

375 NLRB No. 57

General Counsel has not demonstrated that Carr faced a clear and unequivocal choice between his continued employment and his Section 7 rights.

Accordingly, the allegation is dismissed.

ORDER

The National Labor Relations Board orders that the Respondent, S.R. Key Plumbing and Mechanical, LLC, Hiram, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire job applicants because they are union organizers, support a union, or seek union representation.

(b) Coercively interrogating employees about their union affiliations.

(c) Threatening employees with unspecified consequences if they continue to work for the Respondent while maintaining their union affiliation.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer employment to Justin Johnson and Stephen Carey Tucker, in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

(b) Make Justin Johnson and Stephen Carey Tucker whole for any loss of earnings and other benefits suffered as a result of the Respondent's discriminatory refusal to hire, and for any direct or foreseeable pecuniary harms, suffered as a result of the unlawful refusal to hire them, in the manner set forth in the remedy section of the judge's decision as amended by this decision.

(c) Compensate Justin Johnson and Stephen Carey Tucker for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) File with the Regional Director for Region 10, within 21 days from the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(e) Within 14 days of this Order, remove from its files any reference to the unlawful refusal to hire Justin Johnson and Stephen Carey Tucker, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful refusal to hire will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Hiram, Georgia facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 25, 2022.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Fairfield has taken to comply.

Dated, Washington, D.C. September 30, 2026

James R. Murphy,

Chairman

Scott A. Mayer,

Member

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PROUTY, dissenting in part.

More than 30 years ago, the United States Supreme Court confirmed that union salts, i.e., organizers (whether paid or unpaid), can be employees covered under the National Labor Relations Act with the same Section 7 rights as any other employees. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 98 (1995). While working for an employer, employees have a Section 7 right to simultaneously work for a labor union, even if a motive for their employment with the employer is to organize their coworkers. An employer that fires a union salt because of the union salt's work for a labor union is "discriminat[ing] in regard to hire or tenure of employment" in violation of Section 8(a)(3) and (1). Just the same, an employer that causes a union salt to reasonably feel compelled to choose between abandoning union activities and being fired is confronted with the archetypal Hobson's choice, in which there is the appearance of a free choice but, in actuality, only one real option. A union salt—like any other employee—confronted with this illusory choice is constructively discharged in violation of the Act.

This is precisely what happened to welder Jeffrey "Jace" Carr. The Respondent expressly and repeatedly told Carr that he had to choose between continuing in his job as a nonunion employee or having to find work elsewhere. It is irrelevant that the Respondent tried to walk back the severity of its statements by insisting that it never fired Carr. By telling Carr, on multiple occasions, that he could not work for it if he retained his union membership, the Respondent saw to it that Carr, who refused to abandon his Section 7 right to retain his union affiliation, had no choice but to cease working for the Respondent. Accordingly, I would find, contrary to the judge and my colleagues, that the Respondent violated Section 8(a)(3) and (1) by constructively discharging Carr and violated Section 8(a)(1) by maintaining a rule requiring employees who work for it to have severed ties with the Union. I would also modify the remedy for the Respondent's violations as outlined below. Finally, as discussed below, I would revisit Board law so that union salt discriminatees are treated the same as all other discriminatees under the Act.¹

¹ The Respondent in this case was resolute against hiring union members in contravention of the Act. I join my colleagues in affirming the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire pipefitters Justin Johnson and Stephen Carey Tucker for open positions because of their union membership. I would also affirm

I.

The Respondent is a plumbing contractor in the greater Atlanta, Georgia metro area. It is owned by Chet Key. Brett Petrea is the lead organizer for Charging Party Georgia Carolina Pipe Trades (the Union). On January 13, 2022,² Petrea, without revealing his union affiliation, told Key during a phone call that he knew of a pipefitter/plumber and a welder interested in working for the Respondent.³ Key responded, "I've got a job that I desperately could use both of them boys on down there in Griffin, [Georgia]. . . . I've got to have at least—I could use both of them on that job for probably every bit of, you know, about two or three months." Key elaborated about the Griffin job, "But I mean, and that's why I'm not just saying that that's all I've got, but I'm just saying that's where I'm hurting at the moment." On January 14, Carr contacted Key. He said that Petrea had referred him to the Respondent and inquired as to any job openings. Carr admitted to having previously been a union member but stated that he was not currently. Key offered Carr a job and told him to report to work on January 19.

On January 25, after receiving applications from open union supporters, Key called Petrea and asked, "You're not—you're not anyhow involved with the [Union] are you?" Key expounded, "Well, what—what I'm having a problem with is some of the boys that you been sending my way are [union] members." Key claimed, "[T]he problem is this—is that until you officially resign, and you have resigned paperwork, he—you're not really supposed to move forward." When Petrea sought clarification about Key not wanting to hire union members, Key responded, "I don't. I can't. . . . I absolutely cannot because it's—if I have to have it—now, they can—they can be ex-union. . . . They just—they cannot be. They have to be completely resigned out of the [Union]." Key implored Petrea that, for any potential referrals who "might be union, please, please let them know that they have to be completely resigned nonunion."

In a series of phone calls that followed, Key conveyed the same message to Carr multiple times. First, in a call on January 25, Key told Carr that "I needed—I needed to find out if you were completely cut loose from [the Union]" and that this was "extremely important, because I can't be—I can't have anyone that's still tied in" to the

the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to consider both Johnson and Tucker for its open positions.

² All dates hereinafter are in 2022 unless otherwise indicated.

³ Both Petrea and Carr recorded their phone conversations with Key; transcriptions of those calls are part of the record.

Union.⁴ Key explained, “Because that’s against rule bylaws” and that “I need something saying that you do not – you’re not associated with the [Union] anymore.” Key told him that, otherwise, “it gets everybody in trouble. It gets you in trouble, me, you know, with the [Union], everything if you’re still involved with the [Union] working for a nonunion company because that’s illegal on their—on their side.” Key continued, “Yeah, you’re not supposed to work for a nonunion company if you are with [the Union]” and that “[y]ou can work for whoever you want, but you have to resign from the [Union] first.”

In a phone call on January 28 between Key and Carr, Key elaborated, “And you know, and I obviously, I don’t want to have deal with the harassment. . . . [S]o it was a way just making sure because like I said, it’s kind of our policy that we don’t—if somebody is associated [with a union], they can’t be associated anymore if that’s—if they’re coming on with us.” Key confirmed to Carr that, if he were still a union member, he could not work for the Respondent “[b]ecause we are—we are not—I can’t work union men.” Key told Carr that he could not hire union members “because if you do, then there’s a whole thing that you have to go through where you have to, you know, there’s stuff that has to be paid for the union” and that “I just don’t want to have to deal with any of that mess anymore.”

