

## THE PRACTICE OF “SALTING” AND THE NATIONAL LABOR RELATIONS ACT

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Section 7 of the National Labor Relations Act (“NLRA”) provides that “employees 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 concerted activities for the purpose of collective bargaining or other mutual aid or protection....”<sup>1</sup> Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to restrain or coerce employees in the exercise of rights granted them under federal law.<sup>2</sup> Implicitly included in these sections, in the context of a union campaign, is the recognition of employer property interests.<sup>3</sup>

To a certain degree, the employer has a right to control unionization efforts conducted on company property. In *Lechmere, Inc. v. NLRB*, the Supreme Court held that solicitation on behalf of the union by non-employees on company property could be banned, but not solicitation on public areas.<sup>4</sup> In contrast to non-employees, however, the union is less restricted with respect to the solicitation efforts of employees. An employer may not prohibit its own employees from distributing literature in nonworking areas, such as the cafeteria, break room, bathroom or parking lot, during nonworking times, such as before and after work or during lunch or breaks, unless it can show such a ban is necessary to maintain discipline or production.<sup>5</sup> Employees are granted greater leeway in union organization efforts, so it is not uncommon for unions to plant a paid organizer in a nonunion firm with the aim of helping to organize an employer’s workforce, a tactic known as “salting.”

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<sup>1</sup> 29 U.S.C. § 157 (2001).

<sup>2</sup> 29 U.S.C. § 158(a)(1) (2001).

<sup>3</sup> While workers have a right to be educated on union matters, that right must be balanced against the employer’s right to secure his firm from outsiders. In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Court determined that a company could bar non-employee union organizers from conducting organizing activities on company property, provided the union had reasonable means of accessing employees. *Id.* at 113.

<sup>4</sup> 502 U.S. 527 (1992). Once an election is pending, a National Labor Relations Board rule requires employers to file with the regional director, within seven days after an election order is issued, a list of the names and addresses of all employees eligible to vote in a certification election. The list is then turned over to the union or its organizers. This *Excelsior list*, named for the case that established the requirement, gives organizers critical information in their unionization efforts. *Excelsior Underwear*, 156 N.L.R.B. 1236 (1966). This rule, however, does not aid the union in making the initial contact with workers for securing signed authorization cards.

<sup>5</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The burden of proof is on the employer to justify any ban on such activities for efficiency, safety or disciplinary reasons.

For years, it was questionable whether or not the activities of such paid union organizers were protected, because they may not be considered true employees under the NLRA, and only employees are entitled to rights granted under the Act. The resolution of the issue was of considerable importance, for obvious reasons. Section 8(a)(3) of the NLRA specifically provides that it is an unfair labor practice for an employer 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.”<sup>6</sup> If paid union organizers are considered employees, and the employer terminates them because of their unionization efforts or fails to hire them because of their union affiliation, then such action could be considered a violation of federal law.<sup>7</sup> In *National Labor Relations Board v. Town & Country Electric, Inc.*<sup>\*</sup> the Supreme Court considered the issue and sanctioned the practice of salting. The Court held that a worker might be a company’s employee within the meaning of the Act, even if, at the same time, a union pays the worker to organize the workforce.<sup>9</sup> This paper discusses that pivotal case and subsequent cases concerning the practice, and their effect on labor-management relations.

#### I. THE HISTORY OF THE PRACTICE

The application of the term “salting” to unionization purportedly stems from the practice in the mining industry of artificially enriching mines by placing valuable minerals within, so as to defraud prospective buyers.<sup>10</sup> No doubt, union advocates suggest that the term illustrates how union members enrich the workplace, while detractors focus on the fraudulent nature of the practice.<sup>11</sup> This method of organizing a workplace from within has been used throughout the history of the labor movement, particularly in the construction industry.<sup>12</sup>

A couple of factors, however, contributed to its increased use since 1980. First, union membership has reached historical lows, after a fairly steady decline since the early 1980s.<sup>13</sup> Arguably, the decline in numbers eroded the bargaining

<sup>6</sup> 29 U.S.C. § 158(a)(3) (2000).

<sup>7</sup> See *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993) (layoffs).

<sup>8</sup> 516 U.S. 85 (1995).

<sup>9</sup> *Id.* at 88.

<sup>10</sup> James L. Fox, “Salting” the Construction Industry, 24 WM. MITCHELL L. REV. 681, 682 (1998); Victor J. Bourg & Ellyn Moscovitz, *Salting the Mines: The Legal and Political Implications of Placing Paid Union Organizers in the Employer’s Workplace*, 16 HOFSTRA LAB. & EMP. L.J. 1, 5 (1998).

<sup>11</sup> The practice of union members surreptitiously concealing their true identity has also been compared to the famed Trojan horse in Greek history. Kathleen Sheil Scheidt, Comment, *National Labor Relations Board v. Town & Country Electric, Inc.: Allowing a Trojan Horse to Trample Employer Rights*, 24 IOWA J. CORP. L. 89, 92 n. 31 (1998) (citing *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1232 (1992) (Member Oviatt, concurring)).

<sup>12</sup> Bourg & Moscovitz, *supra* note 10, at 3-4.

<sup>13</sup> Scheidt, *supra* note 11, at 89. The change in the economy from manufacturing to service, the global expansion of facilities, and the effects of mergers, consolidations and downsizing are all factors that arguably contributed to this decline in numbers. *Id.* In 1995, just fewer than 15% of American workers belonged to unions, a figure down considerably from a 1945 high of 35.5% in the non-agricultural sector.

strength of unions, as well.<sup>14</sup> Second, a series of anti-union court decisions,<sup>15</sup> which limited recruitment by non-employees on employer property,<sup>16</sup> allowed construction industry employers to terminate their bargaining relationship with a union at the end of its contract, unless the union had won representation rights,<sup>17</sup> and permitted the practice of "double-breasting" - that is, allowing employers to operate a union shop simultaneously with an ostensibly separate, non-unionized business<sup>18</sup> - all adversely affected union organizing efforts, and, commensurately, the number of union members. In response, union leadership stepped up recruitment drives, with salting being a cost-effective way to accomplish the objective of increasing membership.<sup>19</sup>

Employers deplore the use of "salts" in the workplace, not only because they may prove successful in their organizational efforts, but also because their presence may result in the discovery of unfair labor practices and the filing of charges with the National Labor Relations Board ("NLRB").<sup>20</sup> Some observers argue that defending such charges has the real potential to bankrupt small companies.<sup>21</sup> In contrast, others argue that successful salting campaigns have ensured the prosperity of the targeted employer.<sup>22</sup> These conflicting views, sincerely and earnestly held by their respective adversaries, made the issue of the legality of salting a critical one, in light of its increased use by unions in the construction industry.

