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SALTS, LIES AND VIDEOTAPE: UNION ORGANIZING EFFORTS AND MANAGEMENT'S RESPONSE

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The National Labor Relations Act (NLRA or Act)[1] has had a profound impact on the employment relationship since its enactment in 1935. In the ensuing years, there have been numerous charges filed under the Act against both employers and unions. Many of the earlier court rulings upheld management rights and prerogatives, forcing unions to be creative in their attempts to increase their membership. While some recent rulings have begun to swing the pendulum back in favor of organized labor, employers have devised new strategies to counter this momentum. This paper examines some of the recent court decisions and rulings of the National Labor Relations Board (NLRB) and considers the implications these decisions may hold for the future.

UNION ORGANIZING: SALTING

During the 1990s, the Supreme Court issued two landmark rulings on the NLRA that greatly impacted the behavior of union organizers and employers during union organizing campaigns. In *Lechmere, Inc. v. NLRB*,[2] the Court considered the extent to which an employer had to provide union organizers access to employees during an organizing drive. When Local 919 of the United Food and Commercial Workers attempted to organize several hundred workers at a newly-opened retail store, the employer

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denied the union representative the opportunity to leaflet employee cars in the store's employee parking lot and had security personnel remove the leaflets that had already been placed. In keeping with a long history of denying union organizers access to employees they were trying to organize, the Supreme Court ruled in favor of Lechmere, citing its earlier decision in *NLRB v. Babcock and Wilcox Co.*[3] In *Babcock*, the Court established a two-tiered test under which an employer may lawfully prohibit nonemployee access to its employees: the employer must have a general ban on *all* non-employee solicitation and the union must have reasonable means to communicate with employees away from the employer's premises.[4]

This severe setback to union organizers, combined with the fact that union membership had been on the decline for some time, required unions to become more creative in their organizing efforts. In response to *Lechmere*, many unions began to mobilize support for their organizing efforts through a process called "salting." Salting involves paid union organizers applying for and often obtaining employment with an employer whose employees the union is attempting to organize. With greater access and availability to workers than if they were organizing from outside the company, such as in *Lechmere*, the salts then attempt to organize their co-workers from the inside.

By the mid 1990s, the practice had become widespread and its legality challenged by employers in many jurisdictions. The Eighth Circuit had ruled that salts, and related salting activity, were not protected by the NLRA because salts were not "employees" under the Act.[5] The Second and District of Columbia Circuits had come to the opposite conclusion.[6]

In 1995, the Supreme Court resolved the lower court split in *NLRB v. Town & Country Electric, Inc.*[7] In that case, a non union electrical contractor failed to hire one salt and discharged another after four days of employment. Relying, in part, on its earlier ruling in *Phelps Dodge Corp. v. NLRB*,[8] that job applicants are "employees" under the NLRA,[9] the Court ruled that salts were "employees" as defined by the NLRA and hence their salting activity was protected behavior.[10] In so ruling, the Court rejected Town & Country's argument that a salt's responsibility to the union would be in direct conflict with the salt's responsibility as an employee. It cited a provision of the NLRA[11] that forbids an employer from making payments to an individual employed by a union (presumably as a means of disrupting union operations), but does not similarly prevent wages from being paid to an employee who is also an employee of a labor organization.[12]

As unions continue to use salting tactics to gain a foothold in companies they are trying to organize, employers have responded by restricting and/or monitoring salting activities. Recently, several circuits and the NLRB have considered whether certain management policies and activities that attempt to curb union organizing efforts during organizing campaigns are permissible under the NLRA. These decisions required balancing the rights of employees and their prospective unions under the NLRA against the rights of management to operate their businesses as they see fit.

Job application misrepresentations

In *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*,[13] the Seventh Circuit considered the extent to which a salt may lie to an employer about his organizing intentions. The employer, a small Indiana heating and air-conditioning contractor, hired Starnes for a driving position. Starnes stated on his employment application that he had been laid off by his previous employer when he had actually taken a leave of absence to work for the union in support of its organizing efforts. Fifteen minutes after reporting for the first day of work, Starnes informed Hartman that he was a union organizer and intended to organize the company's employees. At that point, Starnes was told to leave the premises but was not formally terminated.

