NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM OM 08-29(CH) February 15, 2008

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

From: Richard A. Siegel, Associate General Counsel

Subject: Case Handling Instructions for Cases involving Oil Capitol Sheet Metal, 349 NLRB No. 118 (May 31, 2007)

This memorandum sets forth instructions and guidance to Regions for investigating and litigating compliance issues under Oil Capitol Sheet Metal, 349 NLRB No. 118 (May 31, 2007), reconsideration denied November 15, 2007, petition for review pending (D.C. Cir). The Oil Capitol framework applies to all compliance investigations and litigation concerning salting discriminatees, including refusal-to-hire, unlawful discharge, and unlawful layoff cases.[1] These instructions supersede all prior directives to Regions about investigating and litigating cases under Oil Capitol.[2]

I. Introduction

Under established Board law for determining backpay, it is presumed that discriminatees in the construction industry, like discriminatees elsewhere, would have continued indefinitely in the respondent's employ. A respondent could challenge a backpay period by proving that the employee would have left the job before completion of the project or, under Dean General Contractors,[3] the respondent could rebut the presumption of continued employment by proving that it would not have transferred or

[1] See Oil Capitol, 349 NLRB No. 118, slip op. at 2.

[2] Accordingly, this memorandum supersedes prior directives to hold in abeyance compliance cases implicating Oil Capitol. Regions should resume their compliance investigations consistent with normal practices and the directives set out here.

[3] 285 NLRB 573, 574, 575 (1987).

reassigned the discriminatee after completion of the project at issue.

The presumption of continued employment set forth in Dean General applied to all discriminatees in the construction industry, salts and nonsalts, alike.[4] In Oil Capitol, the Board overruled the application of the Dean General presumption to salting discriminatees and held that the General Counsel must now affirmatively prove that salting discriminatees would have worked the entire backpay period alleged in the compliance specification. Thus, Oil Capitol shifts the burden of proving the duration of a salting discriminatee's backpay period to the General Counsel. This shift will significantly affect the General Counsel's investigation and litigation of such cases. It may also implicate backpay and instatement issues in cases involving older violations that have been in litigation for some time. For instance, a salting discriminatee's right to instatement is defeasible if the General Counsel fails to carry his burden of proving that the discriminatee would still be employed but for the employer's discrimination.[5]

This memorandum explains the General Counsel's new burden of proof under Oil Capitol and the kind of evidence that the Board will consider relevant in sustaining that burden. In addition, this memorandum discusses issues that may occur in compliance cases arising out of unfair labor practices that occurred and were litigated before Oil Capitol.

Submissions to Washington

1. Division of Advice

As a general rule, as discussed more fully below, cases raising questions under Oil Capitol not resolved by this Memorandum should be submitted for Advice.

2. Contempt and Compliance Litigation Branch

Compliance cases with court-enforced Board reinstatement/instatement orders should also be submitted to CLCB pursuant to outstanding instructions. See, NLRB Casehandling Manual (Part Three – Compliance Proceedings) Secs. 10530.7 and 10646.6 (2006).

Specifically, in compliance cases with court-enforced Board orders involving reinstatement/instatement of salts,

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[4] See, e.g., Ferguson Electric, 330 NLRB 514 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

[5] See Oil Capitol, 349 NLRB No. 118, slip op. at 7 & 7 n.28.

where work is currently available that a discriminatee is qualified to perform, it is important to quickly investigate any respondent claims that events subsequent to the discriminatory action have relieved the respondent of its reinstatement/instatement obligation. Thus, if the respondent claims that reinstatement/instatement is not warranted because, even absent discrimination, the discriminatee would have previously left the respondent's employ, the Region should promptly investigate that assertion by obtaining the parties' position on respondent's claim that instatement/reinstatement is not warranted.[6] After obtaining this information the Region should consult with CLCB telephonically regarding whether contempt proceedings are warranted. If the evidence clearly shows an insufficient basis for initiating contempt proceedings, telephonic consultation with the CLCB suffices. Compliance Manual Section 10530.7. Otherwise, the Region will be instructed to complete its investigation and submit the matter to CLCB (with a copy to the Division of Operations-Management and Advice) with a recommendation as to whether contempt proceedings are warranted.

II. Evidentiary issues in Oil Capitol and burdens of proof

As noted above, the Board in Oil Capitol rejected the presumption of continued employment for salting discriminatees and announced a rule requiring the General Counsel to produce affirmative evidence that discriminatees would have worked for a respondent for the backpay periods claimed in the compliance specification. In its decision, the Board detailed the kind of evidence required to meet this new burden of proof.

A. Who is a salt

Investigation of unfair labor practice charges, particularly in the construction industry, may suggest that an alleged discriminatee is a salt. Respondents bear the burden of proving whether a discriminatee is a salt.[7] Regions should, at the beginning of an unfair labor practice investigation, inquire whether the respondent claims the alleged discriminatees are salts. If so, or if

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[6] In post-judgment cases, Regions are encouraged to consult with the CLCB telephonically, prior to initiating the investigation of such matters, in order to discuss the nature and extent of the investigation to be undertaken. Telephonic inquiries regarding these matters should be directed to CLCB Branch Chief Stan Zirkin or Deputy Branch Chief Ken Shapiro.

[7] See id., 349 NLRB No. 118, slip op. at 2 n.6.

the evidence otherwise suggests that they are, the Region should investigate and determine the issue. An early determination of this issue will focus the Region on the nature of the evidence it needs to gather if Oil Capitol is applicable to the case.

If the unfair labor practices have already been litigated but the salting status of a discriminatee was not litigated or determined, the Region should include this issue in its compliance investigation. If unresolved issues arise regarding whether a discriminatee is a salt, Regions should submit them to Advice.

In Oil Capitol, the Board broadly defined salts as, "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign" and who are subject to the union's disciplinary control.[8] "Salting," in turn, is defined by the Board as "the act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees."[9] The Board further noted that a salting campaign's "immediate objective may not always be organizational," citing cases in which the salts' objective was to precipitate unfair labor practices, thus weakening targeted employers.[10]

B. Proving a salting discriminatee's applicable backpay period and right to instatement

In cases involving salting discriminatees, the General Counsel must present affirmative evidence that the discriminatee, if hired, would have worked for the respondent during the entire backpay period.[11] In most backpay cases, this new evidentiary rule will raise two issues: (1) whether the salting discriminatee would have worked for the respondent for the entire duration of the project in question; and (2) whether, and for how long after the project's end, the discriminatee would have

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[8] Id., slip op. at 1 n.5, 2 n.6.

[9] Id., slip op. at 1 n.5, quoting Tualatin Electric, 312 NLRB 129, 130 n.3 (1993), enfd. 84 F.3d 1202, 1203 n.1 (9th Cir. 1996).

