UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RE: AEROTEK, INC. V. NLRB,
883 F. 3d 725 (8th Cir. 2018) **BOARD CASE: 17-CA-071193**
on remand

BRIEF OF THE GENERAL COUNSEL

On June 8, 2018, the Board notified the parties that it had accepted the partial remand from the 8th Circuit in the above-captioned proceeding and solicited the parties to file statements of position with respect to the narrow remedial question raised on remand: namely, the appropriate remedy for a union salt whom the Respondent discriminatorily refused to hire but who engaged in arguable post-discrimination disloyal conduct.

The General Counsel urges the Board to find that the employee in question engaged in disloyal conduct that rendered him ineligible for instatement and to toll his backpay as of the day that the Respondent learned of this conduct. The General Counsel submits this recommendation with regard to the narrow remedial question on remand only, and without taking a position on the already-resolved merits of the case.

I. History of the Case

Briefly, the Board in the underlying case found that Respondent Aerotek, a staffing agency for the construction industry, violated the Act by refusing to hire four union salts. *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 2 (December 15, 2016). Approximately six or seven months after his application for employment, one of the salts, Brett Johnson, approached one of the Respondent's main clients. *Id*. at 2-3. He offered to "cut out the middleman" by having

workers referred directly to the client from the Union's hiring hall. *Id*. He repeated this offer to the client company's owner a week later. *Id*. The client declined, and the Respondent apparently never learned of Johnson's solicitation of the client until sometime during the unfair labor practice proceedings. *Id*. at 16.

The ALJ concluded that "Johnson's conduct in attempting to exclude [Respondent] from [client's] work is so obviously inconsistent with the duties of an employee that his backpay should be tolled" as of the date he first visited the client. *Id*. The ALJ did not order instatement for Johnson because of his conduct. *Id*.

The Board majority reversed the ALJ on this remedial question. The Board majority assumed, without deciding, that Johnson owed the Respondent some duty of loyalty at the time of his solicitation, even though he had not been hired as an employee. *Id*. at 3-4. The Board majority also assumed, without deciding, that his conduct was disloyal. *Id*. at 4. The Board majority concluded that the appropriate test to determine whether instatement was appropriate was the heightened "unfit for further service" test used when a former employee engages in post-discharge misconduct. *See, e.g.*, *Hawaii Tribune-Herald*, 356 NLRB 661, 662 (2011) (where employee engaged in misconduct that was not a factor in the employer's discriminatory action, Board will order reinstatement and full backpay unless employee's misconduct was "so flagrant as to render the employee unfit for further service"), *enforced* 677 F.3d 1241 (D.C. Cir. 2012). The majority reasoned that: 1) by the time Johnson approached the client, he likely knew that the Respondent was discriminatorily refusing to hire him and had a "natural human reaction to the unlawful acts," which was not so disproportionate or indefensible as to be disqualifying, and 2) there was nothing in his conduct to suggest that he would be disloyal as an employee. *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 4. The Board majority thus found, using the *Hawaii Tribune-*

Herald framework, that Johnson was not unfit for future employment. *Id*. The Board ordered backpay and instatement for all four union salts. *Id*. at 6. Member Miscimarra dissented on the remedy for Johnson, arguing that his conduct was akin to "contractual interference" and agreeing with the ALJ that his backpay should have been tolled as of the date of his first contact with the client. *Id*. at 7-9. He also argued that instatement was inappropriate. *Id*. Member Miscimarra cited several cases for the proposition that employers are not required to employ individuals who attempt to interfere with their business interests. *Id*. at 7-8.

The 8th Circuit enforced the Board's order in substantial part, but granted the petition for review with regard to the Board's proposed remedy for Johnson. *Aerotek, Inc. v. NLRB*, 883 F.3d 725, 734 (8th Cir. 2018). The 8th Circuit concluded that Johnson had approached the client as a competitor to the Respondent rather than as an aggrieved discriminatee; the court thus held that the Board abused its discretion in ordering full backpay and instatement for Johnson under the "wholly unfit for further service" standard and remanded for the Board to reconsider that portion of the remedy. *Id*.