Diane E. Gwin, *Paid Union Organizers Within the Definition of "Employee NLRB v. Town & Country Electric, Inc., 1995-96 Annual Survey of Labor and Employment Law: Labor Law*, 38 B.C. L. Rev. 303, 311 n.79 (1997). However, the trend of declining membership may be changing, as the result of market forces and organizing drives, since union membership actually increased in 1999. Michael D. Goldhaber, *Is NLRB in a Pro-labor Mood?*, NAT'L L.J., Oct. 9, 2000, at B4.

<sup>14</sup> Fox, *supra* note 10, at 683.

<sup>15</sup> For an analysis of the cases, see Bourg & Moscovitz, *supra* note 10, at 10-13.

<sup>16</sup> See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and discussion, *supra* notes 3-5 and accompanying text.

<sup>17</sup> *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

<sup>18</sup> *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976).

<sup>19</sup> Kenneth N. Dickens, Comment, *Town & Country Electric, Inc. v. National Labor Relations Board: Salts: We're Employees — What Happens Now?*, 99 W. Va. L. REV. 561, 564, 592 (1997). Some observers have noted that unions, in order to maintain viability, must also recognize and respond accordingly to the changing face of labor, as evidenced by the increased number of women, people of color, and new ethnic groups and immigrants in the workforce. Bourg & Moscovitz, *supra* note 10, at 49-50.

<sup>20</sup> Fox, *supra* note 10, at 685-86.

<sup>21</sup> Scheidt, *supra* note 11, at 90-91, 102-03. See also John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. Emp. & Lab. L. 49, 80-82 (2001) (union strategy of salting causes deadweight losses, by raising non-union rival firms' costs).

<sup>22</sup> Bourg & Moscovitz, *supra* note 10, at 46.

## II. THE DECISIONS ON SALTING

Prior to the Supreme Court's decision in *Town & Country*, the circuit courts were split on whether or not salts were protected employees under the NLRA.<sup>23</sup> The NLRB maintained that salts should be considered protected employees under the NLRA and should not be discriminated against based on union affiliation,<sup>24</sup> although the employer could refuse to hire agents of the striking union during a strike.<sup>25</sup> The NLRB's position was endorsed by the Second<sup>26</sup> and Third<sup>27</sup> Circuits, as well as the Circuit Court of Appeals for the District of Columbia.<sup>28</sup> Apparently, the Eleventh Circuit was willing to extend protection at least to volunteer organizers.<sup>29</sup>

Other circuit courts did not view organizers as employees entitled to protection. The Fourth Circuit held that a paid professional union organizer was not an employee under the NLRA, because two employers could not employ one person simultaneously; therefore, management had a right to refuse to hire someone already employed.<sup>30</sup> Likewise, the Sixth Circuit held that a worker who assisted the union in organizing and was paid by the union could not be a *bona fide* employee under the NLRA.<sup>31</sup> Finally, in the case that was appealed to the Supreme Court, *Town & Country Electric, Inc. v. NLRB*,<sup>32</sup> the Eighth Circuit concluded that an organizer, paid

<sup>23</sup> For a discussion of the controversy, before the circuits and the NLRB, prior to the Supreme Court's decision, see Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 Harv. L. Rev. 1341, 1343-45 (1995); Jonathan D. Hacker, Note, *Are Trojan Horse Union Organizers "Employees"?: A New Look at Deference to the NLRB's Interpretation of NLRA Section 2(3)*, 93 MICH. L. Rev. 772, 777-791 (1995); Susan E. Howe, *To Be or Not To Be: That Is the Question of Salting*, 3 Geo. MASON IND. L. Rev. 515 (1995); Gregory C. Kloeppel, Note, *Salt Anyone? The United States Supreme Court Holds That Paid Union Organizers Qualify as Employees Under the NLRA in NLRB v. Town & Country Electric, Inc.*, 42 St LOUIS L.J. 243, 254-59 (1998); Dickens, *supra* note 19, at 574-582.

<sup>24</sup> See, e.g., *Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041 (1974), *enforced*, 538 F.2d 312 (2d Cir. 1975); *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975); *Anthony Forest Products Co.*, 231 N.L.R.B. 976 (1977).

<sup>25</sup> *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1230-31 (1992).

<sup>26</sup> *NLRB v. Henlopen*, 599 F.2d 26 (2d Cir. 1979)(paid union organizer is an employee under the NLRA).

<sup>27</sup> *Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845 (1991) (employer who refused to hire a paid organizer committed an unfair labor practice).

<sup>28</sup> *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), *cert. denied*, 507 U.S.909 (1993) (paid union organizer who applies for a job in order to organize the workplace is an employee under the Act, even though he intends to maintain union affiliation and possibly return to full-time employment with union).

<sup>29</sup> *Fluor Daniel, Inc. v. NLRB*, 976 F.2d 744 (11th Cir. 1991), *enforcing without opinion* 304 N.L.R.B. 970 (1991), *reh'g denied* 980 F.2d 1449 (11th Cir. 1992).

<sup>30</sup> *H.B. Zachary Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989). See also *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994), *denying enforcement of* 310 N.L.R.B. 545 (1993) (paid union organizer does not qualify as an employee).

<sup>31</sup> *NLRB v. Elias Brothers Big Boy*, 327 F.2d 421,427 (6th Cir. 1964).