[10] See Oil Capitol, 349 NLRB No. 118, slip op. at 1 n.5, citing Hartman Bros. Heating & Air Conditioning v. NLRB, 280 F.3d 1110, 1112 (7th Cir. 2002); Starcom, Inc., v. NLRB, 176 F.3d 948, 949 (7th Cir. 1999).

[11] See Oil Capitol, 349 NLRB No. 118, slip op. at 2.

worked for the respondent by accepting a transfer(s) to other respondent jobs.[12] Regions should note that with regard to (2), evidence that a respondent's practice is to transfer employees from jobsite to jobsite is not itself sufficient to establish that the salt would have continued to work for the respondent; the General Counsel must present affirmative evidence that the discriminatee would have indeed accepted the transfer.[13] As noted above, a discriminatee's right to instatement is dependent on the General Counsel's ability to prove that the discriminatee would still be employed by the respondent but for the discrimination.[14]

The Board in Oil Capitol specified the following factors as relevant to proving the length of a salting discriminatee's backpay period: (1) the discriminatee's personal circumstances during the backpay period; (2) contemporaneous union policies and practices with respect to other salting campaigns at the time of the discrimination; (3) specific union plans for the targeted employer; (4) instructions or agreements between the discriminatees and the union concerning the anticipated duration of the assignment; and (5) historical data regarding the duration of employment of the discriminatees and other discriminatees in similar organizing campaigns by the same union.[15] While this list is not exhaustive, Regions should focus on these factors when investigating compliance issues involving salting discriminatees.[16]

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[12] See id.

[13] Id.

[14] Thus, a Board order of instatement is defeasible as of the date the backpay period ends. See id., slip op. at 7 & 7 n.28.

[15] See id., slip op. at 2, 5.

[16] See id., slip op. at 2. Regions should note that Toering Electric Co., 351 NLRB No. 18 (September 29, 2007), in which the Board imposed on the General Counsel the burden of proving that discriminatees in refusal to hire cases are bona fide applicants, affects the litigation of unfair labor practice liability in those cases and not compliance issues under Oil Capitol. The General Counsel will issue separate guidelines concerning the new burden of proof in refusal to hire cases under Toering.

III. Application of Oil Capitol to unfair labor practice and compliance cases

Application of Oil Capitol must be considered in all new and ongoing unfair labor practice and compliance cases where the alleged discriminatee is a salt. The following discussion will identify the kind of evidence Regions need to gather during ongoing unfair labor practice and compliance investigations in which Oil Capitol will apply prospectively. In addition, the discussion will identify if, when, and how, Regions should argue that Oil Capitol should not be applied retroactively because it will result in a manifest injustice.

A. Prospective application of Oil Capitol to new charges

When Regions find merit to unfair labor practice charges involving salting discriminatees, they should identify for the union and/or salting discriminatee the evidence needed to sustain the General Counsel's Oil Capitol burden during a subsequent compliance hearing or settlement discussions and should notify them of the potential need to produce such evidence in the future.

Since the issuance of Oil Capitol, the General Counsel has successfully carried his new evidentiary burden before an ALJ in a compliance hearing in which the unfair labor practices triggering commencement of the backpay period had occurred less than two years earlier. In Jeffs Electric, the General Counsel successfully proved the five-month backpay period alleged in the compliance specification.[17] Pursuant to Oil Capitol, the General Counsel produced affirmative evidence of the six discriminatees' personal circumstances during the backpay period, e.g., when they began working for respondent, they were unemployed, in the bottom-half of the union's out-of-work list, and were not expected to be referred to a union contractor for at least six months because of severe unemployment at the time.[18] The General Counsel also adduced evidence of the union's salting practices, such as the fact that it conducted similar organizing campaigns in the same geographical area, including one in which a discriminatee worked for six

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[17] JD(NY)-41-07 (September 17, 2007). No exceptions were filed to the ALJ's supplemental decision and recommended order on backpay, which the Board subsequently adopted on November 1, 2007.

[18] JD(NY)-41-07, slip op. at 8. See also Oil Capitol, 349 NLRB No. 118, slip op. at 2.

months before the union abandoned the campaign. A union official also testified that he believed that the organizing campaign would last at least six months and he requested and received a commitment from each discriminatee that he would work for respondent for the duration of the campaign, through an election or contract, or until the union abandoned the campaign. Finally, the union's intent to maintain a sustained campaign was established by its filing a petition with the Board and winning a representation election.[19]

B. Mitigation Issues

In Contractor Services, 351 NLRB No. 4 (September 27, 2007) the Board held that a paid union organizer failed to properly mitigate his loss of earnings during the backpay period by limiting his job search to nonunion employers.[20] The General Counsel has filed with the Board a motion for reconsideration of this decision as well as the Board's decision to retroactively apply Oil Capitol to another discriminatee's backpay period. It is unclear the extent to which Contractor Services changed prior Board law regarding a salt's mitigation efforts.[21] Thus, Regions should continue to litigate salting discriminatees' backpay earnings under applicable Board law prior to Contractor Services until the Board acts on the General Counsel's motion for reconsideration of that decision.

C. Retroactive application of Oil Capitol to pending cases

Initially, if a Region determines that Oil Capitol applies to a case in which the unfair labor practices have already been litigated, it should first evaluate the administrative record in the unfair labor practice litigation to determine whether there already exists evidence to sustain the General Counsel's Oil Capitol burden. Regions should also consider whether retroactive application of Oil Capitol will cause a manifest injustice to the discriminatees in the case.[22] That issue is

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[19] See Jeffs Electric, LLC, slip op. at 8; Oil Capitol, 349 NLRB No. 118, slip op. at 2, 5.

[20] See Contractor Services, 351 NLRB No. 4, slip op. at 1, 4-6.

[21] Id., slip op. at 5.

[22] See, e.g., SNE Enterprises, 344 NLRB 673, 673 (2005) (although the Board customarily applies new policies and standards retroactively "to all pending cases in whatever

discussed below, along with instructions on how, where appropriate, to challenge retroactive application of Oil Capitol.

1. Determine if relevant issues have already been litigated in the merits proceeding

In all compliance cases involving salting discriminatees, Regions should evaluate the administrative record in the underlying unfair labor practice case to determine whether evidence exists to satisfy the General Counsel's Oil Capitol burden. If such record evidence exists and litigation becomes necessary, Regions should submit to Advice a proposed motion in limine that can be filed with the ALJ before the compliance proceeding in order to restrict re-litigation of issues that were already litigated and/or decided in the underlying unfair labor practice case.

