

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

[CAPTION]

**GENERAL COUNSEL'S MOTION FOR RECONSIDERATION  
AND BRIEF IN SUPPORT**

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

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

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

**I. Background and the Board's Decision and Order**

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

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

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

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

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

**A. Detrimental Reliance on Pre-Existing Law**

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

**affirmed ALJ's application of Dean General or was silent as to respondent's exception.]**

Accordingly, in litigating this case, the General Counsel reasonably assumed that the traditional presumption of continued employment would apply for these discriminatees. As such, the General Counsel had no need to collect and/or preserve the type of affirmative evidence that would prove continued employment.

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

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

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

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<sup>1</sup> Discriminatees might be "otherwise unavailable" because of, e.g., hospitalization, mental incompetence, or other incapacities.

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

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

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

The likelihood that documentary evidence no longer exists and/or that the Union will be unable

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

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

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

**B. Harm to the Purposes and Policies of the Act**

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

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

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

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

**C. Particular Injustice to Discriminatees**

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

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

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

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

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

### **III. Conclusion**

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

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

Dated:

Respectfully submitted,

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Counsel for the General Counsel,  
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Region \_\_\_\_\_