<sup>32</sup> 34 F.3d 625 (8th Cir. 1994), *denying enforcement of* 309 N.L.R.B. 1250 (1992), *rev'd*. 516 U.S. 85 (1995).

or unpaid, could not be considered an employee, because the goal of any salting program was incompatible with a person's status as a loyal employee.<sup>33</sup>

In reversing the circuit court, the Supreme Court held that the Board's construction of the term "employee" under Section 2(3) of the NLRA, which included workers who are paid union organizers, was lawful.<sup>34</sup> First, the Court noted that the statutory definition broadly directed that the term should include *any* employee, accompanied by specific exceptions.<sup>35</sup> The Court then noted that the term had previously been defined liberally, to include confidential employees, undocumented aliens, and job applicants, among others.<sup>36</sup> The Court explained that a broad, literal interpretation was consistent with several of the Act's purposes.<sup>37</sup>

The Court went on to reject the employer's argument, based on common law agency principles, for lack of practical support. Justice Breyer, writing for a unanimous Court, concluded that a worker could be subject to the control of the employer with respect to their assigned tasks and yet organize for the union, for example, during nonworking hours.<sup>38</sup> The Court also rejected the company's argument that salts could not be considered employees, because they might try to harm the employer's business.<sup>39</sup> Justice Breyer reasoned that nothing in the record suggested that there was a problem with acts of disloyalty to the point where the company would lose control.<sup>40</sup> He also explained that the law offered other remedies for such concerns, short of excluding paid or unpaid workers from protection, such as using fixed term contracts with notice periods, as well as using disciplinary or complaint procedures.<sup>41</sup>

In conclusion, the Court stressed the preciseness of its holding, which did not address whether or not the employer's conduct in refusing to interview or retain union organizers amounted to an unfair labor practice, but only provided that the Board's interpretation, which did not exclude paid organizers, was lawful.<sup>42</sup> On remand, the Eighth Circuit enforced the Board's order, which was based upon a conclusion that the employer, who refused to hire the paid union organizers who applied for work, committed an unfair labor practice in violation of the NLRA.<sup>43</sup>

<sup>33</sup> *Id.* at 629.

<sup>34</sup> *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 88 (1995). For discussion of the Supreme Court's opinion, see Kloepfel, *supra* note 23, at 258-262; Gwin, *supra* note 13, at 306-312.

<sup>35</sup> *Town & Country Electric, Inc.*, 516 U.S. at 90-92.

<sup>36</sup> *Id.* at 91-92.

<sup>37</sup> *Id.* at 91.

<sup>38</sup> *Id.* at 95.

<sup>39</sup> *Id.* at 96.

<sup>40</sup> *Id.* The Court further noted that, in some instances, a paid organizer might not share a sufficient "community of interests" with other employees so as to warrant inclusion in the same bargaining unit. *Id.* at 97.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 98.

<sup>43</sup> *NLRB v. Town & Country Electric, Inc.*, 106 F.3d 816 (8th Cir. 1997). The court of appeals also upheld the administrative law judge's findings that the company's decision not to retain a paid union organizer was due to his organizing activities. *Id.* at 821-22.

### III. THE AFTERMATH OF THE SUPREME COURT'S DECISION: NEW OPPORTUNITIES, NEW ISSUES

#### A. Employer Responses: Concerns and Strategies

Arguably, the Supreme Court's holding in *Town & Country Electric* leveled the playing field a bit with respect to workplace access after its holding in *Lechmere*, which restricted the union's accessibility to the physical premises.<sup>44</sup> Even though salts are now properly considered employees under the NLRA, the failure to interview, hire or retain them is not automatically an unfair labor practice.<sup>45</sup> The employer simply may not predicate such decisions on the union affiliation of employees or prospective employees, and their desire to unionize the workplace. To prove an unfair labor practice, there still must be evidence of anti-union animus that motivates decisions not to consider or to hire an applicant (or to terminate an employee), which can be established by circumstantial evidence, such as refusing to hire applicants who reveal their union membership, while at the same time hiring an applicant who lies about his union affiliation.<sup>46</sup>

The Court's decision in *Town & Country Electric* may result in union organizers being able to converse more than previously with non-union workers about the benefits of unionization. Yet, employers will still be able to attempt to discredit claims made by the organizers, although neither labor nor management can express views containing a threat of reprisal or force, or promise of benefit.<sup>47</sup> Even after the decision, employers still can convey management's views on unionism, and predict the likely business ramifications that will result from unionization, as long as those consequences are based upon objective criteria beyond the employer's control<sup>48</sup>

Even though they are now clearly protected against discrimination, it should not be presumed that the presence of salts will be disruptive to an employer's business, and that there is no remedy should such a situation develop. Just because salts are union organizers does not mean that they will be disloyal employees.<sup>49</sup> Presumably, if an

<sup>44</sup> See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and discussion, *supra* notes 3-5 and accompanying text.

<sup>45</sup> Kloeppel, *supra* note 23, at 262.

<sup>46</sup> *Bat-Jac Contracting, Inc. v. NLRB*, No. 96-4055, 153 L.R.R.M. 2832, 1996 U.S. App. LEXIS 27541, at \*7 (2d Cir. Oct. 23, 1996).

<sup>47</sup> Section 8(c) of the NLRA provides that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit."

<sup>29</sup> U.S.C. § 158(c) (2001).

<sup>48</sup> In other words, if economic conditions that accompany unionization will inevitably lead to a plant closing and the employer conveys these objective facts to the workers, then such speech does not constitute a threat of reprisal and is protected. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (implication that employer may take action on his own initiative is a threat of retaliation and not a reasonable prediction based on available facts).

<sup>49</sup> See *Bat-Jac Contracting, Inc. v. NLRB*, No. 96-4055, 153 L.R.R.M. 2832, 1996 U.S. App. LEXIS 27541, at \*6 (2d Cir. Oct. 23, 1996) (a desire to organize is not inconsistent with the salts' status as good

irreconcilable and disqualifying conflict of interest occurs between the union's salting campaign and the obligation salts owe to their employer, a valid justification for discharge would exist.<sup>50</sup> Likewise, their union association does not mean that salts will be incompetent employees, and ability should be the important consideration.<sup>51</sup> If, in fact, their activities on behalf of the union prove to be disruptive and their performance on the job to be substandard, then salts can be discharged for legitimate reasons, not related to their union affiliation.<sup>52</sup> What is prohibited is for employers to presume that the anticipated organizational activities of salts will be disruptive in the absence of objective proof of such disruption, or, alternatively, of poor performance.

