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ARTICLES

SALTING THE MINES: THE LEGAL AND POLITICAL IMPLICATIONS OF PLACING PAID UNION ORGANIZERS IN THE EMPLOYER'S WORKPLACE*

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Mr. Chairman, . . . Thank you for
the opportunity to speak today. I
am here to discuss the serious

Mr. Chairman, I rise to strongly
oppose H.R. 3246, mistakenly
called the Fairness for Small Busi-

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wrongs against employers and employees caused by union salting. The federal government's primary interest on the subject of union representation is to promote employees' freedom of choice. Unions are avoiding this election process and the open debate about the pros and cons of unionization by "salting." "Salting" is the process of union members applying for nonunion jobs, articulating their desire to organize the non-union contractor's workforce. After the union "salts" apply for nonunion jobs, they file charges against non-union employers for alleged . . . violations of federal employment-related laws. Most of these charges are filed with the NLRB. Non-union employers are then forced to defend themselves against union generated litigation. The recurrence of such litigation forces the non-union employer to spend substantial extra costs unrelated to the productive pursuit of the employer's business interests.

Prepared Statement of Peter R. Kraft, Esq. Before the House Education and the Workforce Committee, Employer/Employee Relations Subcommittee, FED. NEWS SERV., Feb. 5, 1998, available in LEXIS, Legis Library, FedNews File.

ness and Employees Act. I use the adverb "mistakenly" because I do not believe that this bill would provide fairness for either small businesses or for employees. This proposed legislation would allow employers to discriminate against any applicant who he or she determines has been either a union organizer or an activist in a union, and who is suspected of engaging in union activity as the "primary purpose" of seeking employment . . . I believe that the moral strength, and economic vigor of this country derive from a healthy balance of power between employer and employee. HR 3246 would destroy that balance by removing some of the fundamental protections of workers in this country.

Prepared Statement of Rep. Louis Stokes, D. Ohio, Before the House Education and the Workforce Committee, Employer/Employee Relations Subcommittee, FED. NEWS SERV., Feb. 5, 1998, available in LEXIS, Legis Library, FedNews File.

INTRODUCTION

The old union adage, "Which Side Are You On,"¹ has taken on new meaning and intensity with the union tactic known as "salting." While the two sides (management and labor) may disagree on the goals of salting, the definition of the practice is without controversy. The Supreme Court recently posed the question this way: "Can a worker be a company's 'employee' within the meaning of the National Labor Relations Act . . . if, at the same time, a union pays that worker to help the union organize the company?"² The Court unanimously answered "yes" to that question.³ The decision in *NLRB v. Town & Country Electric, Inc.*⁴ has gone to the very core of the National Labor Relations Act ("NLRA" or "Act"),⁵ concerning not only the definition of an "employee," but the right of self-organization.⁶

Salting occurs primarily in the building and construction trades and currently tops the concerns of construction industry groups.⁷ In a recent construction industry survey on labor law reform, one-third of the respondents said they wanted legislation allowing employers to be free of hiring known union organizers.⁸ Unions, on the other hand, have had success organizing non-union shops with this practice,⁹ and intend to expand the practice to all business sectors. For unions, the practice of "salting" provides union locals with access to information about unlawful practices of non-union employers, and a way to expose the violations of wage, safety, and anti-discrimination laws that frequently occur on non-union job sites.

As a result of *Town & Country*, a new form of class warfare has emerged, and both sides are digging in for the long run; employers are seeking legislation and new strategies to stop the practice of salting, and

1. This song by Florence Reece was written in 1931, and served as the anthem of mining workers and the American Labor movement. The key phrase in the song goes: "They say in Harlen County, there are no neutrals there; You'll either be a union man, or a thug for J.H. Blair. Which side are you on? Which side are you on?" William Serrin, *Labor Song's Writer, Frail at 83, Shows She Is Still a Fighter*, N.Y. TIMES, Mar. 18, 1984, at 22.

2. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995).

3. *See id.*

4. 516 U.S. 85 (1995).

5. 29 U.S.C. §§ 151-169 (1994).

6. *See id.* §§ 151, 157.

7. *See* John S. McClenahan, *Watch the Salt!*, INDUSTRY WK., June 3, 1996, at 63.

8. *See Time Off For Workers*, NATION'S BUS., Dec. 1996, at 60.

9. *See* Kenneth C. Crowe, *High Court Gives Unions a Boost*, NEWSDAY, Nov. 29, 1995, at A39; William G. Krizan, *Baton Rouge Firm Stung by Salt*, ENGINEERING NEWS-REC., Aug. 12, 1996, at 12.

unions are launching a full scale organizational effort to expand the practice. While there is no longer any legal question regarding the employee status of paid union organizers, the debate over legitimate organizing tactics by unions continues.

In reality, *Town & Country* is only a new beginning to a very old debate. Salting has been in existence, in various forms, throughout the history of the labor movement.¹⁰ Salting is nothing more than the old notion of inside organizing. But inside organizing has taken on new urgency, given the setbacks for labor in the 1970s and 1980s. The main goal of salting is organizing the unorganized into union shops, in order to eliminate the unfair competition based on non-union employers' substandard wages and working conditions.¹¹ The true effects of salting are to level the playing field, and to counter the anti-organizing court decisions of recent years.

Following the *Town & Country* decision, what remains to be seen is whether unions can advance to the next level, successfully organizing once the union organizers *are* hired on the job. Unions must be careful in using these tactics not to alienate workers on the job, and to exercise old fashioned patience in building trusting relationships with the union. Ultimately, salting should be about organizing *people*, not just contracts.

Employers, aware of the potential potency of salting, are seeking to circumvent the *Town & Country* decision, and protect their economic interests. They are lobbying for new legislation that not only shifts the balance of power in their favor, but that squashes any attempts by the National Labor Relations Board ("NLRB" or "Board") to come to the aid of workers when they are discriminated against for seeking union representation.

Part I of this article will explore the history of salting, the NLRB and Courts of Appeal conflicts leading up to the *Town & Country* decision, and the Supreme Court's *Town & Country* decision. Part II will examine the reaction to *Town & Country*, including the legislative efforts to bypass the Court's decision, and the authors' opinion that such legislation is not only unlawful, but wholly unnecessary. Finally, the authors will examine the political implications of placing paid union or-

10. See *infra* Part I.A.

11. See Letter from J.J. Barry, International President, International Brotherhood of Electrical Workers, to Honorable Peter Hoekstra, Chairman, Subcommittee on Oversight and Investigations (Dec. 18, 1995) (on file with the *Hofstra Labor & Employment Law Journal*).

ganizers in the employer's workplace, and how to turn a legal and permissible tactic into a successful strategy for organizing the unorganized.

I.

A. The History of "Salting"

The term "salting" comes from an old mining practice in which mine owners "salted their mines with gold dust to make them appear more valuable to investors."¹² Unions use the term to describe making the employer's business more valuable by having union workers present.¹³ The tactic creates a work force "salted" with union sympathizers.¹⁴

Salting is not a new tactic. Unions have always organized "from the inside" and this was particularly true in the early years of the labor movement when unions were organized along ethnic lines.¹⁵ Unions began in large part as a familial endeavor to help fellow workers and to band together for economic survival.¹⁶

In the 1860s, the Rochester Trades' Assembly (made up of various construction trade unions) formed a committee "for the purpose of assisting members of any trade who may desire to organize a union"¹⁷ This included appointing agents to go into the employer's premises and organize unorganized workers.¹⁸

In the late 1800s, beginning with the mine workers organizing campaigns, the mostly Irish and Welsh coal miners bonded together, *literally from the inside*, to fight for better working conditions in the mines.¹⁹ These workers were among the first to unionize, and the mine's physical environment contributed to the cohesiveness of the labor

12. Jill Hodges, *High Court to Hear Case of Union Tactic*, STAR TRIB., Oct. 10, 1995, at 1D; see *Tualatin Elec., Inc. v. NLRB*, 84 F.3d 1202, 1203-04 n.1 (9th Cir. 1996).

13. See Telephone Interview with Jeff Grabelsky, Director, Construction Industry Organizing Program, Cornell University (June 1997).

14. See *id.*

15. See 1 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 226 (1947); James A. Craft & Marian M. Extejt, *New Strategies in Union Organizing*, 4 J. LAB. RES. 19, 20 (1983).

16. See generally DANIEL NELSON, *SHIFTING FORTUNES: THE RISE AND DECLINE OF AMERICAN LABOR, FROM THE 1820S TO THE PRESENT* 8-14 (1997) (discussing worker autonomy and economic factors in the organizing environment).

17. FONER, *supra* note 15, at 357.

18. See *id.*

19. See NELSON, *supra* note 16, at 34.

force.²⁰ Because the mines were so dark, confined and dangerous, no one but the laborers would work in them, and union organizers seized the opportunity provided by this isolation to go down in the mines and organize fellow workers.²¹ As long as union organizers “retained the support of the laborers who worked with them, they had almost complete control of the workplace.”²² In the mines, organization was a defensive response to a hostile environment.²³ However, the United Mine Workers “brought into its fold not only coal miners, but the carpenters, electricians, transport workers, and general laborers who toiled near the often-remote mining sites.”²⁴ Indeed, miners lead the way for these other industries; by the 1870s, the labor movement had at least 300,000 members, and other unions began to organize shoemakers, iron workers, tailors, and longshoremen, to name a few.²⁵

Henry Miller, the first president of the International Brotherhood of Electrical Workers (“IBEW”), used “salting” in the early 1900s.²⁶ He was the first to use the expression “salting,” borrowing the term from the mining industry and sought to organize electricians by sending organizers into the workplace to organize.²⁷

The Industrial Workers of the World (“IWW”) also used this tactic at the beginning of the century to organize lumber camps.²⁸ The IWW continued to grow by sending organizers in to harvest fields, and work in mines, mills, and factories.²⁹ Similarly, Jewish women in the garment trade saw organizing for the union “their life’s work,” and went from company to company organizing for the International Ladies Garment Workers Union at the turn of the century.³⁰ Mexican women followed the lead of the Jewish garment workers, and organized themselves and fellow cannery workers, beginning in the 1930s.³¹ These women came

20. See *id.* at 23-24.

21. See *id.*

22. *Id.* at 24.

23. See *id.* at 25.

24. ROBERT H. ZIEGER, *THE CIO: 1935-1955* 14 (1995).

25. See FONER, *supra* note 15, at 440.

26. See *Morning Edition: Business Condemns Union Practice of “Salting”* (National Public Radio, Oct. 4, 1996) (interviewing Rich Korvello, Member, International Brotherhood of Electrical Workers).

27. See *id.*

28. See 4 PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 219-20 (1947).

29. See ZIEGER, *supra* note 24.

30. See *THE LABOR HISTORY READER* 269-70 (Daniel J. Leab ed., University of Illinois Press 1985).

31. See VICKI L. RUIZ, *CANNERY WOMEN, CANNERY LIVES* 38-39 (1987).

from a tradition where families did not struggle in isolation.³² Barrio life nurtured traditional values and customs.³³ When Mexican women moved to Los Angeles in the 1930s, the strong familial and community ties continued in the factories and sweatshops.³⁴ What began as self-organization blossomed out to other factories as the newly empowered women organizers went to work in various factories and spread the union message.³⁵

Therefore, salting has been a common and useful practice at the very heart of union organizing for over a century. Moreover, there is nothing new in employers' hostile response to such tactics. Employers in response have always sought ways to rid their workforce of union organizers. Indeed, the Supreme Court in 1941 noted that the "denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations."³⁶

While there is no question that the passage of the Wagner Act in 1935³⁷ helped union organizing by recognizing that collective bargaining leads to "industrial peace,"³⁸ it is well recognized that the Taft-Hartley Act of 1947³⁹ was a major setback for organized Labor.⁴⁰ Congress sought to limit strikes stemming from jurisdictional disputes among unions and banned secondary boycotts and featherbedding.⁴¹ This prohibition against secondary boycott provisions was particularly

32. *See id.* at 4.

33. *See id.*

34. *See id.* at 19-20.

35. *See id.* at 78-84 (describing women's influential role in union organization).

36. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941).

37. National Labor Relations Act, 29 U.S.C. §§ 157-169 (1994). Specifically, the Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id.* § 157.

38. *See id.* Prior to the passage of this act, violent strikes were daily occurrences and the government was seriously worried about revolution. *See* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 975-76 (1993).

39. National Labor Relations Act, 29 U.S.C. § 158(b)(4) (1994).

40. *See* ZIEGER, *supra* note 24, at 246-247; *see also* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 4 (Kate Bronfenbrenner et al. eds., Cornell University Press 1998) (discussing how "expansion in union density halted after Taft-Hartley").

