

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 23, 2017

TO: Charles Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Ulliman Schutte Construction, LLC
05-CA-188093

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The Region requested advice on whether this case, in which the Employer unlawfully refused to hire a salt, presents an appropriate vehicle to urge the Board to overrule its decision in *Oil Capitol Sheet Metal*,¹ and whether the salt-discriminatee properly mitigated his damages under *Contractor Services, Inc.*² We conclude that this case presents an appropriate vehicle to urge the Board to overturn *Oil Capitol*, and that the salt properly mitigated his damages under *Contractor Services*. Accordingly, the Region should issue a consolidated complaint and compliance specification in this matter, absent settlement, and urge the Board to reconsider its decision in *Oil Capitol* and return to the allocation of evidentiary burdens set forth in *Dean General Contractors*.³

FACTS

I. Background

Operating Engineers Local 542 (the “Union”) has been engaged in an ongoing effort to organize nonunion employers operating in the construction industry. Part of this effort includes salting campaigns, where Union salts apply to work for nonunion construction contractors and, if offered employment, work for the nonunion contractor, garner workers’ support for the Union, and eventually attempt to unionize

¹ 349 NLRB 1348 (2007), *petition for review dismissed sub nom. Sheet Metal Workers Local 270 v. NLRB*, 561 F.3d 497 (D.C. Cir. 2009).

² 351 NLRB 33 (2007).

³ 285 NLRB 573, 573-75 (1987).

the workplace. The evidence shows that the Union's salting campaigns have led to the organization of at least three nonunion contractors.

The Union has unwritten policies regarding its salting campaigns, including salts' job applications, the amount of time a salt will work for a nonunion employer if the salt gains employment, and Union incentives for salting.

The first policy, concerning salts' job applications, generally requires salts to apply to nonunion employers as genuine applicants using a resume that contains the salt's real name, full work history, union affiliation, and organizing activities. Under this policy, salts may also submit an "alias" job application to the same nonunion employer. The alias application contains a fictitious name and fictitious work experience, and it lacks any indication of union affiliation. Typically, a salt's alias application lists about half as much relevant work experience as the salt's genuine application, making the alias a less qualified applicant than the salt. The Union uses the alias applications to support unfair labor practice charges should an employer refuse to consider or hire the salt based on the genuine application, while considering or offering employment to the salt's alias.

The second policy concerns the amount of time a salt will work for a nonunion employer if the salt gains employment. Namely, once employed with a nonunion employer, a salt should continue to work for the employer until the workforce is organized, the salt is terminated, or it becomes evident that organizing efforts are futile. The record establishes that Union salts have worked for nonunion employers for long and short periods of time. For instance, the salt here ("Salt") has worked for a nonunion employer as long as nine months but as little as forty-five minutes. In the former instance, the Salt voluntarily quit after the employer signed a collective-bargaining agreement with the Union. In the latter instance, [REDACTED] was dismissed shortly after disclosing his union affiliation.⁴

The third policy concerns salting incentives. The Union pays salts a salary to apply for nonunion work and, if the salt is hired, to work the nonunion job. Salts keep whatever additional wages they earn while working for the nonunion employer. As a final point, if a salt gains employment with a nonunion employer whose worksite is located far from the salt's residence, the Union will pay for the salt's lodging at an extended-stay hotel or motel.

II. The Charge

⁴ Although the Union generally requires salts to list their union affiliation and organizing activities when applying as genuine applicants, salts have not always applied as "overt salts."

The Union filed the immediate charge alleging that the Employer, a nonunion construction contractor, violated Section 8(a)(3) by refusing to hire the Salt.

On May 31, 2016,⁵ the Salt saw a job posting on Craigslist that sought a (b)(6) (b)(7)(C) operator for a long-term project. The posting listed the Employer's name and contact information. The Salt had the relevant work experience, and (b)(6) applied for the position by emailing the Employer directly, submitting an online application through the Employer's website, and leaving a voicemail message at the phone number provided in the job posting. The Salt's resume, which the Salt included in both the email and online application, indicated that the Salt was certified to operate all types of (b)(6) (b)(7)(C) had approximately twenty-five years of (b)(6) (b)(7)(C) operating experience, and had approximately twenty years of salting experience. The Salt states that, if (b)(6) was hired, (b)(6) would have performed the job (b)(6) was hired for and also would have initiated a lawful organizing campaign.