When drafting a motion in limine, Regions should identify, to the extent possible, issues that were already decided by the Board and are thus precluded from further litigation. In addition, Regions should argue that if the ALJ concludes that relevant factual findings were made – even if an ultimate issue was not decided by the Board in the unfair labor practice hearing - the ALJ should at least take judicial notice of those findings and conclude that they assist the General Counsel in sustaining his Oil Capitol burden.[23]

If the ALJ thereafter denies the General Counsel's motion in limine, Regions should submit to Advice a draft motion and supporting brief requesting special permission from the Board to appeal the ALJ's ruling.

2. Evaluate whether retroactive application of Oil Capitol to a pending compliance case will cause a manifest injustice because of lost or unavailable evidence

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stage," in evaluating whether retroactive application of a new rule will cause manifest injustice, it will consider parties' reliance on preexisting law; the effect of retroactivity on accomplishment of the purposes of the Act; and any particular injustice arising from retroactive application). See also Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 931 (1993).

[23] See the sample motion in limine for guidance (Attachment 1).

The Board stated in Oil Capitol that it would apply its new evidentiary rule in the decision itself and "all future" and/or "all" cases involving salting discriminatees.[24] Since Oil Capitol issued, the Board has directed its application to the relevant compliance issues in several salting cases. In several of those cases, the General Counsel is arguing that because of their age, retroactive application of Oil Capitol would cause a manifest injustice to the discriminatees.[25] For instance, we have filed Motions for Reconsideration in the following cases: Contractor Services, 351 NLRB No. 4 (September 27, 2007); Fluor Daniel, Inc., 351 NLRB No. 14 (September 28, 2007); Brown & Root Power & Mfg., 351 NLRB No. 20 (September 28, 2007); and McBurney Corp., 351 NLRB No. 49 (September 29, 2007).

We also filed with the Board a special appeal of the ALJ's decision to retroactively apply Oil Capitol to the compliance proceeding arising from Fluor Daniel, Inc., 333 NLRB 427 (2001), enfd. 332 F.3d 961 (6th Cir. 2003), reh. and reh. en banc denied (2004), cert. denied 543 U.S. 1089 (2005). Charging Party unions have filed their own motions in many of these cases and have also filed Motions for Reconsideration with the Board in the following cases: Bill's Electric, 350 NLRB No. 31 (July 24, 2007); BCE Construction, Inc., 350 NLRB No. 78 (August 31, 2007); and EPI Construction, 350 NLRB No. 81 (August 31, 2007).[26]

Regions should therefore evaluate whether reliable evidence presently exists to support the General Counsel's new burden if Oil Capitol is retroactively applied in the particular case. If so, Regions should proceed with their investigation and/or litigation of compliance issues under the new Oil Capitol burden of proof.

However, Regions should submit to Advice all cases in which the charging party claims, or the Region has independently determined, that evidence needed by the

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[24] See Oil Capitol, 349 NLRB No. 118, slip op. at 2, 6.

[25] In motions for reconsideration, some charging parties argued to the Board that a circuit court order enforcing an underlying Board decision precludes the Board from applying Oil Capitol in a subsequent compliance case. The General Counsel has not made this argument.

[26] The Charging Party union also filed with the Board a motion for reconsideration of the Oil Capitol decision itself. The Board denied the motion on November 15, 2007.

General Counsel to sustain that burden has been lost or is otherwise unavailable because of the passage of time and that, therefore, retroactive application of Oil Capitol will cause a manifest injustice to the discriminatees in the case.[27]

If the Region believes that retroactive application would result in manifest injustice, and if a motion for reconsideration pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations of a Board decision in the case would be timely, Regions should submit to Advice a draft motion for reconsideration.[28] Alternatively, if a motion for reconsideration would not be timely,[29] or if the Region disagrees with the charging party's claim of

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[27] For instance, evidence may be "otherwise unavailable" because of the likelihood of lost evidence, faded memories, and unavailable witnesses due to the passage of time since the union's salting campaign and employer's unlawful conduct. "Unavailable evidence" also includes evidence not initially maintained or preserved because unions and discriminatees had no notice at the time of the salting campaign that they would need to produce it in the future. See, e.g., the model motion for reconsideration (Attachment 2).

[28] Such a Board decision could be either a decision on the underlying unfair labor practice case involving violations that are not recent (e.g., McBurney Corp., 351 NLRB No. 49 (September 29, 2007) (finding unfair labor practice liability for refusals to hire in 1995 and 1996 and directing that backpay be determined under Oil Capitol)), or a decision in a compliance proceeding on violations that are not recent (e.g., Fluor Daniel, Inc., 351 NLRB No. 14 (September 28, 2007) (remanding for reconsideration under Oil Capitol compliance case involving violations that occurred in 1990)).

A motion for reconsideration must be filed within 28 days of the Board decision. See Section 102.48(d)(2) of the Board's Rules and Regulations. Therefore, if a Region anticipates such a motion will be necessary, it should immediately request an extension of time and contact the Division of Advice.

[29] For example, a pending compliance case may be based on a Board unfair labor practice decision that issued before Oil Capitol.

manifest injustice or remains undecided as to the strength of the evidence supporting such claim, it should submit the case to Advice with a recommendation as to whether retroactive application of Oil Capitol would lead to a manifest injustice.[30] In either event, regardless of the procedural posture of the case, the analysis of the manifest injustice claim should track that described below and in the attached model pleading (Attachment 2).

In each case in which the General Counsel has argued manifest injustice, we evaluated the evidence and circumstances to determine whether a manifest injustice would result from retroactive application of Oil Capitol. A model pleading containing the various arguments the General Counsel has made to date, is attached (Attachment 2). As that pleading demonstrates, the main consideration for evaluating whether retroactive application of Oil Capitol would cause a manifest injustice to the discriminatees is the likelihood of lost evidence in the intervening years between the respondent's unlawful conduct and the Regions' investigation and litigation of compliance issues.

For example, as the model pleading demonstrates, where a respondent's unlawful conduct occurred over 17 years ago, the General Counsel argued that earlier reliance on the well-settled Dean General presumption of continued employment, and the unavailability of discriminatees as well as the inability of discriminatees and other witnesses to now recall events and produce documents from so long ago, would detrimentally impact its ability to effectively litigate compliance issues under the new Oil Capitol framework. It may also be appropriate to argue that further delay caused by retroactive application of Oil Capitol (i.e., additional compliance investigation and, in some instances, re-litigation) would also only further delay the Board from accomplishing the Act's purpose of remedying the respondents' unfair labor practices that had been committed many years ago.

In the unusual situation where an ALJ had already evaluated the backpay lengths of the discriminatees under Dean General, the Board's application of Oil Capitol to that case would require the Region, which relied upon Dean General, to conduct additional investigation and further litigation of compliance issues that were otherwise close to resolution. Finally, the General Counsel could argue that these detrimental effects of retroactive application

[30] Regions should also contact the Division of Advice if a charging party refuses to cooperate with the Region's request for evidence and/or investigation of a manifest injustice claim.

of Oil Capitol would result in undue harm to the discriminatees in those cases.

