
A LOWER “SALT” CONTENT FOR EMPLOYERS

I. INTRODUCTION

It has been said that too much salt in your diet is unhealthy. But, can the same proposition hold true in the context of a union organizing drive? Initially, choosing to use the “salting” technique¹ on an employer was a more difficult question for labor unions since “salts” were not generally considered to be protected employees under the National Labor Relations Act (“NLRA”).² In certain circuits, labor unions did not have the recourse of filing an unfair labor practice (“ULP”) charge against an employer if “salting” proved to be unsuccessful.³ Thus, prior to *Town & Country Electric, Inc.*,⁴ labor unions might have argued for a low-salt recipe. However, with the Supreme Court’s decision in that case, labor unions arguably began spicing up their union campaigns with a touch of salt, now that employers had a potential ULP charge to fear.⁵ However, it appears with the National Labor Relation Board’s (“NLRB” or “the Board”) recent decision in *Oil Capitol Sheet Metal, Inc.* (“*Oil Capitol II*”),⁶ which arguably counteracts much of the protection afforded to unions through the NLRB since *Town & Country Electric, Inc.*, the answer to the proverbial question will once again likely be that too much salt will undoubtedly “spoil the broth.”

1. Salting has been defined as “a technique where the union organizers apply for jobs at nonunion companies with the intent of organizing their workers” from within once hired. Kenneth N. Dickens, Comment, *Town & Country Electric, Inc. v. National Labor Relations Board: Salts: We’re Employees—What Happens Now?*, 99 W. VA. L. REV. 561, 562 (1997).

2. National Labor Relations Act (NLRA), 29 U.S.C. §§ 147-87 (2000); see 2 COMM. ON THE DEV. OF THE LAW UNDER THE NAT’L LABOR RELATIONS ACT, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 2260 (John E. Higgins Jr. ed., BNA Books, 5th ed. 2007) [hereinafter THE DEVELOPING LABOR LAW]; Dickens, *supra* note 1, at 563.

3. This resulted because of the former circuit split “on the issue of whether paid union organizers” or “salts” were considered to be employees under the NLRA. See THE DEVELOPING LABOR LAW, *supra* note 2, at 2260.

4. 516 U.S. 85 (1995); Dickens, *supra* note 1, at 565.

5. *Town & Country Electric, Inc.*, 516 U.S. at 98 (finding salts to be covered under the NLRA).

6. *Oil Capitol Sheet Metal, Inc. (Oil Capitol II)*, 349 N.L.R.B. No. 118, slip op. at 1 (May 31, 2007).

With the continual decline in labor union membership, unions have had to develop tactics to combat employers' resistance to unionization within the workplace.⁷ One successful, yet controversial method used by unions in organizing employees is salting.⁸ Generally, employers respond to this tactic by denying employment to all applicants who they believe have union affiliation.⁹ The NLRB has continually reaffirmed the notion that salts are "employees" under section 2(3) of the NLRA¹⁰ and thus entitled to protection under section 8(a)(3).¹¹

The protection of the NLRA entitles "union salts" who feel they were discriminated against in the hiring process to file a ULP charge against the employer with the NLRB.¹² If the NLRB finds the employer's actions constitute an unfair labor practice, part of the remedy the Board can award the employee is backpay.¹³ Traditionally, this backpay remedy was based upon a presumption that had the salt been hired, he or she would have worked for that employer for an indefinite period of time.¹⁴ The employer shouldered the burden of rebutting this presumption and thus the law was arguably in the employees' favor.¹⁵ However, recent NLRB decisions, such as the groundbreaking case *Oil Capitol II*, are tipping the scales in a more employer friendly direction.¹⁶ The union, through the General Counsel, now has the burden of establishing with affirmative evidence that the employee would have been employed from the date employment was denied "until the

7. Dickens, *supra* note 1, at 561-62; Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341, 1341 (1995).

8. Dickens, *supra* note 1, at 562.

9. Note, *supra* note 7, at 1341.

10. See NLRA, 29 U.S.C. § 152(3) (2000) ("The term 'employee' shall include any employee . . .").

11. 29 U.S.C. § 158(a)(3); Dickens, *supra* note 1, at 562. Section 158(a)(3) of the NLRA titled "Unfair labor practices by employer" provides in part: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. 158(a)(3).

12. Dickens, *supra* note 1, at 565.

13. *Id.* at 567.

14. Ryan Poor & Michael Boldt, *NLRB Removes "Salt" From Employers' Wounds*, INFORMED EMPLOYER BRIEFING (Ice Miller LLP, Indianapolis, I.N.), Sept. 28, 2007, <http://www.icemiller.com/enewsletter/InformedEmployerBriefing/Salting.htm>.

15. *Id.*

16. Oil Capitol Sheet Metal, Inc. (*Oil Capitol II*), 349 N.L.R.B. No. 118 (May 31, 2007); see Poor & Boldt, *supra* note 14. One indication of an employer friendly ideology is "that employee statutory rights must yield to countervailing business interests." Wilma Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 584 (2007).

[employer] extends a valid job offer to the discriminatee."¹⁷ Subsequent cases have shown that *Oil Capitol II* has acted as a catalyst for additional changes by the NLRB with respect to the evidentiary burden for the General Counsel.¹⁸

This Note argues that recent NLRB decisions such as *Oil Capitol II* have not only altered the law in this field, but have also had the effect of putting employers in a more economically favorable position. Part II provides a brief history on the unionization technique of salting, defines the role and characterization of salts, and distinguishes the use of this technique in the construction industry. Part III discusses the law establishing "union salts" as protected "employees" under the NLRA. Part IV describes the *Wright Line*¹⁹ test used by the NLRB to determine whether the General Counsel has established a prima facie case that the employer has committed an unfair labor practice. Part V examines the remedies issued by the NLRB in hiring discrimination cases, i.e., backpay. Part VI provides a synopsis of the *Oil Capitol II* holding, specifically in regards to the new evidentiary standard set forth with respect to the establishment of backpay remedies. Further, this section addresses the dissenting Board members' opinions. Part VII argues that because of *Oil Capitol II* and its progeny, employers will inevitably discriminate against union salts. Part VIII discusses the possible effect that *Oil Capitol II* will have on the investigative and litigation strategies of the General Counsel. Part IX includes both cases spawning from *Oil Capitol II* and cases issued subsequently to *Oil Capitol II*, which used its newly established framework. Part X provides a political analysis of the impact of these decisions on the NLRB and the workforce. This Note concludes, that these law-changing decisions have not only assisted employers, but will potentially cause unions to rethink their usage of salts as a unionization method.

17. Poor & Boldt, *supra* note 14.

18. See Press Release, National Labor Relations Board, NLRB Modifies Rule in Backpay Cases Concerning Evidence of Employees' Job Search Efforts (Oct. 11, 2007), available at http://www.nlr.gov/shared_files/Press%20Releases/2007/R-2644.pdf (discussing St. George Warehouse, 351 N.L.R.B. No. 42 (Sept. 30, 2007), which established a new rule for backpay cases further increasing the evidentiary standard for the General Counsel in unfair labor practice cases requiring a showing of efforts made by discriminatees to find interim employment).

19. NLRB v. Wright Line (*Wright Line II*), 662 F.2d 899 (1st Cir. 1981).

II. SALTING: PAST AND PRESENT

A. *The Evolution of the Term and the Practice of Salting*

Salting is a term of art derived from similar phrases used to describe scenarios in which something was artificially synthesized to create the false appearance of a natural occurrence.²⁰ Until the early 1990s, this technique was rarely utilized, possibly due to substantial union membership, and thus was unnecessary.²¹ A resurgence of this unionizing technique potentially occurred in response to decisions such as *Lechmere, Inc. v. NLRB*,²² which made it harder for unions to reach employees on an employer's premises, provided that reasonable access to employees was available outside of the workplace.²³ Since in most cases this decision in effect prevented unions from organizing at the workplace, they again began to utilize this resourceful method of organizing from within the place of employment to reach employees more directly.²⁴

Salting involves unions sending organizers, commonly referred to as salts, to companies to seek employment so once hired they can motivate employees to unionize.²⁵ Salts can be either professionals or volunteers.²⁶ Professionals are in effect seeking dual employment since

20. See *Tualatin Elec., Inc.*, 312 N.L.R.B. 129, 130 n.3 (1993) (discussing the potential origin of salting in unions based upon the usage of the term in the mining and accounting industries). It has also been argued that salting, although not necessarily referred to as such, dates even farther back to the turn of the century when "Industrial Workers of the World" used this method "to organize lumber camps." Dickens, *supra* note 1, at 564.

21. See Dickens, *supra* note 1, at 564.

22. 502 U.S. 527 (1992).

23. *Id.* at 537 ("Where reasonable alternative means of access exist, [section] 7's guarantees do not authorize trespasses by nonemployee organizers, even . . . 'under . . . reasonable regulations' established by the Board."). The Court found "reasonable access" to include tactics such as mailings, phone calls, and home visits. *Id.* at 540.

24. See Note, *supra* note 7, at 1341.

25. Dickens, *supra* note 1, at 562; Note, *supra* note 7, at 1347. A salt has been defined as "a union person who applies for a job with an employer for the purpose of initiating a union organizing campaign." Workplace Prof Blog: NLRB Changes Standard for Proving Damages in Salting Cases, http://lawprofessors.typepad.com/laborprof_blog/2007/06/nlr_changes_st.html (June 5, 2007) [hereinafter *NLRB Changes Standard*].

26. Note, *supra* note 7, at 1341; see also *Oil Capitol Sheet Metal, Inc. (Oil Capitol II)*, 349 N.L.R.B. No. 118, slip op. at 1 n.5 (May 31, 2007) (stating that regardless of the fact that some union salts receive compensation while others do not, they share the collective goal of furthering a unionizing initiative). The Board made clear that their holding would apply equally in this case to both paid and unpaid salts. *Id.*, slip op. at 2 n.6.

they will also continue to receive a full salary from the union for their services.²⁷ Volunteers perform the same function except generally the compensation they receive from the union is merely "the difference between the union wage scale and the pay at the new job."²⁸ Some unions send salts into an industry with a legitimate desire to gain employment with an employer so they can attempt to organize their co-workers while performing their expected duties as an employee of that company.²⁹ Other salts apply for positions assuming they will be denied employment and thus setting the stage for potential litigation.³⁰ In the latter scenario, unions intend to undermine the employer's capacity to combat unionizing attempts in the future, since the employer will likely be economically damaged by the substantial backpay remedy imposed.³¹

B. Overt vs. Covert Salts

While some salts act covertly, not disclosing their union membership while seeking employment, the majority act overtly, revealing their union connection on various levels.³² It is possible that a union salting campaign will concurrently encompass both overt and covert salting techniques.³³ The union will make a calculated decision based on their overall organizing plan when deciding which method will be most effective for a particular situation or employer.³⁴ Most often, salting is a practice used in tandem with other unionizing methodologies.³⁵ Therefore, it follows that the decision to salt in either an overt or covert manner will vary with local needs and what will be most effective for a particular area of employment.

An overt salt may openly disclose their union affiliation by wearing apparel depicting the union name or symbol, or by indicating union membership orally or in the hiring application.³⁶ Disclosure of union

27. Note, *supra* note 7, at 1341.

28. *Id.*

29. Susan E. Howe, *To Be or Not to Be an Employee: That is the Question of Salting*, 3 GEO. MASON INDEP. L. REV. 515, 518-19 (1995); Poor & Boldt, *supra* note 14.

