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April 14, 2008

Sent By E-File & Fax: 202-273-4270
National Labor Relations Board
1099 14th St. N.W.
Washington, D.C. 20570-0001
Att: Lester A. Heltzer, Executive Secretary

Re: All State Power Vac, Inc. and Local 78
Case No.: 29-CA-28264, 29-CA-28351, 29-CA-28394, 29-CA-28556, 29-CA-
28594, 29-CA-28637, 29-CA-28683 & 29-RC-11505

Dear Mr. Heltzer:

Our firm is counsel to All State Power Vac, Inc. in the above referenced matter. On Wednesday, April 9th, General Counsel delivered by hand its request for special permission to appeal and request to overrule the Administrative Law Judge's Ruling which denied General Counsel's motion for recusal pursuant to Section 102.37 and for an Order removing Administrative Law Judge Raymond P. Green as the judge in this matter.

Enclosed please find All State Power-Vac, Inc.'s Response In Opposition To The General Counsel's Request For Special Permission To Appeal And Request To Overrule The Administrative Law Judge's Ruling.

Thank you for your consideration.

Very truly yours,


RICHARD B. ZISKIN

Enc.

cc: All State Power Vac, Inc.
NLRB Region 29
Att: Brent Childerhose, Esq.
Att: Linda Harris Crovella, Esq.
Lowell Peterson, Esq.
Raymond Heineman, Esq.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

-----X
LABORER'S INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 78,

Charging Party

and

ALL STATE POWER-VAC, INC.

Respondent

29-CA-28264
29-CA-28351
29-CA-28394
29-CA-28556
29-CA-28594
29-CA-28637
29-CA-28683

-----X
ALL STATE POWER-VAC, INC.,

Employer

and

29-RC-11505

LABORER'S INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 78,

Petitioner

-----X
**ALL STATE POWER-VAC, INC.'S RESPONSE IN OPPOSITION TO THE
GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO
APPEAL AND REQUEST TO OVERRULE THE
ADMINISTRATIVE LAW JUDGE'S RULING**

Pursuant to the Board's Rules and Regulations, Section 102.26, All State Power-Vac, Inc. (hereinafter the "Employer" or "Respondent") hereby responds to General Counsel's request for special permission to appeal and request to overrule the Administrative Law Judge's Ruling which denied General Counsel's motion for recusal pursuant to Section 102.37 and for an Order removing Administrative Law Judge Raymond P. Green (hereinafter "Judge Green") as the judge in this matter.

On March 17, 2008, a hearing a commenced in the above captioned matters before Judge Green based on charges filed by Local 78, Asbestos, Lead & Hazardous Waste Laborers, Laborers International Union of North America (hereinafter the "Union") against the Employer.

On March 18, 2008, Counsel for the General Counsel's submitted a motion for recusal (GC Exh. 23) in which it alleged that Judge Green was biased and exhibited a pre-disposition against union employee applicants (also known as "salts") in prior Board cases and in this matter as well. The General Counsel further alleged that Judge Green interfered with Counsel for the General Counsel's presentation of evidence and witnesses in the instant matter. General Counsel's motion was not accompanied by an affidavit as required by Section 102.37. Thereafter, Judge Green denied General Counsel's motion.

For the reasons set forth below, the Employer respectfully asserts that Judge Green should be permitted to hear the above cases for the following reasons:

1. The Judge has not exhibited a demonstrated bias against salting cases.
 - a. Decisions from Judge Green reflect no bias against salting cases.
 - b. General Counsel's motion for recusal (GC Exh. 23) was not in compliance with Rules and Regulations Section 102.37 as the Motion was not accompanied by an affidavit.
 - c. The NLRB has recently changed the burden of proof required for establishing that an individual is a Section 2(3) "job applicant" entitled to statutory protection against hiring discrimination.
2. Judge Green did not improperly interfere with the General Counsel's presentation of its case.

- a. Judge Green did not make inappropriate comments against salts in the instant matter nor did he indicate a bias against salts.
 - b. Judge Green did not interfere with the testimony of General Counsel witness Eli Kent.
 - c. General Counsel's allegation that Judge Green threatened to not allow General Counsel's witnesses to testify unless digital recordings of conversations with Respondent's representatives were produced by the Union prior to their testimony is illogical and absurd in light of the fact that General Counsel Brent Childerhose had already e-mailed the digital recordings to the Employer's counsel on March 18th at 8:36 a.m. and 8:38 a.m. which was prior to the testimony of General Counsel's witnesses.
 - d. General Counsel's allegation that Judge Green inappropriately assisted Respondent by directing Respondent to subpoena the digital recordings is similarly illogical and absurd in light of the fact that General Counsel Brent Childerhose had already e-mailed the digital recordings to the Employer's counsel on March 18th at 8:36 a.m. and 8:38 a.m. which was prior to the testimony of General Counsel's witnesses.
 - e. General Counsel's allegation that Judge Green interfered with General Counsel's alleged Spanish only-speaking witness is belied by the fact that the witness was fluent and literate in English as the witness was able to verbally translate a document written in English to Spanish.
3. It would cause severe prejudice, unnecessary delay and expense if the Board reassigned the matter to a new judge for a hearing de novo and/or if the Board

reassigned the remaining portion of the matter to a new administrative law judge as credibility determinations could not be made from a review of the transcript.

4. If the NLRB orders a trial de novo (which Respondent opposes), Respondent specifically requests that Board assign the case to Judges Steven Fish or Steven Davis.