IV. Conclusion

Regions should use this memorandum as guidance when investigating compliance cases involving Oil Capitol and contact the Division of Advice and Contempt Litigation and Compliance Branch with specific questions.

Specifically, Regions should submit to Advice:

- Cases involving unresolved issues regarding whether a discriminatee is a salt;
- All cases where the charging party claims, or the Region independently determines, that application of Oil Capitol would result in manifest injustice. Such submissions may take the form of:
  - Draft motions in limine to be filed with ALJs to restrict re-litigation of issues litigated and/or decided in underlying unfair labor practice cases;
  - Draft motions and supporting briefs requesting special permission from the Board to appeal ALJs' denials of motions in limine;
  - Draft motions for reconsideration of Board decisions retroactively applying Oil Capitol to compliance cases in which Regions determine that a manifest injustice will result;
  - Standard Requests for Advice
    - if the Region determines that a manifest injustice will result but a motion for reconsideration would be untimely
    - if the Region disagrees with a charging party's claim of manifest injustice or remains undecided as to the strength of the evidence underlying such claim
    - if a charging party refuses to cooperate with the Region's request for evidence and/or investigation of a manifest injustice claim.

Regions should submit to CLCB:

- All cases involving a court-enforced reinstatement/instatement order where the respondent has not offered reinstatement/instatement

/s/
R.A.S.

Attachments 1 and 2

cc: NLRBU
Release to Public

[ATTACHMENT 1]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

[CAPTION][1]

COUNSEL FOR THE GENERAL COUNSEL'S MOTION IN LIMINE AND BRIEF IN SUPPORT[2]

I. INTRODUCTION

Counsel for the General Counsel files this Motion in Limine seeking to preclude **[insert if relevant: retroactive application of Oil Capitol Sheet Metal, 349 NLRB No. 118 (2007) to this compliance case and]** litigation over issues already decided in the underlying unfair labor practice hearing. Specifically, Counsel for the General Counsel asks the ALJ to find, **[insert if relevant: that retroactive application of Oil Capitol to this case will cause a manifest injustice. Second, the ALJ should find,]** without the need for additional evidence, that the discriminatees in this matter would have worked for Respondent until laid off, that job vacancies were available for every discriminatee for which they were qualified, and had they been hired, the discrminatees would have joined the pool of Respondent's favored employees and received hiring preferences for future employment.

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[1] This sample is based in large part on the General Counsel's motion in limine in Fluor Daniel, Inc., case 15-CA-12544, et al., filed with the ALJ on August 13, 2007.

[2] If the ALJ denies the General Counsel's Motion in Limine, the Region should, as set out in the accompanying OM Memorandum, submit to Advice a draft Memorandum in Support of the General Counsel's Request for Special Permission to Appeal the Rulings of the ALJ, pursuant to Section 102.26 of the Board's Rules and Regulations.

II. BACKGROUND

[Procedural facts and background omitted.]

III. ARGUMENT

On May 31, 2007, the Board issued its decision in Oil Capitol Sheet Metal, 349 NLRB No. 118 (2007), changing its long-standing presumption that all employees who are victims of illegal discrimination are due backpay from the date of the discrimination until they receive a valid offer of reinstatement. In Oil Capitol, the Board changed this presumption for employees who are also paid or unpaid union "salts," holding that once a respondent establishes that the employee in question is a union salt, the General Counsel has the burden to present affirmative evidence that the salt/discriminatee would have worked for the employer throughout the entire backpay period. Oil Capitol Sheet Metal, 349 NLRB No. 118, slip op. at 2.

[Insert if relevant: The General Counsel submits that retroactive application of Oil Capitol to this compliance proceeding would work a manifest injustice under Board law. The ALJ should therefore hold that Oil Capitol does not retroactively apply to the instant compliance proceeding, involving unfair labor practices that occurred over thirteen years ago and the merits of which were litigated over twelve years ago.]

[If relevant: Alternatively, if the ALJ decides to retroactively apply Oil Capitol to this case,] the General Counsel urges the ALJ to find, for the purpose of res judicata, that the Board has already decided that: (1) if hired, the 120 discriminatees herein would have worked for the duration of the Palo Verde and Exxon jobs for which they applied, (2) job vacancies were available for every discriminatee at Palo Verde and Exxon and the discriminatees were qualified to fill those vacancies; and (3) had they been hired, the discriminatees would have joined Respondent's preferential database. At a minimum, the ALJ should find that these findings from

the decision below satisfied the General Counsel's burden under Oil Capitol, 349 NLRB No. 118, slip op. at 2, to present affirmative evidence that the discriminatees would have worked the backpay periods alleged in the compliance specification.

[Insert Section A. if relevant:

A. The ALJ should find that retroactive application of *Oil Capitol* to the instant compliance proceeding will result in a manifest injustice to the discriminatees and prevent effective administration of the Act

[Manifest injustice argument omitted. To see the General Counsel's retroactivity/manifest injustice arguments, see the model motion for reconsideration (Attachment 2 of the accompanying OM Memorandum).**]**

B. The ALJ should restrict re-litigation of issues already decided by the Board

Notwithstanding the **[insert if relevant: ALJ's/Board's final determination regarding the]** applicability of Oil Capitol, during the underlying unfair labor practice hearing certain issues relevant to the allegations herein were previously litigated and decided. See Fluor Daniel, Inc., 333 NLRB 427 (2001); Fluor Daniel, Inc. v. NLRB, 332 F.3d 961 (6th Cir. 2003). With respect to compliance matters, it is well settled that issues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding. See Transport Service Co., 314 NLRB 458, 459 (1994); Refuse Compactor Services, Inc., 322 NLRB 738, 738 (1996).

Accordingly, with this Motion, Counsel for the General Counsel seeks to preclude the litigation in this compliance hearing of the following issues: (a) that discriminatees would have worked for Respondent until laid off; (b) that job vacancies were available for every discriminatee, and the discriminatees were each qualified for those vacancies; and (c) absent the

illegal discrimination, the discriminatees would have joined the pool of Respondent's favored employees, and received hiring preferences by Respondent for future employment.

Thus, Counsel for the General Counsel seeks an affirmative ruling from the ALJ that these issues were previously decided by the Board or the Court of Appeals, thus precluding further evidence on these issues. At a minimum, if the ALJ chooses to allow further litigation of these issues, [he/she] should find that the General Counsel has satisfied its burden under Oil Capitol of presenting affirmative evidence that the discriminatees would have worked the length of the backpay period alleged in the compliance specification and that the burden now shifts to Respondent to present its defense to mitigate liability. See Oil Capitol, 349 NLRB No. 118, slip op. at 2.