30. Howe, *supra* note 29, at 518-19. Many times the actual goal of a union salt is "to precipitate the commission of unfair labor practices by startled employers." *Hartman Bros. Heating & Air Conditioning v. NLRB*, 280 F.3d 1110, 1112 (7th Cir. 2002).

31. Poor & Boldt, *supra* note 14.

32. Howe, *supra* note 29, at 519.

33. James L. Fox, "Salting" *The Construction Industry*, 24 WM. MITCHELL L. REV. 681, 684 (1998).

34. *See id.* at 684.

35. *See id.* at 685.

36. *Id.* at 684.

affiliation gives the employer notice of their organizing intentions, which potentially can be used as evidence against the employer in future discrimination based litigation.³⁷ This establishes that the employer was aware of the salt's union affiliation and did not hire him or her on that basis. Conversely, covert salts intentionally cover up their union ties when seeking employment with the targeted employer.³⁸ Such concealment techniques can involve leaving out past employment with a union or union affiliated employer and also purposefully misrepresenting themselves when completing a job application.³⁹ However, in most cases a salt's acting covertly will still reveal their union association at some point after being hired, for tactical reasons.⁴⁰

A common belief often acknowledged by courts while resolving various labor disputes is that generally, employers have a natural aversion to a unionized workplace.⁴¹ Although employers' distaste for unions may stem from various reasons, the International Brotherhood of Electrical Workers (IBEW), Local 45 has suggested a chief explanation is that employers will no longer dictate the employment terms and conditions without first bargaining with the union.⁴² In fact, "[e]mployers do lose flexibility in certain circumstances with a union because the rights of both employer and employee are spelled out in a legal, binding contract. For example, employers lose flexibility . . . [t]o layoff employees without recourse and employee input."⁴³ Because of this natural tendency, non-unionized employers typically respond to this organizing technique by denying employment to all applicants with union affiliation.⁴⁴ Denial of employment generally leads the union to respond by filing an unfair labor practice charge against the employer.⁴⁵

C. The Use of Salting in the Construction Industry

Like other trades, the construction industry in particular was greatly

37. Dickens, *supra* note 1, at 565.

38. Fox, *supra* note 33, at 684.

39. *Id.*

40. *Id.*

41. See *NLRB v. E. Smelting & Ref. Corp.*, 598 F.2d 666, 670 (1st Cir. 1979) ("Dislike of unions is not uncommon among employers . . ."), *overruled on other grounds by Wright Line II*, 662 F.2d 899 (1st Cir. 1981).

42. IBEW Local 45, Why Employers Fight Organization, http://www.ibew45.org/about/employers_oppose.html (last visited Sept. 22, 2008).

43. *Id.*

44. Note, *supra* note 7, at 1341.

45. Dickens, *supra* note 1, at 565.

impacted by such decisions as *Lechmere*.⁴⁶ This case granted employers the right to exclude, prompting unions attempting to organize various construction companies to implement various salting tactics in order to reach potential union members.⁴⁷ Aside from using this technique for organizational purposes, unions often implement this method to inhibit the ability of the "open-shop contractor" to conduct his work in a timely and efficient manner.⁴⁸ Unions in this industry have instituted programs centered on this method to organize non-unionized contractors.⁴⁹ In 1993, one program spanning across the United States was called "Construction Organizing Membership Education Training" ("COMET").⁵⁰ The construction industry differs from other areas of employment in that employees work on specific projects that can be of short duration versus working for an indefinite period of time in one location.⁵¹ Thus, the NLRB takes this into consideration if a remedy is necessary in the event of a ULP.⁵²

III. COVERAGE UNDER THE NLRA

For an extended period of time, despite the Supreme Court's holding in *Phelps Dodge Corp.*,⁵³ there was a split among the United States circuit courts with regard to whether union salts could receive protection as "employees" under section 2(3) of the NLRA.⁵⁴ The Eighth Circuit in *NLRB v. Town & Country Electric, Inc.*, reversed the NLRB's initial determination that paid union organizers were included under the statutory term "employee."⁵⁵ The court did not view the word to encompass those concurrently receiving compensation from unions as

46. *Id.* at 567-68.

47. *See id.*

48. Howe, *supra* note 29, at 518-19.

49. Dickens, *supra* note 1, at 567.

50. Howe, *supra* note 29, at 517. COMET was developed by the AFL-CIO, encompassing fifteen different construction related unions. *Id.*

51. Dean Gen. Contractors, 285 N.L.R.B. 573, 573 (1987) (recognizing the unique characteristics about employment duration with respect to the construction industry); Note, *supra* note 7, at 1346.

52. *Dean Gen. Contractors*, 285 N.L.R.B. at 573; Note, *supra* note 7, at 1345-46.

53. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941) ("[R]efusal to hire [applicants] solely because of their affiliation with the Union was an unfair labor practice under § 8(3) . . .").

54. THE DEVELOPING LABOR LAW, *supra* note 2, at 2260; Dickens, *supra* note 1, at 562-63.

55. *Town & Country Elec., Inc. v. NLRB*, 516 U.S. 85, 87-88 (1995); *see also* H.B. Zachry Co. v. NLRB, 886 F.2d 70, 75 (4th Cir. 1989) (holding that paid union organizers were not covered under the definition of "employee" in the NLRA).

well as the company they were attempting to unionize.⁵⁶ The United States Supreme Court granted certiorari in this case because circuit courts, such as the D.C. and Second Circuit, held contrary to the Eighth Circuit's findings.⁵⁷ The Court resolved this discrepancy and once and for all established that hired union organizers were covered employees under section 2(3).⁵⁸

Discriminating against an employee covered under section 2(3) of the NLRA is grounds for a filing a section 8(a)(3)⁵⁹ claim for employer discrimination.⁶⁰ Depending on the nature of the circumstances surrounding the employer's decision to deny employment to the salt, the salt can respond by alleging one of two violations under section 2(3).⁶¹ One possibility for recourse is commonly known as a "failure to hire violation," which is brought when union salts believe that there was job availability and they were not hired solely based on their union affiliation.⁶² In such cases, the General Counsel must establish that the qualified applicant was denied employment for a job in a specific area of which there was availability.⁶³

The other alternative is a "failure to consider violation" which alleges discriminatory exclusion from the entire hiring process by an employer due to the applicant's connection with the union.⁶⁴ The general assumption is that had the individual been included, he or she would have been considered qualified for the position and thus hired.⁶⁵ This may occur where a salt submits a resume to an employer and is denied an interview based on the employer's knowledge or belief that the individual participates in union activity or is affiliated with a union.⁶⁶

56. *Town & Country Elec., Inc.*, 516 U.S. at 88.

57. *Id.*; *Wilmar Elec. Serv., Inc., v. NLRB*, 968 F.2d 1327, 1330-31 (D.C. Cir. 1992) ("[individual] employed simultaneously by a union and a company is an 'employee' under § 2(3) of the [NLRA]."); *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979) (finding an individual to be an employee when employed both by the company and the union).

58. *Town & Country Elec., Inc.*, 516 U.S. at 98; Dickens, *supra* note 1, at 562-63. To support their holding, the Court cited the Restatement (Second) of Agency § 226 (1959) for the proposition that "[a] 'person may be the servant of two master . . . at one time as to one act, if the service to one does not involve abandonment of service to the other.'" *Id.* at 94-95.

59. NLRA, 29 U.S.C. § 158(a)(3) (2000).

60. *FES (a Division of Thermo Power) (FES)*, 331 N.L.R.B. 9, 12 (2000), *aff'd*, 301 F.3d 83 (3d Cir. 2002).

61. *See id.* at 12, 15.

62. *Id.* at 12.

63. *Id.*

64. *Id.* at 15.

65. *Id.* at 27 (Brame, M., concurring).

66. *See generally id.* at 15 (discussing discriminatory refusal to consider violations made by employers).

IV. THE *WRIGHT LINE* TEST

A test formulated by the Supreme Court in an earlier decision for establishing an unfair labor practice in connection with a discriminatory discharge decision made by an employer was adopted in *NLRB v. Wright Line* ("*Wright Line II*").⁶⁷ In some cases the employers' reasoning for their actions is a mere pretext for their motive to discriminate based on union affiliation, thus an NLRA violation will be more straightforward.⁶⁸ In other cases, the employers' basis for their conduct will be less obvious and thus constitute what has been commonly termed a "mixed" or "dual-motive."⁶⁹ A "mixed-motive" situation exists when an employer can be seen to have both permissible or legitimate business reasons and also impermissible or non-legitimate business reasons for their decisions.⁷⁰ This distinction was initially made by the Board in *Wright Line* ("*Wright Line I*").⁷¹

The *Wright Line* test helps determine whether the General Counsel has established a prima facie case that "[the employer's opposition to] protected conduct was a 'motivating factor' in the employer's [discharge] decision."⁷² The NLRB will find that the General Counsel has made a prima facie showing if the following elements are satisfied: (1) "the employer had an impermissible motive of antiunion animus and (2) the employer engaged in an activity covered by the NLRA,"⁷³ "such as discharging an employee for his union affiliation."⁷⁴ However, there was not unanimity amongst the courts of appeals with this two-part test.⁷⁵ Further, it was acknowledged that there was distinction amongst

67. *NLRB v. Wright Line*, 662 F.2d 899, 905 (1st Cir. 1981) (adopting the two-part test set forth in the United States Supreme Court case *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)), *superseded by statute*, 5 U.S.C. §1221 (2000), *as recognized in* *Rivera v. United States*, 924 F.2d 948 (9th Cir. 1991) and *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

68. Pamela A. Howlett, "Salt" in the Wound? Making a Case and Formulating a Remedy When an Employer Refuses to Hire Union Organizers, 81 WASH. U. L.Q. 201, 208 (2003).

69. *Id.*; *see, e.g.*, *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1035 (10th Cir. 2003) (referring to type of case as "mixed-motive"); Howe, *supra* note 29, at 519 (referring to these type of discrimination-based cases as "mixed or dual motives").

70. *Wright Line (Wright Line I)*, 251 N.L.R.B. 1083, 1084 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981); Howlett, *supra* note 68, at 208.

71. *Wright Line I*, 251 N.L.R.B. at 1084.

72. *Wright Line II*, 662 F.2d at 901-02 (quoting the rule announced by the NLRB in *Wright Line I*, 251 N.L.R.B. at 1089).

73. *Wright Line I*, 251 N.L.R.B. at 1089 (adopting the *Mt. Healthy* test).

