

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CONTRACTOR SERVICES, INC.,     )  
  )  
    Employer,                        )  
  )  
    and                                )  
  )  
INTERNATIONAL BROTHERHOOD     )  
OF ELECTRICAL WORKERS,         )  
LOCAL UNION NO. 347,            )  
  )  
    Charging Party.                )

Cases: 10-CA-28856, et al.  
(351 NLRB 33 (2007))

**CHARGING PARTY’S MOTION TO CONSOLIDATE CASES AND SOLICIT BRIEFS FROM PARTIES AND INTERESTED *AMICI* ON ISSUES RAISED**

Charging party International Brotherhood of Electrical Workers, AFL-CIO, Local Union 347 (“IBEW”) hereby moves the National Labor Relations Board (“Board”) to consolidate this case, on remand from the District of Columbia Circuit, with other pending cases, and solicit briefs from the parties and interested *amici* on the question whether the Board should revise the standards set forth in *Toering Electric, Inc.*, 351 NLRB 225 (2007), *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), and the instant case -- *Contractor Services Inc.*, 351 NLRB 33 (2007) (collectively “2007 salting decisions”).

In the alternative, absent consolidation, the IBEW moves the Board to solicit briefing from the parties to the instant case, as well as interested *amici*, on the question whether the Board should overturn the decision issued in the instant case - - *Contractor Services Inc.*, 351 NLRB 33 (2007).

## INTRODUCTION AND SUMMARY OF ARGUMENT

On May 24, 2010, International Brotherhood of Electrical Workers, Local Union 716 (“IBEW Local 716”), which is the charging party in *Independent Electrical Contractors of Houston, Inc.* (“IEC”)<sup>1</sup> and *KenMor Electric Co.*<sup>2</sup> (together, “IEC cases”), moved the National Labor Relations Board (“Board”) to consolidate the IEC cases and solicit briefs from the parties and interested *amici* on the question whether the Board should revise the standards set forth for cases involving organizing in the construction industry, in *Toering Electric, Oil Capitol Sheet Metal*, and the instant case -- *Contractor Services*. See Charging Party’s Motion to Consolidate Cases and Solicit Briefs from Parties and Interested *Amici*, filed on behalf of International Brotherhood of Electrical Workers, Local Union 716, in Cases 16-CA-18821-2 et al. and 16-CA-17895 et al. (May 24, 2010) (“IBEW Local 716 Motion to Consolidate”).

As set forth below, the Board radically altered the law in construction organizing in these 2007 salting decisions. In contrast to other cases in which the Board has effected fundamental changes in the law it applies to organizing in the construction industry, however, the Board never sought briefing, either by the

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<sup>1</sup> *Independent Electrical Contractors of Houston, Inc.*, Case Nos. 16-CA-18821-2 et al., 2001 NLRB Lexis 171 (ALJD Oct. 5, 2001) (“IEC”).

<sup>2</sup> *KenMor Electric Co.*, Case Nos. 16-CA-17895 et al., 1998 NLRB Lexis 762 (ALJD Sept. 29, 1998), affirmed (post-*FES*), 2001 NLRB Lexis 171 (ALJD March 21, 2001). *Kenmore* was formerly titled *Houston Stafford Electric, Inc.*, with the lead Case No. 16-CA 17894 et al., but the parties have settled all charges against *Houston Stafford*, which therefore is no longer a respondent in the case.

parties, or the broader affected community, before issuing its decisions in *Toering*, *Oil Capitol* and *Contractor Services*.

The *IEC* cases raise issues that will require the Board to consider whether and how to apply *Toering*, *Oil Capitol* and *Contractor Services* to those organizing cases. The *IEC* cases involve the same charging party, and some of the same respondents and discriminatees. The IBEW thus asked the Board to consolidate the two *IEC* cases, and, in conformity with Board precedent, solicit briefs from the parties and interested *amici* on the questions whether *Toering*, *Oil Capitol* and *Contractor Services* should be applied to the two *IEC* cases.

The IBEW now asks the Board to consolidate the remanded *Contractor Services* case with the *IEC* cases, and solicit briefing on the continued viability of all three 2007 salting decisions. In the alternative, should the Board decide that the instant case is not suitable for consolidation with the *IEC* cases, the IBEW ask that the Board solicit briefing from the parties and interested *amici* in the instant case on the question whether the three-member panel's decision in *Contractor Services* should be reversed.