II. Argument

In its original decision on the merits, the Board "assume[d], without deciding, that at the time of his conduct, Johnson had some duty of loyalty to the Respondent, although he was merely an applicant for employment, rather than an employee." *See Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 3-4 (December 15, 2016). The General Counsel argues that this is correct under extant Board law and urges the Board to make an affirmative finding that applicants for employment owe their prospective employers a duty of loyalty. In *Five Star Transportation, Inc.*,

349 NLRB 42 (2007), *enforced* 522 F.3d 46 (1st Cir. 2008), for example, the Board noted that "a prospective employer legitimately wants prospective employees to be loyal. . . . [T]he goal is . . . not to have disloyal employees on the payroll." *Id*. at 46. In that case, the Board concluded that a group of bus drivers were not engaged in protected conduct when they wrote letters opposing the selection of the employer for a contract with the school district because the letters disparaged the employer's business reputation and safety record. The Board thus held that the employer did not violate the Act in subsequently refusing to hire them. Similarly, in *American Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003), the Board held that an employer lawfully refused to hire a union representative because it found that his statements about the employer, made at meetings more than a year prior to his application for employment, were unprotected.[1] Thus, the Board should find that applicants for employment such as Johnson owe a duty of loyalty to their prospective employers.

The General Counsel next urges the Board to find that Johnson's conduct in soliciting the Respondent's client to use the Union's hiring hall in lieu of the Respondent's services violated his duty of loyalty as an applicant. In its original decision, the Board assumed, again without deciding, that this conduct was disloyal. *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 4. The General Counsel recommends that the Board make this finding explicit. There is ample caselaw stating that attempting to steal work from one's employer is not protected, and there are several cases where the Board determined that an employee was lawfully discharged for engaging in

[1] In that case, the Board concluded that the employee in question did not owe the employer a duty of loyalty *at the time* that he made his unprotected statements about the employer, when he had yet to seek employment with the employer. *Id*. at 1317. Thus, contrary to both the Board majority, *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 3 n.18, and dissent, *Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 8 n.8 (Member Miscimarra, dissenting), the General Counsel does not read *American Steel Erectors* as holding that applicants for employment do not owe a duty of loyalty to prospective employers.

some type of "contractual interference" designed to take business away from the employer. *See generally Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 8 n.6 (December 15, 2016) (Member Miscimarra, dissenting) (listing cases where Board did not require employers to employ individuals who attempted to interfere with their business interests). In *North American Dismantling Corp.*, 341 NLRB 665 (2004), the Board held that the employer had lawfully refused to rehire an unlawfully discharged employee because, subsequent to his discharge, the employer had learned that the employee had solicited one of its clients. *Id*. at 666-67. The Board in that case found that the employee's attempts to wrest work from the employer was an act of disloyalty and concluded that he was not eligible for reinstatement as a result. *Id*. at 667. By approaching one of the Respondent's primary clients and encouraging it to use the Union's hiring hall in lieu of the Respondent's services, Johnson engaged in precisely the same conduct that the Board in *North American Dismantling Corp.* described as "quintessentially disloyal." *Id*. at 667.

Although it is the General Counsel's view that union salts should be regarded differently than other applicants for employment who do not have divided loyalties *ab initio*, Johnson's solicitation of the Respondent's client would have been disloyal even if he were not a union salt.[2] Thus, the conclusion that Johnson's conduct violated his duty of loyalty as an applicant does not depend on any assumption that a union salt might act disloyally toward his employer; rather, the evidence demonstrates that Johnson engaged in actual disloyalty by contacting the Respondent's customer and seeking to supplant the Respondent.

[2] The General Counsel does not necessarily agree with extant caselaw regarding union salts, *see, e.g., Tradesmen International, Inc.*, 351 NLRB 399, 403 (2007) (finding that the employer violated Section 8(a)(3) by refusing to consider applicants for employment who identified themselves as union salts when they applied); however, in this proceeding, there is no need to decide whether such cases were correctly decided.

Finally, the General Counsel urges the Board to find that Johnson's disloyal conduct rendered him ineligible for instatement and to toll his backpay as of the date that the Respondent learned of Johnson's conduct. In his dissent in this case, Member Miscimarra cited cases involving post-discharge misconduct amounting to contractual interference, where the Board applied principles drawn from *Jefferson Standard*, 346 U.S. 464 (1953), to evaluate the employees' eligibility for reinstatement and backpay. *See Sahara Datsun*, 278 NLRB 1044, 1045-46 (1986) (unlawfully discharged employee ineligible for reinstatement because he falsely told bank providing financing to employer's customers that loan applications had been falsified), *enforced* 811 F.2d 1317 (9th Cir. 1987); *Firehouse Restaurant*, 220 NLRB 818, 825-26 (1975) (declining to order reinstatement for employees who were unlawfully discharged but who subsequently publicly disparaged the employer's food for express purpose of harming business).[3] And even in cases that do not involve allegations of employee misconduct, the Board has carefully tailored the remedy for discriminatees who engaged in business as competitors to their employers. In *Marshall Maintenance Corp.*, 145 NLRB 538, 539-40 (1963), for example, a group of unlawfully discharged employees formed a corporation to engage in the same type of business as the employer. The Board held that it "would be manifestly improper to require [the employer] to employ anyone whose loyalty and efforts as an employee might be affected by his own self-interest as an entrepreneur and business competitor." Although in that case the employees were not denied reinstatement or full backpay, the Board permitted the employer to