Also on May 31, the Salt applied for the same job under an alias. The Salt emailed (b)(6) (b) alias resume to the Employer; (b)(6) did not submit an application for the alias through the Employer's website or call the Employer, acting as (b)(6) (b) alias, to express (b)(6) (b) interest in the job. The alias resume, in comparison to the Salt's actual resume, contained far less applicable experience. However, the alias resume lacked any indication of union affiliation.

On June 13, a project superintendent ("Superintendent") for the Employer contacted the alias about interviewing for the position. On June 16, the Superintendent met with the Salt, who was acting as the alias, and offered (b)(6) (b)(7)(C) a job. They agreed to a start date of June 21. About a week after the interview, the Salt, acting as the alias, called the Superintendent and turned down the job. Subsequently, the Salt, as (b)(6) (b)(7)(C), applied once more for the position by email. The Employer never contacted the Salt to interview (b)(6) (b)(7) or offer (b)(6) (b)(7)(C) a job. The Region has concluded that the Employer unlawfully refused to hire the Salt because of (b)(6) (b) union affiliation.

After not receiving a job offer from the Employer, the Salt continued to apply for work. In the seven months following the refusal to hire, the Salt applied to about twenty-seven jobs. This averages to nearly four jobs per month. The jobs to which (b)(6) applied were largely with nonunion employers, but (b)(6) did apply directly to a union job, and it is possible that (b)(6) (b) applied to more given that some of the job advertisements did not list the employer's name.

ACTION

⁵ All dates hereinafter occurred in 2016 unless stated otherwise.

We conclude that this case is an appropriate vehicle to urge the Board to overturn *Oil Capitol* and that the Salt properly mitigated (b) (6) (b) (7) damages under *Contractor Services*. The Region should issue a consolidated complaint and compliance specification in this matter, absent settlement.

I. This Case is an Appropriate Vehicle to Urge the Board to Overturn *Oil Capitol*

In determining whether a case presents an appropriate vehicle for overturning *Oil Capitol*, we have considered three factors: the case's procedural posture; the likelihood of succeeding on the merits of the underlying charges, i.e., on proving the unlawful refusal to hire; and the likelihood of meeting the General Counsel's burden under *Oil Capitol*.⁶ Regarding the first factor, the case is pre-complaint and thus raises no procedural concerns. Regarding the second factor, the Region has already determined that the Employer violated Section 8(a)(3) by refusing to hire the Salt. While we agree with the Region's merit determination, we discuss certain aspects of the charge below. Regarding the third factor, which we also discuss below, the case has a good likelihood of meeting the General Counsel's burden under *Oil Capitol*. As follows, this case is an appropriate vehicle to urge the Board to overturn *Oil Capitol*.

A. There is a Strong Likelihood of Succeeding on the Merits of the Refusal-to-Hire Allegation

In establishing that an employer unlawfully refused to hire a salt-applicant, the General Counsel must meet its burdens under both *FES*⁷ and *Toering Electric Co.*⁸ As mentioned above, we agree with the Region that the Employer unlawfully refused to hire the Salt. However, we find it pertinent to discuss in more detail why the *Toering Electric* burden will be satisfied.

Toering Electric requires the General Counsel to show that the salt-applicant was genuinely interested in employment.⁹ This burden has two components. First, the

⁶ *A.E. Rosen Electrical Co.*, Cases 03-CA-172907 et al., Advice Memorandum dated Oct. 20, 2016, at 3; *Halcyon, Inc.*, Case 03-CA-143136, Advice Memorandum dated Apr. 24, 2015, at 4.

⁷ *FES*, 331 NLRB 9 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002).

⁸ *Toering Electric Co.*, 351 NLRB 225 (2007).

⁹ *Id.* at 233.