1. All 120 discriminatees would have worked the duration of the Palo Verde & Exxon projects

It is unnecessary to re-litigate the issue of whether, if hired, the discriminatees would have worked throughout the alleged backpay period. Here, during the underlying unfair labor practice case, the Board found that all 120 discriminatees would have worked the duration of Respondent's Palo Verde and Exxon projects, finding that the discriminatees "agreed to accept employment if offered, to stay until laid off, to do a good job, and not to engage in aggression or sabotage." Fluor Daniel Inc., 333 NLRB at 430. The Sixth Circuit, in substantially enforcing the Board's order, also noted testimony from Union organizer Gary Evenson that the applicants, "agreed to accept employment if offered, to stay until laid off, to do a good job…" Fluor Daniel, Inc. v. NLRB, 332 F.3d at 965.

The Board held in Oil Capitol that when a Respondent proves that a discriminatee is a union "salt," then the General Counsel, as part of its existing burden of proving gross backpay, must present affirmative evidence that the discriminatee would have worked for the employer for

the entire backpay period. See Oil Capitol, 349 NLRB No. 118, slip op. at 2. The Board specifically explained that such "affirmative evidence" includes "specific plans for the targeted employer, [and] instructions or agreements between the salt/discriminatee and union concerning the anticipated duration of the assignment…." Id. Here, the Board's finding that the 120 discriminatees "agreed to accept employment if offered, to stay until laid off, to do a good job, and not to engage in aggression or sabotage" precisely fulfills the Oil Capitol requirement for affirmative evidence just described. See id.

At a minimum, if the ALJ chooses to allow further litigation of whether the discriminatees would have worked for Respondent for the duration of the Exxon and Palo Verde projects, [he/she] should find that the findings just described are sufficient, if unrebutted, to satisfy the General Counsel's Oil Capitol evidentiary burden. In this regard, the General Counsel has presented affirmative evidence that the discriminatees would have worked until laid off and therefore, at a minimum, their gross backpay should run until the end of the Palo Verde or Exxon project. Union organizer Evenson was asked in the underlying unfair labor practice hearing whether he gave "the individuals applying for jobs any instructions concerning how long they should stay," to which Evenson replied, "[u]ntil they're laid off, till the job's over hopefully." (Tr. 985) Evenson also testified in the unfair labor practice hearing that he stressed to applicants about, "not putting in an application unless you take the job if it's offered." (Tr. 994) As these findings and testimony show, the General Counsel has already established the Oil Capitol element that the Unions intended for applicants to work the duration of Respondent's projects and instructed the applicants as such.

In the circumstances of this case, it would be inequitable for the ALJ to refuse to credit the Board's own findings from the underlying unfair labor practice decision. Oil Capitol requires

the General Counsel to reconstruct the Unions' plans and goals, the discriminatees' personal circumstances, Union instructions to discriminatees, other Union salting campaigns in the area, and historical data regarding duration of employment of these and other discriminatees in similar organizing campaigns for as far back as 1994 . See Oil Capitol, 349 NLRB No. 118, slip op. at 2, 5. The likelihood that witnesses will be unavailable, documentary evidence has been lost, and memories have faded prevents the General Counsel from successfully reconstructing the intentions of the Unions and discriminatees as they existed in 1994. Requiring the General Counsel to litigate these compliance issues in the face of a Board finding that the discriminatees in this matter had agreed "to accept employment if offered, [and] to stay until laid off," Fluor Daniel, 333 NLRB at 430, would be unjust, as this is just the kind of affirmative evidence that the Oil Capitol Board recommended to prove the minimum reasonableness of the backpay period. See Oil Capitol, 349 NLRB No. 118, slip op. at 2 (in proving the reasonableness of the gross backpay period the General Counsel may rely upon specific plans for the targeted employer and instructions or agreements between the discriminatee and union concerning the anticipated duration of the assignment).

For the same reason, the ALJ's acceptance of the Board's own finding that the discriminatees would have worked until laid off will prevent inequity to the discriminatees. To require re-litigation of this issue now will simply delay the Board's ability to remedy Respondent's unfair labor practices and further impede final resolution of this thirteen year old case. The ALJ should therefore find that the issue of whether the discriminatees would have worked for the duration of the Exxon and Palo Verde projects has been decided and affirmatively find that, at a minimum, the General Counsel has established, pursuant to Oil Capitol, that the

gross backpay for the discriminatees should run through the duration of the Palo Verde and Exxon projects.

2. Job vacancies were available for every discriminatee at Palo Verde & Exxon and the discriminatees were qualified to fill those vacancies

Respondent should be precluded from attempting to litigate during the compliance hearing whether job vacancies were available to every discriminatee. This very issue was litigated during the unfair labor practice hearing, where Respondent asserted that the General Counsel failed to match each alleged discriminatee with an available job that he or she was qualified to perform. With respect to Respondent's claim, the Board found that, "in the proceeding before us, the administrative law judge expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over the life of both projects there were enough positions to have employed every discriminatee." Fluor Daniel, Inc., 333 NLRB at 440-41. Respondent appealed this finding to the Sixth Circuit which specifically agreed with the Board's finding, and noted that there "is substantial evidence in the record as a whole to uphold the finding of the NLRB that openings existed during the time the discriminatees submitted or attempted to submit, applications," and that the discrminatees were qualified for these jobs. Fluor Daniel, Inc. v. NLRB, 332 F.3d at 967, 969.

Respondent should be precluded from attempting to have a "third bite" at this issue. Both the Board and the Sixth Circuit found that when the discriminatees applied, or attempted to apply for employment with Respondent, job openings existed for which they were qualified. Accordingly, the ALJ should make such a finding and preclude additional evidence on this issue.

3. Had the discriminatees been hired, they would have joined Respondent's preferential database

The General Counsel has already proven that had the discriminatees been hired, they would have joined Respondent's preferential database. During the underlying unfair labor practice litigation, both the Board and the Sixth Circuit found that Respondent uses a preferential database of former employees which it uses to staff its new projects. For instance, the Board found that Respondent relied heavily upon telephone and mailgram recruiting of former employees in their database at both the Exxon and Palo Verde projects; e.g., at the Exxon project, Respondent sent out 11,000 mailgrams to former employees looking for pipefitters and welders, 9,218 mailgrams to former employees looking for pipefitters, and 3,300 mailgrams to former employees looking for electricians. See Fluor Daniel, 333 NLRB at 430, 455. The Board even noted that Respondent, like most construction companies, moves "from job to job, i.e., it finishes one job and moves on to the next one and hires, quite often, craftsmen who had worked for it on prior projects." Id. at 446. The Sixth Circuit also noted that Respondent had developed a hiring preference for staffing projects by which it gave first preference to employees certified through its craft program, and then to other former employees. Fluor Daniel Inc. v. NLRB, 332 F.3d at 964.