The job for which Starnes was hired required that he answer questions about his driving record. On his application, Starnes stated that he had received one speeding ticket. Hartman

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informed Starnes that its liability insurer would check his driving record. Based on the results of the insurer's investigation, Starnes would be ineligible for the position if the insurer refused to provide liability coverage for his driving. Four hours after Starnes was ordered off the premises, Hartman received the insurance report which disclosed that Starnes had received not one, but two speeding tickets. Hartman immediately discharged Starnes for this misrepresentation. Starnes then filed a complaint with the NLRB, which ruled in his favor.[14]

On appeal of the Board's decision to the Seventh Circuit, Hartman cited an Indiana law which prohibits a person from knowingly or intentionally making a false or misleading written statement with intent to obtain employment as justification for its decision to terminate Starnes.[15] The Seventh Circuit determined, however, that if the state statute was being used as a means of denying employment to an applicant solely due to the applicant's misrepresentation of his status as a salt, the statute would be preempted by the NLRA.[16] The court found that the misrepresentation would be immaterial to both the hiring decision and the applicant's job qualifications. According to the court, refusing to hire a salt on the basis of the state statute would imply without justification that any applicant for employment who is a salt would not be a bona fide employee. The court further found that the only purpose in criminalizing lying about salt status would be to discourage salting, which would be directly at odds with the Supreme Court's interpretation of the NLRA in *Town & Country*. Thus, the fact that Starnes lied about being laid off by his previous employer pertained to his status as a salt and was not grounds for dismissal.

The Seventh Circuit agreed, however, with the NLRB's ruling that the discharge of Starnes based on his driving record was legal because the action had been taken in accord with a company policy that was uniformly applied to all employees without animus toward an employee's attitudes toward unions.[17] The court found that Hartman did not commit an unfair labor practice by discharging Starnes based on his driving record but did violate the Act by sending him home upon learning of his salt status, thereby depriving him of the opportunity to begin organizing. Thus, the court upheld the NLRB's order that Hartman provide Starnes with backpay for the four hours that elapsed between his arrival at work and Hartman's receipt of the insurance report.

WHILE SOME RECENT RULINGS HAVE BEGUN TO SWING THE PENDULUM BACK IN FAVOR OF ORGANIZED LABOR, EMPLOYERS HAVE DEVISED NEW STRATEGIES TO COUNTER THIS MOMENTUM.

Hartman appealed the monetary backpay award on the principle that Starnes obtained his employment through fraud and would not have been hired nor earned any wages had he been truthful about his driving record. The court dismissed this argument based on the Supreme Court's decision regarding after-acquired evidence in *McKennon v. Nashville Banner Publishing Co.*[18]

Under the doctrine of after-acquired evidence, a litigant is not entitled to any kind of backpay if, during the course of litigation over a discriminatory or otherwise unlawful discharge, the employer discovers evidence that, if known at the outset, would have caused the employer, without fault, to refuse to hire the applicant. The doctrine was developed in various lower courts but was subsequently rejected by the Supreme Court in *McKennon*. Because Hartman discovered Starnes' misrepresentation through its own processing of his employment application,[19] the Seventh Circuit reasoned, the misrepresentation of Starnes' driving record was not information that would have gone undiscovered absent litigation. Consequently, the court ruled that Starnes was not entitled to backpay for any period after the

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time that Hartman learned about his driving record. When Hartman ordered Starnes to leave the premises, however, Hartman had no knowledge of Starnes' misrepresentation of his driving record so the court reasoned that the action of ordering him off the premises could only be motivated by a hostility toward salts. Absent such animosity, Starnes likely would have remained on the payroll until the report was received from the insurance company four hours later. Thus, Starnes was entitled to receive backpay for those hours.

The end result of *Hartman* for employers is that under the NLRA, paid union organizers may lie on their job applications about their union affiliation without liability, but they may not misrepresent their credentials, skills or qualifications for the jobs for which they have applied. Lying about or misrepresenting one's union affiliation is immaterial to the hiring decision because, under *Town & Country*, an employer is prohibited from turning down a job applicant solely because he or she is a salt, union employee or union supporter. In the Seventh Circuit, any applicable state statutes that prohibit lies or misrepresentations by applicants on their employment applications are preempted by the NLRA when such lies or misrepresentations pertain to union affiliation or activity.