On February 2, in a third phone call with Carr, Key asked him if he was working for the Respondent as a union salt. Carr responded, “No, I’m here because I needed a job.” Key asked Carr if he realized “[t]hat you lied to me, that you—that you told me that you had no association with the [Union]. . . . And I told you that I’m a nonunion company. And you decided to come on over here anyway and do this.” Key told Carr that “[i]t’s just that that’s what I’m telling you is, is that you have breached your contract with me, by lying to me. . . . And—and I don’t—I don’t need—I will no longer need you after this week.” In response, Carr asked Key if he was being fired, Key responded, “I’m not. I’m not saying that. I’m saying that you can’t work for me and work for the [Union].” Carr questioned Key, “I can’t be employed by the Union and work for you at the same time?” Key responded, “You cannot. That is against your bylaws. . . . You cannot work for a union and work for a nonunion company, unless it is set up by the [Union], and they’re trying to do it as a setup.” Carr asked Key, “So what, you’re just going to fire me over that?” Key pressed Carr, “Now, who has—who has agreed to let you come work for me as a—as a—as a union man, who has agreed to let you come work for me?” Carr

responded, “I told you from the get-go who I got the phone number from.” When Key answered that it was Petrea, Carr confirmed. Key then remarked, in reference to Petrea, “Now he is an organizer for [the Union], which is something that he never told me either.”

While acknowledging that Carr was more than qualified to do any of the Respondent’s work, Key told Carr, “I think that you—you probably are a great man to do a great job doing what you do. But what—what I’m trying to tell you is, is that this—the thing that you’re doing is not helping you any. You need to be doing what you are trained and qualified to do for the [Union] in Atlanta. Go to Atlanta and do it.” Key reiterated, “[T]he problem with me is, is that you can’t work for me while you’re still working for the [Union]. That’s the part that I’m trying to get across to you. And you can’t work for a nonunion company as a member of the [Union]. I’m not trying to be ugly. This is—this is for your own benefit. You can’t work for a nonunion company.”

When Carr again inquired as to whether he was being fired, Key responded, “Nobody has said anything about firing you. I’m telling you this. I am telling you you cannot do this, so we’re going to have to contact the [union] hall. And you’re going to have to tell them what’s going on, that you’re working for me as a union man, and I’m a nonunion company. . . . I’m going to have to have something in writing saying that they know that.” Key elaborated, “I have got to have something in writing to let me know that, that you don’t have that [union] association, because I’m not—I’m not paying anything to [the Union] for you. . . . And that’s what’s required if you stay here.” Carr told Key that he had no plans to resign from the Union. Key responded, “Okay. Well, if you don’t, then I can’t use you. But I need you—I need you to tell them that I need something in writing from [the Union], saying that—that I am clear[ed] from any kind of dues [for] you. I’ve got to have that. I have to have that. . . . But you can’t just—you can’t work for the [Union]—still work for the [Union]—and also work for me because I am not in the [Union].” Key told Carr that “it has nothing to do with you personally.”

Carr told Key that he would give the Union “a call here in a minute and see if he can get something up for me.” Key responded, “I don’t mind you working here” but “there [are] bylaws and rules behind a nonunion company working a union man. And I just want you to be aware of that if you’re not.” Key ended the call by telling Carr it was “[f]or your—for your own good. So I appreciate it. Just—just letting me know what you find out.” With the

⁴ I agree with the judge and my colleagues that Key’s demand for this information was an unlawful interrogation.

Respondent's permission, Carr spoke to some of his coworkers about the Union. He then gathered his tools and left the jobsite. Because he told Key that he would not resign from the Union, Carr's understanding was that the Respondent had fired him and that he was no longer allowed to work there unless he denounced his union membership. Consequently, because Carr did not return to the Respondent, Key nominally terminated Carr for violating the Respondent's attendance policy.

II.

It seems clear to me—as I think it reasonably would be to any employee—that Key's underlying message from his multiple conversations with Carr, which spanned the course of a single week, was that Carr could not continue working for the Respondent and retain his union membership, which is a violation of Section 8(a)(3) and (1) of the Act. Under the Hobson's choice theory of constructive discharge, the Respondent terminated Carr by conditioning his continued employment on Carr abandoning his union membership, which resulted in Carr not returning to the Respondent's jobsite. See *Mercy Hospital*, 366 NLRB No. 165, slip op. at 4 (2018) (“[T]here are two elements to a Hobson's Choice constructive discharge: conditioning continued employment on the abandonment of Section 7 rights, and a quit that results from the imposition of that condition.”); *Titus Electrical Contracting, Inc.*, 355 NLRB 1357, 1358 (2010) (employer constructively discharged an employee, despite never explicitly threatening to discharge the employee, by telling him that he was not allowed to continue working for the employer until he changed out of a union shirt).

⁵ My colleagues contend that it was appropriate for the Respondent to condition Carr's continued employment with the Respondent on him obtaining the Union's permission to work for the Respondent. They note that Key had told Carr that working for the Respondent as a union member violated the Union's bylaws and was a breach of his contract with the Union. The answer that Key concocted to the asserted problem of Carr's union membership was for Carr to obtain the Union's written approval. But giving credence to this purported solution ignores that there was never an issue that required the Union's intervention. Whether Carr decided to remain a union member, or to in any way involve the Union in his employment decisions, should have been irrelevant to the Respondent's employment of Carr—any repercussions from Carr's purportedly prohibited actions under the Union's bylaws would have fallen on Carr, not the Respondent. Moreover, Key had already made it resoundingly clear to Carr that the Respondent would not employ union members. Employees had to be “completely cut loose from [the Union],” as Key had initially put it. Now Key had suddenly changed his tune by telling Carr that, to keep his job, he could not only be a union member but had to paradoxically work more closely with the Union by obtaining its approval. I do not blame Carr for not buying it. The judge did not. He referred to Key's disingenuous maneuver as a “bluff” and stated that “it is hard to believe that if Carr had obtained a written statement from the Union that he was authorized to work for Key, that Key would have allowed him to do so.” In fact, Key admitted to knowing by this point that Carr was referred to him through Petrea, a union organizer. The

The Respondent led Carr to reasonably believe that he had to choose between resigning from the Union and being terminated. Upon learning of Carr's union membership, Key told Carr that he would not be needed after the end of the week, that he could not work for the Respondent and the Union, that he would need to find welding work with the Union, and that the Respondent could not use Carr so long as he was associated with the Union. Although Key evaded Carr's inquiries into whether he was being fired, everything else Key said to Carr was that his continued union membership would result in his termination. In addition, Carr's relationship with the Union—regardless of whether he obtained a letter from the Union—was not a legitimate basis for the Respondent to terminate him. Carr should not have had to test the seriousness of the Respondent's repeated claims that he could continue working for it if he obtained the Union's written blessing.⁵ Moreover, to the extent there is any validity to the judge's conjecture that Carr would have left his job with the Respondent around February 2 anyway to salt another job, the Board could have left that issue to compliance as part of the determination as to the appropriate backpay period. Taken together, I do not think that Key's cagey response to Carr's questioning as to whether Key was firing him countervails the numerous instances in which Key directly told Carr that he could not work for the Respondent while retaining his union membership.⁶

III.

