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# “SALTING”: A FAIR ORGANIZING STRATEGY OR A NEFARIOUS TACTIC?

by DAVID P. TWOMEY\*

## I. INTRODUCTION

In the United States Supreme Court decision *Lechmere Inc. v. NLRB*, the Court restricted non-employee union organizers' access to employer property.<sup>1</sup> In its *NLRB v. Town & Country Electric, Inc.* decision, the United States Supreme Court held that an employer's refusal to hire outside union organizers (called salts) may be in violation of the National Labor Relations Act.<sup>2</sup> Based on reduced access of outside union organizers to company property under the *Lechmere* rule and the resulting ineffectiveness of some of the traditional organizational techniques used by the outside organizers, and based on pressures placed on union leaders because of a decline in union membership in the country,<sup>3</sup> many unions seek to “salt” the work forces of companies

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<sup>1</sup> 502 U.S. 527 (1992).

<sup>2</sup> 516 U.S. 85 (1995).

<sup>3</sup> In 1995, when the *Town & Country Electric, Inc.* case was decided by the Supreme Court, union membership had slipped by 300,000 to 16.4 million from 16.7 million in 1994 according to Bureau of Labor Statistics data, Daily Labor Report No. 28 (BNA) February 12, 1996, at 1. In 2003, union membership declined to 15.8 million individuals, according to the Bureau of Labor Statistics, <http://www.bls.sou/cps> (Jan. 21, 2004). The IBEW, the union involved in the *Town & Country Electric, Inc.* case, declined from 665,091 members in 2002 to 643,925 members in 2003. Daily Lab. Rep. No. 47 (BNA), Mar. 11, 2004 at E-1.

According to AFL-CIO president John J. Sweeney, it is the AFL-CIO's intention to

targeted for organizational campaigns. This paper will present a discussion of how the legal strategy of salting works and leave it to the readers to decide whether it is a fair organizing strategy or a nefarious tactic. The *Town & Country Electric, Inc.* and the *Lechmere, Inc.* precedents will be discussed. Recent NLRB decisions and court cases will be presented and this developing case law will provide guidance for unions and employers regarding viable organizing efforts and legal defensive strategies.

## II. SALTING: A LEGAL STRATEGY OR NEFARIOUS ACT?

A salt is an individual who seeks employment, at least in part, for the purpose of organizing the employer. "Salting" occurs when a union sends a member to apply for employment at a nonunion employer with the objective being that the union member obtain employment and then organize the employer from within.<sup>4</sup> The salting strategy may be overt, where the applicants tell the employer of their union affiliation and that they will attempt to organize the employees within the parameters of the Act<sup>5</sup> or, covert where the applicants do not disclose their union affiliation and objective.<sup>6</sup> Under either strategy the applicants who are also union organizers retain their status and protections as statutory employees under the Supreme Court's *Town & Country Electric, Inc.* decision. Employers are very reluctant to comply with this decision as evident by the many failures to consider and/or hire cases involving salting recently considered by the NLRB and the courts. For example, when Wayne Griffin, president of one of the largest non-union electrical contractors in the Northeast discovered the International Brotherhood of Electrical Workers union had utilized covert salting as an organizing weapon targeting his company, he advised his employees that signing a union authorization card would be like "stabbing [him] in the back."<sup>7</sup> Mr. Griffin told one of his foremen that "f-king with his company [was

win majority support for the Employee Free Choice Act (H.R. 3619, S. 1925, 108th Cong. (2003)) which proposed legislation has 170 co-sponsors in the House and 31 co-sponsors in the Senate, as of March, 2004. The legislation provides labor law reform to fix problems resulting from organizing drives, including treble damages against employers that violate existing labor laws during organizing campaigns. See Michelle Amber, *AFL-CIO Membership Statistics Show Decrease Nearing 40,000 From 2002*, Daily Lab. Rep. No. 47 (BNA), Mar. 11, 2004 at AA-2.