**GENERAL COUNSEL'S OPENING STATEMENT CLEARLY
ESTABLISHED THAT THE CONSOLIDATED COMPLAINT
ALLEGED THAT THE EMPLOYER UNLAWFULLY REFUSED TO HIRE
UNION APPLICANTS KNOWN AS "SALTS".**

General Counsel Childerhose's opening statement began as follows:

"Your Honor, this case is about Laborers Local 78's organizing campaign of All State Power Vac. On the morning of April 13, 2007, Laborers Local 78 sent eight applicants to apply overtly as Union members for positions with Respondent. Though Respondent was hiring at the time, Respondent refused to consider the eight Union applicants or allow them to apply for work. The evidence will show Respondent did this only because these applicants were affiliated with the Union." (Hearing Volume 1, March 17, 2008, p. 8, l. 11-19)

1. The Judge has not exhibited a demonstrated bias against salting cases

In light of General Counsel's opening statement, if General Counsel believed that the Judge had repeatedly demonstrated a past bias against salting cases, then the General Counsel should have submitted its motion to disqualify the Judge at the outset of trial. However, General Counsel failed to raise its belief that the Judge would not impartially view the General Counsel's presentation of its evidence on the salting issue.¹

General Counsel's argument that Judge Green is biased against union salts is predicated on three Board Cases. Specifically, General Counsel cites to the following:

¹ It should be noted that Employer's counsel has a standing request before Associate Chief Administrative Law Judge Joel Biblowitz to not assign Administrative Law Judge Howard Edelman to any of its cases in light of past issues that Respondent's counsel has incurred.

Iplli, Inc., 321 NLRB 463 (1996); M.J. Mechanical Services, Inc., 324 NLRB 812 (1997); and Zeppelin Electric Company, Inc. 328 NLRB 452 (1999).

Contrary to General Counsel's theory, in Iplli, Inc., Judge Green concluded that union salts are entitled to statutory protection and that when discharged because they engaged in union activity, they are entitled to reinstatement and backpay. 321 NLRB 467. Judge Green further acknowledged that he was bound to Board precedent and concluded that the discharge violated Section 8(a)(1) and (3) of the Act. 321 NLRB 467. Further, contrary to the assertion of the General Counsel, Judge Green did not express a personal distaste for salting nor did the Board conclude that he did so. By expressing an overt acknowledgment that he is bound to follow Board law, Judge Green did not demonstrate a personal bias towards salting cases

In M.J. Mechanical Services, Inc., 324 NLRB 812 (1997), Judge Green found that two individuals (Colon and Derleth) "salting" activities were not protected, but that their discharges still violated Section 8(a)(3) because the Respondent "believed that Colon and Derleth were going to try to organize the employees." The NLRB disagreed with Judge Green and determined that the salting activities were protected by Section 7 and that they were unlawfully discharged in retaliation for engaging in such activities. The NLRB further noted that Judge Green recognized the fact that Colon and Derleth were "salts" does not deprive them of their status as statutory employees. 324 NLRB 812, * 3. Although General Counsel has correctly quoted excerpts from the Board's decision in M.J. Mechanical Services, Inc. in its filing, it should be noted that the Board did not reverse Judge Green's finding that the Employer had not violated Section 8(a)(3) and (1) by allegedly refusing to hire six additional union salts.

In Zeppelin Electric Company, Inc. 328 NLRB 452 (1999), General Counsel correctly quoted excerpts from the Board's decision. However, the General Counsel failed to note that the decision was a 2-1 reversal and that Member Hurtgen set forth that he disagreed with the other Board members in conjunction with their interpretation of Judge Green's decision. 328 NLRB 452, * 8, fn.1.

a. Decisions from Judge Green reflect no bias against salting cases

In Pro-Chem Mechanical Contractors, Inc. and Local Union No. 9, Plumbers & Pipefitters, UA, 1999 WL 33454781 (N.L.R.B. Div. of Judges), Judge Green held that the Respondent-Employer violated Section 8(a)(3) and (1) by refusing to consider for hire and refusing to hire a group of 9 persons whose applications for employment were sent by the Union.

In Alltek Energy Systems Inc. and Sheet Metal Workers International Association, Local Union No. 83, 2000 WL 33665568 (N.L.R.B. Div. of Judges), Judge Green concluded that the Respondent-Employer unlawfully refused to hire two Union job applicants and that the Respondent did not make any effort to interview or contact other union applicants.

In The Raymond Kravis Center for The Performing Arts, 351 NLRB No. 19, 2007 WL 2891100 (N.L.R.B.), Judge Green also concluded that the Respondent violated Section 8(a)(1) and (3) when it engaged in hiring practices which were designed to reduce the probability of hiring individuals who were members of the Union.

Moreover, in a decision issued prior to the cases cited by General Counsel, Judge Green determined that by impliedly notifying job applicants that they could not be hired if they were members of a particular union, the Respondent-Employer had violated

Section 8(a)(1) of the Act. Falcone Electric Corp., 308 NLRB No. 146, 308 NLRB 1042, 141 L.R.R.M. (BNA) 1142, 1992-93 NLRB Dec. P 17521, 1992 WL 259402 (N.L.R.B.).

- b. General Counsel's motion for recusal (GC Exh. 23) was not in compliance with Rules and Regulations Section 102.37 as the Motion was not accompanied by an affidavit.

On March 18, 2008, General Counsel filed a Motion with Judge Green in which it requested that Judge Green recuse himself from the case. (See GC Exh. 23) However, as required by Section 102.37, Counsel for the General Counsel failed to file a "timely affidavit." Without the filing of the required affidavit, the administrative law judge could not disqualify himself and withdraw from the proceeding.

Upon review of all Board case law concerning requests for disqualification made pursuant to Section 102.37, the Board and its administrative law judges have always concluded that the failure to file an affidavit with the request for disqualification serves as a procedural bar against the party making the request. Because of General Counsel's failure to file an affidavit at any stage in this Special Appeal, the Board must deny the motion for recusal.

In Sanford Home for Adults, 253 NLRB No. 153, 253 NLRB 1132, 106 L.R.R.M. (BNA) 1219 (1981), both the Respondent Union and Respondent Employer contend that during the course of the hearing the Administrative Law Judge engaged in an ex parte communication with the Regional Director for Region 29 and counsel for the General Counsel which, at a minimum, gave the appearance of impropriety, and required that the Administrative Law Judge be disqualified. However, the Board noted that such contentions were untimely raised inasmuch as the parties failed to comply with Sec. 102.37 of the Board's Rules and Regulations which requires that any party wishing to

request an administrative law judge “to withdraw on ground of personal bias or disqualification” must do so before the filing of his decision “by filing with [the Administrative Law Judge] promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.” 253 NLRB No. 153, fn. 1.