Nevertheless, because non-union employers are loath to hire union sympathizers, much less organizers, can employers lawfully develop neutral criteria to exclude salts from the work place or to limit their effectiveness? The answer is "perhaps," provided such rules are enforced in a nondiscriminatory fashion and are not motivated by anti-union animus.<sup>53</sup> For example, a rule prohibiting solicitation during work time is valid, if enforced for all types of conversations.<sup>54</sup> However, in *MJ. Mechanical Services, Inc. v. NLRB*,<sup>55</sup> the D.C. Circuit Court of Appeals determined that the company violated the NLRA by targeting the salts' pro-union discussion for punishment, because the company had no reasonable basis for allowing all non-work related conversations except those involving unions.<sup>56</sup> The Sixth Circuit upheld an employer "no moonlighting" rule, which prohibited employees from working for any two employers simultaneously,<sup>57</sup> although the NLRB has found such policies to be unlawful if directed at union activity.<sup>58</sup> Other

faith applicants for employment). *See also* Note, *supra* note 23, at 1356 (concerted activity in organizational drive does not itself constitute disloyal conduct).

<sup>50</sup> On remand, Town & Country Electric argued as much, although the argument was rejected, because it was raised for the first time on appeal. The Eighth Circuit previously had considered the conflict-of-interest argument only in the context of the statutory definition of employee, not as a defense to an unfair labor practices charge. *NLRB v. Town & Country Electric, Inc.*, 106 F.3d 816, 822 (8th Cir. 1997).

<sup>51</sup> *Bourg & Moscowitz*, *supra* note 10, at 50-51; *Hacker*, *supra* note 23, at 792-93.

<sup>52</sup> *See, e.g.*, *Hess Mechanical Corp. v. NLRB*, 112 F.3d 146 (4th Cir. 1997) (union organizer validly terminated for substandard performance in accordance with company policy); *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 834 (7th Cir. 2000), *cert. denied*, 533 U.S. 950 (2001) (employer does not violate the statute for terminating an employee for unauthorized entry into a restricted area, when there is no evidence to suggest that the employer would have tolerated such behavior from union opponents).

<sup>53</sup> For a discussion of various employer strategies, see *Bourg & Moscowitz*, *supra* note 10, at 40-45; *Fox*, *supra* note 10, at 694-97 (application process).

<sup>54</sup> *Dickens*, *supra* note 19, at 591. One commentator suggested that employers are likely to become more subtle in discriminating against qualified applicants who are union organizers, such as by screening for certain traits, such as leadership qualities, which are designed to exclude organizers. *Gwin*, *supra* note 13, at 312-13. In other words, employers may use more sophisticated screening devices, such as psychological tests validated to predict such behavior, at a resultant increased cost to them.

<sup>55</sup> No. 97-1716, 1998 U.S. App. LEXIS 33922 (D.C. Cir. Dec. 28, 1998).

<sup>56</sup> *Id.* at \*7-\*8.

<sup>57</sup> *Architectural Glass & Metal Co., Inc. v. NLRB*, 107 F.3d 426 (1997).

<sup>58</sup> *Tualatin Elec., Inc.*, 319 N.L.R.B. 1237 (1995); *but see* *Little Rock Electrical Contractors*, 327 N.L.R.B. No. 166 (Mar. 22, 1999) (failure to hire union agents was for legitimate, nondiscriminatory reason, pursuant to employer's written rule, which prohibited simultaneous employment).

rules concerning the application process have been upheld as lawful, such as one limiting the number of applicants who may enter the office to apply at one time.<sup>59</sup>

Usually, a finding of anti-union animus must precede a determination that such facially nondiscriminatory practices or policies constitute an unfair labor practice. However, in *Aztech Electric Company*,<sup>60</sup> the NLRB found that a policy of not hiring or considering any applicant whose recent wage history differed by thirty percent from that of the Contractor's Labor Pool, a nonunion construction employee leasing company, violated the NLRA.<sup>61</sup> The Board determined that such a rule was so inherently destructive of the rights of employees that no proof of anti-union animus was necessary.<sup>62</sup>

In the years since the Supreme Court's decision in *Town & Country Electric*, employers have promulgated various rules, such as those previously mentioned, in an effort to exclude salts, and yet hoping not to run afoul of the NLRA and the protected status of salts. Certainly, such rules, in order to be considered nondiscriminatory, must be applied consistently and uniformly, with little deviation.<sup>63</sup> The timing of the implementation of such rules might also be of importance.<sup>64</sup> In other words, was a company's no moonlighting policy a longstanding one, or instead established in response to a union salting program? While the legitimacy of such rules, ostensibly aimed at salts, has been questioned, so too has the allocation of the burden of proof that is needed to establish an unfair labor practice for refusing to hire or to consider the employment applications of salts.

<sup>59</sup> *Custom Topsoil, Inc.*, 328 N.L.R.B. No. 66 (May 20, 1999). A rule that uniformly prohibits the falsification of information included on employment applications, such as prior union affiliation, could be legitimate if applied in an even-handed manner for all types of false information provided by applicants. See *Iplli, Inc.*, 321 N.L.R.B. 463 (1996) (providing false information was not the actual reason for the discharge).

<sup>60</sup> 335 N.L.R.B. No. 25(2001).

<sup>61</sup> *But see J.O. Mory, Inc.*, 326 N.L.R.B. No. 61 (Aug. 27, 1998) (practice of not hiring at entry level positions applicants who are earning more than what the prospective employer was paying is a facially valid policy to protect against turnover); *Kelly Constr. of Indiana, Inc.*, 333 N.L.R.B. No. 148 (May 2, 2001) (preference for hiring applicants who were accustomed to earning wages within the range the employer would pay is a neutral and legitimate hiring policy).

<sup>62</sup> The Supreme Court, in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), recognized that certain conduct could be so inherently discriminatory and destructive of employee rights that proof of antiunion motivation is unnecessary.

<sup>63</sup> *Sunland Constr. Co.*, 309 N.L.R.B. 1224,1229 (1992).

<sup>64</sup> One Board member suggested that employers should have to show that such policies were not merely an *ad hoc* response to a union campaign, but were 1) in existence before the organizational effort, 2) openly promulgated, and 3) widely disseminated among persons involved in the hiring process. *Kelly Constr. of Indiana, Inc.*, 333 N.L.R.B. No. 148 (May 2,2001) (Member Liebman, dissenting in part).