In fact, the Board has consistently acknowledged that Respondent gives hiring preferences to its former employees. Fluor Daniel, 333 NLRB at 428, 430; Fluor Daniel, 311 NLRB 498, 499 n. 10 (1993); Fluor Daniel, 304 NLRB 970, 970 n. 3, 974-75 (1991). See also Fluor Daniel, 351 NLRB No. 14, slip op. at 1 (September 28, 2007). Respondent's preferential hiring system benefited any applicant who had ever worked for Respondent, including those whose employment had been brief or remote in time. Fluor Daniel, 333 NLRB at 432 n. 28. The

Board further found that these experienced applicants were treated with the same priority as those having earned special certifications from Respondent, and that when staffing a job; Respondent placed them above even more experienced applicants who had never worked for Respondent. Id.

These findings establish that Respondent had a preferential database of former employees, it consulted this database when staffing new projects, and employees in this database received preferential hiring treatment. Fluor Daniel, Inc., 332 F.2d at 964; Fluor Daniel, 333 NLRB at 430-33, 450, 454-55. See also Fluor Daniel, 351 NLRB No. 14, slip op. at 1. In fact, the Board specifically found that anyone who had ever worked for Respondent benefited, and received the same hiring priority as applicants who were specially certified by Respondent. Fluor Daniel, 333 NLRB at 432 n. 28. Indeed, as the Board noted, "the Respondent's goal, expressly stated and effectuated through vigorous recruitment efforts, was to hire as many former employees as possible." Id. at 432 n.29. These findings taken together establish that the discriminatees would have worked for Respondent and thus would have been placed in Respondent's preferential database.

Accordingly, Respondent's own defense in the underlying unfair labor practice case and the specific findings made by the Board and the Sixth Circuit in this case establish that absent Respondent's illegal conduct, the discriminatees would have joined Respondent's preferential database, and after the Palo Verde and Exxon jobs ended they would have received preferential hiring treatment. Consequently, the ALJ should grant the Counsel for the General Counsel's Motion in Limine and preclude additional evidence on these issues. At a minimum, the ALJ should find that each discriminatee would have been placed in the Respondent's preferential database. See Fluor Daniel, 333 NLRB at 432 n. 28. If the ALJ chooses to allow further

litigation of whether there might have been periods a discriminatee would not have worked pursuant to the Respondent's preferential hiring policy, [he/she] should conclude that the findings just described are sufficient to satisfy the General Counsel's Oil Capitol evidentiary burden and the Respondent now bears the burden of going forward with evidence that a discriminatee would not have worked for Respondent for any particular period.

IV. CONCLUSION

[Insert if relevant: The ALJ should find that retroactive application of Oil Capitol to this case would cause a manifest injustice. Alternatively,] Counsel for the General Counsel's Motion in Limine should be granted to preclude re-litigation of those findings decided by the Board or by the United States Court of Appeals for the Sixth Circuit in the underlying unfair labor practice litigation. At a minimum, the ALJ should find that those findings satisfy the General Counsel's evidentiary burden under Oil Capitol.

Dated:

Respectfully submitted:

_____

Counsel for the General Counsel

[ATTACHMENT 2]

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

[CAPTION]

GENERAL COUNSEL'S MOTION FOR RECONSIDERATION AND BRIEF IN SUPPORT

Pursuant to Sections 102.48(d)(1) and (2) of the Board's Rules and Regulations, the General Counsel requests that the Board reconsider its Decision and Order in the above-captioned cases, reported at [citation/date].

Section 102.48(d)(1) provides that a party may move for reconsideration of a Board decision "because of extraordinary circumstances" and that, in making such a motion, the party must "state with particularity the material error claimed." See also Desert Aggregates, 340 NLRB 1389, 1389 (2003). The General Counsel submits that the requisite "extraordinary circumstances" and "material error" are present here because the Board's retroactive application of Oil Capitol Sheet Metal, 349 NLRB No. 118 (May 31, 2007) to compliance issues concerning Respondent's unlawful [refusal to hire/discharge/layoff] [number of] discriminatees in [year] failed to address whether retroactive application of Oil Capitol would cause manifest injustice. See, e.g., Wal-Mart Stores, Inc., 351 NLRB No. 17, slip op. at 7 (2007) (Board's original remand decision to retroactively apply IBM Corp., 341 NLRB 1288 (2004), without providing analysis for why IBM was controlling, was "material error" warranting reconsideration within the meaning of Section 102.48(d)(1)). Accordingly, reconsideration is warranted for the Board to consider whether retroactive application of Oil Capitol will work a manifest injustice to this case.

Moreover, the General Counsel submits that upon reconsideration, the Board should find that retroactive application of Oil Capitol to the discriminatees' compliance issues will indeed cause manifest injustice. See id. (upon charging party's motion for reconsideration, Board decides retroactive application of IBM Corp. would cause manifest injustice).

I. Background and the Board's Decision and Order

[Insert procedural background of Board proceedings, Board's conclusion as to unfair labor practices and where applicable, the ALJ's compliance decision, and any relevant ALJ or Board findings regarding the length of the employer's project at issue and/or the transferability of the discriminatees under Dean General Contractors, 285 NLRB 573 (1987).]

II. Application of *Oil Capitol* will result in a manifest injustice and prevent effective administration of the Act

The General Counsel submits that the Board's decision to retroactively apply Oil Capitol to the respective backpay lengths and right to instatement of [these discriminatees] was erroneous and would work a manifest injustice under Board law. The Board should therefore reconsider its decision to apply Oil Capitol to the discriminatees in this matter.

The General Counsel readily acknowledges that the Board customarily applies new policies and standards retroactively "to all pending cases in whatever stage." See SNE Enterprises, Inc., 344 NLRB 673, 673 (2005) (quoting Aramark School Services, 337 NLRB 1063 n.1 (2002); Deluxe Metal Furniture Co., 121 NLRB 995, 1006-1007 (1958)). The propriety of retroactive application is determined by balancing any ill effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." See SNE Enterprises, Inc., 344 NLRB at 673 (quoting Security & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947)). In this regard, the Board will retroactively apply a new rule or standard to the case in which the new rule is announced,

and all other pending cases, unless doing so would produce a "manifest injustice." See SNE Enterprises, Inc., 344 NLRB at 673 (citing cases). In evaluating whether retroactive application of a new rule will cause manifest injustice, the Board will consider: (1) the parties' reliance on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application. See id.; Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929, 931 (1993). The Board's decision to retroactively apply Oil Capitol to the instant compliance proceeding will result in a manifest injustice under this test.