General Counsel must show there was an application for employment.¹⁰ Second, if the employer produces evidence that “creates a reasonable question as to the applicant’s actual interest in going to work for the employer,” the General Counsel must also show, by a preponderance of the evidence, that the applicant was genuinely interested in seeking employment with the employer.¹¹

Here, it is clear that the Salt applied for the (b)(6) (b)(7)(C) operator position, and the Employer cannot raise a reasonable question as to the Salt’s actual interest in working for the Employer. In its position statement, the Employer argues that the Salt was not interested in employment with the Employer because the Salt was already employed by the Union. This argument is not persuasive. The Salt’s job for the Union mandated that (b)(6) seek employment, and work for, nonunion contractors such as the Employer. Thus, the Salt could have maintained both jobs with no conflict.¹²

Other evidence in the record further undermines the Employer’s ability to reasonably question the Salt’s interest in employment. For instance, the Salt never refused a job from the Employer.¹³ Indeed, the job offer given to the Salt’s alias—which the salt, acting as the alias, declined—was not an offer to the Salt, who submitted (b)(6) (b)(7) own application that contained (b)(6) real name and qualifications. It would be inconsistent with the purposes and policies of the Act to require the Salt to accept the job offered to (b)(6) (b)(7) alias to prove genuine interest in employment. Had (b)(6) (b)(7) attempted to accept the offer as (b)(6) (b)(7) alias, (b)(6) (b)(7) acceptance of the offer would be dishonest, and the Employer may have had a lawful reason to terminate (b)(6) (b)(7).¹⁴

¹⁰ *Id.*

¹¹ *Id.*

¹² *Cf. id.* at 234 (citing fact that a salt was “fully employed elsewhere” as evidence that the salt was not genuinely interested in employment with the respondent).

¹³ *Toering Electric Co.*, 351 NLRB at 233 (finding that an employer may contest the genuineness of a salt’s application by pointing to evidence that the individual refused similar employment with the employer in the past).

¹⁴ *See ADS Electric Co.*, 339 NLRB 1020, 1020 n.3 (2003) (indicating that employers may lawfully terminate salts for misrepresenting their prior work experience); *see also Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002) (holding that a salt may lie about his status as a union organizer but not about his qualifications in applying for work); *Quality Mechanical Insulation, Inc.*, 340 NLRB 798, 816 (2003) (in the absence of exceptions, Board adopted administrative law judge’s decision that employer lawfully terminated salt, even

Notably, from a broader perspective, finding that the Salt's conduct raised genuine concerns about (b)(6) interest in employment would fail to comport with the rationale underling *Toering Electric*. In that case, the Board justified its "genuine interest" burden on the observation that some salting campaigns are designed with the sole purpose of using the Board's processes as an economic weapon to put nonunion employers out of business.¹⁵ Here, the Union's primary goal in its salting campaign, as evidenced by the Union's success in organizing workplaces through this method, was simply to organize workers. And, while the Union does have its salts submit alias applications to support unfair labor practice charges, those charges appear to be a mere contingency should the Employer engage in unlawful conduct that inhibits the Union's lawful organizing efforts.¹⁶

Even if the Employer raises a reasonable question as to the Salt's actual interest in employment, the evidence affirmatively shows that the Salt was genuinely interested in the (b)(6) (b)(7)(C) operator position. The Salt had a complete and updated resume,¹⁷ applied for the open position on (b)(6) own,¹⁸ and states that (b)(6) would have

though termination partially motivated by salt's union activity, because salt had applied for and accepted employment under an alias). *Cf. Solvay Iron Works, Inc.*, 341 NLRB 208, 208 (2004) (rejecting as pretextual the employer's defense that it lawfully refused to hire salt because he misrepresented his name); *Pollock Electric, LLC*, 349 NLRB 708, 710 (2007) (rejecting employer's argument that it terminated salt for falsifying his job application because record showed employer had not terminated another employee who falsified his application and because the employer had not reviewed other applicants' applications with same level of scrutiny).

¹⁵ *Toering Electric Co.*, 351 NLRB at 233.