## B. The NLRB's Response: New Decisions

### 1. Guidelines for Salts in Refusal to Hire or Consider Cases

Even before the Supreme Court decided *Town & Country Electric*, there was confusion over what proof was necessary to establish violations of the NLRA for cases involving a discriminatory refusal to hire or to consider for employment. The decision, however, made the issue increasingly important, given the now-protected status of salts and the increased use of salting by unions. Under what is known as the *Wright Line Test*, the NLRB uses a burden-shifting test in mixed motive unfair labor practices cases involving a discriminatory discharge or a refusal to hire.<sup>65</sup> According to *Wright Line*, the General Counsel first must make out a *prima facie* showing sufficient to support the inference that the protected conduct of the applicant was a motivating factor in the adverse hiring decision.<sup>66</sup> The burden then shifts to the employer to establish that the applicant was rejected for reasons not related to the protected activity, or union support.<sup>67</sup>

Some questions remained, however, such as the difference in proof, if any, for a failure to hire case versus a failure to consider case, and the administrative stage at which alleged defenses are to be disputed. For example, in *NLRB v. Fluor Daniel, Inc.*,<sup>68</sup> the Sixth Circuit reversed the NLRB and held that there can be no violation of the statute if an employer has no job openings, and that the General Counsel must match qualified applicants with available jobs at the hearing on the merits,<sup>69</sup> not at a compliance proceeding,<sup>70</sup> as was the position of the Board.<sup>71</sup> In *Starcon, Inc. v. NLRB*,<sup>72</sup> the Seventh Circuit concurred with the Sixth Circuit that the employer must prove at the hearing on the merits that it would have not hired the applicants in the absence of their union activity, but did not support the Sixth Circuit's requirement that the General Counsel had to match qualified applicants with job openings as part

<sup>65</sup> *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The Board's test was approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393,401-04 (1983).

<sup>66</sup> *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1088-89 (1980). For example, the General Counsel must show that an employment application was submitted, employment was refused, the applicant was known or suspected by the employer to be a union supporter, and the employer refused to hire the applicant because of anti-union animus. Fox, *supra* note 10, at 687-88. Often, union supporters will clearly designate their affiliation on the application, so there is no question that the employer knew their status.

<sup>67</sup> In other words, the employer must establish that there were no improper motivations, or that the same action would have been taken anyway, and that there was no anti-union animus. Dickens, *supra* note 19, at 566-67.

<sup>68</sup> 161 F.3d 953 (6th Cir. 1998).

<sup>69</sup> *Id.* at 967-69.

<sup>70</sup> A compliance proceeding considers the appropriate remedies for violations and usually happens after an unfair labor practices hearing.

<sup>71</sup> The NLRB's position was that the Act was violated when the employer refused to consider hiring a qualified applicant. The D.C. Circuit endorsed this approach. *Great Lakes Chemical Corp. v. NLRB*, 967 F. 2d 624,628-30 (D.C. Cir. 1992).

<sup>72</sup> 176 F.3d 948 (7th Cir. 1999).

of the *prima facie* case for a refusal to hire violation.<sup>73</sup> On the other hand, the Fourth Circuit, in *Ultrasystems Western Constructors v. NLRB*,<sup>74</sup> recognized that a remedy was appropriate only when a refusal to consider also results in a refusal to hire, but that such a determination should be made in the remedial stage, at a compliance hearing.<sup>75</sup>

In order to clarify unfair labor practices cases concerning refusals to hire and refusals to consider applicants for employment, the NLRB recently announced a new framework, to make clearer the elements of a violation, the respective burdens of the parties, and the stage at which issues, such as employer defenses, are to be litigated. A manufacturer of industrial refrigeration equipment, FES, advertised for welders and pipe fitters. Although qualified union journeymen responded, none were hired; the persons who were hired, however, did not have the qualifications set forth in the advertisements.<sup>76</sup> In its decision in *FES (A Division of Thermo Power)* on the unfair labor practices charge filed by the union, the Board concluded that the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated on the merits.<sup>77</sup> Thus, under *Wright Line* and *FES*, the General Counsel must show that 1) the employer was hiring or had concrete plans to hire, 2) the applicants had the relevant experience or training<sup>78</sup> (or the employer failed to adhere uniformly to the requirements or that they were pretextual) and 3) anti-union animus contributed to the decision not to hire.<sup>79</sup>

Once such proof is established, the burden shifts to the employer to show that the applicants would not have been hired in the absence of their union activity or affiliation, or that the applicants either did not possess the requisite qualifications or were not as qualified as those persons hired.<sup>80</sup> Unlike a discriminatory discharge

<sup>73</sup> *Id.* at 951. Instead, the appeals court held that the General Counsel, at a minimum, had to establish the number of union supporters who would have been hired in the absence of anti-union animus, not exactly which ones. *Id.* at 951-52.

<sup>74</sup> 18F.3d251 (4th Cir. 1994).

<sup>75</sup> *Id.* at 259. In other words, the Board must find that there was an actual vacancy for refusal to consider liability. *Id.* at 255-56.

<sup>76</sup> For a discussion of the case, see *NLRB Adopts New Guidelines for "Salting" Cases*, Nev. Employment L. Letter, Aug. 2000 (on file with authors).

<sup>77</sup> 321 N.L.R.B. No. 20 (May 11, 2000).

<sup>78</sup> Testimony or documentary evidence, such as an application with employment history, experience or training, should be introduced to establish proof beyond mere assertion or conjecture. *Oil Capital Electric*, 337 N.L.R.B. No. 150 (July 31, 2002) (no evidence in record to carry General Counsel's burden to show applicant's relevant experience or training).

<sup>79</sup> Anti-union animus and discriminatory motivation may be inferred, for example, when an employer that receives applications marked "voluntary union organizer," subsequently posts a notice that it is no longer accepting applications, and then three months later begins to rely exclusively on temporary employment agencies for all its manpower needs. *Tim Foley Plumbing Service, Inc.*, 337 N.L.R.B. No. 88 (May 31, 2002).

<sup>80</sup> The General Counsel must show that the applicants met the objective criteria for employment, that is, the applicants met the announced job requirements to the extent that they were based on nondiscriminatory, objective and quantifiable criteria. Then, since employers are familiar with their subjective employment criteria, the burden rests with them to show that the applicant failed to meet imprecise or ambiguous criteria relying on judgment calls, or alternatively, that others had superior

case, where there was obviously a position in the firm for the alleged discriminatee and the issue is why he was terminated, a refusal to hire case centers on why the applicant was not included in the firm in the first place. Therefore, the Board reasoned, in addition to establishing anti-union animus in the decision not to hire, the General Counsel must also prove that there was at least one opening for which the pro-union applicant was qualified.<sup>81</sup>

In contrast, a discriminatory refusal to consider could violate the NLRA, even when no hiring is taking place. In refusal to consider violations, the Board concluded that the General Counsel bears the burden of showing at the hearing on the merits that the employer excluded certain applicants from the hiring process, and that anti-union animus contributed to the decision not to consider. Once such proof is forthcoming, the burden shifts to the employer to show that it would not have considered them, even in the absence of their union activity or affiliation. The Board noted that, in these types of cases, the compliance proceeding was the appropriate forum for determining whether there was an actual job loss as a result of the refusal to consider.