<sup>4</sup> See *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), *enfd.*, 84 F.3d 1202 (9th Cir. 1996). In *Aneco Inc. v. N.L.R.B.*, 285 F.3d 326, 328 (4th Cir. 2002), Judge Luttig described salting as the process "where union organizers seek to become employees of a company targeted by the union," and they work for the targeted employer "as long as there is a prospect of success at organizing its workers."

<sup>5</sup> *Smucker Company*, 341 N.L.R.B. No. 10 (Jan. 30 2004).

<sup>6</sup> *Griffin Electric Inc. v. N.L.R.B.*, 2002 WL 1269902 (4th Cir. 2002).

<sup>7</sup> *Id.* at \*3.

like] f-king with his kids."<sup>8</sup> The Board found Griffin Electric had committed numerous unfair labor practices. And, in enforcing the Labor Board's order, the Fourth Circuit Court of Appeals rejected Griffin's contention that the Board was inappropriately favoring union salting.<sup>9</sup>

In *Smucker Company*,<sup>10</sup> an overt salting case, the company was engaged as a nonunion interior finishing contractor at a project at Villanova University when the company's director of Human Resources received employment applications from three business agent-organizers of construction trade unions on April 26. All of these individuals were wearing union shirts and insignia when they applied for jobs.<sup>11</sup> Apparently, the HR director thought back to a seminar he had attended in March as to how to avoid salting, and remembered he was to have posted a notice to all applicants that applications expired after 30 days and thereafter had to be renewed. He posted a 30 day rule the day following receipt of the applications from the three union organizer-applicants, in late April.<sup>12</sup> The company did not hire any employees in May. It hired seven new employees in June and eleven new employees in July. The company held off hiring for the month of May in an attempt to free itself from a need to consider the three union applicants.<sup>13</sup> This attempt to avoid considering and hiring salts proved unsuccessful when the HR director conceded in testimony before the ALJ that on April 26 no rules on application expirations were posted and in effect. Accordingly the company was found to be in violation of the NLRA.<sup>14</sup>

Unions believe that existing labor laws do not properly "right the wrongs" that are all too common regarding organizing drives in workplaces all over the country, where the NLRB has found employers guilty of increased surveillance and spying, harassment and intimidation of union supporters and unfair firings.<sup>15</sup> They perceive salting as one counterveiling legal strategy to be used to increase union membership.<sup>16</sup>

<sup>8</sup> *Id.* at \*4.

<sup>9</sup> *Id.* at \*5.

<sup>10</sup> *Smucker Company*, 341 N.L.R.B. No. 10 (Jan. 30, 2004).

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.* at 8.

<sup>14</sup> *Id.*

<sup>15</sup> See "Some Of Them Are Brave: The Unfulfilled Promise of American Labor Law" a report released to the AFL-CIO Executive Council on March 10, 2004 (Daily Labor Report No. 47 (BNA) Mar.11, 2004, at AA-2.

<sup>16</sup> For example, the *International Brotherhood of Electrical Workers' salting manual* states that the goals of a salting operation included: "[t]he addition of several high-priced, non-productive journeymen [attorneys] to... payroll; the exposure of [the employer] to

Employers believe that salting abuse is a “nefarious union pressure tactic” intended to wreak economic hardship on non-union employers by increasing costs to employers through workplace sabotage and the filing of frivolous discrimination charges.<sup>17</sup>

### III. THE *TOWN & COUNTRY ELECTRIC, INC.* PRECEDENT

Town & Country Electric, Inc., a nonunion electrical contractor, desired to hire licensed Minnesota electricians for construction work at a paper mill in International Falls, Minnesota. Town & Country, through an employment agency, advertised for job applicants who responded to the advertisements. Its employment agency hired one union applicant whom Town & Country interviewed, but he was dismissed after three days on the job.<sup>18</sup>

