

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

[CAPTION]¹

COUNSEL FOR THE GENERAL COUNSEL'S MOTION IN LIMINE AND BRIEF IN
SUPPORT²

I. INTRODUCTION

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

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

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

II. BACKGROUND

[Procedural facts and background omitted.]

III. ARGUMENT

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

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

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

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

[Insert Section A. if relevant:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Dated:

Respectfully submitted:

Counsel for the General Counsel