41. "Featherbedding" is a term used to describe union required overmanning, prevalent in the transport and construction trade unions. *See* ROBERT'S DICTIONARY OF INDUSTRIAL RELATIONS 214 (3d ed. 1986); *see also* 29 U.S.C. § 158(b)(6) (stating that it is unlawful for a labor organization or its agents "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.").

harmful to craft unions because of the transient nature of construction employers' worksites, and their inevitable contact with other employers and their workers at the same site. The new law made it an unfair labor practice for a labor organization to encourage the employees of any employer to engage in a strike where an object is to require any person from ceasing to do business with another person.⁴² The express intent of this law was to eliminate the use of the boycott as a "weapon in labor's arsenal."⁴³ In *Sailors' Union of the Pacific (Moore Dry Dock)*,⁴⁴ the Board set limits for picketing where two employers were performing separate tasks on common premises.⁴⁵ The Board established a four-part test to be employed when the union sets up picket lines at the site, which could persuade the other employer's employees to honor that strike and cease work.⁴⁶ The Board held that "[w]hen a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights."⁴⁷ Picketing the secondary employer will be considered "primary" if:

- (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.⁴⁸

Not only were employees prohibited from communicating with other employees at a secondary site, or even the same site, but the Court also upheld the "two-gate system," thereby permitting employers to insulate employees of independent or sub-contractors from labor disputes of the employer on the employer's premises.⁴⁹ This employer tactic

42. See 29 U.S.C. § 158(b)(4). The Act also specifically sought to exclude supervisors and independent contractors from the meaning of "employee" under section 2(3) of the NLRA, and reprimanded the NLRB for having expanded the definition. See *id.* § 152(3).

43. *Douds v. Metropolitan Fed'n of Architects*, 75 F. Supp. 672, 676 (S.D.N.Y. 1948).

44. 265 F.2d 585 (1959).

45. See *Sailors' Union of the Pac. (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950).

46. See *id.*

47. *Id.*

48. *Id.* (footnotes omitted).

49. See *Local 761, Int'l Union of Elec., Radio and Mach. Workers v. NLRB*, 366 U.S. 667, 681 (1961).

served to prevent employees of neutral employers from putting pressure on their employers.⁵⁰

In the 1950s, decisions like *NLRB v. Babcock & Wilcox Co.*⁵¹ restrained the ability of union organizers to have access to the employer's property for purposes of organizing employees. But it was three major anti-union decisions in the last three decades that pushed the practice of salting to the forefront.⁵²

The first case came in 1973, with the NLRB decision upholding the legality of "double breasting."⁵³ "This practice has proven particularly attractive to employers confronted with depressed economic conditions and competitive bidding, because it allows them to divert work to the nonunion sector and to pressure their unionized workers to grant wage and benefit concessions."⁵⁴ This decision was followed by an explosion in the number of double-breasted companies operating in the construction industry and the corresponding decrease in union shops.⁵⁵

The practice of double-breasting began in the 1970s, at a time when union contractors performed about eighty-five to ninety percent of construction work in the Washington, D.C. area.⁵⁶ Ten years later, the situation was reversed with non-union employees performing eighty-

50. See *Seafarers Int'l Union v. NLRB*, 265 F.2d 585, 590 (1959).

51. 351 U.S. 105 (1956); see *infra* pp. 13-15.

52. The three main cases are: *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs (Peter Kiewit Sons' Co.)*, 425 U.S. 800 (1976), and *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB (Deklewa)*, 843 F.2d 770 (3d Cir. 1988).

53. See *Peter Kiewit Sons' Co.*, 206 N.L.R.B. 562 (1973), *aff'd in part, rev'd in part sub. nom.* *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976). "Double-breasted" companies exist when an employer with a unionized work force creates an ostensibly separate business that hires only non-union workers. See *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 789 F.2d 9, 12 n.2 (D.C. Cir. 1986). Courts must decide whether this separate business is the "alter ego" of the first, or whether the two really act as a "single employer." See generally *Radio Union v. Broadcast Serv.*, 380 U.S. 255 (1965) (discussing the "single employer" doctrine for the first time). The "alter ego" theory has also been around for some time. See *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1941) (applying the doctrine to prevent employers from avoiding unfair labor practice sanctions through a "disguised continuance" of the employing entity).

54. Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and of Proposed Reformulation*, 1987 WIS. L. REV. 67, 67 (1987).

55. See *The Subcommittee on Oversight and Investigations of the Committee on Economic and Educational Opportunities, U.S. House of Representatives* (1995) (statement of Robert A. Georgine, President, Building and Construction Trades Department, AFL-CIO).

56. See Befort, *supra* note 54. Overall union membership has declined to 15.4% in the United States as of 1994. See United States Dept. of Labor Statistics, Jan. 1995, at 214 tbl.40.

five to ninety percent of the work.⁵⁷ This decline in the unionized work force was not limited to the construction industry, but it did coincide with the NLRB's recognition of the legality of double-breasting in the construction industry.⁵⁸ Because of competitive bidding and a transitory work force, double-breasting arose as a means of allowing employers to be more competitive and to operate non-union without violating certain laws.⁵⁹ The NLRB's willingness to recognize double-breasting as a legitimate mode of operation greatly expanded the practice, hurting unionized workers.⁶⁰

Another development with a major impact on unions was the *Deklewa* decision, which held that a construction industry employer could terminate its bargaining relationship with a union at the end of its contract, unless the union had won an NLRB representation election or obtained voluntary recognition from the employer.⁶¹ Until that decision, the construction industry operated primarily under pre-hire agreements allowable under section 8(f) of the Act.⁶² A pre-hire agreement is a con-

57. See Befort, *supra* note 54.

58. See *id.* at 67-68.

59. See *id.* at 68.

60. See generally Stephen A. Watring, Comment, *Double-Breasted Operations in the Construction Industry; A Search for Concrete Guidelines*, 6 U. DAYTON L. REV. 45 (1981) (discussing the NLRB's trend in decision-making in cases involving double-breasting). See also Gerace Constr., Inc., 193 N.L.R.B. 645 (1971) (examining whether the respondents functioned as a single enterprise).

61. See International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB [hereinafter *Deklewa*], 843 F.2d 770, 772 (3d Cir. 1988).

62. 29 U.S.C. § 158(f) (1994). This section provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a pe-

tract agreed to by an employer and a union before the workers to be covered by the agreement have been hired.⁶³ When non-construction industry employees covered by the NLRA are covered by a collective bargaining agreement, the union normally will be presumed to be the “exclusive representative” of the employees within the meaning of section 9(a) of the Act.⁶⁴ Under section 9(a), a representative designated or selected for the purpose of collective bargaining by a majority of employees in the unit will be the exclusive representative of all the employees in that unit for purposes of collective bargaining.⁶⁵ That majority status is established by a union collecting authorization cards or petitions indicating a desire on the part of employees to be represented by the union.⁶⁶ This petition or filing of authorization cards is followed by an election held by the NLRB where the employees vote to determine whether or not to be represented by the union.⁶⁷ Because construction work is seasonal, and workers do not work for a given employer very long, section 8(f) operates differently.⁶⁸

In *Deklewa*, the employer had agreed to be bound by a pre-hire agreement between the association and the iron workers.⁶⁹ The employer had been involved in such pre-hire agreements for a twenty year period between 1960 and 1980.⁷⁰ “The pre-hire agreement in dispute covered the years 1982 to 1985.”⁷¹ During the life of that contract, Deklewa re-

tion filed pursuant to section 159(e) of this title.

Id.

63. See ROBERT’S DICTIONARY OF INDUSTRIAL RELATIONS 562 (3d ed. 1986).

64. 29 U.S.C. § 159(a) (1994). This provision provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Id.

65. See *id.*

66. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602-03 (1969).

67. See *Brooks v. NLRB*, 348 U.S. 96, 98 (1954). Employers can voluntarily recognize the union, without an election, but this rarely happens.

68. See 29 U.S.C. § 158(f).

69. See *Deklewa*, 843 F.2d at 771.

70. See *id.* at 771-72.

71. *Id.* at 772.

signed from the Association of Building Contractors and notified the union that it had repudiated the agreement.⁷² The union filed an unfair labor practice charge alleging that Deklewa had violated section 8 (a)(5) of the Act by refusing to bargain after the contract expired.⁷³

As explained in the *Deklewa* decision,

Congress enacted Section 8(f) of the Act in recognition of special conditions that existed in the construction industry. These special conditions included the fact that employers not only needed an assurance that skilled labor would be available but needed a basis for estimating labor costs in bidding on construction contracts. Employees, on the other hand, were often denied the benefits of union representation because of the temporary and sporadic nature of their employment. It is clear, however, that in enacting section 8(f) to assist in resolving such problems, Congress merely permitted parties to enter into such pre-hire agreements without violating the Act. It does not mean that a failure to abide by such an agreement is automatically a refusal to bargain. In essence, therefore, this pre-hire agreement is merely a preliminary step that contemplates further action or the development of a full bargaining relationship: such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a pre-hire agreement.⁷⁴

The Court upheld the NLRB's decision that pre-hire agreements may not be unilaterally repudiated during its term, but would not act as a bar to a petition for election⁷⁵ and did not obligate an employer to bargain after the contract expired.⁷⁶ *Deklewa* made it clear that section 8(f) contracts with construction industry employers were not safe after they end; that unions must go the regular section 9(a) route.⁷⁷ This decision made "top down" organizing difficult, and convinced construction unions that they would have to organize from the "bottom up."⁷⁸

72. *See id.*

73. *See id.*

74. *Deklewa*, 843 F.2d at 774 (relying on *Ruttmann Constr. Co.*, 191 N.L.R.B. 701, 702 (1971)).

75. *See id.* at 779.

76. *See id.* at 775.

77. *See id.*

78. *See* Telephone Interview with Jeff Grabelsky, Director Construction Industry Organizing Program, Cornell University (June 1997).

The ability of unions to organize was further limited with the 1992 Supreme Court decision in *Lechmere, Inc. v. NLRB*.⁷⁹ The *Lechmere* case, which strengthened the employer's right to exclude non-employee organizers from its private property, created a powerful incentive for organizers to become employees.⁸⁰

Lechmere, Inc. was a retail store in a large shopping plaza in a metropolitan area.⁸¹ *Lechmere* also owned the plaza's parking lot, which was separated from a public highway by a grassy strip, almost all of which was public property.⁸² During a union campaign, non-employee union organizers placed handbills on the windshields of cars parked in the employees' part of the parking lot.⁸³ After *Lechmere* denied the organizers access to the lot, they distributed the handbills and picketed from the grassy strip.⁸⁴ They were able to contact approximately twenty percent of *Lechmere's* employees in this manner.⁸⁵

The union filed an unfair labor practice charge with the NLRB, alleging that *Lechmere* had violated the NLRA by barring the organizers from its property.⁸⁶ The Administrative Law Judge ruled in the union's favor and the Board affirmed.⁸⁷ The Court of Appeals also enforced the Board's order.⁸⁸ However, the Supreme Court reversed, holding that *Lechmere* did not commit an unfair labor practice by barring non-employee union organizers from its property.⁸⁹

The Court stated that the NLRA, by its "plain terms" confers rights only on *employees*, not on unions or their non-employee organizers.⁹⁰ The Court compared *Lechmere* to its earlier decision in *NLRB v. Babcock & Wilcox*.⁹¹ In *Babcock*, the Supreme Court had held:

The right to distribute is not absolute, but must be accommodated to the circumstances. Where it is impossible or unreasonably difficult for

79. 502 U.S. 527 (1992).

80. See Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 HARV. L. REV. 1341 (1995).

81. See *Lechmere*, 502 U.S. at 529.

82. See *id.*

83. See *id.*

84. See *id.* at 530.

85. See *id.*

86. See *Lechmere*, 502 U.S. at 531.

87. See *id.*

88. See *id.*

89. See *id.* at 541.

90. See *id.* at 532.

91. See *Lechmere*, 502 U.S. at 532-37 (comparing *Lechmere* to *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)).

a union to distribute organizational literature to employees entirely off of the employer's premises, distribution on a nonworking area, such as the parking lot and the walkways between the parking lot and the gate, may be warranted.⁹²

The Court reiterated in *Lechmere* that

[w]hile *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that *no other reasonable means of communicating* its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the Courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.⁹³

The *Lechmere* Court stated that the threshold inquiry in this case, was whether the facts justified application of *Babcock's* inaccessibility exception.⁹⁴ The Administrative Law Judge below had observed that "the facts herein convince me that reasonable alternative means [of communicating with *Lechmere's* employees] were available to the Union."⁹⁵ The Court held that the NLRB erred by holding that the union had no reasonable means short of trespass to make *Lechmere's* employees aware of its organizational efforts.⁹⁶ It stated that the employees did not "reside" on *Lechmere's* property and they were not presumptively "beyond the reach" of the union's message.⁹⁷ Further, since the employees lived in a large metropolitan area, the Court felt that these employees were not inaccessible in the sense contemplated by the *Babcock* case.⁹⁸ The Court stated that accessibility was possible by contacting them directly at home, via mailings, phone calls and home visits.⁹⁹

As one labor commentator wrote following the *Town & Country* decision:

92. *Id.* at 533 (citing *Babcock & Wilcox*, 109 N.L.R.B. 485, 493 (1954)).

93. *Id.* at 535 (emphasis added).

94. *See id.* at 539.

95. *Id.*

96. *See Lechmere*, 502 U.S. at 540.

97. *See id.*

98. *See id.*

99. *See id.*

Employers, understandably, have come to regard the *Babcock-Lechmere* line as importing a feature of Russian democracy for the resolution of union representation disputes. In Russia, only Boris Yeltsin gets to campaign on television; Zyuganov can use home visits, phone calls, signs in the street and the mail to attempt to round up a constituency. In America, only the employer gets to campaign where the employees work; the unions can emulate Zyuganov, in most instances with similar success.