The eleven members of the union, the International Brotherhood of Electrical Workers, filed charges with the National Labor Relations Board claiming that Town & Country and their employment agency had refused to interview or retain them because of their union membership. The National Labor Relations Board, in the course of its decision, determined that all eleven job applicants, including two union officials and one member briefly hired, were “employees” as the Act defines that word.<sup>19</sup> The Board recognized that under well-established law, it made no difference that ten members who were applicants simply were never hired.<sup>20</sup> Moreover, the Board concluded with respect to the meaning of the word “employee,” that it did not matter that the union members intended to organize the company if they secured the advertised jobs,<sup>21</sup>

substantial back pay and interest liability plus fringe benefit accruals, if any...[t]he eventual placement on the payroll and job of a substantial number of Local 934 member-organizers.” See *Ippli, Inc.*, 321 N.L.R.B. 463, 469 (1996).

<sup>17</sup> See the testimony of Jason Krause, a construction industry human resources manager, testifying before the House Subcommittee on Union Salting on February 26, 2004 in favor of the Truth in Employment Act (H.R. 1793), which would amend the National Labor Relations Act to make clear that employers are not required to hire any person who seeks a job in order to promote interests unrelated to the employer. See also the Truth in Employment Act of 2001, H.R. 2800, 107th Cong. (2001). This bill, which was not enacted into law, would have amended Section 8(a) of the NLRA by adding the following language: “Nothing in this subsection shall be construed as requiring an employer to employ any person who is not a bona fide employee applicant, in that such person seeks or has sought employment with the employer for the primary purpose of furthering another employment or agency status.”

<sup>18</sup> *Id.* at 452. This individual, Malcolm Hansen, was a journeyman electrician with 28 years as a member of the IBEW. In his three days on the construction project, he earned \$725 from the employer and \$1100 from the union. See 309 N.L.R.B. 1250 at 1269.

<sup>19</sup> *Town & Country Electric, Inc.*, 309 N.L.R.B. 1250, 1258 (1992).

<sup>20</sup> *Id.* at 1257.

<sup>21</sup> *Id.*

or that the union would pay them while they went about their organizing.<sup>22</sup>

The United States Court of Appeals for the Eighth Circuit reversed the Board, holding that the Board incorrectly interpreted the statutory word "employee." In that Court's view, the term "employee" did not cover those who work for a company while a union simultaneously pays them to organize that company.<sup>23</sup> Since this determination was in conflict with decisions by the District of Columbia Circuit<sup>24</sup> and the Second Circuit,<sup>25</sup> the Supreme Court granted *certiorari* to resolve the conflict.

A unanimous Supreme Court decided that paid union organizers can qualify as "employees" of a company, and are therefore entitled to applicable protections offered them under the National Labor Relations Act.

Section 2(3), the definitions' section of the NLRA states in part:

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....<sup>26</sup>

The Supreme Court held that the Board's broad, literal reading of the statutory definition of "employee" is entitled to considerable deference as the interpretation of the agency created by Congress to administer the Act.<sup>27</sup> Further, Section 302(c)(1) of the LMRA of 1947 specifically contemplates the possibility that a company's employees may also work for a union.<sup>28</sup>

The Supreme Court rejected the employer's agency law argument based on Comment a, of the Restatement (Second) Agency, Section 266, which comment stated in part, that a person "... cannot be a servant of two masters at the same time in doing an act as to which an intent to serve one necessarily excludes an interest to serve the other."<sup>29</sup> The Court pointed out that the Restatement (Second) Agency, Section 266, also stated that a person may be the servant of two masters "... at one time as to one act, if the service to one does not involve the abandonment of the service to the other."<sup>30</sup> The Court adopted the

<sup>22</sup> *Id.*

<sup>23</sup> *Town & Country Electric Inc. v. N.L.R.B.*, 34 F.3d 625, 629 (8th Cir. 1994).

<sup>24</sup> *Willmar Electric Service Inc. v. N.L.R.B.*, 968 F.2d 1327 (D.C. Cir. 1992).

<sup>25</sup> *N.L.R.B. v. Henlopen Manufacturing Co.*, 599 F.2d 26 (2nd Cir. 1979).

<sup>26</sup> 29 U.S.C. Section 152(3) (1988 ed.).