Similarly, I would also find that the Respondent maintained a rule, which Key repeatedly conveyed orally to Carr and Petrea, requiring employees who work for it to

Union was clearly no impediment to Carr working for the Respondent. Key's earlier, unequivocal statements to Carr demonstrate that nothing the Union said would have changed Key's initial reaction to learning of Carr's union affiliation—that Carr could not work for it. Instead, as my colleagues note, the Respondent simply did not want to have to “pay dues,” along with the higher wage and benefit costs, that it could incur if its employees unionized and it had to abide by a collective-bargaining agreement.

⁶ My colleagues assert that, when considered in context, Key's statements did not present Carr with a “clear and unequivocal choice” between his union activity and continued employment. During the course of multiple phone conversations, over the span of a single week, Key told Carr, “I can't have anyone that's still tied in” to the Union,” “I need something saying that you do not—you're not associated with the [Union] anymore,” “I can't work union men,” “I'm saying that you can't work for me and work for the [Union],” “the problem with me is, is that you can't work for me while you're still working for the [Union],” and “I have got to have something in writing to let me know that, that you don't have that [union] association. . . And that's what's required if you stay here.” I cannot think of what more Key could have said to Carr for Key's ultimatum to have been any more “clear and unequivocal.” Compare *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 9 (2001) (employer presented employee with a “clear and unequivocal” choice that prompted her constructive discharge by telling her that she would be terminated if she did not improve her “negative attitude” within 4 days).

have severed ties with the Union, in violation of Section 8(a)(1). See *Eastern Energy Services, LLC*, 349 NLRB 554, 554, 558 (2007) (employer's statement to job applicants that the employer does not hire union members was inherently coercive and violative of the Act); *Fred'k Wallace & Son, Inc.*, 331 NLRB 914, 914, 919 (2000) (same). The Respondent did not except to the judge's finding that these statements violated Section 8(a)(1). Nonetheless, the General Counsel and the Union except to the judge failing to find that these statements constituted an oral rule that the Respondent should be ordered to rescind.

In agreement with the General Counsel and the Union, I would reverse the judge on this issue. Here, Key's conversations with Carr and Petrea demonstrated that the Respondent had a rule, even if unwritten and informal, that it would not allow its employees to be associated with the Union. Key repeated this prohibition multiple times and, during his January 28 phone call with Carr, even described it as "kind of our policy." Under these circumstances, the Respondent should be required to not only cease and desist from threatening employees but to rescind any rule that the Respondent adopted not permitting its employees to be members of or associated with a union.⁷

IV.

As to the appropriate remedy for the Respondent's violations, unlike my colleagues, I would grant the General Counsel's exception to provide the additional remedy of requiring the Respondent to include, for a period of 6 months, at the beginning of the Respondent's job applications for plumbing, pipefitting, and pipe welding positions, and on all of its advertisements for such positions, a mandatory statement attesting to the Respondent's compliance with the Act.⁸

⁷ The cases cited by the judge are readily distinguishable. *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 243 & fn. 5 (2014), involved a single instance of a questionable comment that could not reasonably be interpreted as implementing a new policy, and *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776–777 (2006), concerned a single instance of a supervisor lawfully telling an off-duty employee that she could not call on-duty employees and interrupt their work to discuss union business. In contrast, Respondent's directive in this case was clearly unlawful and uniformly repeated multiple times on separate occasions to both Carr and Petrea.

Contrary to my colleagues, I see no defense to the Respondent's rule against employing union members in the Respondent's assertion that it merely sought to ensure compliance with the Union's bylaws. The Respondent has no role or responsibility to enforce the Union's bylaws through a rule of its own, much less to judge what conduct the Union permitted. (Indeed, even if the Respondent *had* a collective-bargaining relationship with a union, it could not unilaterally impose a rule applying that union's bylaws to its employees because matters concerning the internal relationship between employees and their union, such as a union enforcing its bylaws, do not concern terms and conditions of employment and are permissive bargaining subjects. See *Betra Mfg. Co.*, 233

Effective dissemination of the Board's notice is essential if it is to have any teeth. I have previously urged the Board to make notice readings and hand distribution of the Board's notice a standard Board remedy. See *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151 (2022), *enfd.* 98 F.4th 314 (D.C. Cir. 2024). I would order those remedies here. However, the General Counsel correctly points out a glaring deficiency in the Board's remedy if the Board's notice is only seen by current and former employees. Applicants (or potential applicants) who are not named discriminatees are not notified that the Respondent has violated the Act and that the Respondent is now attesting to its future compliance with the Act. Yet this is exactly the population most directly affected by the Respondent's unlawful conduct. Where the Respondent is hiring from a limited pool of qualified applicants, it is especially likely that the Respondent's unlawful conduct would have spread by word of mouth. Union member applicants should not be chilled from seeking employment with the Respondent because they think the Respondent's willingness to violate the Act would make it futile. They are a diffuse population that would otherwise be difficult for the Board to reach without the Respondent vouching for its compliance with the Act on its written applications and job advertisements. In response, the Respondent only asserts that such a remedy would be superfluous because it does not use a written application process, which, if true, would make it that much easier for the Respondent to comply.

V.

As urged by the Union and (initially) the General Counsel in their exceptions, I would also revisit the Board decisions in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), review denied sub nom. *Sheet Metal Workers*

NLRB 1126, 1135 (1977), *enfd.* 624 F.2d 192 (9th Cir. 1980), cert. denied sub nom. *Thomas v NLRB*, 450 U.S. 966 (1981). And, in fact, the Respondent was flatly wrong—Carr could maintain his union membership and work for the Respondent. Finally, although my colleagues assert that the Respondent did not promulgate and maintain a policy requiring employees to cease their union affiliation, Key explicitly told Carr that it was "kind of our policy."

⁸ The General Counsel proposed the following language: "S.R. Key Plumbing and Mechanical, LLC is required to comply with the National Labor Relations Act. Therefore, we will recruit and refer any and all applicants without regard to their involvement with, membership in, or allegiance to any union. We acknowledge the right of employees to form, join, or assist unions of their own choosing, or to refrain from such activities."

I join my colleagues in applying *Thryv, Inc.*, 372 NLRB No. 22 (2022), vacated in part on other grounds 102 F.4th 727 (5th Cir. 2024), to the make-whole remedy in this case. I continue to believe that *Thryv* was correctly decided, is well within the Board's remedial authority, and is necessary to satisfy the Board's statutory obligation to provide meaningful make-whole relief. See *Leo Marine Services, Inc.*, 375 NLRB No. 35, slip op. at 5 fn. 17 (2026).

