15.) Indeed, Respondent was organized well before Johnston began working at the facility. (Tr. 131.) Accordingly, she does not qualify as a salt under established Board precedent. *Oil Capitol Sheet Metal, Inc.*, 349 NLRB at 1349 n.5 (defining a “salt”). As such, she is entitled to the typical presumption of indefinite employment as part of her remedy. *See, e.g., Packaging Techniques, Inc.*, 317 NLRB 1252, 1252 (1995) (applying traditional remedy to failure to hire case). And therefore the Board should apply a traditional remedy as in any other failure to hire case.

Dated: July 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Exceptions and Brief in Support of Exceptions on behalf of the General Counsel was filed via e-filing and served on July 21, 2016, by email on the parties whose names and addresses appear below.

Served via Email

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