If one develops from *Babcock-Lechmere* an understanding that the NLRA has conferred a right upon employers, but not unions, to campaign on work premises, it follows naturally that a union that tries to insinuate its agents into the workplace through the device of proffering them as employees is engaged in a form of chicanery that deserves no legal protection. Salts are the labor-management equivalent of the Trojan Horse. It's dirty pool for a union to seek to communicate with employees in the one place they can be found.¹⁰⁰

The *Lechmere* decision made it even more difficult for union organizers to reach employees than the *Babcock* decision. Because *Babcock* and *Lechmere* applied only to non-employees of an employer, the unions began to reevaluate their organizing tactics, and reinstituted salting as one approach to traditional union organizing.¹⁰¹ That is, once the union organizer becomes an employee, neither *Babcock* nor *Lechmere* would prevent an employee from exercising his or her section 7 rights under the NLRA to approach fellow employees and discuss union organizing. Thus, the unions resurrected "bottom up" organizing, and went back into the workplace, to convince employees of the need to unionize.

B. The Courts of Appeals Conflicts

Until the 1995 decision in *Town & Country*, the NLRB and various circuit courts reached different conclusions when deciding whether an employer commits an unfair labor practice when it discharges an employee, or refuses to hire an applicant, because the applicant is also a paid union organizer. While not directly addressing the issue of salts,

100. Michael H. Gottesman, *Technicians at Work: Labor, Employment and Benefit Decisions of the Supreme Court's 1995-96 Term*, Daily Lab. Rep. (BNA) No. 152, at D20 (Aug. 7, 1996).

101. See Telephone Interview with Jeff Grabelsky, Director Construction Industry Organizing Program, Cornell University (June 1997).

the Supreme Court's 1941 *Phelps Dodge Corp. v. NLRB*¹⁰² decision extended NLRA protection against an employer's refusal to hire based on union activity.¹⁰³ That case involved an employer who refused to hire job applicants who were union members, though there was no evidence they intended to do anything but *work* for the employer.¹⁰⁴ The Supreme Court, upholding the NLRB, ruled that such applicants were employees, entitled to section 8(a)(3) protection.¹⁰⁵ Although the Court found employers have a right to choose their own employees, it stated employers could not "under cover of that right . . . intimidate or coerce its employees with respect to their self-organization and representation."¹⁰⁶ The Court also recognized that labor unions were organized "out of the necessities of the situation . . . Union was essential to give laborers opportunity to deal on equality with their employer."¹⁰⁷ The Supreme Court felt so strongly that union affiliation discrimination in hiring was unlawful; the Court stated:

Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.¹⁰⁸

Even though this principle was undeniably propounded by the Supreme Court,¹⁰⁹ over the years, the federal circuit courts have ignored this fundamental right.

In *NLRB v. Elias Brothers Big Boy, Inc.*,¹¹⁰ the Sixth Circuit was the first circuit court to hold that a paid union organizer did not qualify as an employee under the NLRA.¹¹¹ In *Elias*, a waitress was assisting the union by attempting to get employees to sign union authorization cards, and received fifteen dollars a week by the union to cover expenses re-

102. 313 U.S. 177 (1941).

103. See *Phelps Dodge*, 313 U.S. at 182.

104. See *id.*

105. See *id.* at 185-86.

106. *Id.* at 183.

107. *Phelps Dodge*, 313 U.S. at 183 (deletions in original).

108. *Id.* at 185.

109. See *id.* There was no dissent.

110. 327 F.2d 421 (6th Cir. 1964).

111. See *Elias*, 327 F.2d at 427. But see *NLRB v. Fluor Daniel, Inc.*, 102 F.3d 818 (6th Cir. 1996).

lated to organizing efforts.¹¹² After Elias terminated her employment, she became a full-time paid organizer for the union.¹¹³ The Sixth Circuit found that the NLRB erred when it ordered the waitress to be reinstated with back pay, stating that the waitress was an organizer for the union, who was planted in respondent's restaurant, and was "not a bona fide employee within the meaning of section 2(3)."¹¹⁴ She was, therefore, not entitled to the protection of the Act.¹¹⁵

In 1975, the NLRB first addressed whether a paid union organizer was an employee under section 2(3) of the NLRA.¹¹⁶ In *Oak Apparel, Inc.*,¹¹⁷ the Board held broadly that the term "employee" was intended to include "members of the working class generally,"¹¹⁸ and that paid union organizers were entitled to the same protection of the Act when applying for a job.¹¹⁹ Further, the Board held that employees who passed out union literature were protected by the Act as *employees*, whether they viewed their work for the employer as permanent, or not.¹²⁰ The NLRB has consistently applied this rule for defining "employee," while various Courts of Appeals have disagreed.

The Fourth Circuit disagreed with the NLRB in *H.B. Zachry Co. v. NLRB*,¹²¹ when it held that a paid union organizer was *not* a bona fide applicant for employment and therefore not covered under the Act.¹²² There, a full-time union organizer sought employment with Zachry for the purpose of entering the company and organizing the employees.¹²³ Additionally, while the organizer was employed by the Zachry company, the union intended to compensate the employee for taking a reduced salary, continue to pay the employee's health and life insurance and pension, and pay for all transportation and living expenses related to the job.¹²⁴

The Fourth Circuit disagreed with the Board's definition of "employee," characterizing it as "sufficiently broad to include persons

112. See *Elias*, 327 F.2d at 427.

113. See *id.*

114. *Id.*

115. See *id.* at 423.

116. See 29 U.S.C. § 152(3) (1994).

117. 218 N.L.R.B. 701 (1975).

118. *Oaks Apparel*, 218 N.L.R.B. at 701.

119. See *id.*

120. See *id.* at 707.

121. 886 F.2d 70 (4th Cir. 1989).

122. See *H.B. Zachry*, 886 F.2d at 71.

123. See *id.*

124. See *id.*

concurrently employed, supervised, and paid by another employer,” and stating that the Board’s argument “exalts form over substance.”¹²⁵ The Court held that the term employee “does not contemplate someone working for two different employers at the same time and for the same working hours.”¹²⁶ The Court explained that a paid union organizer could not be considered an employee of Zachry, since he was performing services for the company only because he was instructed to do so by his union employer.¹²⁷ The Court also stated that the Board’s position was bad policy because the Supreme Court held in *NLRB v. Babcock & Wilcox*¹²⁸ that the Act “does not require that the employer permit the use of its facilities for organization when other means are readily available.”¹²⁹ The Court held that allowing the individual to solicit and organize on Zachry property, merely because he claimed to be a job applicant, would “render ineffective the protection offered employers in the *Babcock* decision.”¹³⁰

Five years later, the Fourth Circuit again held in *Ultrasystems Western Constructors, Inc. v. NLRB*¹³¹ that the employer did not violate sections 8(a)(1) and 8(a)(3) of the Act by refusing to hire a paid union organizer.¹³² The Court reiterated its position in *Zachry* when it held that a paid union organizer, applying for work at the direction of the union employer, is “qualitatively different from that of a bona fide applicant.”¹³³ The Court reasoned that since the paid union employee intended to remain a union employee while working for Ultrasystems, and his employment with Ultrasystems would be in furtherance of his union employment, he lost the protection of the Act provided to bona fide applicants for employment.¹³⁴

Similarly, the Eighth Circuit held in *Town and Country Electric, Inc. v. NLRB*,¹³⁵ that a worker or job applicant who was being paid by a union to conduct union organizing could not be an employee as that

125. *Id.* at 72-73.

126. *Id.* at 73.

127. *See H.B. Zachry*, 886 F.2d at 73.

128. 351 U.S. 105 (1956).

129. *H.B. Zachry*, 886 F.2d at 74 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113-14 (1956)).

130. *Id.*

131. 18 F.3d 251 (4th Cir. 1994).

132. *See Ultrasystems*, 18 F.3d at 253.

133. *Id.* at 254 (citing *H.B. Zachry Co. v. NLRB*, 886 F.2d 70, 74 (4th Cir. 1989)).

134. *See id.* at 255.

135. 34 F.3d 625 (8th Cir. 1994).

term is used in the Act.¹³⁶ The Eighth Circuit held that the Board erred when it found that Town & Country violated the NLRA by refusing to interview two applicants who were union members and officials, and subsequently discharged and failed to rehire another union member.¹³⁷ Relying primarily on the common law of agency, the Court stated that “a person may be the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other.”¹³⁸ The Court found that since the union members and officials applied for a position only to further the union’s interest, and the union paid the employee’s wage differential and travel expenses related to organizing efforts, an inherent conflict of interest existed.¹³⁹

The District of Columbia Circuit reached an opposite conclusion in *Willmar Electric Service, Inc. v. NLRB*.¹⁴⁰ The Court held that an “employee” under the Act includes a worker who is employed by a union and a company at the same time.¹⁴¹ The employer in *Willmar* refused to hire an applicant who made it clear that he intended to use his free time during lunch and after work to try to organize Willmar’s employees.¹⁴² The Court stated that “[u]nder common law principles ‘[a] person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other.’”¹⁴³ Until the employee abandons the non-union employer for the union employer, he should not be denied the protection of the Act.¹⁴⁴ Both courts in *Town & Country* and *Willmar Electric Service* focused their inquiry on common law principles of agency, rather than the plain language of the Act itself.

But the Second Circuit followed the NLRB’s position in *NLRB v. Henlopen Manufacturing Co.*,¹⁴⁵ when it held that paid union organizers or members could be employees entitled to protection from discrimina-

136. See *Town & Country*, 34 F.3d at 626. This is the same case that later went to the Supreme Court. See *Town & Country Elec., Inc. v. NLRB*, 516 U.S. 85 (1995).

137. See *Town & Country*, 34 F.3d at 628-29.

138. *Id.* at 628.

139. See *id.* at 629.

140. 968 F.2d 1327 (D.C. Cir. 1992).

141. See *Willmar*, 968 F.2d at 1331.

142. See *id.* at 1328.

143. *Id.* at 1329-30 (citing RESTATEMENT (SECOND) OF AGENCY § 226 (1958); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974)).

144. See *id.* at 1330.

145. 599 F.2d 26 (2d Cir. 1979).

tion under the Act.¹⁴⁶ That court rejected the employer's argument that a paid union organizer is not a bona fide employee under the Act.¹⁴⁷

After years of conflict between the NLRB and the various circuit courts, these issues were eventually resolved when the Supreme Court agreed to hear the appeal in *Town & Country*, and decided in favor of NLRA protection.¹⁴⁸

C. The *Town & Country* Decision

Because the various Courts of Appeals and the NLRB were in conflict over how to define "employee," the Supreme Court granted certiorari to resolve the conflict. The case, *Town & Country*, began as a small-town, midwest organizing campaign.¹⁴⁹ Locals 292 and 343 of IBEW sought to organize Town & Country Electric, Inc., a non-union electrical contractor.¹⁵⁰ Town & Country had advertised through an employment agency for job applicants.¹⁵¹ Eleven union members, including two professional union staff, overtly applied for jobs.¹⁵² Town & Country refused to interview ten of the eleven union activists; it hired one, but he was dismissed after a few days on the job.¹⁵³

The union filed a charge with the NLRB, alleging violations of sections 8(a)(1) and 8(a)(3)¹⁵⁴ of the NLRA, on the basis that the employer refused to interview (or retain) the employees because of their

146. See *Henlopen*, 599 F.2d at 30.

147. See *id.*

148. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995). See generally Susan E. Howe, *To Be or Not To Be An Employee: That Is the Question of Salting*, 3 GEO. MASON INDEP. L. REV. 515 (1994) (providing a good (though employer-biased) history of the decisions leading up to the *Town & Country* case).

149. See *Town & Country*, 516 U.S. at 87.

150. See *id.*

151. See *id.*

152. See *id.* Salting campaigns sometimes advise prospective applicants to alert employers to their union status in the job hiring process, to protect and advance their rights in any subsequent unfair labor practice hearing. See Telephone Interview with Jeff Grabelsky, Director Construction Industry Organizing Program, Cornell University (June 1997).

153. See *Town & Country*, 516 U.S. at 87.

154. See section 8(a)(1) of the Act which states that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1). Section 157 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157. Section 8(a)(3) states in part that it shall be unlawful to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3).

union membership.¹⁵⁵ An Administrative Law Judge ruled in favor of the union members and the NLRB affirmed that ruling.¹⁵⁶

The primary legal issue before the Board, and ultimately before the Eighth Circuit Court of Appeals and the Supreme Court, rested on the definition of "employee."¹⁵⁷

In the course of its decision, the Board determined that all 11 job applicants (including the two Union officials and the one member briefly hired) were "employees" as the Act defines that word The Board recognized that under well-established law, it made no difference that the 10 members who were simply applicants were never hired Neither, in the Board's view, did it matter (with respect to the meaning of the word "employee") that the Union members intended to try to organize the company if they secured the advertised jobs, nor that the Union would pay them while they set about their organizing. The Board . . . rejected the company's fact-based explanations for its refusals to interview or to retain these 11 "employees" and held that the company had committed "unfair labor practices" by discriminating on the basis of union membership.¹⁵⁸

The case was appealed to the United States Court of Appeals for the Eighth Circuit, which reversed the Board's decision.¹⁵⁹ It held that the Board had not correctly interpreted the word "employee," and as such, the Act did not protect a union organizer from anti-union discrimination.¹⁶⁰

The Supreme Court limited its focus on how to define "employee" under the NLRA. It took a strict constructionist view. Under section 152(3) of the Act, an employee is defined as follows:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural

155. *See Town & Country*, 516 U.S. at 87.