## ARGUMENT

The Board has twice in recent memory clarified the law as it applies to organizing in the construction industry. In a pair of cases, *Town & Country Electric, Inc.*, 309 NLRB 1250 (1992) and *Sunland Construction Co.*, 309 NLRB 1221 (1992), the Board ruled that a paid union organizer is an “employee” within the meaning of Section 8(2)(3) of the Act, and is, therefore, protected from

discrimination in regard to hire under Sections 8(a)(1) and (3) of the National Labor Relations Act.<sup>3</sup> Several years later, the Board clarified the actual elements of a case involving discrimination in regard to hire, in *FES*, 331 NLRB 9 (2000). In neither case did the Board act precipitously. Instead, before altering the law, the Board first sought the views of the parties and any interested *amici*, through briefs and oral argument. *Town & Country*, 309 NLRB at 1250 and n.1; *Sunland*, 309 NLRB at 1224 and n. 1; and *FES*, 331 NLRB at 9 and n.2.

Indeed, the Board has a practice of soliciting the parties' and *amici's* views before effecting fundamental changes to the law. *See, e.g., Dana Corp.*, 353 NLRB 434, 434 at n.2 (2007) (seeking briefing on recognition-bar doctrine); and *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (seeking briefing on standards for evaluating supervisory status). And the Board recently issued a press release inviting amicus briefs in pending cases on issues solely within the Board's discretion, *i.e.*, the compliance issues of electronic posting of notices and compounding of interest. *See* Press Release, National Labor Relations Board, "NLRB Invites amicus briefs in pending cases, At issue: Electronic posting of notices, and compound interest" (May14, 2010).

Yet, in 2007, the Board effected fundamental changes to the law of construction organizing, and created a disfavored class of Section 7 activity, in *Toering*, *Oil Capitol*, and *Contractor Services*, without being asked to do so by the

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<sup>3</sup> The Board's decisions in these cases were, of course, upheld by a unanimous Supreme Court, in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

parties, without soliciting the parties or *amici* views, and without letting the affected public know what it was considering.

In *Toering Electric, Inc.*, 351 NLRB No. 18 (September 29, 2007), in a three-to-two opinion, the Board majority substantially altered the nature of a violation of Section 8(a)(3) of the National Labor Relations Act (“Act”). The Board effected this fundamental change in the law by shifting the primary focus under Section 8(a)(3) from the employer’s motivation in denying employment to an applicant to the *applicant/discriminatee’s* motivation in applying. In so doing, the Board also altered the definition of “employee” under the Act, by creating a separate definition for job applicants who are union members seeking employment with the intent to organize. In such cases, and only in such cases, the General Counsel now must prove that the union applicant was “bona fide” or “sincere” in his or her desire to work for the respondent employer. 351 NLRB at 232. No other alleged discriminatee has such a burden before the Board, requiring him or her to prove a “bona fide” motive before the lawbreaking employer’s motives even become relevant.

In *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 2007 (2007), the Board, again by a three-to-two margin, altered compliance jurisprudence as it applies to a make-whole remedy for either an applicant or an employee who sought or obtained employment as part of an organizing effort. In all other cases, in determining the period for which back pay is owed, the Board applies a rebuttable presumption that a discriminatee would have continued to work for the discriminating employer indefinitely. This presumption is in keeping with the Board’s longstanding theory

that it is the respondent, whose unlawful conduct created the uncertainty of how long the discriminatee would have remained employed absent the discrimination, who should bear the burden of that uncertainty. In *Oil Capitol*, however, the Board nullified this presumption in construction organizing (“salting”) cases and replaced it with a new requirement that the General Counsel prove how long the discriminatee would have remained, in order to arrive at a back pay amount. Thus, the Board shifted the burden of uncertainty in the evidence to the General Counsel who represents the innocent discriminatee. Moreover, if the General Counsel cannot prove that the discriminatee would still be working for the respondent at the time of the compliance trial (which is often many years after the initial act of discrimination), the lawbreaking employer is also relieved of the obligation even to offer the discriminatee a job. As stated, the Board has not applied its new rule in an even-handed fashion to all discriminatees under the Act. Rather, it has singled out union “salts” and “salting activity” for application of the new *Oil Capitol* standard, thus raising the additional question whether the Board’s authority to interpret and construe the Act includes the authority to create a subclass of disfavored Section 7 activity for purposes of determining backpay and instatement issues during compliance proceedings.