<sup>27</sup> *N.L.R.B. v. Town & Country Electric, Inc.*, 516 U.S. 85, 89-90.

<sup>28</sup> *Id.* at 92.

<sup>29</sup> *Id.* at 93.

<sup>30</sup> *Id.* at 94-5.

Board's view that service to the union for pay does not involve abandonment of service to the company.<sup>31</sup>

Concerning the employer's argument that practical considerations like "salts" may quit when the company needs them, or they may disparage the company, or sabotage the firm or its products, the Court pointed out that nothing in the record proves that such acts of disloyalty were present in the instant case.<sup>32</sup> Further, the Court listed for the employer alternative remedies available to it to correct such problems, other than exclusion of paid or unpaid union organizers from all protections under the Act.<sup>33</sup>

#### IV. UNION ACCESS TO PRIVATE PROPERTY

The National Labor Relations Act (NLRA) sets forth in Section 7 the rights of employees, which guarantee the "right to self-organization to form, join, or assist labor organizations."<sup>34</sup> These rights are further protected by Section 8(a)(1) of the NLRA, which states, "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 7."<sup>35</sup> Sections 7 and 8 reference "employees" as receivers of this protection and do not expressly include labor unions or labor organizers in the statutory language. But due to the fact that the employees "right to self-organization" depends in some measure on the ability of the employees to learn the advantages of self organization from others, unions and their agents, non-employee union organizers, have been given derivative protection of Section 7.<sup>36</sup> The Supreme Court first set forth guiding principles for resolving conflicts between Section 7 rights and property rights in its *NLRB v. Babcock & Wilcox Co.* decision in the following language:

Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent

<sup>31</sup> *Id.* at 95-6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 97.

<sup>34</sup> 29 U.S.C. §157.

<sup>35</sup> 29 U.S.C. §158(a)(2)

<sup>36</sup> *N.L.R.B. v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956)

needed to permit communication of information on the right to organize.<sup>37</sup>

In *Babcock*, a case involving an industrial plant employer's refusal to allow non-employee union organizers access to its private parking lot to distribute organizational literature to employees, the Court held that the non-employee organizers were not entitled access to company property because the employees lived in nearby communities and could be reached by "usual methods of imparting information."<sup>38</sup>

The NLRB in its *Jean County* decision developed a policy based on its reading of *Babcock* for dealing with the matter of allowing outside organizers onto company property which weighed (1) the strength of the union's Section 7 rights, (2) the strength of the employer's property rights, and (3) the availability of reasonable and effective alternative means of communication.<sup>39</sup>

In *Lechmere, Inc v. NLRB*, Local 919 of the United Food and Commercial Workers Union sought to organize the 200 workers at a newly opened Lechmere store located in a strip mall in Newington, Connecticut.<sup>40</sup> On June 18, union organizers began leafleting cars at this Lechmere mall, but the organizers were ordered by store officials to leave the parking lot, and the leaflets were removed by security guards.<sup>41</sup> The union placed five advertisements in the *Hartford Courant* newspaper in an attempt to organize Lechmere's workforce, with little evidence that affected employees actually saw the ads. The union also took down the license plate numbers of cars parked where employees had been told to park, and the union obtained certain names and addresses from the Registry of Motor Vehicles. Ultimately, it obtained 41 names and addresses from all their efforts, but half of the individuals had unlisted telephone numbers. The union filed unfair labor practice charges against Lechmere because of its refusal to allow representatives of Local 919 to engage in organizational activity in the parking lot.<sup>42</sup> The Board decided that Lechmere had committed an unfair labor practice by barring union representatives from handbilling in the parking lot, and the Court of Appeals affirmed.

Lechmere Inc. believed that it had the absolute right to ban the non-employee union organizers from its property under the *Babcock* decision. It had posted on each set of doors to its premises 6" x 8" signs stating:

<sup>37</sup> *Id.* at 112.

<sup>38</sup> *Id.* at 113.