Aside from unionization goals, as Judge Posner observed in *Starcon, Inc.*, a proximate aim of the union in salting cases involving refusals to hire and refusals to consider is to precipitate an unfair labor practice proceeding that will result in heavy back pay costs for the nonunion employer.<sup>82</sup> Therefore, the appropriate remedy for these cases is of critical importance.

## 2. The Remedy Revisited

In *FES*, the NLRB stated that the appropriate remedy for a discriminatory refusal to hire violation is a cease-and-desist order, along with an offer of reinstatement and a make-whole remedy for losses sustained by reason of the discrimination. If there are more applicants than openings, then a compliance proceeding can determine which applicants are entitled to relief.<sup>83</sup> For a refusal to consider violation, the appropriate remedy is a cease-and-desist order and notification concerning future openings. If a job opening occurs immediately after a refusal to consider, the question whether or not the applicant would have been hired for it is to be determined at a compliance proceeding.

The make-whole remedy of reinstatement and back pay, the traditional remedy in such unfair labor practices cases, raised additional issues in salting

qualifications in that regard. For a subsequent application of the *FES* criteria and burden-shifting formula, see H.B. Zachry Co., 332 N.L.R.B. No. 110 (Oct. 31, 2000).

<sup>81</sup> *FES* (A Division of Thermo Power), 321 N.L.R.B. No. 20 (May 11, 2000). In cases in which the number of applicants exceeds the available jobs, the Board held that a compliance proceeding might be held to determine which applicants would have been selected in the absence of discrimination and provided a remedy.

<sup>82</sup> *Starcon, Inc. v. NLRB*, 176 F.3d 948, 949 (7th Cir. 1999).

<sup>83</sup> The General Counsel has the burden of establishing the damage that needs to be rectified in order to restore the individual to the position he would have been in, absent the unlawful conduct.

campaigns. Ferguson Electric Company, Inc. was the respondent in an unlawful refusal to hire case resulting from such a campaign. The administrative law judge found that the company violated the Act in declining to hire a salt, because of his union affiliation; the decision was adopted by the NLRB and enforced by the court of appeals.<sup>84</sup> The calculation of the back pay award was disputed in a supplemental proceeding before the Board. The Board found that the applicant was entitled to a back pay award, refused to adopt a *per se* rule that a failure to mitigate damages results if the union limits the universe of employers to whom an organizer may apply for work (such as to targeted nonunion contractors), and declined to offset wages paid by the union to the salt in calculating the award.<sup>85</sup>

On appeal to the Second Circuit, Ferguson Electric raised three issues concerning back pay and salts: 1) whether or not the back pay award was based on too speculative a calculation of damages, 2) whether or not earnings as an organizer should be offset against an award of back pay, and 3) the extent of a duty to mitigate damages in salting cases. The appeals court recognized that the courts had not addressed the question of a remedy for salts who are the victims of discriminatory hiring practices.<sup>86</sup> With respect to the alleged speculative nature of an award in such cases, the court reasoned that the fact the applicant would have quit, when the union determined that his organizing efforts were no longer needed, did not render the award impermissibly speculative, particularly because deciding the point at which the union would make such a determination was no less speculative.<sup>87</sup> Further, in such cases, doubt should be resolved against the employer, who could end the back pay period by offering employment.<sup>88</sup> The court then concluded that the union wages paid salts were wages from secondary employment, akin to moonlighting, and should not be offset in situations wherein organizing activities would be undertaken during nonworking hours, according to longstanding Board precedent.<sup>89</sup> Finally, the court recognized that once the gross amount of back pay has been established, it is the employer who has the burden of proving that the employee willfully incurred a loss of earnings, such as by failing to mitigate damages through securing other employment.<sup>90</sup> The Second Circuit determined that the record simply did not establish that the union unreasonably restricted any employment search to only a few

<sup>84</sup> For a discussion of the case, see *Salt in the Wound: Calculating Back Pay for Union Organizers Denied Employment*, N.Y. EMP. L. LETTER, April 2001 (on file with authors).

<sup>85</sup> Ferguson Electric Co., 330 N.L.R.B. No. 75 (Jan. 19, 2000).

<sup>86</sup> NLRB v. Ferguson Electric Co., Inc., 242 F.3d 426,430 (2d Cir. 2001).

<sup>87</sup> *Id.* at 431-32.

<sup>88</sup> *Id.* See also *Aneco, Inc.*, 333 N.L.R.B. No. 88 (Mar. 29, 2001) (compliance related ambiguities, such as whether a salt would have left employment when and if the union organizational objectives were either achieved or abandoned, must be resolved against the wrongdoer).

<sup>89</sup> *Ferguson Electric Co. Inc.*, 242 F.3d at 433. The court noted that it was immaterial that the salary the salt earned for organizing during his non-working time would have been higher than his wages as a Ferguson electrician. To make him whole, wages for being both an organizer and an electrician must be paid. *Id.*

<sup>90</sup> *Id.* at 434.

selected non-union employers, proof of which might suggest that there was a failure to mitigate.<sup>91</sup>

Subsequently, the D.C. Circuit Court of Appeals considered similar issues raised in a salting case, along with one that resulted from the temporary nature of employment in the construction industry. A nonunion electrical contractor was found to have unlawfully refused to hire salts, because of their union activities. The administrative law judge determined that the salts' back pay award should be calculated under the rubric of *Dean General Contractors*,<sup>92</sup> whereby the Board presumes that, absent discrimination, the unlawfully discharged employee would have been assigned to another job upon the completion of the project at which he was fired, subject to rebuttal evidence presented by the employer. The administrative law judge also concluded that seeking employment exclusively at union shops and refusing short-term jobs, so as to not jeopardize eligibility with the union, did not breach the salts' duty to mitigate. The NLRB concluded that the *Dean General Contractors* analysis of the reinstatement and back pay award was appropriate in failure to hire cases involving salts, and that, on the facts, there was no merit in the contention that the discriminatee willfully failed to mitigate damages, for example, by not seeking interim work for a nonunion contractor.<sup>93</sup>