[3] As Member Miscimarra noted in his dissent, the reasoning of both of these cases was explicitly overruled by *Hawaii Tribune-Herald*, 356 NLRB at 662-63, 662 n.9. But Member Miscimarra also noted that the Board in *Hawaii Tribune-Herald* left the outcomes of these cases undisturbed. *See Aerotek, Inc.*, 365 NLRB No. 2, slip op. at 9 n.9 (Member Miscimarra, dissenting). The General Counsel takes no position as to whether the Board should continue to follow the "unfit for future service" standard set out in *Hawaii Tribune-Herald*.

condition its offers of reinstatement upon the employees' divestment of their interests in the competing business. Likewise, in *Rex Printing Co.*, 227 NLRB 1144, 1144-45 (1977), although the Board ordered reinstatement and backpay for an unlawfully discharged employee despite the fact that he co-owned a business that competed with the employer and personally solicited the employer's customers for his own business, the Board permitted the employer to condition reinstatement upon the employee's divesting himself of his interest in the competitor company. The Board also tolled the employee's backpay as of the date the employer learned that he was soliciting the employer's clients, because the Board found that would have been lawful grounds for discharge. In the instant case, Johnson's solicitation of the Respondent's client to supplant the Respondent's services with the Union hiring hall placed him squarely in the position of a business competitor.[4] Moreover, the Respondent cannot be assured that Johnson's disloyalty would not continue into his employment if the Board ordered instatement. The Board in *Marshall Maintenance Corp.* and *Rex Printing Co.* recognized that the potential for future conduct against the employer's interests could be tempered by requiring discriminatees to divest their interests in the competitive enterprises prior to reinstatement. Here, by contrast, Johnson will continue to have an interest in acquiring more work for the union hiring hall, and he has already engaged in conduct that is disloyal to the Respondent in the service of that interest. By declining to order instatement and tolling Johnson's backpay, the Board can avoid infringing upon the Respondent's lawful interest in not employing a disloyal employee while not allowing it to evade altogether its liability for its unlawful conduct.

[4] The General Counsel notes that this reasoning may be particularly persuasive to the 8th Circuit in light of the court's finding that Johnson was acting as a competitor rather than an aggrieved employee when he solicited the Employer's client. *Aerotek, Inc. v. NLRB*, 883 F.3d at 734.

Thus, the General Counsel largely agrees with Member Miscimarra's reasoning and recommended remedy as set forth in his dissent in this case. Unlike Member Miscimarra, however, the General Counsel urges the Board to toll Johnson's backpay as of the date that the Respondent learned of his solicitation of its client. In nearly all of the cases where the Board has tolled an employee's backpay because of his misconduct, the relevant date is the date that the employer learned of the misconduct—i.e. the date that the employer would have had a lawful motivation for not employing the employee. *See, e.g.*, *North American Dismantling Corp.*, 341 NLRB at 666 (on remand from 6th Circuit, tolling backpay for unlawfully discharged employee as of the date the employer learned he had solicited its client; solicitation occurred prior to his unlawful discharge but employer learned of it several weeks later); *John Cueno, Inc.*, 298 NLRB 856 (1990) (on remand from D.C. Cir., Board held that employee's backpay should be tolled as of date the employer learned that he had falsified his initial application for employment); *Rex Printing Company*, 227 NLRB 1144, 1144, 1151 (1977) (where employee who was unlawfully discharged was co-owner of a business that was employer's direct competitor, Board ordered backpay from date of discharge to date employer learned of the extent of his competitive solicitations for his own business). Thus, the General Counsel argues that Johnson's backpay should be tolled as of the date that the Respondent learned of his solicitation of its client.

III. Conclusion

In sum, the General Counsel urges the Board to find that: Johnson owed the Respondent a duty of loyalty as an applicant for employment; his conduct in soliciting the Respondent's client to use the Union hiring hall violated that duty of loyalty; this act of disloyalty rendered him ineligible for instatement; and his backpay for the Respondent's unlawful refusal to consider him

for employment should be tolled as of the date that the Respondent learned of his disloyal conduct.

DATED AT Washington, D.C., this 8th day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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