<sup>39</sup> LRRM 1201 (1988); *aff'd*, 914 F.2d 313 (1st Cir. 1990).

<sup>40</sup> 502 U.S. 529 (1992).

<sup>41</sup> *Id.* at 530.

<sup>42</sup> *Id.* at 531.



TO THE PUBLIC. No solicitation, Canvassing,  
Distribution of Literature or Trespassing  
By Non-Employees in or on Premises.<sup>43</sup>

And Lechmere strictly enforced this no-solicitation rule in its store and parking lots. Lechmere also believed that the union did have reasonable alternative means of communicating with Lechmere's employees through the "usual channels" as stated in *Babcock*. The Supreme Court rejected the Board's three part balancing test as contrary to the handling in *Babcock*.<sup>44</sup> The Supreme Court majority determined that union organizers had reasonable access to employees outside of the employer's property.<sup>45</sup>

As a result of *Lechmere, Inc.*, employers who have and enforce a no-solicitation policy on their property as a general rule cannot be compelled to allow non-employee union organizers on their property to distribute organizational literature.<sup>46</sup> However, where employers do not exclude other organizations, such as political or charitable groups, from soliciting on their property, they may find themselves subject to disparate treatment claims by unions under *Babcock & Wilcox*, which allows no-solicitation rules against unions so long as the employer does not discriminate against unions by allowing other distributions.<sup>47</sup> In its *Lincoln Center for the Performing Arts, Inc.*<sup>48</sup> decision, the National Labor Relations Board determined that an owner discriminatorily excluded representatives of the Hotel Employees Union from handbilling on the Columbus Avenue sidewalk the employer was licensed to manage and maintain in violation of Section 8(a)(1) of the NLRA.<sup>49</sup> The union was handbilling in conjunction with an organizing campaign to unionize food service employees working for contractors at Lincoln

<sup>43</sup> *Id.* at 530, n. 1.

<sup>44</sup> *Id.* at 538.

<sup>45</sup> *Id.* at 540.

<sup>46</sup> Broader free speech rights under California law leads to a different outcome, however, in that state. It was state property law that created the interest entitling employers like Lechmere to exclude outside union organizers from company-owned store parking lots. California's state constitution provides broader free speech rights than the First Amendment to the U.S. Constitution. California law permits reasonably exercised free speech at privately owned shopping centers and adjacent walkways and parking lots. In the *NLRB v. Calkins* decision, 187 F.3d 1080 (9th Cir. 1999), the Ninth Circuit Court of Appeals upheld the Board's determination that a California grocery store committed a Section 8(a)(1) unfair labor practice by having outside union organizers arrested for handbilling and picketing in the store's private parking lot.

<sup>47</sup> *Riesbeck Food Markets, Inc.*, 315 N.L.R.B. 940 (Dec. 16, 1994).

<sup>48</sup> *Lincoln Center for the Performing Arts*, 340 N.L.R.B. No. 134 (Nov. 28, 2003).

<sup>49</sup> *Id.* at 26.

Center. The Board found the owner discriminated against the union because it allowed non-union individuals to engage in leafleting.<sup>50</sup>

Contrary precedent exists in the Sixth Circuit. In *Albertsons, Inc. v. NLRB*,<sup>51</sup> the Sixth Circuit Court of Appeals refused to enforce a Board ruling that five Albertsons supermarkets in Oregon and Washington<sup>52</sup> had discriminated against the United Food and Commercial Workers Union (UCFW) when it banned the union for distributing union materials in organizing drives at their stores, which activities Albertsons stated were in violation of its no-solicitation policy. In fact, Albertsons had allowed charitable, civic, and educational groups to solicit its customers near the entrances to their stores, including the Salvation Army, and various youth, school, and veterans groups. The Board believes the employer's tolerance of non-employee charitable solicitations is probative evidence of discrimination against non-employee organizing activity.<sup>53</sup> However, the Sixth Circuit believes that for discrimination to exist it must be among comparable groups or activities, and the activities themselves under consideration must be comparable; and it points out that Albertsons did not allow non-union organizers of another union to disseminate union information that it banned the UCFW for disseminating.<sup>54</sup>

## V. THE DEVELOPING LAW

Unions and employers have had recent successes before the NLRB and the courts regarding refusal to consider and/or hire and related cases regarding salting.