¹⁶ The Employer argues that setting up employers for unfair labor practice charges is the Salt's "modus operandi." We reject this characterization. This case is clearly different from the situation in *Toering Electric*, where the union was trying to put nonunion businesses out of business, not unionize them. *Id.* By contrast, the evidence here shows that the Union (via the Salt, a number of times) has organized several employers through salting campaigns.

¹⁷ *Cf. Toering Electric Co.*, 351 NLRB at 234 (finding salts' interest in employment was called into question because their resumes were either out of date, "stale[,] or incomplete").

¹⁸ (b) (7)(A)

[REDACTED]

accepted the job had it been offered.¹⁹ Additionally, the evidence shows that the Salt has *actually worked* for nonunion employers (e.g., operating (b)(6) (b)(7)(C)) while salting for the Union. This evidence is sufficient to show that the Salt had a genuine interest in working for the Employer, and satisfies the General Counsel's burden under *Toering Electric*.

B. We Will Meet the General Counsel's Burden Under *Oil Capitol*

In *Dean General Contractors*, the Board held that traditional make-whole remedies and a presumption of continued employment would apply in the construction industry despite the industry's employment patterns.²⁰ In *Oil Capitol*, however, the Board rejected the rebuttable presumption of continued employment for salts working in the construction industry, and it announced a rule requiring the General Counsel to produce affirmative evidence that a salt discriminatee would have worked for a respondent for the backpay period claimed in the compliance specification.²¹ The Board also held that if the General Counsel fails to prove that the salt discriminatee would "still be employed by the [employer] if he had not been a victim of discrimination," reinstatement or reinstatement is an inappropriate remedy.²²

The Board in *Oil Capitol* specified the following five factors as relevant to proving the length of a salting discriminatee's backpay period:

(b) (7)(A)

¹⁹ (b) (7)(A)

²⁰ 285 NLRB at 573-75.

²¹ 349 NLRB at 1349.

²² *Id.* at 1354.

[T]he 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 assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns.²³

The evidence in the immediate case shows that the Salt would have worked for the Employer during the entire backpay period, which makes full backpay and reinstatement/reinstatement an appropriate remedy.

Regarding personal circumstances, the evidence shows that the Salt would have worked for the Employer as long as possible. This is because the Salt was aware that, on top of the wages earned directly from the Employer, [REDACTED] would have continued to receive [REDACTED] Union salary. This "double pay" increases the likelihood that [REDACTED] would have been willing to continue working for the Employer. Additionally, [REDACTED] was applying for a long-term job that would have provided some stability. Moreover, while the Employer's jobsite was a considerable distance from [REDACTED] residence, that fact is diminished by [REDACTED] knowledge that the Union would have paid for [REDACTED] lodging near the jobsite.

Regarding the Union's policies and practices concerning its salting campaigns, evidence shows that the Salt would have worked for the Employer for a significant period of time. Indeed, the Union's stated policy is for salts to work for the nonunion employer until the salt is fired, the workforce is organized, or organization is deemed futile. Here, nothing in the record contradicts the Union's or Salt's commitment to that policy.²⁴

Regarding historical data on the duration of employment for the Union's salts, evidence suggests that the Salt would have worked for the entire backpay period. The Salt has worked for nonunion employers for significant periods of time—as long as nine months. While the Salt has worked other jobs for significantly shorter periods, it

²³ *Id.* at 1349.

²⁴ *Leiser Construction, LLC*, Case 17-CA-23177, Advice Memorandum dated Oct. 20, 2009, at 6-7 (finding that salts lacked a serious commitment to long-term employment because the evidence showed that they voluntarily left nonunion jobs after short periods of time and without organizing the employer).

appears that in at least some of those instances [REDACTED] was fired for apparently unlawful reasons.²⁵

For the reasons above, it is clear that we can meet the General Counsel's burden under *Oil Capitol*. This conclusion, along with our conclusions that the procedural posture and strength on the merits are favorable, makes this case an appropriate vehicle for urging the Board to overturn *Oil Capitol*.