In Serendippity-Un-Ltd, and Tigerrr, Inc., 263 NLRB No. 100, fn. 3, 263 NLRB 768, 111 L.R.R.M. (BNA) 1263 (1982), Respondent’s motion for a stay and for a new trial was denied since it failed to support its allegations of prejudice and denial of due process as Respondent did not file an affidavit as required by Section 102.37.

In Washington Stair and Iron Works, Inc., 285 NLRB No. 70, fn. 1, 285 NLRB 566, 126 L.R.R.M. (BNA) 1143 (1987), the Respondent moved pursuant to Section 102.37 of the Board's Rules and Regulations that the judge be disqualified. The NLRB noted that the motion was untimely raised inasmuch as the Respondent failed to comply with the procedural constraints of Sec. 102.37 of the Board's Rule's and Regulations which requires that any party wishing to request a judge to withdraw from a case must do so before the filing of his decision by filing with the judge promptly on the discovery of the alleged facts, “a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.” The Board found no basis on which to disqualify the judge and specifically noted that the Respondent did not file the required affidavit.

In International Brotherhood of Teamsters, Local 722, AFL-CIO, 314 NLRB No. 168, 314 NLRB 1016, 147 L.R.R.M. (BNA) 1123, 1993-94 NLRB Dec. P 15452, 1994 WL 486566 (N.L.R.B.), the Administrative Law Judge held that “It is quite apparent that Section 102.37 of the Board's Rules and Regulations requires a request for withdrawal of

an administrative law judge for personal bias or disqualification shall be accompanied by an affidavit.” 1994 WL 486566, ** 8.

In Bethlehem Temple Learning Center, Inc., 330 NLRB No. 166, 330 NLRB 1177, 167 L.R.R.M. (BNA) 1006, 2000 WL 380244 (N.L.R.B.), the Administrative Law Judge determined that Respondent's oral motion that the judge recuse himself “was not properly filed in accordance with the requirements of Rule 102.37 inasmuch as the motion was not accompanied by a “timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.” 2000 WL 380244, ** 11.

Because of General Counsel’s failure to file an affidavit pursuant to Section 102.37 and/or at any stage in this Special Appeal, the Board must deny General Counsel’s motion for disqualification.

- c. The administrative law judge should not be disqualified as the NLRB has recently changed the burden of proof required for establishing that an individual is a Section 2(3) “job applicant” entitled to statutory protection against hiring discrimination.

In Toering Electric Co., 351 NLRB No. 18 (2007), the Board “abandon[ed] its previous implicit presumption that anyone who applies for a job is protected as a Section 2(3) employee.” The Board stated:

We hold that an applicant for employment entitled to protection as a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer We further hold that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer.

Prior to Toering, the Board presumed that an individual who submitted an application for employment was a Section 2(3) employee and thus entitled to protection

against discriminatory employer practices. See, e.g., Progressive Electric, Inc. v. NLRB, 453 F.3d 538, 551-553 (D.C. Cir. 2006), enfg. 344 NLRB 426 (2005).

In Toering, the Board explained that although the FES burden-shifting framework still applies in refusal to hire and consider cases, proof of an applicant's genuine job interest is now also an element of the General Counsel's prima facie case. Specifically, under Toering's modified FES framework, the General Counsel has the burden of proving that an applicant is genuinely interested in seeking to establish an employment relationship with an employer, rather than the employer having the burden of proving the applicant had no such interest. This requirement embraces two components: (1) there was a bona fide application for employment; and (2) the applicant had a genuine interest in becoming employed by the employer.

As to the first component, the General Counsel must first introduce evidence that the individual actually applied for employment. If the General Counsel demonstrates that there was an application for employment, their burden is met unless the employer raises "a reasonable question as to the applicant's actual interest in going to work for the employer." An employer may raise such a question by introducing evidence that an applicant recently refused similar employment with the employer; made belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine desire to establish an employment relationship with the employer. Similarly, an application that is "stale" or incomplete may, depending on the circumstances, indicate that the applicant did not genuinely seek to establish an employment relationship with the employer.

Additionally, an applicant may not be genuinely seeking employment if the applicant did not (i) submit an application in accordance with the employer's procedures, (ii) make follow-up inquiries regarding the application, (iii) have relevant work experience with other employers, and/or (iv) seek similar employment with other employers. Similarly, an employer may claim that an applicant would not have been able to perform his job duties because he also worked for the union by demonstrating that the applicant's union responsibilities would have interfered with his obligations to the employer.

Based upon the newly established legal standard in salting cases, it is impossible for General Counsel to contend that Judge Green is biased against union salts when he has not been afforded the opportunity to render a decision under the Toering standard.

2. Judge Green did not improperly interfere with the General Counsel's presentation of its case.

- a. Judge Green did not make inappropriate comments against salts in the instant matter nor did he indicate a bias against salts.

The quotation attributed to Judge Green on page seven (7) of "General Counsel's Request For Special Permission To Appeal And Request To Overrule Administrative Law Judge's Ruling" is correct, but does not express any bias against "salts."

Further, the Judge's statement was issued after the eight (8) alleged salts had concluded their testimony and where it had already been revealed that each of the eight (8) individuals were employed as business agents, organizers or in some other official capacity by Local 78 and that no backpay and/or offer of reinstatement would be appropriate.

- b. Judge Green did not interfere with the testimony of General Counsel witness Eli Kent.