156. *See id.* (citing *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250, 1258 (1992)).

157. *See id.* at 89.

158. *Id.* at 87-88 (citing *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250, 1256, 1258 (1992) and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941)).

159. *See Town & Country Elec., Inc. v. NLRB*, 34 F.3d 625, 629 (1994).

160. *See id.*

laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.¹⁶¹

The question for the Court was whether this language could include company workers, or potential company workers, who are also paid union organizers.¹⁶²

The Court held that “several strong general arguments” favored the Board’s interpretation of “employee.”¹⁶³ First, the language of the Act itself was “broad enough to include those company workers whom a union also pays for organizing.”¹⁶⁴ The Court relied on an ordinary dictionary definition of employee: “any ‘person who works for another in return for financial or other compensation.’”¹⁶⁵ Since the term “employee” shall include *any* employee, and since these employees would be paid by the employer for providing work to the employer, “no exception would apply here.”¹⁶⁶

Second, in the Court’s view, this literal interpretation of the term “employee” was consistent with the Act’s purpose of “protecting ‘the right of employees to organize for mutual aid without employer interference.’”¹⁶⁷ Third, the broad literal reading was consistent with other cases where the “breadth of [section 152(3)’s] definition is striking.”¹⁶⁸

Finally, the Court believed one other provision of the 1947 Labor Management Relations Act¹⁶⁹ clarified the Act’s protection of union activists as employees. This section specifically

161. 29 U.S.C. § 152(3) (1994).

162. *See Town & Country*, 516 U.S. at 89.

163. *See id.* at 90.

164. *Id.*

165. *Id.* (quoting AMERICAN LAW DICTIONARY 604 (3d ed. 1992)).

166. *Id.* at 90-91.

167. *Town & Country*, 516 U.S. at 91 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) and 29 U.S.C. § 157 (1988)).

168. *Id.*; *see, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that the Act covers undocumented aliens); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (holding that certain confidential employees fall within definition of employee); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (stating that the Act protects the right of employees to organize for mutual aid without employer interference); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (deciding that job applicants are employees).

169. 29 U.S.C. § 186(c)(1) (1994).

contemplate[s] the possibility that a company's employee might also work for a union. This provision forbids an employer . . . from making payments to a person employed by a union, but simultaneously exempts from that ban wages paid by the company to "any . . . employee of a labor organization who is also an employee" of the company.¹⁷⁰

The Court also rejected Town & Country's argument that the definition "employee" should rest upon the common law of agency.¹⁷¹ The company argued the Restatement (Second) of Agency would exclude paid union organizers from the definition of employee:

Since . . . the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them . . . [A person] cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other.¹⁷²

The employer argued that when a paid union organizer serves the union, it is at times acting adversely to the company, and that the organizer's first loyalty is to the union, not the employer.¹⁷³ Since the employee could not really serve "two masters" in this situation, the company argued, the employee could only be the servant (employee) of the union.¹⁷⁴

The Court rejected these common law definitions of employee, because there was no absence of the term "employee" in the NLRA.¹⁷⁵ Since the Act *does* clearly define employee, it is that definition that must be followed, and not the common law definition.¹⁷⁶ Further, the Court found that the employer's argument failed *even in common law*.¹⁷⁷ The Restatement also indicates that a "person *may* be the servant of two masters . . . *at one time as to one act*, if the service to one does not in-

170. *Town & Country*, 516 U.S. at 92 (discussing 29 U.S.C. § 186(c)(1) (1988)).

171. *See id.* It is not surprising that the Court would reject this argument. Even Justice Scalia, no friend of labor, would have to reject this argument because "a statute [should not] go beyond its text." ANTONIN SCALIA, A MATTER OF INTERPRETATION 26 (1997). It is "the words, rather than the intent of the legislature, which is the law that must be followed." *Id.* at 29 (emphasis added).

172. *Town & Country*, 516 U.S. at 93 (citing RESTATEMENT (SECOND) OF AGENCY § 226, cmt. a (1957)).

173. *See id.*

174. *See id.*

175. *See id.* at 94.

176. *See id.*

177. *See Town & Country*, 516 U.S. at 94.

volve *abandonment* of the service to the other.”¹⁷⁸ The Board had concluded that serving the union does not necessarily involve abandonment of service to the company.¹⁷⁹ The Court also rejected any “abandonment” theory, without actual proof.¹⁸⁰

Finally, the Court rejected the company’s argument that salts are “disloyal employees,” who would seek to *harm* the company, as there was no evidence in the record to support this.¹⁸¹ The Court unanimously held that “the Board’s construction of the word ‘employee’ is lawful; that term does not exclude paid union organizers.”¹⁸²

While this issue was decided without dissent, employers are now looking for ways to circumvent this decision and still refuse to hire known union members or activists.

II.

A. The Legislative Efforts to Stop “Salting”

Following the Supreme Court’s decision in *Town & Country*, Republicans in Congress responded with legislation designed to overturn the Court’s ruling. In March 1998, the Republicans passed H.R. 3246, a version of an anti-salting bill known as the “Fairness for Small Business and Employees Act of 1998.”¹⁸³ However, the passage in the Senate is doubtful and President Clinton has vowed to veto the legislation.¹⁸⁴

178. *Id.* at 94-95 (quoting RESTATEMENT (SECOND) OF AGENCY § 226 (1957)).

179. *See id.* at 95.

180. *See id.*

181. *See id.* at 96 (emphasis added). Indeed, this would go against the very principle of salt organizing, to create *profitable* signatory employers. *See generally* CORNELL UNIVERSITY, NYSSILR, COMET II, WORKSITE ORGANIZING WITH COMET ACTIVISTS, TRAINERS’ MANUAL (1994) (teaching organizing tactics, with a primary focus on salting). The “COMET II” program was originally developed by the United Brotherhood of Carpenters and Joiners of America in conjunction with Cornell University. The program is supported by the Building and Construction Trade Unions and councils to advance the cause of construction organizing. *See id.*

182. *Town & Country*, 516 U.S. at 98.

183. H.R. 3246, 105th Cong. (1998). The Republicans achieved this by an interesting ploy. They waited until President Clinton went to Africa, taking sixteen (mostly democratic) members of the Black Congressional Caucus with him. They then arranged for a hurried vote, and passed the bill 202-200. There is no question that those sixteen votes would have gone against the legislation. *See News Services, House Narrowly Approves Bill to End ‘Salting’ of Businesses by Union Organizers*, ST. LOUIS DISPATCH, Mar. 29, 1998, at A3.

184. *See News Services, House Narrowly Approves Bill to End ‘Salting’ of Businesses by Union Organizers*, ST. LOUIS DISPATCH, Mar. 29, 1998, at A3.

This legislative effort had begun earlier when The House of Representatives' Committee on Education and the Workforce drafted a bill known as the "Truth in Employment Act of 1996."¹⁸⁵ Hearings had been prompted by various contractor's trade groups who were concerned over the increased use of salting as an organizing tool of the unions.¹⁸⁶ As chairman of the Committee's Subcommittee on Employer-Employee Relations, Representative Harris W. Fawell (R-Ill) introduced the bill into the House on March 29, 1996.¹⁸⁷ The bill proposed to amend section 8 of the Act¹⁸⁸ by adding the following language: "Nothing in this subsection shall be construed as requiring an employer to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status."¹⁸⁹

As the lone sponsor of the bill, Representative Fawell's main goal was to bring the subject of union salting tactics to the attention of the legislature.¹⁹⁰ While introducing the bill, Fawell commented that employers targeted by union salts must "either hire the union 'salt' who is sure to disrupt your workplace . . . or deny the 'salt' employment and risk being sued for discrimination under the NLRA."¹⁹¹

On April 12, 1996, Fawell conducted a third hearing with House Small Business Committee Chairwoman Jan Meyers (R-KS) in Overland Park, Kansas.¹⁹² During the hearing, Fawell took the opportunity to promote his bill while various employer witnesses testified as to the negative effects that salting has on non-union businesses.¹⁹³

185. See H.R. 3211, 104th Cong. (1996). The hearings were held by the House of Representatives' Committee on Education and the Workforce Subcommittee on Oversight and Investigations on Apr. 18, 1995 and Oct. 31, 1995. See Telephone Interview with Laurie Martin, Staff Assistant to the Committee on Education and the Workforce (Apr. 29, 1997).

186. See Telephone Interview with Laurie Martin, Staff Assistant to the Committee on Education and the Workforce (Apr. 29, 1997) (explaining that the contractor's trade groups that were pushing for the hearings are too numerous to list); *No Salt Legislation Aimed*, ENGINEERING NEWS-REC., Apr. 8, 1996, at 9.

187. See H.R. 3211, 104th Cong. (1996).

188. 29 U.S.C. § 158 (1994).

189. H.R. 3211, 104th Cong. § 4 (1996).

190. See Telephone Interview with Laurie Martin, Staff Assistant to the Committee on Education and the Workforce (Apr. 29, 1997).

191. 142 CONG. REC. E520 (daily ed. Mar. 29, 1996) (statement of Rep. Fawell).

192. See Jan Meyers, *House Committees Schedule Hearing in Kansas on Union "Salting" Practices and the Effect on Small Business, Union Agents Apply for Employment, Encourage Disruption for Purpose of Organizing*, GOV'T PRESS RELEASES, Apr. 8, 1996, available in 1996 WL 8785378.

193. See *Organizing: Open Shop Builders, Unions Face Off on Salting in House Field Hearings*, Daily Lab. Rep. (BNA) No. 75, at D10 (Apr. 18, 1996).

It was the elicitation of these anti-salting stories, orchestrated by Fawell, that preceded his efforts to draft a bill in support of employers' rights. In fact, the "experiences" of these business owners were embodied in the findings that Fawell included in the language of the Act.¹⁹⁴

The first of these findings begins with the statement that "trust and civility in labor-management relationships is essential to a productive workplace and a healthy economy."¹⁹⁵ This statement was followed by a description of "salting" and proceeded to define it as "an aggressive form of harassment" that "threatens the balance of rights which is fundamental to our system of collective bargaining."¹⁹⁶ The last two findings put forth by the bill concluded that nonunion employers are often confronted with union organizers who are seeking employment "primarily to organize the employees . . . or to inflict economic harm specifically designed to put nonunion competitors out of business, or to do both."¹⁹⁷ Of course, the first goal of the union, to organize, is perfectly legal under the NLRA.

Although the findings stated that employees are protected from discrimination based on "their views concerning collective bargaining," the bill clearly stated that an employer's "right to expect job applicants to be primarily interested in utilizing their skills to further the goals of the business" should be protected.¹⁹⁸ This language is impossibly vague and would be very difficult to enforce.

Based on these "findings," the proposed amendment to the NLRA was designed with three stated purposes. As put forth in the Truth in Employment Act of 1996, the purpose of the amendment was:

(1) to preserve the balance of rights between employers, employees, and labor organizations which is fundamental to our system of collective bargaining;

(2) to preserve the rights of workers to organize, or otherwise engage in concerted activities protected under the National Labor Relations Act; and

194. *See id.*

195. H.R. 3211, 104th Cong. § 2(1) (1996).

196. *Id.* § 2(2).

197. *Id.* § 2(3). The language of the latter provision harkens back to the days of the Sherman Antitrust Act when unions were enjoined from organizing by the mere threat of their presence. *See* 15 U.S.C. §§ 1-40 (1988); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

198. H.R. 3211, 104th Cong. § 2(4) (1996).

(3) to alleviate pressure on employers to hire individuals who seek or gain employment in order to disrupt the employer's workplace or otherwise inflict economic harm designed to put the employer out of business.¹⁹⁹

An identical companion bill was subsequently introduced into the Senate on June 28, 1996 by Senator Slade Gorton (R-Wash).²⁰⁰ This bill, also known as the Truth in Employment Act of 1996, had garnered the support of fourteen Senate members including Senator Gorton.²⁰¹ In presenting the bill, Senator Gorton focused on the "devastating economic effect" that salting has on "small businesses" in his home state.²⁰² In a statement to the press regarding this proposed bill, Senator Gorton was quoted as saying, "[T]his legislation will not jeopardize a union's legitimate right. Unions clearly have a right to organize workers and a right to seek a job wherever they choose, but they do not have a right to harass small business owners and jeopardize the jobs of their employees."²⁰³

Despite the efforts of Representative Fawell and Senator Gorton, the two companion bills were overshadowed by more pressing legislation and subsequent hearings were never held.²⁰⁴ Since both bills were introduced late in the session, it was not surprising that they did not receive the attention that their sponsors had anticipated.²⁰⁵

The bill's sponsors, however, redoubled their efforts to gain additional support for the bill. On February 13, 1997, the Truth in Employment Act of 1997 was reintroduced into both the House of Representatives and the Senate, virtually unchanged from its original form.²⁰⁶ What had changed was the rhetoric used by the bill's most ardent supporters.²⁰⁷

In his second statement to the House of Representatives, Representative Fawell made his feelings quite clear as to how he views union

199. *Id.* § 3.