### A. Union Successes

The NLRB and courts have enforced employee rights in the following cases. Section 8(a)(1) of the NLRA prohibits an employer from interfering with, restraining or coercing employees in the exercise of their Section 7 rights.<sup>55</sup> Section 8(a)(3) of the Act prohibits discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a union.<sup>56</sup> Under *Lechmere*, employers may generally prohibit non-

<sup>50</sup> *Id.*

<sup>51</sup> 301 F.3d 441 (6th Cir. 2002).

<sup>52</sup> While the dispute arose at stores in Oregon and Washington, which are part of the Ninth Circuit Court of Appeals, *Albertsons, Inc.* also has stores in Michigan and Tennessee, which are located in the Sixth Circuit. Knowing favorable precedents existed in the Sixth Circuit, *Albertsons* brought its appeal of the Board's decision to this circuit.

<sup>53</sup> 301 F.3d at 446.

<sup>54</sup> *Id.* at 451-52.

<sup>55</sup> 29 U.S.C. §158(a)(1)(2000).

<sup>56</sup> 29 U.S.C. §158(a)(3)(2000).

employee union organizers from soliciting employees on company property. However, once a covert salt is hired, he or she attains full employee status, and has the right under Section 7 of the NLRA to solicit on behalf of a labor organization during non-work periods. For example, Eric Berner, a covert salt for the Carpenter's Union was hired by Zarcon, Inc. on May 26th.<sup>57</sup> By June 22nd supervisor and part-owner Randy Lea was aware that the Carpenter's Union was trying to salt and organize his company. Subsequently, from his observations and from rumors, he believed Berner was involved in union activity.<sup>58</sup> Berner was laid off July 26th, being told by Lea that the company was running out of work. Lea later acknowledged that Berner was let go because the company found out about his union activities.<sup>59</sup> In its *Zarcon, Inc.* decision the National Labor Relations Board determined that the employer violated Section (8)(a)(3) of the NLRA when it laid off Eric Berner because of his union activity and the Board ordered his reinstatement with back pay.<sup>60</sup>

Also regarding the *Zarcon, Inc.* case before the Labor Board, union member Mitch Butts telephoned supervisor Lea, whom he knew from prior work experience, seeking employment. Lea questioned Butts, asking "you ain't carrying a card no more?"<sup>61</sup> Butts replied that he was and he was ready to go to work. Lea testified that he knew Butts was a good carpenter and that the company needed carpenters when he talked with Butts. He testified that he did not hire Butts because he could not hire union people.<sup>62</sup> The Board found Lea's questioning of Butts about his union status was a violation of Section 8(a)(1).<sup>63</sup> Moreover, the failure to hire Butts was found to be a Section 8(a)(3) violation for which the Board ordered reinstatement to the position applied for and the right to be made whole for a loss of pay and benefits.<sup>64</sup>

In the Labor Board's *FES, a Division of Thermo Power*<sup>65</sup> decision, it established a framework for analyzing refusal-to-consider and/or hire cases by making clear the elements of the violation, the burdens of the parties, and the stage at which issues are to be litigated. To establish a discriminatory refusal-to-hire violation, the General Counsel must, at the hearing on the merits, show: (1) that the respondent was hiring, or

<sup>57</sup> *Zarcon, Inc.*, 340 N.L.R.B. No. 145 (2003).

<sup>58</sup> *Id.* at 5, 6.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> *Id.* at 13.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2.

<sup>64</sup> *Id.* at 13, 14.