One issue that the court did not address is whether an employer may make a direct inquiry about an applicant's salt status. Such inquiries would seem illogical because, as the court ruled, information about salt status can not be used relative to a hiring decision and, more so, a salt applicant is free to lie in response. An employer might use such information, however, to allow management to monitor more carefully the salts' work activities to ensure that organizing activities are not interfering with the job responsibilities for which they are being paid.

Implications

Hartman represents a victory for unions that leaves employers, at least in the Seventh Circuit, in a somewhat precarious position. Decisions like *Hartman* may make it less difficult for unions to place salts among the employees of companies they are attempting to organize. As a result, employers must ensure that selection criteria for employees is objective, valid and not in any way based on applicants' actual or perceived salt status. Asking a suspected salt about his status and intentions could work against the employer as once this fact is known, charges could be levied against an employer for failure to hire based on union animus. If an employer is unaware of the salt status of a rejected applicant, however, it would be difficult to prove that union animus motivated the decision not to hire the applicant.

Although the author is not aware of any cases involving "perceived" salt status, the Seventh Circuit's ruling in *Hartman* makes it probable that applicants perceived to be salts will enjoy the same protection as known salts. *Hartman* is a clear victory for organized labor. One possible means available to employers to counteract salting in light of *Hartman* would be the implementation of a policy that prohibits employees from simultaneously holding full or part-time employment with any other employer, particularly one within the same industry. Such a "conflict of interest" policy may or may not be upheld in a given jurisdiction, but its chances of success are more likely if enforced in a uniform manner toward all employees and justified by the employer as a necessary business practice.

VIDEOTAPING ORGANIZATIONAL ACTIVITIES

The same week that the Seventh Circuit issued its ruling in *Hartman*, the Sixth Circuit issued a ruling related to employer conduct during union organizing drives that also favored the union. In *Timken v. NLRB*,[20] the court found that Timken violated the NLRA by 1) restricting employee union handbillers' access to employees to a specific location at the public highway entrance to the employer's parking lot; 2) restricting the number of handbillers at a pedestrian turnstile; 3) using surveillance cameras to observe and record handbilling

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activities: and 4) imposing suspensions for insubordination on employees who failed to comply with the restrictions.[21]

Citing *Lechmere*, Timken argued that the organizing rights of employees needed to be balanced against its property rights in determining and limiting the access union organizers should have to employees. While *Lechmere* involved union organizers who were not employees, the court noted, *Timken* involved the union organizing activities of employees.[22] In *Lechmere*, the Supreme Court specified that the NLRA confers rights only on employees and not on union representatives or nonemployee union organizers.[23] Therefore, the *Timken* court found that no balancing of employer property rights and employee organizing rights was necessary as restrictions on employee distribution of union literature in nonworking areas are unlawful under Section 8(a)(1) unless the employer can show that its operations were somehow disrupted.

The Sixth Circuit also found that Timken violated Section 8(a)(1) by indiscriminately videotaping the dissemination of union literature by employees at the turnstile by the employee entrance to the plant.[24] In defense, Timken had argued that it only videotaped activity at the entrance turnstile after a confrontation occurred between a human resource manager and a pro-union employee when the manager attempted to enforce an ad hoc company policy of restricting the number of employees passing out union literature at the turnstile to no more than two. Timken further argued that such videotaping was necessary to prove or defend any allegations of assault and battery or other improper behavior in spite of the fact that the videotaping continued at times when no member of the management team was present.

The court was unpersuaded by these arguments. In the absence of any legal justification, the court held, videotaping of protected concerted activities violates the NLRA because it is intimidating to employees who are attempting to exercise their 8(a)(1) rights. The court further found that Timken's two-employee limit on assembly at the turnstile was unnecessary and without justification and that the decision to punish employees who failed to abide by these rules was a further violation of employees' right to assemble. When the off-duty handbillers refused Timken's order to disperse, they were not engaged in the paid performance of work tasks but rather union organizing activities being conducted on their own time and within their rights under the NLRA, the court reasoned. Furthermore, the handbilling activities presented no disruption to Timken's operations and the employees' law-abiding refusal to comply did not amount to unprotected insubordination.