200. See 142 CONG. REC. S7305 (daily ed. June 28, 1996) (statement of Sen. Gorton).

201. See *id.* This list includes Senators Gorton, Coats, Hatch, Faircloth, Warner, Gregg, Frist, Cochran, Lott, Kassebaum, Kyl, Mack, Pressler, and Nickles.

202. See *id.*

203. *Gorton Introduces Senate Anti-Salting Bill*, Daily Lab. Rep. (BNA) NO. 126, at D17 (July 1, 1996). The proposed distinction between organizing and harassment would certainly be difficult to interpret and enforce and could only invite continuous litigation.

204. See Telephone Interview with Laurence Cohen, Building Trades Legal Counsel (Apr. 1997).

205. See H.R. 3211, 104th Cong. (1996).

206. See H.R. 758, 105th Cong. (1997); S. 328, 105th Cong. (1997).

207. See 143 CONG. REC. E252 (daily ed. Feb. 13, 1997) (statement of Rep. Fawell).

salting tactics.²⁰⁸ "In recent years, salting has evolved into an abusive practice which, sadly, has little to do with legitimate union organizing," stated Fawell.²⁰⁹ "Instead, salting has become a tool - or perhaps better stated; a weapon - for putting nonunion companies out of business."²¹⁰

During his statement, Fawell also commented on the lack of activity surrounding the bill the previous year.²¹¹ He stated, "[a]nd, while I was disappointed that we concluded the 2nd session of the 104th Congress without addressing the problems of union salting, I was pleased that a significant number of our colleagues were also sufficiently concerned to join me as co-sponsors of that legislation."²¹²

An identical companion bill was also reintroduced in the Senate unchanged from the previous year. The Truth in Employment Act of 1997 was presented by Senator Tim Hutchinson (R-Ark) with the support of fifteen of his colleagues.²¹³ Much like Senator Gorton did when presenting the bill during the previous session, Hutchinson focused on the effects salting has on small businesses in his home state, as well as across the nation.²¹⁴

"Salting is not merely a union organizing tool," commented Hutchinson.²¹⁵ "It has become an instrument of economic destruction aimed at nonunion companies."²¹⁶ Hutchinson also spoke to the Senate about the "frivolous charges, legal fees, and lost time" that business owners are subjected to as a result of union salting activities.²¹⁷

Although Senator Hutchinson spoke of specific instances where small businesses have allegedly been forced to defend themselves against frivolous complaints, the bill has not stirred much debate within the Senate. In fact, after it was reintroduced on February 13, 1997, the bill was referred to the Senate Committee on Labor and Human Resources where no further action was taken until June of 1997.

208. *See id.*

209. *Id.*

210. *Id.*

211. *See id.*

212. 143 CONG. REC. E252 (daily ed. Feb. 13, 1997) (statement of Rep. Fawell).

213. *See* S. 328, 105th Cong. (1997). New and current Senate sponsors include Hutchinson, Nickles, Warner, Mack, Kyl, Brownback, Cochran, Roberts, Hatch, Gorton, Enzi, Gregg, Allard, Lott, Sessions, and Faircloth. *See id.*

214. *See* 143 CONG. REC. S1396 (daily ed. Feb. 13, 1997) (statement of Sen. Hutchinson).

215. *Id.*

216. *Id.*

217. *Id.*

On June 10, 1997, the Senate Labor and Human Resources Committee held hearings on Senate Bill 328.²¹⁸ A variety of construction industry representatives and union representatives testified on their views of salting.²¹⁹ In addition, Senators voiced their opinions.²²⁰ The hearings were contentious. The Independent Electrical Contractors, a national trade organization that represents over 2,500 small electrical businesses, accused the NLRB and other agencies of "being used as 'tools' of organized labor."²²¹ It was their opinion that the "salts" intentions "are not to expand their employment or their membership but to simply destroy competition and drive non-union shops out of business."²²² This view was echoed by individual business owners, who have had bad personal experiences with "salting" campaigns.

The Committee also heard from former NLRB member Clifford Oviatt, who testified that his opinions supporting the Board's definition of "employee" were the "most difficult of all the over 3000 decisions I participated in while I served on the NLRB for the three and one-half years from 1989 to 1993."²²³ Mr. Oviatt explained that although he followed Supreme Court and statutory law in making his decision, he believed that "the decision is wrong, the practice of salting is basically improper and unfair, because it is fundamentally dishonest and it forces the employer . . . to defend superficial, groundless charges at great cost"²²⁴ Oviatt expressed support for the passage of Senate Bill 328.²²⁵

The Associated General Contractors ("AGC") also voiced its support.²²⁶ AGC claimed it conducted a survey of fifty-two contractors who

218. See *Divided Loyalties: The Impact of Salting in the Workplace: Hearing of the Committee on Labor and Human Resources*, 105th Cong. (1997).

219. See *id.* (statements of George E. Smith, President, Little Rock Electrical Contractors, Little Rock, AK; Don O. Mailman, Vice President, Bay Electric Company, Incorporated, Cape Elizabeth, NJ; Roselyn F. Nyeholt, President, Nyeholt Steel Company, Incorporated, Holt, MI; Terrance G. Korthof, President, Wright Electric, Incorporated, Plymouth, MN; and Charles Fletcher, Vice President for Industrial Relations and Safety, Corey Delta Constructors, Benicia, CA, on Behalf of the Associated General Contractors of America).

220. See *id.* (statements of Sens. Hutchinson, Kennedy, and Collins).

221. *Prepared Statement of Independent Electrical Contractors, Inc. IEC Before the Senate Labor and Human Resources Committee*, FED. NEWS SERV., June 10, 1997, available in LEXIS, Legis Library, FedNews File.

222. *Id.*

223. *Prepared Statement of Clifford R. Oviatt Before the Senate Labor and Human Resources Committee*, FED. NEWS SERV., June 10, 1997, available in LEXIS, Legis Library, FedNews File.

224. *Id.*

225. See *id.*

226. See *Prepared Testimony of Charles Fletcher, VP Industrial Safety, Corey Delta Constructors, Benicia, CA, Before the Senate Labor and Human Resources Committee*, FED. NEWS

were targets of a salting attempt.²²⁷ Of the fifty-two, he claimed only thirteen (26.5%) of the contractors reported that an election petition was filed as a result.²²⁸ Of the petitions, one was dismissed, four were withdrawn, and the election was never held in one other case.²²⁹ In the nine elections held, employees voted for a union in three cases and against a union in six cases.²³⁰

While the AGC argued that these statistics showed salting was largely ineffective and cost the employers a lot of money,²³¹ its argument misses the central protections afforded by the NLRA. The elections and organizing attempts no doubt cost the unions a lot of time and money, too.²³² But such organizing, followed by elections, are at the core of the NLRA — the unions have a right to lawfully organize, and the employers have the right to lawfully resist.²³³ Ultimately, it is up to the workers to decide.²³⁴ This is the democratic process upon which our labor laws are founded. Further, this “cost,” this process, is true in *every* union organizing campaign, regardless of whether salts are involved or not. It is the nature of organizing. Employers will always be unhappy at attempts to be unionized, bemoan the costs involved, and seek to dissuade employees from joining, no matter what organizing tactics unions choose to use. But it is the union’s lawful right to try to do so.

Robert Georgine, President of the Building and Construction Trades Department, American Federation of Labor - Congress of Industrial Organizations (“AFL-CIO”), explained to the Committee why salting is not only a lawful, but legitimate means of union organizing.²³⁵ After reviewing the history of pre-hire agreements, and anti-union decisions,²³⁶ Georgine explained:

SERV., June 10, 1997, available in LEXIS, Legis Library, FedNews File [hereinafter *Prepared Testimony of Charles Fletcher*].

227. See *id.*

228. See *id.*

229. See *id.*

230. See *id.*

231. See *Prepared Testimony of Charles Fletcher*, *supra* note 226.

232. See *id.*

233. See *id.*

234. See *id.*

235. See *Prepared Statement of Robert A. Georgine, President, Building and Construction Trades Department, AFL-CIO, Before the Senate Committee on Labor and Human Resources, FED. NEWS SERV.*, June 10, 1997, available in LEXIS, Legis Library, FedNews File [hereinafter *Prepared Statement of Robert A. Georgine*].

236. See *supra* Part I.A.

Since jobs are of short duration and turnover from one job to the next is usually very high, organizers in the construction industry do not have the luxury of spending weeks or months developing contacts among nonunion employees. Without access to employees on the jobsite, organizing in the construction industry is impossible. A salt—an applicant for employment who will seek to organize his fellow employees during non-working time—provides that access. As we show in this Statement, salting is a legitimate organizing tool which is, and should remain, protected under the NLRA.²³⁷

Georgine contended that the employer's real objection to salts is that the law prohibits them from refusing to hire and from discharging employees simply because they intend to participate in union organizing.²³⁸ There is nothing unfair in that prohibition, and it is consistent with the basic policies of the Act.²³⁹

Further, he refuted employer contentions that salts seek to disrupt the employer's business or perform poor work to cause economic harm:

Salts understand, when they apply for work, that they will be expected to fulfill the employer's legitimate employment expectations. Because union organizers do not want to give the nonunion contractors an excuse to discharge them, and because they need to earn the respect of their nonunion co-workers, they are encouraged to be exemplary employees. They are instructed to obey all of the employer's work rules and to work efficiently and skillfully. When participants apply for jobs with nonunion contractors, they are usually instructed to reveal to the employer the fact that they are with the union, so that the employer cannot successfully claim that it was unaware of their union status should it unlawfully refuse to hire them or later discharge them because of that status.

If, as frequently happens, an employer responds to a salting campaign by committing unfair labor practices, charges will be filed with the NLRB. We make no apology for filing these charges; employers do not have the right to restrain, coerce, or discriminate against employees who support union organizing, and employers who commit those

237. *Prepared Statement of Robert A. Georgine, supra note 235.*

238. *See id.*

239. *See id.*

violations of the law should be held responsible for their conduct. That is not merely our view of how things ought to be, that's the law.²⁴⁰

Georgine defended the union's right to file unfair labor practice charges *if* the laws are actually being violated:

Nonunion construction employers, who find obeying the law either too burdensome or too threatening to their nonunion status, are promoting a fiction when they argue that receiving any degree of remuneration from the union converts these individuals into an unprotected status and entitles the employers to discharge or refuse to hire them with impunity.

Moreover, prohibiting employers from discriminating against union organizers simply because they are union organizers does not deprive employers of any greater degree of control over their work force or their work place than is inherent in the employee protections afforded by the Act. Nothing in the law limits an employer's right to promulgate and enforce legitimate work rules that are not a pretext for discrimination against union supporters. Nothing in the law precludes an employer from discharging an employee who is insubordinate or incompetent. Nor does the law prohibit an employer from refusing to hire an employee for a valid business-related reason, if, for example,

240. *Id.* Michael T. Manley of the International Brotherhood of Boilermakers echoed that view by stating:

Let me say once again, organized labor specifically and unequivocally does not encourage such activity. Once again, work slow downs and sabotage are unlawful under the National Labor Relations Act and may be prohibited by other state and federal statutes as well. Not only are employers protected from such activity under the laws that now exist, but the employers are always free to discharge or discipline an unproductive employee.

Moreover, sabotage, work slow-downs and other unproductive activities are not in the interest of unions in connection with an organizing campaign. The non-union worker will have little or no respect for the union engaging in such activity and is highly unlikely to join any organization that condones such activity. The non-union employer will have little or no interest in entering into a collective bargaining relationship with any organization that has engaged in such activity. In short, to my knowledge, labor unions do not encourage lack of productivity in connection with salting campaigns and, even if they did, employers are protected under existing law.

Prepared Testimony of Michael T. Manley, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, Before the Senate Labor and Human Resources Committee, FED. NEWS SERV., June 10, 1997, available in LEXIS, Legis Library, Fed-News File.

the employer concludes, based on nondiscriminatory grounds, that the applicant cannot perform the job adequately.²⁴¹

Senator Edward Kennedy also voiced opposition to the bill, contending that under this bill, employers could hire and fire based on their subjective view of an employee's motivation.²⁴² "This bill would make mind reading a protected right under the National Labor Relations Act," he exclaimed.²⁴³ Senator Kennedy refuted the view that countless *frivolous* unfair labor practice charges were filed against employers.²⁴⁴ He stated "[i]n 1995, the National Labor Relations Board ordered 7,500 workers reinstated. Those workers had been fired unlawfully for union activities. Over 26,000 workers discharged for unionizing were awarded back pay. On average, workers waited four years from the date of the unlawful discharge, before being awarded any relief."²⁴⁵

As written, Senate Bill 328, the "Truth in Employment Act," served no legitimate purpose. The language of the act, "to alleviate pressure on employers to hire individuals who seek or gain employment in order to *disrupt* the employer's workplace or otherwise *inflict economic harm . . .*," was so subjective, no court would have been able to interpret it.²⁴⁶ All employers could allege that *any* employee who sought to organize the employer's workplace would be a *disruption* to that workplace.²⁴⁷ All employers could allege that "going union" would inflict economic harm. All employers could argue that having to defend themselves against unfair labor practice charges would inflict economic harm. These new employer rights would be in direct conflict with the right of *any* employee to organize "for the purpose of . . . mutual aid and protection."²⁴⁸ The very nature of labor relations is the right of employees to try to organize a union and the right of the employers to *lawfully* resist.²⁴⁹

241. *Prepared Statement of Robert A. Georgine, supra* note 235.