74. Howlett, *supra* note 68, at 209 (footnotes omitted).

75. *Id.* at 211-12 (citing as examples of this disagreement *NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 967 (6th Cir. 1998) and *Starcon, Inc. v. NLRB*, 176 F.3d 948, 951 (7th Cir. 1999)).

unlawful discharge versus failure to hire cased in that the violation is not as obvious in the latter.⁷⁶ As a result, the NLRB reworked the initial test in *FES (a Division of Thermo Power)*,⁷⁷ to make it “more specific to job openings and applicants.”⁷⁸

Under the modified test for failure to hire cases, the General Counsel must now demonstrate the following in order to establish a *prima facie* case:

(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.⁷⁹

The *Wright Line* test was only applicable to unlawful discharge cases; however, the alteration, set forth in *FES*, expanded its application to failure to hire cases.⁸⁰ The Board “ma[d]e[] the test more concrete by requiring the Board’s General Counsel to match at least one specific applicant to a specific job opening.”⁸¹ Further, the Court addressed the inherent difference in unlawful discharge versus hiring cases, namely that the employer decisions in the hiring process can be hasty and are more likely to be based on pretext.⁸² The presence of a ULP is more clear-cut in the discharge cases, as employees are better able to ascertain whether the employer’s actions were based upon their union affiliation as opposed to more legitimate grounds for discharge.⁸³

When a failure to consider violation is alleged, the *Wright Line* test can still be used with a slight variation in the elements.⁸⁴ This test, like the initial *Wright Line* test, only requires that two elements, as opposed to three, be satisfied.⁸⁵ The General Counsel must establish: “(1) that the

76. *FES (a Division of Thermo Power) (FES)*, 331 N.L.R.B. 9, 24-25 (2000), *aff’d*, 301 F.3d 83 (3d Cir. 2002).

77. 331 N.L.R.B. 9 (2000).

78. Howlett, *supra* note 68, at 211-12.

79. *FES*, 331 N.L.R.B. at 12 (footnotes omitted).

80. *See* Howlett, *supra* note 68, at 212.

81. *Id.*

82. *FES*, 331 N.L.R.B. at 24.

83. *See id.* at 24-25.

84. *Id.* at 15.

85. *Id.*

respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.”⁸⁶

After the General Counsel has made an argument as to these elements for a failure to hire violation, the burden of proof shifts to the respondent-employer to make a rebuttal.⁸⁷ In essence, the employer is required to establish that regardless of the applicant’s affiliation with the union, that individual would not have been hired.⁸⁸ Further, the respondent must show: “(1) that improper motivations had no part in the employment decision; or (2) that the same action would have been taken regardless of (a) the employee’s involvement in protected activities; or (b) the employer’s union animus.”⁸⁹ For the failure to consider violation the burden also then shifts to the employer “to show that it would not have considered the applicants even in the absence of their union activity or affiliation.”⁹⁰ In both instances, this creates a hardship for the respondent-employer who must in effect “prove a negative as an affirmative defense.”⁹¹ This may motivate overt union salts to bring unfair labor practice charges against employers who deny them employment since the *Wright Line* test gives them the upper hand.⁹² After both sides have presented their evidence, the Board must make a determination as to whether a ULP has been committed by the employer.⁹³ If the Board decides the employer’s actions were discriminatory, they generally must require the employer to remedy the situation, provided that the infraction is not minor in nature or a simple technicality.⁹⁴

86. *Id.*

87. Howe, *supra* note 29, at 520. This rebuttal essentially operates as an affirmative defense.

Id.

88. FES (a Division of Thermo Power) (*FES*), 331 N.L.R.B. 9, 12 (2000), *aff’d*, 301 F.3d 83 (3d Cir. 2002).

89. Howe, *supra* note 29, at 520.

90. *FES*, 331 N.L.R.B. at 15.

91. Howe, *supra* note 29, at 520.

92. *Id.*

93. See Dickens, *supra* note 1, at 567.

94. 48 AM. JUR. 2D *Labor and Labor Relations* § 2071 (2007) [hereinafter *Labor and Labor Relations*].

V. HIRING DISCRIMINATION REMEDIES

A. Brief Overview of Remedies Issued by the NLRB

Any remedy issued by the NLRB for section 8(a)(3) violations stemming from discriminatory hiring or discharge cases should serve the purpose of making whole the injured party and “restor[ing] the part[y] to the same status [he or she] enjoyed before the occurrence of unfair labor practices and eliminate any imbalance created by the underlying violations.”⁹⁵ The remedy implemented in these types of discrimination cases is commonly referred to as a “make-whole remedy.”⁹⁶ The objective is to remedy the discriminatory situation and not to punish the employer with punitive damages.⁹⁷ Despite discrepancies among the circuit courts with regard to the remedy of cease-and-desist orders, the NLRB in *FES*, in accordance with the Seventh Circuit, found that in refusal to hire cases involving multiple applicants, a showing of discrimination against one applicant was sufficient to warrant such an order.⁹⁸

Where the Board finds an unlawful discrimination by an employer, typically they will institute a remedy that is proportionate to the violation.⁹⁹ Generally, in an unlawful discharge situation the remedy will be a reinstatement order along with backpay and in certain instances, a requirement to cease-and-desist from future discriminatory conduct.¹⁰⁰ In cases involving refusal to hire violations, the remedy is the same as that which is awarded in the case of an unlawful discharge, except the order mandates instatement rather than reinstatement, since the applicants were never employed.¹⁰¹ In these types of cases, a compliance proceeding will be conducted to evaluate whether those who applied for the position would have been granted employment and to determine how much backpay to award, in situations where the amount

95. *Id.*

96. *FES* (a Division of Thermo Power) (*FES*), 331 N.L.R.B. 9, 14 (2000), *aff'd*, 301 F.3d 83 (3d Cir. 2002).

97. *Labor and Labor Relations*, *supra* note 94. Common remedies granted by the NLRB for ULPs rooted in discriminatory discharge or hiring include: reinstatement with backpay, hiring (instatement) with backpay, and/or cease-and-desist orders. *FES*, 331 N.L.R.B. at 14; Dickens, *supra* note 1, at 567.

98. *FES*, 331 N.L.R.B. at 14.

99. Howlett, *supra* note 68, at 226.

100. THE DEVELOPING LABOR LAW, *supra* note 2, at 2750.

101. *FES*, 331 N.L.R.B. at 12.

of job applicants is greater than job availability.¹⁰²

Unlike discriminatory discharge and refusal to hire cases, the common remedy granted for refusal to consider a violation is a cease-and-desist order.¹⁰³ Such an order will "requir[e] the employer to consider the discriminatees for job openings based upon nondiscriminatory criteria and an order requiring the employer to notify the region, the discriminatees, and the charging party of future openings in the same or substantially equivalent positions."¹⁰⁴ Regardless of the remedy, since this is not meant to be punitive, the NLRB will never order a discriminatory employer to "provide a remedy for something greater than the violation it committed."¹⁰⁵

B. Development of the Backpay Remedy

If backpay is granted, the NLRB formulates an award based on the notion that this type of remedy serves the purpose of placing the employee as closely as possible back in the position he or she would have been in had the discrimination not occurred.¹⁰⁶ Backpay always includes wages and in certain situations it can also encompass any of following: "vacation benefits, bonuses, shares in profit-sharing programs, pension coverage, health and medical coverage, employee-owned housing, employee discounts on purchases, car allowances, overtime hours, meal allowances, employee stock ownership plans, tips, and, where appropriate, moving and traveling expenses incurred to obtain alternative employment."¹⁰⁷

In granting backpay, the Board must determine the period of time from which to compute the compensation that will be awarded.¹⁰⁸ In situations involving discriminatory hiring violations by employers, "backpay is owed for the entire period between the [unlawful]

102. THE DEVELOPING LABOR LAW, *supra* note 2, at 2751. As noted above, cease-and-desist orders may be granted for these types of violations in cases involving numerous applicants upon a showing of discrimination against a single applicant. *FES*, 331 N.L.R.B at 14.

103. THE DEVELOPING LABOR LAW, *supra* note 2, at 2751.

104. *Id.*

105. Howlett, *supra* note 68, at 227.

106. THE DEVELOPING LABOR LAW, *supra* note 2, at 2754-55. In other words, the Board's objective is to "make whole" the discriminatee. *Id.* at 2755.

107. *Id.* at 2754. In addition, the NLRB mandates that the employer pay the discriminatee interest on the backpay. *Id.* at 2755 (footnotes omitted).

108. See *Diamond Walnut Growers, Inc.*, 340 N.L.R.B. 1129, 1132 (2003) (discussing the rebuttable presumption associated with determining the backpay period in discriminatory hiring or discharge cases).

discrimination and [the employers'] valid offer of reinstatement [or instatement]."¹⁰⁹ In *Diamond Walnut Growers, Inc.*,¹¹⁰ this presumption was established by the NLRB to be rebuttable.¹¹¹ Furthermore, it was set forth that the Board has great discretion to align the remedy with the facts of each case in an effort to account for differences in severity of the violation committed by the specific employer in question.¹¹² Finally, the Board made it clear that the remedy granted cannot put the discriminatee "in a better position than he would have been in had the unfair labor practice not occurred."¹¹³

Until recently, when the NLRB examined cases within the construction industry, the rebuttable presumption for the backpay remedy differed due to the nature of the industry.¹¹⁴ Construction jobs, being of a shorter duration than other industries and having a completion date, bring up the issue of whether an individual's employment ends on that specific completion date or continues as they take on another project.¹¹⁵ The Board typically applied the further presumption that the construction employee's employment would not end upon the completion of one specific job but rather the individual would be transferred or given another assignment.¹¹⁶ Therefore, the burden was placed upon the employer to refute this presupposition by establishing that the employee in this situation would not have continued in his or her employment.¹¹⁷ If the employer was not successful in rebutting this presumption, each discriminatee would be entitled to backpay and must be offered a job.¹¹⁸

Despite this presumption of an indefinite employment period the Board has considered factors while formulating the period of backpay that reduced the amount of backpay awarded.¹¹⁹ The NLRB could find time frames within the backpay period that do not allow for an

109. *Id.*

110. 340 N.L.R.B. at 1129.

111. *Id.* This means that an employer was presented with the opportunity to counter or attempt to mitigate the discriminatory allegations. *Id.*

112. *Id.*

113. *Id.*

114. See *Ferguson Elec. Co.*, 330 N.L.R.B. 514, 515 (2000).

115. See *id.*; *Dean Gen. Contractors*, 285 N.L.R.B. 573, 573 (1987).

116. *Ferguson Elec. Co.*, 330 N.L.R.B. at 515; *Dean Gen. Contractors*, 285 N.L.R.B. at 573; Note, *supra* note 7, at 1346.

117. *Ferguson Elec. Co.*, 330 N.L.R.B. at 515; *Dean Gen. Contractors*, 285 N.L.R.B. at 573; Note, *supra* note 7, at 1346.

118. Note, *supra* note 7, at 1346. This has held true even when the amount of individuals who applied for jobs exceeded the number of job openings. *Id.*

119. See MATTHEW M. FRANCKIEWICZ, WINNING AT THE NLRB 328 (BNA Books 1995).

accumulation of backpay.¹²⁰ These gaps have been referred to as either “excepted periods” or “excluded periods.”¹²¹ The burden has generally been on the respondent-employer to demonstrate the existence of such “excepted periods.”¹²² Where the Board ultimately reversed the earlier decision, this time frame has been included for purposes of calculating the backpay period.¹²³

Another consideration for the Board in computing the amount of backpay to award a discriminatee may be interim earnings.¹²⁴ If a salt, after being denied employment, then finds another job, the NLRB might subtract any earnings that overlapped with the decided backpay period when the Board determines how much to award that individual.¹²⁵ Stemming from the idea of interim earnings is the notion that essentially the discriminatee has a duty to mitigate his or her damages.¹²⁶ This could arguably be seen as an early attempt by the NLRB to make the backpay period less damaging for employers.