General Counsel contends that Judge Green inaccurately and unreasonably formulated Eli Kent's testimony to say that Kent did not intend to accept and complete an employment application. (See page 9-10 of "General Counsel's Request For Special Permission To Appeal And Request To Overrule Administrative Law Judge's Ruling")

However, the testimony reveals the following:

1. Eli Kent testified that he refused Respondent's offer of an employment application and Respondent's offer of a road test. (See Tr. 280, l. 2-19)
2. Eli Kent had not applied for any employment in the previous four (4) years and has had no other employment (other than Local 78) during such period. (See Tr. 282, l. 3-8)

Notwithstanding the above, Judge Green specifically stated the following:

"I'm not ready to rule on Mr. Kent's situation as to whether or not the Employer refused to consider him for employment." (See Tr. 296, l. 20-22)

Moreover, Judge Green did not preclude General Counsel from offering any exhibits and/or evidence with respect to the testimony of Eli Kent and the Judge did not sustain any of Respondent's objections which would have served to preclude any portion of Mr. Kent's testimony.

- c. General Counsel's allegation that Judge Green threatened to not allow General Counsel's witnesses to testify unless digital recordings of conversations with Respondent's representatives were produced by the Union prior to their testimony is illogical and absurd in light of the fact that General Counsel Brent Childerhose had already e-mailed the digital recordings to the Employer's counsel on March 18th at 8:36 a.m. and 8:38 a.m. which was prior to the testimony of General Counsel's witnesses.

The alleged off-the-record conversation as alleged by General Counsel (page 13-15 of "General Counsel's Request For Special Permission To Appeal And Request To Overrule Administrative Law Judge's Ruling") is erroneous and moot.

General Counsel alleges, without any supporting affidavit, that Respondent sought to subpoena the digital recordings from General Counsel witness Byron Silva. However, there was no need and/or requirement for Respondent to subpoena the digital recordings at the March 18th hearing as Counsel to the General Counsel had previously e-mailed the five (5) digital recordings at issue to Respondent's counsel. (See attached e-mails dated March 18th at 8:34 am and 8:38 am).

Although Respondent's counsel had a notebook computer (a/k/a "laptop computer") it was unable to access the digital recordings because the hearing room's internet connections were failing. Respondent's position was that it needed access to a working internet connection so that it could listen to the audio recordings. The internet connection is what General Counsel refused to provide. When the Judge advised that he would preclude General Counsel from presenting further evidence, General Counsel provided the digital recorder which allowed Respondent to download the audio recordings without the need for an internet connection.

Because Counsel for the General Counsel had previously supplied the digital recordings to Respondent's counsel, the issue of a subpoena was moot. Respondent's only hindrance in accessing the digital recordings was the failing of the hearing room's internet connections as well as Region 29's and the General Counsel's unwillingness to provide a working internet connection. For the above reasons, General Counsel's motion should be denied.

- d. General Counsel's allegation that Judge Green inappropriately assisted Respondent by directing Respondent to subpoena the digital recordings is similarly illogical and absurd in light of the fact that General Counsel Brent Childerhose had already e-mailed the digital recordings to the Employer's counsel on March 18th at 8:36 a.m. and 8:38 a.m. which was prior to the testimony of General Counsel's witnesses.

The Board is respectfully referred to Respondent's answering response above. However, it should be further noted that General Counsel was not forced to release a 611(c) witness from testifying because the recordings were going to be allegedly used to impeach her testimony regarding the Respondent's refusal to let overt salts apply for work. (See page 16 of "General Counsel's Request For Special Permission To Appeal And Request To Overrule Administrative Law Judge's Ruling")

This contention is completely erroneous and demonstrates General Counsel's significant shortcomings, poor trial preparation and its need to engage in shopping for what it hopes is a more sympathetic administrative law judge. In this regard, General Counsel had subpoenaed a former employee of Respondent, Nydia Delgado (the 611(c) witness) to testify at the first day of trial. (See Tr. 94-95) In an off the record conversation, Counsel for the General Counsel had expressed a desire to call Ms. Delgado on the second day of trial rather than the first day, but ultimately decided that it could not call Ms. Delgado on the first day until they were first finished with witness Glenn Burke. On the first day of trial, even Judge Green stated: "We need to get to Ms. Delgado" on the stand. (See Tr. 99, l. 18-19) Ultimately and now apparently regrettably, General Counsel declined to call Ms. Delgado as a witness on the first day of hearing.

Again, General Counsel's allegations are without any merit as it was Counsel Childerhose who had supplied the digital recordings to Respondent's counsel by e-mail prior to the second day of trial.

- e. General Counsel's allegation that Judge Green interfered with General Counsel's alleged Spanish only-speaking witness is belied by the fact that the witness was fluent and literate in English as the witness was able to verbally translate a document written in English to Spanish.

While it is very understandable and necessary for Counsel and Judges to be sympathetic to the needs of a witness who requires an interpreter it was not necessary in the case of witness William Dominich.

Nevertheless, Judge Green did not require the witness to respond in English to English questions. In this regard, Judge Green constantly and consistently restated that if the witness had difficulty understanding the question in English, then the witness should look to the interpreter. Further, Judge Green stated that if the witness has difficulty expressing himself in English, he should look at the interpreter and the interpreter will help him. (See Tr. 512, l. 6-11, p. 511, l. 11-16, p. 510, l. 10-13, p. 508, l. 19-20), p. 507, l. 13-21)

Additionally, it should be noted that Mr. Dominich was able to translate Company Exhibit 2, an English written document into Spanish. Therefore, not only was Mr. Dominich literate in both Spanish and English, he was able to instantly translate a written document from English to Spanish. (See Tr. 521, l. 21-25, p. 522, l. 1-25)

3. It would cause severe prejudice, unnecessary delay and expense if the Board reassigned the matter to a new judge for a hearing de novo and/or if the Board reassigned the remaining portion of the matter to a new administrative law judge as credibility determinations could not be made from a review of the transcript.

As General Counsel knew beforehand that the instant matter, in large part, concerned the issue of salting, General Counsel should have requested that Judge Green recuse himself from the outset of the trial and/or should have requested that the Associate Chief Administrative Law Judge not assign this case to Judge Green. By waiting to the second day of trial to submit its defective motion, as it was not accompanied by an affidavit, General Counsel is clearly seeking a second opportunity to try this matter before a Judge that it hopes will be more sympathetic to its case.