In the instant case, *Contractor Services*, a three-member panel of the Board ruled that a paid union organizer failed to mitigate his financial losses during the back pay period, and denied him any backpay, for the sole reason that he did not seek employment through the union hiring hall. In so doing, the Board altered,

while claiming not to alter, its prior ruling in *Ferguson Electric, Inc.*, 330 NLRB 514 (2000), *enforced*, 242 F.3d 426 (2d Cir. 2001) (a restriction imposed on a paid union organizer by the union employer, which restricts the organizer's job search to only unorganized contractors is not, standing alone, sufficient evidence of a willful failure to mitigate financial losses). Thus, in order to receive a backpay remedy under the Act in accordance with *Contractor Services*, a paid union organizer must forego his or her right to organize, and must take jobs away from the union members by whom he or she is actually employed, and is working to benefit.

In addition, in *Contractor Services*, the Board's own General Counsel filed a Motion for Reconsideration in which he argued that the panel's decision in *Contractor Services* is directly contrary to both the Board's prior decision in *Ferguson Electric* and to the unanimous decision of the United States Supreme Court in *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). See General Counsel's Motion for Reconsideration and Brief in Support, filed in *Contractor Services*, Case Nos. 10-CA-29123 et al. (December 26, 2007).

In none of the 2007 salting cases did any party ask the Board to change the law, nor did the Board seek the views of the parties or other interested persons on the fundamental changes it was considering making. Thus, the changes were decided in a legal black hole, without the full and careful consideration of all viewpoints that the public has come to expect from the Board. In *Toering* and in *Oil Capitol*, the dissenting Board members expressly complained about this lack of public input. See *Toering*, 351 NLRB at 238 (Members Liebman and Walsh noting

that the majority had ruled “[w]ithout the benefit of briefs, oral argument, or even a request to reconsider precedent”) and *Oil Capitol*, 349 NLRB at 1357 (Members Liebman and Walsh observing that “[t]oday’s change in the law is made without any party having raised the issue, without the benefit of briefing, and without a sound legal or empirical basis.”). In *Contractor Services*, the three-member panel changed the law, not only without public input, but also without the input of their fellow Board Members.

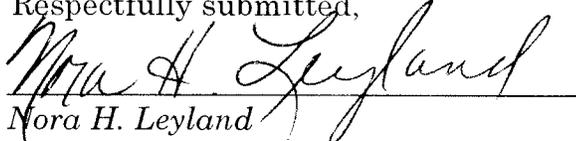
As set forth in the IBEW Local 716 Motion to Consolidate, the current Board will have to consider the application of all three decisions to the *IEC* cases, which, upon information and belief, are the only remaining “salting” cases pending before the Board awaiting decisions on the merits. See IBEW Local 716 Motion to Consolidate (May 24, 2010) at 8-9. Because *Contractor Services* is already implicated in any decision the Board would reach in the *IEC* cases, the IBEW now asks that the Board also consolidate the instant remanded case with the *IEC* cases and solicit briefing from the parties and interested *amici* on the questions whether all three cases should be overruled.

In the alternative, absent consolidation, the IBEW asks that the Board solicit briefing in the instant case, from all parties and interested *amici*, on the question whether, as argued in Motions for Reconsideration by the IBEW and the Board’s own General Counsel, *Contractor Services* should be overruled.

## CONCLUSION

For all of the foregoing reasons, the IBEW respectfully requests that the Board consolidate the instant case with the *IEC* cases, and solicit briefing by the parties and interested *amici*, on the questions whether the Board should continue to apply *Toering*, *Oil Capitol*, and *Contractor Services*. In the alternative, the IBEW asks that the Board solicit such briefing in the instant case on the question whether *Contractor Services* should be overruled.

Respectfully submitted,

A handwritten signature in cursive script, reading "Nora H. Leyland", written over a horizontal line.

Nora H. Leyland

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the Charging Party's Motion to Consolidate Cases and Solicit Briefs from Parties and Interested *Amici* on Issues Raised were served, on August 13, 2010, by electronic mail and regular mail on:

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