Monitoring with hidden surveillance cameras

Subsequent to *Timken*, the Seventh Circuit considered another decision of the NLRB involving the use of surveillance cameras. In *National Steel Corporation v. NLRB*,[25] the court ruled that an employer has a duty to bargain collectively over its use of hidden surveillance cameras to investigate possible employee theft or other wrongdoing. The court further affirmed the employer's duty to bargain includes providing information about the existence and location of such cameras as well as its confidentiality policies and practices related to employee surveillance.[26]

National Steel operates a facility that employs approximately 3,000 workers who are represented by 10 different unions and covered by seven different collective bargaining agreements. The company uses over 100 video cameras in the plant, which are in plain view, to monitor selected work areas. In addition, the employer uses an undisclosed number of hidden cameras to monitor employee behavior and assist in investigating cases of suspected theft, vandalism or other instances of wrongdoing. National Steel installed a hidden camera in a manager's office in an attempt to determine who had been using the office at night to make unauthorized long-distance calls from the office phone. It was discovered that a union employee was the culprit and, as a result, the unions became aware of the hidden cameras and filed a grievance. In support of their

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charges, the unions cited an earlier case involving Colgate-Palmolive Co. in which the NLRB held that the use of hidden surveillance cameras by employers is a mandatory subject of bargaining.[27]

The company defended its practice by arguing that the forced disclosure of the cameras' location would defeat their purpose, and that it had employed a "consistent and longstanding policy of using surveillance when there is a reasonable suspicion of wrongdoing and in areas where employees should have no expectation of privacy." The Seventh Circuit deferred to the NLRB ruling in *Colgate-Palmolive* that the installation and use of hidden cameras was "analogous to physical examinations, drug/alcohol testing and polygraph testing," all of which the Board had determined to be mandatory subjects of bargaining.[28] Because such cameras are deployed in the physical work environment that employees experience on a daily basis and their use is not "fundamental to the basic direction of the enterprise," an added responsibility for collective bargaining over their use exists.[29]

National Steel had argued that mandatory bargaining, especially over the location, is contrary to public policy because it would compromise their efficacy and purpose. Because the surveillance cameras were not being used solely to monitor or catch unionized employees but rather *any* employee who committed a crime, the company argued that their use should not be a mandatory subject of bargaining. The court reiterated that it was *not* mandating that cameras be prohibited nor was it mandating any prescribed outcome of negotiations but rather simply mandating that any use of hidden surveillance cameras be a item that management negotiates with its unions.[30] Consequently, National Steel retained the right to use hidden cameras as well as preserve a level of confidentiality necessary to allow for their continued effective use, subject to bargaining with its unions. The duty imposed on both parties was to "bargain toward an accommodation between the union's information needs and the employer's justified interests."[31] In this instance, the court mandated a balancing act that was left to the parties and not imposed by the court itself.

MANAGEMENT EFFORTS TO COMBAT ORGANIZING

Both *Hartman Bros.* and *Timken* handed unions significant victories related to their organizing efforts. *National Steel* also resulted in a victory for unions by requiring employers to bargain over the use of hidden surveillance cameras. Employers, however, have not taken a passive stance in resisting efforts of unions to gain a foothold in their organizations. A recent Seventh Circuit ruling, *Operating Engineers, Local 150 v. NLRB*,[32] places a stamp of approval on certain employer efforts to combat salting.

Preferential hiring policies

Brandt Construction Company, a highway contractor in Illinois, is engaged in the businesses of road construction, bridge building, concrete and asphalt paving, sewer and water utility work and demolition work. Since 1994, Brandt has used a preferential hiring policy whereby employment applications filed by current or former employees and applications filed by individuals referred by current employees receive preferential consideration over applications received from walk-in applicants. Brandt also gives preferential treatment to applicants referred by equal employment opportunity service providers under a conciliation agreement entered into with the United States Department of Labor in March, 1997.[33] Under this policy these applicants may apply for employment at any time without an appointment while walk-in applications are only accepted when the company is hiring and even then, only on Mondays.