However, after approximately seven days of trial, Respondent would be severely prejudiced if it was required to retry this case. The financial toll for having to try this case a second time would be prohibitively expensive. In this regard, Respondent has regularly devoted two attorneys to this matter as has General Counsel.

Further, Counsel to the General Counsel waited until the conclusion of the sixth day of trial, on April 9th, before it submitted its Special Appeal notwithstanding the fact that the Judge adjourned the trial on March 20th so as to allow General Counsel additional time to submit its Special Appeal.

Further, if the Board reassigns this matter to another Administrative Law Judge without ordering a hearing de novo, it would be nearly impossible for a newly designated Judge to make credibility determinations from a review of the transcript.

4. If the NLRB orders a trial de novo, Respondent specifically requests that Board assign the case to Judges Steven Fish or Steven Davis.

It is Respondent's belief that Counsel for the General Counsel is shopping for a Judge that might be more sympathetic to its case. As Respondent is well aware that Counsel for the General Counsel is successful in at least eighty-five percent (85%) of its

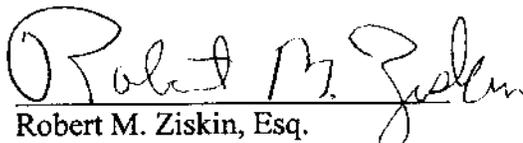
cases, it is Respondent's sincere belief that General Counsel is shopping for a Judge who will adopt their submitted findings of fact and conclusions of law at the close of trial.

Because of Respondent's great concern that General Counsel is attempting to unscrupulously steer this case away from Judge Green, Respondent respectfully requests that if this case is reassigned (which it opposes for the above reasons) that it be reassigned to either Judge Steven Fish or Judge Stephen Davis. In this regard, Respondent's counsel has always found Judges Green, Fish and Davis to be fair and impartial Judges. Unfortunately, this has not always been our experience with other Judges and Respondent's fears will be somewhat alleviated if the case is reassigned to a Judge which it knows to be impartial. An assignment to a different administrative law judge will only serve to affirm Respondent's belief that General Counsel is unscrupulously pursuing the reassignment of this matter.

5. Conclusion

For the above referenced reasons, Respondent respectfully requests that the NLRB deny General Counsel's Special Appeal as (i) it is defective; (ii) it is unsupported by the record evidence; and (iii) General Counsel engaged in undue delay in filing its Special Appeal.

The Ziskin Law Firm, LLP

By: 
Robert M. Ziskin, Esq.
Richard B. Ziskin, Esq.
Counsel to Respondent
All State Power-Vac, Inc.
Office and P.O. Address:
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Commack, NY 11725
(631) 462-1417

CERTIFICATE OF SERVICE

STATE OF NEW YORK)
COUNTY OF SUFFOLK)

I, Richard B. Ziskin, an attorney admitted to practice in the courts of the State of New York and in the federal district courts of the Southern and Eastern Districts of the State of New York, do hereby certify, under the penalties of perjury, that true and correct copies of Allstate Power Vac, Inc.'s All State Power-Vac, Inc.'s Response In Opposition To The General Counsel's Request For Special Permission To Appeal And Request To Overrule The Administrative Law Judge's Ruling are served by mailing same in a sealed envelope, with postage pre-paid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addresses as indicated below:

Kroll, Heineman & Giblin
99 Wood Avenue South, Suite 207
Iselin, NJ 08830
Att: Raymond Heineman, Esq.

Meyer, Suozzi, English & Klein
1350 Broadway
Suite 501
NY, NY 10018
Att: Lowell Peterson, Esq.

National Labor Relations Board
Region 29
Two Metro Tech Center, 5th Floor
Brooklyn, New York 11201
Attention: Brent Childerhose, Esq.
Linda Harris Crovella, Esq.

Dated: Commack, New York
April 14, 2008



RICHARD B. ZISKIN

G C 23

Motion To the Administrative Law Judge
To Recuse Himself

The Counsel for the General Counsel Moves for the recusal of Judge Raymond P. Green from the All State Power Vac, Inc. Cases 29-CA-28264; 29-CA-28355; 29-CA-28394; 29-CA-28556; 29-CA-28594; 29-CA-28637; 29-CA-28683 and 29-RC-11505 on the following grounds:

1. Judge Green has a demonstrated bias against salts. He ~~has~~ described salting as "vicious interference with business relations" (Tualatin Electric, 312 NLRB 129, 130 fn. 3 (1993)). The Board has repeatedly admonished this Judge for asserting his opinions about salting programs in numerous decisions (see: M.J. Mechanical Services, 324 NLRB 812, 813 (1997)) "[I]t is clear that the judge's personal opinion of union 'salting' rather than a close review of the record informed his conclusion." Also see: Zeppelin Electric Co., "The Board, however, has repudiated this judge's assumptions about salting in M.J. Mechanical Services, supra, and Ippli, Inc 321 NLRB 463 (1996)." Regretfully, despite these admonitions from the Board, Judge Green continues to be biased against salts. As evidence of this bias we note in the present case, despite the clear language of Section 102.118 of the Board's Rules and Regulations, Judge Green ordered Counsel for the General Counsel to turn over witness statements (recordings), to opposing Counsel

prior to the witnesses being allowed to testify, and under threat that he would not allow them to testify if General Counsel refused to produce the ~~same~~ at that time.

2. Further, he has expressed on the record his view that a salt cannot be genuinely interested in employment if the salt does not first resign his employment with the Union by stating that the two jobs were mutually exclusive, a conclusion he stated on the record ~~was~~ that is illogical and contrary to common sense.

Respectfully submitted in brief, on the record, and more fully herein, this 18th day of March, 2007.

Due to the Judge's on the record denial of this Motion, Counsel for the General Counsel has requested a Special Appeal to the Board, and been denied an adjournment pending the outcome.