Local 270 v. NLRB, 561 F.3d 497 (D.C. Cir. 2009), and *Toering Electric*, 351 NLRB 225 (2007). In *Oil Capitol Sheet Metal*, the Board, over a two-member dissent, eliminated for union salt discriminatees the rebuttable presumption that the backpay period should continue indefinitely from the date of the discrimination until a valid offer of reinstatement had been made. 349 NLRB at 1348. Shortly thereafter, in *Toering Electric*, the Board, again over a two-member dissent, placed the burden on the General Counsel to prove in refusal-to-hire and refusal-to-consider cases that union salt discriminatees had a genuine interest in obtaining employment when applying for an open position, where an employer placed at issue the genuineness of their job interest. 351 NLRB at 233. In my opinion, both decisions were wrongly decided and should be overruled.

Regarding the backpay calculation at issue in *Oil Capitol Sheet Metal*, union salt discriminatees should be treated the same as all other discriminatees under the Act. In union salting cases, the Board should apply its standard method of calculating backpay by applying the rebuttable presumption of indefinite employment, which rightfully places factual uncertainties as to the amount of backpay owed on the wrongdoer whose violation created the uncertainty. It is, after all, the employer that created the uncertainty as to what would have been the duration of the discriminatees' employment by its unlawful conduct. See *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001) ("The principle that the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages has as much force in a case involving salts as in any other.").

Placing the burden on the wrongdoer to show that the discriminatees would not have indefinitely stayed at the job is not punitive; it prevents employers from benefiting from discriminatees' identity as a union salt and seeks to restore the status quo that existed before the Respondent's unlawful conduct. One especially problematic consequence of the *Oil Capitol Sheet Metal* decision is that union salt discriminatees are not entitled to reinstatement (in refusal to hire cases) or reinstatement (in discharge and layoff cases) if the General Counsel fails to prove that the backpay period should run indefinitely. By denying reinstatement or reinstatement as a remedy for union salt discriminatees, the employer's unlawful conduct is much more likely to frustrate an organizing campaign by denying the discriminatees' access to the workplace, at the expense of the Section 7 rights of the employees who would have utilized the discriminatees' organizing assistance.

Moreover, the rationale for making the remedy for union salt discriminatees more difficult to prove lacks evidentiary support because union salts have not been shown to

be more likely to leave their employer than other employees, especially in today's increasingly mobile labor market. And even if union salt discriminatees were to leave a job at the end of an organizing campaign, it would be impossible for the General Counsel to show, with any degree of certainty, how long the union salts would have stayed at that job. The union salts' employment tenure would likely be dependent, at least in part, on the length of the organizing campaign. Yet there is no way to know how long the organizing campaign would have lasted if the employer had not engaged in unlawful discrimination. Quite simply, the General Counsel is in no better position than the employer to know how long union salt discriminatees would have worked for the employer if there were no unlawful conduct. Shifting the burden to the General Counsel to prove the reasonableness of the backpay period is just a way of lessening the remedial obligation of an employer that has engaged in unlawful conduct against union salt discriminatees, despite the protections offered to them under Section 7.

With respect to *Toering Electric*, the Board improperly carved out "non-genuine" job applicants as a special class of individuals exempt from the Act's protections, contrary to the statutory text in Section 2(3). Union salts applying for a job are every much employees under Section 2(3) as those who are not union salts, and they should be afforded the same statutory protections against unlawful discrimination as other employees covered under Section 2(3). *Town & Country Electric, Inc.*, 516 U.S. at 98. The defining issue to an 8(a)(3) allegation is whether an employer acted with an unlawful motive, not the alleged discriminatees' subjective intent. There is no justification for the Board to condone an employer's union discrimination only because the job applicant may have ultimately declined the job offer, especially because any backpay owed by the employer to the job applicant would be reduced by the job applicant's interim earnings and any failure to mitigate.

By placing the burden of proof on the General Counsel, *Toering Electric* excuses an employer's discriminatory refusal to hire or consider union-affiliated job applicants, if the General Counsel cannot disprove evidence challenging the job applicants' genuine interest in working for the employer. In doing so, the Board needlessly fails to remedy an employer's unlawful union discrimination, at the expense of not only the discriminatee but also the next union-affiliated job applicant improperly denied a position with the employer. Union salts play an important role in teasing out hiring discrimination because a typical job applicant who is discriminated against by an employer is less likely to file an unfair labor practice charge due to the job applicant's limited dealings with that employer and

being less vested in the job that they were unlawfully rejected from by having never worked for the employer. Furthermore, even where the General Counsel can show a union salt's genuine job interest, the General Counsel must needlessly prolong the Region's investigation and spend time and resources to ensure that it can successfully litigate the issue. She should not bear this burden.

This case exemplifies the issues with *Toering Electric*. Even though the record clearly shows that the Respondent refused to hire pipefitters Johnson and Tucker because of their union affiliation, the Respondent was able to prolong the litigation by contesting the genuineness of their applications, as purportedly evidenced by them not inquiring into the pay or job duties of any of the Respondent's positions, submitting incomplete resumes to the Respondent that left off some of their recent work experience, and not following up on the status of their applications. Although the Respondent failed to do so here, if it had put forth sufficient evidence to support its claims, the Respondent would have prevailed under current Board law and been found to have not violated the Act by challenging Johnson's and Tucker's subjective motives, despite the Respondent's blatant antiunion motivation.

VI.

Accordingly, there is no justification for the Board to treat union salt discriminatees differently than any other employees covered under Section 2(3). Even if an employer is adamantly opposed to hiring a union salt, like Carr, Section 8(a)(3) of the Act prohibits an employer from "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." In this case, Key violated the Act by constructively discharging Carr. Key repeatedly insisted to Carr that he could not work for him because of Carr's union membership and expressed to Carr his blatant animus against hiring union-affiliated employees, to the point where Carr faced the illusory—and, as relevant here, unlawful—choice between denouncing his union membership and having to leave his job with the Respondent. The Respondent should also be ordered to rescind any rule that it has against having union-affiliated employees work for it and to attest on job applications and advertisements, for a period of 6 months, that it will comply with the Act. In addition, the Respondent should be ordered to remedy its unlawful conduct towards Carr by making him whole for its unlawful conduct, regardless of the General Counsel's ability to show how long Carr would have worked for the Respondent if he had not been constructively discharged. Furthermore, where the Respondent is motivated by union animus to not hire union-affiliated job applicants, the General Counsel should not have to prove that the job applicants, like Johnson and Tucker, had a genuine

interest in working for the Respondent. The Board's failure to overrule *Oil Capitol Sheet Metal* and *Toering Electric* improperly denies a subset of Section 2(3) employees—precisely because of their union affiliation—the rights afforded to them under Section 7 of the Act.

Dated, Washington, D.C. September 30, 2026

David M. Prouty,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire job applicants because they are union organizers, support a union, or seek union representation.

WE WILL NOT coercively interrogate you about your union affiliation.