242. *See Prepared Statement of Senator Edward M. Kennedy, Before the Senate Committee on Labor and Human Resources, FED. NEWS SERV., June 10, 1997, available in LEXIS, Legis Library, FedNews File [hereinafter Prepared Statement of Senator Edward M. Kennedy].*

243. *Id.*

244. *See id.*

245. *Id.*

246. S. 328, 105th Cong. § 3(3) (1997) (emphasis added).

247. *See Prepared Statement of Senator Edward M. Kennedy, supra* note 242.

248. 29 U.S.C. § 157 (1994); *see* 29 U.S.C. § 158(a)(1).

249. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) (stating that the national interest consisted of encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom and association). "Only thus could workers ensure themselves standards consonant with national well-being." *Id.* But the court was clear to point out

As one labor commentator so aptly explained this conflict:

The image of the employer caught between ruinous back pay liability on the one hand and unionization on the other tacitly recognizes that the employees may wish to exercise their right to unionize—after all, the employer can put it to the test by hiring the organizer.²⁵⁰

Even employer representatives recognize the futility of this legislation. Stanley Kolbe, lobbyist for the Sheet Metal and Air Conditioning Contractor's National Association ("SMACNA"), has stated, "[i]f the money spent on anti-salting measures was put into a legitimate training program, salting would go away."²⁵¹ Kolbe states that the non-union sector spends almost no money on training and has not trained for years, while the union puts out a highly skilled work force.²⁵²

As a result, the union recruits out of a trained labor pool. If the non-union company would train their own skilled labor pool, they would not need to beg union people to work for them. They would not have union people in their program and salting would go away. They are not going to be able to stop salting until they train themselves and create employee loyalty.²⁵³

Further, Kolbe explains that a federal law to "stop sabotage" in the workplace is "ludicrous."²⁵⁴ The company could use any local or state law to deal with a union employee who does physical destruction to the company.²⁵⁵ And, if a worker intentionally does not work, or performs work poorly, he can legitimately be fired.²⁵⁶

In 1998, in the 105th Congress, the efforts to pass anti-salting legislation expanded. The most current version, the Fairness for Small Business and Employees Act of 1998, House Bill 3246, contains even

the Act does *not* interfere with the "normal exercise of the employer to select its employees or discharge them." *Id.* at 182-83.

250. Telephone Interview with Jeff Grabelsky, Director Construction Industry Organizing Program, Cornell University (June 1997).

251. *No Salt Legislation Aired*, ENGINEERING NEWS-REC., Apr. 8, 1996, at 9. It should be noted that the SMACNA is a union contractor association.

252. See Interview with Stanley Kolbe, Lobbyist, Sheet Metal and Air Conditioning Contractor's National Association (SMACNA) (Apr. 1997).

253. *Id.*

254. See *id.*

255. See *id.*

256. See *id.*

more pressure for the NLRB to abandon its protection of the right to unionize.²⁵⁷ House Bill 3246 contains a new preamble.²⁵⁸ This bill is

to assist small businesses and labor organizations in defending themselves against Government bureaucracy; to ensure that employees entitled to reinstatement get their jobs back quickly; to protect the right of employers to have a hearing to present their case in certain representation cases; and to prevent the use of the National Labor Relations Act for the purpose of disrupting or inflicting economic harm on employers²⁵⁹

This Act still contains the same offending, vague language “to alleviate pressure on employers to hire individuals who seek or gain employment in order to disrupt the workplace of the employer or inflict economic harm designed to put the employer out of business.”²⁶⁰ It has added provisions allowing employers²⁶¹ to recover attorneys’ fees and costs against the NLRB if the employer prevails.²⁶² This will serve to create a chilling effect on the Board’s duty to protect the workers’ right to organize. It singles out the Board for the unreasonable burden of paying all attorney’s fees of all prevailing parties, regardless of whether the Board was justified in its position. All other government agencies are protected against such fee provisions under the requirement that the government’s position must not have been “substantially justified.”²⁶³ However, all indications are that the Senate will not approve this bill this session, and even if it did, President Clinton has vowed to veto it.²⁶⁴

If employers want to discourage union salts from being effective, legislation is not the answer. Providing a decent living wage, safe working conditions, and continuous skills training, would go much further in allowing an employer to “protect” its business, than vague and ambiguous legislation — legislation that would only invite expensive litigation costs in trying to enforce or interpret the legislation.

257. See H.R. 3246, 105th Cong. (1998).

258. See *id.*

259. *Id.*

260. *Id.* § 102.

261. Defined as “parties who have not more than 100 employees and a net worth of not more than \$1.4 million” at the time the civil action was filed. *Id.* § 402.

262. See H.R. 3246, 105th Cong.

263. See 5 U.S.C. § 504; see also *infra* Part II.B. (discussing the subject further).

264. See News Services, *House Narrowly Approves Bill to End ‘Salting’ of Businesses by Union Organizers*, ST. LOUIS DISPATCH, Mar. 29, 1998, at A3.

B. Other Employer Strategies to Bypass the Town & Country Decision

Employers are instituting a variety of new facially neutral policies to avoid having to hire union employees. These strategies are time-honored. Employers have always argued that they should have the right to dismiss employees for disloyalty.²⁶⁵

One of the strategies that management labor lawyers are employing and advising employers to use is the promulgation of "no moonlighting" policies.²⁶⁶ In *Architectural Glass and Metal Co. v. National Labor Relations Board*,²⁶⁷ the Sixth Circuit reversed the NLRB's finding that an employer had violated section 8(a)(3) of the Act by refusing to hire a job applicant who was a full-time paid union organizer.²⁶⁸ This was because the employer had a "nondiscriminatory" policy of refusing to hire persons who would be employed simultaneously by another employer (a no moonlighting policy).²⁶⁹

In this case, the prospective employee, Harry Zell, was a full-time paid field representative for Local 1165 of the Glazer, Architectural, Metal and Glass Workers' Union.²⁷⁰ He received a salary of \$600 per week plus expenses from the union.²⁷¹ As a field representative, his primary responsibilities were to organize the employees at non-union businesses and deal with prevailing wage issues.²⁷² Mr. Zell applied for work at Architectural Glass & Metal Company ("AGM") under the union's salting campaign.²⁷³ Mr. Zell applied for the job covertly, rather than overtly.²⁷⁴ He did not state anywhere on his application that he was a member of the union.²⁷⁵ Originally, a representative of the employer offered Zell an \$8.00 an hour job as a helper.²⁷⁶ However, at the point of

265. See generally *NLRB v. Local Union 1229, International Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464 (1953) (holding employees who publicly criticize their employer's product, if unrelated to any labor practice of the employer, may be discharged). But see *Community Hosp. of Roanoke Valley v. NLRB*, 538 F.2d 607 (4th Cir. 1976), enforcing 220 N.L.R.B. 217 (1975) (upholding the Board's decision that employees may criticize their working conditions to the public, if the criticisms are not "egregious").

266. See *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 432 (1997).

267. 107 F.3d 426 (1997).

268. See *Architectural Glass*, 107 F.3d at 434.

269. See *id.* at 433.

270. See *id.* at 428.

271. See *id.*

272. See *id.*

273. See *Architectural Glass*, 107 F.3d at 428.

274. See *id.*

275. See *id.*

276. See *id.* at 429.

hiring, Zell mentioned to the prospective employer that he was also in the union, and that he was a *paid* union employee.²⁷⁷ The representative of the employer called him back later and retracted the job offer.²⁷⁸ The union filed charges with the NLRB, alleging that the employer had violated sections 8(a)(1) and 8(a)(3) of the Act.²⁷⁹

The Board found that the employer committed unfair labor practices by interrogating and refusing to hire a paid union organizer, in violation of 8(a)(1) and 8(a)(3) of the Act.²⁸⁰ The Board had endorsed the Administrative Law Judge's finding that Zell was a bona fide applicant for employment even though he was a paid union organizer.²⁸¹ The Board found no merit to the employer's claim that it did not hire Zell because he was a full-time employee elsewhere because the employer representative never asked Zell "whether the union job would interfere with the job at AGM."²⁸²

The Sixth Circuit reversed the Board's decision, agreeing with the employer that Zell was not hired because it had a nondiscriminatory policy prohibiting the employment of those who simultaneously hold another full-time job.²⁸³ The employer was able to assert successfully that it did not violate the Act because it had demonstrated a legitimate reason for asking Zell about his union employment and for not hiring him.²⁸⁴ Since this policy of no other employment was applied in a non-discriminatory manner (whether the employee had other employment with a union or non-union employer), the employer was able to overcome the prima facie establishment of anti-union animus.²⁸⁵

277. *See id.*

278. *See Architectural Glass*, 107 F.3d at 429.

279. *See id.*

280. *See id.* at 430.

281. *See id.* at 429-30.

282. *Id.* at 430.

283. *See Architectural Glass*, 107 F.3d at 433.

284. *See id.* at 434.

285. *See id.* at 431. The court, following *Wright Line*, analyzes cases involving charges of employment action motivated by anti-union animus and employer protestations of legitimate reasons for the actions. Under the *Wright Line* test, the general counsel must establish by a preponderance of evidence the prima facie case that anti-union animus motivated or contributed at least in part to an employment action. *See Wright Line*, 251 N.L.R.B. 1083, 1088 n.11 (1980). If this prima facie case is established, then the employer can avoid being held in violation of sections 8(a)(1) and 8(a)(3) if it proves, also by a preponderance of the evidence, that the employer action "rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

The Board endorses the causation test, based on *Wright Line*.²⁸⁶ However, the Sixth Circuit, in *NLRB v. Fluor Daniel, Inc.*,²⁸⁷ held the *Wright Line* test for discriminatory animus was inapplicable in cases involving hiring rather than discharge or discrimination for employment.²⁸⁸ The Court believed that the employer's policy against hiring individuals who intended to work simultaneously for another employer on a full-time basis, would allow the employer to prevent a dual employment policy.²⁸⁹ It did not believe that the proffered business justification was pretextual.²⁹⁰

While paid union organizers are "employees" within the meaning of Section 2(3) of the Act, that does not mean that an employer's refusal to hire a paid union organizer is always unlawful under Section 8(a)(3). Rather, as in all cases involving charges of employment actions motivated by anti-union animus, the employer should be permitted to attempt to demonstrate that it had a legitimate business reason for taking employment action against a paid union organizer. Indeed, just because an employee is a paid union organizer does not mean that an employer can take no adverse actions against that employee.²⁹¹

This decision has given employers their first real victory since *Town & Country Electric, Inc. v. NLRB*.²⁹² Unions may worry that this decision shifts the burden of proof in "refusal-to-hire" cases. In the past, it was up to the contractor to show that its refusal to hire a qualified union organizer was not discriminatory.²⁹³ Now it appears that the union must show that the policy was enacted for discriminatory purposes, for example, to allow employers to refuse to hire salts.²⁹⁴ The Board continues to assert its position in different circuits.²⁹⁵

286. See *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 431 (1997) (citing *Wright Line*, 251 N.L.R.B. 1083 (1980)).

287. 102 F.3d 818 (1996).

288. See *Architectural Glass*, 107 F.3d at 431.

289. See *id.* at 432.

290. See *id.*

291. *Id.* (footnotes and citations omitted).

292. 516 U.S. 85 (1995).

293. See *Architectural Glass*, 107 F.3d at 431.

294. See *id.*

295. See, e.g., *Ken Maddox Heating & Air Conditioning, Inc.*, Nos. 25-CA-24297, 25-CA-24445, 25-CA-24987, 25-CA-25565, 1998 NLRB LEXIS 370, at *20 (June 15, 1998) (stating that "[since] this case does not arise in the 6th Circuit and I find it would be improper for me to rely on a Court of Appeals decision instead of relevant Board decisions on the issues" the Board decision would be followed).