Linda S. Harris Corda

Linda S. Harris Corda
Counsel for the General Counsel

Brent E. Childerhose

Brent E. Childerhose
Counsel for the General Counsel

From: Childerhose, Brent E. <Brent.Childerhose@nrb.gov>

To: richard@ziskinlawfirm.com

Cc:

Date: Tuesday, March 18, 2008 08:34 am

Subject: Allstate recording

The recording of Glenn and Jose Castillo is attached.

Brent E. Childerhose
NLRB, Region 29
Two Metro Tech Center, 5th Floor
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Attachments:  Castillo burke (6).WAV (12MB)

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Date: Tuesday, March 18, 2008 08:38 am

Subject: Allstate applicant recordings

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Attachments:  edwin robert allstate.WAV (974KB)
 guyen Fabian allstate.WAV (777KB)
 Manuel kryz allstate.WAV (786KB)
 Roldan Eli allstate.WAV (1MB)

1 with the, with one objection. Actually, it states, it
2 incorrectly states two objections because one of the objections
3 was decided in the hearing held by the Region. There's only,
4 there's only one objection that's being consolidated.

5 JUDGE GREEN: No, I understand. I understand. Do I, do
6 I, could I see the formal papers, please? Are they, there's two
7 sets of formal papers.

8 MR. CHILDERHOSE: Yes.

9 JUDGE GREEN: So, all right.

10 MR. CHILDERHOSE: They're marked one and two I think.
11 Your Honor, this case is about Laborer's Local 78's organizing
12 campaign of All State Power Vac. On the morning of April 13,
13 2007, Laborers Local 78 sent eight applicants to apply overtly
14 as Union members for positions with Respondent. Though
15 Respondent was hiring at the time, Respondent refused to
16 consider the eight Union applicants or allow them to apply for
17 work.

18 The evidence will show Respondent did this only because
19 these applicants were affiliated with the Union. Shortly after
20 sending the overt applicants, the Union then sent two more of
21 its members, Angel Rivera and Jose Castillo.

22 JUDGE GREEN: Where was, approximately where was that?
23 You don't, if you don't know the exact date it's all right.

24 MR. CHILDERHOSE: It was either the same day or within a
25 couple of days.

- 1 and a social security card; is that right?
- 2 A I'm not certain. She said that -- she that I could fill
3 out an application at that time for future employment but --
- 4 Q But you chose not to do so?
- 5 A Right.
- 6 Q And she also told you at that time if you filled out the
7 application at that time that she would try to arrange for a
8 test drive for you; is that correct?
- 9 A No.
- 10 Q Well, your affidavit, in the middle of it says, "She said
11 we needed to have the licenses with us in order to apply and
12 also that a driver from the Company would have to be there to
13 test drive us."
- 14 A Okay, can I look at my affidavit?
- 15 Q Sure, see if that's correct.
- 16 A Okay. Which line are you talking about?
- 17 Q Middle of the page, 9 and 10. It's written in hand.
18 (Witness examines the document.)
- 19 A Okay. So that's correct, she did say that.
- 20 Q Fine. Did you ever go back to apply for a job with the
21 Company?
- 22 A No, I didn't.
- 23 Q Did you ever secure a HAZMAT license?
- 24 A No.
- 25 Q Did you ever secure a CDL license?

1 JUDGE GREEN: Okay.

2 BY MR. R.M. ZISKIN:

3 Q How many times have you applied for a job as a salt?

4 A This one time.

5 Q In the last four years have you had any other employment
6 other than your employment with Laborers Local 78 or the
7 related unions?

8 A No.

9 MR. R.M. ZISKIN: I have no further questions.

10 Let the record show that I'm returning the affidavit.

11 REDIRECT EXAMINATION

12 BY MR. CHILDERHOSE:

13 Q Mr. Kent, had you been given an application for the field
14 technician position that morning what would you have done?

15 MR. R.M. ZISKIN: He's asked and answered already.

16 JUDGE GREEN: Yeah, but he didn't take --

17 MR. R.M. ZISKIN: He already -- he's already answered
18 that he would take it. He's already testified --

19 JUDGE GREEN: It's a hypothetical.

20 All right, I'll allow him to give his opinion about it
21 but his opinion is going to be contrary to what his testimony
22 is.

23 MR. R.M. ZISKIN: He's already testified --

24 MR. CHILDERHOSE: His intent.

25 JUDGE GREEN: His intent was not to take it; that's what

1 Now, obviously if he had -- if he was clear and if the
2 Union had made it clear that he was going to suspend all his
3 activities in another industry and just work at All State then
4 I suppose that that would be -- that would not be mutually
5 exclusive.

6 MR. CHILDERHOSE: I believe --

7 JUDGE GREEN: But you know --

8 MR. CHILDERHOSE: -- Your Honor --

9 JUDGE GREEN: -- and I gave him the opportunity to say
10 that he was willing to suspend all his operations and
11 organizing in the asbestos industry.

12 MR. CHILDERHOSE: You restated Mr. Kent's testimony, we
13 believe, inaccurately --

14 JUDGE GREEN: Then the record --

15 MR. CHILDERHOSE: -- and in a prejudicial way.

16 JUDGE GREEN: Then the record will state what he said and
17 I rule on what the witness says and what the record shows.

18 The other problem with Mr. Kent's testimony is that he
19 basically refused to give an application, but that's neither
20 here nor there, I'm not ready to rule on Mr. Kent's situation
21 as to whether or not the Employer refused to consider him for
22 employment.

23 MR. CHILDERHOSE: I don't think Mr. Kent did refuse to
24 give an application and I don't think a fair --

25 JUDGE GREEN: Well, then you're mischaracterizing his --

1 A No, but the two gentlemen here were, absolutely.

2 Q Okay, at the very beginning of their --

3 A Absolutely.

4 Q And is every employee given an All State baseball cap?

5 A Those two gentlemen were, yes. Are they? No, not
6 necessarily, I try to give it to them.

7 Q How many employees -

8 MR. ZISKIN: Excuse me. I didn't realize that there were
9 employees in the room. I would like to have them sequestered.