In *Tualatin v. NLRB*,<sup>94</sup> the D.C. Circuit upheld the Board in all respects. First, the Court observed that, in light of the Supreme Court's holding that salts do not forfeit their employee status or statutory protection against unlawful discrimination, the Board properly reasoned that neither do they forfeit their eligibility for back pay.<sup>95</sup> The court rejected Tualatin's argument that *Dean General Contractors* should not be applied to cases involving salts, holding the Board may apply the presumption when calculating the back pay due salts. The court also noted that the employer retains the correlative right to present evidence that a salt would not have been transferred at the conclusion of the project, whether by reason of the union's policies or its own.<sup>96</sup> On the mitigation issue, the court determined that it is not unreasonable for the Board to limit the duty to mitigate, so as not to require a salt to accept employment that would subject him to union discipline or the abandonment of full union membership.<sup>97</sup>

<sup>91</sup> *Id.* at 436. The court concluded that the existence of some restrictions imposed by the union on a salt's search for employment does mean that there was a failure to mitigate, absent further evidence of the limitations of the scope of the job search.

<sup>92</sup> 285 N.L.R.B. 573 (1987).

<sup>93</sup> 331 N.L.R.B. No. 6 (May 12, 2001). The Board reasoned that, because a union member is not free to seek interim employment where it would subject him to internal discipline, an employee is free to quit such employment for the same reason.

<sup>94</sup> 253 F.3d 714 (D.C. Cir. 2001).

<sup>95</sup> *Id.* H I M .

<sup>96</sup> *Id.* at 718.

<sup>97</sup> *Id.* at 719. The court also concluded that the Board's position, that an employee does not violate his duty to make a diligent and reasonable search for work when he rejects a short-term assignment based on a reasonable expectation that doing so will enhance chances of securing a long-term job, was neither unreasonable nor contrary to precedent. *Id.* at 720.

These decisions of the Board and reviewing courts have certainly put teeth in the Supreme Court's recognition of the protected status of salts. Of course, in other salting cases, both the Second Circuit and the D.C. Circuit have followed the lead of the NLRB.<sup>98</sup> It remains to be seen whether or not the circuit courts, which have been less deferential to Board decisions on issues involving salts,<sup>99</sup> will concur with the Board's remedial approach in salting cases. If a split of authority develops again, as it did before, with respect to the protected status of salts, the Supreme Court may need to clarify the remedy for what is now illegal discrimination. Other issues will likely develop as well, such as whether or not employers facing salting campaigns may be exposed to "front pay"<sup>100</sup> claims for wages that an employee would earn in the future as an alternative to reinstatement and back pay in certain cases, such as those in which the employer and other employees are hostile to the union and the union no longer seeks representation.<sup>101</sup>

### C. Legislator Responses: Proposed Legislation

In every year since 1996, Congress has considered legislation to amend the NLRA, in order to modify the effect of the Court's ruling in *Town & Country Electric*.<sup>102</sup> In 1996-97, Congress considered the Truth in Employment Act, which would have permitted employers to deny employment to persons who seek employment in furtherance of other employment or agency status.<sup>103</sup>

In 1998, Congress considered the Fairness for Small Business and Employees Act.<sup>104</sup> In favorably reporting the bill, the House Committee on Education and the Workforce determined that salting was not merely an organizing tool, but an instrument of economic destruction aimed at non-union companies.<sup>105</sup> Congressional

<sup>98</sup> See *supra* notes 24-28 and accompanying text.

<sup>99</sup> See *supra* notes 30-33, 68-73 and accompanying text.

<sup>100</sup> Front pay is often awarded in other types of employment discrimination cases in which the employee cannot be reinstated, such as those involving sexual harassment.

<sup>101</sup> A Board interagency memorandum recently explored the front pay remedy and in what circumstances it might be appropriate to seek, although historically the NLRB has not awarded front pay. Guideline Memorandum Concerning Frontpay, No. GC 00-01 (Feb. 3, 2000) (from general counsel to regional directors). See also *NLRB Raises the Price of Discrimination*, WIS. EMPLOY. L. LETTER, Apr. 2000 (on file with author).

<sup>102</sup> H.R. 758, 105th Cong. (1997); H.R. 3246, 105th Cong. (1998); S. 328, 105th Cong. (1998); S. 1981, 105th Cong. (1998); S. 2085, 105th Cong. (1998); H.R. 1441, 106th Cong. (1999); S. 337, 106th Cong. (1999); H.R. 2800, 107th Cong. (2001). The House has held hearings on the question of salting subsequent to the Supreme Court's decision. See, e.g., *Hearing on Legislation to Promote Fairness for Small Businesses and Employees: Hearing on H.R. 758, H.R. 1595, H.R. 1598, H.R. 2449 Before the Subcomm. on Employer-Employee Relations of the House Comm., on Education and the Workforce*, 105th Cong., 2d Sess. (1998); *The Practice of Salting and Its Impact on Business: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm., on Education and the Workforce*, 106th Cong., 1st Sess. (1999).

<sup>103</sup> For a discussion of these legislative efforts to stop salting see Bourq & Moscowitz, *supra* note 10, at 24-35.

<sup>104</sup> H.R. 3246, 105th Cong. 2d Sess. (1998).

<sup>105</sup> H. Rep. No. 59-006, 105th Cong. 2d Sess. (1998).

findings accompanying the 1998 legislation included conclusions that 1) salting had evolved into an aggressive form of harassment that was not contemplated when the NLRA was enacted, and which threatened the balance of rights fundamental to collective bargaining; 2) union organizers were seeking employment, not because of a desire to either work or organize, but instead to inflict economic harm or put nonunion competitors out of business; and 3) employers had a right to expect job applicants to be primarily interested in using their skills to further the goals of the employer.<sup>106</sup> Like the 1996-97 legislation, Title I of the proposed act would have amended the NLRA to make clear that an employer is not required to hire someone who is not a *bona fide* applicant.<sup>107</sup> The House passed the bill by a 202-200 vote on March 26, 1998, although the Senate failed to approve it.