A. Detrimental Reliance on Pre-Existing Law

First, the General Counsel, the Charging Party Union, and discriminatees have all relied to their detriment on the longstanding presumption of continued employment as controlling Board precedent throughout the [number of] years of processing and litigating this matter. In Dean General Contractors, 285 NLRB 573 (1987), the Board held that the traditional presumption of continued employment would apply in the construction industry. The Board held that a respondent could challenge the backpay period, and thus rebut the presumption of continued employment, by proving in compliance that it would not have transferred or reassigned the discriminatee after completion of the project at issue. See Dean General Contractors, 285 NLRB at 574, 575. It also could prove circumstances demonstrating that the employee would have left the worksite before completion of the project. In litigating this matter, the General Counsel assumed that the traditional presumption of continued employment would apply for these discriminatees. **[Possible arguments here: ALJ concluded in unfair labor practice decision that Dean General would apply to any backpay issues involving the discriminatees in the compliance proceeding to which respondent did not except and/or respondent excepted to potential application of Dean General but Board either specifically**

affirmed ALJ's application of Dean General or was silent as to respondent's exception.] Accordingly, in litigating this case, the General Counsel reasonably assumed that the traditional presumption of continued employment would apply for these discriminatees. As such, the General Counsel had no need to collect and/or preserve the type of affirmative evidence that would prove continued employment.

In contrast, in Oil Capitol, the Board eliminated the presumption of continued employment for salting discriminatees and announced a rule requiring the General Counsel to produce affirmative evidence that discriminatees would have worked for a respondent for the backpay periods claimed in a compliance specification. Under the specific directives in Oil Capitol, the General Counsel in this case would have to adduce evidence such as: (1) the discriminatees' personal circumstances at the time they applied for work and over the intervening [number of years between salting campaign/employer's unlawful conduct and present]; (2) contemporaneous Union policies and practices with respect to other salting campaigns in [year of salting campaign]; (3) the Union's specific plans for the campaigns at the Respondent's facilities in [year of salting campaign]; (4) instructions or agreements between the discriminatees and the Union concerning the anticipated duration of the assignment in [year of salting campaign]; and (5) historical data regarding the duration of employment of the discriminatees and other discriminatees in similar organizing campaigns in [year of salting campaign]. See Oil Capitol, 349 NLRB No. 118, slip op. at 2, 5. Thus, the events that the Board would find relevant to this new burden of proof occurred over [number of] years ago. The likelihood of faded memories, lost evidence, and unavailable witnesses since [year of salting campaign], amply demonstrates the General Counsel's tremendous difficulty sustaining this burden and how the General Counsel's reliance on the well-settled presumption of continued employment detrimentally

impacts its ability to litigate this compliance proceeding under Oil Capitol. See, e.g., Dana Corp., 351 NLRB No. 28, slip op. at 10-11 (2007) (Board found equity dictates prospective application where new rule was "significant departure from preexisting law" and to avoid frustration of parties' reliance on prior law).

Insert here: [**A-1: if there are discriminatees who have died or are otherwise unavailable:**[1] For example, it may now be impossible to accurately prove the "personal circumstances" of the discriminatees. See Oil Capitol, 349 NLRB No. 118, slip op. at 2. [Number] of the discriminatees have died [and/or, if applicable, become otherwise unavailable to supply evidence] since Respondent violated the Act by failing to hire them in [date of unlawful action]. Because prior Board law did not require the General Counsel to collect or preserve the kind of evidence that it is now required to produce under Oil Capitol, and because these discriminatees are no longer available to provide evidence regarding their personal circumstances, the General Counsel will likely be unable to establish their entire backpay period from the time of Respondent's unlawful conduct until their deaths. Moreover, given the significant passage of time since Respondent's unlawful conduct, even those discriminatees who are available will have difficulty recalling remote events or producing supporting records that, under the Board's presumption of continued employment, they could not have known would be necessary.[2]]; or [**A-2: if no discriminatees have died:** For example, it may now be impossible to accurately prove the "personal circumstances" of the discriminatees. See Oil Capitol Sheet

[1] Discriminatees might be "otherwise unavailable" because of, e.g., hospitalization, mental incompetence, or other incapacities.

[2] Retroactive application of Oil Capitol may not cause a manifest injustice to discriminatees where the compliance litigation is close enough in time to the unfair labor practices as to assure the existence of the affirmative evidence required to establish discriminatees' backpay periods. See Jeffs Electric, JD(NY)-41-07, slip op. at 8 (September 17, 2007) where General Counsel satisfied his Oil Capitol burden of proving backpay period where unfair labor practices triggering commencement of backpay period occurred less than two years earlier.

Metal, 349 NLRB No. 118, slip op. at 2. Indeed, after [insert number] years, they will have difficulty recalling events so far in the past or producing supporting records that, under the Board's presumption of continued employment, they could not have known would be necessary.[3]]

The General Counsel's ability to successfully litigate the compliance issues also depends on the Union's capacity to successfully reconstruct the details of its plans to organize Respondent, including "contemporaneous union policies and practices … specific plans for the targeted employer, instructions or agreements" between the Union and discriminatees, and "historical data regarding the duration of employment" of similar campaigns from [insert date of salting campaign]. See Oil Capitol, 349 NLRB No. 118, slip op. at 2. Having had no notice that it would be required to produce such records [insert number of years] after the event, the Union will not now be able to produce a complete record of the salting campaign. **[Here, Regions can insert relevant evidence, if known, of the union's inability to produce evidence of the circumstances/details of salting campaign due to union officials' health or memory problems, retirement, or death. For example, in one such case, the union official who had referred the discriminatee to the employer during the salting campaign, now "suffers from serious memory difficulties due to injuries sustained in a motorcycle accident and is currently receiving disability payments." In that case, the former union business manager had also retired more than five years ago and his long-time secretary had passed away.]** The likelihood that documentary evidence no longer exists and/or that the Union will be unable

[3] Retroactive application of Oil Capitol may not cause a manifest injustice to discriminatees where the compliance litigation is close enough in time to the unfair labor practices as to assure the existence of the affirmative evidence required to establish discriminatees' backpay periods. See Jeffs Electric, JD(NY)-41-07, slip op. at 8 (September 17, 2007) where General Counsel satisfied his Oil Capitol burden of proving backpay period where unfair labor practices triggering commencement of backpay period occurred less than two years earlier.

to produce available officials who can testify about Union plans and tactics from over [insert number of years] years ago necessarily places the General Counsel at a distinct disadvantage.