This backpay calculation has often been criticized by both scholars and the courts, from both sides of the spectrum. Some scholars have condemned this remedy as not being strong enough and thus, employers may be encouraged to violate the NLRA.¹²⁷ A more common criticism seems to be that the presumption of an indefinite period of employment in calculating the backpay award is too punitive, which is in direct opposition to the make-whole purpose of the backpay remedy.¹²⁸ Thus, the remedy is not “tailored to the actual consequences of discrimination.”¹²⁹ Another critique has been that it incorrectly places

120. *Id.*

121. *Id.* These gaps generally pertain to periods where the employee would not have generated earnings despite the ULP, e.g., during a time where operation ceases due to vacation. *Id.* “Excepted periods may also be based on factors unique to the particular employee, such as periods of illness or other inability to work, as well as periods when the employee for personal reason was out of the labor market.” *Id.*

122. *Id.* at 333.

123. THE DEVELOPING LABOR LAW, *supra* note 2, at 2757.

124. *Id.*

125. *See id.* at 2758.

126. *Id.* In other words, the discriminated individual must make a reasonable attempt to seek other employment. *Id.*

127. Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 234 (2005).

128. Oil Capitol Sheet Metal, Inc. (*Oil Capitol II*), 349 N.L.R.B. No. 118, slip op. at 2 (May 31, 2007); Poor & Boldt, *supra* note 14; Winston & Strawn, LLP Briefing, Labor and Employment Practice, Oil Capitol Sheet Metal Update, June 2007, at 1 http://www.winston.com/siteFiles/publications/Oil_Capital_Sheet_Metal_Update.pdf [hereinafter Winston & Strawn].

129. Winston & Strawn, *supra* note 128.

the burden on the employer to establish how long the salts may be employed.¹³⁰ The argument is:

the respondent employer is in the best position to demonstrate that a given job would have ended or a given employee would have been terminated at some date certain for nondiscriminatory reasons, and any uncertainty as to how long an applicant, if hired, would have worked for a respondent employer is primarily a product of the respondent's unlawful conduct.¹³¹

It is possible that this argument and other criticisms are what prompted the NLRB to make the groundbreaking evidentiary changes it did in the recent decision in *Oil Capitol II*.

VI. OIL CAPITOL SHEET METAL, INC.

A. Factual Background

At the time of the incident in question, Michael Couch ("Couch") had been operating as a union organizer for more than four years.¹³² His obligations encompassed unionizing workplaces that were not represented and persuading companies without collective bargaining contracts with unions to sign such agreements.¹³³ Couch stated that he arrived at the respondent's place of business in February of 1998, outfitted in union apparel in an effort to convince the Chairman of Oil Capitol Sheet Metal, Inc. ("Oil Capitol") to partake in a collective bargaining agreement with his union.¹³⁴ However, the company was not receptive to such attempts.¹³⁵ During this time, Couch successfully convinced some of the Oil Capitol's employees to leave the company

130. See Jake R. Fulcher, *NLRB Ruling on Union "Salting" Gives Employers Relief*, THE KDDK ADVANTAGE (Kahn, Dees, Donovan & Kahn, LLP, Evansville, Ind.) Aug. 2007, available at <http://www.kddk.com/newsletters/2007/aug07.html>.

131. *Oil Capitol II*, 349 N.L.R.B., No. 118, slip op. at 1.

132. Oil Capitol Sheet Metal, Inc. (*Oil Capitol I*), 17-CA-19714 (ALJ Jan. 3, 2000), reprinted in *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 18 (May 31, 2007). The NLRB attached the ALJ's opinion subsequent to their decision. *Id.*; see also Peter Kok & Gregory Ripple, *Less Salt in the Wound: New Rules for Backpay in Salting Cases*, MILLER JOHNSON, Oct. 5, 2007, <http://www.millerjohnson.com/pubs/xprPubDetail.aspx?xpST=PubDetail&pub=1577> [hereinafter Kok & Ripple] (discussing Couch's prior experience as a union organizer).

133. *Oil Capitol I*, 349 N.L.R.B. No. 118, slip op. at 18.

134. *Id.*

135. *Id.*

and join a unionized employer.¹³⁶

On May 5, 1998, Couch responded in person to an Oil Capitol employment advertisement, wearing attire advocating his union affiliation.¹³⁷ There he interacted with DeRycke, an individual whom he knew had previously worked for a unionized company as an estimator.¹³⁸ DeRycke asked him to demonstrate his ability to perform a specific mechanical procedure in writing.¹³⁹ Since Couch anticipated that an incorrect response would cost him the employment, he sought clarification of the assignment.¹⁴⁰ A resulting conversation indicated that this type of written test was generally not given to job applicants by the company during an interview.¹⁴¹ President John C. Odom (the "President") of Oil Capitol, whom Couch claimed to have previously met, confronted Couch about the questions he had failed to answer.¹⁴² At that point Couch made clear his capabilities and willingness to demonstrate them in any practical test necessary.¹⁴³ Couch alleged that he was then accused by the President of harassment to which he responded that he was only there to apply for employment.¹⁴⁴ Thus, the claim brought on Couch's behalf was for failure to hire based on his union affiliation, in violation of sections 8(a)(1) and (3) of the NLRA.¹⁴⁵

Michael London ("London") was also a union organizer who saw Oil Capitol's employment advertisement.¹⁴⁶ Upon inquiry, London received indication from DeRycke that there was still job availability and enthusiasm was expressed at the prospect of him coming to work there.¹⁴⁷ DeRycke responded to London's statement that he could not immediately come in for an interview with the implication that if he came in for an interview based on his level of experience he would be granted employment.¹⁴⁸ London eventually came to Oil Capitol and during his meeting the President inquired from London as to whether the

136. *Id.*

137. *Id.*; see also Kok & Ripple, *supra* note 132 (discussing that Couch's primary objective when he applied at Oil Capitol was to gain employment in order to unionize).

138. *Oil Capitol I*, 349 N.L.R.B. No. 118, slip op. at 18.

139. *Id.*

140. *Id.*

141. *Id.*, slip op. at 18, 21.

142. *Id.*, slip op. at 18-19.

143. *Id.*, slip op. at 19.

144. *Id.*

145. *Id.*, slip op. at 21.

146. *Id.*, slip op. at 19.

147. *Id.*

148. *Id.*

contractor, Liberty Sheet Metal, was a union company.¹⁴⁹ Unlike Couch, London did not arrive at Oil Capitol wearing union apparel, nor did he reveal his union affiliation.¹⁵⁰ Further, he was never asked to respond to the types of questions that Couch had demonstrated resistance to during his interview.¹⁵¹ London was hired, thus the grounds for the allegations were not failure to hire or even failure to consider, but rather were made on the basis of the purported unlawful interrogation as to his previous place of employment being union affiliated.¹⁵²

The Company President, John C. Odom, painted a completely different image of the events that transpired between his company and Couch. Despite the potential implications of his interaction with both alleged discriminatees, the President described himself as union friendly.¹⁵³ To counter the allegations, the President claimed that despite not having a union contract at the time, he had no bias against union members since he believed workers with a union affiliation tended to be better trained and more skilled than their nonunion counterparts.¹⁵⁴ As opposed to what Couch perceived to be anti-union animus, the President justified his request for Couch to complete the written test based on his necessity for an employee to perform this function out in the field.¹⁵⁵ He described his encounter with Couch as being very tense and caused him at times to feel threatened due to Couch's aggressive mannerisms and his refusal to answer the written questions.¹⁵⁶ As to his interaction with London, the President stated that they had an agreeable encounter and he hired London based on his merits as a sheet metal worker.¹⁵⁷

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*, slip op. at 21.

153. *Id.*, slip op. at 19. He stated that he had implemented contractual agreements with unions, which lasted for an extended period of time. *Id.*

154. *Id.* The President expressed his belief that some of the skills union workers possess could not be developed from training in technical schools. *Id.*

155. *Id.*, slip op. at 19-20. An assertion made by the company in its defense is that this test, in actuality, put Couch in a better position than most interviewees in that it provided him with the opportunity to formulate answers to questions he would have otherwise had to respond to spontaneously during an interview. *Id.*, slip op. at 21.

156. *Id.*, slip op. at 20. The company used this confrontational situation to support its argument that it had not exhibited discrimination against union members during the hiring process, but rather had a valid reason for not hiring this specific individual. *Id.*

157. *Id.*

B. The Administrative Law Judge's Decision

1. Initial Determination

In response to a claim brought by the regional director of the Board, the administrative law judge ("ALJ") evaluated the merits of the case based on the facts at hand.¹⁵⁸ His determination that there was employer conduct in violation of section 8(a)(3) involved four components.¹⁵⁹ Before discussing each of these in detail, the ALJ made an initial credibility determination based on the testimony of both parties.¹⁶⁰ As a whole, the ALJ was suspicious of much of the President's testimony with regard to his actions and his perception of the encounter that took place between himself and applicant Couch.¹⁶¹

The ALJ evaluated each element in turn. First, the ALJ determined that the employer in question, Oil Capitol, was undoubtedly covered by the NLRA.¹⁶² Next, the ALJ found that Oil Capitol was unquestionably hiring employees or at a minimum intended to do so at the time when Couch came into the company seeking employment.¹⁶³ Third, the ALJ concluded the respondent-employer had clearly demonstrated anti-union animus during the hiring process.¹⁶⁴ The ALJ felt that despite the President's testimony to the contrary, he had knowledge of Couch's status as a union organizer from the previous encounter that Couch alleged occurred in early 1998.¹⁶⁵ The anti-union animus was further evidenced by the unprecedented written requirement that Couch was asked to complete during his interview.¹⁶⁶ The situation with London also exemplified the company's anti-union sentiment in that he was interrogated as to whether one of his previous employer's was a

158. *Id.*, slip op. at 18.

159. *Id.*, slip op. at 22-23.

160. *Id.*, slip op. at 22.

161. *Id.*, slip op. at 22-23. One aspect of the President's testimony that the ALJ found particularly unconvincing was the President's statement that training of the caliber the union provided was not available from technical schools. *Id.*, slip op. at 22.

162. *Id.*, slip op. at 23.

163. *Id.* This finding was evidenced by the fact that Oil Capitol's records showed that job applicants were hired both before and after the incident with Couch. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* Further, the ALJ found that the company took advantage of Couch's attempts to seek further explanation of the task at hand, using it as a basis for immediately concluding the interview. *Id.*

unionized company.¹⁶⁷ Finally, the hiring of London, a covert union organizer, and not Couch, an overt organizer, confirmed Oil Capitol's blatant discrimination towards individuals with union affiliation.¹⁶⁸

The final determination made by the ALJ was that based on his qualifications and skill, Couch was indisputably a valid job applicant, despite his position as a paid union salt.¹⁶⁹ Thus, Couch was entitled to the full protection by the NLRA.¹⁷⁰ The company was not able to counter the evidence presented by showing that Couch would not have been granted employment "even in the absence of any protected conduct on his part."¹⁷¹ The ALJ concluded from this analysis that Oil Capitol had committed an unfair labor practice in violation of sections 8(a)(1) and (3) the NLRA.¹⁷²

To remedy their unfair labor practice, the ALJ held that it would be appropriate to mandate that Oil Capitol cease and desist as well as take measures to bring itself into compliance with the policies set forth by the NLRA.¹⁷³ Since it had been found that Oil Capitol had acted in a discriminatory manner when it refused to hire Couch after his interview, the ALJ further held it must evaluate his job qualifications and compensate him with appropriate backpay.¹⁷⁴

2. Supplemental Opinion Subsequent to *FES*

In a supplemental decision on July 31, 2000, after the Board remanded the case back to him for reevaluation given the NLRB's decision in *FES*, the ALJ reaffirmed his earlier rulings.¹⁷⁵ Based upon *FES*, the ALJ established both that: (1) positions were available at the time of the purported discriminatory conduct as supported by his earlier findings that the company was taking affirmative actions to recruit job

167. *Id.* London's interview further demonstrated anti-union animus where he was explicitly told by one of the company's employees that Oil Capitol was not represented by a union when he inquired as to whether the company was hiring. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* This is evidenced by the fact that London, the covert union organizer, was hired. *Id.*

172. *See id.*, slip op. at 21, 23.

