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**NLRB ANNOUNCES NEW EVIDENTIARY STANDARDS FOR ESTABLISHING  
DURATION OF BACKPAY PERIOD IN CERTAIN DISCRIMINATION CASES**

In *Oil Capitol Sheet Metal, Inc.*, [349 NLRB No. 118](#), the National Labor Relations Board has announced new evidentiary standards for determining the duration of the backpay period when the discriminatee is a “salt.”

In cases of this kind, a union has sent members to seek employment from a nonunion employer with the intent of obtaining employment and then organizing the employer’s employees. Those members are commonly referred to as “salts.” Under the law, if the employer discharges or refuses to hire the salt because of his union affiliation or activity, the employer’s conduct is unlawful.

In this decision, the Board found unanimously that the employer, Oil Capitol Sheet Metal, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act by refusing to hire a salt. The Board split, however, over the remedy to be ordered. The decision is signed by Chairman Robert J. Battista and Members Peter C. Schaumber and Peter N. Kirsanow. Members Wilma B. Liebman and Dennis P. Walsh dissented in regard to the remedy. The decision is posted on the Board’s website at [www.nlr.gov](http://www.nlr.gov).

Prior to this decision, the remedy for an unlawful discharge or refusal to hire included the employer’s payment of backpay to the employee for the period from the unlawful act until the employer made a valid offer of reinstatement (or instatement, in the case of an unlawful refusal to hire). The Board applied a presumption that, if hired, the “salt” would have stayed on the job for an indefinite period. If the job was a construction job, the Board applied a further presumption that the employer would have transferred the employee to other jobsites when the job from which he was discharged (or for which he should have been hired) came to an end.

The Board majority declined to continue to apply those presumptions. The Board reasoned that they are inconsistent with the reality of salting. The reality is that salts, when hired, stay on the job until they succeed in their organizational effort or reach the point where such efforts are unsuccessful. In either situation the union typically then sends the salt to seek to organize the employees of another nonunion employer.

The Board recognized that this will not always be the case. There may be instances where the union will permit a member to work for the targeted employer for an indefinite period.

However, the Board majority view is that the union is in the better position to explain its intentions, and thus the burden to establish the fact should be on the union. The burden should not be on the employer to prove the contrary.

In its opinion, the majority stated:

The traditional presumption that the backpay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement loses force both as a matter of fact and as a matter of policy in the context of a salting campaign. Indeed, as discussed below, rote application of the presumption has resulted in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted nonunion employer. In this context, the presumption has no validity and creates undue tension with well-established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice, and that the Board's authority to command affirmative action is remedial, not punitive.

In reaching its conclusions, the majority relied in part on the Fourth Circuit's decision in *Aneco v. NLRB*, 285 F.3d 326, where the court deemed "indefensible" the Board's assumption that the hired salt would have worked for the respondent employer for 5 years.

The majority acknowledged that the parties to the case before it had not sought a reversal of Board law. However, the Board said that it was its responsibility to ensure that its remedies are compensatory and not punitive.

The majority also held that reinstatement to the job would not be ordered where the "salt" would have left the job prior to the Board's decision.

In dissent, Members Liebman and Walsh criticized the majority for overturning Board precedent endorsed by two appellate courts and rejected by none, without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis. The dissent would have continued to treat salts as the Board treats all other employees who are subjected to employment discrimination. The dissent stated that, in backpay cases, it is fundamental that the Board resolves factual uncertainties against the wrongdoer, the employer. This approach is not unique to the Board. Rather, as the Supreme Court stated in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946), the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." In the view of the dissenting members, the majority's new approach not only violates that well-established principle of resolving remedial uncertainties against the wrongdoer, but it treats salts "as a uniquely disfavored class of discriminatees, notwithstanding the Supreme Court's ruling that salts are protected employees under the National Labor Relations Act. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995)."

The dissent also stated that the majority's reasons for adopting its new evidentiary approach were "dubious at best," and that it was unreasonable to presume that salts would leave employment at some fixed point in time, known by a union in advance. For those same reasons, the dissenters found that there was no justification for the majority's departure from the presumption that a salt, like any other employee at a construction site, would have been transferred to one of the employer's other projects upon completion of the project at the site where the discrimination occurred.

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