Conversely, Respondent should have been prepared to litigate compliance issues under prior law, including Dean General, controlling Board law for twenty years and the existing evidentiary standard for remedies in the construction industry at the time of the underlying unfair labor practice litigation. See Wal-Mart Stores, Inc., 351 NLRB No. 17, slip op. at 7 (retroactive application of IBM Corp., 341 NLRB 1288 would lead to a manifest injustice whereas application of prior law would not prejudice employer's interests since employer knew of applicable law in effect at time of unlawful conduct). Unlike the General Counsel who will be at a distinct disadvantage if it must investigate and litigate compliance issues [insert number of years] after Respondent's initial unlawful conduct in order to satisfy its burden of proof under Oil Capitol, Respondent was on notice of the applicability of Dean General and the presumption of continued employment, and will therefore suffer no prejudice from its application to this case.

B. Harm to the Purposes and Policies of the Act

Furthermore, retroactive application of Oil Capitol here will only further delay the Board from accomplishing the Act's purpose of remedying unfair labor practices that were committed in [insert date of employer's unlawful conduct]. As part of the Agency's *Strategic Plan for FY 2007-FY 2012*, the Board has committed itself to "remedy cases of unfair labor practice by employers. . . impartially and promptly." *Strategic Plan for FY 2007 – FY 2012*, at p. 7. One objective in fulfilling that goal is to "[p]rovide prompt and appropriate remedial relief when violations are found." *Id.* Indeed, the Agency notes that it "firmly believe[s] that 'justice delayed is justice denied.'" Id. at 8. These discriminatees were entitled to work for Respondent in [insert date discriminatees were refused hire or were discharged/laid off] and to invoke their statutory right to organize Respondent's workplace. See, e.g., Fluor Daniel, 311 NLRB 498, 500 (1993),

enfd. in part and remanded 161 F.3d 953 (6th Cir. 1998), supp. decision 351 NLRB No. 14 (September 28, 2007) (noting that "voluntary union organizers" have statutory right to organize fellow employees). [**Insert where applicable:** They were the beneficiaries of a Board order enforcing that right in [year].] [Insert number of years] later, they still have not secured justice. **[If any discriminatees have died, retired, or become unable to work, insert the following:** Justice is indeed denied for those discriminatees who have died, retired or have become similarly unavailable for instatement.**]**

The greater difficulty the General Counsel will have meeting the Oil Capitol burden will only compound the harm these discriminatees have suffered. The Agency's efforts to remedy the unfair labor practices in this case have already been protracted. **[Insert here any relevant facts from the Background section establishing that the procedural history before the Board and/or courts has been protracted. For instance, in one case, "the unfair labor practice case was pending before the Board on exceptions for nearly two years before the Board remanded it in 2000 in light of FES, and then for another six and a half years after the ALJ issued his supplemental decision on remand."]** Retroactive application of Oil Capitol here will produce only more protracted litigation and further delay final resolution of the case. Insert here: [**B-1: in cases that have already been litigated in compliance and to the extent relevant:** Indeed, it will require the General Counsel to re-interview any witnesses still available and gather new evidence in order to draft an amended compliance specification covering an even greater period of time since Respondent's unlawful conduct. [**Insert where applicable:** Furthermore, in light of Respondent's numerous objections to the General Counsel's gross backpay calculation methods and amounts during the initial compliance proceeding, it can be anticipated that re-litigation of backpay issues under Oil Capitol will be similarly protracted.]

Most significantly, however, the Board's decision to retroactively apply Oil Capitol to this case will require the General Counsel to re-litigate compliance issues that were decided by a judge [number of] years ago under well-established Board law applicable at the time of the compliance litigation.]; or **[B-2: in cases where discriminatees have died:** As explained above, already [number] discriminatees have died and been denied the right to their ultimate remedy for Respondent's unfair labor practices. As more times passes, that number will likely grow. In these circumstances, retroactive application will undercut the Agency's commitment to resolve unfair labor practices as promptly as possible and will deny even more employees the rights to which they are entitled.]; or **[B-3: if no discriminatees have died:** As shown above, thus far the discriminatees have been denied the right to their ultimate remedy for Respondent's unfair labor practices. In these circumstances, retroactive application will undercut the Agency's commitment to resolve unfair labor practices as promptly as possible.]

C. Particular Injustice to Discriminatees

As noted above, the passage of time since Respondent's unfair labor practices has ensured the loss of evidence that the General Counsel is now required to produce under Oil Capitol. The absence of evidence now needed by the General Counsel demonstrates how retroactive application of Oil Capitol will detrimentally impact its ability to litigate the compliance proceeding and in turn unduly harm the discriminatees in this case. The Board should therefore reconsider its decision to retroactively apply Oil Capitol to this matter and find that doing so will cause a manifest injustice to the discriminatees.

[Insert the remaining paragraphs only to the extent applicable and with relevant case citations from the underlying decision(s)]:

The Board's concerns about salting practices, as articulated in Oil Capitol, are not present in this case and should not deter the Board from reconsidering its decision. See Oil Capitol, 349

NLRB No. 118, slip op. at 1 n.5 (citations omitted) (citing cases which attribute objective of salting campaigns as precipitating unfair labor practices by "startled" employers). **[Examples from previous cases: C-1:** "Here, many of the applicants made numerous attempts to secure employment with Respondent after Respondent announced that jobs were available. The applicants not only possessed the requisite skills for the job but some had previously worked for the Respondent and were not hired even though Respondent considered them to be good employees. [citation];" **C-2:** "In this case, the ALJ found that the discriminatees were bona fide applicants, and that many Union members were out of work in 1990. [citation] The ALJ also found that Union members working far from home would have likely given "serious consideration" to an opportunity to work closer to home on Respondent's three-year … project if they committed to help organize Respondent's workforce, even if that job paid less than Union-scale wages. [citation] Finally, Respondent has a long history of violating the Act. [citation]"]

Thus, this matter simply does not present the Board's concern to avoid providing a backpay "windfall" to salts whose plan is solely to entrap unsuspecting employers into inadvertently committing unfair labor practices. Rather, this matter involves bona fide applicants looking for work, who were denied a fair right to seek employment with Respondent because of its discriminatory and unlawful treatment. To further delay Board vindication of their statutory rights because of a change in law [insert number] years after the unfair labor practices were committed – when it is clear that the policies animating that change do not apply to them – would be manifestly unjust.

III. Conclusion

The General Counsel submits that, as demonstrated above, retroactive application of Oil Capitol here is not appropriate because of detrimental reliance on pre-existing law, harm to the purposes and policies of the Act, and the particular injustice to the discriminatees in this matter.

Accordingly, the Board should reconsider its decision to retroactively apply Oil Capitol and conclude that doing so would cause a manifest injustice in this matter.

Dated:

Respectfully submitted,

_____
Counsel for the General Counsel,
National Labor Relations Board
Region _____