173. *Id.*, slip op. at 23.

174. *Id.* Additionally, the ALJ attached a Notice for the employer to post at the jobsite setting forth employee's collective bargaining rights and impermissible conduct from which Oil Capitol must now refrain. *Id.*

175. *Id.*, slip op. at 23, 25. This occurred after "[r]espondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief." *Id.*, slip op. at 1.

applicants, and (2) Couch possessed the appropriate background required for the available job and in fact the employer deviated from the standards set forth in the job description or applied such standard in a discriminatory fashion.¹⁷⁶ Thus, the ALJ reaffirmed his original bench decision establishing that the employer had committed a refusal to hire violation in accordance with the new test set forth in *FES*.¹⁷⁷

3. The NLRB's Decision

Following this supplemental decision issued by ALJ Cates, Respondent submitted exceptions in conjunction with a brief in support thereof and the NLRB reheard the case considering these exceptions.¹⁷⁸ The NLRB agreed with the ALJ that Oil Capitol's discriminatory failure to hire Couch constituted an unfair labor practice under section 8(a)(3) of the NLRA.¹⁷⁹ Specifically, that the General Counsel had made out a prima facie case in accordance with the new test set forth in *FES*.¹⁸⁰ Further, the Respondent did not successfully refute these allegations by showing that Couch would have been denied employment regardless of his union connections.¹⁸¹

The Board reversed the portion of the ALJ decision pertaining to London, where the ALJ found that the employer had unlawfully interrogated London by asking him whether a previous employer was unionized and thus, had committed a section 8(a)(1) violation.¹⁸² The NLRB concluded this determination was incorrect as there was no implicit connotation that an affirmative answer to the posed question would negatively impact their hiring decision, nor did it indicate an antiunion sentiment.¹⁸³ Additionally, the Board found that the statement made by DeRycke that Oil Capitol was a nonunion employer was a factual rather than a coercive statement; thus, it did not suggest anti-

176. *Id.*, slip op. at 24-25.

177. *Id.*, slip op. at 25. The ALJ determined that the proper terminology for part of the remedy to be imposed for a failure to hire violation is "instatement" as opposed to "reinstatement" which was the term he had originally used in his earlier bench decision. *Id.*

178. Oil Capitol Sheet Metal, Inc. (*Oil Capitol II*), 349 N.L.R.B. No. 118, slip op. at 1 (May 31, 2007).

179. *Id.* With respect to the ALJ's findings regarding Michael Couch, the Board found that the ALJ had erred by affirming as opposed to amending his conclusions of law, remedy, and order. *Id.*, slip op. at 3. In doing so, he reserved the issue of the employer's refusal to hire for a compliance proceeding, which the Board deemed superfluous. *Id.*

180. *Id.*, slip op. at 3.

181. *Id.*

182. *Id.*, slip op. at 8.

183. *Id.*

union animus.¹⁸⁴

The groundbreaking nature of this decision stemmed from the fact that the Board, on its own initiative, addressed whether there should be a change in the longstanding tradition of providing discriminatees with backpay based upon a presumption of indefinite employment.¹⁸⁵ The NLRB treated this as the primary issue for consideration in this case.¹⁸⁶ Specifically, it evaluated whether a salt is entitled to the application of a rebuttable presumption with respect to the backpay period.¹⁸⁷ A distinction was made between union salts and typical job applicants with respect to each individual's goals of obtaining the position and the desired duration of the employment.¹⁸⁸ The Board set forth the terms of the evidentiary requirement the General Counsel must meet, holding that there could no longer be a reliance on the presumption to satisfy their burden of proof with respect to the backpay period warranted.¹⁸⁹ Part of their determination was based upon the notion that prior to this decision, the burden was misplaced upon the respondent employer who was not in as good of a position as the General Counsel to produce evidence regarding the presumed duration of an individual's employment.¹⁹⁰

Many ramifications resulted from the Board's consideration of this issue and the way in which their decision altered backpay determinations. Most importantly, the Board will now no longer apply the traditional presumption if the discriminatee in question is acting as a

184. *Id.*, slip op. at 9.

185. *Id.*, slip op. at 1. The Board reasoned that despite the dissent's argument in the alternative, it falls within the Board's independent power to raise issues resulting in the imposition of a remedy that they see fit. *Id.*, slip op. at 6. Specifically, the majority disagreed with the fact that the parties did not challenge this remedy prevented them from raising it themselves. *Id.*

186. *Id.*

187. *Id.*; see also *NLRB Adopts New Evidentiary Standard for Establishing "Salt" Backpay Period*, LEGAL UPDATES (Jackson Lewis, White Plains, N.Y.), June 12, 2007, <http://www.jacksonlewis.com/legalupdates/articleprint.cfm?aid=1139> [hereinafter *New Evidentiary Standard*] (highlighting that the interim goal of the union salt would impact the Board's consideration of this issue).

188. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 2. The NLRB alluded to the fact that typically a salt that is hired with the sole purpose of unionizing will continue or plan to continue only as long as the goal remains or until it is fulfilled. *Id.*; see also Michael R. Lied, *NLRB Changes Damages Presumptions When Employer Refuses to Hire Paid Union Organizers*, (Howard & Howard Peoria, Ill), June 28, 2007 (discussing that union salts are usually seeking only "limited engagement" unlike the average applicant).

189. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 1-2. The removal of the presumption was based upon the Board's decision that it was too speculative in nature and not applicable to this class of alleged discriminatees. *Id.*, slip op. at 2.

190. *Id.*; see also Poor & Boldt, *supra* note 14 (supporting the idea that this burden has historically been mislaid).

paid union organizer.¹⁹¹ The Board, in effect, created a novel obligation for the General Counsel with respect to the evidence that must be presented to support the amount of backpay based upon what would have been the anticipated term of employment had the individual actually been hired by the respondent employer.¹⁹² The evidence that must be presented must be affirmative in nature.¹⁹³ The Board provided a list of non-exhaustive evidence that could be submitted by the General Counsel including the following:

[T]he salt/discriminatees 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.¹⁹⁴

Furthermore, with respect to construction projects, the presumption of transfer to other sites upon job completion will also no longer be accepted as sufficient on face value.¹⁹⁵ There will need to be an affirmative showing with evidence that a transfer to a new jobsite would be welcomed and accepted by that individual employee if he or she had initially been hired.¹⁹⁶

This case sets important precedent for similar cases that will be presented to the Board down the line. The new standard of evidentiary proof for the General Counsel will be required by the Board in cases involving either a failure to hire or an unlawful discharge of a union salt.¹⁹⁷ The Board anticipated that its decision would affect the remedy of instatement/reinstatement in that if the General Counsel failed to meet

191. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 2. The Board partly relied on *Aneco v. NLRB*, 285 F.3d 326 (4th Cir. 2002), in making this determination. Ross' Employment Law Blog: NLRB: Calculating Backpay for Salters, http://www.lawmemo.com/blog2007/06/nlr_calculatin.html (June 5, 2007) [hereinafter Ross' Employment Law Blog]. In *Aneco*, the court held that the Board improperly assumed that the paid union organizer would have been employed by the respondent for a specific period of time. *Id.*

192. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 2; see also Poor & Boldt, *supra* note 14 (emphasizing that the NLRB's decision places the burden of establishing damages indirectly on the union by making it the obligation of the General Counsel to make such a demonstration).

193. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 2.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

their burden, such a remedy would not be permitted for the salt.¹⁹⁸ Although the Board's decision will have an impact on the burden of proof in various types of salting cases, this effect will not carry over to cases not involving union salts.¹⁹⁹

4. The Dissent

Despite the unanimity of the Board with respect to the failure to hire violation by Oil Capitol of sections 8(a)(1) and (3) of the NLRA, there was avid disagreement regarding the section 8(a)(1) violation and, more significantly, the remedy issue raised by the Board in this case.²⁰⁰ Specifically, Members Wilma B. Liebman²⁰¹ and Dennis P. Walsh²⁰² disagreed with the Board's decision to act on its own initiative when it raised the issue with respect to backpay period duration, which led to the eventual overturning of strong precedent.²⁰³ The dissenting members felt that the Board overstepped its bounds when they decided to examine an aspect of the law that had not been questioned by either of the parties in this case.²⁰⁴ They disagreed with the majority's theory that a new policy choice with respect to the evidence requirement in these employment discrimination cases was warranted.²⁰⁵ Further, the dissenting members disagreed that a distinction should be made between salts and other employee plaintiffs who claim they have suffered from discrimination.²⁰⁶ They reasoned that since backpay is only awarded after the employer is found to be at fault, it seemed fitting to resolve any

198. *Id.*

199. *NLRB Changes Standard*, *supra* note 25.

200. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 10 n.1 (Liebman, M. & Walsh, M., dissenting); Ross' Employment Law Blog, *supra* note 191.

201. Wilma B. Liebman was designated Chairman of the NLRB by President Barack Obama on January 20, 2009. This Note refers to her title at the time of the decision in *Oil Capitol*.

202. Scholars emphasized that it came as no shock that these members would find fault in the majority's new approach to calculating backpay periods in cases involving union salts. *NLRB Changes Standard*, *supra* note 25.

203. Ross' Employment Law Blog, *supra* note 191. The dissenters noted that this precedent had been followed previously by appellate courts on two separate occasions and, more substantially, never been rejected. *Id.*

204. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 11 (finding the new approach taken by the majority to be unfounded in both a factual and legal sense); *NLRB Changes Standard*, *supra* note 25 (stressing that the Board had raised this issue without it having it been briefed by either of the parties and further without "any sound legal or empirical basis").

205. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 11.

206. *NLRB Changes Standard*, *supra* note 25 (describing the dissenting opinion's view that salts should continue to receive the same treatment as non-salts in discrimination cases with respect to backpay awards); Ross' Employment Law Blog, *supra* note 191.

discrepancy as to the facts alleged against that employer.²⁰⁷

Members Liebman and Walsh took issue with three aspects of the majority's new evidentiary requirement.²⁰⁸ First, they found it problematic that the majority neglected to set forth explicit standards to be used in establishing whether or not a discriminatee is in fact a union salt.²⁰⁹ In other words, in every case the issue of whether an individual discriminatee is a salt or not will arise and thus, have to be litigated. Second, a lack of a distinction between voluntary salts and those who receive compensation for their union organizing efforts was found to be a cause for concern.²¹⁰ Finally, they found the Board erred when they addressed the issue of whether salts must receive reinstatement or reinstatement as this was outside of the scope of the backpay issue.²¹¹ The dissenters also took issue with how the majority extended their holding beyond the question of backpay in failure to hire cases, to unlawful termination cases since the latter present issues of greater severity and do not necessarily warrant the same remedy.²¹²

As the dissenters recognized in concluding their opinion, it can be argued that the majority has flouted traditional NLRA policy by overstepping the bounds of their role as rule constructionists by creating new arbitrary rules.²¹³ It is rare for the NLRB to exercise rulemaking authority and when it does in fact do so, it has generally been limited to situations where they found it necessary to establish parameters for representation elections.²¹⁴ The Supreme Court has made clear that although rulemaking can be permissible in policy determinations, the Board may not abuse their discretion in doing so.²¹⁵ The majority's holding in *Oil Capitol II* is arguably such an abuse of discretion, as supported by the lack of legal and factual support for the removal of the longstanding presumption of indefinite backpay. This decision has hastily invalidated what has been seen as established case law, which has

207. *NLRB Changes Standard*, *supra* note 25.

208. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 14 (Liebman, M. & Walsh, M., dissenting).

209. *Id.*

210. *Id.* They pointed out that since paid and unpaid salts may be treated differently by the union, it was an error for the NLRB to overlook this distinction. *Id.*, slip op. at 15.

211. *Id.*, slip op. at 14.

212. *Id.*, slip op. at 15. Noting that the level of coercion in unlawful discharge cases would likely be greater than in failure to hire cases due to the possibility that other employees will be privy to this occurrence. *Id.*

213. *Id.*

214. THEODORE J. ST. ANTOINE ET. AL, LABOR RELATIONS LAW: CASES AND MATERIALS 38 (11th ed. 2005).

215. *Id.* at 39.

been consistently upheld by the NLRB in past decisions and as such, contravenes the adversarial practice of stare decisis.²¹⁶ Furthermore, this holding can be criticized as stemming from a societal distaste for the unionizing method of salting that has been developing since the tactic's favorable treatment in *Town & Country Electric, Co.*²¹⁷ It was improper for the Board to retract from its prior recognition that this tactic was in fact protected under the NLRA as a valid collective bargaining practice.²¹⁸ As the dissent plainly recognized, the Board should not be "endors[ing] what amounts to the Board's own discrimination against salts."²¹⁹

VII. OIL CAPITOL, A VEHICLE FOR DISCRIMINATION?

If one thing is clear from the majority's holding in *Oil Capitol II*, it is that the employer may now be more inclined to discriminate against union salts in terms of hiring. This ruling arguably facilitates the ease with which employers may filter out applicants whom they believe are not truly prospective employees due to their union affiliation. Further, this has sparked the Board to continually decide cases in a more employer friendly manner, effectively counteracting much of the advancement workers have gained since the Board's decision in *Town & Country Electric, Co.*, to include salts in the definition of employee in the NLRA.

Recently, Wilma B. Liebman, one of the dissenters in *Oil Capitol II*, made a statement before employment-related subcommittees in the House of Representatives and the Senate regarding the impact of recent decisions on workers' rights.²²⁰ A major issue she addressed was the current trend of Board decisions moving away from well-established

216. See *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 15 (Liebman, M. & Walsh, M., dissenting).

217. *Id.* (discussing that since the Board's decision in *Town & Country Electric, Co.*, this practice has experienced widespread success as a technique of union organization).

218. See *id.*

219. *Id.*

220. Wilma B. Liebman, Member, NLRB, The National Labor Relation's Board: Recent Decisions and Their Impact on Workers' Rights, Statement Before the Subcommittee on Employment and Workplace Safety, Committee on Health, Employment, Labor and Pensions of the United States Senate, and the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Labor of the United States House of Representatives 1 (Dec. 13, 2007) (transcript available online with the House at the website for the Committee on Education of the House of Representatives), available at <http://edlabor.house.gov/testimony/121307WilmaLiebmanTestimony.pdf> [hereinafter Liebman Statement].

principles of law.²²¹ One principle being that "uncertainties are to be resolved against the wrongdoer: here, the employer who engaged in unlawful discrimination."²²² This principle was prudently manufactured into the test set forth by the Board's decision in *FES*, for determining whether a failure to hire violation existed.²²³ Any uncertainties with respect to whether an employer had committed such a violation were decided in favor of the union salt.²²⁴ She addressed that *Oil Capitol II* contravenes this longstanding tenet of labor and employment law.²²⁵ Liebman drew attention to her dissenting opinion in which her and Member Walsh criticized the majority's holding as "fundamentally unfair" as it regarded union salts as "a uniquely disfavored class of discriminatees."²²⁶

Liebman further addressed that the NLRB explored and ruled on issues that were not raised by the parties to the suit in *Oil Capitol II* and other subsequent decisions.²²⁷ She found it to be troubling and arguably an abuse of power that the Board was establishing a new trend of ruling on issues with established precedential value by acting without prompt and without soliciting briefs from the parties.²²⁸ Even more disturbing was the fact that the Board's justifications for doing so were unsupported.²²⁹

Member Liebman analogized the fluctuation in decision making of the NLRB seen as a new Administration takes office, which in effect changes the Board's composition by appointing new members, to a playground see-saw.²³⁰ Her argument centered on the fact that the Bush-appointed Board departed from the pattern set forth by the Board appointed during the Clinton Administration was by no means unanticipated.²³¹ It was especially notable that the current Board has

221. *Id.* at 13.

222. *Id.* at 13-14.

223. *Id.* at 13.

224. *See id.* at 13-14.

225. *Id.* at 13. The evidentiary burden established in *Oil Capitol* makes it such that any discrepancies will be resolved against the discriminatee-salt. *See id.*

226. *Id.* at 14 (citing *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 10 (May 31, 2007)).

227. *Id.* at 5, 13.

228. *Id.* at 5.

229. *Id.* at 5-6.

230. *Id.* at 5. Her analogy was made in order to demonstrate the profound impact that political change has on the composition of the Board and, as a result, the decision making process as well. *See id.* She emphasized that the recent decisions were especially problematic in this sense and constituted what she terms a "sea change," since the present NLRB arguably departs in a substantial manner from the underlying policies and ideals surrounding the NLRA. *Id.*

231. *Id.*

been reversing past decisions that had been continually reaffirmed not only by the Clinton Administration but also numerous preceding Boards.²³² The impact of this new tendency has caused an uproar among unhappy litigants who feel slighted by the loss of protection that was once provided under the NLRA as well as scholars in the field of labor and employment law.²³³ The long-term effect has been a continual decline in the NLRB's caseload due to distrust and loss of faith in this system by would-be litigants in labor and employment-related disputes.²³⁴ In shying away from bringing cases before the NLRB, labor unions have redirected their focus to their state and local governments for obtaining relief in failure to hire and other unfair labor practice allegations against employers.²³⁵

Another fault of the current NLRB, which is evidenced by both *Oil Capitol II* and other recent decisions, is its failure to properly utilize remedies laid out in the NLRA for unfair labor practice cases.²³⁶ The alteration in how the remedy granted to discriminatees will be calculated, as set forth in *Oil Capitol II*, will arguably now have less of a deterrent effect on employers in terms of discriminating against union salts in both hiring and discharge.²³⁷ A prominent scholar articulated his view that remedies imposed by the NLRB have habitually been of the "slap-on-the-wrist variety," even prior to this change in *Oil Capitol II*.²³⁸ However, now with this ruling, employers might be more willing to take the hit of paying a small backpay remedy in exchange for being able to rid themselves of a pesky union salt.²³⁹ The harsh reality of this case is that the potential for increased discrimination by employers is inevitable.

VIII. OIL CAPITOL'S POTENTIAL IMPACT ON THE GENERAL COUNSEL'S INVESTIGATIVE AND LITIGATION STRATEGIES

Subsequent to the Board's groundbreaking decision in *Oil Capitol*

232. *Id.* She felt this Board was unique for this reason, as no past Board had blatantly disregarded such established precedent in this manner. See discussion regarding the Board ruling on its own initiative *supra* notes 185-90 and accompanying text.

233. Liebman Statement, *supra* note 220, at 6.

234. *Id.* Member Liebman provided statistics, which illuminate this recent decline. *Id.* at 6 n.5.

235. *Id.* at 6.

236. *Id.* at 28; Liebman, *supra* note 16, at 585.

237. This could potentially be seen as an impediment in the calculation of backpay awards. Liebman, *supra* note 16, at 585 n.116.

238. *NLRB Changes Standard*, *supra* note 25.

239. See *id.*

II, it was initially unclear to the General Counsel as to how they would meet this new evidentiary burden.²⁴⁰ As such, they put decisions in which the *Oil Capitol II* framework would apply on hold until a proper consensus could be reached on how to proceed with such cases.²⁴¹ Finally, in February 2008, the Assistant General Counsel released a memorandum to all NLRB Regional Offices establishing the new framework to be used at both the investigatory and litigation stages of cases involving the issue of unfair labor practices involving union salts.²⁴² This proof structure would displace any previous instructive orders that would have applied in such cases.²⁴³

The memorandum advised all regional offices of the substantial impact of the *Oil Capitol II* decision on the pursuance of such cases, in terms of the alteration in burden of proof and the evidence that will have to be produced.²⁴⁴ In deciding on how to go forward with a case, if at all, it is crucial to first determine whether or not the alleged discriminatee is purported to be a salt, as this will impact the type of evidence that must be adduced.²⁴⁵ It is possible that having to make such a determination before proceeding will discourage the General Counsel from bringing the case at all. Additionally, it was suggested that the Regional Directors should focus, amongst other things, on the factors laid out by the NLRB in *Oil Capitol II* when establishing the duration of a backpay period.²⁴⁶

The memorandum discussed *Jeffs Electric, LLC*,²⁴⁷ a recent case, in which the *Oil Capitol II* proof structure was applied and in which an ALJ found that the General Counsel had properly met their evidentiary burden.²⁴⁸ The General Counsel produced evidence that satisfied the aforementioned factors, for example,

240. See Memorandum from Richard A. Siegel, Assoc. Gen. Counsel of the Nat'l Labor Relations Bd. Office of the Gen. Counsel on Case Handling Instructions for Cases Involving *Oil Capitol Sheet Metal* to all Reg'l Dirs., Officers-in-Charge, and Resident Officers, Memorandum 08-29(CH) 1 & n.2 (Feb. 15, 2008), available at <http://www.nlr.gov> (search "Search: OM Memos" for "08-29(CH)"; then follow "OM 08-29(CH)" hyperlink).

241. *Id.* at 1 n.2.

242. *Id.* at 1.

243. *Id.*

244. *Id.* at 2.

245. *Id.* at 3-4. This determination is vital because this new evidentiary burden applied in salting cases involves a computation based upon whether the discriminatee would have worked for the entire period alleged in the backpay claim. *Id.* at 4.

246. *Id.* at 5; see *supra* note 192 and accompanying text.

247. 34-CA-11371, 11398 (ALJ Sept. 17, 2007).