10 MS. HARRIS-CROVELLA: It's a little late given that -

11 MR. ZISKIN: Well, I didn't see them because I can't -

12 MS. HARRIS-CROVELLA: -- we've had Ms. Delgado here.

13 MR. ZISKIN: I can't move my chair.

14 MS. HARRIS-CROVELLA: Well, we've had Ms. Delgado here the
15 whole time.

16 MR. ZISKIN: She's not my witness. I didn't call her, you
17 subpoenaed her.

18 JUDGE GREEN: All right, I'll grant the motion to
19 sequester. But you can, you have to designate somebody to be on
20 your side, and who will that be?

21 MR. CHILDERHOSE: Well, we'll have -

22 JUDGE GREEN: Okay, who do you want to designate?

23 MR. ZISKIN: That gentleman.

24 JUDGE GREEN: Who is that gentleman?

25 MR. ZISKIN: I don't know who he is.

1 MR. CHILDERHOSE: No, he wants to know who your designee
2 is.

3 MR. ZISKIN: Pardon me?

4 MR. CHILDERHOSE: Who is your representative ?

5 MR. ZISKIN: Glen will be my representative when he's
6 finished testifying.

7 MR. CHILDERHOSE: He can be a representative even before
8 that.

9 MR. ZISKIN: I know that, but he will be -

10 JUDGE GREEN: All right, fine, everybody else has got to
11 leave.

12 MS. HARRIS-CROVELLA: Ms. Delgado and Jose, you have to
13 leave.

14 JUDGE GREEN: All right.

15 MR. CHILDERHOSE: In the main lobby room.

16 JUDGE GREEN: Sir, do you understand?

17 MS. HARRIS-CROVELLA: Excuse me, it's not necessary to
18 address him, I just spoke to him. The business agent is
19 speaking to him. He understands, he's leaving, and Ms. Delgado
20 is still sitting here.

21 MR. ZISKIN: She's your witness.

22 MS. DELGADO: I thought I was a witness, all right.

23 MS. HARRIS-CROVELLA: And they've just made a motion that
24 you have to leave.

25 JUDGE GREEN: Okay, fine. All right, if he had gone

1 work, didn't you?

2 A I don't recall doing that because he wore it all the time,
3 and he was not suspended, there was no disciplinary action taken
4 against him.

5 Q Okay.

6 A Absolutely none

7 JUDGE GREEN: Did there come a point in time when you
8 would either, you decided to change your mind about t-shirts,
9 where you were told by somebody that you should change your mind
10 about the t-shirts?

11 THE WITNESS: It just wasn't, it just wasn't worth, they,
12 it wasn't effecting anything, like the stickers it was a health
13 and safety issue. T-shirts weren't effecting anything. I made
14 the decision if that they were going to wear them, they can wear
15 them. I wasn't going to fight them all.

16 MR. CHILDERHOSE: Okay. Your Honor, if we could just take
17 a short break?

18 JUDGE GREEN: All right, fine. We need to get to Ms.
19 Delgado. All right. I take it, Mr. Ziskin, that you'll reserve
20 your examination to -- until, when you put on your case?

21 MR. ZISKIN: No.

22 JUDGE GREEN: Come on, give me a break.

23 MR. ZISKIN: No, I'm not. If she testifies today, I'm
24 going to -

25 JUDGE GREEN: No, no, I'm talking about her. I'm talking

1 I'd like the answer in English.

2 JUDGE GREEN: Well --

3 UNIDENTIFIED SPEAKER: Your Honor --

4 MS. HARRIS-CROVELLA: This is so irregular.

5 UNIDENTIFIED SPEAKER: Let's make a --

6 JUDGE GREEN: You know, will you stop it already. I've
7 set the rules as to how we're going to do this. If the witness
8 had difficulty understanding the question in English, then he's
9 going to look at the interpreter. If the witness has difficulty
10 expressing himself in English, he'll look at the interpreter and
11 the interpreter will help him.

12 MS. HARRIS-CROVELLA: And that's what he just did and Mr.
13 Ziskin instructed him otherwise.

14 JUDGE GREEN: And I told Mr. Ziskin that that's not the
15 way we're doing it.

16 MS. HARRIS-CROVELLA: I missed that part.

17 JUDGE GREEN: Well, very nice. Then we should all keep
18 our ears open, please.

19 BY MR. ROBERT ZISKIN:

20 Q What else did Mr. Ross say to you, that you remember?

21 A He asked me a bunch of questions, but I really don't
22 remember the rest of them.

23 JUDGE GREEN: Well, you could be specific, if you have
24 specific things in mind.

25 MR. ROBERT ZISKIN: I know.

1 years --

2 MR. ROBERT ZISKIN: I don't feel like asking.

3 MS. HARRIS-CROVELLA: -- of English language instruction
4 he's had.

5 MR. ROBERT ZISKIN: Look --

6 JUDGE GREEN: You know, so far he's had no difficulty
7 understanding these questions in English and he's had no
8 difficulty in responding in English. That's the fact. If he
9 has a difficult --

10 MS. HARRIS-CROVELLA: I disagree with Your Honor.

11 JUDGE GREEN: All right. You can do whatever you like.
12 You're entitled to your opinion. I've told this witness that if
13 he has any difficulty at all, he should look at the interpreter
14 and the interpreter will help him. And so far there's one
15 occasion during this set of questions when he's looked at the
16 interpreter.

17 BY MR. ROBERT ZISKIN:

18 Q In this conversation, did Mr. Ross ask you if you were
19 wearing protective equipment?

20 A Yes.

21 MR. ROBERT ZISKIN: Look, I'm not asking you to translate.

22 JUDGE GREEN: No, but I'm asking. I'm telling the witness
23 that if he has difficulty understanding your question, he should
24 look to the reporter.

25 MR. ROBERT ZISKIN: All right. Well, I'd like the answer,

1 suspended?

