Fluor Daniel, Inc. *and* United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States of America and Canada, Plumbers & Steamfitters, Local 198, AFL–CIO *and* International Brotherhood of Electrical Workers, Local 995, AFL–CIO *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, & Helpers, AFL–CIO *and* United Brotherhood of Carpenters and Joiners of America. Cases 15–CA–12544, 15–CA–12666, 15–CA–12723, 15–CA–12852, 15–CA–12936, 15–CA–12938, 28–CA–12750, and 28–CA–13357

September 25, 2008

DECISION AND ORDER REMANDING PROCEEDING

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On August 23, 2007, the second day of hearing in these cases, Administrative Law Judge Gregory Meyerson issued an on-the-record ruling that the Board's decision in *Oil Capitol Sheet Metal*[1] applies to this compliance proceeding. On the same day, he also issued on-the-record rulings that the 119 discriminatees at issue were union "salts,"[2] and that it was the General Counsel's burden to establish both the length of time the discriminatees would likely have remained at their jobs and that they would have joined the Respondent's preferential database. The judge then recessed the hearing in order to permit the parties to file requests for special permission to appeal his rulings. Thereafter, the General Counsel, the Charging Parties, and the Intervenor filed several requests for special permission to appeal the judge's rulings. The Respondent filed briefs in opposition and a motion to strike the General Counsel's request, the General Counsel and Charging Party International Brotherhood of Boilermakers filed reply briefs, and the General Counsel filed a brief in opposition to the Respondent's motion to strike his request.

The National Labor Relations Board grants the General Counsel's, Charging Parties' and Intervenor's requests for special permission to appeal.[3]

After careful consideration, and consistent with earlier Board decisions, we find that the judge did not abuse his discretion by ruling that *Oil Capitol* applies to these proceedings.[4] See, e.g., *McBurney Corp.*, 352 NLRB 241 (2008), motion for reconsideration denied 352 NLRB 879 (2008).[5]

In addition to declining to revisit *Oil Capitol*, we point out that the Board lacks jurisdiction to further consider the Respondent's reinstatement obligations because this aspect of the Board's Order in the underlying case on the merits[6] has been enforced by the Sixth Circuit.[7] Accordingly, the Board's instatement Order, as enforced by the Sixth Circuit, is the law of the case.[8]

As to the judge's ruling that the discriminatees at issue were union "salts," we deny the Charging Parties' appeal. The judge specifically ruled on the record "that the Board determined in the unfair labor practice case that the [119] discriminatees were the equivalent of salts[,]"

[1] 349 NLRB 1348 (2007).

[2] Although both the judge and the underlying decision refer to 120 discriminatees who are entitled to instatement and backpay, the Board's Order in the underlying case requires the Respondent to instate and make whole 119 discriminatees.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] The Respondent contends that the General Counsel's, Charging Parties' and Intervenor's Requests for Special Permission to Appeal should be rejected as untimely because they were not filed "promptly" as required by Sec. 102.26 of the Board's Rules and Regulations. We find it unnecessary to address this contention because we deny the appeals on the merits.

[5] For institutional reasons, Member Liebman, who dissented in *Oil Capitol*, a controlling decision by the full Board, concurs in the denial of the General Counsel's, the Charging Parties,' and the Intervenor's appeals. While Member Liebman believes that claims of manifest injustice resulting from the retroactive application of a new legal rule should be considered on a case-by-case basis, denying the present appeals avoids delay in the disposition of this case. In Member Liebman's view, if the retroactive application of *Oil Capitol* ultimately has a demonstrably adverse effect on the backpay award in this case, the General Counsel or the Charging Parties would be free to pursue the manifest injustice issue. See *McBurney Corp.*, supra, 352 NLRB 879 fn. 7 (2008).

[6] *Fluor Daniel, Inc.*, 333 NLRB 427 (2001).

[7] *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961 (6th Cir. 2003).

[8] The Charging Parties and Intervenor assert that the judge erred in finding that *Dean General Contractors*, 285 NLRB 573 (1987), is not the law of the case. They contend that because the Board stated in the underlying decision, 333 NLRB at 427 fn. 4, that "[i]ssues concerning the applicability of *Dean General* . . . to the instant case can be raised in the compliance proceeding," the Sixth Circuit enforced a Board Order that included a "sufficiently specific evidentiary standard." (Br. at 12–13.) The Board's decision in *Fluor Daniel*, 351 NLRB 122 fn. 11 (2007), precludes this argument. Consistent with her dissent in that case (see id. at 4 fn. 9), Member Liebman agrees with the Charging Parties and the Intervenor that *Dean General Contractors*, supra, is the law of the case under the facts presented here, and that the Board should be precluded from applying *Oil Capitol* retroactively under the "law of the case" doctrine. She recognizes, however, that the majority decision in *Fluor Daniel* is controlling Board precedent on the "law of the case" issue presented here, and she agrees to apply that decision solely for institutional reasons and to expedite final resolution of this case.

