

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 09-16

November 21, 2008

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

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Mitigation by paid union organizers under *Contractor Services*

In *Contractor Services*, 351 NLRB No. 4 (2007), the Board held that a paid union organizer failed to properly mitigate his loss of earnings during the backpay period by limiting his job search to nonunion employers.¹ In OM 08-29(CH) Case Handling Instructions for Cases involving Oil Capitol Sheet Metal, 349 NLRB No. 118 (May 31, 2007), dated February 15, 2008, we indicated that, because the General Counsel had asked the Board to reconsider its decision in Contractor Services, Regions should continue to litigate salting discriminatees' backpay earnings under applicable Board law prior to that decision.² On August 27, 2008, in an unpublished order, the two-member Board denied the General Counsel's motion for reconsideration.

Therefore, Regions should apply Contractor Services in determining paid union organizers' backpay for salting violations. Such application requires a case by case analysis. Thus, Regions should conduct an individual investigation and analysis of a paid union organizer's search for work when determining the applicable backpay period. Regions should continue to seek backpay and reinstatement for salting discriminatees who limit their job search to only nonunion employers where the facts and circumstances can readily be distinguished from those present in Contractor Services, such as a potential backpay period substantially less than 46 months, or where the discriminatee took a systematic approach to the search for nonunion work or indicated a willingness to take short-term jobs. Regions should not seek backpay in cases that cannot be distinguished, or where the job search is arguably more unreasonable or haphazard than that in Contractor Services. Where Regions are uncertain, they should submit the case to Advice.

/s/
R. A. S.

cc: NLRBU
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¹ See *Contractor Services*, 351 NLRB No. 4, slip op. at 1, 4-6.

² See OM 08-29 at p.7.