In early 1997, Brandt formalized and memorialized these hiring practices and policies and posted them on various employee bulletin boards. In addition to the above restrictions, the posting noted that applications would only be "considered current for

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a period of two weeks.....After fourteen days the employment application expires and any individual interested in employment must complete a new application, if they are being accepted. We do not accept applications when we are not hiring."[34] The posting also provided that Brandt "rigorously follows" a policy by which preference is given to applicants in the following descending order: 1) current employees of the company; 2) past employees with proven safety, attendance and work records; 3) applicants recommended by supervisors; 4) applicants recommended by current non-supervisory employees; 5) unknown (walk-in) applicants.[35]

Several months after the posting, Local 150 decided to send a number of its members to Brandt to apply for employment upon hearing that Brandt had been awarded a large job. The union members were instructed in how to fill out Brandt's employment application, encouraged to apply wearing union hats or other insignia and further instructed to indicate on their applications that they were referred by the union for the express purpose of organizing the company. Brandt simultaneously received 32 referral applications as well as 20 additional walk-in applications. Brandt subsequently hired eight of the referred applicants. For the remainder of the calendar year, Brandt hired a total of 29 employees, 28 of whom were referrals, from a pool of 67 referrals. All of these new hires were offered employment within 14 days of the date of their initial application with Brandt.

In October, 1997, Local 150 filed an unfair labor practice charge against Brandt, alleging that Brandt had "changed, limited and made more onerous its hiring practices and procedures with the purpose of making it more difficult for applicants with pro-union sentiments to apply or obtain employment," in violation of Section 8(a)(1) of the NLRA.[36] The charge further alleged a violation of Section 8(a)(3) of the Act by Brandt's refusal to hire or consider union members for employment.

In June, 1998, Local 150 filed a second unfair labor practice charge against Brandt, alleging that the company refused to hire union members. All of the 26 individuals hired by Brandt in 1998 had been former employees, referrals from current employees or supervisors or referrals from equal employment opportunity service providers. Brandt did not accept any applications from walk-ins during 1998.

EMPLOYERS HAVE RESPONDED TO INCREASED INCIDENTS OF SALTING WITH ADOPTION OF PREFERENTIAL HIRING PRACTICES AND RESTRICTED HIRING CRITERIA. APPROVAL OF THESE APPROACHES BY BOTH THE NLRB AND THE COURTS SHOULD ENCOURAGE FURTHER EXPLORATION OF THE USE OF SIMILAR METHODS.

In March, 1999, Local 150 filed a third unfair labor practice charge against Brandt, alleging that Brandt "has in effect and continues to maintain and apply a hiring practice of giving a preference in hiring to referred applicants regardless of their skill level over walk-in or unknown applicants" and that "such policy is designed to discriminate, interfere and prevent union-affiliated applicants from being considered for employment.....and is designed to deter the effects of union organization in violation of the Act." [37]

The court found that while Brandt's policy made it more difficult for pro-union applicants to submit employment applications, the policy did not violate the NLRA as the manner in which all applicants had been hired—by referral—excluded *all* walk-in applicants, regardless of union membership or status. In affirming the earlier NLRB ruling in Brandt's

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favor, the court cited as precedent two earlier NLRB rulings. The first, *Zurn/N.E.P.C.O.*,[38] held that an employer who followed a hiring policy which gives preference to current and former employees, as well as referrals by management, did not discriminate on the basis of union activities because "the policy does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds."[39] The second, *Custom Topsoil, Inc.*,[40] held that an employer did not discriminate on the basis of union activities when it differentiated between "stranger" and "familiar" applicants because that differentiation did not involve per se union and nonunion applicants.[41]

The court also commended Brandt for giving preference to women and minority applicants pursuant to its conciliation agreement with the Department of Labor. Such a practice reinforced Brandt's longstanding hiring policy of hiring those referred from sources deemed trustworthy over unknown walk-in applicants.[42] The deciding factor that prevented Local 150 members from being hired was the fact that they chose to apply as walk-ins, which were applicants of last choice for Brandt. While the court found that Brandt did display antiunion animus by making it more difficult for union members to obtain employment with the company, the union applicants were given the same minimal consideration as all other walk-in or unknown applicants and were in no way prevented from obtaining a referral from a preferential applicant source. Thus, Brandt was not in violation of the NLRA.