<sup>65</sup> 331 N.L.R.B. 9 (2000).

had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that such requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants.<sup>66</sup> If established, the respondent-employer must show that it would not have hired the applicants even in the absence of their union activity or affiliation.<sup>67</sup> In *FES*, the ALJ found that nine union pipe fitter-applicants would have been hired as welders by FES but for the company's anti-union animus and ordered back pay and reinstatement for each applicant; this order was adopted by the Board.<sup>68</sup> The Third Circuit Court of Appeals enforced the Board's order.<sup>69</sup>

In *Casino Ready Mix, Inc. v. NLRB*,<sup>70</sup> the Board applied the *FES* analytical framework to the employer's refusal to hire two overt salts, union organizers Dooley and King, who applied for driver positions at the non-union company's ready mix concrete operation in Las Vegas, Nevada in response to Casino's advertisement for drivers.<sup>71</sup> Both wore shirts identifying themselves as organizers for the union as well as baseball caps with union logos when they applied in person on April 8. Each stated his organizer status on his application.<sup>72</sup> The company received their applications and told them they were not hiring. In fact, the company hired four other drivers between April 8 and 21. Both Dooley and King were qualified drivers.<sup>73</sup> The Board concluded that the General Counsel had established the *FES* factors; (1) that Casino was hiring; (2) that Dooley and King had the experience and training required; and (3) that anti-union animus contributed to the decision not to hire since evidence showed that the company president had stated he would never allow a union to represent his employees.<sup>74</sup> The burden then shifted to the company to demonstrate that it would not have hired either Dooley or King regardless of their status as union organizers.<sup>75</sup> In this regard the company raised a "disabling conflict" defense which was rejected by the Board and approved by the D.C. Circuit Court of

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 40.

<sup>69</sup> *N.L.R.B. v. FES (A Division of Thermo Power)*, 301 F.3d 83 (3rd Cir. 2002).

<sup>70</sup> *Casino Ready Mix, Inc. v. N.L.R.B.* 321 F.3d 1190 (D.C. Cir. 2003)

<sup>71</sup> *Id.* at 1193.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1194.

<sup>75</sup> *Id.* at 1195.

Appeals. Disabling conflicts exist when a paid union organizer seeks employment behind the picket line when his role would unmistakably be inconsistent with his employment; or is involved in subterfuge or an attempt to drive the employer out of business.<sup>76</sup> No disabling conflict was shown in this case. The Court of Appeals made clear that in the absence of objective evidence the Court would not infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations.<sup>77</sup> The Court enforced the Board's order against the company.<sup>78</sup>

### *B. Employer Successes*

Employers have had some success in recent salting related cases. In *Contractors' Labor Pool, Inc. v. NLRB*<sup>79</sup> the D.C. Circuit Court of Appeals enforced the NLRB's order that the employer discriminated against several paid union organizers. However, it refused to enforce the Board's order regarding the Board's finding that Contractors' Labor Pool's (CLP) policy of refusing to hire applicants whose recent wages were higher than CLP's starting wages was discriminatory within the meaning of Section 8(a)(3).<sup>80</sup> CLP conducted a study which determined that precluding applicants whose prior wages deviated by 30% from CLP's starting salary would cause its retention rate to rise by 3.5%.<sup>81</sup> While the Board determined that implementation of the 30% rule was not motivated by anti-union animus but pursued as a legitimate business objective, nevertheless it was found to be in violation of Section 8(a)(3) because the 30% rule excluded previously organized workers and therefore had extremely destructive effects on employees' Section 7 rights.<sup>82</sup> The Court of Appeals refused to accept the Board's reasoning because it was contrary to the Supreme Court's longstanding interpretation of Section 8(a)(3) which requires a finding of anti-union motivation for the practice in question to be unlawful. The Court decided that the Board cannot conclude that the employer's motivation was benign and then hold the practice independently violates Section 8(a)(3).<sup>83</sup> Interestingly, the Court determined that the Board may not support its conclusion of discrimination in violation of Section 8(a)(3) of the

<sup>76</sup> *Id.* at 1199.

<sup>77</sup> *Id.* at 1196.

<sup>78</sup> *Id.* at 1202.

<sup>79</sup> 323 F.3d 1051 (D.C. Cir. 2003).