248. Memorandum from Richard A. Siegel, *supra* note 240, at 6.

[A]ffirmative 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.²⁴⁹

This case exemplified the type of affirmative evidence needed to satisfy the burden.²⁵⁰

Further, this memorandum discussed the potential effects on cases still pending at the litigation stage.²⁵¹ The Associate General Counsel indicated that there could possibly be retroactive effects on cases that are still in the decision process.²⁵² Specifically, an instruction was provided on how to avoid re-litigation of matters already decided in favor of the General Counsel, with respect to the evidentiary burden as set forth in *Oil Capitol II*.²⁵³ Furthermore, he addressed potential negative ramifications of applying this new model to cases that were initiated prior to this decision.²⁵⁴ A major concern being that necessary evidence might be misplaced or inaccessible at this point in the litigation.²⁵⁵ A suggested method for avoiding such retroactivity of this proof structure was to analyze the case to see whether such an application would result in a "manifest injustice to the discriminatees in the case."²⁵⁶ As cases are decided in the wake of the *Oil Capitol II* decision, the hope is that a more concrete method of analysis will be developed, to minimize any potential negative ramifications.

IX. OIL CAPITOL PROGENY

Oil Capitol II was not the only employer-friendly decision handed down by the current NLRB. Subsequent cases provided employers with even more leeway to refuse employment to certain types of union salts. A distinction must be made between union organizers who legitimately seek to be employed so that they can later organize the company from

249. *Id.* (citing *Jeff's Electric LLC*, 34-CA-11371, 11398, slip op. at 8 (May 12, 2006)).

250. *Id.*

251. *Id.* at 7-8.

252. *Id.* at 8.

253. *Id.*

254. *Id.* at 8-9.

255. *Id.* at 9.

256. *Id.* at 8-10. If the regional office concludes that this would in fact be the result, they should go forward in preparing a Motion for Reconsideration. *Id.* at 10.

within, and those who apply for employment anticipating to be denied so that they can file an unfair labor practice charge against that employer.²⁵⁷ The Board has begun to focus on this difference and is proactively trying to remedy this situation.

A. Toering Electric Company

Previous Board decisions seemed to indicate that all job applicants—whether salts or not—would be considered covered employees under section 2(3) of the NLRA.²⁵⁸ However, in *Toering Electric Co.*,²⁵⁹ the NLRB emphasized that not all job applicants will receive protection under section 2(3) of the NLRA.²⁶⁰ Once again the Board acted on its own initiative and considered the novel issue of whether an authentic desire to gain employment was a necessary factor in determining whether an individual is a covered employee and thus entitled to protection.²⁶¹ The Board found that this was a key component and as such, individuals lacking a genuine interest in obtaining employment would not be entitled to protection.²⁶² Further, applying for a job to spark unfounded charges against an employer will not be considered protected activity under section 7 of the NLRA.²⁶³ The

257. See discussion on overt versus covert salts, *supra* Part II.B (discussing that some salts purposely disclose their union affiliation for late litigation purposes).

258. *Oil Capitol Sheet Metal, Inc. (Oil Capitol II)*, 349 N.L.R.B. No. 118, slip op. at 3 (May 31, 2007); see, e.g., *Town & Country Elec., Inc.*, 516 U.S. 85, 90-91 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 191 (1941).

259. 351 N.L.R.B. No. 18 (Sept. 29, 2007).

260. *Id.*, slip op. at 1, 4. In *Toering*, eighteen union-affiliated job applicants were denied employment when the union submitted their resumes. *Id.*, slip op. at 2. It was argued by the respondent-employer, that these individuals were acting as union salts for the Union, Local Union No. 275, International Brotherhood of Electrical Workers, AFL-CIO. *Id.*, slip op. at 1-2. Additionally, it was argued that these applicants were not genuinely attempting to obtain employment with Toering Electric Co. and thus, should not be protected under the NLRA. *Id.*, slip op. at 2.

261. *Id.*, slip op. at 14 (dissenting opinion); *Bush Board Has Been Busy: Protection Eliminated for Salts Not "Genuinely Interested" in Securing Employment*, CROSS, GUNTER, WITHERSPOON & GALCHUS E-NEWSLETTER (Cross, Gunter, Witherspoon & Galchus, Little Rock, Ark.), Nov. 2007, <http://www.cgwg.com/enews/view.asp?id=40> [hereinafter *Bush Board Has Been Busy*].

262. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 4. Thus, the Board concluded that these eighteen individuals would not be considered covered employees since evidence was lacking that they were legitimately seeking employment. *Id.*, slip op. at 10. The evidence instead revealed their motive was solely to initiate litigation with the respondent; however, they would have the opportunity to present contrary evidence on remand. *Id.*

263. *Id.*, slip op. at 6-7; see also Workplace Prof Blog: The NLRB Cuts Back on Salt(ing), http://lawprofessors.typepad.com/laborprof_blog/2007/10/the-nlr-cuts-b.html (Oct. 4, 2007) [hereinafter *NLRB Cuts Back*] (emphasizing that the majority focused on those applicants seeking

Board narrowed the definition of “employee” found in section 2(3), which was once thought to encompass “any employee.”²⁶⁴ It will now be considered an aspect of the General Counsel’s burden to establish that a salt should be covered as an employee.²⁶⁵

1. Practical Implications of the *Toering* Decision

This decision is significant, not only because it limits the scope of coverage of the NLRA, but also in that it represents the Board taking another step away from employee-favored interpretations of the NLRA. Further, it is seen by some labor law professionals as being “potentially a major victory for nonunion employers who are targets of salting campaigns and could alleviate the extreme litigation costs and disruption associated with such campaigns.”²⁶⁶ Employers now have another tool to utilize when seeking to deny employment to those individuals who appear to not have a legitimate interest in working for their company. The denial of employment will no longer necessarily be seen as a ULP, rather it will now be more likely to be seen as a valid act supported by case law.

This decision seems to reflect the developing trend in NLRB decisions to make it more difficult for unions to organize workplaces through salting. *Toering*, like *Oil Capitol II*, removes what was once an automatic presumption, namely that a salt would be an “employee” covered under section 2(3) of the NLRA. This is clearly a favorable ruling for employers as it will enable them to avoid being forced to employ a person lacking a legitimate interest in holding that job, solely out of fear of a charge of discrimination. In contrast, this decision may have negative implications for unions, in that employers may be more inclined to act in a manner that would constitute ULPs since the deck is essentially stacked against the union with respect to salting.²⁶⁷ If employers were not already encouraged by the higher evidentiary

to incite litigation by applying for positions without any true desire for employment).

264. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 3-4.

265. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 9; see also *Bush Board Has Been Busy*, *supra* note 261 (discussing the General Counsel’s burden of proof with respect to job applicants); *NLRB Cuts Back*, *supra* note 263. (noting the General Counsel’s obligation to establish that that applicant had a “genuine interest”). The Board found such a showing necessary to implement NLRA policies and procedures. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 1.

266. *Bush Board Has Been Busy*, *supra* note 261.

267. See *Liebman Statement*, *supra* note 220, at 14. This statement argued that due to the obscure holding about covered employees, employers were essentially “free to discriminate against union salts, unless it could be proved that the salts were genuinely interested in employment.”

standard created in *Oil Capitol II*, this decision will certainly lead them in this direction.

2. Dissent and Scholarly Criticism

Some scholars argue that the NLRB went too far in this decision, not only in overturning long-standing precedent but also by creating a blanket exclusion of such individuals from the protection of the NLRA.²⁶⁸ Much of the argument stems from the fact that the Board once again considered an important issue "[w]ithout the benefit of briefs, oral argument, or even a request to reconsider precedent."²⁶⁹ The dissent also took issue with the fact that the majority seemed to go against the very core of the NLRA as well as long-standing case law.²⁷⁰ The dissent found fault in the majority's reasoning that all salts will inherently act in a disloyal manner because of their attempt to unionize.²⁷¹ More specifically, it was problematic that the Board created an absolute presumption with respect to salts as a whole, where such determinations should more properly be made on an individual fact-specific basis.²⁷²

The dissent argued that the Board inaccurately placed its focus on the attempt by some salts to incite litigation, rather than on the discriminatory decisions made by employers.²⁷³ Additionally, the General Counsel was arguably left without any instruction on how to fulfill their new burden of establishing that a salt is a bona fide applicant.²⁷⁴ Unlike the contrary views of some practitioners, the dissent believed these new guidelines would increase litigation costs for reasons such as a greater likelihood that the "genuineness issue" will be litigated by employers seeking to defend their actions in denying such applicants

268. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 14 (dissenting opinion); NLRB Cuts Back, *supra* note 263. Amongst those who disagreed with the majority's opinion were Wilma B. Liebman and Dennis P. Walsh, the dissenting members of *Oil Capitol*, finding similar faults with the Board's holding in this more recent case. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 14 (dissenting opinion).

269. *Id.* (dissenting opinion).

270. *Id.* The dissent felt that this decision reinforced the notion that the period in which the Board recognized the validity of union salting as an appropriate organizing technique, irrespective of the salter's motive, appeared to be drawing to a close. *Id.*

271. *Id.*, slip op. at 16. The dissent also found fault in the following two aspects of the majority's argument: (1) claims by union salts against an employer for ULPs are by their nature lacking in merit, and (2) the proof structure set forth in *FES* does not sufficiently protect against unfounded litigation brought against employers by salts. *Id.*

272. NLRB Cuts Back, *supra* note 263.

273. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 18 (dissenting opinion).

274. *Id.*, slip op. at 20.

employment.²⁷⁵

B. St. George Warehouse

St. George Warehouse,²⁷⁶ a decision handed down the day after the NLRB made its determination in *Toering*, also stemmed from the *Oil Capitol II* holding and extended it in the context of backpay proceedings with respect to the discriminatee's attempt to mitigate damages.²⁷⁷ Specifically, the Board established that the burden of production for setting forth evidence that refutes the contention that a discriminatee failed to apply for significantly similar jobs, without good reason, during the backpay period is on the discriminatee and the General Counsel.²⁷⁸ This case was analogous to *Oil Capitol II* in that it placed the evidentiary burden on the party who would be in the better position to have access to the evidence relating to the elements in question.²⁷⁹ However, the Board maintained the position that the burden of persuasion ultimately lies with the respondent-employer who must show that "a discriminatee has failed to make a reasonable search for work."²⁸⁰ Despite the Board maintaining certain established principles, there is an evident departure in many respects from previous case law.²⁸¹ This decision has created yet another obstacle for the General Counsel, on behalf of an alleged discriminatee, to overcome when attempting to secure damages for that individual.²⁸²

C. Decisions Adhering to the Oil Capitol Framework

In light of *Oil Capitol II*, several ALJ opinions, which came before the NLRB on appeal, have been altered in terms of the remedy initially allocated. In *Cossentino*,²⁸³ the NLRB altered the remedy provided for

275. *Id.*, slip op. at 21. *But cf.* Bush Board Has Been Busy, *supra* note 261 (arguing that the new framework would reduce costs associated with litigation). Employers now have the opportunity to defend their actions by presenting facts to establish that an individual's job application is in effect pretext for future litigation against that employer in an attempt to unionize. *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 21.

276. 351 N.L.R.B. No. 42 (Sept. 30, 2007).

277. *Id.*, slip op. at 1; *Toering Elec. Co.*, 351 N.L.R.B. No. 18, slip op. at 1.

278. *St. George Warehouse*, 351 N.L.R.B. No. 42, slip op. at 1.