The same effort continued in 1999, when the Truth in Employment Act of 1999 was introduced.<sup>108</sup> This bill was virtually identical to the 1998 one, except that the proviso was augmented to clarify that the amendment was not intended to affect any rights of *bona fide* employees to engage in the concerted activities of selforganization and collective bargaining.<sup>109</sup> In its report on the bill in 2000, the House Committee on Education and the Workforce stated that the proposed legislation did not seek to overrule the Supreme Court's decision, but rather to establish a primary purpose test for the NLRB to apply to the motivation of the individual at the time he or she seeks to secure employment. If the primary purpose of the applicant is to further the status of another employer, then the activity of the applicant would not be protected. Further, as part of the *prima facie* case, the General Counsel would have to establish that the applicant would have sought the job, even in the absence of his or her salting activity.<sup>110</sup> The same bill to amend section 8(a) of the NLRA was reintroduced in the 107th Congress and again referred to the same committee of the House.<sup>111</sup>

#### IV. CONCLUSION

As the NLRB pointed out in *FES (A Division of Thermo Power)*, the issues raised in conjunction with salting activities go to the heart of the most fundamental rights guaranteed by the NLRA, the workers' rights of association and of selforganization:

Unquestionably the denial to employees of access to the work force because of their union activity or affiliation runs directly against this policy. The Board's treatment of allegations of discriminatory

<sup>106</sup> H.R. 3246, 105th Cong. 2d Sess. (1998).

<sup>107</sup> *Id.*

<sup>108</sup> H.R. 1441, 106th Cong., 1st Sess. (1999). The Senate version of the Truth in Employment Act was identical. S. 337, 106th Cong., 1st Sess. (1999).

<sup>109</sup> H.R. 1441 §4, 106th Cong., 1st Sess. (1999); S. 337 §4 106th Cong., 1st Sess. (1999).

<sup>110</sup> H. Rep. No. 89-006, 106th Cong. 2d Sess. (2000).

<sup>111</sup> H.R. 2800, 107th Cong. 1st Sess. (2001).

refusals to consider or to hire and its determination of related remedial issues is a measure of the Board's effectiveness in giving substance to the rights it is charged to protect."<sup>112</sup>

Congress should proceed with caution before amending the statute so as to deny employees access to the work force because of their purpose or intent to exercise those rights in conjunction with their employment responsibilities. Discerning which of those objectives is primary will prove problematic, and to put the onus on the employee to establish which is the higher calling seems to undermine the goals of the national labor policy. Dual goals should be permitted, absent a showing, on a case-by-case basis, that their coexistence is intolerable. Further, the Supreme Court was familiar with salting activities when it rendered its unanimous decision in *Town & Country Electric*, it seems incongruous that it would recognize a wrong without a presumption that the traditional board remedies would be applicable for violations. Therefore, the NLRB's newly announced guidelines for establishing violations in failure to hire and to consider cases, and its evaluation of the proper calculation for back pay awards, seem appropriate.

While discrimination against salts is a wrong for which the NLRB has established a remedial framework, the employer may still thwart organizational drives using legitimate means.<sup>113</sup> Certainly, a content labor force is the best insurance against unionization efforts. Employees who are satisfied with workplace policies and practices should dissuade unionization efforts. The levels of remuneration and benefits offered are often key to employee contentment. Employee satisfaction is also influenced by equitable compensation packages, meaningful work assignments opportunities for advancement, job security and positive relationships with co-workers and supervisors.

Moreover, managers must pay careful attention to how workers are treated. When people perceive themselves as being adversely affected by arbitrary and capricious management decisions, they may respond favorably to the lure of unionization, despite their more than adequate level of compensation. Perceptions of mistreatment, as well as favoritism by managers, will lead to a disenchanting work group. Therefore, it is important to get feedback from workers on the performance of managers. Exit interviews are an excellent way to monitor the complaints of associates, as is a confidential system whereby employees are permitted to register complaints against supervisors. Also, cooperative employee/employer programs may exist legally to deal with agendas of mutual concern, as long as the group involves participation by, and not representation of, employees, and the program remains structurally independent of management.<sup>114</sup>

<sup>112</sup> 321 N.L.R.B. No. 20 (May 11, 2000).

<sup>113</sup> See *supra* notes 45-64 and accompanying text.

<sup>114</sup> While it may be important from a worker management relationship to establish work groups or labor-management committees to identify concerns, such participatory committees cannot supplant the role of a labor organization under the Act. The NLRA defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor

While these types of suggestions may be appropriate in a substantial number of employment situations, they are less applicable to those involving the trades, which are the primary focus of salting campaigns. What the salting decisions and the Board's response to them might mean in cases involving the private sector<sup>115</sup> construction industry is that nonunion contractors will be less able to outbid competitors based on lower labor costs. Non-union contractors may lose the former basis for their competitive edge (lower wages paid), but they can remain competitive if they are able to adjust other variable costs along with profit margins. As more contractors become unionized, profit margins may be reallocated so as to reflect labor's share of the pie.

Unionization does not always adversely impact management. In many ways, unions can facilitate the discussion of issues common to both sides, formalize grievance procedures in the absence of any formalized policies or procedures, and give a focal point to workers, who may feel more empowered and less alienated with representation. The presence of a union in the workplace can project a sense of fairness into the employment relationship and provide a mechanism to counter policies that otherwise might be perceived as management's arbitrary and capricious decisions affecting workers. While the relationship between union and management does not always need to be adversarial, it is undeniable that management relinquishes a degree of control with unionization. Of course, given the pervasive regulation at the state and federal level with respect to human resource and employment issues, the control that is lost is less today than what it would have been at the onset of unionization sixty years ago.

disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (2000). If employee committees are determined to constitute, from a functional perspective, a *labor organization* — and such a conclusion can be reached even if the committee does not bargain collectively with management - then they must be neither dominated nor supported by management. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). Even if the employer is making a *bona fide* effort toward more participatory governance in the workplace, the NLRA will still be violated if employee action groups are wholly dependent upon the employer for their continued existence and for the determination of their functions. Such groups must have unfettered independence of action and may not function in a representative capacity for issues concerning conditions of employment. *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994). Further, if the committee is established contemporaneously with an incipient or ongoing union organization campaign, then it is more likely to be considered a violation of Section 8(aX2) of the NLRA.

<sup>115</sup> The public sector of the industry is constrained to some degree by the Davis-Bacon Act, Ch. 411, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. 276a-5), and its attendant wage levels for federal construction projects.