II. The Salt-Discriminatee Properly Mitigated Damages Under *Contractor Services*

In claiming a certain backpay liability, the General Counsel must show that the discriminatee made “an honest, good-faith effort to find interim work.”²⁶ This requirement applies in normal discrimination cases as well as salting cases where the discriminatee is a professional union organizer.²⁷ A salt-discriminatee does not per se fail to mitigate damages when the salt, under direction of the union, only applies to nonunion employers.²⁸ However, under *Contractor Services*, a salt fails to mitigate damages where the evidence shows a failure to make a “good-faith effort to follow [the salt’s] usual method of seeking employment, the union’s policies unreasonably limited the [salt’s] job search, or the [salt] otherwise unreasonably failed to mitigate his loss of earnings”²⁹

²⁵ *Joseph Lombardo, d/b/a Modern Graphics and Design*, Case 03-CA-25292, Advice Memorandum dated July 30, 2009, at 3, 5 (finding that historical data was sufficient to meet General Counsel’s burden under *Oil Capitol*, even though salts had typically only worked jobs for a few days, because salts had been unlawfully fired from those jobs shortly after revealing their identities as union organizers and evidence indicated that union intended for them to remain employed for as long as possible).

²⁶ *Contractor Services, Inc.*, 351 NLRB at 36 (citing *Chem Fab Corp.*, 275 NLRB 21 (1985), *enforced mem.*, 774 F.2d 1169 (8th Cir. 1985); *St. Barnabas Hospital*, 346 NLRB 731, 732 (2006)).

²⁷ *Ferguson Electric Co.*, 330 NLRB 514, 518 (2000), *enforced*, 242 F.3d 426 (2d Cir. 2001).

²⁸ *Contractor Services, Inc.*, 351 NLRB at 37 (citing *Ferguson Electric Co.*, 330 NLRB at 518).

²⁹ *Id.* at 37.

Here, the evidence shows that the Salt properly mitigated damages. First, [REDACTED] followed [REDACTED] usual method of seeking employment by applying for jobs through online job search tools, and [REDACTED] applied for at least one job with a unionized employer.³⁰ Second, the Union's policy of applying to nonunion employers did not unreasonably limit his job search. In *Contractor Services*, the union's policy of applying only to nonunion employers resulted in the salt-discriminatee applying to less than one job per month.³¹ Here, the Salt applied to about four jobs per month, and [REDACTED] did not strictly limit [REDACTED] search to nonunion employers. Third, the Salt did not otherwise unreasonably fail to mitigate [REDACTED] loss of earnings. While [REDACTED] did turn down a job offered to [REDACTED] alias, this was not a failure to mitigate damages. Requiring workers to mitigate damages by seeking and accepting work under an alias with fictitious work experience would be inconsistent with the purposes and policies of the Act, as it would encourage fraudulent, unprotected conduct.³² For the reasons above, the Salt properly mitigated damages under *Contractor Services* and is owed full backpay and reinstatement.³³

For the foregoing reasons, we find that this case presents a good vehicle to urge the Board to overturn *Oil Capitol*. We also find that the Salt properly mitigated damages. The Region should issue a consolidated complaint and compliance specification for reinstatement and backpay, absent settlement.

³⁰ Compare *Allied Mechanical, Inc.*, 352 NLRB 880, 880-82 (2008) (finding that the discriminatee's search for work was adequate, despite applying to fourteen jobs in eight months, when he, among other things, placed his resume online and searched online and paper job postings), with *Joseph Lombardo, d/b/a Modern Graphics and Design*, Case 03-CA-25292, Advice Memorandum dated July 30, 2009, at 7 (finding discriminatee failed to engage in an adequate job search when discriminatee averaged less than one employment "inquiry" per month during the contended backpay period, failed to fill out any job applications, and failed to utilize online resources).

³¹ *Contractor Services, Inc.*, 351 NLRB at 37-38.

³² See *Gary Krezman Electric Inc.*, Case 20-CA-32108, Advice Memorandum dated Apr. 11, 2005, at 12-15 (finding that lying on a resume to conceal identity and union affiliation is not protected activity).

³³ (b) (7)(A)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

/s/
B.J.K.

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