WE WILL NOT threaten you with unspecified consequences if you continue to work for us while maintaining your union affiliation.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, offer employment to Justin Johnson and Stephen Carey Tucker, in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

WE WILL make Justin Johnson and Stephen Carey Tucker whole for any loss of earnings and other benefits resulting from our discriminatory refusal to hire, less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary

harms suffered as a result of the unlawful refusal to hire, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Justin Johnson and Stephen Carey Tucker for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 10, within 21 days from the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to our unlawful refusal to hire Justin Johnson and Stephen Carey Tucker, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

S.R. KEY PLUMBING AND MECHANICAL, LLC

The Board's decision can be found at <https://www.nlrb.gov/case/10-CA-291436> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Kurt Brandner and Demi Kim, Esqs., for the General Counsel.
K. Prabhaker Reddy, Esq. and Alpharetta, Georgia, for the Respondent.
Kevin Dill, Esq. (O'Donoghue & O'Donoghue LLP), of Washington, D.C., for the Charging Party.*

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was heard in Atlanta, Georgia, on September 18 and 19, 2023.

This is what is commonly referred to as a salting case. The General Counsel alleges that Respondent terminated or constructively discharged employee Jeffrey "Jace" Carr, because of

his union affiliation. She also alleges that Respondent has refused to consider 2 union organizers, Justin Johnson and Stephen Carey Tucker, for employment, or hire them for open positions for which they were qualified. The complaint alleges that Respondent refused to consider the 2 for hire or hire them on account of their union affiliation and because they indicated their intention to promote unionization of Respondent's employees and to discourage its employees from seeking union representation in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel also alleges that Respondent by its owner, Chet Key and Project Manager Clint Tatum violated Section 8(a)(1) in interrogating Jeffrey Carr and Justin Johnson about their union activities. She also alleges that Key made other statements that violated Section 8(a)(1).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a plumbing contractor which was based in Douglasville, Georgia, at the times material to this case. Since then, it has moved its office to Hiram, Georgia. In 2022, Respondent purchased and received goods valued in excess of \$50,000 directly from locations outside the State of Georgia. Respondent admits and I find that Respondent is and has been an employer engaged in commerce within the meaning of Section (2), (6) and (7) of the Act.

The Charging Party Union, the Georgia Carolina Pipe Trades Association, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Chet Key has been the owner of S.R. Key Plumbing and Mechanical since 2018. S. R. Key generally employs about 15 individuals. Chet's wife, Renee, is his office manager. His project manager is Clint Tatum. Both Chet Key and Tatum were long-time members of Plumbers and Pipefitters Local Union 72 in Atlanta prior to 2022 (GC Exh. 3, p. 4; GC Exh. 13, p. 4, GC Exh. 12 (audio)).

Respondent was a union contractor for about a year, GC Exh. 11, p. 6. In 2021, Local 72 tried unsuccessfully to convince Key to sign a collective-bargaining agreement with the Union,

Both Key and Tatum were aware of the construction unions' salting strategy before 2022 (GC 13 p. 5). In January 2022, they also suspected that Local 72 was trying to plant union salts in their workforce (Tr. GC Exh. 7, p. 2, 5). Tatum, at least, harbors significant animus towards Local 72 resulting from what transpired when he quit the Union.

In January 2022, S.R. Key was working on the largest project it ever had, doing the plumbing work for a Rinnai Corporation warehouse under construction in Griffin, Georgia. It subcontracted the pipefitting work on the project to a union company, RDH Mechanical Contractors.

After unsuccessfully trying to get Key to sign a collective-bargaining agreement for the Rinnai project, Terry Newsome, Jr., the business manager of Local 72 called Bret Petrea, the lead

organizer of the Georgia Carolina Pipe Trades Association.

Between January 1 and 13, 2022, Petrea called Chet Key. He had contacted Key previously about supplying labor for Respondent. Without revealing his affiliation with the Union, Petrea told Key that he knew of a pipefitter/plumber and a welder who were interested in working for Respondent. Key responded:

I've got a job down there in Griffin...I could use both of them on that job for probably every bit of, you know, about two or three months.. GC Exh 2, and 3 p. 3.

This response is significant because it belies Respondent's claim that it did not consider or hire the 2 organizers who later applied, because they were overqualified. Chet Key knew he was hiring someone who was more than a basic plumber as early as January 13 (GC Exhs. 2 and 3). The record also demonstrates that Johnson and Tucker, like Jace Carr, were perfectly capable of performing the plumbing work at the Riannai jobsite.

A bit disingenuously, Petrea then told Key that the pipefitter used to be a union member and asked if that was a problem. Key responded that he'd been a union member for 27 years, and that the pipefitter could work for him so long as he recognized that Respondent was a nonunion company.

Around this time, Local 72 organizer Cody Payne contacted a young union pipefitter/welder, Jeffrey "Jace" Carr, who had just finished working on a job in Alabama.¹ Payne asked Carr to apply for work at S.R. Key. Carr called Chet Key on January 14, 2022. He told Key that Brett Petrea had referred him to Respondent.

Key offered Carr a job. Carr started work for Respondent on January 19, 2022. He did not reveal his union affiliation for almost 2 weeks. When Key asked him whether he was a union member, Carr said he had been, but was not a union member currently. At about this time, Key, in a voicemail message, told Petrea that he needed employees in addition to Carr (GC Exh. 5).

On January 25, 2002, Local 72 organizer Payne applied for work at Respondent. He also contacted Justin Johnson, another organizer for the Georgia Carolina Pipe Trades and asked him to apply as well. Johnson called the S.R. Key office. He spoke with Renee Key, Chet's wife. Johnson asked Renee Key if Respondent was hiring. Mrs. Key said no, Respondent was not hiring at this time. She also said the company did not have a need for pipefitters or welders, or at that time even plumbers. GC Exh. 17. By this time, Key was suspicious that the Union was trying to salt his company (GC Exh. 7).

Johnson asked Renee Key if he could send Respondent his resume. She said he could do so, that Respondent would keep it on file and call him if they needed employees. She did not indicate that his application would become stale at some point. Johnson then told her he was an organizer with the Union and wanted to try to organize Respondent's workforce. Mrs. Key responded:

"Oh, absolutely not. No."²

Johnson sent a resume to Respondent via certified mail, return receipt requested, on January 25. Johnson testified that he called Respondent about a week later but that nobody answered the phone. He made no other attempts to contact Respondent. Johnson has worked on a number of non-union jobs as a salt since 2019. Respondent does not contend that it did not receive Johnson's resume; I find that it did so.

Organizer Stephen Carey Tucker also attempted to apply for work at Respondent on January 25. He called Key and left a voicemail message. In that message Tucker inquired as to whether Respondent was hiring any pipefitters or welders. He also identified himself as an organizer for the Union. Tucker received no response to his voicemail. Based on Chet Key's discussion with Jeffrey Carr on February 2, 2022, about getting calls from the Union seeking employment, I find that Respondent was aware of Tucker's call and its contents.

Tucker followed up by sending Key an email with his resume. He received a response that the email address was incorrect. On January 28, Tucker mailed Key a resume via certified mail. As with Johnson's, I find that Respondent received it. Tucker left another voicemail for Key on about February 8 stating that he had emailed and mailed hard copies of his resume to Respondent.. Respondent did not respond to Tucker at any time. In 2021 Tucker worked for a non-union company as a salt for 2 weeks.