In addition, a “no-moonlighting policy” cannot be used as a pretext for discouraging union membership.²⁹⁶ In *Tualatin Electric*, the Board said:

We agree with the judge that the Respondent’s “moonlighting” policy, which prohibited employees from receiving compensation from any source other than the Respondent, violates Section 8(a)(1). Despite the Respondent’s contention that the moonlighting policy was “intended to provide both needed time off to employees [and] to avoid [employee] conflict of interest in serving different masters,” there is abundant evidence in the record indicating that the moonlighting policy was adopted primarily as a result of the Respondent’s antiunion animus. In this regard, the judge credited the testimony of the Respondent’s former senior designer/project manager, Hal Pietrobono, who testified that in meetings with the Respondent’s owner, Mike Overfield, Overfield admitted that the purpose of the moonlighting policy was to prevent or eliminate the employment of “salts.” Pietrobono also testified that Overfield instructed the Company’s superintendent to “eliminate wherever possible any personnel that were affiliated with the union.” The record further reflects that the Respondent offered to create an exception to the moonlighting policy for a job applicant who planned to obtain outside compensation from his locksmith trade, without inquiring into whether that employee might be deprived of needed time off or whether the locksmith trade would present any conflicts for the employee. In addition, the Respondent implemented its moonlighting policy in the summer of 1993, well after the Union’s salting initiative began, thus providing at least some indication that it was adopted in response to the Union’s salting program. Finally, during his testimony, Overfield recounted his ongoing battles with the Union and repeatedly demonstrated his virulent antiunion sentiment, including his belief that the Union engaged in organized crime and that it was out to destroy his Company.²⁹⁷

These findings by the NLRB show that the Board will look behind a stated company policy to be sure the rationale for the policy is not a pretext for anti-union sentiment.

*NLRB v. Fluor Daniel*²⁹⁸ narrowed the broad brush of the NLRB by holding that in a “refusal to hire” case, the union must prove that there were more than “some job vacancies applied for by the voluntary union

296. See *Tualatin Elec.*, 319 N.L.R.B. 1237 (1995).

297. *Id.* (footnotes omitted).

298. 102 F.3d 818 (1996).

organizers”²⁹⁹ It must show the employer harbored “anti-union animus” because the applicants engaged in protected union activities.³⁰⁰ Otherwise, the Court held, “mere entertainment and expression of anti-union animus would constitute an unfair labor practice.”³⁰¹ Further, the Board has made clear the appropriate remedy in a refusal to hire case is to offer the discriminated against applicants employment in the same or similar positions.³⁰²

Another successful employer strategy is to require “conforming” job applications. In *TIC-The Industrial Company Southeast, Inc. v. NLRB*,³⁰³ the employer required job applications to be written on “special watermarked forms” and to omit information not requested, such as “Vet, Boy Scout or Union Organizer.”³⁰⁴ The employer rejected several applications from union organizers because they designated themselves as “union organizers” on the applications.³⁰⁵ The Court, reversing the Board, found that “[p]rohibited motive will not be inferred where job applicants fail to follow regularly applied, facially neutral application procedures.”³⁰⁶ It is questionable whether this same application requirement would have been valid if it only asked for applicants to omit union information.³⁰⁷

Other legal strategies have so far worked in the employers’ favor. In April 1997, the Fourth Circuit Court of Appeals ordered the NLRB to pay the attorneys’ fees of an open shop contractor that fired a union salt for poor job performance.³⁰⁸

In *Hess Mechanical Corp. v. NLRB*, the company hired an employee (Darr) and another union member to work on a project at the National Institutes of Health in Bethesda, Maryland.³⁰⁹ The employer hired both men “with full knowledge of their long-term union membership.”³¹⁰ It can be inferred that the men went to work for Hess for the purpose of organizing.³¹¹ The employees worked subject to a ninety-day

299. *Flour Daniel*, 102 F.3d at 832.

300. *See id.*

301. *Id.*

302. *See WestPac Elec., Inc.*, 321 N.L.R.B. 1322, 1323 (1996).

303. 126 F.3d 334 (D.C. Cir. 1997).

304. *TIC-The Industrial Company Southeast, Inc.*, 126 F.3d at 336.

305. *See id.* at 336-37.

306. *Id.* at 338.

307. *See id.*

308. *See Hess Mechanical Corp. v. NLRB*, 112 F.3d 146 (4th Cir. 1997).

309. *See id.* at 147.

310. *Id.*

311. *See id.* at 148.

probation period, where they could be fired if they failed to perform work adequately.³¹²

Two days after Darr began work, there were complaints he was not properly performing his employment duties and was not getting along with co-workers.³¹³ Darr was reassigned to a variety of different tasks by the employer, but performed poorly at each task.³¹⁴ It was alleged his work was slow and substandard.³¹⁵ The employee testified he spent eighty percent of his working time talking about the union.³¹⁶ After several warnings, Darr was fired.³¹⁷ The union filed an unfair labor practice charge, alleging Darr was fired for engaging in union activities.³¹⁸ The Region Five Director of the NLRB issued a complaint against Hess.³¹⁹ However, after a one-day hearing, the Administrative Law Judge dismissed the case in its entirety and concluded "Hess had terminated Darr for substandard performance 'in strict accordance with valid, established company policy.'"³²⁰ Neither the Board's General Counsel nor the union filed exceptions to the Administrative Law Judge decision and Hess then applied for attorney fees and costs pursuant to the Equal Access to Justice Act ("EAJA"),³²¹ contending that the NLRB charge was not "substantially justified."³²² Passed in 1980, the EAJA has occasionally been utilized against the NLRB.³²³

312. *See id.* at 147.

313. *See Hess*, 112 F.3d at 147.

314. *See id.* at 148.

315. *See id.*

316. *See id.* at 149.

317. *See id.* at 148.

318. *See Hess*, 112 F.3d at 148.

319. *See id.*

320. *Id.* (quoting the Administrative Law Judge's conclusion which was affirmed in *Hess Mechanical Corp.*, 320 N.L.R.B. 1014 (1996)).

321. 5 U.S.C. § 504 (1994). Under the EAJA, a prevailing party in an adjudication before a federal agency is entitled to attorney fees and costs unless the position of the agency "was substantially justified or that special circumstances make an award unjust." *Id.* § 504(a)(1). The test for "substantial justification" is one of reasonableness. *See generally* *Pierce v. Underwood*, 487 U.S. 552 (1988) (discussing the test used to determine substantial justification).

322. *See Hess*, 112 F.3d at 147.

323. *See Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541 (7th Cir. 1992); *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143 (D.C. Cir. 1988). *But see* *EuroPlast, Ltd. v. NLRB*, 33 F.3d 16 (7th Cir. 1994) (holding attorney fees against the NLRB were not warranted where credibility findings could not be foreseen.); *M.P.C. Plating, Inc. v. NLRB*, 953 F.2d 1018 (6th Cir. 1992) (stating that attorney fees are not justified in picket-line misconduct case, where law was in state of flux).

The Fourth Circuit held attorney fees and costs were warranted in this case.³²⁴ In fact, the Court stated the case was “notable for its flimsiness.”³²⁵ The NLRB had argued that the employer had failed to produce sufficient evidence to establish its defense without the necessity for credibility determinations. The Court, however, disagreed:

We are hard pressed to determine how the ALJ could have credited Darr’s testimony in the face of overwhelming evidence that Hess harbored no anti-union animus and had fired Darr solely for poor performance. Hess hired Darr and Burk with full knowledge of their long-standing union membership. Burk testified that he spent 80 percent of his work day openly organizing, yet he admits that Hess never took action against him as a result. The best and only evidence the Board can find to corroborate Darr’s testimony is isolated statements in two employee affidavits which suggest that Darr spoke with some employees about the union. Although the Board now relies on these statements, the Board’s own estimate of their probative value is clear from its failure to introduce them at the hearing. However, even assuming Darr did conduct union activity, his testimony was still the only evidence that Hess either was aware of the alleged activity or fired Darr because of it.

Undisputed evidence established that Darr’s performance was inadequate and that his discharge was entirely in accordance with valid company policy. The record is replete with statements from Darr’s co-workers criticizing his poor work habits. One stated that Darr “seemed not to care about his work” and “didn’t do a good job.” Others voiced similar concerns. “There was a lot of complaints about the work wasn’t getting done fast enough” because of Darr; he “was holding up the work.” “People still complained after several warnings.” “Richard has the attitude like an ‘I don’t care’ attitude We like to do our work, and we like to take pride in our work. Of course, we have to get our work done. This wasn’t happening.”³²⁶

The Fourth Circuit believed the weakness of the union’s case was obvious even before the complaint was filed, and that there was no evidence Darr was fired because of his union activities:

324. See *Hess*, 112 F.3d at 151.

325. *Id.* at 147.

326. *Id.* at 149.

In this case, the General Counsel went forward with a complaint on the basis of a single, uncorroborated affidavit and in the face of a wall of adverse evidence. In a civil action with a similar record, this would border on conduct sanctionable under Rule 11. It certainly cannot meet the higher standard imposed by *Pierce v. Underwood*, where the Court explicitly warned that “[t]o be ‘substantially justified’ means, of course, more than merely undeserving of sanctions for frivolousness.” Finally, we note that the failure of courts to enforce the EAJA would only benefit parties who seek to drive up company costs by forcing them to defend against meritless unfair labor practice charges. To hold this complaint “substantially justified” would condone the conversion of Board processes into a mechanism of harassment.³²⁷

While this case is of significant value to employers, letting them know there *is* recourse for the filing of unwarranted or frivolous unfair labor practice charges, it *does* demonstrate that legislation against salting is unnecessary. Employees who do not perform work at quality levels can be dismissed if the dismissal is not based on anti-union animus.³²⁸ The laws are already in place to protect employers on this point.³²⁹ If the employer is *unfairly* accused of discrimination, remedies already exist to reimburse the employer for the legal costs of fighting such a case.³³⁰ This case demonstrates the system *works* for employers, just as it works for unions and workers when an employer *does* engage in unfair labor practices.³³¹ However, encouraged by this case, opponents of salting have sought to add this Court’s rationale to the anti-salting legislation, *removing* the “substantially justified” language.

Employers have similar remedies when an employee lies about his background to cover up the fact he has had union employment.³³² In one case, a union salt was hired after falsifying his application to cover up previous union work.³³³ The employee was hired, and there was no dis-

327. *Id.* at 150-51 (quoting *Pierce v. Underwood*, 487 U.S. 552 (1988)) (citation omitted); *see also* *Irwin Indus., Inc.*, Nos. 31-CA-20526, 31-CA-20774, 31-CA-20776, 31-CA-20806, 1998 WL 261141 (May 19, 1998) (concluding that the employer proved that it would have discharged the employees even in the absence of their protected activity).

328. *See Hess*, 112 F.3d at 149.

329. *See Wright Line*, 251 N.L.R.B. 1083 (1980).

330. *See Hess*, 112 F.3d 148-49.

331. *See id.* at 149.

332. *See Arrow Flint Elec. Co.*, 321 N.L.R.B. 1208 (1996). While the NLRB reversed the ALJ’s finding that no unfair labor practice had occurred, it did say it would “leave to the compliance stage . . . what effect, if any . . . [the employee’s] deceit during the hiring should have on the remedy.” *Id.* at 1210.

333. *See Iplli, Inc.*, 321 N.L.R.B. 463 (1996).

pute he performed well for the employer.³³⁴ He waited several months before beginning to organize for the union.³³⁵ It was at that point in time, six months after being hired, that the employee was told he was being fired for falsifying his employment application.³³⁶ While ordinarily that would be legitimate grounds for firing an employee, the Administrative Law Judge found, and the NLRB agreed, that the real reason for the firing here was the employee's attempt to unionize the other workers.³³⁷ However, they stated such a policy was valid if evenly applied.³³⁸

But even some employers and their representatives have realized that to avoid unfair labor practice charges, they *must obey the law*. In a video made by the Associated Builders & Contractors, Inc. ("ABC") entitled, "You Are the Target," ABC advises employers on how to deal with the COMET program and salts.³³⁹ The video begins with sinister music and talks about union intimidation of contractors.³⁴⁰ It discusses the union's "evil plan" - to organize workers into a union - and claims there are over 50,000 salt agents.³⁴¹

But the video goes on to explain the law to its members, and by clearly explaining the law and the corresponding rights and obligations, employers are advised how to avoid unfair labor practice charges: do not ask if a prospective applicant is a member of a union, and if so advised, do not discuss or comment on the union membership; do not falsely state you have no openings to union members, when there are, in fact openings; do not change the hiring rules just to avoid hiring union members; and do not reject all union members, which would show a pattern of discrimination.³⁴²

This is wise advice, and if followed, a substantial number of unfair labor practice charges would be eliminated. Despite these admonitions by the employer representatives, other employers are still responding to salting campaigns by "referring to [the union] as organized crime trying to put" the employer out of business.³⁴³

334. See *id.* at 465.

335. See *id.*

336. See *id.* at 466.

337. See *id.*

338. See *Iplli*, 321 N.L.R.B. at 466.

339. See Videotape: Union Intimidation of Construction Contractors: You Are The Target (Associated Builders & Contractors, Inc.) (on file with the *Hofstra Labor & Employment Law Journal*).

340. See *id.*

341. See *id.*

342. See *id.*

343. *Tualatin Elec., Inc. v. NLRB*, 319 N.L.R.B. 1237, 1239 (1995) (encompassing facts

Employers should stop spending so much time, money and effort in trying to keep union employees out of their work force. Such employees will provide quality, skilled labor — and if they perform poorly, they can be fired. An employer who treats its employees fairly and loyally and pays them a decent wage will likely receive loyalty in return. A union salt can only be effective where employees are dissatisfied with their employer. The collective bargaining process should be allowed to work, without interference or coercion (as mandated by law), and allow employees free choice. In the end, whether these salts are paid by the union to organize, or whether a regular employee advocates for the union, it is up to the union to convince the employees of the reason that a union is needed. The employer is free to explain why unionization is disadvantageous (as long as it is done without threats or false promises). That is the process envisioned and in place since the day the NLRA was enacted. It remains to be seen what the unions will do given the opportunity to organize.