<sup>80</sup> *Id.* at 1053.

<sup>81</sup> *Id.* at 1054.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1059.

National Labor Relations Act under the "disparate impact" line of court decisions rendered under Title VII of the Civil Rights Act.<sup>84</sup>

In *International Union of Operating Engineers, Local 150 v. NLRB*,<sup>85</sup> the Second Circuit Court of Appeals reviewed the Board's determinations under the *FES* factors regarding whether the employer had refused to consider and/or hire overt salts and union applicants on account of their union affiliations in violation of Sections 8(a)(3) and 8(a)(1) of the NLRA. The employer, Brandt Construction Company, followed a set hiring policy, well established before the start of the union's organizing campaign, of giving preference to employment applications filed by current and/or former employees, as well as individuals referred by current supervisors or employees, over walk-in applicants.<sup>86</sup> Brandt also gives preferential treatment to applicants referred by equal employment opportunity service providers pursuant to a conciliation agreement with the U.S. Department of Labor.<sup>87</sup> The owner, Terry Brandt, told employees that the company "was no longer handing out applications over the counter because it knew that Local 150 was trying to salt the workforce."<sup>88</sup> Under the *FES* analysis, the General Counsel had met its burden, including establishing that Brandt displayed anti-union animus by making it more difficult for pro-union applicants to submit applications with the company.<sup>89</sup> Under *FES* at this point in the analysis the employer must show that it would not have hired the applicants even in the absence of their union affiliation. The Board determined that notwithstanding his anti-union animus, Brandt would not have hired the applicants under the company's preferential hiring policy. Brandt established that the preferential hiring policy was a means to better assess the caliber of prospective employees.<sup>90</sup> All but one employee hired in the two year period in question were hired under this policy. And all walk-in applicants, including the pro-union applicants, never "made it to any other cut."<sup>91</sup> Since substantial evidence of record supported the Board's determination, the Court refused to disturb the Board's findings and dismissed the Union's petition.

<sup>84</sup> *Id.* at 1059, 1060.

<sup>85</sup> 325 F.3d 818 (7th Cir. 2003).

<sup>86</sup> *Id.* at 820.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 823.

<sup>89</sup> *Id.* at 829.

<sup>90</sup> *Id.* at 820.

<sup>91</sup> *Id.* at 835.

## VI. CONCLUSION

The National Labor Relations Board applies a carefully drawn framework set forth in the *FES* decision in analyzing refusal to consider and/or hire cases, and it has reached appropriate conclusions strictly confined to the evidence of record before it. It has refused to be persuaded by mere arguments, speculation or inferences that paid union organizers will harm the employer's operations, and requires objective evidence to support "disabling conflicts" by salts that would harm the employer. Likewise, where a union challenges a company's employment policy or practice perceived as an avoidance tactic, and such was initiated and pursued by the employer for a legitimate business objective, the Board has refused to find a violation of the NLRA notwithstanding the presence of anti-union animus where the applicants would not have been hired regardless of their status as union organizers. Legislative relief for either employers or unions does not appear to be on the horizon.<sup>92</sup> Rather, the developing case law will provide guidance to unions and employers regarding viable organizing efforts and legal defensive strategies.

<sup>92</sup> Bills entitled the "Fairness for Small Business and Employees Act" and the "Truth in Employment Act" which could allow employers to decline to consider or hire paid union organizers have not been enacted into law. See, for example, the "Truth in Employment Act" (H.R. 1793, 108th Cong.(2003)) presently being considered by Congress. So called labor law reform legislation, varying in scope and supported by organized labor, has been considered by Congress from time to time over the past twenty-five years without success. Presently, the "Employee Free Choice Act" (H.R. 3619, S. 1925, 108th Cong.(2003)) is being considered by the House and Senate. While sponsors of both current bills are optimistic about passage of the bills, the fact remains that no legislation has been enacted on this subject matter after the 1992 *Lechmere, Inc.* and 1995 *Town & Country Electric, Inc.* decisions.