and that since the discriminatees, as voluntary union organizers, were "one and the same" as salts, the General Counsel was precluded from revisiting the issue at compliance.[9] The judge's ruling is consistent with the Board's ruling in prior decisions, and we find no reason for reversing it here.[10]

The last challenged ruling relates to disposition of the General Counsel's August 13, 2007 motion in limine, which requested, as relevant here, that the judge give preclusive effect to the following findings of the Board in its earlier decision: (1) that the discriminatees had "agreed to accept employment if offered, [and] to stay until laid off," and (2) that the Respondent uses a preferential database of former employees in staffing new projects. See *Fluor Daniel*, 333 NLRB at 430. Relying on these findings in the underlying case, the General Counsel sought "to preclude litigation over issues already decided in the underlying unfair labor practice hearing." Specifically, the General Counsel requested that the judge find "without the need of additional evidence, that: ([1]) the discriminatees in this matter would have worked for Respondent until laid off . . . and ([2]) had they been hired, the discriminatees would have joined the pool of Respondent's favored employees, receiving hiring preferences for future employment." (GC Motion in Limine at 2–3.)

The judge specifically declined to make the requested findings. Rather, as to the first issue, the judge reasoned that the mere fact that the discriminatees had "agreed" to work until laid off did not establish that they actually would have worked until laid off. Consequently, the judge ruled that "[u]nder the burdens established in *Oil Capitol*, it will be the General Counsel's responsibility to establish the length of time the discriminatees would have likely remained on the Palo Verde and Exxon projects and whether they would have applied for and been hired for jobs on subsequent projects."[11]

As to the second issue, in declining to find that the discriminatees would have joined the Respondent's preferential database, the judge reasoned that "it has not been established that each of the discriminatees would have automatically been added to that database, as it has not been established that each of the discriminatees would have continued to be employed at the Palo Verde and Exxon projects until laid off."[12] The judge then ruled that "[u]nder the burdens established in *Oil Capitol*, it will be the General Counsel's responsibility to establish the length of time the discriminatees would have likely remained on the two projects and the likely circumstances under which their individual employment would have ended."[13]

As explained above, we have denied the General Counsel's special appeal of these rulings on the merits. However, we note that, in the underlying proceeding, the Board and the court made specific factual findings that the discriminatees had "agreed to accept employment if offered, [and] to stay until laid off," and that the Respondent used a preferential database of former employees in staffing new projects, 333 NLRB at 430. See also 332 F.3d at 964–965. Consistent with the precedent cited below, we find that these factual findings may not be relitigated in the compliance proceeding, but we leave to compliance whether these findings are sufficient to satisfy the General Counsel's burden of proof under *Oil Capitol* regarding the duration of the backpay period.

Finally, we also deny Charging Party International Brotherhood of Boilermakers' appeal regarding the record in the underlying unfair labor practice hearing, without prejudice to raising this issue in a proper motion to the judge. On July 2, 2007, the first day of the hearing, the judge indicated, in response to a question from the Charging Party's counsel, that he would not read or rely on the record in the underlying unfair labor practice hearing, which encompassed 51 days of hearing and numerous exhibits.[14] Although the judge discussed this issue on the record, he never "ruled" on it because there was no motion before him. Therefore, the Board lacks jurisdiction to consider the merits of the Charging Party's appeal.

We note, however, that Board precedent bars relitigation of issues in a compliance proceeding that were previously decided in an underlying unfair labor practice proceeding. See, e.g., *Great Lakes Chemical Corp.,* 300 NLRB 1024, 1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992) and cases cited therein ("In general, a factual finding that was necessary to support the judgment

[9] Aug. 23, 2007 Tr. at 97.

[10] See, e.g., *Fluor Daniel,* 351 NLRB 103 (2007). Under Board law, salts are "individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign." *Oil Capitol*, supra at 348 fn. 5. A salting campaign, in turn, is defined as a campaign in which a union sends its member(s) to an unorganized jobsite "to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202 (9th Cir. 1996). The discriminatees at issue here fit the *Oil Capitol* definition of a "salt."

[11] August 23, 2007, Tr. at 91–92.

[12] Id. at 92.

[13] Id. at 92–93.

[14] July 2, 2007, Tr. at 56–58.

in a prior proceeding will bar relitigation on that issue in a subsequent proceeding involving the same parties.”); *Task Force Security & Investigations*, 323 NLRB 674, 674 fn. 2 (1997) (“A respondent in a compliance proceeding may not relitigate issues previously decided in an underlying unfair labor practice proceeding.”).

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Gregory Meyerson for further action consistent with this decision.