2 A Oh.

3 Q Yes? Did he tell you in this meeting that you were
4 suspended?

5 **(Questions and answers continue with Spanish translation.)**

6 TW: Yes.

7 BY MR. ROBERT ZISKIN:

8 Q Okay, let's go back to English again. Did he explain to
9 you why you were suspended?

10 JUDGE GREEN: Well, wait a second. If you don't
11 understand the question that's posed to you in English, look at
12 the reporter. If you don't know how to -- then if you can't
13 answer in English, look at the reporter.

14 UNIDENTIFIED SPEAKER: Why doesn't Mr. Ziskin ask in
15 Spanish and then he'll answer in English.

16 MR. ROBERT ZISKIN: Because Mr. Ziskin doesn't want to.

17 UNIDENTIFIED SPEAKER: But he wants you to ask in Spanish.
18 He's even asked.

19 MR. ROBERT ZISKIN: You want me to ask in Spanish? I only
20 had four years of Spanish, so I'll reserve my knowledge of
21 Spanish --

22 MS. HARRIS-CROVELLA: That might be more years than Mr.
23 Dominich has had of English.

24 MR. ROBERT ZISKIN: I don't know that. He's --

25 MS. HARRIS-CROVELLA: Well, why don't you ask him how many

1 incorrect ruling on your part and I take exception to it that --

2 JUDGE GREEN: Okay, fine.

3 MS. HARRIS-CROVELLA: That he should be forced to speak in
4 English, when he has said that his first language is Spanish and
5 he's more comfortable speaking in Spanish.

6 JUDGE GREEN: Okay.

7 MS. HARRIS-CROVELLA: And that shall be noted further in
8 the special appeal.

9 JUDGE GREEN: Fine. Can you answer his question? Can you
10 tell me what was said, and if you have trouble speaking or
11 understanding his question in English, look at the reporter and
12 he'll help you out.

13 BY MR. ROBERT ZISKIN:

14 Q Now let me ask a question. Mr. Dominich, what do you
15 recall being said to you in that meeting by Mr. Ross?

16 JUDGE GREEN: Do you want him to try to speak in English?

17 MR. ROBERT ZISKIN: Yes, I want him to -- I don't want the
18 translator.

19 JUDGE GREEN: All right. If you understand in English,
20 then respond in English.

21 BY MR. ROBERT ZISKIN:

22 Q What did Mr. Ross say to you?

23 A I don't remember too much --

24 Q Whatever you remember.

25 A He told me about my responsibility in this case. But he

1 the record now, Your Honor, that he is more comfortable speaking
2 with a Spanish interpreter and that is his right --

3 JUDGE GREEN: I know. But you know something --

4 MS. HARRIS-CROVELLA: -- under the Board Rules and
5 Regulations --

6 JUDGE GREEN: You know something --

7 MS. HARRIS-CROVELLA: -- to use an interpreter.

8 JUDGE GREEN: You know something, you're not supposed to
9 be that comfortable when there is cross-examination. This is --

10 MS. HARRIS-CROVELLA: Excuse me?

11 JUDGE GREEN: -- cross-examination and --

12 MS. HARRIS-CROVELLA: He requested an interpreter.

13 JUDGE GREEN: I understand. But the conversation that
14 took place in this office took place in English. It was not in
15 Spanish. Neither the person from the management nor he spoke in
16 Spanish. They both spoke in English. In order for me to
17 evaluate whether or not, first of all, what was said and to
18 evaluate what was said, I would like to hear him talk, talk
19 about it in English, if he can. If you can respond in English,
20 I'd like you to do so. If you need the help of a translator,
21 just look at the translator.

22 MS. HARRIS-CROVELLA: I'd just like to state again for the
23 record, for the record specifically that I think that this is
24 highly irregular. I think that the witness has a right to have
25 the Spanish translator translate for him. I think that it is an

1 use. I couldn't tell you if anyone else did.

2 Q Did you use these bags on the job?

3 A Yes.

4 Q How often did you have occasion to use these urine bags
5 while you were working for the company?

6 A On, on a few opportunities. On others, I had do them some
7 other, some other way.

8 Q And some of the other ways were going to McDonald's or
9 Dunkin Donuts?

10 A Yes.

11 Q Were you present when Miguel Bisono urinated in a Gatorade
12 jar?

13 A No.

14 Q To your knowledge, did you ever sign a receipt for having
15 received the company safety policies?

16 A When they do talks, Mr. Guerrero has us sign documents
17 when we've seen videos and things like that.

18 MR. ROBERT ZISKIN: Show him that.

19 JUDGE GREEN: All right. So you -- do you have a copy?

20 MR. RICHARD ZISKIN: You want to mark this as Company 2?

21 JUDGE GREEN: Yeah.

22 **(Respondent Exhibit 2 marked for identification.)**

23 BY MR. ROBERT ZISKIN:

24 Q I'm showing you Company Exhibit 2 and ask you if you
25 recognize the document?

1 A I think this comes attached to the work application.

2 Q And were you given this document to sign?

3 A It comes in the pack with the application. You have to
4 sign it.

5 Q Did you sign it? Is that your signature?

6 A Yes.

7 Q Did you read it?

8 A No.

9 Q Can you read it?

10 JUDGE GREEN: Don't read it out loud. The question is can
11 you read it?

12 THE WITNESS: "I understand that I've received the company
13 policy and security, and follow these instructions to be a
14 company employee. I certify that I received a hardhat and I've
15 gotten other personal protective equipment."

16 JUDGE GREEN: Okay.

17 MR. ROBERT ZISKIN: I'd just like the record to reflect
18 that not only was --

19 JUDGE GREEN: All right, the record will reflect it.

20 MR. ROBERT ZISKIN: And that this what I was given -- what
21 I gave him was in English and not only did he read it, he
22 translated it into Spanish.

23 JUDGE GREEN: Yeah, I know. The record already shows
24 that. You don't need to say it.

25 MR. ROBERT ZISKIN: Fine.