The NLRB's decision in *Brandt* was not a fluke. Recently, the Board ruled in favor of an employer who used similar preferential hiring criteria. In *Ken Maddox Heating & Air Conditioning, Inc.*,[43] an Indiana HVAC contractor showed preference in hiring for applicants it had previously employed as well as for applicants referred by current employees and business associates. The policy was challenged when only one of 37 qualified overt union applicants was hired while 55 nonunion applicants were hired to fill 56 vacancies. As evidence that the policy was not adopted to counter a salting campaign, the Board noted that it had been in existence four years prior to the alleged unfair labor practice charges. The Board also found that the policy "was not inherently destructive of employee rights" or "sufficient, by itself, to establish animus."[44] Citing *Brandt* as precedent, the Board found that the use of referral policies, in general, is a legitimate employment practice. In this case the practice did not create a closed hiring system, which effectively screened out union applicants, nor was it applied in a disparate manner.[45]

From preferential treatment to restricted hiring criteria

In addition to the Seventh Circuit's upholding of the use of certain preferential hiring criteria, employers have also found support in NLRB decisions for their attempts to fight union organizing through the use of restricted hiring criteria. At issue in *Kanawha Stone Company, Inc.*,[46] was a hiring policy consistently used by the employer since the company's inception. After assessing the needs of a particular job, superintendents would hire accordingly, usually within 24 hours, with applications filled out on the employee's first day of work. Kanawha did not maintain any application pool or hiring lists unless a mass hiring was being conducted, and hiring was handled at the individual job sites rather than at the main office. The criteria used for hiring on individual jobs was: 1) employees on temporary lay off, 2) former employees and 3) referrals from existing employees. Individuals who did not fall into one of these categories were not considered. Union applicants who had applied at the main office, rather than the job site, and who did not fit the above criteria were not considered.

Since 2000, the NLRB analyzes refusal to consider and refusal to hire cases under a burden-shifting scheme established by the NLRB in *FES (A Division of Thermo Power)*.[47] As explained by the Board,

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> To establish a discriminatory refusal to hire, the General Counsel must....first show: (1) that the respondent was hiring, or 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 requirement of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirement, or that the 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. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.[48]

While union applicants were excluded from Kanawha's hiring process and some antiunion animus appeared to be present, the Board found that Kanawha met its burden of proof in showing that it lawfully would not have considered the union applicants, even absent their union activity, because the applicants failed to meet any of the hiring criteria.[49]

Wage incompatibility

Wage incompatibility as a basis for refusing to hire union applicants was the primary issue considered by the NLRB in *Kelley Construction of Indiana, Inc.*[50] The employer refused to hire 27 union applicants based on the criteria that new hires be accustomed to earning wages within the range that Kelley would pay. This criteria was established to allow the employer to retain satisfactory employees for as long as possible. In *Wireways, Inc.*,[51] the NLRB had approved this criteria as a legitimate means of selecting applicants in the absence of evidence of disparate application to union members. In *Kelley*, the Board applied the *FES* shifting-burden scheme to conclude that Kelley would have made the same hiring decisions regardless of the salts' union affiliation because the salts did not satisfy the legitimate hiring criteria of wage compatibility.

Whether wage incompatibility as a hiring criteria with withstand all challenges is not completely settled. Subsequent to *Kelley*, the NLRB considered another salting case and found that wage disparity was not a legitimate justification for denial of employment. In *Contractors Labor Pool*[52] (CLP), the employer enforced a "30-percent rule," under which any applicant whose most recent wage history differed by 30 percent from the employer's starting wages was refused employment. The newly-established 30-percent rule was based on a study of worker retention undertaken by the Chairman of CLP, which attempted to determine the "breakpoint" where employees would be less likely to remain in the employ of CLP.