Respondent's inquiries to Jeffrey Carr; Respondent's alleged discharge or constructive discharge of Jeffrey Carr

The calls from Johnson, Tucker and others precipitated an inquiry from Chet Key to Jeffrey Carr. On January 25, Key called Carr. Carr returned the call (GC Exhs. 8 and 9).

Key started the conversation by asking Carr if he was "completely cut loose from Local 72." Key insisted that Carr get something in writing attesting to the fact that he no longer had any connection with Local 72. He told Carr that he knew that the Union's bylaws prohibited a union member from working for a non-union contractor and was concerned that if Carr was violating the Union's by-laws, the Union would take action against Carr.³ Carr continued to give Key the impression that he was no longer associated with the Union.

On January 28, Carr spoke with Chet Key and told him that Local 72 had confirmed that he was no longer a member of the Union, which was untrue (GC 10 and 11 p. 3). In response to a question from Carr, Key told Carr that he could not work for Respondent if he was associated with the Union.

On February 2, Respondent's project manager, Clint Tatum, approached Carr while he was working. Tatum had visited Carr's Facebook page prior to this conversation and was suspicious about references to Local 72. In the conversation he interrogated Carr about his familiarity with union organizers Petrea and Cody

¹ Carr was a member of Pipefitters Local 72 in Atlanta and then switched to Local 188 in Savannah. This is irrelevant to any issue in this case other than for the fact that he was a union pipefitter at all times relevant to this case.

² Although not alleged to be an agent of Respondent per Section 2(13) of the Act, Mrs. Key clearly is one. Anyone calling Respondent's office would believe she was authorized to speak on behalf of Respondent.

Mrs. Key signed Antonio Gaines' separation notice as Office Administrator, GC Exh. 26.

³ Article 15 of the Local 72 bylaws forbids a member of Local 72 from working for a non-union contractor without the approval of the Executive Board. R. Exh. 2, at 23. I doubt, as Respondent suggests, that Chet Key made these inquiries out of concern for Carr's welfare. Key was by this time familiar both with the Local 72 by-laws and the salting strategy of several construction unions.

Payne. He cautioned Carr about getting fined by the Union if he worked for a non-union company. Then he asked Carr if the Union was using Carr to salt the Rinnai project. Carr denied this. (GC Exh. 13).

Key and Carr also spoke again on February 2. Carr informed Key that he was still a union member and had been sent to Respondent by Brett Petrea, who was a union organizer. Key commented that as soon as he hired Carr, he started getting phone calls from Local 72, seeking employment. Clint Tatum explained to Carr that he understood that the Union was trying to load the job with union members (GC 13 p. 5). Tatum also told Carr that the Union could bring charges against Carr for working for Respondent. Then he recounted what the Union tried to do to him when he quit Local 72.

Carr denied that he was working at S. R. Key to salt their job. He told Tatum and Key that he needed a job for a couple of weeks.

Later that day, Carr called Chet Key and told him he was going to tell other employees about the benefits of the Union. Key told Carr he could tell the employees whatever he wanted. Key also said that Carr lied to him, breached his contract with him and that he would no longer need him after the current week (GC 14 and 15 pp. 4 and 10). Key denied that he was firing Carr but that he could not work for Key and for Local 72. Key cited the Local 72 by-laws. Carr told Key that he had no plans to drop his membership in the Union.

Carr told Key that Brett Petrea had given Carr Key's phone number. By this time, Key knew that Petrea was a union organizer. Thus, at some level, Key understood that Carr was working for him with the permission of the Union. However, Key continued to insist that Carr obtain something in writing from Local 72 stating that he could work for Respondent. (GC Exh. 15 at 7–10). When Carr inquired as to whether Key was firing him, Key responded, "Nobody said anything about firing you." He told Carr that Carr needed to give Key something in writing that the Union was aware that Carr was working for his company.

Carr told Key that he would call organizer Cody Payne to get something from the Union in writing. Key indicated that he did not have any complaints about the quality of Carr's work for Respondent. Carr did not obtain anything in writing from the Union stating that he could work for Respondent. With Respondent's permission, Carr spoke to at least some of the other Key employees about what he considers the benefits of union representation after lunch on February 2. Then he left Respondent's jobsite and did not return.

No later than February 3, 2022, Carr spoke to Brett Petrea, who asked him to apply for work with Ark Fabricators in Savan-

nah, as a covert salt. Carr applied for work at Ark Fabricators on February 4, took a drug test on February 7, a weld test on February 8 and started work on February 9. Carr worked for Ark Fabricators for about 1 month.⁴

Respondent's hiring and vacancies in 2022

Respondent hired the following employees in 2022:

Tim Petty on January 19 or 20, 2022 at \$25 per hour.

Justin McAllister, hired as a helper on January 24. McAllister quit or was discharged on January 30. He had worked for Respondent in 2021 as well.

Dalton Hunter started work at the Rinnai jobsite on February 7, 2022. I credit the testimony of Chet Key and Hunter, that Key offered Hunter employment on January 17, 2022.

Antonio Gantes, a helper, on March 7.

Thomas Little, as a plumber on April 11.

Matthew Shadix on April 29 as a plumber.

Coleman Couch on July 10 and again on October 21.

Brendon Hill as a helper or apprentice on September 12 and on January 30, 2023.⁵

Dustin Lee was hired on October 24 and terminated on December 11, 2022.

ANALYSIS

Alleged failure to consider and/or hire Justin Johnson and Stephen Carey Tucker

There are a number of cases under the Act that apply to salting and thus establish the framework for considering the facts of this case. The most important of these cases are:

NLRB v. Town & Country Electric, Inc., in which the Supreme Court, noting the considerable deference accorded to the Board's interpretation of the Act, affirmed that the Board could lawfully construe the Act's definition of "employee" to include paid union organizers. 516 U.S. 85, 94–95, 98 (1995).

FES, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). In *FES*, the Board held that:

apply for work at Ark. In this regard, I note that Carr made no attempt to discuss the Union with other employees until he was ready to leave the S.R. Key jobsite. He had already accomplished his mission in establishing a basis for ULP charges on account of Respondent's refusal to consider and hire Johnson and Tucker.

On February 1, 2022, Justin Johnson also applied for work at Ark Fabricators as an overt salt. Judge Ramirez found that Ark violated the Act in refusing to consider Johnson for hire and for refusing to hire him.

⁵ Hill credibly testified that the date on a W-4 form that indicates he was hired in January 2022 is incorrect.

⁴ *Ark Fabricators*, 10–CA–291560, Tr. 28–29, 110–113. The Ark Fabricators record is not part of the record in this case. I became aware of the case by virtue of the decision by Administrative Law Judge G. Rebekah Ramirez on October 26, 2023.