279. *Id.*

280. *Id.*

281. Liebman Statement, *supra* note 220, at 16.

282. *See St. George Warehouse*, 351 N.L.R.B. No. 42, slip op. at 1. To obtain the full extent of available damages, the General Counsel must now satisfy this burden. *Id.*

283. 351 N.L.R.B. No. 31 (Sept. 29, 2007).

by the ALJ so that it would be in compliance with the new framework established by the Board in *Oil Capitol II*.²⁸⁴ In *McBurney Corp.*,²⁸⁵ it was set forth that two of the discriminatees were union salts and as such would fall under the *Oil Capitol II* proof structure.²⁸⁶ Accordingly, the ALJ's remedy was altered, as in *Cossentino*.²⁸⁷ Notably, in both *Cossentino* and *McBurney Corp.*, the opinions included footnotes addressing the fact that Members Liebman and Walsh had dissented in *Oil Capitol II*, but acknowledged that they were constrained to apply these principles as they presently stand.²⁸⁸ Additionally, *Cossentino* was affected by the *Toering* decision with respect to the issue of establishing the genuine interest of the applicant.²⁸⁹

It is clear from such decisions as *Contractors Services Inc.*,²⁹⁰ that certain ALJ decisions will need to be remanded to determine backpay in accordance with the new *Oil Capitol II* framework.²⁹¹ The Board pointed out that upon remand in such cases, it will often be necessary to gather additional evidence thus, the framework must be structured accordingly.²⁹² The abovementioned cases make it clear that *Oil Capitol II* has both been applied to and will continue to significantly impact cases pending before the NLRB. This includes cases that already have come before an ALJ and are just now, via the appeals process, being heard by the Board.

X. WHAT HAPPENED TO STARE DECISIS?

A criticism of the NLRB is that predicting when they will overturn well-established precedent is as feasible as speculating when a tornado will hit.²⁹³ It can be argued that the NLRB never actually establishes

284. *Cossentino Contracting Co.*, 351 N.L.R.B. No. 31, slip op. at 2.

285. 351 N.L.R.B. No. 49 (Sept. 29, 2007).

286. *McBurney Corp.*, 351 N.L.R.B. No. 49, slip op. at 3-4.

287. *Id.*

288. *Cossentino Contracting Co.*, 351 N.L.R.B. No. 31, slip op. at 2 n.6; *McBurney Corp.*, 351 N.L.R.B. No. 49, slip op. at 4 n.11. It is clear that *Oil Capitol's* dissenting members are still in disagreement with the novel framework laid out, but yield to its application in subsequent cases "for institutional reasons only." *Cossentino Contracting Co.*, 351 N.L.R.B. No. 31, slip op. at 2 n.6; *McBurney Corp.*, 351 N.L.R.B. No. 49, slip op. at 4 n.11.

289. *Cossentino Contracting Co.*, 351 N.L.R.B. No. 31, slip op. at 1. In the same footnote, previously mentioned, the reservations also applied with respect to the *Toering* decision in this case. *Id.*, slip op. at 2 n.6.

290. 351 N.L.R.B. No. 4 (Sept. 27, 2007).

291. *Id.*, slip op. at 1.

292. *Id.*

293. See William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor*

precedent as evidenced by its frequency to change its views when new presidential administrations take over.²⁹⁴ With the election of a new president comes the opportunity to appoint new Board members, which arguably allows for alteration of the NLRB composition so that its membership is more aligned with the policies and viewpoints of the new electee.²⁹⁵ The proposition that the Board's inconsistency in its findings is attributable to alterations in political composition has been prevalent among critics virtually since the NLRB's formation.²⁹⁶ It is clear from one case study on the Eisenhower administration that presidents tend to impart their own views in this continuously expanding area of law through their appointments of Board members.²⁹⁷

Further, in a more recent study, it was suggested that where the Board member's political party affiliation is the same as the President's, an interesting trend appears with respect to the Board member's sympathy for a specific party.²⁹⁸ It was found that Democratic Party affiliated Board members who were appointed into their positions by Democratic presidents were far more inclined to express union friendly views in reaching Board decisions.²⁹⁹ On the other hand, Republican Board members appointed by a president of the same political party, tended to show more sympathy for employers.³⁰⁰ Therefore, it was clear from this study that political affiliation has an impact on NLRB decisions.³⁰¹

The argument has been made that this political wavering has negatively impacted employers and employees, as both will find it difficult to center their cases on NLRB decisions.³⁰² "When the Board makes the majority of its law through individual adjudications and

Practice Decisions, 35 INDUS. & LAB. REL. REV. 539, 539 (1982).

294. *See id.*

295. *Id.* at 539-40; *see also* Claire Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1118 (2006).

296. Cooke & Gautschi III, *supra* note 293, at 540 ("[The] proper balance was never struck in the first twelve years of the NLRB's history—and the consequences have been enduring." (quoting JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947*, 262 (Albany: State University of New York Press 1981)).

297. *Id.* (citing Seymour Scher, *Regulatory Agency Control Through Appointment: The Case of the Eisenhower Administration and the NLRB*, 23 J. OF POLS. 667, 667-68 (1961)).

298. *Id.* at 546.

299. *Id.*

300. *Id.*

301. *Id.* The impact of party affiliation was not as evident in cases where the Board member of the opposite political party to the President was appointed. *Id.*

302. Tuck, *supra* note 294, at 1118.

subsequently overturns many controversial decisions after a change in presidential administration, labor organizations and employers hesitate to invest in complying with current Board decisions."³⁰³ One might hypothesize that as a result of the overturning of precedent in *Oil Capitol II*, both salts and potential employers would be inclined to disregard this new rule. Additionally, unions employing salts will be hurt more significantly by such decisions since they often are less equipped to deal with the associated expenses of litigating such matters.³⁰⁴

Whenever the Presidency has shifted hands to the opposing political party, alterations in the Board's ideologies have been clear, irrespective of the entering party.³⁰⁵ Thus, it is a reality that with the election of a Democratic candidate as President, the Board is likely to demonstrate more union-friendly views, provided President Obama appoints individuals from his own political party.³⁰⁶ Even more noteworthy is that because *Oil Capitol II* is arguably favorable to employers in some respects, there is potential that a newly composed "Obama" Board might overturn this holding on appeal.

XI. CONCLUSION

There is no question that the elimination of the automatic presumption and the new evidentiary requirement associated with the backpay period set forth in *Oil Capitol II* have been viewed by the legal community as watershed decisions.³⁰⁷ This holding has been significant

303. *Id.*

304. *Id.* This is true because of the potential increase in cases that are brought to the litigation stage since argument is needed with respect to what precedent is proper for application, considering the inconsistency demonstrated by the Board. *Id.*

305. *Id.* at 1122.

306. For example, during the 2008 election, Democratic Candidate Barak Obama, subsequently elected President, articulated his "pro-union" views during his campaign when he revealed that "[i]f president, his appointees would be 'sympathetic' to labor." Lynn Sweet, *Obama Clear: He's Pro-Union*, CHI. SUN TIMES, May 15, 2007, at 23. On the other hand, Republican Candidate John McCain was perceived by unions such as the AFL-CIO and the United Steelworkers as being more supportive of employers, based on his past actions of "[speaking] out against unions and . . . [voting] against collective bargaining rights for workers." AFL-CIO.org, An Important Message From the AFL-CIO: McCain Will Not Protect Our Rights, http://www.aflcio.org/issues/politics/upload/mccain_rights.pdf (last visited Sept. 17, 2008). Leo Gerard, President of the United Steelworkers, said that Senator McCain has a "long history of anti-union sentiment and anti-worker actions." Tony LaRussa, *USW Not Swayed by McCain's New Link to Union*, PITTSBURGH TRIBUNE REVIEW, Aug. 30, 2008.

307. See, e.g., Fulcher, *supra* note 130; Jed. L. Marcus, *The NLRB Puts Employers on a "Low Salt" Diet*, LAB. & EMP. LAW UPDATE, (Bressler, Amery & Ross, New York, N.Y.) Oct. 2007; Poor & Boldt, *supra* note 14.

with respect to salting in that it has virtually lifted a weight off employers' shoulders by shifting the evidentiary burden to the alleged discriminatee salt.³⁰⁸ The trend set forth in *Oil Capitol II* has trickled down to impact subsequent NLRB's rulings, most notably in *Toering Electric Co.*, thus "remov[ing] . . . [even more] 'salt' from [the employers'] wounds."³⁰⁹ Although some labor law professionals, such as NLRB Chairman Wilma Liebman and Professor Richard Bales, argue this is making the already weak NLRA remedies essentially toothless,³¹⁰ it can be countered that such a change was warranted, as the sole purpose of remedies is to make the discriminatee whole.³¹¹ It would be contrary to the "make-whole" policy to provide for an automatic remedy of indefinite backpay, since doing so could arguably put salts in better positions than they were initially.

Despite the many criticisms of the NLRB, the actions of the Board with respect to the *Oil Capitol II* decision could potentially be seen as leveling the playing field for salts and employers, thus making such criticisms inapplicable here. Mainly this decision has been critiqued on the basis that the Board took it upon itself to raise this issue without briefs by either party. While this could be seen as an improper method of decision-making, it is within the authority of the Board to decide to utilize its rulemaking ability rather than deciding a case with its adjudicatory powers.³¹² The circumstances surrounding *Oil Capitol II* warranted such an initiative by the Board as it was "effecting a change in policy."³¹³ As the scales were disproportionately tipped in favor of the employee in terms of production of evidence, it can be argued that such a change was necessary and, as such, not an abuse of discretion by the Board.

Although *Oil Capitol II* does fall within the parameters of the political arguments previously discussed, it should not be seen as an unfounded change made solely to advance political ideologies. It was vital in this situation to balance the rights of unions, their represented employees, and the targeted employers in order to rectify any unintended

308. *Oil Capitol Sheet Metal, Inc. (Oil Capitol II)*, 349 N.L.R.B. No. 118, slip op. at 6 (May 31, 2007).

309. Poor & Boldt, *supra* note 14.

310. Liebman, *supra* note 16, at 585; *see NLRB Changes Standard*, *supra* note 25.

311. *Oil Capitol II*, 349 N.L.R.B. No. 118, slip op. at 5.

312. *ST. ANTOINE*, *supra* note 213, at 38-39 (citing *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267 (1974)). According to the Supreme Court, this principle will hold true provided that the Board does not abuse its discretion. *Id.* (citing *Bell Aerospace Co. Div. of Textron*, 416 U.S. at 294).

313. *Id.* (citing *Bell Aerospace Co. Div. of Textron*, 416 U.S. at 294).

favoritism that lingered from the Board's establishment of an indefinite period of backpay for union salts in failure to hire or consider cases. As such, this landmark decision should not be reversed on appeal nor minimized in subsequent decisions even if the composition of the Board is altered. Upholding this decision will arguably counter the criticism of the Board as being unpredictable, in addition to maintaining sound policy.

Several things are apparent, regarding the impact of this decision on both unions and their targeted employers. One might argue that employers will be more inclined to either fail to consider or hire an individual they know to be a union salt as the consequences are much less dire for such an offense. From the union's perspective, there may be more skepticism with respect to using this method of organization because of the increased amount of evidence needed in the event that its salt is discriminated against in hiring. Further, as evidenced from *Oil Capitol II* progeny such as *Toering*, they will need to find union organizers who have a genuine interest in being employed with the targeted employer, which might impede their use of this technique. The union might also have to reveal its unionizing schemes when trying to meet its evidentiary burden; something, it would be hesitant to do.³¹⁴ Despite the fact that some of these effects may appear to be negative, perhaps in the grand scheme of things, considering the availability of other alternative methods of unionization, a lower salt content is just what the doctor ordered.

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314. Poor & Boldt, *supra* note 14.

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