The Board held that CLP had articulated a legitimate business interest for adopting the policy and that such policy was not motivated by anti-union animus. The policy was, however, "inherently destructive" of employees' Section 7 rights to organize as the effect of the policy was to "disqualify automatically virtually all applicants who had recently earned union contract wages" which "directly penalizes those who have exercised their protected right to work in an organized workforce and imposes a formidable threshold barrier to protected organizational activity in the unorganized workforces of CLP and its contractor clients."[53] The Board found such an outcome analogous to disparate impact cases under Title VII of the Civil Rights Act of 1964.[54]

The Board considered that while the 30-percent policy impacted others who were not union members, this fact did not mitigate the "obvious and profound discriminatory effect" it had on those whose rights were expressly protected under the NLRA. The result was that the policy excluded virtually *all* applicants with recent union history while only excluding *some* applicants with recent nonunion wage history. In other words, the only way to gain employment with CLP was through prior employment with another nonunion employer.

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Despite accepting the employer's legitimate business interest in employee retention as the basis for the policy, the Board weighed the employer's legitimate business interests against the rights of employees under the NLRA. The Board concluded that the 30-percent rule was "not essential to the successful operation of CLP's business" while the "destructive impact of this rule on employee rights is direct, broad, severe and enduring."[55] In ruling that the 30-percent rule was in violation of Section 8(a)(3) of the NLRA and needed to be rescinded, the Board noted that it was not ruling on the legitimacy of any other wage compatibility rules "that may have a lesser exclusionary effect or that may be more narrowly drawn and essential to an employer's business operation."

On appeal, the DC Circuit reversed the Board's ruling on the wage disparity rule.[56] The court held that once the Board concluded that the policy was not motivated by antiunion animus, it could not then find that it was "inherently destructive" of employees' Section 7 rights. "Indispensable to a determination of a violation of Section 8(a)(3)...is a finding that an employer acted out of an anti- (or pro-union) motivation. Whatever legitimate inference that might be drawn from petitioner's adoption of the 30% rule, the Board certainly cannot conclude explicitly that petitioner's motivation is benign and then hold that its practice independently violates Section 8(a)(3)."

The court also found fault with the Board's reliance on the disparate impact line of cases under Title VII due to the difference in the statutory language and the Supreme Court's reluctance to extend disparate impact theory to other laws prohibiting discrimination even where the statutory language "bears greater resemblance."[57]

IMPLICATIONS

The Supreme Court ruling in *Town & Country Electric* effectively ushered in a new era in labor relations in the United States. Suffering from a decline in membership, unions were having little success in the courts as they attempted to employ more aggressive organizing strategies. *Town & Country* validated the right of labor organizers to seek employment in order to organize from inside the workplace as employees. More recently, the Sixth and Seventh Circuits have handed unions and labor organizers major victories with their rulings in *Hartman Bros.*, *Timken* and *National Steel*. These rulings will certainly empower unions to continue to test the extent of their rights before the NLRB and in the courts.

Employers have responded to increased incidents of salting with adoption of preferential hiring practices and restricted hiring criteria. Approval of these approaches by both the NLRB and the courts should encourage further exploration of the use of similar methods. Employers do not appear to be in violation of the NLRA when they employ preferential hiring policies. The Seventh Circuit affirmed, in *Local 150*, an employer's right to utilize preferential hiring criteria as long as they are applied equally to both union and nonunion applicants. Restricted hiring criteria cases have been validated by the NLRB relative to the exclusion of non-referrals. With respect to wage disparity rules, the Board has stressed the need to consider cases based on their individual facts and circumstances.

Organized labor in the United States is at a critical juncture. As many of the jobs traditionally performed by union members become automated and/or moved overseas, unions have to be aggressive in maintaining and expanding their membership bases if they are to survive. At the same time, many employers are attempting to cut costs by eliminating positions held by union members and/or reducing benefit levels of unionized employees. The stakes are high for both sides. Short of reaching win/win compromises, both sides now have added incentive, in light of recent court decisions, to escalate their partisan behavior. The courts will ultimately determine who wins not only the individual battles but the ongoing war.