C. Advancing the Union's Organizing Agenda

For the union to succeed in its ultimate task, organizing employees into the union, the *Town & Country* case is merely a beginning and not an end.³⁴⁴ *Town & Country* only affirms the right of paid union organizers to compete for jobs under the same conditions as non-union applicants.³⁴⁵ The real issue is: what will the union do, once they are hired on to the project?

While there is every likelihood that the right to allow union organizers to organize from the inside will continue, unions must think carefully about how to succeed in its ultimate goal of organizing *people*, not just contracts. A “salt” who does nothing more than report violations of the non-union employer achieves nothing if he only succeeds in shutting down the business. Such tactics may affect other non-union employers, encouraging them to recognize the union, but it is not likely to win the hearts and minds of the non-union employees put out of work. Harassing co-workers about joining the union from day one, without taking some time to build personal and caring relationships between the co-

where the employer also instructed its superintendent “to eliminate wherever possible any personnel that were affiliated with the union”). Tualatin has been the subject of several unfair labor practice decisions. See *Tualatin Elec.*, 84 F.3d 1202 (9th Cir. 1996).

344. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995).

345. See *id.* at 96-97.

workers and the union organizer, is not a successful strategy for organizing.³⁴⁶

Some salting campaigns have been hugely successful, and should be a model for what unions can achieve with a well-thought-out plan. Cornell University's Construction Industry Program did a case study in 1996 examining the organizing experience of Local Number 611 of the IBEW.³⁴⁷ The organizing campaign used "salting" as a central feature.³⁴⁸ The local union was based in Albuquerque, New Mexico and represented 2,800 members, 1,500 of whom worked in the construction industry.³⁴⁹ The case study focused on the successful campaign to unionize DKD Electric, formerly the largest non-union electrical contractor in the state.³⁵⁰ The campaign to organize DKD not only relied on the tactic of salting, but also worked hand in hand with the employer to ensure it remained the most prosperous and profitable electrical contractor in the state.³⁵¹

Interestingly, the union had also focused its efforts on the second largest open shop contractor in the state, Gardner Zemke, which successfully *defeated* the union's attempts to organize.³⁵² However, unlike DKD's work force, which went from 240 electricians to about 500 union electricians, Gardner Zemke's work force was gradually reduced from nearly 300 electricians to about 50 journey level electricians within the Local's jurisdiction.³⁵³ Consequently, because Gardner Zemke did not work with the union, its business actually lost contract opportunities.³⁵⁴ DKD learned that the more union electricians the company hired, the more skilled employees DKD brought to the job, and the more DKD was successful in obtaining contracts.³⁵⁵

The Local pursued a market-wide strategy that avoided targeting individual contractors in isolation from one another and analyzed the

346. See, e.g., *Frazier Indus. Co.*, 1997 NLRB LEXIS 977 (Dec. 1997) (encompassing a case where employees complained that the salt did nothing but talk about the union all day long to the point of driving workers to physical altercations).

347. See Brian Condit et al., *Construction Organizing: A Case Study of Success*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 309 (Cornell University Press 1998) [hereinafter Condit Study].

348. See *id.* at 311.

349. See *id.* at 309.

350. See *id.* at 310, 313.

351. See *id.* at 316.

352. See Condit Study, *supra* note 347, at 311.

353. See *id.* at 316.

354. See *id.*

355. See *id.*

inter-dependency of each player in the market.³⁵⁶ This was important, because if the union targeted only one employer, and therefore forced that employer into a competitive disadvantage, only non-union contractors would benefit from the campaign. This was not the union's goal.³⁵⁷

Local 611 had been suffering from the same problems as many construction trade unions in the 1980s. In 1965, 66% of the 185,000 electricians in the United States were IBEW members; by 1989, only 28.6% of the industry's 525,000 employees were unionized.³⁵⁸ Open shop construction firms now make up 75% of the companies in the United States, while the remaining 25% are union shops.³⁵⁹ The union had been transformed by forces in the industry and watched its influence significantly decline.

During the 1970s, in New Mexico, the union estimated its share of the construction market to be about 45%.³⁶⁰ However, in the 1980s that number declined as non-union "permit workers" from the Southwest were invited to work on several big union jobs.³⁶¹ In New Mexico, as well as other regions of the country, these union projects contributed to a crisis that entangled the building trades. As union contractors and workers gravitated to industrial projects that often offered "time and material" contracts to builders and abundant overtime to members, the less desirable "hard money jobs" in the commercial market were abandoned to fledgling non-union contractors eager to step beyond their base in the residential sector.³⁶²

When the large industrial projects began to wind down in the 1980s, Local 611 faced a problem that confronted the building trades throughout the country. Travelers were sent home and permit workers were returned to New Mexico's non-union labor pool with new skills in industrial construction.³⁶³ These trained non-union workers obtained skills from the union, but then were able to obtain jobs ordinarily obtained by the union for less money.³⁶⁴ This hurt the union's membership

356. *See id.* at 313.

357. *See* Condit Study, *supra* note 347, at 309.

358. *See id.*

359. *See id.* at 315.

360. *See id.* at 310.

361. *See id.*

362. *See* Condit Study, *supra* note 347, at 310.

363. *See id.*

364. *See id.*

and the market share of union electricians also declined during the mid-80s.³⁶⁵

The IBEW's president, John J. Barry, initiated a series of proposals to reverse the trend.³⁶⁶ The IBEW launched an organizing campaign with the hope of revitalizing the unionized industry.³⁶⁷ The salting strategy was an integral part of the program, but not the only part of the program.³⁶⁸

The union followed up by organizing DKD, by "stripping" Gardner Zemke's workforce of its most skilled workers.³⁶⁹ "Stripping" involves soliciting employees from non-union shops, to come and work for union shops, at union wages and benefits.³⁷⁰ This activity is usually lawful.³⁷¹

In the end, DKD was glad it unionized and many of the open shop contractors in New Mexico have since gone union.³⁷² Union leaders believe that progress can only be sustained if the Local fulfills its promise to all its business partners.³⁷³ They state that DKD must prosper as a unionized employer so as to set an example for other open shop builders contemplating signing with the IBEW.³⁷⁴

This is the type of example that union officials are trying to instill in union organizers through its COMET training program.³⁷⁵ This training program, developed by the IBEW and other building trade unions, with the assistance of Jeff Grabelsky of Cornell University's Construction Organizing Project, trains union members to become effective salts on an employer's project.³⁷⁶ The NLRB has made clear its willingness *not* to protect salts who engage in *unprotected* activity, designed simply to hurt the employer's business.³⁷⁷ Therefore, trainees are taught to op-

365. *See id.*

366. *See* Letter from J.J. Barry, International President, International Brotherhood of Electrical Workers, to Honorable Peter Hoekstra, Chairman, Subcommittee on Oversight and Investigations (Dec. 18, 1995) (on file with the *Hofstra Labor & Employment Law Journal*).

367. *See* Condit Study, *supra* note 347, at 311.

368. *See id.* at 311-12.

369. *See id.* at 316.

370. *See id.* at 312.

371. *See* Arlington Elec., Inc., No. 12-CA-17156, 1997 NLRB LEXIS 568, at *28 (July 16, 1997).

372. *See* Condit Study, *supra* note 347, at 317.

373. *See id.* at 312.

374. *See id.* at 313.

375. *See id.* at 312-13.

376. *See generally* CORNELL UNIVERSITY, NYSSILR, COMET II, WORKSITE ORGANIZING WITH COMET ACTIVISTS TRAINERS' MANUAL (1994) (teaching organizing tactics with a primary focus on salting).

377. *See, e.g.,* NLRB v. Local Union 1229, International Bhd. of Elec. Workers (Jefferson Standard), 346 U.S. 464 (1953), *aff'g* 94 N.L.R.B. 1507 (1951) (holding that employees who en-

erate within the law, and are told to be the best employees possible on the job so as not to risk being fired.

Other salt organizing efforts have been successful: Local 25 of the IBEW signed up more than eighty new members with its salting campaign.³⁷⁸ Local 995 of IBEW, in Baton Rouge, has also had success.³⁷⁹ Finally, Local 640 of the IBEW recently signed the largest non-union contractor in Arizona to a union contract.³⁸⁰

These successes might not have been possible without allowing organizers into the employer's workplace. But they also would not have been possible if the union workers performed work poorly, and sought to destroy the employer's business.

Labor stands at a real crossroads. With a new leadership,³⁸¹ and a commitment to rebuilding the labor movement, many new and old organizing strategies must be reexamined. Union membership is at an all-time low—only eleven percent of the American workforce.³⁸² Labor must recruit 300,000 new members each year, just to keep up with the growth of the labor force and to compensate for the thousands of union jobs lost each year to plant closings and layoffs.³⁸³ Unions cannot simply blame the law or external forces for their declining membership, though conservative legal rulings and economic factors have certainly had an impact. Unions bear a significant share of the blame for their own lackadaisical attitudes towards organizing in the 1960s, 1970s and 1980s.

The workforce has changed: more women, more people of color, and new ethnic groups and immigrants are constantly changing the face of American labor. Union organizers will have to take the time to work through language barriers, cultural biases, racial issues and gender issues (e.g., issues related to discrimination, harassment, maternity leave,

gage in certain activity, even though concerted, but designed to injure their employer's business, may be without protection of the Act).

378. See Kenneth C. Crow, *High Court Gives Union a Boost/Planting Organizers Is Allowed*, *NEWSDAY*, Nov. 29, 1995, at A39.

379. See William Krizan, *Baton Rouge Firm Stung by Salt*, *ENGINEERING NEWS-REC.*, Aug. 12, 1996, at 12.

380. See *Organizing in the Valley of the Sun: Phoenix Local 640 Signs Up Largest Nonunion Contractor in Area*, *IBEW J.*, Apr. 1997, at 14.

381. In 1995, the AFL-CIO elected John Sweeney as its President, Linda Chavez-Thompson as Vice-President and Richard Trumka as Secretary, a reform slate particularly committed to improving and increasing the labor movement's organizing efforts. See Robert L. Rose & Asra Q. Nomani, *New President is Known as Successful Organizer; Executive Panel Grows*, *WALL ST. J.*, Oct. 26, 1995, at A2.

382. United States Bureau of Labor Statistics, 1997.

383. See *id.*

single parent households and child care issues). Labor must go back into the workplace and learn to struggle and connect with people in their day to day lives by organizing from the inside, to make that difference. Reaching out to workers in all facets of their community life, from neighborhood work to religious and other social groups, labor must organize from the bottom up, not the top down.

CONCLUSION

When all is said and done, the controversy over salting only adds “salt” to long-standing wounds in the war over unionization, and ought to be put to rest after *Town & Country*. While employers may feel the *Town & Country* decision tipped the balance of labor relations in favor of unions, many unions see the decision as tipping the balance back, creating a more level playing field after a number of pro-employer decisions had hindered unions’ ability to organize.

Existing laws are sufficient to deal with the possibility of union organizers in the workforce. Employers can legitimately institute “no-moonlighting” policies and fire for falsifying employment applications or poor work performance, as long as such policies are applied evenly to all employees and are not simply a pretext to rid themselves of pro-union employees. If unions break the law, employers already have ample legal recourse, and remedies are available if unions file frivolous unfair labor practice charges.

But employers should also reflect on the real cost of fighting unionization. It may be cheaper in the long run to avoid the legal costs of fighting a union. Those funds could instead go to acquiring and training a quality skilled labor force, which all sides agree the union provides. The unionized employer will ultimately be able to expand its business with that quality reputation.

Those that accuse the NLRB of being a “tool” of unions need only look to the NLRB’s long history of pro-employer decisions.³⁸⁴ The balance of the NLRB’s rulings may tip depending on the political party of the administration it serves, but ultimately, its members can only follow the NLRA. The issue of whether paid union organizers constitute employees for purposes of the Act was correctly decided by the NLRB and U.S. Supreme Court. The law, as enacted, and the intent behind the law, mandated that decision. It is time for employers to accept that decision.

384. See Laurence J. Cohen and Victoria L. Bor, *The National Labor Relations Act Under Siege: A Labor View of the Reagan Board*, 31 INST. ON LAB. L. § 4.02 (1985).

If not, unions must do what they have done in the past—get into the workplace and organize.

Embedded in the NLRA is the premise that there is no conflict between the right of employees to engage in collective activity and their obligations to their employers. There is thus no conflict between a union organizer's duty to the nonunion employer by which he or she is employed, and that organizer's duty to the union. As the NLRB concluded in *Town & Country*, "[t]he statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer." The fact that paid union organizers intend to organize the employer's workforce if hired establishes neither their unwillingness nor their inability to perform quality services for the employer.

The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize.³⁸⁵

The process of collective bargaining must take its course, as Congress intended.

385. *Prepared Statement of Robert A. Georgine, President, Building and Construction Trades Department, AFL-CIO Before the Senate Committee on Labor and Human Resources*, FED. NEWS SERV., June 10, 1997, available in LEXIS, Legis Library, FedNews File (relying on *Town & Country Elec.*, 309 N.L.R.B. 1250, 1257 (1992)).