On September 18, 2023, Carr testified in this case that the call he received from Petrea was not about a job in Savannah, Tr. 78. On August 9, 2023 before Judge Ramirez he remembered that on February 3, 2022, Petrea asked him to apply at Ark in Savannah. This raises a serious question in my mind as to whether Petrea and Carr are being less than forthright about when Petrea told Carr to apply at Ark. It is quite possible that Petrea called Carr on February 2 to tell him to leave Respondent and

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (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. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.—

The FES framework was modified by the Board in *Toering Electric Co.*, 351 NLRB 225, 232–234 (2007). The Board found that in salting cases, the General Counsel bears the ultimate burden of proving the applicant’s genuine interest in employment. This burden has two components: 1) that there was an application for employment; and 2) that if the employer contests the applicant’s actual interest in employment, the General Counsel must prove by a preponderance of the evidence that the applicant was genuinely seeking to establish an employment relationship with the employer.⁶

Another case which is not directly applicable to the proceeding on the merits before me, but which obviously has great bearing on the litigation posture of this case is *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007). In that case the Board held that the General Counsel, as part of his existing burden of proving the reasonable gross backpay amount due, must present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel’s compliance specification.

There is no evidence that Respondent refused to consider or hire any of the applicants because it thought they were not genuinely interested in employment. Moreover, the record herein regarding “genuine interest” is materially indistinguishable from that in *Cossentino Contracting, Co.*, 351 NLRB 495 (2007) and *Jeff Mactaggart Masonry, LLC*, 363 NLRB 1399 fn. 1, 1407 (2016).

In *Cossentino Contracting*, 12 union members, including 5 who were full-time union officials, showed up at Cossentino’s office en masse. The Board found that Cossentino violated the Act in refusing to consider for hire and refusing to hire union organizers Quinton Anderson and Mark McQuay. Despite Cossentino’s challenge to the genuineness of the interest in employment on the part of these two organizers, the Board found genuineness was established. Anderson and McQuay attempted to apply for work and testified that they would accept employment if offered. There are no facts that distinguishes applicants John-

son and Tucker in this case from Anderson and McQuay, other than they did not apply to S.R. Key in person.

However, they attempted to apply and the uncontradicted evidence that they had worked as salts since becoming union organizers establishes their genuine interest in employment.

As to the alleged refusal to hire, the record establishes that Respondent had vacancies and hired within months after Johnson and Tucker applied for work. Respondent did not contend at hearing that it did not hire them because their applications were stale. The record does not establish that Respondent had a policy of not considering employment applications after any particular period of time. Thus, I find that Respondent violated the Act in refusing to hire Johnson and Tucker on one or all of the following occasions: the January 30, 2022, termination of Justin McAllister; the February 2, 2022 constructive discharge or quit of Jeffrey Carr, the vacancies filled by other employees, starting with Gantes in March 2022 and Little and Shadix in April 2022.

Finally, to the extent that Respondent contends that it did not hire Johnson and Tucker because they were over-qualified, that defense is pretextual. This is established by the fact that it hired Jeffrey Carr, who was almost equally over-qualified as Johnson and Tucker. Contrary to Respondent’s assertion in its brief at page 5, Chet Key knew he was hiring someone who was more than a basic plumber as early as January 13 (GC Exhs. 2 and 3.)

Respondent also contends that Johnson and Tucker were not genuinely seeking employment because their resumes were incomplete, that they knew Respondent was not hiring and they were indifferent to the wages Key was offering. I reject all these contentions. A covert salt may decide to omit past employment to conceal his or her union affiliation or previous salting employment. That does not mean the person is not genuinely interested in being hired as a salt. As to wages, unions often augment the wages paid by the salted employer. The record shows they would have done so for Johnson and Tucker (Tr. 137). Thus, the fact that Key would have paid Johnson and Tucker far less than they were paid in the past is irrelevant to whether they were genuinely interested in salting S. R. Key.,

Finally, Johnson and Tucker did not know Key was not hiring. They had information via Brett Petrea to the contrary, e.g. (GC Exh. 5). Moreover, whether or not Key was hiring when the two organizers applied, they had reason to believe that it would be hiring in the near future, certainly by February 2, 2022, when the Union knew that Jace Carr had quit.

8(a)(1) violations

I find that Chet Key coercively interrogated Jeffrey Carr about his union affiliation on January 19 and 25, 2022. He questioned Carr before he knew that Carr was a union member. From the context of the conversation, it was clear that Key would not have allowed Carr to work for his company if Carr told him the truth.

Similarly, I find Respondent by Chet Key violated Section 8(a)(1) by telling Carr on February 2 that he could not work for him and the Union at the same time. In all these instances Key’s inquiries meet the test set forth in *Rossmore House*, 269 NLRB

⁶ The General Counsel asks that the Board overturn its decision in *Toering*. I am bound by current Board law. I would also note that *Toering*, a case over which I presided in 1997, is easily distinguished on its

facts from this one. For one thing, many of the resumes sent to Toering, were sent in a batch by an organizer. Some of the alleged discriminatees may not even have been aware that they had applied for work at Toering.

1176 (1984), *Camaco Lorain Mfg. Plant*, 356 NLRB 1181, 1181–1182 (2011) and *Bourne v. NLRB*, 332 F. 2d 47, 48 (2d Cir. 1964).⁷ Among the *Rossmore* factors relevant to my conclusion that Key’s inquiries violated Section 8(a)(1) are the following: Chet Key is Respondent’s President and Owner; Key’s overt hostility to unionization; the nature of the information sought (Carr’s relationship to the Union); the fact that Carr felt compelled to lie in responding to the inquiry; the lack of any valid purpose for the inquiry, the fact that Key told Carr he could not employ individuals associated with the Union and lack of any assurance that Key would not take an adverse action against Carr if he answered truthfully. It is also highly relevant that at the time of the inquiries, Carr was keeping his union affiliation a secret.

Project Manager Clint Tatum also coercively interrogated Carr on February 2. Tatum inquired about Carr’s union affiliation and whether he was at the Rinnai project as a salt. Carr’s untruthful denial about salting is one factor in my conclusion that the questioning violated the Act.

On the other hand, I find that Respondent did not promulgate a rule requiring its employees to sever their ties to a union as alleged in complaint paragraph 7. The Board has not articulated a specific standard as to when an oral statement by a supervisor constitutes a rule. However, the Board decision in *St. Mary’s Hosp. of Blue Spring*, 346 NLRB 776, 777 (2006) at least suggests that an admonition to a single employee does not generally constitute the promulgation of a rule. The Board in *Flamingo Las Vegas Operating Co.*, 359 NLRB 873, 874 (2013) so concluded. However, that decision was set aside due to the composition of the Board in 2013, 361 NLRB 1047 (2014). Also see, *Flamingo Las Vegas Operating Co.*, 360 NLRB 243 fn. 5 (2014). Respondent’s directive in this regard was made only to Carr in private.