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ENDNOTES

1 29 U.S.C. § 151 *et seq.*
2 502 U.S. 527; 112 S.Ct. 841; 117 L.Ed.2d 79 (1992).
3 351 U.S. 105; 76 S. Ct. 679; 100 L. Ed. 975 (1956).
4 *Id.*, at 109-110; 682-683; 981-982.
5 Town & Country Electric, Inc., v. NLRB, 34 F.3d 625, 629 (8th Cir. 1994).
6 Willmar Elec. Service, Inc. v. NLRB, 968 F.2d 1327, 1330-31 (C.A.D.C. 1992), cert denied, 507 U.S. 909, 113 S.Ct. 1252, 122 L.Ed2d 651 (1993). NLRB v. Henlopen Mfg. Co., 599 F.2d 26, 30 (2nd Cir. 1979).
7 516 U.S. 85, 116 S.Ct. 450 (1995).
8 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed2d 1271 (1941).
9 *Id.*, at 185-186.
10 116 S. Ct. 450, at 456.
11 This provision was contained in the Labor Management Relations Act of 1947, also known as the Taft-Hartley Act, which amended the NLRA.
12 29 U.S.C. § 186 (c)(1) 1988 ed., Supp V.
13 280 F.3d 1110 (7th Cir. 2002).
14 Hartman Bros. Heating & Air-Conditioning, 332 N.L.R.B. No. 142 (2000).
15 *See* Ind. Code § 35-43-5-3-(a)(2).
16 *See supra* note 13, at 1113.
17 *Id.*
18 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995).
19 *See supra* note 13, at 1115.
20 29 Fed. Appx. 266; 2002 U.S. App. LEXIS 2059; 171 L.R.R.M. 3215.
21 *Id.*, at 268-270.
22 *Id.*, at 269.
23 502 U.S. at 533-34.
24 *See supra* note 20, at 268-269.
25 324 F.3d 928 (7th Cir. 2003).
26 *Id.*, at 934.
27 323 N.L.R.B. 515 (1997).
28 *See supra* note 25, at 932.
29 *Id.*
30 *Id.*, at 933.
31 *Id.*, at 934.
32 325 F.3d 818 (7th Cir. 2003).
33 *Id.*, at 820. This agreement required, in part, that Brandt make efforts to increase the numbers of women and minorities on each job pursuant to federal, state and local equal employment opportunity regulations. *Id.*
34 *Id.*, at 821.
35 *Id.*, at 821.
36 *Id.*, at 824, unfair labor practice charge number 33-CA-12410, citing 29 U.S.C. § 158 (a)(1).
37 *Id.*, at 825, unfair labor practice charge number 33-CA-12941.
38 329 N.L.R.B. 484 (1999).
39 *Id.*
40 328 N.L.R.B. 446 (1999).
41 *Id.*, at 447.
42 See *supra* note 32, at 833.
43 340 N.L.R.B. No. 7 (2003).
44 *Id.*, at 2.
45 *Id.*
46 334 N.L.R.B. No. 28 (2001).
47 331 NLRB No. 20, enf'd 301 F.3d 83 (3rd Cir. 2002). *FES* involved a ruling against the employer who utilized wage incompatibility criteria to deny employment to otherwise qualified union applicants. A company vice-president testified that the union applicants were not a "good fit" for FES and that this "fit" was determined by consideration of the completeness of the application for employment, the applicant's skills and experience, the stability of the applicant's employment history and the compatibility of the applicant's wage history with wages offered by FES. *Id.*, at 92. The wage compatibility criterion was established by the company as a means of reducing employee turnover. The same vice-president later testified that the union applicants possessed the skills and experience that FES was seeking and that some of the hired applicants had gaps in their employment history and had filled out their applications incompletely. *Id.* Further, FES could provide no specific examples of any instance in which the wage compatibility criteria had been used to exclude non-union applicants from consideration. *Id.*, at 95.
48 *Id.*, at 87, citing FES I, 331 N.L.R.B. 9 (2000), at 12.
49 *See supra* note 46, slip opin.at 2.
50 333 N.L.R.B. No. 148 (2001).
51 309 N.L.R.B. 245 (1992).
52 335 N.L.R.B. No. 25 (2001), enf'd in part and rev'd in part, Contractors' Labor Pool, Inc. v. NLRB, 323 F.3d 1051 (DC Cir. 2003).
53 *Id.*, slip opin. at 3.
54 *Id.*, slip opin. at 4.
55 *Id.*
56 Contractors' Labor Pool, Inc. v. NLRB, 323 F.3d 1051 (DC Cir. 2003).
57 *Id.*

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