The statements made by Chet Key to Carr on January 25, 28 and February 2, also constitute illegal threats as alleged in paragraph 6 of the complaint. Key was certainly suggesting that he might terminate Carr if he did not establish that he was not associated with the Union. Key did not interrogate Carr on January 28. However, Key told Carr that he could not work for Respondent and be associated with the Union. That statement implies adverse consequences for Carr if he had a union association.

*Alleged Discharge or Constructive Discharge of Jeffrey “Jace” Carr*⁸

I find that Respondent did not terminate Jeffrey Carr. Both Carr and Key were less than forthright in their conversations on February 2, 2022. When Carr asked Chet Key if he was firing him, Key said he was not. Key continued to insist that Carr present him with written permission from the Union allowing Carr to work for Respondent. I find that by this time, Key knew Carr had such permission and was a salt. However, Respondent

did not demand that Carr leave its jobsite. He did so on his own volition. Carr may have quit because his mission as a salt, establishing a predicate for ULP charges against Key regarding Johnson and Tucker, had been accomplished.

An employee who quits his employment when given a choice between quitting and abandoning protected activity, has been constructively discharged if the employee quits, *Intercon I (Zercom)*, 333 NLRB 223 (2001); *Masdon Industries*, 212 NLRB 505, 507 (1974); *American Enterprises, Inc.*, 191 NLRB 866 (1971). The choice between quitting and abandoning union or other protected activity must be clear and unequivocal in order that an employee’s decision to quit his or her employment constitutes a constructive discharge, *Comgeneral Corp.* 251 NLRB 653, 657–658 (1980) enfd. 684 F.2d 367 (6th Cir. 1982).

Carr was not faced with a clear and unequivocal choice between quitting and abandoning his union membership. He could have obtained a letter from the Union saying he was a salt, authorized to work for Respondent, and possibly kept his job. Bret Petrea solicited Carr to apply at Ark Fabricators as a covert salt no later than February 3, 2022, the day after his last day working for S.R. Key. Carr applied for work at Ark Fabricators on February 4.

Given what I have gleaned from the Ark Fabricators record, it is not clear to me whether Carr left Respondent because of the statements made to him by Chet Key or because the Union had directed him to salt Ark Fabricators. Which came first, the chicken or the egg? On the other hand, it is hard to believe that if Carr had obtained a written statement from the Union that he was authorized to work for Key, that Key would have allowed him to do so. However, I find that Carr was obligated to call Chet Key’s bluff and put this uncertainty to the test. Given that Carr did not obtain the letter that Key was demanding and that the General Counsel bears the ultimate burden of proving discrimination, I dismiss the allegation that Respondent constructively discharged Carr.

CONCLUSIONS OF LAW

Respondent did not violate the Act by discharging or constructively discharging Jeffrey Carr.

Respondent violated the Act in refusing to consider Justin Johnson and Stephen Carey Tucker for employment.

Respondent violated the Act in not offering employment to Justin Johnson and Stephen Carey Tucker when it had vacancies. The General Counsel met its evidentiary burden set forth in *FES* and *Toering*. Respondent did not establish a legitimate affirmative defense.

Respondent, by Chet Key and Clint Tatum, violated the Act by interrogating Jeffrey Carr about his union affiliation and activities and threatening Carr with unspecified consequences if he continued to work for Respondent without severing his relationship with the Union.

⁷ The *Bourne* criteria are not prerequisites for finding coercive questioning, but rather useful indicia that serve as a starting point for assessing the totality of the circumstances under which the inquiries were made, *United Services Auto Assn. v. NLRB*, 387 F. 3d 908 (D.C. Cir. 2004).

⁸ Respondent contends that this allegation should be dismissed on the grounds that the Charging Party Union did not have standing to file a

charge over Carr’s termination. First of all, Respondent is incorrect as to the identity of the Charging Party, which is the Georgia Carolina Pipe Trades Association, not Local Union 188 or 72. Moreover, there is no requirement that a union represent an employee for whom it files an unfair labor practice charge. A charge may be filed by any person, Section 102.9 of the Board’s Rules of Procedure.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to hire Justin Johnson and Stephen Tucker must institute them and make them whole for any loss of earnings and other benefits, consistent with the Board's decision in *Oil Capitol and Sheet Metal*, 349 NLRB 1348 (2007), computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) as computed in *New Horizons*, 283 NLRB 1173 (1987).

Respondent shall file a report with the Regional Director for Region 10 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Johnson and Tucker for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016). Also, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, Respondent shall file with the Regional Director for Region 10 a copy of the corresponding W-2 forms reflecting the backpay award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, S.R. Key Plumbing and Mechanical, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment or refusing to hire any job applicant because the applicant is a union organizer, supports a union or seeks union representation.

(b) Interrogating employees about whether or not they are affiliated with a union.

(c) Threatening employees with unspecified consequences if they continued to work for Respondent while maintaining their association with a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, offer immediate employment (instatement) to Justin Johnson and Stephen Carey Tucker in the positions for which they applied, or, if such positions no longer exist, to substantially equivalent positions.

(b) Make Justin Johnson and Stephen Tucker whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy

section of the Board's decision. This make whole remedy shall take into account whatever Justin Johnson receives resulting from the discrimination against him by Ark Fabricators.

(c) Within 14 days of the Board's Order, remove from Respondent's files any reference to the unlawful refusal to consider for hire Justin Johnson and Stephen Tucker, and within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider Johnson and Tucker for hire will not be used against them.

(d) Within 14 days of the Board's Order, remove from Respondent's files any reference to the unlawful refusal to hire Justin Johnson and Stephen Tucker and within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them.

(f) File with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. Compensate Justin Johnson and Stephen Tucker for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(g) File with the Regional Director for Region 10 a copy of the corresponding W-2 form(s) reflecting the backpay award as set forth in the remedy section of this decision.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its work sites copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 25, 2022. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(j) Within 21 days after service by the Region, file with the

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 17, 2023

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for hire or refuse to hire any job applicant because we believe that they intend to try to organize our employees or because they are represented by a Union.

WE WILL NOT question you as to whether or not you are affiliated with a union, support a union or desire union representation.

WE WILL NOT threaten you with unspecified consequences if you work for us and are affiliated with a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer immediate employment to Justin Johnson and Stephen Tucker. If the positions that existed when they applied for employment no longer exist, we will offer them employment in substantially equivalent positions.

WE WILL make Justin Johnson and Stephen Tucker whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the Board's decision.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful refusal to consider for hire or to hire Justin Johnson and Stephen Tucker.

WE WILL, within 3 days thereafter, notify Justin Johnson and Stephen Tucker in writing that this has been done and that the refusal to consider them for hire, or to hire them will not be used against them.

WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the corresponding W-2 form(s) reflecting the back pay award.

WE WILL compensate Justin Johnson and Stephen Tucker for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

S.R. KEY PLUMBING AND MECHANICAL, LLC

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/ 10-CA-291436](http://www.nlrb.gov/case/10-CA-291436) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

